

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MARLO THOMAS,  
Appellant,

v.

THE STATE OF NEVADA,  
Respondent.

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Case No. 65916

**RESPONDENT'S APPENDIX  
VOL. III**

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## **INDEX**

<b>Document Name</b>	<b>Document Date</b>	<b>Page numbers</b>
Petition for Writ of Habeas Corpus	3-6-2008	000001-000012
Request for Funds for Investigative Assistance	11-9-2009	000013-000086
Response to Request for Funds for Investigative Assistance	12-8-2009	000087-000137
State's Response to Supp PWHC	4-14-2014	000179-000185
Supp PWHC	7-12-2010	000138-000156
RT Penalty Hearing Day 1	6-23-1997	000186-000422
RT Penalty Hearing Day 2	6-25-1997	000423-000567
RT Penalty Hearing (2)	10-31-2005	000568-000616
RT Penalty Hearing (2)	11-1-2005	000617-000671
RT penalty Hearing (2)	11-1-2005	001006-001042
RT Penalty Hearing (2)	11-2-2005	000672-000915
RT Penalty Hearing (2)	11-3-2005	000916-001005
RT Penalty Hearing (2)	11-4-2005	001043-001118

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ORIGINAL

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

JUN 21 1 54 PM '97

THE STATE OF NEVADA

Plaintiff

vs.

MARLO DEMETRIUS THOMAS

Defendant  
.....

CLERK CASE NO. C136862

DEPT. NO. VI  
DOCKET NO. "B"Transcript of  
Proceedings

BEFORE THE HONORABLE JOSEPH T. BONAVENTURE, DISTRICT JUDGE

JURY TRIAL - PENALTY PHASE - DAY 2  
WEDNESDAY, JUNE 25, 1997

## APPEARANCES:

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RA 000423

1 LAS VEGAS, NEVADA, WEDNESDAY, JUNE 25, 1997, 9:45 A.M.

2 (Court is called to order)

3 THE COURT: Counsel, stipulate to the presence of  
4 the jury.

5 MS. McMAHON: So stipulated, Your Honor.

6 MR. LaPORTA: Yes, sir.

7 THE COURT: The State stipulate to the presence of  
8 the jury?

9 MR. ROGER: State does.

10 THE COURT: All right. Good morning, ladies and  
11 gentlemen. Again, thank you for your appearance, and we're  
12 going to complete the case, hopefully this morning. The  
13 defense could call their next witness.

14 MS. McMAHON: Thank you, Your Honor. The defense  
15 would call Marlo Thomas.

16 THE COURT: All right. Mr. -- is this an unsworn?

17 MS. McMAHON: Yes, Your Honor, it is.

18 THE COURT: All right. Mr. Thomas, you want to take  
19 the seat there, please?

20 THE DEFENDANT: Yes, sir.

21 MARLO THOMAS, DEFENDANT, NOT SWORN

22 THE COURT: Approach the bench, counsel. Sit down a  
23 minute, Mr. Thomas, right there.

24 (Off-record bench conference)

25 THE COURT: All right, it's my understanding then

1 Mr. Thomas wants to address the jury at this time, Ms.  
2 McMahon, but this an unsworn statement, is that correct?

3 MS. McMAHON: That's correct, Your Honor.

4 THE COURT: All right. Let's proceed then.

5 THE DEFENDANT: Are we --

6 THE COURT: Yes, speak into that microphone and say  
7 what you want.

8 THE DEFENDANT: My name is Marlo Thomas, I'm 24  
9 years old. I've been a resident here in Nevada for 24 years.  
10 I been in -- been in trouble since '84 -- 1984, and that due  
11 to my trouble in this I was confined to Youth Authorities. I  
12 was also confined to jail. At the age of 16 I was bound over  
13 to adult system, in that the Youth Authorities say that they  
14 was -- I was too uncontrolling, so they put me in a detention  
15 center, Clark County. And then I was bound to prison at the  
16 age of 17 years old.

17 Now, while I was incarcerated at 17 years old I was  
18 -- I was considered a teenager into adult system, and my  
19 behavior was due to the fact that I was -- I called it  
20 survival. Based on I was there with people that was older  
21 than me that I heard bad things that they do to teenagers, and  
22 that all I was doing was defending myself throughout the time  
23 that I was incarceration.

24 MR. SCHWARTZ: Your Honor, I believe this line of at  
25 least his dialogue is violative of the Court's order requiring

1 allocation being limited to certain areas; hopes for the  
2 future, remorse.

3 THE COURT: Yeah, as I indicated, Mr. Thomas, you  
4 must limit your comments to expressions of remorse, pleas of  
5 leniency, plans and hopes for the future. But let's proceed  
6 then. Knowing that, let's proceed. I don't want to cut you  
7 off too much, but let's proceed, Mr. Thomas.

8 THE DEFENDANT: And when I see Mr. Dixon and the  
9 Carinakis's [sic] family here in court today I sit there in  
10 that chair on the right side of the Court, and I'm very sorry  
11 that this incident ever took place. I am very sorry. But I  
12 hurt three people; my family, Mr. Carinakis [sic] and the  
13 Dixons. I understand that their children are gone, that I  
14 can't bring 'em back, but if I could, I would. That would be  
15 my choice, if I could, I would.

16 I know that I am not never gettin' out the  
17 penitentiary or prison again. I will never see my family on  
18 the street. I wake up every morning -- this case has been  
19 over a year old -- I ain't had a bit -- a bit of sleep,  
20 because now I am also hurting. I'm in pain. But, I can't do  
21 nothing to bring their children back. But that's -- that's  
22 what all I would like to say. But in the hope and their  
23 future, if I am granted to spare my life, I would try to  
24 better myself, because I owed it to my family very deeply.

25 And I don't want to bore you all with this, but I'm

1 very sorry that they died, but I can't do nothin'. I wish I  
2 can bring 'em back, 'cause I feel for them, I sit there and  
3 watch 'em, but I can't. That's all I would like to say to the  
4 Court and to the jury, that I express my remorse to their  
5 families and also my family that sit there.

6 THE COURT: All right, thank you, Mr. Thomas.  
7 Your next witness, please?

8 MS. McMAHON: Thank you, Your Honor. We would call  
9 Dr. Thomas Kinsora

10 THE COURT: Dr. Thomas Kinsora?

11 MS. McMAHON: Pardon me, Your Honor.

12 (Pause in the proceeding)

13 THE COURT: Sir, please remain standing up over  
14 there. Remain standing up over there and raise your right  
15 hand and be sworn.

16 THOMAS KINSORA, DEFENDANT'S WITNESS, IS SWORN

17 THE CLERK: Thank you. Please be seated.

18 THE COURT: Please state your name and spell your  
19 last name for the record.

20 THE WITNESS: It's Thomas Francis Kinsora. It's  
21 K-I-N-S-O-R-A.

22 THE COURT: Ms. McMahan?

23 MS. McMAHON: Thank you, Your Honor.

24 //

25 //



KINSORA - DIRECT

DIRECT EXAMINATION

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BY MS. McMAHON:

Q Good morning, Dr. Kinsora.

A Good morning.

Q The title of doctor, does that represent a doctorate degree?

A Yes, it does.

Q And can you tell me what your doctorate degree is in?

A I have a doctorate degree in clinical psychology with a specialty in clinical neuropsychology.

Q Dr. Kinsora, could you explain to us in lay terms what a clinical psychologist is and what neuropsychology is, and if there's a distinguishing --

A Sure, there is. A clinical psychologist is trained first in personality theory in assessing individuals, as well as psychotherapy in helping individuals with personal problems. A clinical neuropsychologist differs in the fact that they typically require more education, there is more of an emphasis in neurological functioning, brain functioning, and assessing levels of cognitive disorders and brain disorders. So, it's a little bit -- little bit more training, little bit more specialty.

Q Dr. Kinsora, how are you currently employed?

A Currently I'm in private practice here in Las Vegas.

KINSORA - DIRECT

1 Q And in your private practice are there areas or  
2 fields that you work in?

3 A Yes, there are. There are. I do work -- a lot of  
4 my work has to do with the brain injured population,  
5 individuals who have sustained brain injuries of one sort or  
6 another, individuals who've developmentally not acquired  
7 cognitive -- cognitive functioning that allows them to live in  
8 society. Or -- and as well as those who have acquired mild  
9 cognitive problems, learning disabilities, and things like  
10 that.

11 Q Included in your practice, do you do forensic work?

12 A Yes, I do.

13 Q Okay. And could you explain to the ladies and  
14 gentlemen of the jury what that involves?

15 A I do work with regard to both civil  
16 neuropsychological assessment. And in those cases I'm  
17 typically assessing the level of brain functioning in an  
18 individual who might have had a brain injury, and determining  
19 how it might affect their life. In some cases I'm called in  
20 to assess whether in fact a brain injury actually occurred.  
21 There's a -- there's a lot of lawsuits in which someone's  
22 claiming to have a brain injury, but in fact is malingering or  
23 faking to have a brain injury in order to seek some kind of a  
24 monetary reward. I also do criminal cases, such as these.

25 Q Can you tell the ladies and gentlemen of the jury

KINSORA - DIRECT

1 about your background, starting with your education?

2 A Sure. I did my undergraduate work at Wayne State  
3 University in Detroit, Michigan. My graduate work was done at  
4 the California School in Fresno, California, and that's a  
5 private graduate school that was started by the California  
6 State Psychological Association.

7 From there, in addition to the course work, of course,  
8 for the doctoral degree, I also did several different  
9 practicums. If you'd like me -- I'd be more than happy to go  
10 through those.

11 Q Okay. Could you explain to us what a practicum is?

12 A Okay. Practicums are basically internships where  
13 you go to a certain setting and you begin to work with  
14 patients, and you're heavily supervised, and basically you are  
15 watched over to make sure that the quality of your work is  
16 satisfactory and what it needs to be to be a doctoral student.

17 And my first -- my first practicum was with the  
18 Fresno Unified School District, where I was doing intellectual  
19 and projective testing with kids.

20 And from '85 to '86 I was working at a place called  
21 Ham's [phonetic] Downtown School, which was a private school  
22 for children with severe emotional and behavioral disorders.

23 And from '85 to '86 also I was working at the  
24 California Mens Colony, which was a protective custody --  
25 well, it was a prison, basically, that was for both protective

KINSORA - DIRECT

1 custody inmates, as well as those who require psychiatric  
2 care. And that was from '85 to '86.

3 From '86 to '87 I worked at Fresno Treatment Center.  
4 That was also a practicum where I was working with adolescents  
5 who had emotional and behavioral disorders.

6 I then went to my pre-doctoral internship at the  
7 Veterans Administration Medical Center in Elm Park, Michigan,  
8 where I worked part time on the neurology ward working with  
9 neurological patients and part time in the outpatient clinic  
10 doing psychotherapy and psychological assessment.

11 I did my post-doctoral training at the Rehab  
12 Institute of Michigan, where I was the lead neuropsychologist  
13 on the traumatic brain injury unit. And from there, went on  
14 to -- went basically into the work force, working at Community  
15 Rehab Services, where I was the director of brain injury  
16 services there, and then I went into private practice from  
17 there.

18 Q In the period of time that you did these internships  
19 or practicum, can you estimate the number of hours you had in  
20 training outside of your classroom work?

21 A I've added it up to be somewhere over ten thousand  
22 hours of supervised training.

23 Q Okay. During the years that you were getting your  
24 education and doing your training, were you the recipient of  
25 any grants or federal programs?

KINSORA - DIRECT

1           A     Yes. I was involved in research. This was -- I  
2 actually had two grants amounting to somewhere in the  
3 neighborhood of twenty-five or thirty thousand dollars to  
4 study various types of memory processing. And I helped  
5 develop a memory test and memory measure to look at a new type  
6 of theory related to memory processing in the human system.

7           Q     Okay. In your practice and in your internship, have  
8 you done presentations or done speaking in front of groups  
9 about the various areas of your practice?

10          A     Yes. And I've got a long list, actually, of quite a  
11 few different -- I don't know if you want me to go through 'em  
12 all, but I've done quite a few different talks, both with --  
13 related to brain injury, related to -- I sat on the board for  
14 the National Multiple Sclerosis Society, and I've given quite  
15 a few presentations there. I've given presentations on  
16 behavioral interventions with severely aggressive patients  
17 after brain injury, things like that.

18          Q     Have you published in your field?

19          A     I've -- I published an abstract on a research  
20 article where I was differentiating early Alzheimers patient's  
21 memory disorders from those who have Parkinsons disease, who  
22 also have memory problems.

23          Q     As a neuropsychologist, do you belong to  
24 professional societies or organizations?

25          A     Yes, I do. I belong to the National Academy of

KINSORA - DIRECT

1 Neuropsychology, the International Neuropsychological Society,  
2 as well as the American Psychological Association. And I'm  
3 currently secretary with the Nevada State Psychological  
4 Association.

5 Q Okay. In your profession, is it necessary to have  
6 licensing to practice here in the state of Nevada?

7 A Yes, it is.

8 Q Okay. In fact, you are licensed?

9 A Yes, I am.

10 Q Okay. In your work in your field and in the  
11 community, do you serve on any boards?

12 A Yes. I'm on a variety of boards right now.  
13 Currently I'm with -- I'm the president of the Operating Board  
14 of Nevada Childrens' Center, and I also consult there once a  
15 week. And that's a not-for-profit organization that's devoted  
16 to severely behaviorally disturbed kids and emotionally  
17 disturbed kids.

18 I work with the National Multiple Sclerosis Society.  
19 I'm also involved in several other groups related to traumatic  
20 brain injury, as well as the Nevada State Psychological  
21 Association.

22 Q Dr. Kinsora, have you testified in court before as  
23 an expert witness?

24 A Yes, I have.

25 Q And that was in the field of forensic medical work?

KINSORA - DIRECT

1 A Correct.

2 Q Okay. Have you testified here in this district in  
3 this court system as an expert?

4 A Yes, I have.

5 Q Do you have an idea of how frequently you've done  
6 that?

7 A I believe there were somewhere in the order of four  
8 or five capital murder trials and then several other civil  
9 trials.

10 Q Okay.

11 MS. McMAHON: Your Honor, I would move the Court to  
12 qualify Dr. Kinsora as an expert in forensic medical.

13 MR. SCHWARTZ: We'd submit it, Your Honor.

14 THE COURT: All right, he'll be qualified in that  
15 field. You can proceed.

16 MS. McMAHON: Thank you, Your Honor.

17 BY MS. McMAHON:

18 Q Dr. Kinsora, it's correct, isn't it, that Mr.  
19 LaPorta contacted you to do neuropsychological and personality  
20 assessments on Marlo Thomas?

21 A Yes, ma'am.

22 Q Okay. When you're approached by an attorney, such  
23 as Mr. LaPorta or myself in a criminal case, do you take every  
24 case that you're approached on?

25 A No, I don't. I look at various aspects of the case

KINSORA - DIRECT

1 and determine whether it's valuable for me to be a part, you  
2 know, of the assessment.

3 Q Okay. In determining that, what kinds of factors do  
4 you take into consideration?

5 A Well, if there -- if there are factors that I can  
6 see right at the beginning are going to involve areas that I'm  
7 not trained in, don't have experience with or don't feel  
8 comfortable testifying about, because of my training, I would  
9 -- I would decline those.

10 And, I mean, other factors include just my schedule  
11 and whether I'm going to be able to devote the time to it,  
12 'cause these are pretty time-consuming assessments.

13 Q So, in fact, you accept some cases and you turn some  
14 down?

15 A Yes.

16 Q Obviously you made a decision to do an assessment of  
17 Mr. Thomas. Can you tell us some of the issues that were  
18 involved in your decision to do that assessment?

19 A Well, after reviewing his past history of persistent  
20 problems as a child with behavior, with learning. He -- you  
21 know, there were quite a few psychological reports that were  
22 available. He's been placed in multiple centers as a child  
23 for being severely emotionally disturbed, as well as having  
24 significant learning problems. I felt that I could -- I could  
25 offer something to the case anyway.



KINSORA - DIRECT

1           Q     In doing your assessment of Mr. Thomas, can you tell  
2 us what kind of information that you had to work with,  
3 separate and apart from the time that you spent with Mr.  
4 Thomas?

5           A     I reviewed fairly detailed information related to  
6 his education. He had available I think four or five  
7 different psychological reports. Several of them included  
8 intellectual assessments and academic assessments. I received  
9 information related to his past -- his pash -- I'm sorry --  
10 his past problems with the law and the legal system as a  
11 juvenile.

12                   I also interviewed his mother, to talk with her  
13 about his early development and things like that.

14           Q     Can you tell us, if you would, some of the factors  
15 in his early development that you learned from your interviews  
16 and from reviewing that you felt were of importance?

17           A     Yes. Starting from -- if I can start just at --  
18 before childhood, actually. I was informed by his mother that  
19 while she was pregnant with Marlo she drank, and I'll -- if  
20 it's written right here. She drank wine, she said Strawberry  
21 Hill wine, or vodka every day until she was extremely  
22 intoxicated. And this apparently went on throughout her  
23 childhood, or throughout his -- her pregnancy with him.

24                   In addition, she reported that she was frequently  
25 physically abused by Marlo's father, and punched and kicked in

KINSORA - DIRECT

1 the stomach many times while she was pregnant with Marlo.  
2 That started very early on there.

3 His early childhood was apparently not particularly  
4 conducive to good -- to being raised as a -- you know, with  
5 normal development. He had his father who was incarcerated  
6 when he was rather young, he -- his mother apparently did  
7 quite a bit of physical whipping him and things like that.  
8 His brother was apparently the main person who raised him,  
9 because his mother worked quite a bit. And he was apparently  
10 -- oh, he was described as a strict authoritarian. But Marlo  
11 also attributed him to keeping him out of some of the trouble  
12 that he might have gotten in, had he not been there.

13 He was, very early on, seemed to be problemated with a  
14 lot of -- with a lot of behavior -- behavioral issues. He was  
15 brought to Childrens' Behavioral Services, which is one of the  
16 state programs. He was later also placed in Miley  
17 Achievement Center, which is an achievement center for  
18 severely emotionally disturbed kids. He qualified as a  
19 severely emotionally disturbed child very early on.

20 He also qualified as a learning disabled very early  
21 on. He was way behind in school. And these factors were  
22 apparently not particularly related to just his social  
23 upbringing, they were -- they were things that seemed to have  
24 been just part of Marlo's neurological functioning as he grew  
25 up.

KINSORA - DIRECT

1           He had persistent problems with bladder control. My  
2 understanding was that he was called -- his mother told me  
3 that his peers called him "Stinky," because he frequently  
4 smelled of urine when he was going to school. He apparently  
5 had this problem until he was about 12 years old.

6           His peer relations were very, very poor. He had a  
7 hard time getting along with anyone that was his age. He was  
8 frequently feeling -- he was frequently feeling as if he was  
9 picked on, and probably frequently was picked on.

10           His mother told me that he always seemed to feel  
11 that his -- that she loved the other brothers more than him.  
12 And, you know, as he moved into adolescence he began getting  
13 in more and more physical fights. He had a great deal of  
14 difficulty with authority, and was eventually picked up  
15 basically by the juvenile court system in his juvenile years.

16           Q     The first factor that you mentioned, and apparently  
17 gave importance to was that the mother drank heavily during  
18 the pregnancy. Can you tell us, Dr. Kinsora, what literature  
19 or what your area of expertise -- what's known about this?  
20 What impact does that have?

21           A     Well, there is a syndrome called fetal alcohol  
22 syndrome, which -- which is -- which has distinct physical  
23 characteristics when an individual is born that is clearly  
24 fetal alcohol, okay. And that includes, for example, a  
25 smaller -- a smaller last finger, the lip is created -- is

KINSORA - DIRECT

1 created a little bit differently, and there are epicanthal  
2 folds in the eyelids that would not typically appear in most  
3 individuals, unless you are from Asian descent. That's normal  
4 for an Asian descent individual.

5 But Mr. Thomas does not have those characteristics;  
6 however, we know from research that there are a lot of effects  
7 that alcohol causes, especially extreme levels of alcohol  
8 during pregnancy, that may not show up in physical  
9 characteristics, but clearly show up in neurocognitive  
10 functioning. There are -- there are no present tests that we  
11 can give him to say, yes, you are definitely fetal alcohol  
12 syndrome, but he definitely shows neurocognitive deficits that  
13 are consistent with that.

14 Q Okay. What is a neurocognitive deficit, Dr.  
15 Kinsora?

16 A Basically those are deficits in cognition or  
17 intellect, or reasoning, or memory, or concentration, or  
18 learning, that are caused by neurological functioning, the  
19 functioning of the brain, the functioning of the way the brain  
20 works in order to produce thought. And that's primarily what  
21 a neurocognitive functioning is.

22 Q Now, you mentioned that in your information  
23 gathering and conversations with the mother, that she told you  
24 that she was physically abusive to Marlo when he was a child?

25 A Yes, when he was very young.

KINSORA - DIRECT

1 Q Can you tell us what is known in your field about  
2 how this affects children as they go into adolescence and  
3 adulthood?

4 A Well, we know that children who grow up in  
5 impoverished environments and environments where there's a lot  
6 of physical abuse, we know that these children tend to be more  
7 violent than other children, they tend to have more  
8 aggression, more problems with anger management and things  
9 like that. And I think that that -- in Mr. Thomas's case, I  
10 think that that was a partial -- I think that was a partial  
11 factor in what happened. But, again, I think there's multiple  
12 factors going on with Marlo that are at play here.

13 Q After interviewing the family and reviewing the  
14 documentation, you interviewed Marlo, is that correct?

15 A Yes, I did.

16 Q Can you tell us approximately how many times you met  
17 with him or how much time you spent with Marlo?

18 A Sure. I met with him on five different occasions,  
19 beginning in December of 1996, lasting -- and through June  
20 9th, 1997. I met with him approximately ten hours.

21 Q And during these meetings with Marlo did you, in  
22 fact, administer various tests to Marlo?

23 A Yes, I did.

24 Q And the purpose of this testing was?

25 A Basically to assess his neuropsychological

KINSORA - DIRECT

1 functioning, his ability to concentrate, his ability to  
2 remember things, his intellectual skills, his learning and  
3 academic skills, his motor functioning, his problem solving  
4 and reasoning, as well as his personality functioning.

5 Q Dr. Kinsora, I'm going to show you what's previously  
6 been marked as Defense Exhibit A.

7 (Off-record colloquy)

8 BY MS. McMAHON:

9 Q Dr. Kinsora, this has been marked as Defense Exhibit  
10 A. Are you familiar with this chart?

11 A Yes, I am.

12 Q And, in fact, you prepared this chart at my request,  
13 is that correct?

14 A Yes, I did.

15 Q Does this chart list the information and results of  
16 your testing?

17 A Of most of them, yes.

18 Q Okay. Dr. Kinsora, I'm going to place it up here so  
19 that the jury can see it, and I'm going to ask you, if you  
20 would, please come down here and -- you've got your own?  
21 Okay. and I'd like you, with the assistance of this chart, to  
22 explain to the ladies and gentlemen of the jury the tests that  
23 you gave to Marlo Thomas and how the information on this chart  
24 reflects those tests?

25 A Okay. Now, as I stated before, I ran Mr. Thomas

KINSORA - DIRECT

1 through quite a few tests, and I think there were over thirty  
2 different measures that I administered to him. The most  
3 pertinent of those are up here. There were some more, but I  
4 really couldn't fit 'em on there, and they weren't quite as  
5 pertinent.

6           And what you see in front of you are percentile  
7 rates right here. This is the one hundred percentile rate.  
8 This goes all the way down to the zero percentile rate. And  
9 percentile rates have to do with a person's performance  
10 compared to other people their age, their education, and so  
11 on.

12           The average person -- I mean, most people are around  
13 the fiftieth percentile. That means you're right in the  
14 middle. And if you wanted to capture -- if you wanted to  
15 capture quite a few of the people, if you looked at anywhere  
16 from about sixteen percent, which is considered the first  
17 standard deviation, all the way over to about the eighty-  
18 fourth percent, you've got -- you've got -- most people's  
19 performance fall right in this range right here. This is all  
20 considered pretty much the normal range.

21           However, whenever I see an individual who falls  
22 probably below the thirtieth percentile I begin to get a  
23 little bit concerned, because that's an individual whose  
24 performance is beat by seventy percent of the population. And  
25 when I say the population, I mean all individuals including

KINSORA - DIRECT

1 those who are severely -- severely mentally retarded, who are  
2 in institutions, who do very, very poorly. And a certain  
3 percentage of the population are in that category, those who  
4 fall in the very low percentile rates.

5           The first area of what we call impairment occurs at  
6 the sixteenth percentile. Anyone who performs below the  
7 sixteenth percentile on a given measure is considered what we  
8 call impaired, okay. Those who fall between thirty and  
9 sixteen percent, they're on the borderline low average range.  
10 Those are ranges that -- where there's -- they're a lot worse  
11 than most other people, but it may not be a functional problem  
12 for them.

13           Now, for Mr. Thomas, when I administered the  
14 intellectual assessment, his verbal IQ of 82 was at the  
15 twelfth percentile. That means basically that eighty-eight  
16 percent of the general population performed better than him,  
17 in terms of verbal reasoning skills.

18           His performance -- and let me kind of go through  
19 some of the tests with the verbal IQ. These are tests related  
20 to your information about the world, how much you know about  
21 the world, your ability to repeat numbers forward and numbers  
22 backwards, for example, your vocabulary level, your ability to  
23 comprehend why things are in the world. For example, why does  
24 the state require that we have a marriage license before we  
25 get married. Very common sense kind of things.



KINSORA - DIRECT

1           In similarities, the very last test here is related  
2 to how well he can conceptualize two words as being part of  
3 the same category. For example, how is a dog and a lion alike  
4 or the same. Well, they're both animals. Mr. Thomas had a  
5 hard time on that test as well. On these tests together he  
6 performed in the twelfth percentile range. That's very, very  
7 poor. And that is, again, beyond the marker right here where  
8 we begin to get very concerned.

9           His performance IQ, and performance relates to his  
10 ability to, for example, find missing pieces in pictures, his  
11 ability to put a series of pictures together that tell a  
12 story, you know, under a time constraint. For example, he  
13 gets sixty minutes and he has to do it as quickly as possible.  
14 His ability to put blocks together to form different geometric  
15 designs, and his ability to put different puzzles together.  
16 These are the kind of visual reasoning, what we call right  
17 brain kind of activity, and stuff like that. Again, he did  
18 very poorly on that and performed in the seven percentile,  
19 which is extremely poor. And, again, we're talking ninety-  
20 three percent of the general population performs better than  
21 him at that.

22           His full scale IQ, which is what we call your  
23 person's IQ, basically, fell at the eighth percentile, which  
24 again is very, very poor. That's considered borderline  
25 intellectual functioning.

KINSORA - DIRECT

1           The mentally retarded range occurs at 69, so he was  
2 approximately ten points off or six percentile points off from  
3 that.

4           His reading skills are at the four percentile range,  
5 which again is very, very poor. We're talking about ninety-  
6 six percent of the population his age can read better than  
7 him. His spelling is at the one percentile, his math is at  
8 the one percentile.

9           We have previous testings of all these right here  
10 back from 1981, 1984 and so on, and he didn't perform any  
11 better then than he's doing right now. He's pretty much  
12 consistent with where he was when he was in the program for  
13 emotionally and behaviorally disturbed kids and for learning  
14 disabilities.

15           And the one thing I want to point out real quickly  
16 here is that you can have deficits in reading, spelling, or  
17 math, yet perform way over here intellectually. I have tested  
18 multiple people who have had learning disabilities, whether it  
19 be reading, spelling or math, and they can be individual, who  
20 in fact are in the superior or genius range on intellectual  
21 functioning. These are separate functionings. But when they  
22 occur together, when you see low intellect and you see major  
23 problems in reading that look like dyslexia and other problems  
24 like that, when they occur together you're talking about many  
25 more problems with that individual than the average person who

KINSORA - DIRECT

1 might just have an isolated problem here or there. They  
2 become insurmountable when you don't have the intellectual  
3 skills to overcome them.

4 Other areas that I looked at are attention and  
5 concentration. On these tests he performed in a fairly  
6 mediocre manner. His ability to say numbers forward and say  
7 numbers in reverse, which involves mental tracking, the  
8 ability to manipulate information in their mind, that was at  
9 about the sixteenth percentile. Not real good, kind of on  
10 that borderline range.

11 His ability to -- let's see, his ability to rapidly  
12 transcribe information using symbols was at the ninth  
13 percentile, which is fairly poor. These last two tests right  
14 here, they're called the Paced Auditory Serial Edition Test,  
15 and that's a test of concentration and mental -- and what we  
16 call mental tracking, your ability to keep information -- one  
17 piece of information in your mind while you're working on  
18 another piece of information.

19 Most of us, we know from -- you know, most of us  
20 perform at the fiftieth percentile again, or at least within  
21 this range. Mr. Thomas had very, very -- a very, very hard  
22 time with this test and performed at the less than one  
23 percentile on the first trial and at the one percentile on a  
24 second trial. I didn't even give him the third and fourth  
25 trial, because it was -- it was just way too difficult for

KINSORA - DIRECT

1 him.

2           So, we see, you know -- so here we see an individual  
3 that doesn't have good attention skills, doesn't have good  
4 concentration skills, together with low -- you know, low  
5 intellect as well as very, very poor academic skills.

6           His memory skills are fine. He seemed to do fairly  
7 well on the list learning task, where I gave him long lists of  
8 words and repeated that same list over multiple occasions,  
9 multiple trials. He did fairly well on that. His delayed  
10 recall was within the average range.

11           His immediate recall of stories, that's where I read  
12 him a story and he has to remember as much as he can of the  
13 story, that was at the seventeenth percentile. He was a  
14 little bit low on that.

15           This last test is a recognition test, which I  
16 actually throw in there as both a test of recognition memory,  
17 but it's also a test of what we call malingering. It's a test  
18 that seems very difficult, but in fact is fairly easy. And  
19 people who are trying to fake that they have a major problem  
20 often do very, very poorly on that, and poorer than what even  
21 severe brain injured patients do. And usually if I see that,  
22 a flag goes up in terms of suspecting that they're trying to  
23 pull one over on me.

24           On this case he performed at the ninetieth  
25 percentile, which is way above average. He got almost every

KINSORA - DIRECT

1 single word. I think he missed one, which is quite a bit  
2 above average. And this is a good example of how many  
3 different skills can be very, very low, but one can be very,  
4 very high in isolation. Just as we've seen in the literature,  
5 a lot of individuals who may be in the severely retarded range  
6 or in the mentally retarded range and can't read and can't  
7 write very well, yet have mathematical abilities that are way  
8 beyond the average person. Those are what we call the idiot  
9 savants. I don't know if you've heard of that. That's --  
10 often you see that in autistic kids and adults.

11 His problem solving skills are fairly poor as well.  
12 I think the major ones here, he did adequately on some of  
13 them. On one of the tests it's called Test of Problem  
14 Solving, that's a test where he's read various stories, and I  
15 ask him various questions that pull for his ability to solve  
16 the social problem that's in that particular story. Mr.  
17 Thomas had a great deal of difficulty with that. I don't know  
18 the exact percentile, but I know it's below the sixteenth  
19 percentile. It's in what we call the impaired range. And  
20 looking at that, he performed at a rate of what you'd expect  
21 for a 14-year-old adolescent, 13, 14-year-old.

22 His motor functioning is fine. His motor speed  
23 seems to be within normal limits for both his right and left  
24 hand. His right's a little bit worse than his left. His fine  
25 motor coordination, again his right's a little bit worse than

KINSORA - DIRECT

1 his left, which is not what you typically see. Typically you  
2 see the right being much better than the left.

3 And that's pretty much what we see in terms of  
4 neurocognitive functioning. And I can go into the personality  
5 evaluation after this if you'd like.

6 Q Okay. Why don't you return to your seat? Thank  
7 you, Doctor.

8 (Off-record colloquy)

9 BY MS. McMAHON:

10 Q Now, the testing and the results that you've just  
11 explained to us with the use of the chart had to do with  
12 cognitive ability with his intellectual functioning.

13 A Correct.

14 Q Okay. Did you also administer tests to Mr. Thomas  
15 to assess personality or emotional functioning?

16 A Yes, I did.

17 Q Okay. And can you tell us, Dr. Kinsora, a little  
18 bit about those tests, what they are and what they measured?

19 A The first measure that I administered is called the  
20 Minnesota Multiphasic Personality Inventory, and this is  
21 Version II. It's probably the most widely used and widely  
22 respected and definitely most researched personality  
23 assessment that's available right now. It consists of 567  
24 true and false statements. And Mr. Thomas was asked to either  
25 endorse them or not endorse them. In other words, is this

KINSORA - DIRECT

1 particular statement true or not true for you. There is a  
2 variety of what we call validity scales on this measure that  
3 detect whether an individual is being -- is being protective  
4 about any personal problems and hiding them, whether they're  
5 exaggerating personal problems. There's also measures on  
6 there to determine whether the person is just randomly  
7 responding. And these tend to be pretty -- pretty good  
8 indicators of whether in fact the profile that you got is a  
9 valid profile or it's one of an individual who's trying to  
10 create an impression of one type or another.

11           And on this -- on this particular measure he -- if  
12 you look straight at -- if you look just at the interpretation  
13 that's out of the -- out of the textbooks, related to this  
14 particular profile, it's consistent with an individual who  
15 experiences significant hypomanic episodes, where he has  
16 excessive energies, energy, feelings of imperturbability or  
17 grandiosity. He also seems to be very paranoid at times,  
18 seems that -- feels that other people are out to persecute him  
19 and out to hurt him. He also admits to some bizarre sensory  
20 experiences and intrusive thoughts.

21           And also individuals with a similar profile have  
22 impulse control problems. He feels often dejected and  
23 alienated from others and doesn't have a good grasp of who he  
24 is and what his place is in society. Those with a similar  
25 profile also have a great deal of difficulty with authority.

KINSORA - DIRECT

1 That was that particular one.

2 There was also another one I --

3 Q Before we have you tell us about the other test,  
4 some of the language that you used, can you explain to us what  
5 a hypomanic episode is, what happens to an individual when  
6 they experience that?

7 A This is -- and I wouldn't -- hypomanic refers to  
8 someone who feels as if they have an incredible amount of  
9 energy. They tend to be people who are very impulsive, may  
10 talk quickly, may get excited very easily over things, whether  
11 it be anger or excited over good things even, and have a hard  
12 time controlling that sense of energy that they have. And  
13 this is real consistent with him as a child, he was fairly  
14 hyperactive, he was a hard -- it was hard controlling him, he  
15 had to be placed in special centers because of his inability  
16 to control his arousal when he gets kind of -- in a real over  
17 energized state. Whereas most of us can calm ourselves down  
18 quickly when we need to, when the situation changes and we  
19 need to change our demeanor, we're able to do that fairly  
20 quickly, Mr. Thomas has more difficulty with that. He had  
21 great difficulty as a child. He still has significant  
22 difficulty with that.

23 Q One of the other terms you used was paranoid or  
24 paranoia. How does that affect an individual if they have  
25 those feelings, what are they feeling?



KINSORA - DIRECT

1           A     Well, I think in -- at least in Mr. Thomas's case, I  
2 think he feels -- and I think he's felt this way since he's  
3 been young, he's felt that his mother didn't love him as much  
4 as the other kids, the other -- the other -- peers, for  
5 example, were picking on him constantly. He has never felt  
6 that anyone has really understood him, so as a result he  
7 begins to not trust other people. And he has a difficult time  
8 problem solving in that respect, to learn how to trust people  
9 and to understand that some people may work on his behalf.  
10 And he may find that when people work on his behalf and things  
11 don't go his way, he may get very angry and feel that they  
12 turned against him somehow during the process, which may not  
13 even be true.

14           Q     You also mentioned intrusive thoughts, and I have  
15 two questions about that for you, Dr. Kinsora. One is what  
16 are intrusive thoughts, and how, if at all, do they affect  
17 behavior?

18           A     Okay. Now, we know from research with severely  
19 emotionally disturbed children, and other kids who fit the  
20 profile of Mr. Thomas when he was a young kid, in particular,  
21 we know that these kids have a harder time organizing and  
22 controlling their thoughts and their mind than most others in  
23 society. And that means that all of us have, for example,  
24 when we see someone that we don't like or something, we may  
25 have an initial thought about not liking them. He may have

KINSORA - DIRECT

1 problems editing that thought and pushing it out of his mind,  
2 because we as -- most of us know that it's inappropriate to  
3 think something bad of someone, or to say something  
4 inappropriate. Mr. Thomas may know that it's wrong, but his  
5 ability to impose any kind of control over that thought and  
6 often resultingly the action of impulsively saying something  
7 or doing something is defective. He's not able to do it.

8 Q Thank you.

9 A And again, that's a more of a -- that's a  
10 neurological kind of thing. The way that he's wired is  
11 differently than you or I.

12 Q Now, you gave another or other test to Mr. Thomas,  
13 in terms of personality assessment, a Minnesota Multiphasic?

14 A Yes, I did. I gave him what is called the Hehr  
15 [phonetic] Psychopathy Checklist, which is basically a  
16 checklist that was developed through -- on many thousands of  
17 inmates and forensic patients. And it's probably -- again,  
18 it's one of the most widely respected used measures of  
19 antisocial personality and sociopathic personality that's  
20 available.

21 And there's two different factors that go into the  
22 score and into the checklist. One of them has to do with you  
23 rate the person in terms of different -- on a bunch of  
24 different scales related to callousness or remorseless use of  
25 other people. And then the other -- the other factor is

KINSORA - DIRECT

1 related to chronically unstable and antisocial lifestyles.

2           And on that particular checklist he performed, on  
3 factor one his score was seven and the cutoff is actually  
4 sixteen for what we call a sociopath. The factor two was  
5 scored at sixteen, which is right on the border of -- in terms  
6 of his unstable and chronic problems with authority and things  
7 like that.

8           And what this tells me basically is that he may --  
9 he's kind of an antisocial personality. He has a great deal  
10 of difficulty with authority. He's had a very hard life  
11 growing up, he's gotten into multiple brushes with the law.  
12 He has difficulty controlling his behavior. But he differs  
13 qualitatively or in several different ways from what we call  
14 the cold sociopath, the person who may glibly go about or  
15 happily go about using people and hurting people, you know,  
16 throughout their lifetime.

17           Q     One of the factors that you mentioned that that test  
18 measured was remorse. Is that capacity for remorse?

19           A     Capacity for remorse, correct.

20           Q     And what did Marlo's score on that portion of the  
21 inventory indicate to you?

22           A     Well --

23           Q     If you can isolate it from the other --

24           A     -- yeah. I mean, it --

25           Q     -- portions of the test?

KINSORA - DIRECT

1           A     -- there's quite a few things that went into that  
2 whole particular factor. You know, I think in Mr. Thomas's  
3 case, his capacity for remorse is there; from his history as a  
4 child, his capacity for remorse was there. The difficulty  
5 that arises, though, with Mr. Thomas is that typically when he  
6 gets involved in situations where someone gets hurt, he feels  
7 -- he feels justified for some reason. He -- his social  
8 problem solving is defective in that he seems to feel that his  
9 actions were justified. So, it's not a matter of remorse or  
10 not remorse, if you feel that something was self defense, you  
11 don't feel as much remorse.

12                     And that differs from someone who, for example, when  
13 I was working in the prison system, who would kill people for  
14 the fun of it, mutilate bodies and do things that are just --  
15 just very, very cold, and they would have no emotion  
16 whatsoever. Mr. Thomas is someone who's grown up from a very  
17 young child with too many emotions and a great deal of  
18 difficulty maintaining and handling those emotions. So,  
19 that's --

20           Q     Okay. Dr. --

21           A     -- the difference there.

22           Q     Okay. Dr. Kinsora, you stated earlier that Marlo  
23 was subject to paranoid ideation, a feeling of being  
24 persecuted. Would this feeling of justification for actions  
25 be a result of the initial perception that he's being

KINSORA - DIRECT

1 persecuted and his responses were justified by that  
2 persecution? Is that one of the equations that's going on?

3 A I think so. I think -- I think when he's in the  
4 midst of whatever anger outburst he's involved in, and he's  
5 had many, he feels justified at those moments. I mean, you  
6 know, just looking at some of his stuff that occurred just  
7 prior, just within the month prior, at one point he came into  
8 the house and accused everybody of doing something. I don't  
9 even know if it was clear from his mother's standpoint. And  
10 he came in and he basically destroyed part of the house and  
11 wanted to beat everybody up, and no one could figure out why.  
12 It was just an act -- he lost his temper and he felt justified  
13 in that moments afterwards, but looking back on it I don't  
14 think anyone could really determine what the big deal was over  
15 -- over his behavior. So --

16 Q If I understand your testimony then, it is your  
17 opinion that with some qualification or some limitations, that  
18 Marlo exhibited what you would classify as an antisocial  
19 personality disorder?

20 A I think in part, yes, in addition to, you know, his  
21 severe emotional disturbances, yes.

22 Q Based on the time that you spent with Marlo, and the  
23 tests that you administered, and your observations and your  
24 interaction with him, did you arrive at a diagnosis of Marlo  
25 Thomas?

KINSORA - DIRECT

1           A     Yes, I did.

2           Q     And can you tell us what that diagnosis includes and  
3 explain to us what it means?

4           A     Sure. I -- you know, and again, I -- if I were to  
5 -- if he were to come into a clinic and I were to do the  
6 assessment, and to give a full diagnosis of him, this is what  
7 -- this is what it would include.

8                     Number one would be an attention deficit hyper-  
9 activity disorder, predominantly what we call hyperactive  
10 impulsive type. And this is according to his history as well  
11 as some of his problems now.

12                    I would also diagnose him with a reading disorder.  
13 His -- his reading is very clearly what we see in dyslexic  
14 individuals, a disorder of written language, or written  
15 expression; his spelling is also very, very consistent with  
16 what you see in dyslexia.

17                    A mathematics disorder. He's -- his mathematics  
18 tend to be fraught with multiple problems, and not just -- and  
19 -- well, I don't think it was caused just by a lack of  
20 education, it was caused also by a problem with the way that  
21 he actually processes numerical operations.

22                    And then what we call a learning disorder not  
23 otherwise specified, which I think was -- is related to what  
24 we call borderline intellectual functioning, because he  
25 definitely falls in that -- in that range.

KINSORA - DIRECT

1           And then personality-wise, I would -- I would  
2 consider him an anti-social personality disorder individual.

3           He also probably has an intermittent explosive  
4 disorder. This is an individual who is -- who tends to be  
5 very impulsive, and his "buttons" basically, if I can use that  
6 kind of language, his buttons get pushed very easily, and once  
7 pushed he explodes, and typically someone get hurt -- gets  
8 hurt. As well as an impulse control disorder. He has had a  
9 great deal of difficulty with his impulses throughout his  
10 lifetime.

11          Q     Okay. As part of your expertise, Dr. Kinsora,  
12 taking the results of your testing and the diagnosis that you  
13 have, what can you tell us about how Marlo in this diagnosis  
14 would behave in the future? Is this going to be a continual  
15 pattern the way it is, or do changes come with age and with  
16 growth and experience?

17          A     Well, research suggests that those with anti-social  
18 personality disorder tend to, what they call "burn out." But  
19 it essentially means that the problems that are associated  
20 with that behavior tend to diminish greatly in the forties,  
21 you know, in the fourth decade sometime. And again, you know,  
22 this is looking at large populations of the prison population.  
23 There is obviously exceptions, but for the most part these  
24 individuals get into less trouble with their behavior in their  
25 forties and fifties and from then on than they do earlier.

KINSORA - DIRECT

1 Q What, in your opinion -- or, let me rephrase that.

2 In your opinion, in the prison structure, in the  
3 structured system of the prison, given these factors that  
4 you've described to us, how do you believe that he would  
5 function?

6 A Well, in general, I think he would have more  
7 controls on his behavior than he would out in the free  
8 society. He's someone who I think does not do well in society  
9 and he's someone who sometimes needs to be protected from  
10 society because of his -- his problems. In a prison setting  
11 he'll probably do much better in that respect. I do  
12 understand he's been into some significant problems, even  
13 within the prison system, but again this gets back to his hot  
14 temper, his inability to control his impulses, his  
15 difficulties with social reasoning and problem solving. So I  
16 think -- I think the problems in terms of altercations will be  
17 reduced, but again, putting him in a prison setting, he's not  
18 going to be perfectly cured of all of his -- because he's  
19 still going to have difficulties and he's still going to have  
20 to be managed more carefully than maybe the other inmates.

21 Q One of the reasons that you're of that opinion is  
22 that there's a reduction in the social interaction where in  
23 fact he has problems processing information?

24 A You mean in the prison system, or?

25 Q Outside of the prison system.



KINSORA - CROSS

1           A     Yeah. Well, outside of the prison system there's  
2 fewer -- let me think of -- there's fewer controls over his  
3 behavior and there's -- and there's -- there's fewer people  
4 that are impinging on him to behave appropriately. In a  
5 prison situation there are the guards, obviously, that are  
6 there, and in addition there's also other inmates, there's a  
7 lot of peer pressure by the other inmates to fall in line in  
8 certain respects; and there's also forces that pull away from  
9 that. But there -- there's -- there's a more immediate  
10 response in a prison system, whereas out in free society you  
11 can commit a crime and may never get caught. It's less likely  
12 in a prison system than out in society.

13           Q     Thank you, Dr. Kinsora.

14           MS. McMAHON: I have no further questions at this  
15 time --

16           THE COURT: All right.

17           MS. McMAHON: -- pass the witness.

18           THE COURT: Cross?

19           MR. SCHWARTZ: Yes. Thank you, Your Honor.

20                               CROSS-EXAMINATION

21 BY MR. SCHWARTZ:

22           Q     Good morning, sir.

23           A     Good morning.

24           Q     You don't hold a medical degree from any accredited  
25 medical school, do you?

KINSORA - CROSS

1 A I have -- no, I have a doctorate degree in --

2 Q So you're not a medical doctor?

3 A I'm not a medical doctor, no, sir.

4 Q You're not a neurologist?

5 A No.

6 Q Neurosurgeon?

7 A No.

8 Q Okay. You hold a degree much like the degree any  
9 lawyer practicing in the state of Nevada holds, a doctorate of  
10 jurisprudence, you're a doctorate of --

11 A Of psychology.

12 Q -- psychology?

13 Would it be fair to say that psychiatric diagnoses  
14 and assessments are subjective in nature?

15 A No, actually.

16 Q Okay. Speculative?

17 A I think that the -- using the qualitative methods  
18 that I use, they come as close to science as you probably  
19 possibly can get.

20 Q So you would argue with those who say that it's  
21 speculative?

22 A I -- it depends what kind of psychiatric assessments  
23 are being done. If you're using the Rorschach, which is the  
24 ink blot test, the traditional ink blot test, or if you're  
25 asking the person to draw a picture and then you're making

KINSORA - CROSS

1 conclusions regarding their repressed memory of something,  
2 then I think that that's probably hogwash. But if you're  
3 using quali -- or quantitative methods that have -- are based  
4 in research and are based on individuals in large populations  
5 of people, it becomes much more scientific at that moment.

6 Q Okay. So you're familiar of course with the  
7 Rosenhand [phonetic] study where these people pretended to be  
8 mentally ill and psychiatrists, psychologists examined these  
9 individuals and diagnosed them as being mentally ill when they  
10 were 100 percent incorrect, because these people were faking?

11 A That's right. They -- they weren't -- they weren't  
12 given quantitative assessments though.

13 Q So because of the testing that you perform on this  
14 defendant, you cannot be fooled by this defendant?

15 A I -- of course I could be fooled; I think the  
16 chances are reduced, certainly.

17 Q Now on page 1 of your report you state that the  
18 defendant allegedly was connected to a robbery and a double  
19 murder at the Lone Star restaurant. Are you aware as you sit  
20 here today, Dr. Kinsora, that the defendant has been found  
21 guilty of two counts of first degree murder with use of a  
22 deadly weapon, first degree kidnapping with use of a deadly,  
23 robbery with use of a deadly weapon, and conspiracy to commit  
24 robbery?

25 A Yes, I am.

KINSORA - CROSS

1 Q Now on page 1 of your report under "Social History"  
2 you write that "The defendant came from a lower middle-income  
3 family. He was well-provided for by his mother." Is that  
4 what you state on page 1?

5 A This is according to Mr. Thomas's reports, yes.

6 Q Okay. On page 2 of your report you state,  
7 "Emotional" -- quote, "Emotional support and nurturing  
8 provided by his mother and brother was very good." Is that  
9 correct, did you state that on page 2?

10 A That I was taking right off of Mr. Thomas's reports,  
11 yes.

12 Q Okay. On page 2 of your report you -- or the  
13 defendant told you he had never been abused as a child?

14 A That's correct.

15 Q On page -- again page 2 of your report, beginning  
16 with:

17 "When he was 13 years of age he was found guilty of  
18 a felony battery charge and was sent to Elko, Nevada  
19 for six months. The battery charge was related to  
20 the beating of an adult with a pool stick. During  
21 his juvenile years he picked up for" -- "he was  
22 picked up for over ten incidences involving battery,  
23 two incidents regarding trespassing, evading police  
24 officers, vagrancy and prowling, three incidences of  
25 grand larceny, possession of a stolen vehicle,

KINSORA - CROSS

1 domestic violence, robbery with use of a deadly  
2 weapon, as well as a curfew violation."

3 Is that correct, sir?

4 A That's correct.

5 Q As far as you know, the defendant is on no  
6 medication, correct?

7 A That's correct.

8 Q There were no significant neuro-medical conditions,  
9 early childhood injuries or illnesses or head injuries that  
10 you were aware of?

11 A That's correct.

12 Q And that's based on conversations with the  
13 defendant, reading all these reports that were made available  
14 to you, and talking with his mom?

15 A Correct.

16 Q On page 4, did the defendant not tell you that he  
17 wasn't responsible for his criminal record, he felt that he  
18 was unjustly treated and wrongfully accused?

19 A Yes, he does feel like that.

20 Q On page 5 of your report, you state that the  
21 defendant has an IQ of 79, which is ten points away from being  
22 considered retarded?

23 A That's true.

24 Q Okay. Now you're not telling us that he goes out  
25 and does these crimes that he does and kills two innocent

KINSORA - CROSS

1 people because he's got a low IQ, are you?

2 A No.

3 Q Many, many millions of people have IQs less than his  
4 and lead productive lives, don't they?

5 A That's correct.

6 Q And many people with higher IQs, much higher, in the  
7 perhaps genius range, go out and commit crimes as well, don't  
8 they?

9 A That's correct.

10 Q I believe on page 2 of your report, and you  
11 mentioned it on direct examination, that you determined that  
12 the defendant at one time, or perhaps now, suffers from  
13 dyslexia, is that correct?

14 A That's correct.

15 Q Now he didn't go out and kill these two innocent  
16 kids because he's dyslexic, did he?

17 A No.

18 Q Never had a neurologist look at the defendant, did  
19 you?

20 A No.

21 Q A neurologist would be able to determine whether or  
22 not there was any kind of physical damage to the brain, would  
23 he not, or she?

24 A Probably not, but he might be able to if it was  
25 severe. Yeah.

KINSORA - CROSS

1 Q You say on page 9 that "The defendant has feelings  
2 of grandiosity." What do you mean by that term, sir?

3 A Those are feelings that he's on top of the world, he  
4 can do just about, you know, just about whatever he wants to  
5 do. I think he thinks -- you know, for example, during the  
6 assessment he felt that he was doing much better on the  
7 assessment than he was in fact doing. Those kind of things.

8 Q So would it be fair to say that the defendant will  
9 do whatever he wants to do whenever he wants to do it?

10 A Well, that's not -- that's not quite the same as  
11 grandiosity, but --

12 Q Close?

13 A No, not really. I think grandiosity is more of a  
14 feeling that you -- that you -- that you -- that you have a  
15 lot of ability that you perhaps don't. That doesn't  
16 necessarily mean that you think you can do whatever you want  
17 whenever you want; it's a little bit different, but.

18 Q On page 9 you state that "The defendant has great  
19 difficulty with authority." And what led you to make that  
20 statement?

21 A Just reviewing his history, his history as to  
22 brushes with the law, his chronic problems as a -- as a -- as  
23 a client with the -- with the Miley Achievement Center and the  
24 Children's Behavioral Services.

25 Q Okay. In your summary you state "The defendant is

KINSORA - CROSS

1 not mentally deficient or retarded," is that correct?

2 A He's not considered mentally retarded, no.

3 Q Or mentally deficient?

4 A Well, mentally deficient is --

5 Q Well, is that what you --

6 A -- is the new term.

7 Q Did you not state that --

8 A I did state that.

9 Q -- in your report?

10 A Right.

11 Q On page 10 you state that "The defendant's routine  
12 response to difficulties is anger and physical threats," is  
13 that correct?

14 A That is correct.

15 Q And on page 10 you state, "His anger has and will  
16 continue to get him trouble in society for some time to come."

17 A That's correct.

18 Q Okay. And how long did you meet with the defendant  
19 prior to authoring this report?

20 A How many hours?

21 Q Yes.

22 A Somewhere in the neighborhood of ten hours.

23 Q Okay. Now, it would be fair to say that the  
24 majority of those hours, perhaps eight or nine of those hours  
25 involved his taking those tests that you've described?



KINSORA - CROSS

1           A     Probably about maybe eight of those hours involved  
2 various assessments, yes.

3           Q     So the other two hours, or whatever the difference  
4 would be, would be a clinical interview with the defendant?

5           A     Yes. And there were -- there were periods after  
6 each assessments where we talked about various questions I had  
7 related to history and such.

8           Q     Did the defendant talk about the double murder?

9           A     Somewhat, yes.

10          Q     Did you speak to Vince Oddo and Steve Hemmes  
11 regarding what had occurred on April the 15th, 1996?

12          A     No, I didn't.

13          Q     Do you know who they are?

14          A     No, I don't.

15          Q     Did the defendant tell you that just ten days before  
16 these two brutal murders he had pled guilty to battery with  
17 substantial bodily harm in this courthouse and was out on  
18 bail?

19          A     Yes, I'm aware of that.

20          Q     He told you that?

21          A     I'm aware of that, yes.

22          Q     Okay. And you didn't put any of that in the report,  
23 but --

24          A     No. No I didn't.

25          Q     Okay.

KINSORA - CROSS

1           A     But I was aware of that.

2           Q     Okay. Did you speak to a Ms. Loletha Jackson, who

3 had her teeth knocked out with a handgun in the possession of

4 this defendant?

5           A     No.

6           Q     Did you speak to Hanifa Alkareem, a robbery victim

7 of this man who he claims attacked him, tried to crush his

8 skull in with a -- with a boulder, did you speak --

9           A     No.

10          Q     -- with him? Did you speak with Wendy Cecil?

11          A     No.

12          Q     Do you know who she is?

13          A     No, I don't. I imagine I read through some of the

14 reports related to that, but.

15          Q     But those names don't ring a bell?

16          A     I -- some of them were mentioned in some of the

17 reports related to his past charges, and I'm assuming that all

18 these are related to his past charges --

19          Q     And --

20          A     -- past victims.

21          Q     -- where would you have obtained these reports?

22          A     Those probably would have been in his listing of

23 different charges that he's had in the past.

24          Q     Okay.

25          A     A lot of 'em just list the charge, they don't

KINSORA - CROSS

1 necessarily list the victim involved.

2 Q Okay. So you didn't speak with a Mr. Belltrane who  
3 claimed to have been robbed at knifepoint by this defendant?

4 A No.

5 Q Now you state, sir, that the defendant will do much  
6 better in prison 'cause there's more controls on his behavior  
7 in a prison environment, is that correct?

8 A That's correct.

9 Q Okay. In connection with that, did you speak to  
10 Correction Officer Drain [phonetic]?

11 A No.

12 Q Did you speak to Correction Officer Leavitt?

13 A No.

14 Q Did you speak to Correction Officer Cameron?

15 A Of course not.

16 Q How about Officer Kissel?

17 A No.

18 Q Officer Neagle?

19 A No.

20 Q Officer Johnson?

21 A No.

22 Q Officer Thompson?

23 A No.

24 Q Officer Edwards?

25 A No.

KINSORA - CROSS

1 Q Officer Boyter?

2 A No.

3 Q Officer Sedlacek?

4 A No.

5 Q Officer Wheelock?

6 A No. I spoke to no one else besides those.

7 Q Are you aware that all those individuals or their  
8 reports came before this Court in the last few days?

9 A I understand that a good portion of them were going  
10 to be coming here, yes.

11 Q Did you look at the photographs of the crime scene?

12 A No, I didn't.

13 Q Have you reviewed the preliminary hearing that took  
14 place in this case?

15 A No.

16 Q Have you reviewed the transcript of Kenya Hall, who  
17 was an accomplice in this case, as to what occurred on April  
18 the 15th?

19 A I believe I reviewed a summary of his statements.

20 Q Have you reviewed the daily transcript that's  
21 available to you as this trial proceeds each day?

22 A No.

23 Q So you talked to the defendant's mother, the  
24 defendant, and you read some reports and administered tests?

25 A That's correct.

KINSORA - CROSS

1 Q Those are the only people you talked to, those two?  
2 And perhaps the attorneys.

3 A That's correct.

4 Q Would it be fair to say that many people who are in  
5 a jam or in trouble have a tendency to lie to kind of help  
6 themselves, make themselves look better than they are?

7 A Certainly.

8 Q And much of your assessment is based upon what the  
9 defendant told you during those interviews?

10 A The history -- the history is according to the  
11 statements that were part of the information that was given to  
12 me, Mr. Thomas's statements and the statements of his mother.

13 Q Okay. So if Mr. Thomas lied to you, could that  
14 affect some of your conclusions?

15 A Given the preponderance of other reports and -- and  
16 history related to psychological care that he's gotten, the  
17 multiple problems he's had with behavior and -- and anger  
18 management and aggression, I don't think it would, no.

19 Q Okay. So you couldn't be wrong?

20 A Of course I could be wrong.

21 Q Are you aware of the fact that the defendant had  
22 worked at the Lone Star restaurant for some period of time?

23 A Yes, I am aware.

24 Q That he was capable of handling a job?

25 A Certainly.

KINSORA - CROSS

1 Q And on page 4 of your report do you not indicate, I  
2 believe starting with about the third line down, "In  
3 discussing his past convictions and run-ins with the law, Mr.  
4 Thomas seemed to provide a rationale for each of his actions,  
5 and in most cases felt that he was unjustly treated and  
6 falsely accused"?

7 A That's correct, yes.

8 Q Now you spoke with his mother, is that correct, sir?

9 A That is correct.

10 Q Would it be fair to say at the time you spoke with  
11 his mother she was aware of the possibility that her son, the  
12 defendant, could be sentenced to death?

13 A Yes, certainly.

14 Q Would a mother have any interest in assisting her  
15 son and extricating him from that type of a predicament?

16 A I would think so, but given what she told me she  
17 didn't seem to hold any punches, but.

18 Q She told you he was very dangerous, didn't she?

19 A Yes, she did.

20 Q Now you stated he had no characteristics of this  
21 fetal alcohol syndrome that you've discussed.

22 A No physical characteristics.

23 Q No --

24 A He seems to have no --

25 Q -- I'm sorry, no physical characteristics.

KINSORA - CROSS

1 Have you ever read the book called "The Abuse  
2 Excuse" by Alan Dershowitz?

3 A No.

4 Q Are you aware of what that book's about?

5 A I assume it's about people blaming their problems on  
6 their physical abuse when they were a child --

7 Q Well --

8 A -- or sexual abuse --

9 Q -- it could be physical abuse --

10 A -- or whatever.

11 Q -- sexual abuse, the fact that they were an only  
12 child, the fact that they were adopted --

13 A Right.

14 Q -- the fact that they ate Twinkies before they  
15 committed these crimes?

16 A Correct.

17 Q These are documented cases.

18 A Correct.

19 Q Now, you met the defendant for the first time  
20 December 1996, is that correct?

21 A That is correct.

22 Q So that'd be about eight months after these two  
23 murders occurred?

24 A Correct.

25 Q You'd never met him prior to that?

KINSORA - CROSS

1 A No. No.

2 Q Now you state, I believe one of your conclusions was  
3 that he had a good memory, or a decent memory, is that  
4 correct?

5 A He has a decent memory, certainly.

6 Q And as I look at that chart there, the majority of  
7 the dots are in the area that you say is normal, maybe  
8 borderline normal; the majority --

9 A I think --

10 Q -- more than half?

11 A I'm not sure I -- I seem to remember a good portion  
12 of them being in the impaired range, but haven't had a --

13 Q Okay. Well, I added up eleven that were really  
14 low --

15 A Right, mm-hmm.

16 Q -- like one or two percent, and about seventeen that  
17 were above that -- where you put that yellow line, that's  
18 thirty percent up.

19 A Oh, the thirty -- thirtieth percentile? Yeah, but  
20 that's not quite the proper way of looking at it; you can't  
21 just add 'em up and say half and half. It's a little bit  
22 different than that, but.

23 Q So he did well on some of the tests?

24 A Certainly.

25 Q And of course he's capable of fooling you, as is any



1 patient?

2 A Probably, yes.

3 Q You said he had a hard life growing up, is that  
4 correct?

5 A That's correct.

6 Q Do you think it was as hard as Carl Dixon's or Matt  
7 Gianakis's? They're the victims in this case.

8 A I don't know their personal history, so.

9 Q Now you say he had math problems, is that a reason  
10 he went out and killed two people, because he had difficulty  
11 with solving math problems?

12 A Of course not.

13 Q You also state, "He explodes and someone invariably  
14 gets hurt."

15 A That's correct.

16 Q Has that changed?

17 A Probably not, no.

18 Q Now, you testified that you've only -- I'm -- you  
19 testified that you've only testified in criminal cases about  
20 four or five times?

21 A Something in that order, yes.

22 Q Now directing your attention to page 11 of your  
23 report, last three lines, "Mr. Thomas will likely function  
24 well within" --

25 "Mr. Thomas will likely function well within the

KINSORA - CROSS

1 structure provided by the correctional system, where  
2 there are fewer ambiguities and more immediate  
3 feedback regarding the appropriateness of his  
4 behavior than are found in society."

5 Is that correct, sir?

6 A That's correct.

7 MR. SCHWARTZ: Court's indulgence.

8 BY MR. SCHWARTZ:

9 Q Doctor, I'm showing you a series of exhibits that  
10 came in in this trial, beginning with I believe 85, and the  
11 last one perhaps 107. I'm not going to ask you to read all  
12 these, I'm just asking you if you've ever seen these documents  
13 before. And if so, if you could tell us which ones.

14 A I think it would take me quite a while to go through  
15 all of these, but I -- it looks like a good portion of these I  
16 probably have not seen. Some of these related to some of his  
17 criminal behavior I think I have seen.

18 Q Well, in fairness to you, Doctor, they're all  
19 records from the prison --

20 A Correct.

21 Q -- from prisons. And some of them you may have  
22 seen, but --

23 A And I know that I was -- I did discuss some of his  
24 behavior in the prison system with his attorneys, and I  
25 understand that he's had quite a bit of difficulty in terms of

1 hurting other people.

2 Q So you say he's had quite a bit of difficulty of  
3 functioning well within the criminal system, wouldn't you say  
4 that, Doctor?

5 A He -- he has had some trouble, yes; he's certainly  
6 -- you know, in terms of severe emotional disturbance, he's  
7 pretty severe. And I think even -- he's going to have  
8 difficulties there, and I think they need special -- a little  
9 more special care with him.

10 Q So is it still your conclusion that he would  
11 function well within the prison environment or --

12 A I certainly think he'll function better than he will  
13 in society. I don't think he's going to be perfect though.

14 Q Is that saying a whole lot?

15 A Well, I think -- I think it's saying a lot in terms  
16 of keeping society from having him hurt people, and hopefully  
17 protecting other people, and keeping him from getting in more  
18 trouble.

19 MR. SCHWARTZ: Court's indulgence.

20 (Pause in the proceeding)

21 BY MR. SCHWARTZ:

22 Q Doctor, you were hired by the defense to prepare a  
23 report -- to test the defendant and then prepare a report and  
24 testify in this courtroom, is that correct?

25 A Correct.

KINSORA - CROSS

1 Q Would your conclusions be uncertain -- would it be  
2 fair to say that you are uncertain about your conclusions?

3 A I would say that -- I would say that my conclusions  
4 are reasonably certain from -- at least from a statistical  
5 standpoint and from the standpoint of my experience with  
6 individuals who have difficulties such as his.

7 Q Wouldn't you say that you're uncertain about  
8 everything because you're a psychologist?

9 A Well, as a scientist I don't believe very much. I  
10 -- I have to, you know, obviously I'm a scientist and I need  
11 to see absolute proof. So, yes, I'm skeptical of everything.

12 Q Now you once testified that you're uncertain about  
13 everything?

14 A A good portion of things, you know, I mean, we don't  
15 all automatically assume that water boils at 212 until we see  
16 it boil at 212.

17 Q But my question is, you have testified in the past  
18 that you as a scientist or a psychologist are uncertain about  
19 everything.

20 A Certainly.

21 Q Okay. Thank you.

22 MR. SCHWARTZ: Nothing further, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. McMAHON: Yes, Your Honor.

25 //

KINSORA - REDIRECT

REDIRECT EXAMINATION

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BY MS. McMAHON:

Q Dr. Kinsora, in the testing that you did on Marlo,  
one of the tests that you referred to was the Minnesota Multi-  
phasic Personality Inventory.

A Correct.

Q Can you tell us about the development, or the  
history of usage of this particular --

THE COURT: Let's take a ten-minute recess.

Don't converse among yourselves or with anyone else  
on any subject connected with the trial, read, watch or listen  
to any report or commentary on the trial or any person  
connected with the trial by any medium of information,  
including, without limitation, newspapers, television, radio;  
don't form or express any opinion on any subject connected  
with the trial until the cause is finally submitted to you.

(Court recessed)

(Jury is not present)

THE COURT: -- instructions, this is the time for  
settlement of instructions outside the presence of the jury.

Does the State object to any of the instructions the  
Court has indicated will be given?

MR. ROGER: No, sir.

THE COURT: Does the defense object to any of the  
instructions the Court has indicated will be given?

1 MR. LaPORTA: No, Your Honor.

2 MS. McMAHON: No, Your Honor.

3 THE COURT: Does the State request the giving of any  
4 instructions in addition to those the Court has indicated will  
5 be given?

6 MR. ROGER: No, Your Honor.

7 THE COURT: Does the defendant request the giving of  
8 any instructions in addition to those the Court has indicated  
9 will be given?

10 MR. LaPORTA: No, Your Honor, our requested  
11 instructions were included.

12 THE COURT: All right. So counsel stipulate that we  
13 settled these instructions here in open court outside the  
14 presence of the jury and they should be given prior to  
15 argument?

16 MR. ROGER: Yes, Your Honor.

17 MR. LaPORTA: Yes, Judge.

18 MS. McMAHON: That's correct.

19 THE COURT: Is there anything else to come before  
20 the Court before we bring the jury in?

21 MS. McMAHON: Just briefly one matter. Yesterday,  
22 if the Court will recall, there was discussion regarding the  
23 testimony of Kenya Hall at the preliminary hearing which  
24 occurred on June 27th of '96. It was the position of the  
25 State that Kenya testified that Marlo Thomas told him in the

1 restaurant to shoot Vincent Oddo. It was the recall of the  
2 defense that that was not Mr. Hall's testimony.

3 The reason that I bring it up, Judge, is that  
4 clearly this impacts on closing arguments that are going to be  
5 made to the jury. I went back and reviewed the preliminary  
6 transcript, and I'm certain that Mr. Rogers has. The -- Mr.  
7 Harmon was the prosecutor that took Kenya Hall on direct  
8 examination, and he referenced a statement that Mr. Hall had  
9 given to the Highway Patrol officer. If I can refer to page  
10 119 of the transcript, Mr. Rogers. Mr. Harmon asked if "he,"  
11 meaning Mr. Thomas, "ever say anything about being concerned  
12 that there wouldn't be any witnesses?" The answer was, "Yes."  
13 The question then was, "When did he say that?" And the answer  
14 was, "In the car. He said if you commit a crime you're not  
15 supposed to leave any witnesses." Okay.

16 On cross-examination Mr. Hall stated that there was  
17 no conversation about robbing the place or anyone inside, and  
18 that's on page 120. That there was no conversation upon  
19 entering the Lone Star that robbery was intended.

20 On redirect by Mr. Harmon, and that's on page 131 of  
21 the transcript, Mr. Harmon asked Mr. Hall:

22 "Specifically, when you were inside the restaurant,  
23 were you ever told by Marlo Thomas to shoot the  
24 manager of the restaurant?"

25 Mr. Hall responded that, "Not that I remember."

1 Question then was, "Do you remember what it was that  
2 you told the police when you talked to them?"

3 Response: "Yes."

4 Question: "Did you give a recorded statement to the  
5 police?"

6 "Yes."

7 Mr. Harmon then proceeds to read from that statement  
8 to Mr. Hall. On page 134 Mr. Harmon then says:

9 "So you're saying that when Marlo Thomas told you  
10 that you were supposed to shoot the guy in the back  
11 of the head, that wasn't inside the restaurant?"

12 Answer: "It was in the car."

13 Question: "That happened out in the car after it  
14 happened?"

15 Answer: "Yes."

16 I believe the record indicates that it was not the  
17 testimony of the young man at the preliminary hearing that he  
18 was told either on the way into the restaurant or during the  
19 restaurant that he was to shoot Vincent Oddo.

20 THE COURT: So what is your motion?

21 MS. McMAHON: My motion is that the State be  
22 precluded in closing argument from arguing to the jury that in  
23 fact Marlo Thomas told the young man, Kenya Hall, to shoot  
24 Vince Oddo, or the manager, in the head after getting the  
25 money, because that's not what the record reflects, Judge.



1 THE COURT: Mr. Roger.

2 MR. ROGER: Judge, I'm entitled to argue all  
3 inferences from the evidence, and what she did not read to you  
4 is a statement that is in the transcript where the -- where  
5 Kenya Hall told the highway patrolman at the time of his  
6 arrest, this is page 134, line 12, "And then he told the guy  
7 to open up the safe. He put the gun in my hand, he told me to  
8 get the money and shoot the guy in the back of the head when I  
9 leave, like that." Now that's what he told the Highway Patrol  
10 trooper. Now he --

11 THE COURT: And that was in the transcript read to  
12 the jury?

13 MR. ROGER: Yes, sir.

14 THE COURT: Well, I don't want you to -- I don't  
15 want you to go into any quadruple murders, but maybe if you  
16 want to allude there could have been a triple murder but  
17 perhaps because of that reason.

18 MR. ROGER: That'd be fine.

19 THE COURT: That's the order of the Court. All  
20 right? Okay?

21 MS. McMAHON: Thank you, Your Honor.

22 MR. ROGER: Yes, Your Honor.

23 THE COURT: All right, bring in the jury.

24 (Jury reconvened)

25 THE COURT: All right, counsel stipulate to the

KINSORA - REDIRECT

1 presence of the jury?

2 MR. ROGER: Yes, Your Honor.

3 MS. McMAHON: Yes, Your Honor.

4 THE COURT: All right. Let's finish up on the  
5 redirect. All right?

6 MS. McMAHON: Thank you.

7 REDIRECT EXAMINATION (Continued)

8 BY MS. McMAHON:

9 Q Dr. Kinsora, Mr. Schwartz asked you about a study  
10 wherein various individuals were able to convince  
11 psychiatrists, psychologists, of being mentally ill when in  
12 fact they were not.

13 A That is correct.

14 Q And you're familiar with that study?

15 A Yes, I am.

16 Q Is it correct that that study was done maybe twenty-  
17 five, thirty years ago?

18 A I believe so, it was done in the '60s sometime.

19 Q Okay. Is it also correct that that study was based  
20 only on interviews?

21 A I believe it was almost all interviews, basically  
22 coming in and saying, I'm hearing voices, I think people are  
23 after me. And the psychiatrists were -- and I believe there's  
24 some residents also were involved as the doctors there -- were  
25 admitting people into the psychiatric hospital on the basis of

KINSORA - REDIRECT

1 simply those words.

2 Q Those representations?

3 A That's correct.

4 Q Is it correct that the kind of psychometric testing  
5 that for example you employ on a regular basis was not used in  
6 that case study?

7 A Certainly it was not used, nor were the  
8 psychiatrists, or I believe -- I'm not even sure psychologists  
9 were involved, nor were they -- nor were they taking  
10 particular care interviewing the patients with regard to  
11 looking for suspicious reports and things like that.

12 Q One of the tests that you administered to Marlo  
13 Thomas was the Minnesota Multiphasic Inventory, Personality  
14 Inventory?

15 A That is correct.

16 Q Can you tell us briefly approximately when this test  
17 was developed and what kinds of statistical material are  
18 available in interpreting that?

19 A Originally the measure was developed during the  
20 '40s, and -- I mean, probably tens of thousands of research  
21 articles related to the measure were -- have been done. It  
22 was a new -- a second version of the test; some of the items  
23 were changed and there were some weaknesses in the original  
24 measure. It was revised then in the late '80s and we now have  
25 the version number two.

KINSORA - REDIRECT

1           And it's based on, you know, the original normative  
2 sample, in other words, the sample where they originally go  
3 out and give it to a bunch of Americans to see how everybody  
4 does and what the average profiles are for people, that was  
5 done on several thousand people. And then since then  
6 thousands of people have been tested with it, both in  
7 psychiatric, in prison populations, in -- we have a lot of  
8 information on people who are getting hired for high-stress  
9 jobs and things like that, so.

10           Q     Now you mentioned in discussing the test earlier a  
11 validity scale.

12           A     Correct.

13           Q     Can you explain to us what a validity scale is?

14           A     The validity scales are designed to assess the  
15 person's accuracy of responding. And the person's bias and  
16 their -- what we call "response bias," in other words, are  
17 they picking items that make them look sick. And there's a  
18 lot of items in the Minnesota Multiphasic Personality  
19 Inventory that even psychiatric patients really don't have  
20 those types of symptoms, but you might think they do, and  
21 people who are trying to look crazy will endorse those.

22                     There's also validity scales for just the opposite,  
23 for people who are trying to look real good. For example,  
24 people -- we have a lot of information on people who are  
25 getting hired for a nuclear power plant employee and they're

KINSORA - REDIRECT

1 given this measure; and of course they want to appear as well-  
2 functioning as they can, so they hide problems. And we know  
3 the ways that people use to hide problems, and they tend to  
4 score particularly high on this level of guardedness. And  
5 similar with the prison population. We know when -- we know  
6 what the scales look like when someone's really trying to pull  
7 it over on us.

8           Obviously there's subtle ways that people probably  
9 can, but it doesn't change the profile significantly. When  
10 you really fake you can really tell, is typically the way it  
11 is with the MMPI.

12           Q     So based on the history, the structure of the test,  
13 and the validity scales that it contains, is it your opinion  
14 that the results of that test in regard to Mr. Thomas were  
15 valid?

16           A     I believe they were valid. Mr. Thomas admitted to  
17 some behaviors that work against him, related to violence,  
18 related to anger management, impulse control, things that if  
19 he was wanting to protect himself in that way I don't think he  
20 would have answered in that particular way. He also endorsed  
21 items of some bizarre -- you know, bizarre problems that he's  
22 having, and he's endorsed some related to good functioning,  
23 you know, appropriate functioning, so.

24           Q     When these tests were administered to Marlo, you  
25 were observing him?

KINSORA - REDIRECT

1           A     Correct. Throughout the test procedure and in  
2 between tests there is small talk, there's discussing what the  
3 test's about. I observe his behavior throughout the test and  
4 how he -- how he approaches each of the tasks and how he works  
5 through the task that's given to him.

6           Q     To change topics slightly, Dr. Kinsora, Mr. Schwartz  
7 read through a long laundry list of names of individuals, men  
8 and women who testified during this proceeding. Would there  
9 have been any purpose if you had interviewed these people?

10          A     I don't really think so. I mean, there's -- that we  
11 have -- and they have a better than average history. I mean,  
12 in most cases I'm not provided with such rich history in terms  
13 of care that he's gotten. He's been in programs since he's  
14 been very, very young, there's a long list of people who he's  
15 had anger outbursts toward, he's been severely emotionally  
16 disturbed, and was considered severely emotionally handicapped  
17 as a child and was placed in special programs because of that.  
18 I don't think it would have changed any of my opinions.

19          Q     Is it a fair statement to say that overall, based on  
20 your studies, your observations, your conversation with Marlo,  
21 that emotionally he's functioning somewhere on the level of a  
22 13- or 14-year-old?

23          A     I think that his -- his social problem solving is  
24 younger like that, but even 13- and 14-year-olds don't have  
25 the anger problem, so it's not as simple as that. It -- it's

KINSORA - RECROSS

1 much more complex in that he doesn't have the behavioral and  
2 impulse controls that you and I have, you know, he's  
3 neurologically wired a little bit differently. He's  
4 borderline intellectual functioning, he has a lot of problems  
5 understanding the world. He has very -- he has a very  
6 difficult time inhibiting his impulses and anger and managing  
7 his anger. And this has been going on since he's been very,  
8 very young, so.

9 Q So in effect, in social situations the emotional  
10 behavior, the emotional feelings take ascendancy over the  
11 reasoning process?

12 A Correct.

13 Q Thank you, Dr. Kinsora.

14 MR. SCHWARTZ: Very briefly, Your Honor.

15 RECROSS EXAMINATION

16 BY MR. SCHWARTZ:

17 Q Dr. Kinsora, you testified that the tests that you  
18 performed are a lot different than what happened in the  
19 Rosenhand study and that you have these safeguards that make  
20 them more valid than the Rosenhand study type of test.

21 A It protects them somewhat more from a -- from  
22 deception.

23 Q And these advanced tests that you administered and  
24 you testified about led you to conclude that "Marlo Thomas  
25 would function well within a prison setting." That was the

KINSORA - RECROSS

1 basis of your conclusion from these advanced tests with the  
2 proper safeguards?

3 A No, actually, that statement was drawn straight from  
4 the diagnosis of -- of antisocial personality disorder, from  
5 the research based on that. But he -- again, the problem is  
6 is he's not just a simple antisocial personality disorder,  
7 he's much more, and he's much more a problem than that.

8 Q And you realize today that this is a penalty phase,  
9 the defendant faces four possible punishments, one of which is  
10 the death penalty?

11 A That is correct.

12 Q You give a conclusion about how he'll behave in  
13 prison, in a prison environment, but you don't talk with any  
14 of the people in prison who have contact with this defendant.

15 A I --

16 Q You didn't think that was important?

17 A I don't think the State would pay for me to spend  
18 the time to -- to interview each one of them.

19 Q Did you ask?

20 A Of course not.

21 MR. SCHWARTZ: Nothing further.

22 THE COURT: Anything else?

23 MS. McMAHON: No, Your Honor.

24 THE COURT: All right. Thank you, you're excused.  
25 Call your next witness.



1 MS. McMAHON: Thank you. Your Honor, the defense  
2 would call Linda Overby.

3 THE COURT: Is that chart to be admitted?

4 MS. McMAHON: No, Your Honor, it was simply for  
5 demonstrative purposes.

6 THE COURT: Not marked?

7 THE CLERK: It's marked.

8 THE COURT: It's marked as A. Doctor, just a  
9 minute.

10 THE WITNESS: Oh. Do I need to bring it back?  
11 Okay.

12 THE COURT: Well, I don't know.

13 THE WITNESS: That's fine then. You can --

14 THE COURT: I mean, seems to me that the clerk  
15 marked it as A. Is that right?

16 MS. McMAHON: That's correct, Your Honor. We had  
17 marked it --

18 THE COURT: You don't have to admit it or not, I  
19 don't care.

20 MS. McMAHON: We had it simply for demonstrative  
21 purposes.

22 THE COURT: All right. Then just put it down there,  
23 give it to the clerk at a later time, or whoever you want to.

24 Please stand up, raise your right hand and be sworn.

25 LINDA OVERBY, DEFENDANT'S WITNESS, IS SWORN

OVERBY - DIRECT

1 THE CLERK: Thank you. Please be seated.

2 THE COURT: State your name and spell your last  
3 name.

4 THE WITNESS: I'm Linda Overby, last name is  
5 O-V-E-R-B-Y.

6 THE COURT: All right, Ms. McMahon.

7 MS. McMAHON: Thank you.

8 DIRECT EXAMINATION

9 BY MS. McMAHON:

10 Q Good morning, Ms. Overby. Could you please tell us  
11 how you're currently employed?

12 A I'm a school psychologist with the Clark County  
13 School District.

14 Q Okay. As a school psychologist, you have special  
15 training and education?

16 A Yes, I do.

17 Q Could you please describe to us briefly what your  
18 educational background has been?

19 A I received my undergraduate in education, secondary  
20 education. Then I went to -- went back to school and I  
21 received a masters in education. It seems like I've always  
22 been going to school. I've received two masters past that  
23 first one, and an ed. specialist. I have taught in the  
24 classroom special education, mentally retarded, emotionally  
25 disturbed, before I became the school psychologist.

OVERBY - DIRECT

1 Q And how long have you been working in the field of  
2 psychology?

3 A I've been a school psychologist since 1979.

4 Q As a school psychologist, what do your duties  
5 include?

6 A Mostly I do testing for special education; we  
7 determine eligibility for youngsters who are mentally  
8 challenged, emotionally challenged, learning disabled.

9 Q In the work that you do with these children, does  
10 that include in part observing these children?

11 A Yes.

12 Q Okay. Observing them interact with other children?

13 A Right.

14 Q Observing them with teachers or assistants?

15 A Right. I provide consultation for classrooms,  
16 behavior management kinds of things, also educational  
17 implications.

18 Q As a school psychologist now, where are you  
19 currently assigned?

20 A I spend one day a week at Child Find where I  
21 evaluate youngsters coming from out of state, severely  
22 disabled youngsters, and early childhood youngsters from age  
23 three through five. Two -- one day a week I'm at juvenile  
24 court schools; I also have an extended day there, so I go  
25 there every day. And then I'm at Variety School three days a

OVERBY - DIRECT

1 week.

2 Q Now, And you've been doing this since 1973?

3 A '9.

4 Q '79, okay. How many children do you suppose on a  
5 yearly basis you either work with or observe or test or assist  
6 in the programming?

7 A I evaluate anywhere from seventy-five to a hundred  
8 students every year. How many I actually impact, how many I  
9 see, observe, I wouldn't even be able to venture a guess.

10 Q Okay. As part of your duties, in the past have you  
11 testified in court regarding some of these children?

12 A A little, yes.

13 Q Okay. But that's not a major part of your duties?

14 A No, it is not.

15 Q Okay. It's correct that you met with Mr. LaPorta  
16 and myself regarding this case?

17 A Yes.

18 Q And isn't it correct that you remember Marlo Thomas?

19 A Yes, I do.

20 Q Okay. And what age was Marlo when you had contact  
21 with him?

22 A My memory may be faulty, but he was middle school  
23 age, about that time. He was at CBS School; at the time that  
24 classroom was called a "Mod Program," it was for emotionally  
25 disturbed youngsters, and it was located at CBS. That was one

OVERBY - DIRECT

1 of my schools that I was assigned to.

2 Q During this time period when you were assigned to  
3 CBS and Marlo was there, did you have interaction with Marlo's  
4 mother?

5 A I don't believe so. I don't recall, if I did.

6 Q Okay. Does the Clark County School District keep  
7 records or reports on the students that are in these special  
8 programs or are at Children's Behavioral Services?

9 A Yes, the Clark County School District keeps  
10 psychological information, medical information on youngsters.  
11 Every three years those records are updated, and they are kept  
12 for a short period of time after the child's 22nd birthday.

13 Q And after a child reaches 22 they're systematically  
14 destroyed?

15 A They are. And I'm not just sure what the time limit  
16 is on that.

17 Q So in fact if an individual who as a child had been  
18 in the system, or Behavioral Services, past the age of 22,  
19 those records for the most part are not going to be available;  
20 is that correct?

21 A That's correct.

22 Q Okay. Given the fact that we don't have reports or  
23 documentation from this time period, can you advise us, advise  
24 the jury, what your recall of Marlo Thomas and his behavior  
25 was during that time period?

OVERBY - DIRECT

1           A     That group at CBS, in that classroom, were the  
2 district's most severe youngsters for behavior and emotional  
3 disturbance. As I remember, Marlo did not learn from  
4 consequences very well. He -- there were a lot of teaching  
5 interactions during that time, where the teacher would sit  
6 down with youngsters, one or two or three, or a group, and  
7 they would just work out ways of how we would do things  
8 differently, what could you do next time, and they would work  
9 through those things. And a lot of those youngsters learned  
10 very well from that, and they were able to apply that at a  
11 later time; or if they had a consequence, they were able to  
12 say, I'm not going to do that again because this will happen.

13               As I remember with Marlo, he didn't really remember  
14 those things. He just was very impulsive, he just acted, and  
15 then he would have to go through the consequences all over  
16 again; and then the next time it didn't make a difference  
17 again.

18           Q     So there -- in your recall, there was no learning,  
19 just repeated behavior?

20           A     Right.

21           Q     If you were going to choose an emotional category to  
22 describe Marlo or his behavior, what would you think that  
23 emotion was?

24           A     As a category, Marlo fits very poorly in any of the  
25 categories that I know about for special education. I did not

OVERBY - DIRECT

1 -- and, you know, I didn't see him being emotionally  
2 disturbed, which would be things like depression, anxiety,  
3 psychiatric disorders; and I didn't see that.

4 We also have youngsters who are conduct-disordered,  
5 and now they do not qualify for special ed in Clark County.  
6 But I didn't see Marlo really being conduct-disordered either,  
7 because conduct-disordered youngsters pattern their behavior  
8 over what -- they don't want to get caught, so they don't do  
9 certain things; they learn from experience, generally  
10 speaking.

11 With Marlo, it was more of -- I would place him more  
12 in a category now that's considered a medical diagnosis with  
13 the Clark County School District. He would qualify more under  
14 "other health-impaired," which is hyperactivity, attention  
15 deficit disorder, impulsivity; just very poor ability to  
16 learn.

17 He fits youngsters who are prenatally drug or  
18 alcohol involved. At the time that Marlo was growing up we  
19 didn't have those kind of categories and attention deficit was  
20 not the big buzz that it is now, so I don't recall whether he  
21 ever carried a diagnosis like that or if he ever received  
22 medication for that, but I suspect not.

23 Q We now have a category of fetal alcohol syndrome,  
24 you're familiar with that?

25 A Mm-hmm.

OVERBY - DIRECT

1 Q And you've worked with children who have the  
2 behavior patterns. Would it seem reasonable to you to assume  
3 that some of the behavior patterns that Marlo had when you  
4 look back at it are comparable to those children who have  
5 fetal alcohol syndrome or problems as a result of alcohol or  
6 controlled substance use by the mother during pregnancy?

7 A Yes. More so attention deficit. And attention  
8 deficit isn't always related to fetal alcohol, but it  
9 certainly is a component of fetal alcohol. I would say that  
10 the pattern of behavior is very similar.

11 Q Thank you, Ms. Overby.

12 MS. McMAHON: I have no further questions.

13 THE COURT: Do you have any?

14 MR. ROGER: No questions.

15 MR. SCHWARTZ: No, Your Honor.

16 THE COURT: Thank you very much for testifying.  
17 You're excused.

18 What else you have?

19 MS. McMAHON: That's our final witness, Your Honor.  
20 Thank you.

21 THE COURT: Anything else?

22 MR. SCHWARTZ: No rebuttal, Your Honor.

23 THE COURT: Ladies and gentlemen, I'm going to  
24 instruct you now as to what the law is on this case, and then  
25 we'll hear some closing arguments.



1           Number 1. It is now my duty as Judge to instruct  
2 you on the law that applies to this penalty hearing. It is  
3 your duty as jurors to follow these instructions and to apply  
4 the rules of law to the facts as you find them from the  
5 evidence.

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

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

18           3. The trial jury shall fix the punishment for  
19 every person convicted of murder in the first degree.

20           4. The jury shall fix the punishment at:

21           (1) A definite term of one hundred (100) years  
22 imprisonment with eligibility for parole beginning when a  
23 minimum of forty (40) years has been served;

24           (2) Life imprisonment with the possibility of  
25 parole;

1           (3) Life imprisonment without the possibility of  
2 parole; or,

3           (4) Death.

4           5. Life imprisonment with the possibility of parole  
5 is a sentence of life imprisonment which provides that a  
6 defendant will be eligible for parole after a period of twenty  
7 (20) years. This does not mean that he would be paroled after  
8 twenty years, but only that he would be eligible after that  
9 time.

10           Life imprisonment without the possibility of parole  
11 means exactly what it says, that a defendant shall not be  
12 eligible for parole.

13           If you sentence a defendant to death, you must  
14 assume the sentence will be carried out.

15           Although under certain circumstances and conditions  
16 the State Board of Pardons commissioners has the power to  
17 modify sentences, you are instructed that you may not  
18 speculate as to whether the sentence you impose may be changed  
19 at a later date.

20           6. In the penalty hearing, evidence may be  
21 presented concerning aggravating and mitigating circumstances  
22 relative to the offense, and any other evidence that bears  
23 upon the defendant's character. Hearsay is admissible in a  
24 penalty hearing.

25           7. The State has alleged that aggravating

1 circumstances are present in the case. The defendants have  
2 alleged that certain mitigating circumstances are present in  
3 the case. It shall be your duty to determine:

4 (a), whether an aggravating circumstance or  
5 circumstances are found to exist; and

6 (b), whether a mitigating circumstance or  
7 circumstances are found to exist; and

8 (c), based upon these findings, whether a defendant  
9 should be sentenced to a definite term of one hundred (100)  
10 years imprisonment, life imprisonment or death.

11 The jury may impose a sentence of death only if:

12 (1) the jurors unanimously find at least one  
13 aggravating circumstance has been established beyond a  
14 reasonable doubt; and

15 (2) the jurors unanimously find that there are no  
16 mitigating circumstances sufficient to outweigh the  
17 aggravating circumstance or circumstances found.

18 A mitigating circumstance itself need not be agreed  
19 to unanimously; that is, any one juror can find a mitigating  
20 circumstance without the agreement of any other juror or  
21 jurors. The entire jury must agree unanimously, however, as  
22 to whether the aggravating circumstances outweigh the  
23 mitigating circumstance, or whether the mitigating  
24 circumstances outweigh the aggravating circumstances.

25 Otherwise, the punishment shall be imprisonment in

1 the State Prison for a definite term of one hundred (100)  
2 years imprisonment with eligibility for parole beginning when  
3 a minimum forty (40) years has been served, or life with or  
4 without the possibility of parole.

5 8. You are instructed that it is not necessary for  
6 the defendant to present any mitigating circumstances. Even  
7 if the State establishes one or more aggravating circumstances  
8 beyond a reasonable doubt and the defendant presents no  
9 evidence in mitigation, you should not automatically sentence  
10 the defendant to death.

11 The law never requires that a sentence of death be  
12 imposed; the jury, however, may consider the option of  
13 sentencing the defendant to death where the State has  
14 established beyond a reasonable doubt that an aggravating  
15 circumstance or circumstances exist and the mitigating  
16 evidence is not sufficient to outweigh the aggravating  
17 circumstance.

18 9. In order to consider the death penalty as an  
19 option for sentencing, you must first find beyond a reasonable  
20 doubt that at least one aggravating circumstances alleged by  
21 the State in fact does exist. If you do not find that any  
22 aggravating circumstances exist, you may not consider the  
23 death penalty as an option.

24 If you find beyond a reasonable doubt that one or  
25 more aggravating circumstances exist, you must then determine

1 whether any mitigating circumstances exist. The finding of a  
2 mitigating circumstance or circumstances need not be  
3 unanimous.

4           If you determine that any mitigating circumstance  
5 exists, you must then determine if one -- if the one or more  
6 of the mitigating circumstances found to exist outweigh the  
7 one or more aggravating circumstances found to exist. If the  
8 one or more mitigating circumstances do not outweigh the one  
9 or more aggravating circumstances, you may consider the death  
10 penalty as an option. Likewise, if you find that one or more  
11 mitigating circumstances do not exist and you find that the  
12 existence of one or more aggravating circumstances, you may  
13 consider the death penalty as an option.

14           Even if you find that one or more aggravating  
15 circumstances are not outweighed by the one or mitigating  
16 circumstances, or if you find that there are one or more  
17 aggravating circumstance and that there are no mitigating  
18 circumstances at all, you still have the discretion to vote  
19 for the imposition of a sentence of one hundred (100) years,  
20 life with the possibility of parole or life without the  
21 possibility of parole, rather than the death penalty.

22           10. Mitigating circumstances are those factors  
23 which, while they do not constitute a legal justification or  
24 excuse for the commission of the offense in question, may be  
25 considered, in the estimation of the jury, as extenuating or

1 reducing the degree of the defendant's moral culpability.

2           You must consider any aspect of the defendant's  
3 character or record, and any of the circumstances of the  
4 offense that the defendant proffered as a basis for the  
5 sentence less than death.

6           11. The law does not require the jury to impose  
7 the death penalty under any circumstances, even when the  
8 aggravating circumstances outweigh the mitigating  
9 circumstances. Nor is the defendant required to establish any  
10 mitigating circumstances in order to be sentenced to less than  
11 death.

12           12. You are instructed that the following factors  
13 are circumstances by which murder of the first degree may be  
14 aggravated:

15           (1) The murder was committed by a person who was  
16 previously convicted of a felony involving the use or threat  
17 of violence to the person of another, to wit: attempted  
18 robbery, Case Number C96794, Eighth Judicial District Court of  
19 the State of Nevada in and for the County of Clark.

20           (2) The murder was committed by a person who was  
21 previously convicted of a felony involving the use or threat  
22 of violence to the person of another, to wit: battery with  
23 substantial bodily harm, Case Number C134709, Eighth Judicial  
24 District Court of the State of Nevada in and for the County of  
25 Clark.

1           (3) The murder was committed while the person was  
2 engaged in the commission of, or an attempt to commit, a  
3 burglary, any burglary.

4           (4) The murder was committed while the person was  
5 engaged in the commission or an attempt to commit any robbery.

6           (5) The murder was committed to avoid or prevent a  
7 lawful arrest.

8           (6) The defendant has, in the immediate proceeding,  
9 been convicted of more than one offense of murder in the first  
10 or second degree.

11           13. Murder of the first degree may be mitigated by  
12 any of the following circumstances, even though the mitigating  
13 circumstances is not sufficient to constitute a defense or  
14 reduce the degree of a crime:

15           (1) The defendant has no significant history of  
16 prior criminal activity.

17           (2) The murder was committed while the defendant  
18 was under the influence of extreme mental or emotional  
19 disturbance.

20           (3) The victim was a participant in the defendant's  
21 criminal conduct or consented to the act.

22           (4) The defendant was an accomplice in a murder  
23 committed by another person and his participation in the  
24 murder was relatively minor.

25           (5) The defendant acted under duress or under the

1 domination of another person.

2 (6) The youth of the defendant at the time of the  
3 crime.

4 (7) Murders were committed by a person with an IQ  
5 of 79.

6 (8) The murders were committed by a person who has  
7 suffered, as a child and young adult, learning disabilities.

8 (9) The murders were committed by a person who had  
9 suffered, as a child and young adult, emotional disabilities.

10 (10) The murders were committed by a person who was  
11 -- who was bladder incontinent until age 12.

12 (11) Mercy.

13 (12) Any other mitigating circumstances.

14 14. The burden rests upon the prosecution to  
15 establish any aggravating circumstance beyond a reasonable  
16 doubt, and you must be unanimous in your finding as to each  
17 aggravating circumstance.

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



1 speculation.

2           16. The jury is instructed that in determining the  
3 appropriate penalty to be imposed in this case that it may  
4 consider all evidence introduced and instructions given at  
5 both the penalty hearing phase of this proceeding and at the  
6 trial of this matter.

7           17. In your deliberation you may not discuss or  
8 consider the subject of guilt or innocence of a defendant, as  
9 that issue has already been decided. Your duty is confined to  
10 a determination of the punishment to be imposed.

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

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

21           19. Although you are to consider only the evidence  
22 in the case in reaching a verdict, you must bring to the  
23 consideration of the evidence your everyday common sense and  
24 judgment as reasonable men and woman. Thus, you are not  
25 limited solely to what you see and hear as witnesses testify.

1 You may draw reasonable inferences from the evidence which you  
2 feel are justified in the light of common experience, keeping  
3 in mind that such inferences should not be based on  
4 speculation or guess.

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

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

13 Your verdicts must be unanimous, except with regard  
14 to any findings you may make as to the existence of individual  
15 mitigating circumstances. When you have agreed upon your  
16 verdicts, they should be signed and dated by your foreperson.

17 21. The Court has submitted two sets of verdicts to  
18 you. One set of verdicts reflects the three possible  
19 punishments which may be imposed. The other verdict is a  
20 special verdict. They are to be -- they are to reflect your  
21 findings with respect to the presence or absence and weight to  
22 be given any aggravating circumstance and any mitigating  
23 circumstances.

24 22. Now you will listen to arguments of counsel,  
25 who will endeavor to aid you to reach a proper verdict by

1 refreshing in your minds the evidence and by showing the  
2 application thereof to the law. But whatever counsel may say,  
3 you will bear in mind that it is your duty to be governed in  
4 your deliberation by the evidence as you understand it and  
5 remember it to be, and by the law that was given you in these  
6 instructions, and return a verdict which, according to your  
7 reason and candid judgment is just and proper.

8 Mr. Roger.

9 PLAINTIFF'S CLOSING ARGUMENT

10 MR. ROGER: Thank you, Judge.

11 Judge Bonaventure, counsel. Good afternoon, ladies  
12 and gentlemen. You are about to take on a tremendous  
13 responsibility in this case.

14 The decision that you make will be longlasting. I'm  
15 sure that it will be a decision that you will remember for  
16 quite some time. I don't mean to suggest that it's an easy  
17 decision. But from the State of Nevada's position, there is  
18 only one penalty which is appropriate in this case.

19 It has been said that our human capacity for  
20 goodness and compassion makes the death penalty tragic. But  
21 it is still our same human capacity for evil and depraved  
22 conduct which makes the death penalty so absolutely necessary.

23 Many people have been impacted by the crimes that we  
24 have heard about here in court. It is a tragedy, it's a  
25 tragedy for the family of Matthew Gianakis. Their life, no

1 matter what your decision is in this case, will never be the  
2 same. Mr. Gianakis explained that the family will always miss  
3 him, his companionship, his love. And his friends will miss  
4 him.

5 It's tragic for Carl Dixon's family. As Mr. Dixon  
6 explained, he will never be able to find his love, get  
7 married, provide grandchildren. It's a tragedy for them.

8 It's a tragedy for someone else who perhaps we  
9 haven't heard about a lot in this penalty hearing. And that's  
10 15-year-old Kenya Hall. He was a 15-year-old boy. And when  
11 you look at his picture that has been admitted into evidence,  
12 he was a young boy. And he was brought into this picture by a  
13 person who has had a significant impact on his life now and on  
14 his future.

15 It's a tragedy for Marlo Thomas's family.  
16 Obviously, Georgia Thomas, who has done her very best at  
17 trying to raise Marlo, certainly successful in raising the  
18 minister, the defendant's brother, successful in raising other  
19 children, it's a tragedy for her, no matter what your decision  
20 is, because his life, the defendant's life will be impacted,  
21 and it will be a heartfelt problem that she will suffer the  
22 rest of her life.

23 But, ladies and gentlemen, it is important to  
24 maintain focus in this case. We are here for one reason, and  
25 because of one person. He is the person who has created this

1 tragedy. He is the person who has created this tragedy for  
2 Carl Dixon's family, Matthew Gianakis's family, his wife, his  
3 brother-in-law, 15-year-old Kenya Hall. He is the person who  
4 has created this tragedy for the family. And so, while it is  
5 proper to look at the impact of other people, we have to keep  
6 focus on who created this problem. Why are we here? We're  
7 here because of one person. He is the person who committed  
8 the most selfish act that any human being can ever accomplish,  
9 that's murder, that's taking the life of two human beings, and  
10 that's the defendant.

11 And so, when you go back into your deliberation room  
12 and you consider punishment, consider who brought us here in  
13 this case and who perpetrated these terrible crimes on April  
14 15th, 1996, and it's the defendant.

15 It is said that justice occurs when the punishment  
16 fits the crime, when the punishment fits the defendant. And  
17 so the question that you will have to wrestle with is what  
18 punishment fits this double murder, what punishment fits this  
19 defendant?

20 As you are aware by now, in the state of Nevada,  
21 there is only one crime which qualifies for capital  
22 punishment, and it is perhaps the most severe crime, and  
23 that's murder of the first degree. But even then our  
24 legislature has determined that not every first degree murder  
25 case qualifies for the death penalty. Our legislature has

1 determined that certain categories of individuals who commit  
2 first degree murder are eligible for the death penalty, and  
3 that a jury may impose that most severe punishment, when those  
4 circumstances exist.

5 Our legislature has said that if one aggravating  
6 circumstance exists, and you weigh it against the mitigating  
7 circumstances and it outweighs those circumstances, the death  
8 penalty can be imposed. All that a jury needs to find is one  
9 aggravating circumstance. In this case we have many of them.  
10 This defendant's violent history has provided us a road map to  
11 his ultimate criminal acts of murder.

12 Juvenile authorities determined long ago that it was  
13 in the best interest of the community, because of this  
14 defendant's dangerous and explosive personality, that he be  
15 sent to the adult system. Immediately we put him in prison.  
16 Unfortunately, we could not keep him in prison long enough.  
17 Many people saw that this defendant would commit such a  
18 violent act, and he has.

19 Our legislature has determined that when people have  
20 been previously convicted of violent felonies, those are the  
21 type of violent individuals who should be eligible for the  
22 most severe punishment.

23 Aggravating circumstance number 1, is the  
24 defendant's prior conviction in 1990 for attempted robbery.  
25 You heard that Mr. Belltran had been robbed by two individuals

1 while he was outside of a bar, after he had cashed his  
2 paycheck. One of those individuals had an eight-inch-long  
3 knife. And although the reports are not clear, Officer Rose  
4 was not clear, one of the individuals had an eight-inch knife.  
5 Does that ring a bell?

6           The fact of the matter was that he was given a very  
7 substantial plea bargain, a break from the criminal justice  
8 system in 1990, after he had been certified as an adult, after  
9 he had suffered a very substantial criminal history as a  
10 juvenile. The system failed, ladies and gentlemen. He was  
11 given a break, he was sentenced to six years in the Nevada  
12 State Prison, and for the most part spent every day of that  
13 time.

14           You heard from correctional officers that defendants  
15 or inmates who are sent to prison are given statutory good  
16 time credits. And that if they behave in prison, they will be  
17 released sometime a little over half of their time. So, if  
18 the Court sentences a defendant to six years, he spends  
19 actually three years if he behaves. Marlo Thomas spent all of  
20 that. And the prison could do nothing else, they had to  
21 release him. You have the judgement of conviction in  
22 evidence.

23           That's aggravating circumstance number 1. That  
24 circumstance alone, according to the legislature, qualifies  
25 him for the death penalty. But we have so much more.

1           When he was released sometime in late 1994 or early  
2 1995, a chance to rehabilitate, a chance to go out and make  
3 his mother proud. It wasn't a short time later that he went  
4 bursting into a house, occupied by Pamela Davis, Loletha  
5 Jackson, with a gun. As a convicted felon, he's not supposed  
6 to carry a gun. A person with such a violent and explosive  
7 personality should not have guns in their possessions? And  
8 this defendant, this person who will be asking for mercy from  
9 you, the sentencing jury, went into that residence, firing a  
10 gun through the house, into a back bedroom where a 5-year-old  
11 child was laying, where Loletha Jackson was laying. And this  
12 is the person that is entitled to some mercy?

13           He battered Loletha Jackson, knocking out several  
14 teeth. And he went to Pamela Davis and stuck a gun in her  
15 face, obviously a loaded gun. This is an individual -- this  
16 is a killer who cares nothing about human life. And yet, he's  
17 going to ask you for mercy.

18           Once again, he was given a plea bargain. The system  
19 failed once again in his case. He was released on his own  
20 recognizance, on his own good behavior. He was supposed to  
21 report to Parole and Probation, he was supposed to contact the  
22 officer to set up an appointment so they could do his  
23 interview. He didn't do that. He didn't go to Parole and  
24 Probation. Parole and Probation had to come to him.

25           And once again, receiving the second break from the



1 system, he recruits a 15-year-old young man, loads up a gun,  
2 plans a robbery. He says he was going to get his job back.  
3 How absurd. How insulting. He went there to rob the place.  
4 He had worked there, he knew when cash would be available, he  
5 knew where the cash was kept. And from the State of Nevada's  
6 perspective he went to kill people.

7           Aggravating circumstance number 1, aggravating  
8 circumstance number 2, his conviction for battery with  
9 substantial bodily harm, are both crimes of violence, and they  
10 qualify him for the ultimate punishment.

11           Our legislature has determined that when you engage  
12 in certain violent and dangerous felonies and a murder occurs,  
13 then that person is eligible for the most severe punishment.  
14 Our legislature has determined that a burglary is a dangerous  
15 felony, and that when people enter residences or businesses  
16 with the intent to commit a crime in that building, that is  
17 burglary, and that qualifies for the most severe punishment.

18           In this case you have already determined that Marlo  
19 Thomas intended to commit some crime as he entered into the  
20 Lone Star restaurant during those early morning hours. So,  
21 that aggravating circumstance exists, you've already found  
22 that.

23           Likewise, when people take money or something of  
24 value from another human being, it's reprehensible, it's  
25 morally wrong. But when they take that property through force

1 or violence, when they take that property through killing  
2 another human being, that's robbery, and that class of killer  
3 stands out above and beyond your ordinary premeditated killer.  
4 And that person is eligible for the death penalty. You have  
5 found that aggravating circumstance.

6           The Court instructed you that when people are killed  
7 because they are witnesses, when they are killed so that they  
8 may elude capture or avoid a lawful arrest, that is an  
9 aggravating circumstance. When the defendant went into that  
10 restaurant he took Kenya Hall to the manager's office, knocked  
11 on the door. Vince Oddo answered the door, he demanded money  
12 at gunpoint, and then he gave the gun to Kenya Hall.

13           You heard Kenya Hall's transcript, and he indicated  
14 that he had told police, Trooper David Bailey, in Hawthorne,  
15 Nevada, that when the defendant gave him the gun the defendant  
16 told him to plug Vince Oddo in the back of the head. During  
17 the transcript he backpedaled a little bit and said, no, it  
18 happened afterwards. But why would he give Kenya Hall the gun  
19 and then go searching for other individuals?

20           Whether you believe that he told Kenya Hall this or  
21 not, his actions speak louder than words, because he went  
22 hunting down for the only two other witnesses who were in the  
23 Lone Star restaurant. That was Matthew Gianakis and Carl  
24 Dixon. And according to the evidence, as the State of Nevada  
25 sees it, he confronted Matt Gianakis, a witness, a person who

1 could come into court and identify him as being the robber in  
2 the Lone Star restaurant, someone who had worked with Marlo  
3 Thomas before, knew he was there that day. He was stabbed in  
4 the kitchen in his back, and then stabbed in his heart, as he  
5 turned around. He was killed to silence him so that he could  
6 not come into court, in a jury trial like this, in a robbery  
7 case.

8           And then he went into the men's room looking for  
9 Carl Dixon. He could have escaped at that point. Why did he  
10 kill Carl Dixon? I suggest to you that it's because he wanted  
11 to silence, eliminate another witness. And then, when he  
12 confronted Kenya Hall, according to Kenya Hall, when he asked  
13 where Vince Oddo was, and Kenya Hall said that he had gone out  
14 the front door, according to Kenya he was in a panic. He  
15 didn't know which way to go. He went out towards the front of  
16 the restaurant. Did he want to kill this Vince Oddo as well?  
17 Another witness in this case. Does that establish his intent  
18 to silence witnesses?

19           And then, according to Kenya Hall, he went back to  
20 the car and he told Kenya Hall that when you commit a crime  
21 "you're not supposed to leave no witnesses," quote, unquote.  
22 So, why was Carl Dixon and Matt Gianakis killed? He killed  
23 them to silence them.

24           And then the defendant told either Emma Nash or  
25 Barbara Smith that one person got away, and he hoped he died.

1           Ladies and gentlemen, there are an abundance of  
2           aggravating circumstances that qualify this defendant for the  
3           ultimate punishment. And that aggravating circumstance  
4           exists. And then finally, this aggravating circumstance. The  
5           killing of more than one person.

6           If none of the other aggravating circumstances  
7           persuades you that the death penalty is appropriate, I suggest  
8           to you that this aggravating circumstance should have a very  
9           profound effect on your deliberations. It is terrible when  
10          one human being is killed, and killed in the fashion in which  
11          this defendant chose to kill.

12          But when you kill two people, you've crossed the  
13          line. A killer should forfeit his life to live in a civilized  
14          society or in prison for the rest of his life, when he kills  
15          two people. And I suggest to you that all of the aggravating  
16          circumstances, all six of those aggravating circumstances have  
17          been proven beyond a reasonable doubt. And they allow you to  
18          consider the death penalty. But your job isn't over yet; you  
19          have to consider mitigating circumstances. And if you find  
20          any of those mitigating circumstances you go through a  
21          weighing process, and you look at the gravity of the  
22          aggravating circumstances, the merits of the mitigating  
23          circumstances, and you weigh them. It's a weighing process.  
24          It's not a numbers game.

25          And if you find that the aggravating circumstances

1 are compelling, that they outweigh the mitigating  
2 circumstances, then at that point you may consider the death  
3 penalty.

4 I want to take a few minutes and talk about some of  
5 these mitigating circumstances. Some of these circumstances  
6 are statutory in nature. Others have been alleged by the  
7 defense. As you can see, they're fact specific. Anything  
8 that you might consider can be a mitigating circumstance.

9 Number one, the defendant has no significant history  
10 of prior criminal activity. That certainly doesn't apply.  
11 You've heard from numerous witnesses about his criminal  
12 activity, which started at age 11 and was nonstop throughout  
13 his criminal career.

14 December 1984, he confronted a newspaper boy in  
15 North Las Vegas. Him and another individual beat this  
16 newspaper boy for his newspapers in front of a police officer.  
17 He was given a plea bargain, he pled guilty to battery.

18 September 19th, 1984, he confronted a student in  
19 class and struck this student for no apparent reason. And  
20 then when the police -- when the teacher confronted him he  
21 berated her and struck the teacher. He was given probation in  
22 the juvenile system.

23 September '84, evading police officer, vagrancy  
24 prowling. November of '84, trespassing, battery. May of  
25 1985, disorderly conduct, battery. August of 1985,

1 trespassing. October 2nd, 1985, battery. October 4th, 1985,  
2 four counts of battery. March 16th, 1986, battery. March  
3 4th, 1986, battery. June 4th, 1987, where he stole the  
4 bicycle, he was sent to Elko for that; he was released. July  
5 9th, 1987, battery with use of a deadly weapon.

6 August 26th, 1988, when he went to the Meadows Mall  
7 and stole items and was confronted by Cathy Barfuss, and he  
8 struck her in the face and took off running, and then got into  
9 a security guard's vehicle and crashed that, he was charged  
10 with grand larceny, grand larceny auto, battery. He was given  
11 a plea agreement, he pled guilty to battery and sent to Elko  
12 once again.

13 He was paroled, he was given -- he committed curfew  
14 violation in October of 1989. December of 1989, domestic  
15 violence and battery. January 4th, 1990, you heard from  
16 Alkareem Hanifa. This happened on December 28th, 1989, when  
17 he was robbed by the defendant, when the defendant took a  
18 boulder and tried to pummel him in the face, in the head. He  
19 was given -- he was certified as an adult, and that went  
20 nowhere.

21 March 8th, 1990, possession of stolen vehicle.  
22 You've heard from the officers about the chase of the  
23 defendant. And then, August 10th, 1990, Mr. Beltran, the  
24 victim of the 1990 attempt robbery plea bargain, where he was  
25 confronted by an assailant with a knife. And the defendant

1 went to prison over that.

2 Certainly that mitigating circumstance does not  
3 apply.

4 Number two, the murder was committed while the  
5 defendant was under the influence of extreme mental or  
6 emotional disturbance. I suggest to you that there's no  
7 credible evidence of that at the time. You heard from Dr.  
8 Kinsora that he has a personality disorder, but is this the  
9 type of extreme mental and emotional disturbance that is  
10 envisioned by this mitigating circumstance?

11 Number three, the victim was a participant in the  
12 defendant's criminal conduct or consented to the act. Not  
13 applicable.

14 The defendant was an accomplice in a murder  
15 committed by another person. Not applicable. Kenya Hall did  
16 not commit these murders. He committed them himself.

17 The defendant acted under the duress or under the  
18 domination of another person? Fifteen-year-old Kenya Hall? I  
19 don't think so.

20 The youth of the defendant at the time of the crime.  
21 The defendant was 23 years old when he committed these two  
22 killings. He was married, he had held down jobs, he had been  
23 through the criminal justice system. Fourteen-years-old  
24 defendants, 15-year-old defendants, 16-year-old defendants,  
25 17-year-old defendants are youthful defendants, but not a 23-

1 year-old, two-time convicted felon.

2           And then these are fact specific, alleged by the  
3 defense. The murders were committed by a person with an IQ of  
4 79. The murders were committed by a person who had suffered  
5 as a child and young adult with learning disabilities. The  
6 murders were committed by a person who had suffered as a child  
7 and young adult with emotional disabilities. The murders were  
8 committed by a person who had bladder incontinent until age  
9 12.

10           I don't mean to belittle these problems. But the  
11 fact of the matter is that many people in society come from  
12 broken homes, they come from homes where perhaps they have  
13 been neglected. They have learning disabilities. But is that  
14 sufficient to mitigate a double murder? A person who has been  
15 given many, many breaks by the criminal justice system?

16           And what effect did that have on the defendant on  
17 April 15th, 1996, when he went in there, stabbing and creating  
18 a blood bath in that restaurant? What effect did his problem  
19 with his bladder at age 12 have on this? And is it sufficient  
20 to excuse, not the crime, but the punishment, and give him  
21 something less than the maximum allowed by law?

22           And then mercy. That's what these two fine  
23 attorneys are going to be asking you for, is mercy. And you  
24 will have to determine whether this killer, this two-time  
25 killer, is a proper candidate for your mercy as a jury.



1           And when you consider that mitigating circumstance,  
2 and considering whether or not you should give him what the  
3 State of Nevada believes he should receive, and that's the  
4 ultimate punishment, think about the terror that was in the  
5 eyes of Matthew Gianakis and Carl Dixon when their co-worker,  
6 when their supposed friend came after them with a knife.

7           And when you listen to the defendant's statement to  
8 homicide detectives, that he had spent time with Carl Dixon,  
9 that he was Carl Dixon's friend, think about the injuries that  
10 occurred. Think about the fifteen stab wounds that Carl Dixon  
11 suffered as he's fighting for his life. Think about the  
12 nineteen times he was stabbed by this killer, as he laid in  
13 the bathroom, in the men's room, at the Lone Star restaurant.  
14 And consider whether this killer, this person who killed two  
15 people, deserves your mercy.

16           I suggest to you, ladies and gentlemen, on behalf of  
17 the State of Nevada, that the aggravating circumstances  
18 outweigh any mitigating circumstances that you might find.  
19 The gravity of the things that this killer has done certainly  
20 allows you legal justification to consider the ultimate  
21 punishment. And so, the question is this, what punishment  
22 fits the crime? What punishment fits this defendant?

23           By your verdict you will be sending a message to the  
24 community. You will be sending a message to other people who  
25 might consider going into establishments to rob at gunpoint,

1 at knifepoint. You will send a message to other criminals  
2 that when you go out to commit crimes, you do it at your own  
3 risk, and that if you kill during your crimes, the community  
4 is looking at the most absolute and final punishment you can  
5 receive. Punishment is an appropriate objective of the  
6 criminal justice system. Punishment is society's sense of  
7 morale outrage at people who commit crimes. And in this case,  
8 deadly crimes.

9           This is not a rehabilitation hearing. There is no  
10 program that we know of that rehabilitates killers. It's a  
11 special type of mentality, a special type of person who can  
12 plunge a knife into a human being thirty-four, thirty-six  
13 times. This is a penalty hearing. And your decision will be  
14 what punishment is appropriate for a double murder.

15           Deterrence is another objective of the criminal  
16 justice system. There's general deterrence. The message that  
17 I have spoken to you about telling other criminals that when  
18 they commit crimes they will be held accountable for their  
19 actions and they will have to take responsibility, and when  
20 the crime fits the criteria, when the defendant fits the  
21 criteria, the maximum punishment will be imposed. Mr. LaPorta  
22 will certainly suggest to you that there is no evidence that  
23 the death penalty deters killers.

24           There is never any empirical death where killers  
25 will suggest that -- or people will suggest that they didn't

1 kill because they knew that the death penalty was an option.  
2 However, if it stops one person from going into a 7-Eleven  
3 store with a loaded gun, if it stops one spouse from using a  
4 firearm or a knife during a heated altercation, then perhaps  
5 deterrence has occurred. But equally important is specific  
6 deterrence, deterring this killer from ever killing again.  
7 Deterring this killer from ever injuring another inmate.

8           You heard about the defendant's stay in prison.  
9 Repeatedly this defendant was attacking the guards,  
10 correctional officers, either physically or verbally, throwing  
11 urine on a six-month pregnant officer. That's the person who  
12 is going to ask for mercy. Attacking another inmate with a  
13 homemade type of blackjack, a sock, putting either batteries  
14 or rocks in it, striking another inmate in this maximum  
15 security prison, causing him to be hospitalized, striking out  
16 at guards. He was in our maximum facility, Ely State Prison,  
17 where death row is.

18           And he had every reason to behave while he was in  
19 prison so he could get out in a short period of time. And  
20 yet, throughout his entire incarceration, he threatened the  
21 lives of guards, correctional officers, and other inmates.

22           If you sentence him to life without the possibility  
23 of parole, what hammer does he have over his head? What  
24 reason does he possibly have to behave in prison? If he hits  
25 another guard, he's spending the rest of his life in prison.

1 If he strikes out at another inmate, he's spending the rest of  
2 his life in prison. If he wants to throw urine at another  
3 guard, what can they do? He's spending the rest of his life  
4 in prison.

5           You have a very unique position in this case,  
6 because you know how this person behaves in prison. He  
7 doesn't. And so, your decision will have to be whether we  
8 execute a known killer, we execute a person who cannot control  
9 his impulsivity, a person who has a personality disorder.  
10 Whether we execute that person or whether we risk the  
11 execution of innocent people, that's your decision.

12           The writer John Donne once wrote, do not ask for  
13 whom the bell tolls, because the bell tolls for thee.

14           I ask you to remember that on April 15th, 1996,  
15 shortly after 8:00 a.m., 21-year-old Matt Gianakis was stabbed  
16 to death. The bell tolled for him at that point. On April  
17 15th, 1996, the bell tolled for Carl Dixon, age 23, as he was  
18 stabbed thirty-four times.

19           By your verdict here today, Wednesday, June 25th,  
20 1997, let the bell toll for their killer, Marlo Thomas.

21           THE COURT: Thank you, Mr. Roger. Mr. LaPorta?

22           MR. LaPORTA: Yes, Your Honor.

23           DEFENDANT'S CLOSING ARGUMENT

24           MR. LaPORTA: Your Honor, counsel, ladies and  
25 gentlemen of the jury. I've stood here many times in the past

1 addressing juries such as yourselves. But today I'm  
2 experiencing the sense of being afraid. Afraid that no matter  
3 how skilful my argument, no matter how much of my experience I  
4 bear upon this argument, that somehow I will not be able to  
5 convince you to spare my client's life. I am afraid of that.

6           The issue is really a very narrow one, one that I  
7 told you in my opening statement. Is Marlo so beyond  
8 redemption that he needs to be eliminated from the human  
9 community? Simply put, do you need to kill him? If a glimmer  
10 of humanity is in him, he need not be killed, for killing him  
11 is the absolute last resort.

12           There is another extreme form of punishment, and  
13 that's imprisonment with no chance for parole. And that's  
14 exactly what it means, no parole. This isn't an issue of  
15 whether he lives or dies, this is an issue between two forms  
16 of severe punishment, harsh punishment. Imprisonment or the  
17 death penalty.

18           Now, we're here in this penalty hearing because the  
19 punishment must be individualized. The State of Nevada,  
20 through the legislature, through our statutes, has determined  
21 that there are three forms of punishment when you have found  
22 somebody guilty of first degree murder. So, obviously, the  
23 legislatures, with all their studied thought, have determined  
24 that in some cases people convicted of first degree murder  
25 need not be executed.

1           To put it into context, to frame this for you, I'm  
2 only going to use this board one time so bear with me. The  
3 triangle represents everybody convicted of first degree  
4 murder. These are the people at the top of the pyramid that  
5 need to be executed, that deserve the death penalty. Does  
6 Marlo fit in there? Well, let me suggest this to you, and  
7 once again, to put it in -- to frame it, to put it in its  
8 proper context, is he a Ted Bundy? Is he a man who went to  
9 law school and then chose to roam throughout four states,  
10 raping and viciously killing women over a period of many  
11 years? Is he a soldier who turned traitor on his country and  
12 killed over a hundred and sixty people? I ask you to consider  
13 that when putting it into reference.

14           Who is he? Well, as I told you when we started out,  
15 presenting a life is a very difficult situation for an  
16 attorney. He's obviously a 23-year-old black man who was  
17 raised by his mother. His father wasn't at home. His older  
18 brother, Darrell, helped. In his early life you heard about  
19 his nickname "Stinky," and you can only imagine the effect  
20 that had on this youngster growing up, when other school  
21 children, who can be cruel, criticized, ridiculed, made fun of  
22 him. It had an effect on him. The mental cruelty that had to  
23 have been heaped on him at that point in time had to have been  
24 considerable for this youngster.

25           Then we presented some testimony as to -- from Dr.

1 Kinsora as to his learning problems. He was going to school.  
2 He was severely impaired intellectually. You heard the  
3 testimony this morning from Dr. Kinsora. I am not going to  
4 sit here and spend another ten or fifteen minutes going  
5 through that fresh testimony. You heard it as well as I do.

6 He functions on a borderline basis intellectually.  
7 Simply put, forget all the psycho babble, his wiring up here  
8 is defective. It's not like the everyday person's. He  
9 processes stuff very slowly. He doesn't think quickly. He  
10 functions as a 14-year-old, both intellectually and  
11 emotionally. Don't let the fact that this big man over here  
12 is just that, a man. Intellectually and emotionally he  
13 operates at the level of a 14-year-old. He has problems  
14 generating solutions to everyday situations. His impulses,  
15 his gut reactions overcome his ability to rationalize and make  
16 an intelligent decision. He has anger control problems.  
17 You've heard all of that.

18 You heard Linda Overby, the school psychologist, who  
19 has seen hundreds if not thousands of children through the  
20 years. She remembers Marlo. Why? He was a serious  
21 behavioral problem and had serious emotional problems as a  
22 child in Miley School, which was a school just for those  
23 people. And they had trouble controlling him there.

24 But, as she said, their resources were limited. The  
25 emotion -- the area of emotions, the same way as intellectual.

1 He has impulse control problems. He can't control his  
2 behavior. It's very difficult for him to. His wiring is  
3 different. He functions as a 14-year-old emotionally. He's a  
4 dangerous man, make no mistake about that. As diagnosed by  
5 the doctor, he has an antisocial personality. He's not a true  
6 sociopath. There is a glimmer, there is a glimmer of  
7 humanity.

8           Let's talk about his life in jail, both as a child  
9 and an adult. He got introduced into the system about twelve  
10 years of age. He had many incidents involving Juvenile  
11 Services. The first one, I believe, was hitting a teacher,  
12 robbery. He was a bad kid, a real bad kid, but a bad kid with  
13 emotional and intellectual problems. And the State of Nevada  
14 did not have adequate resources to help correct the problem.

15           He desperately needed help. He put some brief  
16 stints in Childrens' Behavioral Services, in Miley School, but  
17 with their limited resources he was beyond their help. As the  
18 juvenile probation officer of 24 years, and I forget her name,  
19 she told you, juveniles were treated as criminal problems, not  
20 as social problems. We're talking about 10, 11-year-old  
21 children.

22           Despite the cruelty of his acts as a child, I want  
23 you to remember, he was just that, a child, with many many  
24 serious problems. The DA's mentioned that you've known about  
25 each and every one. They've recounted them all. And I'll



1 agree, he was a bad kid. But that doesn't take away from the  
2 fact that at this time this was a youngster who had turned bad  
3 and the State had no resources to get things turned around.  
4 He had legitimate emotional and intellectual problems.

5           This is a good juncture or point for me to address  
6 why I'm talking to you about this. You say to me, what does  
7 this have to do with this adult crime, this horrible crime,  
8 this senseless crime, this unforgivable crime? Well, that's  
9 just it, it's unforgivable. And it's inexcusable. And I  
10 don't offer you this stuff in asking for forgiveness to the  
11 point where you spare his life. I offer this to you not to  
12 justify these crimes, because nothing can justify them. I  
13 want you to know what forces shaped Marlo's life as he grew  
14 up, what brought him to this point in his life where the State  
15 is now asking you to kill him.

16           As I said, the punishment system is individualized.  
17 This penalty phase will determine just that punishment. This  
18 mitigation is offered to you for the simple and sole fact of  
19 helping you, assisting you in determining just which  
20 punishment is appropriate. After all, common sense tells you,  
21 you don't punish a 14-year-old as you would a 23-year-old.

22           This 23-year-old man who's capable and has caused  
23 great damage, has killed two people, functions as a 14-year-  
24 old. Look at who he took to the crime scene with him, a 15-  
25 year-old. Think about that. Not another adult, a 15-year-

1 old. Why? He identifies with him, because he's acting as a  
2 14-year-old up here. We get to prison, nothing changed. He  
3 continued to perform in an uncontrollable and angry fashion.

4 Well, why? Well, I guess the best way to talk about  
5 this is to demonstrate by using a parable that came from the  
6 Bible. And that was that some seeds fell on the earth, were  
7 cast upon the earth. Some of those seeds fell upon rocks, and  
8 they withered and died. Some of those seeds fell amongst  
9 thistle and thorns. A few became productive, but most were  
10 choked off and had stunted development. Some fell upon  
11 productive land, and most grew to be full and productive.  
12 They were well nurtured.

13 Well, people are like seeds. You're born into and  
14 exist, all of us, in significantly different social, economic  
15 and environmental situations. There can be no doubt about  
16 that. Just look around yourself. And I say to you, Marlo  
17 grew up amongst the thorns and thistles. And he didn't grow  
18 up to be too productive, did he? No, not at all. Now he  
19 finds himself faced in a situation where the State asks for  
20 the death penalty. Well, the defense is asking you for  
21 another severe form of punishment, and that's imprisonment  
22 with no parole.

23 And, believe me, ladies and gentlemen of the jury,  
24 no parole means just that, no parole. This man will die in  
25 prison. Will society outside of prison be protected? Most

1 definitely. He's inside those walls.

2           What about the society that exists inside the  
3 prison? Mr. Roger made comment as to some of the inmates,  
4 some of the correction officers at the end of his argument.  
5 Well, let's analyze that. Let's analyze his prison behavior.  
6 You heard it. Some pretty outrageous and reckless behavior.  
7 Intolerable. Should never be tolerated. But he was  
8 disciplined by in-house procedures. Locked down, loss of  
9 privileges. What was his behavior? I don't mean to minimize  
10 it or trivialize it, because I don't. Because what he did was  
11 serious and scary. But he acted like a mouthy 14-year-old  
12 issuing a lot of threats; death threats, threats of a sexual  
13 nature. You got to remember, when he first went to prison,  
14 adult prison, he was about 16, 17 years of age. He was acting  
15 tough. He threw some urine on a guard, a few punches at some  
16 guards. There's also a report of an inmate who received some  
17 eye treatment as a result of a problem that he had with Mr.  
18 Thomas, but we saw no written report as to that.

19           With all of that, there was only one incident where  
20 somebody had to go to the infirmary, and that was the  
21 unfortunate correction officer who had the urine propelled  
22 upon her. No one else, inmates or correction officers, ever  
23 received any medical help. No one else had been injured.

24           And there's testimony the prison was violent. You  
25 better believe it's a violent place. The guards are concerned

1 about their safety, as they all told you. That's of paramount  
2 concern to them. They don't take their jobs lightly, ladies  
3 and gentlemen. If they err, they're going to err on the side  
4 of safety, because they want to go home. They too have  
5 children at home, they too have wives and husbands. But there  
6 are two things, through all of these incidents of bad behavior  
7 by this man, that never happened. And the prison could have  
8 easily done either two. He was never classified a high risk  
9 prisoner.

10           When I talk about high risk prisoners, let me remind  
11 you, they are locked up for twenty-three hours a day,  
12 approximately. They receive their meals inside their cell.  
13 They are taken out one hour a day, given a shower every other  
14 day. When they are taken out of their cell, they are  
15 completely shackled, arms and legs, and there are two well-  
16 protected guards in attendance. And if necessary, because of  
17 his behavior, or another inmate's behavior, there can be more  
18 assigned.

19           He goes everywhere in that status, in leg irons and  
20 shackled. How big a threat, and I pose this as a rhetorical  
21 question to you all, how big of a threat do you think the  
22 people who are charged with overseeing him perceived him as to  
23 their life or limb if they never bothered to reclassify him?  
24 That the two forms of punishment they gave him were lockdown  
25 with forty-eight other inmates, or some loss of a privilege,

1 such as a television, telephone privileges.

2 And you also heard that they had a second form.  
3 Something else that didn't happen. And that was the most  
4 serious criminal activities, they file charges. Either the  
5 attorney general's office or that county prosecutor file  
6 charges on behalf of the prison. Never happened.

7 Despite wanting to shock you with his shocking  
8 behavior while in prison, and I admit it's shocking and it's  
9 disturbing, but it appears that the people who are charged  
10 with the responsibility of tending to this man, it appears  
11 that within their world, he's within tolerable limits. It  
12 doesn't make his behavior right. But I ask you to consider  
13 that when putting this into the big picture.

14 The testimony was they have the means to protect  
15 themselves and the prison population. The death penalty is  
16 not mandatory in this situation. It's never mandatory under  
17 any situation. As Mr. Roger told you, that even if you find  
18 all the aggravators beyond a reasonable doubt, and you find  
19 absolutely no mitigation here, which would be an extreme  
20 situation, you can still reject the death penalty. You're  
21 never required to impose it, under any circumstance.

22 Now, there's been some comments made during the  
23 trial, and you may hear from Mr. Schwartz about Marlo's lack  
24 of remorse. Well, I'm going to say two things about that.  
25 You've sat here over these last two weeks and you watched this

1 gentleman. You decide. And then I'll add one more point to  
2 that.

3           You also saw a tape, a tape where he confessed to  
4 the crimes. No attorney present, no family members present,  
5 just him and two police officers. A hostile situation. Asked  
6 one last question, do you have anything else you want to tell  
7 us, not anything do you want to say to the families, the  
8 unfortunate families. And this person who thinks slowly, who  
9 can't process quickly, so you have to wonder, did this not  
10 come from his gut, was this not heartfelt, immediately said, I  
11 want to apologize to the victims' families. Think about that.

12           One last point. You may hear that he exercised his  
13 free will. Forget all this mitigation, forget this impaired  
14 intellectually, impaired emotionally, and all the other  
15 problems. Well, I ask you to consider all those other  
16 problems because that's what shaped him. And that's what  
17 shaped his form of free will. Yes, he chose to kill his  
18 victims, he chose to take their lives, no question. Yes, he  
19 exercised free will, no doubt about it. But we presented this  
20 mitigation to you to show you what tools this young man, this  
21 14-year-old, had in exercising that free will. Make no  
22 mistake about it, despite the State's attempts, you cannot  
23 trivialize his emotional and intellectual problems. They are  
24 real, they are present. They shape and form this man. He has  
25 defective tools, ladies and gentlemen, in dealing with social

1 situations and problems.

2 And at this time, I would ask you to spare his life  
3 and to impose the severe punishment of imprisonment without  
4 the possibility of parole. And I thank you for your attention  
5 and your participation.

6 MR. SCHWARTZ: Your Honor, may we approach?

7 THE COURT: Yes.

8 (Off-record bench conference)

9 THE COURT: Stretch your legs for five minutes, then  
10 we're going to -- Mr. Schwartz is going to give a brief  
11 statement, and then I have lunch provided to you; you go take  
12 a regular lunch. Is that all right with everybody?

13 Don't converse among yourselves or with anyone else  
14 on any subject connected with the trial, read, watch, or  
15 listen to any report of or commentary on the trial or any  
16 person connected with the trial by any medium of information,  
17 including, without limitation, newspaper, television or radio,  
18 and don't form or express any opinion on any subject connected  
19 with the trial until the cause is finally submitted to you.

20 About five minutes, then we'll come back.

21 (The Court recessed)

22 (The Jury is present)

23 THE COURT: All right. Counsel stipulate to the  
24 presence of the jury?

25 MS. McMAHON: Yes, Your Honor.

1 THE COURT: All right. Mr. Schwartz?

2 MR. SCHWARTZ: Thank you, Your Honor.

3 PLAINTIFF'S REBUTTAL ARGUMENT

4 MR. SCHWARTZ: Good afternoon, ladies -- or, good  
5 morning, ladies and gentlemen. Before I get into my comments,  
6 I'd like to discuss the diagram that Mr. LaPorta prepared for  
7 you today. He indicated that this triangle represents people  
8 in prison who have been convicted of murder, and I assume he  
9 meant first degree murder. And that the top portion of that  
10 diagram is reserved for the meanest of the mean, the worst of  
11 the worst, those people who are on death row.

12 And he indicates to you that the defendant belongs  
13 somewhere below that. I submit to you, ladies and gentlemen,  
14 the vast -- the vast majority of people who are on death row  
15 in the state of Nevada, these worst of the worst, have killed  
16 one -- one single human being. Where does the defendant go,  
17 Marlo Thomas, who has committed two, two brutal murders of the  
18 first degree?

19 Since January the 16th, 1996 -- sorry, 1997, all of  
20 us have been engaged in a factual process to determine whether  
21 or not this defendant was guilty of murder in the first  
22 degree. You have found the defendant guilty of first degree  
23 murder, not once, but twice. Now you have a most important  
24 duty or responsibility to fulfill. You have to make a  
25 decision, a determination as to what is the just punishment



1 for not one, but two brutal murders. You can fix punishment  
2 at life in prison with parole possibilities, life in prison  
3 without parole possibilities, or the imposition of the death  
4 penalty.

5           You have heard through Mr. Roger that in the state  
6 of Nevada, before you can consider the death penalty at least  
7 one aggravating circumstance has to be proven to you beyond a  
8 reasonable doubt. Mr. Roger went through the six aggravating  
9 circumstances that have been alleged and based upon the  
10 evidence proven to you beyond any reasonable doubt. So, you  
11 may consider the death penalty.

12           With regards to mitigating circumstances or  
13 mitigating factors that have been alleged by the defense, as  
14 you heard about half of those mitigating factors come from our  
15 statutes. But the ones that seem to deal with this particular  
16 case, like the IQ, mercy, bladder control, bladder  
17 difficulties, those were submitted by defense counsel. They  
18 are not statutory mitigating circumstances.

19           Mr. Roger went through the defendant's vast criminal  
20 history, his two felony convictions. So, you cannot consider  
21 as a mitigating factor the absence of a significant criminal  
22 record. We've established that he has a significant criminal  
23 record.

24           Another mitigating factor, State said the murder was  
25 committed while the defendant was under the influence of

1 extreme mental or emotional disturbance. The defense brought  
2 in a psychologist who Mr. LaPorta referred to as his expert,  
3 gave us psychobabble. Now, the psychologist testified that he  
4 performed some tests, and that the defendant was of low  
5 intelligence. So what? He said he was ten points from being  
6 considered retarded. So what? The doctor could not point to  
7 any area and say that with any degree of certainty that this  
8 defendant was suffering from emotional or extreme mental or  
9 emotional disturbance. In fact, the doctor said, as a  
10 scientist he's always uncertain about things.

11 But he goes on to state that this defendant will  
12 likely function well in a prison setting. I have nothing  
13 personal against Dr. Kinsora, he's a gentleman, he was a  
14 witness for the defense. They have every right to call  
15 somebody to give an excuse or an explanation as to why things  
16 may have happened. But history is a lot more reliable about  
17 what this defendant is capable of doing than speculation from  
18 a doctor who met him for the first time eight months after  
19 these horrible crimes were committed, and didn't see fit to  
20 question any witnesses, any people in the prison, but yet can  
21 tell you that you should not sentence him to death because he  
22 can function well in prison. Just put him in prison, he'll be  
23 fine. Well, history is a lot more reliable, with all due  
24 respect, that Dr. Kinsora.

25 There's another mitigating factor that's been

1 alleged by the defense, and that's that the defendant acted  
2 under duress or the domination of another person. The  
3 defendant was the leader, not the follower. Mr. LaPorta makes  
4 a statement to you that the defendant associated with Kenya  
5 Hall, because Kenya Hall was 15 and the defendant was 14.  
6 That's why he chose to associate with him, 'cause he chose to  
7 associate with people his own age. Now, that's nonsense. He  
8 associated with Kenya Hall because Kenya Hall was the brother  
9 of his wife. He associated with Kenya Hall and brought him  
10 into this horrible crime because he knew Kenya Hall was easily  
11 manipulated, would do whatever he said, would carry out  
12 whatever orders he gave. But he was wrong. He also wanted to  
13 dump all of this on the head of Kenya Hall when he got caught.

14 Again, the youth of the defendant at the time of the  
15 crime is alleged as a mitigating circumstance, and Mr. Roger  
16 addressed that. A 24-year-old man is responsible for his  
17 actions, he should be held accountable for his actions. He  
18 was old enough on April the 15th, 1996 to take two human  
19 lives, to go into that restaurant with a loaded gun, take a  
20 knife and stab it into two living and breathing human beings.  
21 He was old enough then to commit those horrible crimes, he's  
22 old enough today to be sentenced to death.

23 You cannot let the defendant hide behind his age and  
24 escape responsibility or accountability. There was testimony  
25 regarding certain problems he had with his bladder as a child,

1 twelve or thirteen years ago. Millions and millions of  
2 people, children, go through life with problems at an early  
3 age. Some of them outgrow them, some continue on to teenage  
4 years, even later. People have visual problems, people are  
5 hearing impaired, people have difficulty walking. Millions of  
6 people. And the list goes on. These people do not go out and  
7 premeditate and kill two living breathing human beings.

8 His bladder condition, the fact that he may have  
9 been teased as a child, which many of us probably were exposed  
10 to growing up, that can serve as no excuse for what he did on  
11 April the 15th.

12 Now, ladies and gentlemen, I'd like to discuss with  
13 you why the death penalty is the only appropriate verdict in  
14 this particular case. The defense suggests that life  
15 imprisonment without the possibility of parole would be  
16 punishment enough for those two young lives. With all due  
17 respect to Mr. LaPorta, he is wrong, based upon the evidence.  
18 Remember, as Mr. LaPorta said, prison is a society, a society  
19 behind bars, a society behind walls, but nevertheless, a  
20 society. Within those walls people breathe, unlike Matt  
21 Gianakis or Carl Dixon. Within those walls people eat and  
22 drink, unlike Matt Gianakis and Carl Dixon. Within those  
23 walls people watch the sunrise and the sunset, unlike Matt and  
24 Carl. Within those walls people watch cable TV, watch movies,  
25 have access to an education, music, unlike Carl Dixon and Matt

1 Gianakis. Within those walls inmates are visited by their  
2 family, by their children if they have children, their  
3 mothers, their fathers. They can speak with them, they can  
4 hug them, they can kiss them, unlike Matt Gianakis and Carl  
5 Dixon.

6           Within those prison walls there is life, ladies and  
7 gentlemen. And where there is life, there is hope. What  
8 would Carl Dixon or Matt Gianakis give to be able to see their  
9 mother or their father again? What would Carl Dixon or Matt  
10 Gianakis give to be able to watch a ball game, to be able to  
11 listen to music, to talk to their girlfriends? What would  
12 Carl Dixon and Matt Gianakis give to be able to watch the  
13 sunrise and the sunset, to breathe the air? What would those  
14 two young men give just to be alive?

15           Based upon the evidence, ladies and gentlemen, while  
16 certainly a sentence of life without the possibility of parole  
17 is a strong sentence, it does not do justice to the facts of  
18 this case. There are certain cases where life without the  
19 possibility of parole is just not punishment enough. And this  
20 is one of those cases.

21           The defendant is deserving of the same sympathy and  
22 compassion and mercy that he extended to Carl Dixon and Matt  
23 Gianakis. Don't let justice be robbed in the name of mercy.

24           When we were all put here, God took the chance, took  
25 a risk in giving man the ability to make a choice, or make

1 choices, that some men might choose good, some men might  
2 choose evil, some men might choose life, and some men might  
3 choose death. This defendant made several choices on April  
4 the 15th, 1996. He chose to get Kenya Hall, a 15-year-old, to  
5 participate in these horrible crimes, he chose to enter the  
6 Lone Star with a loaded revolver, he chose to knife to death  
7 two young men, he chose to ask Kenya Hall to shoot Vince Oddo  
8 in the back of the head.

9           This defendant made decisions on that date. No one  
10 -- no one made them for him. His problems as a child isn't  
11 why he did what he did on April the 15th, his IQ isn't why he  
12 did what he did on April the 15th. He wasn't led to these  
13 decisions on April the 15th because the school system failed  
14 him or because teachers weren't good, or resources weren't  
15 available to help him. The evidence strongly suggests that  
16 everyone bent over backwards, not only to help him, but give  
17 him breaks when he got into trouble. He was led to these  
18 decisions on April the 15th by his meanness, based upon the  
19 evidence.

20           He made choices on April the 15th, 1996. He chose  
21 evil over good and he chose death over life. He blames others  
22 for his actions. He tried to convince the Judge, when he pled  
23 guilty to attempt robbery, that he was a nice person and would  
24 be a contributing member to society, and he deserved  
25 probation. And you have that letter. It's part of the

1 documents that were admitted at the penalty phase.

2 He was able to stay out of jail after pleading  
3 guilty to battery with substantial bodily harm. He was able  
4 to convince the Court to allow him to remain free, pending his  
5 sentencing for that felony. This is not a stupid individual,  
6 ladies and gentlemen, based upon the evidence, just mean.

7 The evidence shows that the defendant knows the  
8 criminal justice system, he knows how to successfully  
9 manipulate that system, and he has successfully manipulated  
10 that system. He tried to get Kenya Hall to take the fall for  
11 him. He knows what to say when he's in trouble. His  
12 statement to Detective Mesinar is another attempt at  
13 manipulating the system. And Mr. LaPorta talked about that,  
14 that you should look at that tape, because he makes an apology  
15 to the victims' family. Well, is he as sincere in that  
16 apology as he is when he tells Detective Mesinar how these two  
17 victims attacked him and how he killed them in self defense?  
18 Was that apology to the family today sincere?

19 He was in trouble when Detective Mesinar picked him  
20 up. He had been arrested for murders, two murders. Based  
21 upon the evidence, I suggest to you he would have said  
22 anything to extricate himself, get himself out of that  
23 predicament, make himself look better than he actually is.

24 He's been very successful in fooling the criminal  
25 justice system over the years, ladies and gentlemen. Don't

1 let him fool you. The criminal justice system is far from  
2 perfect, but it's only as good as the people who are involved  
3 in that system. For the last two weeks you, twelve  
4 individuals, have been involved in the criminal justice  
5 system. You can complain about the system, but now you have a  
6 position or an opportunity where you can do justice to that  
7 same system.

8           You heard from Dr. Kinsora on how the defendant will  
9 function well in prison. The evidence tells you Dr. Kinsora  
10 is totally wrong. Just the opposite is likely to occur, based  
11 upon the evidence. Even family members say that the defendant  
12 won't listen to anyone. He just won't listen. He does what  
13 he wants when he wants to.

14           Do you think that if the defendant is sentenced to  
15 life imprisonment without parole he will behave in prison? Do  
16 you think that if he's given a sentence of life without  
17 parole, inmates, prison guards, civilian employees, medical  
18 staff will be safe? Do you think if the defendant is  
19 sentenced to life without the possibility of parole, he may  
20 not try to incite yet another riot, like was testified to here  
21 a few days ago, urging young inmates to get off the tier,  
22 getting off the tier, as they refer to getting them all on top  
23 of the correction guards, going after correction guards. And  
24 how he laid down on the -- in the yard after shots had been  
25 fired, because the inmates were kind of revolting or really



1 causing a problem. And he urged everybody to get up and let's  
2 kill the guards. Do you think that if the defendant is  
3 sentenced to life without the possibility of parole, the  
4 thought might occur to him, I want to get outta here, let's  
5 plan a way to escape.

6 MR. LaPORTA: Your Honor, I want to object to that  
7 comment. There's absolutely no evidence in the record as to  
8 that.

9 THE COURT: Objection is sustained. That'll be  
10 stricken from the record. Proceed.

11 MR. LaPORTA: Thank you, Judge.

12 MR. SCHWARTZ: With all due respect to everyone, Mr.  
13 LaPorta talked to his witness, I believe Dr. Kinsora, about  
14 the future dangerousness of this defendant. Mr. LaPorta  
15 brought that out. And Dr. Kinsora said, well, you know, a lot  
16 of these people who are tough, and mean, and nasty, when they  
17 get to be 40, 45 or 50, they kind of slow down a little and  
18 they're no longer the threat that they were earlier on. So,  
19 for the next sixteen years or twenty years before this  
20 defendant reaches that age where maybe he'll calm down, he's  
21 going to be in that prison environment with those same guards,  
22 same civilian employees.

23 His family -- and I can't imagine what they're going  
24 through, just like the family of Matt and Carl, they asked for  
25 another chance. What chance did he give Matt Gianakis and

1 what chance did he give Carl Dixon? What if he struck Hanifa  
2 Alkareem with that boulder that he smashed in the direction of  
3 Mr. Alkareem's head as he lay on the floor during that  
4 robbery? What if the shot fired into the wall at 2500 Clayton  
5 not only penetrated through the wall but struck the 5-year-old  
6 child who was in that room, or Loletha Jackson?

7           This defendant has run out of excuses, he's run out  
8 of chances. There is no excuse for what he did, with all due  
9 respect to those defense witnesses. I submit to you, ladies  
10 and gentlemen, that enough is enough. Truth and justice are  
11 two important things that must occur in any criminal trial.  
12 The truth is that, based upon the evidence, the defendant is a  
13 murderer, not once, but twice, a kidnapper and a robber. You  
14 made that determination by your verdicts.

15           Now then, what about justice? Truth, which you  
16 found has no meaning unless justice goes with it. And this is  
17 the phase where you have to determine what is justice for what  
18 this defendant did. How can you do justice to the facts of  
19 this case?

20           In looking at the defendant for a moment you see  
21 a significant criminal history of violent behavior, a  
22 significant criminal history of violent behavior, both on the  
23 streets and off the streets. It makes no difference. Based  
24 upon the evidence, he is a very, very dangerous man. While he  
25 was awaiting sentencing on a felony, battery with substantial

1 bodily harm, he committed these horrible crimes which took the  
2 lives of two young men.

3           What does that tell you about the defendant? He  
4 manipulated the system and took it to his advantage -- or,  
5 used it to his advantage. He could care less about the  
6 devastation that he has brought. He laughs at the criminal  
7 justice system by his record. Ladies and gentlemen, it's time  
8 to tell him that the criminal justice system isn't a joke.

9           Someone once said that by his actions shall ye know  
10 him. Those photographs, the witnesses you've heard testify,  
11 tell you all you need to know about the defendant and what the  
12 appropriate punishment or sentence should be. The defendant  
13 has already been convicted twice of two violent felonies.  
14 He's already victimized many people, both inside and outside  
15 the prison. The defendant took the lives of two innocent men  
16 in a horrific manner. Where does he go from there? What does  
17 he do for an encore? The shorter the sentence, the sooner  
18 this community will find out.

19           The evidence tells you the defendant cannot be  
20 trusted. The evidence tells you that this defendant is  
21 incapable of rehabilitation and incapable of demonstrating  
22 sincere remorse for his actions. The evidence tells you this  
23 defendant made his victims suffer.

24           The extreme violence of these killings is important  
25 for you to consider in determining punishment. The fact two

1 people were killed is important for you to consider in  
2 determining the appropriate punishment. As Mr. Roger stated,  
3 the punishment should indeed fit the crime. This defendant  
4 has displayed a total disregard for human life.

5 Consider the evidence you heard both at the guilt  
6 phase and the penalty phase. He must be held accountable for  
7 what he did on April the 15th, 1996. The facts of this case  
8 alone warrant a sentence of death. Those photographs warrant  
9 a sentence of death. But, in addition to the facts of this  
10 case, you have something else that makes it easier. Not to  
11 say any decision of this magnitude is easy, but at least would  
12 help you in making the appropriate determination.

13 You know about his criminal past, you know he's been  
14 twice convicted of violent felonies, you know how he behaved  
15 before going to prison and how he behaved while in prison.  
16 You also know that ten days before these two horrible killings  
17 occurred, this defendant was in this building, pleading guilty  
18 to a felony, battery with use of a deadly -- I'm sorry,  
19 battery with substantial bodily harm, and was given yet  
20 another break by the system in that he could get his affairs  
21 in order, if prison time were appropriate, but nevertheless  
22 remain free. Not incarcerated but go out of that courtroom,  
23 go out the front door of this courthouse. Ten days before  
24 Matt Gianakis and Carl Dixon were brutally murdered he walked  
25 out of this courthouse, after pleading guilty to a felony.

1 The evidence shows his utter contempt for the criminal justice  
2 system.

3 As Mr. Roger indicated earlier, another reason the  
4 death penalty is appropriate is deterrence. Deterrence is  
5 achieved through severity of punishment. It's important for  
6 the image of the criminal justice system, for those who view  
7 how it works, that they understand that lines are drawn that  
8 you just don't go over.

9 On April the 15th, 1996, this defendant went way  
10 over that line when he committed those two horrible brutal  
11 first degree murders.

12 A sentence of death may go out and deter the future  
13 Marlo Thomases of this world. Will a sentence of death bring  
14 back the life of Carl Dixon? No. Will a sentence of death  
15 bring back to life Matt Gianakis? No. Will a sentence of  
16 death bring an end to this horrible violence that this country  
17 has experienced? No. Will a sentence of death prevent this  
18 individual, who has already taken two lives, from yet hurting,  
19 harming, killing another person? You bet it will.

20 We should use the criminal justice system to protect  
21 society from physical danger. Preserving the life of a man  
22 who has brutally murdered two innocent people compromises the  
23 value of human life. Capital punishment is not murder. There  
24 is a tremendous moral difference between the taking of a  
25 brutal murderer's life and the death of two individuals.

1           People believe that an organized society is  
2 unwilling or unable to impose on criminal offenders the  
3 punishment that they truly deserve for the most horrible  
4 crimes. Law and order deteriorate, become demoralized, and  
5 society becomes defeated. A free society requires of its  
6 jurors vigilance and courage and strength to resolve and  
7 resolve in making the decisions that you have to make today.  
8 It would be easy for you to return a sentence of life  
9 imprisonment without the possibility of parole and be done  
10 with this, but that would not do justice to the facts of this  
11 case, based upon the evidence that you've heard.

12           The worst possible crime deserves the worst possible  
13 punishment. This defendant, by his own hands, took the lives  
14 of not one but two young men, and ordered an accomplice to  
15 kill yet a third individual. At the outset of this trial you  
16 said that if presented with sufficient evidence you could come  
17 into this courtroom and return verdicts finding the defendant  
18 guilty of first degree murders with the use of a deadly  
19 weapon. And you have done that. You also stated that in the  
20 appropriate case you could come into this courtroom and impose  
21 a sentence of death. Ladies and gentlemen, this is the  
22 appropriate case.

23           A sentence of death is the only appropriate sentence  
24 for the man responsible for all of us being here today. The  
25 man who singlehandedly and forever altered the lives of two

1 very loving families. Those who are against the death penalty  
2 say nothing is ever gained by killing a killer. Well, what is  
3 gained by taking the life of a killer is that society --  
4 society is saying that it respects human life, and it cannot  
5 overlook the cruel and brutal acts of a person, like the  
6 defendant, who senselessly kills two innocent people.

7           The return of a death sentence is society's way of  
8 -- or act of self defense. A return of a death verdict is the  
9 enforcement of society's right to be free from murder. By  
10 denying Matt Gianakis and Carl Dixon their right to live, he  
11 has forfeited his right to live.

12           Ladies and gentlemen, if human life is ever to be  
13 held sacred, which it must be, the law forbidding the taking  
14 of human life should also be held sacred. And the only way  
15 that the law can be made sacred is to entitle the law to  
16 impose a sentence of death.

17           The defendant deserves death because Carl and Matt  
18 deserved to be alive. For those reasons, ladies and  
19 gentlemen, the State of Nevada respectfully asks that you  
20 return verdict sentencing the defendant, Marlo Thomas, to  
21 death for the brutal murder of Carl Dixon, as well as a  
22 sentence of death to the brutal murder of Matt Gianakis.

23           Aristotle once said, what is justice, to give each  
24 man his due. Ladies and gentlemen, I respectfully ask on  
25 behalf of the State of Nevada, to give the defendant his due

1 for what he did on April the 15th, 1996.

2 As I mentioned earlier, Mr. LaPorta talked about a  
3 secured prison environment, the most secure way in which an  
4 individual can be housed in the prison system in the state of  
5 Nevada. The vast majority of those individuals, as I said  
6 earlier, who are on death row, have only killed once, not  
7 twice, such as this defendant.

8 Based upon the evidence, this defendant deserves to  
9 join those other inmates currently housed on death row. Thank  
10 you.

11 THE COURT: Thank you, Mr. Schwartz. Why don't you  
12 swear in the officer to take charge of the jury again, Ms.  
13 Clerk?

14 BAILIFF IS SWORN

15 THE COURT: All right, why don't you follow Hank?

16 (The Jury recessed)

17 THE COURT: All right. Anything else to come before  
18 the Court before we take --

19 MR. LaPORTA: Yes, Your Honor, just one brief thing.  
20 My objection to Mr. Schwartz's comment, we do not want that  
21 stricken from the record. We made an objection as it was --  
22 we felt it was an improper comment. We're preserving an  
23 appeal issue, Judge. That was all.

24 THE COURT: Fine.

25 MR. LaPORTA: So, we'd ask that it not be stricken



1 from the record.

2 THE COURT: All right. I sustain your objection --

3 MR. LaPORTA: Thank you, Judge.

4 THE COURT: -- and that it won't be stricken from  
5 the record. All right. Anything else?

6 MS. McMAHON: No, Your Honor.

7 MR. LaPORTA: No, Judge.

8 THE COURT: No? Thank you.

9 (The Court recessed until 6:30 p.m.)

10 (Jury is present)

11 THE COURT: All right, ladies and gentlemen,  
12 selected a foreperson again?

13 JURY FOREPERSON: Yes, myself.

14 THE COURT: Please stand up, sir.

15 Have you arrived at verdicts?

16 JURY FOREPERSON: Yes, we have.

17 THE COURT: Hand the verdicts to the bailiff.

18 (Pause in the proceeding)

19 THE COURT: All right. Mr. Foreman, please read the  
20 verdicts aloud, starting from "We, the jury."

21 JURY FOREPERSON: "We, the jury in the above-  
22 entitled case have found the defendant, Marlo  
23 Thomas, a/k/a Marlow Demitrius Thomas, guilty of  
24 Count II, murder of the first degree, Carl Dixon" --

25 THE COURT: Is it all right if the -- if the clerk

1 reads the verdicts? I know he has a little --

2 MS. McMAHON: That'd be fine.

3 THE COURT: -- is it all right?

4 MR. LaPORTA: Yes, Your Honor.

5 THE COURT: Why don't you give that to the clerk. I  
6 know it's a little difficult. You can sit down, sir.

7 JURY FOREMAN: Thank you.

8 THE COURT: You've reached those verdicts, we're  
9 going to have the clerk read the verdicts aloud and inquire of  
10 the jury if that is their verdicts.

11 THE CLERK: State -- "District Court, Clark County,  
12 Nevada. State of Nevada, plaintiff, versus Marlo  
13 Thomas, a/k/a Marlow Demitrius Thomas, defendant.  
14 Case Number C136862, Department Number VI, Docket B.  
15 "Special verdict.

16 "We, the jury in the above-entitled case, having  
17 found the Defendant Marlo Thomas, also known as  
18 Marlo Demitrius Thomas, guilty of Count II, murder  
19 of the first degree, Carl Dixon, designate that the  
20 aggravating circumstance or circumstances which have  
21 been checked below have been established beyond a  
22 reasonable doubt:

23 "The murder was committed by a person who was  
24 previously convicted of a felony involving the use  
25 or threat of violence to the person of another, to

1 wit: attempt robbery, Case Number C96794, Eighth  
2 Judicial District Court of the State of Nevada in  
3 and for the County of Clark.  
4 "The murder was committed" --  
5 THE COURT: That was -- and say was that checked or  
6 not. All right?  
7 THE CLERK: Yes, it was.  
8 THE COURT: All right.  
9 THE CLERK: Also checked:  
10 "The murder was committed by a person who was  
11 previously convicted of a felony involving the use  
12 or threat of violence to the person of another, to  
13 wit: battery with substantial bodily harm, Case  
14 Number C134709, Eighth Judicial District Court of  
15 the State of Nevada in and for the County of Clark.  
16 "The murder was committed while the person was  
17 engaged in the commission of, or an attempt to  
18 commit, any burglary."  
19 THE COURT: That checked?  
20 THE CLERK: That's checked.  
21 "The murder was committed while the person was  
22 engaged in the commission of or in an attempt to  
23 commit any robbery." That's checked.  
24 "The murder was committed to avoid or prevent a  
25 lawful arrest." That's checked.

1 "The defendant has, in the immediate proceeding,  
2 been convicted of more than one offense of murder in  
3 the first or second degree." That's checked.  
4 "Dated at Las Vegas, Nevada this 25th day of June  
5 1997." Signed foreperson.  
6 "Special verdict.  
7 "We, the jury in the above-entitled case having  
8 found the defendant, Marlo Thomas, a/k/a Marlow  
9 Demitrius Thomas, guilty of Count II, murder of the  
10 first degree, Carl Dixon, designate that the  
11 mitigating circumstance or circumstances which have  
12 been checked below have been established:  
13 "No mitigating circumstances are found to exist."  
14 THE COURT: That's checked?  
15 THE CLERK: That's checked.  
16 "Special verdict.  
17 "We, the jury in the above-entitled case, having  
18 found the defendant, Marlo Thomas, a/k/a Marlow  
19 Demitrius Thomas, guilty of Count III, murder of the  
20 first degree, Matthew Gianakis, designate that the  
21 aggravating circumstance or circumstances which have  
22 been checked below have been established beyond a  
23 reasonable doubt:  
24 "The murder was committed by a person who was  
25 previously convicted of a felony involving the use

1 or threat of violence to the person of another, to  
2 wit: attempt robbery, Case Number C96794, Eighth  
3 Judicial District Court of the State of Nevada in  
4 and for the County of Clark." That's checked.  
5 "The murder was committed by a person who was  
6 previously convicted of a felony involving the use  
7 or threat of violence to the person of another, to  
8 wit: battery with substantial bodily harm, Case  
9 Number C134709, Eighth Judicial District Court of  
10 the State of Nevada in and for the County of Clark."  
11 That's checked.  
12 "The murder was committed while the person was  
13 engaged in the commission of or an attempt to commit  
14 any burglary." That's checked.  
15 "The murder was committed while the person was  
16 engaged in the commission of or an attempt to commit  
17 any robbery." That's checked.  
18 "The murder was committed to avoid or prevent a  
19 lawful arrest." That's checked.  
20 "The defendant has in the immediate proceeding been  
21 convicted of more than one offense of murder in the  
22 first or second degree." That's checked.  
23 "Dated at Las Vegas, Nevada this 25th day of June  
24 1997." Foreperson.  
25 "Special verdict. We, the jury in the above-

1 entitled case, having found the defendant, Marlo  
2 Thomas, a/k/a Marlow Demitrius Thomas, guilty of  
3 Count III, murder of the first degree, Matthew  
4 Gianakis, designate that the mitigating circumstance  
5 or circumstances which have been checked below have  
6 been established:"

7 Checked is, "No mitigating circumstances are found  
8 to exist."

9 "We, the jury in the above-entitled case, having  
10 found the Defendant Marlo Thomas, a/k/a Marlow  
11 Demitrius Thomas, guilty of Count II, murder of the  
12 first degree, Carl Dixon, and having found that the  
13 aggravating circumstance or circumstances outweigh  
14 any mitigating circumstance or circumstances, impose  
15 a sentence of DEATH.

16 "Dated at Las Vegas, Nevada this 25th day of June,  
17 1997." Foreperson.

18 "Verdict. "We, the jury in the above-entitled case,  
19 having found the defendant, Marlo Thomas, also known  
20 as Marlow Demitrius Thomas, guilty of Count III,  
21 murder of the first degree, Matthew Gianakis, and  
22 having found that the aggravating circumstance or  
23 circumstances outweigh any mitigating circumstance  
24 or circumstances, impose a sentence of DEATH.

25 "Dated at Las Vegas, Nevada this 25th day of June,

1           1997," and signed foreperson.  
2           Ladies and gentlemen of the jury, are those your  
3 verdicts as read --  
4           THE JURY: Yes.  
5           THE CLERK: -- so say you one, so say you all?  
6           THE JURY: Yes.  
7           THE COURT: Any counsel like the jury polled?  
8           MS. McMAHON: Please, Your Honor.  
9           THE COURT: Just as juror number.  
10          THE CLERK: Juror Number 1, is that your verdict as  
11 read?  
12          JUROR NUMBER 1: Yes.  
13          THE CLERK: Juror Number 2, is that your verdict as  
14 read?  
15          JUROR NUMBER 2: Yes.  
16          THE CLERK: Juror Number 3, is that your verdict as  
17 read?  
18          JUROR NUMBER 3: Yes.  
19          THE CLERK: Juror Number 4, is that your verdict as  
20 read?  
21          JUROR NUMBER 4: Yes.  
22          THE CLERK: Juror Number 5, is that your verdict as  
23 read?  
24          JUROR NUMBER 5: Yes.  
25          THE CLERK: Juror Number 6, is that your verdict as

1 read?  
2 JUROR NUMBER 6: Yes.  
3 THE CLERK: Juror Number 7, is that your verdict as  
4 read?  
5 JUROR NUMBER 7: Yes.  
6 THE CLERK: Juror Number 8, is that your verdict as  
7 read?  
8 JUROR NUMBER 8: Yes.  
9 THE CLERK: Juror Number 9, is that your verdict as  
10 read?  
11 JUROR NUMBER 9: Yes.  
12 THE CLERK: Juror Number 10, is that your verdict as  
13 read?  
14 JUROR NUMBER 10: Yes.  
15 THE CLERK: Juror Number 11, is that your verdict as  
16 read?  
17 JUROR NUMBER 11: Yes.  
18 THE CLERK: Juror Number 12, is that your verdict as  
19 read?  
20 JUROR NUMBER 12: Yes.  
21 THE COURT: I usually say a lot at this point,  
22 ladies and gentlemen, but it's been a long day, and it's a  
23 very emotional, traumatic experience for everybody. All I'm  
24 going to do is thank you so much. Follow Hank out and he'll  
25 escort you.



1 (Jury excused)

2 THE COURT: In view of the fact that the jury has  
3 found the defendant guilty and imposed the death penalty and  
4 the other sentences that they imposed that the Court is going  
5 to have to sentence the defendant on, he's remanded to the  
6 custody of the sheriff.

7 And we'll set a -- we'll set a sentencing date down,  
8 Ms. Clerk.

9 THE CLERK: August 18, 9:00 a.m.

10 MS. McMAHON: Pardon me, Your Honor. I will not be  
11 in the jurisdiction on the 18th --

12 THE COURT: All right, we'll --

13 MS. McMAHON: -- could we make it the following  
14 week, please?

15 THE COURT: Absolutely.

16 THE CLERK: August 25th?

17 MS. McMAHON: That'd be fine. Thank you.

18 THE CLERK: August 25th, 9:00 a.m.

19 THE COURT: Is there anything else to come before  
20 the Court on behalf of the State?

21 MR. SCHWARTZ: No, Your Honor.

22 MR. LaPORTA: No, Judge.

23 THE COURT: On behalf of the defense?

24 MR. LaPORTA: No, Judge.

25 MS. McMAHON: No, Judge. Thank you.

1 THE COURT: I want to thank you very much, the  
2 attorneys involved in this; it was exceedingly professional  
3 both sides. And the jury has spoken. We'll see you at  
4 sentencing.

5 PROCEEDINGS CONCLUDED

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INDEX

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
DEFENDANT'S WITNESSES				
Thomas Kinsora	6	38	58	68
Linda Overby	71	--	--	--

STATEMENT OF DEFENDANT

PAGE 2

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
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