

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,
Appellant,

v.
THE STATE OF NEVADA,
Respondent.

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**RESPONDENT'S APPENDIX
VOL. V**

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1 THE COURT: Yes.

2 THE WITNESS: I let her stay there because
3 she was Marlow's wife.

4 THE COURT: Did you go to the wedding.

5 THE WITNESS: They went down to the court
6 house and got married.

7 THE COURT: Now, based on that question
8 any additional questions?

9 MR. ALBREGT: No.

10 THE COURT: We've got another jury
11 question. Write it down and put your name on the back of
12 the question.

13 (Discussion held at the bench.)

14 THE COURT: Mrs. Thomas, did any of your
15 other children witness Bobby Lewis beating you.

16 THE WITNESS: Yes.

17 THE COURT: Darrell and Larry.

18 THE WITNESS: Yes.

19 THE COURT: And Marlow.

20 THE WITNESS: Yes.

21 THE COURT: Any additional questions.

22 MR. ALBREGT: No, ma'am.

23 THE COURT: Ms. Thomas, thank you for your
24 testimony here this afternoon. You are excused.

25 Let's take our afternoon recess at this

1 time. We'll be in recess until 3:30.

2 Same admonition will apply.

3 RECESS ADMONISHMENT

4 Don't converse among yourselves or with
5 anyone else including without limitation, the lawyers,
6 parties and witnesses, on any subject connected with this
7 trial; or read, watch or listen to any report of or
8 commentary on the trial or any person connected with this
9 trial by any medium of information concluding, without
10 limitation, newspapers, television, the internet and
11 radio; or form or express any opinion on any subject
12 connected with the trial until the case is finally
13 submitted to you.

14 We'll be in recess until 3:30. Thank you.

15 (Brief recess taken.)

16 THE COURT: Back in the hearing of the
17 State of Nevada versus Marlow Thomas. We have with us
18 counsel and Mr. Thomas, in the absence of the jury, and
19 all officers of the court.

20 Instruction number one, simply it's not my
21 duty as judge -- if in these instructions is number two,
22 in the penalty hearing evidence may be presented
23 concerning aggravated and mitigating circumstances as a
24 defense, hearsay is admissible in penalty hearing is
25 number 3 -- jury must find the existence of each

1 aggravating circumstance, if any, beyond a reasonable
2 doubt. The jurors need not find mitigating circumstances
3 unanimously.

4 During the first portion of the hearing
5 you will consider evidence relevant to the existence of
6 aggravating circumstances in evidence relevant to the
7 existence of mitigating circumstances. You must consider
8 each type of evidence for it's appropriate purposes. In
9 determining unanimously whether any aggravating
10 circumstances has been proven beyond a reasonable doubt,
11 you are to consider only evidence relevant so that
12 aggravating circumstance.

13 In determining individually whether any
14 mitigating circumstance exists you are to consider only
15 evidence relevant to that circumstance.

16 In determining individually whether any
17 mitigating circumstance is outweighed in aggravating
18 circumstances you are to consider only evidence relevant
19 to any mitigating and aggravating circumstances.

20 If you find unanimously beyond a
21 reasonable doubt that one aggravating circumstance exists
22 and each of you determine any mitigating circumstance do
23 not obviate -- this is on the special verdict form -- if
24 you do not decide unanimously that at least one
25 aggravating circumstance is proven beyond a reasonable

1 doubt, or if at least one of you determines that one
2 mitigating circumstance outweigh the aggravating -- note
3 this on special verdict form. That is number 5.

4 You're instructed the following factors
5 are circumstance by which murder of the first degree may
6 be aggravated. Got any opposition to that -- what's on
7 that page?

8 MR. SCHIECK: No, your Honor.

9 THE COURT: Mitigating circumstances are
10 those factors --

11 MR. SCHWARTZ: We set those -- that second
12 paragraph there, I think we set that out as two separate
13 aggravating circumstances.

14 THE COURT: You didn't type it twice, but
15 on the verdict form there's two places.

16 MR. OWENS: So we can argue that.

17 THE COURT: Next one is 7, that is the
18 definition of mitigating circumstances.

19 Now we might not need this one. So 7 just
20 says mitigating circumstances are those factors which
21 while they do not constitute a legal justification or
22 excuse for the commission of the offence in question, may
23 be considered in the estimation of the jury in fairness
24 and mercy as extenuating or reducing the degree of the
25 defendant's moral culpability. That would be 7.

1 Then 8 is an instruction requested by the
2 defense, where they have listed the following possible
3 mitigators.

4 Murder in the first degree may be
5 mitigated by any of the following circumstances, even
6 though the mitigating circumstance is not sufficient to
7 constitute a defense or reduce the degree of the crime;
8 One, the murder was committed while Marlow Thomas was under
9 the influence of extreme mental or emotional influence of
10 drugs.

11 MR. ALBREGT: It's or influence of
12 drugs.

13 THE COURT: I didn't type it.

14 MR. ALBREGT: I'm not saying you are at
15 fault. We just need to get more funding for the special
16 public defender's office.

17 THE COURT: Marlow Thomas accepted
18 responsibility for the crime, Marlow Thomas was
19 cooperative with authorities and voluntarily gave a
20 statement, Marlow Thomas expressed remorse for the
21 incident, Marlow Thomas was raised without the benefit of
22 a father figure, Marlow Thomas says it occurred during a
23 confrontation and as such there was no premeditated
24 intention to cause death.

25 I don't think that can be in there,

1 because we -- I don't try the case the first time around,
2 but it was charged as an open murder, either premeditated,
3 deliberate, willfully, and whatever, or felony murder, so
4 I don't think (6) can be in there.

5 MR. SCHIECK: It's the McConnell holding,
6 your Honor. We don't know whether the jury found it was
7 death during the commission of a robbery.

8 THE COURT: This is instructing them.
9 This is an instruction from the court. I'm not commenting
10 on the evidence, and I'm not giving that one.

11 You can ask for it. Give it up here,
12 you're requested, not given. 6 is coming out.

13 MR. SCHIECK: You've read into the
14 record.

15 THE COURT: You have to mark it and put it
16 in here, otherwise Justice Moppin can't find it.

17 MR. SCHIECK: That's on the record.

18 THE COURT: Justice Moppin can't find it
19 in the record.

20 MR. ALBREGT: Can I white-out and make a
21 copy.

22 THE COURT: We'll call it (8) proposed.

23 MR. ALBREGT: I'll let your clerk do
24 that.

25 THE COURT: Marlow Thomas has counseled

1 others in his criminal acts, the defendant suffered as a
2 child and young adult with learning disabilities.

3 Where was the evidence of that?

4 MR. ALBREGT: His mother.

5 THE COURT: He went to a special school,
6 but it wasn't for the learning disabled.

7 MR. SCHWARTZ: I didn't heart anything
8 about that.

9 THE WITNESS: It's the child behavior
10 service center.

11 THE COURT: What was the name of the
12 school you attended?

13 THE WITNESS: CBS.

14 THE COURT: All right. Well, there's
15 evidence of that.

16 Defendant suffered as a young child, young
17 adult with emotional disabilities. Where did we hear
18 about that.

19 MR. SCHIECK: From the mother also, your
20 Honor.

21 THE COURT: What kind of emotional
22 disabilities -- I was listening, I wasn't asleep. Tell me
23 what disabilities there were.

24 MR. ALBREGT: Emotional disabilities were
25 the affect -- just the whole upbringing with mother

1 favoring his younger brother, with her beating him, the
2 affect the beating from the father.

3 THE COURT: He was the baby, her baby for
4 8 years. She showered him with attention until he was 8
5 years old.

6 MR. ALBREGT: I'm telling you what our
7 position is.

8 MR. OWENS: I didn't hear anything
9 about -- that all sounds professional like he was assessed
10 and there was some kind of professional finding that he
11 had emotional disabilities.

12 THE COURT: I never heard her say the word
13 emotional difficulty once.

14 MR. ALBREGT: I wouldn't expect a woman
15 with her educational background and up-bringing to use
16 those words. I don't think she needs to use the words.

17 MR. OWENS: Judge, there's a catch-all at
18 the end of this, and they can argue whatever they want, but
19 when the judge puts something in writing to the
20 instructions to the jury, it sort of puts the imprimatur
21 on the court. If there's a question mark at all, say, let
22 them pitch it, but don't put it in the instructions.

23 MR. ALBREGT: The fact that he's being
24 tried for a potential death penalty case, the question
25 mark should enure to benefit the defendant if there is any

1 evidence at all. It's like an instruction on a theory of
2 defense, as bad as the defense may be, and as middle as
3 the evidence may be.

4 THE COURT: I'm taking (6) out.

5 You can say these are possible mitigators
6 whether you find them to be true or not is up to you to
7 determine.

8 MR. ALBREGT: That's fine.

9 MR. OWENS: They want the courts
10 imprimatur on these things.

11 In the past there are several mentioned in
12 the statute. We used to put those in blanks after that
13 and the jury can fill-in and argue them.

14 Now the last few that I have done they
15 want to list everyone they can think of and still have a
16 catch all. Obviously the reason they're doing that is
17 they want the court to put these in black and white and
18 read them to the jury as though it's the court's
19 suggestion. It's becoming clear because they don't want
20 us saying it's their suggestion.

21 THE COURT: I understand your position. I
22 understand my position. I'm not giving number (6). I'll
23 give the others.

24 The Supreme Court has never defined them.
25 There is a never ending number of them. You heard voir

1 dire, what people think about, you know, the sour milk
2 syndrome. You weren't here. You did. They rather
3 soundly rejected it.

4 MR. OWENS: See I would say we should go
5 back to the ones that are statutory and leave these
6 blank.

7 THE COURT: I think that the Supreme Court
8 decisions have said that the defense has -- the defense is
9 entitled to put down every one that they think exists,
10 plus, any others that the jury wants to find.

11 Now that is number 8, and 8 proposed has
12 number 6 on it -- the 6th one, which the court refused to
13 give, based on the facts of the case.

14 In determining whether mitigating
15 circumstances exist would be number (9). Problem with 9?

16 MR. OWENS: No.

17 THE COURT: Reasonable doubt is 10.

18 Jury is instructed in determining the
19 existence of mitigating circumstances as well as
20 mitigating may consider all evidence introduced both at
21 the penalty phase of these proceedings and the trial of
22 the matter, stating in the trial the --

23 Instruction 11, in your deliberation you
24 may not discuss the subject of guilt or innocence.

25 Credibility or believability is number 13.

1 Although you are to consider only the
2 evidence in the case' is 14.

3 During deliberation you will have all
4 exhibits admitted. Counsel, di you resolve these exists
5 admitted.

6 MR. SCHWARTZ: I got with Terry and
7 looked.

8 MR. ALBREGT: Can we, after closing,
9 double check it?

10 THE COURT: We can do that. We don't want
11 to send them something about other bad acts that haven't
12 been admitted, assuming there would be anything 15.

13 Three sets of verdicts for you is 16.

14 Listen to arguments of counsel is 17.

15 Now, the state's familiar with proposed
16 instructions 1 through 17 inclusive and other then your
17 argument on one of the mitigators, proposed by the
18 defense, is the state's opposing the giving of any of the
19 instructions 1 through 17.

20 MR. OWENS: No, your Honor.

21 THE COURT: Any additional instructions
22 that the state wants given?

23 MR. OWENS: Not that I'm aware of.

24 THE COURT: Mr. Schieck and Mr. Albregt on
25 behalf of defense, you are familiar with proposed 1

1 through 17, inclusive, any instructions 1 through 17, that
2 you don't want given.

3 MR. SCHIECK: No, your Honor.

4 THE COURT: Any additional instructions
5 other than number (6) which was stricken from instruction
6 number (8) that want given?

7 MR. SCHIECK: No, your Honor. The court
8 had given me instructions that --

9 THE COURT: It's taken care of, because
10 the whole group that you gave me didn't have -- didn't
11 have a real clear picture of what it was the jurors duty
12 to do in this group we've now given them.

13 The special verdict forms.

14 MR. SCHIECK: Yes.

15 THE COURT: The first page is special
16 verdict, which is for aggravators, and above count two I
17 have interlineated Carl Dixon.

18 The next special verdict is count 3, I
19 have interlineated on line 18, first pain, Matt Gianakis.

20 And on special verdict form where you list
21 the mitigators, count two, I put Carl Dixon. And on line
22 18, the next one, I put Matt Gianakis.

23 And then on special verdict form, the nest
24 one, count two, I have interlineated Carl Dixon, and the
25 next one, Matt Gianakis.

1 So that they can keep straight in their
2 mind who is who, because it doesn't have the names in
3 there.

4 Any opposition or problem with the verdict
5 forms that are agreed to by the parties?

6 MR. OWENS: Fine.

7 MR. SCHIECK: They're fine, your Honor.
8 We can just explain to them that they need to write in
9 whatever they find in mitigation.

10 THE COURT: Just because we only put that
11 many lines doesn't mean they can't fill up the whole page
12 and the back of the page.

13 Now while the bailiff photocopies these
14 for us, you can, please, check the exhibits.

15 Thanks.

16 (Brief recess taken.)

17 THE COURT: Back on the record in State of
18 Nevada versus Marlow Thomas.

19 The record will reflect the presence of
20 the parties and counsel, in the absence of the jurors, and
21 all officers of the court.

22 Someone has something outside the presence
23 before we instruct and close?

24 MR. SCHWARTZ: There was one exhibit that
25 Detective Mesinar (ph) showed the jury and explained. We

1 assumed it was admitted at the last trial and I guess it
2 hasn't been. We're moving to admit it today.

3 It's the DNA chart, that's 76.

4 THE COURT: Any objection?

5 MR. ALBREGT: No.

6 THE COURT: 76 is admitted.

7 MR. OWENS: The court may recall we asked
8 for (inaudible) first witness for defense, expressed
9 concern about going to character defense evidence that he
10 was the person that --

11 THE COURT: Would never do this, they were
12 shocked, everyone of them said they were shocked.

13 MR. OWENS: There were three people, first
14 David Hudson said, didn't sound like Marlow, Shirley Nash
15 said he wouldn't do something like that, and Charles Nash
16 said, that's not him, you got to wrong person, I know him,
17 and that's not him, as being his reaction.

18 Now true they know about one robbery and
19 they know about the battery with substantial bodily harm,
20 but they made a play to the jury as though that's all he
21 had. And then otherwise the impression by these people is
22 that he didn't have anything else.

23 THE COURT: Half of them didn't know he
24 went to prison.

25 MR. OWENS: They asked -- the defense,

1 they asked that question of every witness, they didn't get
2 the response. At lease a couple of additional friends
3 said he wasn't the kind of person that would do this kind
4 of thing. In fact he is the exact kind of person that
5 could do this kind. There was another attempted robbery
6 and 20 juvenile attempts of him being violent and beating
7 people and busting out teeth.

8 THE COURT: That's other bad acts and the
9 jury is not to consider other bad acts in determining
10 aggravators and mitigators in whether the aggravators
11 outweigh the mitigators.

12 MR. OWENS: Which would be true if they had
13 not introduced that issue. But based on what he did
14 despite the warning at the bench, it's a one-sided thing
15 now. They were able to introduce character evidence
16 basically without us being allowed to rebut it. And even
17 though we were in first phase we should still be allow
18 rebuttal within that first phase. But I'm proposing to
19 offer what's marked in Exhibit 86, certification order
20 from juvenile court for -- that attempt robbery with use
21 of deadly weapon lists all other juvenile evidence leading
22 up to that crime in 1990.

23 In addition this is where they did the
24 interview of the mother for preparation of that
25 certification order and in here it states -- this is

1 something that she denied saying or said that she wouldn't
2 say that that was true -- Mrs. Thomas reports her
3 relationship with Marlow was good and Marlow was spoiled
4 rotten and somewhat independent. She rates her degree of
5 parental control as fair. Mrs. Thomas states Marlow's
6 older brother is no longer living in her home, Marlow
7 believes he is able to do his dirt. Mrs. Thomas is not
8 married to Marlow's biological father, Bobby Lewis, whose
9 been incarcerated in prison. She states that there has
10 been no indication or suspicion Marlow has been involved
11 in drugs, but she does believe he will get into drugs if
12 he thinks he can make a quick buck.

13 Now she denied these things. She denied
14 that they would be true at the time. We would offer that
15 portion of this report as well to impeach her because
16 that's an area that they chose to go into with him.

17 THE COURT: Response, counsel.

18 MR. SCHIECK: Well, number one, it's
19 hearsay.

20 Number two, I don't think we opened any
21 doors. We're allowed to bring in mitigation during the
22 first phase.

23 THE COURT: Let me ask you this, under --
24 what version of mitigation do you think relatives saying
25 that they don't think their son, brother, cousin, nephew

1 would every do this? What -- where is that in
2 mitigation.

3 I don't think that's mitigation. That's
4 simply 6, or 8, or 10 times you call asking for residual
5 doubt, which you know is disallowed, but that's exactly
6 what you did. You brought it in here, and you guys
7 aren't -- this isn't your first rodeo. Dave Schieck, you
8 are the most experienced capital defender in the State of
9 Nevada, so you had to do it for some reason, and it wasn't
10 for mitigation.

11 MR. SCHIECK: We asked how did it make you
12 feel when you heard or saw Marlow on TV. They responded
13 saying I couldn't believe it, that's not the Marlow I
14 know. That's not us introducing character evidence.
15 Character evidence is we come in and say, he's not
16 violent, do you think he's violent, no, he's not violent.
17 No, I have never seen him violent. Have you ever seen him
18 do any other criminal acts, no, I never have. Then we're
19 opening the door. But for them to just say I was shocked
20 and didn't think Marlow would do something like that is
21 not character evidence.

22 THE COURT: You're splitting hairs, Mr.
23 Schieck.

24 Now, the question is do you think, based
25 upon what all these relatives said, it is appropriate for

1 exhibit number -- what was it, Mr. Owens, 86.

2 MR. OWENS: Yes, your Honor.

3 THE COURT: For Exhibit 86 to be admitted
4 as rebuttal for this phase of this procedure.

5 MR. SCHIECK: We are going to bring in a
6 piece of paper that's manufactured by somebody who wrote a
7 report which makes it hearsay. There's no way we can
8 confront that report because there's no one to
9 cross-examine on it. So now we're violating the 6th
10 Amendment along with violating the bifurcation of the
11 trial.

12 THE COURT: Well, Mr. Schieck, you know
13 the instruction that you agreed to is that hearsay is
14 admissible in a penalty proceeding. And that's what that
15 report is.

16 MR. SCHIECK: The statute says hearsay is
17 admissible at a penalty hearing. The 6th Amendment say
18 it's not, because it denies the right to confront the
19 declarant, the person who authored the document. There's
20 no way for us to cross-examine that document or the author
21 of the document.

22 THE COURT: The mother was equivocal. She
23 said she couldn't remember. It was 15 years ago. She
24 couldn't remember how old he was in 1990.

25 MR. SCHIECK: Is that character evidence

1 that opens the door to something if she can't remember
2 what she might have said back then. We couldn't
3 cross-examine her on what was said because she doesn't
4 remember what was said. I think they asked her whether
5 Marlow told her that at one point. It sounds like the
6 report says she said she wouldn't be surprised if he got
7 into drugs. They got that in over my objection, because I
8 thought that was now getting into bad character
9 evidence.

10 And so they've got -- they've got
11 something in on that. Let's call it even and move on.

12 THE COURT: Well, you know, Mr. Owens, I
13 have always wanted to err on the side of safety, because
14 Lord knows I never want to have to do these things over
15 again, the third time over again. I know the State always
16 feels it's getting beaten up on these rulings, but the
17 truth of the matter is that if you don't allow something
18 in then they have no appellate issue. So it will go into
19 the next phase.

20 MR. OWENS: They can beat us up with it
21 today or tomorrow.

22 THE COURT: And think of how upset it might
23 make the jurors when they are making the final decision
24 when they find out, you know, that this family, this close
25 knit family doesn't of the slightest idea what Marlow

1 Thomas has been up to all of his life.

2 MR. OWENS: I understand the court's
3 judgment on this, I think at a minimum it shows the
4 difficulty with the bifurcated proceeding. It's really
5 kind of unfair.

6 THE COURT: Well, you know --

7 MR. SCHIECK: We've argued that already.

8 THE COURT: All right. Thank you. So it
9 won't come in.

10 Now, you all have your copies of the
11 instructions and the verdict forms. Jonathan, you want to
12 bring in the jury panel, please.

13 Welcome back to the penalty hearing of the
14 State of Nevada versus Marlow Thomas. The record will
15 reflect the presence of the parties, counsel, all officers
16 of the court, and the full jury and alternate jurors.

17 Counsel for defense, you called a number
18 of witnesses before the afternoon recess, do you have
19 additional witnesses?

20 MR. ALBREGT: We rest.

21 THE COURT: Ladies and gentlemen, we have
22 now heard all the evidence that will come out at this
23 portion of the proceedings. I'm going to read the
24 instructions that apply to this portion of the proceedings
25 to you. You'll each have your own copy, and you'll have

1 copies of the verdict forms attached to the back of the
2 instructions.

3 It's now my duty as judge to instruct you
4 in the law that applies to this penalty hearing. It is
5 your duty as jurors to follow these instructions and apply
6 the rules of laws to the fact as you find them from the
7 evidence.

8 You must not be concerned with the wisdom
9 of any rule of law stated in these instructions,
10 regardless of any opinion you may have on what the law
11 ought to be, it would be a violation of you oath to base a
12 verdict upon any other view of the law then that given in
13 the instructions of the court.

14 If in these instructions any rule,
15 direction, or idea is repeated or stated in different ways
16 no emphasis there on is intended by me and none may be
17 inferred by you. You are not to single out any certain
18 sentence or individual point or instructions and ignore
19 the others, but you are to consider all the instructions
20 as a whole and each in the light of all the others.

21 In the penalty hearing evidence may be
22 presented concerning aggravating and mitigating
23 circumstances relative to the defense. Hearsay is
24 admissible at a penalty hearing.

25 The jury must find the existence of each

1 aggravating circumstance, if any, unanimously and beyond a
2 reasonable doubt. The jurors need not find mitigating
3 circumstances unanimously.

4 During the first portion of the penalty
5 hearing you will consider evidence relevant to the
6 existence of aggravating circumstances and evidence
7 relevant to the existence of mitigating circumstances.
8 You must consider each type of evidence for its
9 appropriate purposes.

10 In determining unanimously whether any
11 aggravating circumstance has been proven beyond a
12 reasonable doubt, you are to consider only evidence
13 relevant to that aggravating circumstance. In determining
14 individually whether any mitigating circumstance exists
15 you are to consider only evidence relevant to that
16 mitigating circumstance.

17 In determining individually whether any
18 mitigating circumstance outweigh any aggravating
19 circumstance, you are to consider only evidence relevant
20 to mitigating and aggravating circumstances.

21 If you find unanimously and beyond a
22 reasonable doubt that at least one aggravating
23 circumstance exists, and each of you determines that any
24 aggravating circumstance -- that any mitigating
25 circumstance do not outweigh the aggravating, note this on

1 a special verdict form.

2 If you do not decide unanimously an
3 aggravating circumstance has been beyond a reasonable
4 doubt or if at least one of you determines that the
5 mitigating circumstances outweigh the aggravating, note
6 this on a special verdict form.

7 You are instructed that the following
8 factors are circumstances by which murder of the first
9 degree may be aggravated; the murder was committed by a
10 person who at any time before a penalty hearing is
11 conducted is or has been convicted of a felony involving
12 the use or treat of violence to the person of another; the
13 murder was committed to avoid or prevent a lawful arrest
14 or affect an escape from custody; the defendant has any
15 immediate proceedings that convicted of more then one
16 offence of murder in the first or second degree.

17 Mitigating circumstances are those factors
18 which do not constitute a legal justification or excuse
19 for the offence in question, may be considered in the
20 estimation of the jury in fairness and mercy as
21 extenuating or reducing the degree of the defense and
22 moral culpability. In balancing aggravating and
23 mitigating circumstances it's not the mere number of
24 aggravating circumstances or mitigating circumstances that
25 controls.

1 Murder of the first degree can be
2 mitigated by any of the following circumstances; even
3 though mitigating circumstances is not sufficient to
4 constitute a defense or reduce the charge of the crime.
5 One, the murder was committed while Marlow Thomas was
6 under the influence of extreme mental or emotional
7 disturbance or influence of drugs.

8 Two, Marlow Thomas accepted responsibility
9 for the crime.

10 Three, Marlow Thomas was cooperative with
11 authorities and voluntarily gave a statement to the
12 detective.

13 Four, Marlow Thomas expressed or
14 demonstrated remorse for the incident.

15 Five, Marlow Thomas was raised without the
16 benefit of a father figure.

17 Seven -- six intentionally omitted --
18 Seven, Marlow Thomas has counseled others against criminal
19 acts.

20 Eight, Marlow Thomas suffered as a child
21 or young adult with learning disabilities.

22 None, he suffered as a child or young
23 adult emotional disabilities.

24 Ten, any other mitigating circumstances.

25 In determining whether mitigating

1 circumstances exist, jurors have an obligation to make an
2 independent and objective analysis of all of the relevant
3 evidence.

4 Arguments of counsel or a party do not
5 relieve jurors of this responsibility. Jurors must
6 consider the totality of the circumstances of the crime
7 and the defendant as established by the evidence presented
8 in the guilty penalty phase of the trial. Neither the
9 prosecution nor the defendant's insistence on the
10 existence or non-existence of the mitigating circumstances
11 is binding on the jurors.

12 Reasonable doubt is based on reason it is
13 not a mere possible doubt, but is such a doubt we govern
14 or control our person in the weight of affairs of life.
15 If the minds of the jurors after comparison of all the
16 evidence are of such a condition that they can say they
17 feel an abiding conviction of the truth of the charge,
18 there is not a reasonable doubt thought to be reasonable
19 must be actual, not mere possibility or speculation.

20 The jury is instructed that in determining
21 the existence of aggravating circumstances as well as
22 mitigated circumstances that it may consider all of the
23 evidence introduced at both the penalty hearing phase of
24 these proceedings and at trial of this matter.

25 In your deliberations you must not discuss

1 or consider the subject of guilty or innocence of the
2 defendant as that issue has already been decided.

3 Credibility or believability of a witness
4 should be determine by his manner upon the stand, his
5 relationship to the parties, is fear, motives, interest,
6 or feeling, his opportunity to have observed the matter to
7 which he testified, the reasonableness of his statements,
8 and the strength or weakness of his recollection. If you
9 believe that a witness has lied about any material fact in
10 this case you may disregard the entire testimony of that
11 witness or any portion of the testimony which is not
12 proven by other evidence.

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

22 A verdict may never be is influenced by
23 prejudice of public opinion. Your decision should be the
24 product of sincere judgment and sound discretion in
25 accordance with these rules of law.

1 During your deliberation you will have all
2 of the exhibits which were admitted into evidence, written
3 instructions, and formed of verdict, which are prepared
4 for your convenience.

5 The court has submitted two sets of
6 verdicts to you. They'll be stapled into two blue bags,
7 and you'll have all the copies attached to your
8 instructions. I've separated them out so there is one set
9 of verdicts for Carl Dixon and one set for Matt Gianakis.

10 The one set is for determination of the
11 existence of an aggravating circumstance. The second set
12 is for determination of the existence of mitigating
13 circumstances. The third set is a determination of weight
14 to be given the aggravating and/or mitigating
15 circumstances.

16 Now you will listen to the arguments of
17 counsel who will endeavor to aid you in refreshing in your
18 minds the evidence showing the application thereof the
19 law, but whatever counsel may say you will bear in mind it
20 is your duty to be governed by the evidence as you
21 understand it and remember it to be, and by the laws given
22 to you in these instructions with the sole, fixed, and
23 steadfast purpose of equal and exact justice for the
24 defendant and the State of Nevada.

25 Counsel for the State, are you ready.

1 MR. SCHWARTZ: Yes, your Honor.

2 THE COURT: You may proceed.

3 MR. SCHWARTZ: Thank you, your Honor.

4 CLOSING SUMMATION

5 BY MR. SCHWARTZ:

6 Your Honor, counsel, Mr. Owens. Good
7 afternoon, ladies and gentlemen.

8 On behalf of the State of Nevada I would
9 like to take this opportunity to thank you for the time,
10 the attentiveness you have shown all of the witnesses
11 during the court of this trial, and we know how important
12 it is to both the defendant and the State of Nevada,
13 what's being done here today at this penalty hearing.

14 This is the phase, portion of the penalty
15 hearing, where you are asked to make a decision as to
16 whether this defendant, Marlow Thomas, is eligible for the
17 death penalty.

18 Your determination here is not a sentence,
19 but a finding as to whether you will have 3 options or 4
20 options when you later on go back a second time and
21 deliberate. You may only consider the imposition of the
22 death penalty as a possible option if, one, you
23 unanimously -- all 12 -- find at least one aggravating
24 circumstance has been proven by the State of Nevada beyond
25 a reasonable doubt, and that there are no mitigating

1 circumstances that outweigh the aggravating circumstance
2 or circumstances.

3 Now if during your deliberations you find
4 the existence of both aggravating circumstances and
5 mitigating circumstances, then you are on -- then you are
6 instructed that you are to weigh them or balance them.
7 For example, if you find that there are 4 aggravating
8 circumstances and 5 mitigating circumstance, you will
9 weigh the aggravating circumstances against the mitigating
10 circumstance.

11 The fact that there may be more mitigators
12 then aggravators, or more aggravators then mitigators
13 doesn't control. What controls is the weight that you
14 give the aggravating circumstances or mitigating
15 circumstances. It's not a question of numbers.

16 Ladies and gentlemen, the State has
17 alleged and based upon the evidence the State has proven
18 to you beyond a reasonable doubt the existence of 4
19 aggravating circumstances. In instruction number 6, the
20 court lists the aggravating circumstances alleged by the
21 state. The first paragraph says that the murder was
22 committed by a person who at any time before the penalty
23 hearing is conducted is or has been convicted of a felony
24 involving the use or threat of violence to the person of
25 another.

1 In my opening statement I repeated that
2 aggravating circumstance, the special verdict has that
3 aggravating circumstance listed twice because, as you
4 recall, 1990, the defendant was convicted of a felony
5 involving violence, attempt robbery. And again in 1996,
6 battery with substantial bodily harm. So those are two
7 separate and distinct aggravating circumstances.

8 The third is that the murder was committed
9 to avoid or prevent lawful arrest or to effect escape from
10 custody.

11 And the fourth aggravating circumstance is
12 the defendant has in the immediate proceedings be
13 convicted of more than one offence of murder in the first
14 or second degree. A killing of more than one individual,
15 that's an aggravating circumstance. In other words, a
16 double homicide or double murder is a separate and
17 distinct aggravating circumstance.

18 We'll talk about these 4 aggravating
19 circumstances alleged and I submit to you proven beyond a
20 reasonable doubt by the State of Nevada. Let's talk about
21 the last aggravator on instruction number 6, the double
22 homicide.

23 The state has clearly proven to you beyond
24 a reasonable doubt that aggravating circumstance. A jury
25 several years ago, 1997 I believe, returned verdicts

1 finding this defendant, Marlow Thomas, guilty of first
2 degree murder with use of a deadly weapon in the murder of
3 Carl Dixon and guilty of first degree murder with use of a
4 deadly weapon in the murder of Matt Gianakis. There is no
5 question about that aggravating circumstance. It has been
6 proven to you beyond a reasonable doubt.

7 The defense will argue what they feel are
8 mitigating circumstances and each of you can come to your
9 own conclusion what you feel is the mitigating
10 circumstances in these proceedings. There's a list of
11 several mitigating circumstance on the instructions that
12 you can consider whether they are mitigating circumstances
13 or not.

14 You might find -- all 12 of you
15 collectively -- may find the presence or the existence of
16 one mitigating circumstance. You may find the existence
17 of ten mitigating circumstances. And you may find the
18 existence of 20 mitigating circumstance. But I submit to
19 you, ladies and gentlemen, based upon what you heard in
20 this courtroom the last day or two, this one aggravating
21 circumstance outweighs any of these potential mitigating
22 circumstances, be they one, ten or twenty, the brutal
23 killing of two young innocent men.

24 But we have more then just that
25 aggravating circumstance. There are 3 additional ones. I

1 read the first aggravating circumstance, if the person at
2 the penalty hearing has been convicted of a felony
3 involving the use or threat of violence to the person of
4 another. On August 10th, 1990, the defendant was arrested
5 by North Las Vegas police Officer Holly and charged with
6 the crime of robbery, with use of a deadly weapon.

7 The facts of that case were that Mr.
8 Presley Beltran had just cashed his paycheck at a bar in
9 the area of Las Vegas Boulevard shortly before midnight,
10 and then he was accosted by the defendant and another
11 individual. And from the testimony of one of the defense
12 witnesses today, we get the picture that it was probably
13 Sherman Nash or one of the defendant's cousins who was
14 with him. I believe one of witnesses for the defense
15 talked about that case.

16 One of the two individuals -- Detective
17 Holly didn't know which one -- but one of two individuals
18 held a knife to Mr. Beltran while the other went through
19 his pockets and retrieved \$475.00. Police were called.
20 Officer Holly spoke with Mr. Beltran, but you heard he had
21 difficulty because Mr. Beltran spoke Spanish or broken
22 English, but there was difficulty in communicating with
23 one another.

24 But lo and behold Mr. Beltran sees the
25 defendant walking down the street and tells Officer Holly,

1 that's the guy that robbed me or word to that affect. And
2 Officer Holly tried to talk with the defendant. The
3 defendant kept moving away, then Officer Holly testified
4 that he started running, he sprayed him with some type of
5 mace-type device or liquid, gave chase, and ultimately the
6 defendant was now hiding in some bushes and arrested,
7 charged with robbery with use of a deadly weapon.

8 On October 23rd, 1990, the defendant
9 entered into a plea agreement with the State of Nevada
10 that he was allow to plead guilty to a lesser crime,
11 attempt robbery, and he received a 6 year prison
12 sentence.

13 You heard from Officer Holly. The State
14 introduced a judgment of conviction. I believe some
15 family members talked about it, although several didn't
16 even know the defendant had been in prison, but one or two
17 talked by the 6 year prison sentence that he had received.
18 There can be no doubt, ladies and gentlemen, that the
19 state has proven beyond a reasonable doubt that second
20 aggravating circumstance relating to the felony of
21 violence that occurred in 1990.

22 The next aggravating circumstance and
23 another crime of violence, a felony conviction, that the
24 defendant sustained in 1996, battery with substantial
25 bodily harm. On April 5th, 1996, ten days before he

1 entered the Lone Star, plead guilty to that particular
2 felony and was let out on a low bail. The facts and
3 circumstances regarding that second felony conviction, you
4 heard the testimony of -- prior testimony read this
5 morning was that the defendant March 5th, 1996, went to
6 the home of Pamela Davis and Loletha Jackson.

7 He entered the home with a gun. We know
8 it was loaded because he fired it in that house. He fired
9 the weapon into the back bedroom where his girlfriend and
10 5-year-old child were laying down. He then took the gun,
11 struck Loletha Jackson knocking out several teeth and
12 rendering her unconscious. This morning the testimony
13 from after a prior proceeding was read to you:

14 Question: Did there come a time when you
15 came out of hiding and you went to see what had
16 happened -- this is a question toward Ms. Jackson.

17 Answer by Ms. Jackson, yes.

18 Question: And what did you see when you
19 came out of hiding?

20 Marlow coming down the hallway pointing a
21 gun at me.

22 Question: What is the next thing you
23 remember happening?

24 Answer: Him busting me in the face, and I
25 just remember being unconscious and that's it.

1 Question: Did you feel any pain in your
2 stomach area.

3 Answer: Yes. To my chest.

4 Question: What caused that.

5 Him stomping me with his feet.

6 Question: Did you lose any teeth as a
7 result of this incident.

8 Answer: Yes.

9 That was in 1996, and ten days before he
10 kills these two young men he pleads guilty and the judge
11 lets him out on a low bail, puts some trust in the
12 defendant.

13 In that particular case where the
14 defendant entered a plea of guilty to battery with
15 substantial bodily harm, he was also given a benefit
16 because three other counts were dismissed; aiming a
17 firearm at a human being and discharging a weapon wherein
18 a person might be endangered -- so that was dismissed.

19 The next aggravating circumstance is the
20 one that reads that the murder was committed to avoid or
21 to prevent a lawful arrest. Once the defendant Kenyon
22 Hall had the money from Vince Oddo -- in my opening
23 statement I might have mentioned \$7,000.00, Mr. Oddo said
24 \$3,500.00, the judge may have asked, in each bag, he said,
25 no, but it's your recollection that controls. But

1 certainly money was taken, a significant amount of money.

2 Once he had the money the defendant and
3 15-year-old Kenyon Hall, once they had the money from
4 Vince Oddo there was nothing in the world to prevent them
5 from walking out of that Lone Star restaurant without
6 hurting a single person. This wouldn't have been the
7 first robbery for the defendant; however, the defendant
8 had spent 6 years in prison, wasn't anxious to go back,
9 the defendant ordered Kenyon Hall, 15-year-old kid to
10 shoot Oddo in the head after he received the money. And
11 the defendant knew, and his cousin, I believe, testified
12 that he knew Matt Gianakis and Carl Dixon. Worked with
13 them, and according to the cousin had been to the cousin's
14 house ones or twice. Carl Dixon, perhaps, more than
15 Matt Gianakis, but clearly those two young men knew Marlow
16 Thomas. He had worked at the Lone Star. And They
17 certainly, certainly could have identified him as the
18 individual who committed the armed robbery of Vince Oddo
19 that morning.

20 So the defendant he went and butchered
21 those two descent kids so that he would never ever be able
22 to identify him on a later date.

23 Kenyon Hall gave a rather lengthy
24 statement to Trooper David Bailey that same day or the
25 very next day after the horrific crimes had occurred at

1 the Lone Star. The pages aren't numbered and the exhibit
2 has been admitted, and I counted the pages and on page 21,
3 there is an answer by Kenyon Hall referring to what Marlow
4 Thomas said to him.

5 Hall: He said, uh, he -- he was telling
6 Angela that he went in there and that, uh, he started
7 talking to the manager or something like that, and he told
8 him to open the safe and give me the gun, and told me,
9 point it at his head and shoot him once he opens the safe.
10 And he said he would be back. He told Angela that he was
11 going to come right back, and he said he ran back there
12 and he went to the bathroom. And he told one of the guys
13 cutting up meat to come here, then he said he started
14 stabbing him.

15 No mention of being attacked by anyone, he
16 started stabbing him. And the guy was yelling, Marlow,
17 Marlow, why are you doing this to me, man, like that. And
18 he said the guy was his friend.

19 But he was a witness, or something like
20 that. And then he -- the other guy came, the other guy
21 was walking, he said come here, like that, and the guy,
22 the guy didn't come here. The guy came around the corner
23 and he stabbed him in his heart, like that. That's on
24 page 21.

25 A few pages later on Kenyon Hall states,

1 Marlow came out and he was all, how did you let that other
2 guy go -- was he talking about Vince Oddo, the manager,
3 that he instructed Kenyon to kill -- how did you let the
4 other guy go like that. And I said it was an accident. I
5 didn't know, I didn't know you wanted me -- what you
6 wanted me to do. I didn't know that you wanted me to kill
7 him like that. He said you were supposed to put the 'gun
8 to his head and shoot him. I thought it's not your fault,
9 I shouldn't have let you like that, and I was so mad. And
10 he said man, the guy got away, I'm going back to the
11 joint. A witness got away, so the defendant here is going
12 back to the joint.

13 The next page, top of the page, again,
14 Kenyon Hall speaking of Marlow Thomas. He was mad because
15 I didn't shoot that guy in the head, and I let him get
16 away. But he calmed down and stuff and he told me that it
17 wasn't my fault and stuff, and I didn't feel good and
18 stuff. He wanted me to shoot that guy and I was so scared
19 to shoot him and stuff. I told him I wasn't going to do
20 it. Then he said I'm sorry, like that, he said it's just
21 your first robbery, like that.

22 Ladies and gentlemen, the aggravating
23 circumstance that the murder was committed to avoid the
24 lawful arrest or to affect escape from custody has clearly
25 been proven to you beyond any doubt, let alone a

1 reasonable doubt. He killed two people so they couldn't
2 identify him. If Kenyon Hall had followed instructions
3 we'd have three pictures up there. And if Steve Hemmes
4 had worn shoes instead of sandals, maybe 4.

5 You heard and saw a video tape statement
6 that the defendant gave to the police two days after the
7 murder. The defendant said he was going to the Lone Star
8 to get his job back. They have a mitigating factor in
9 that instruction that says he cooperated with the police.
10 He sat down and gave them a nice pretty video taped
11 statement. He went there to get his job back, that's what
12 he told the police. Is that cooperation. He said he
13 talked to Vince Oddo about getting his job back. You
14 heard Vince Oddo testify at this proceeding, he never
15 mentioned that. He said he never did talk about his job.

16 The first thing he saw before he saw the
17 defendant's face was a hand gun. Defendant said he had no
18 intention of robbing the Lone Star or hurting anyone, but
19 he tells Detective Mesinar he went in there with two
20 guns -- he said one -- but he loaded the gun before going
21 into the restaurant, but he gives this ridiculous
22 statement, he gives this statement to Detective Mesinar
23 that 9 out of 10 black guys carry guns. So that's his
24 justification for going to Lone Star with a gun.

25 He had no intention of robbing it. He was

1 going in to try and get his job back. He probably had a
2 resume in his left pocket.

3 The defendant said that Vince Oddo planted
4 the idea of the robbery. It wasn't Marlow Thomas' idea to
5 rob the Lone Star, Vince Oddo was so nervous when he saw
6 the gun, I guess, that, hey, what the heck, I got a gun,
7 there's money, I'm going to do a robbery. It's Vince's
8 idea. What a great idea. That's cooperation with the
9 police, telling them that stuff.

10 Now 15 year old Kenyon Hall knew a robbery
11 was going down when he saw the defendant load the gun
12 before entering the Lone Star. He told that to Trooper
13 David Bailey during that interview. Now, again, after
14 listening to that taped statement from the defendant, the
15 defendant makes it sound like he stabbed these two young
16 men to protect himself. Thirty-some-odd stab wounds on
17 Mr. Carl Dixon. He's in the fight of his life, this
18 defendant, no injuries, no cuts. Matt Gianakis was
19 stabbed in the back, does that sound like self-defense.

20 He told the police that the knife was
21 there in the bathroom, and if he didn't get it one of the
22 other guys could have gotten to it and what could have
23 happened to him. Ladies and gentlemen, use your common
24 sense. These men who are preparing food, cutting
25 tenderloins, are they taking their knives with them in the

1 bathroom when they're going to use the facilities.

2 Thirty stab wounds on the body of
3 Carl Dixon. What other purpose could he have had but to
4 kill Carl Dixon. Stabbing in the back and in the heart of
5 Matt Gianakis, for only one reason, to kill him. And he
6 was annoyed. He was annoyed when Matt Gianakis left, was
7 able to get away, and he told either his Aunt Emma or his
8 cousin Barbara, one guy got away, but I hope he dies.
9 Well, his wish came true.

10 Detective Mesinar asked the defendant why
11 didn't you use your gun if you had a gun with you, that 9
12 millimeter. The defendant said, these two guys were his
13 friends, he wasn't going to shoot them. This is his
14 friend, he's not going to shoot him.

15 Someone once said that no one ever
16 committed a crime without doing something stupid, and this
17 case is no exception. This defendant made a mistake in
18 having Kenyon Hall entrusted with the responsibility for
19 getting the money from Vince Oddo, and then executing
20 Vince Oddo. 15-year-old Kenyon Hall was not up to it,
21 based upon the evidence.

22 The evidence tells us that Kenyon Hall was
23 different then the defendant. Also the defendant forgot
24 about Steve Hemmes. Remember Steve Hemmes shows up for
25 work. Vince Oddo tells him he's got to go home because

1 he's wearing sandals, and it's against the restaurant's
2 policy. So he leaves, runs into Marlow Thomas who he
3 knows from before, having worked at the Lone Star. They
4 engage in a little chatter, and Steve Hemmes leaves the
5 area.

6 I submit to you, ladies and gentlemen,
7 that the defendant silenced two witnesses, thought Kenyon
8 Hall was going to kill Vince Oddo and he, the defendant,
9 forgot about Steve Hemmes. Out of sight out of mind.

10 Ladies and gentlemen, based upon the
11 evidence you heard the State has proven beyond any
12 reasonable doubt the existence of that aggravating
13 circumstance. That the killing was done to prevent
14 lawful arrest. Based upon the evidence you heard, ladies
15 and gentlemen, the State has proven beyond a reasonable
16 doubt the existence of four aggravating circumstances, and
17 when you weigh them against any mitigating circumstance
18 you may find, those mitigating circumstances pale in
19 comparison to the aggravating circumstances that the State
20 has proven to you beyond a reasonable doubt. And this
21 defendant should be and is a candidate for the death
22 penalty.

23 Now one of the mitigating circumstances
24 listed in the instruction deals with the defendant was
25 under the influence of extreme mental or emotional

1 disturbance, or suffered as a child, as a young adult
2 emotionally. In other words, his family life, his
3 up-bringing. During jury selection many of you were
4 asked, mostly by the defense, about certain mitigating
5 circumstances, what you felt would be a mitigating
6 circumstance. And the questionnaire may have asked you
7 about family life, bad up-bringing or poor childhood, if
8 you found that was a mitigating circumstance. Some of you
9 responded many good people come from horrific backgrounds,
10 horrible family lives, but go on to become productive
11 human beings, productive members of society. Many people
12 do horrible things and do wonderful things.

13 It's not his mother. It's not Angela Love
14 or Angela Thomas. It's not the neighbor kids. It's not
15 the kids he hangs out with on the street when he was 10,
16 or 12, or 15, or 20. He's not a victim of a poor
17 up-bringing, he's a victim of himself. He's a victim of
18 his own choices in life. He made the decisions throughout
19 his life. He made a decision to rob a man in 1990. He
20 made a decision to beat the living daylights out of a girl
21 in 1996. And he made a conscious decision to take a hand
22 gun, to load it, to go into that Lone Star Restaurant, to
23 give that loaded weapon to Kenyon Hall, order him to kill
24 one man, and to brutally stab to death two other
25 individuals.

1 He didn't stab these two young men because
2 his mother smacked him. He didn't stab these two men
3 because he may have hung out with bad kids in the
4 neighborhood. He stabbed these two men because he didn't
5 want witnesses. He took the money because it was easy.
6 It was easy to take money, a lot easier then working.

7 When we were put here on earth we are
8 given the option to make good choices or bad choices.
9 There's a risk involved. Many choose good, some choose
10 bad. Many, hopefully most, choose life, others choose
11 death. He made a decision to do evil and to do death,
12 over good and life. And you could put a hundred
13 mitigating circumstances, and I still submit to you this
14 one aggravating circumstance outweighs them all.

15 The evidence suggests that family members,
16 and nothing I say, ladies and gentlemen, is meant to be
17 disrespectful to the family members. They are doing what
18 any family member would do. They want to take the blame
19 so you only have three choices rather than four during the
20 next proceeding.

21 Shakespeare once said that the fault of
22 Brutes is not in the stars. It's not in the family. It's
23 not in Angela, but it's in ourselves. The fault is right
24 square on his shoulders. It's Marlow Thomas' fault that
25 we are all here today, and Marlow Thomas deserves your

1 consideration of four possible choices of sentence. One
2 of those choices is the death penalty. And for you to get
3 to that stage you've got to find the State has proven the
4 existence of at least one aggravating circumstance beyond
5 a reasonable doubt, and that there are no mitigating
6 circumstances that outweigh the aggravating circumstances.

7 Thank you.

8 THE COURT: Counsel for defense.

9 MR. SCHIECK: Thank you, your Honor.

10 CLOSING SUMMATION

11 BY MR. SCHIECK:

12 Good afternoon, ladies and gentlemen, or
13 good early evening, I suppose. I'm not going to be nearly
14 as long as Mr. Schwartz was in his presentation, and the
15 reason for that is basically because when we stood up here
16 in voir dire we told that you he was guilty of two counts
17 of first degree murder with use of a deadly weapon. We
18 told you he had two prior robbery convictions. We told
19 you he had been to prison. Those weren't issues that we
20 are contesting during this hearing because the previous
21 trial determined his guilt and we can't argue that guilt
22 to you, so that's a given. We knew that when we were
23 asking you questions. We didn't try to play games with
24 you about what testimony was going to be. They spent, you
25 know, the better part of all day one day presenting

1 evidence that you didn't need to hear. The only reason to
2 do that is to inflame you to make you think with prejudice
3 and passion because of bad evidence. And I'm not going to
4 say that this was not a double homicide, and Mr. Thomas is
5 not guilty, because the instructions tell you that he
6 is.

7 What I want you to do is not be so
8 overwhelmed by the nature of the State's theory of the
9 presentation of the case, but to think logically and with
10 compassion toward Marlow Thomas. We are not asking and
11 won't ask in the next phase to get him free. That's just
12 not really an option in this case. However, you need, in
13 making the entire decision in this case, to not just
14 consider all the pictures, autopsy photographs, and things
15 of that nature, but focus on what your decision is really
16 about. And that is deciding what severe punishment would
17 be sufficient in this case.

18 Now -- and I don't mean to in any way be
19 interpreted as contesting the guilt in this case. He is
20 guilty of first degree murder. But I would submit to you
21 that the evidence as spun by the State is not actually
22 accurate as to what happened.

23 Steven Hemmes had his first contact with
24 Marlow that night. He didn't see a gun. Marlow wasn't
25 agitated. Everything seemed normal. They had a

1 conversation. He said he was going in to look for a job.
2 Marlow didn't forget about Steve Hemmes, he told Detective
3 Mesinar that he had that conversation with Steve Hemmes as
4 he was getting to Lone Star.

5 Why then, knowing that there is an
6 eye-witness left would you carry out the plan. Unless the
7 plan was to go in and see about getting the job back.
8 That's what Marlow told the detective. In fact, Detective
9 Mesinar did his power point presentation, that's the
10 theory he put into his power point presentation as to what
11 happened based on the statements of Marlow and Kenyon and
12 the physical evidence that matched up to that.

13 And Marlow told Detective Mesinar things
14 went terribly bad, that I didn't intend to happen. Does
15 that mean it's not first degree murder, no, under any
16 number of theories. But it does mitigate against having
17 to decide that Marlow's death penalty eligible at this
18 point in his life. It's not an excuse, not a
19 justification, just a fact for you to consider that
20 perhaps Detective Mesinar was pretty accurate in his
21 recreation, that Marlow went in there to the bathroom
22 because you have to remember the robbery hadn't been
23 completed yet. He hadn't left Kenyon yet with Mr. Oddo.
24 And so it makes sense that he is going in to say you guys
25 stay in the bathroom and wait until we get -- assuming

1 that they are going to know that a robbery is going down
2 at that point -- just stay in here, everything is fine,
3 get the money and leave.

4 That's what he told Detective Mesinar he
5 intended to happen, and then a struggle occurred. We
6 heard that both Matt and Carl are fair sized individuals.
7 Perhaps, and we'll never really know what was in their
8 minds, but perhaps they thought they needed to prevent the
9 robbery, didn't see a weapon on Marlow, and then the whole
10 thing went down.

11 And obviously it was frenzied, whatever
12 went down. That's not a cold, calculating type of
13 homicide. After all they had a gun. Why not use the gun.
14 He didn't have a knife. The knife must have come from
15 somewhere. That shows a frenzy from a confrontation, from
16 losing your temper from something happening that you
17 didn't intend to happen because that doesn't make sense
18 any other way.

19 Now today Mr. Schwartz has read to you
20 from the statement that Kenyon gave to Troop Bailey up in
21 Hawthorne. That wasn't under oath. That was in the
22 presence of a number of police officers, uniformed and a
23 15-year-old boy telling a story to these troops. But
24 prior to that you heard the sworn testimony of Kenyon Hall
25 under oath in court as to his recollections of what

1 happened. Compare those two.

2 Kenyon's really not sure when he learned
3 any part of this. Was it after it happened, was it on the
4 way back to Hawthorne. Kenyon at one point said there was
5 a discussion about it, he thought there was a discussion
6 about it, yet, Angela was driving the car, has no idea
7 that this happened or what was going to happen. If you
8 believe Kenyon you must believe Angela hand here. Or
9 Kenyon was making up a story to do the best he could to
10 avoid culpability.

11 Under oath he testified he did not see any
12 stabbing, did not see a struggle other then the fight on
13 the floor and the guy got up, picked (ph) Marlow and left.
14 But he didn't go all the way down there, he didn't have
15 any conversations. Look at the sworn testimony before you
16 decide whether or not this statement given at Hawthorne by
17 the detective is accurate or not.

18 Marlow had never had any problems from any
19 of the witnesses that testified with either Carl or Matt.
20 His cousin came in and testified that, in fact, he gave
21 them rides home. They had been over to his house
22 together. They got along fine.

23 Mr. Hemmes testified that he never saw any
24 problems between Matt and Marlow, that he knew that they
25 socialized, Carl and Marlow. It just doesn't make sense

1 that there would be as cold-blooded a the State wants to
2 portray this pre-planned thought going into this as
3 opposed to something going off that was unexpected. It
4 was tragic. It's Marlow fault, but that it's something
5 that mitigates against deciding which outweighs the
6 aggravators and mitigators.

7 The prosecution has this theory that
8 Marlow must have of chased them into the bathroom. These
9 gentlemen had worked in the Lone Star for some time and
10 the evidence showed that there was a number of doors in
11 the Lone Star. Why would two employees that know where
12 the doors are at, if they are being chased, run into a
13 dead end bathroom. They would obviously run to one of the
14 doors, front door, side door, back door, if it happened
15 the way the State wants you to believe it happened. It
16 doesn't justify it. It doesn't make it any less then
17 first degree murder. But it's something you should think
18 about in deciding if it's as heinous as the State wants to
19 spin it.

20 One of the mitigators is that Marlow
21 cooperated. Before I go into that, let's talk about
22 mitigation. Mitigation can be anything in the world. You
23 can decide whatever you want mitigation to be and the
24 instructions tell you that. In fact, the instructions
25 tell you that if there's not mitigation listed in the

1 instructions, if I don't talk about mitigation, if they
2 don't talk about mitigation, the jury has a duty to look
3 at the case and decide any mitigation they want to find in
4 the case. And that's Instruction No. 9.

5 Mitigation is not an excuse. It's not a
6 justification. It's a factor that a jury has to take into
7 account in deciding the fate of an individual. And we
8 know that's weighty decision. It's a decision that most
9 of us would prefer to never have to make. But our system
10 requires a jury to make this decision.

11 You have to take into account those
12 things. We put his family on to try and humanize Marlow,
13 not the make excuses. We're not blaming his mother.
14 We're not blaming the cousins. But we want you to know
15 about Marlow, his up-bringing, what he went through which
16 led us to be here where we are at now.

17 And another factor that we really haven't
18 touched on up to this point is this 1990 conviction of
19 Marlow, where he went to prison for 6 years. He was 18
20 years old. Sent to prison. Does that factor into the
21 person that Marlow became when he got out, then hooked up
22 with Angela, got involved with Angela, and as the family
23 said Angela led him into some bad areas and some bad
24 situations. Marlow, according to his brother was doing
25 drugs. Did the use of drugs impact upon Marlow and his

1 actions that caused him to go off. You have to decide
2 that.

3 To find an aggravator, which we've already
4 admitted exists in this case, you have to be unanimous.
5 All 12 of you have to find it beyond a reasonable doubt.
6 That shouldn't be too hard, ever since voir dire is when
7 we told you what the facts were.

8 Mitigators are much different. I told you
9 this in opening. Mitigators any one juror can find
10 anything he wants to be a mitigator. Not beyond a
11 reasonable doubt, just because you want to. That juror
12 then weighs whatever mitigators he or she finds against
13 the aggravators. Then the 12 of you have to be unanimous,
14 you all have to decide that the aggravators are not
15 outweighed by the mitigators, or you can't find a
16 unanimous finding that they outweigh. And so any one
17 juror has the ability to say I think the mitigators
18 outweigh the aggravators, and I'm not changing my vote and
19 we only have three choices when we come back for the
20 second phase of the hearing.

21 But each person is different that we
22 select on a jury. Each person believes something is more
23 important than another person. That's why we have 12
24 jurors to make these decisions, and that's why we let each
25 juror decide what they believe mitigation is.

1 Mitigators that are listed are just
2 examples that may be mitigation. You don't have to find
3 any of them. You can find none. You can find all. You
4 can make up others that you believe exist base on the
5 testimony that you received. In the special verdict form
6 that you'll get there is a place to put what mitigators
7 you find as to both counts. One for Count (2) and one for
8 Count (3). And there are blank spaces so any mitigation
9 that any of you jurors find exist you should list on
10 that -- on that special verdict form. Not just because
11 you all believe it exists, but if any one of you believe
12 it exists you should ask the foreman to put that on the
13 form, because that is the process you need to go through
14 to make sure the mitigators are documented and being
15 consider.

16 It's in your hands now. Thank you.

17 THE COURT: Thank you, Mr. Schieck.
18 Counsel do you wish a short rebuttal?

19 MR. OWENS: Yes.

20 THE COURT: You may proceed.

21 BY MR. OWENS:

22 When I was little my parents would take me
23 and my brother over to our grandparent's house, and they'd
24 sing to us, tell stories. And I remember this one phrase
25 my grandfather -- he operated heavy equipment and did some

1 prospecting in Arizona as a hobbie -- used to say, don't
2 buy a pig in a poke. As a young man I never knew what
3 that meant. I didn't know -- I knew what a pig was, I
4 didn't know what a poke was. I didn't know why somebody
5 would want a pig and a poke. And it was years later when
6 I was nearly 20, and I was living for a brief period of
7 time in West Virginia and I went to a grocery store and
8 bought some items and the clerk asked me if I wanted my
9 groceries in a poke. I couldn't understand what he's
10 talking about. You want that in a poke, you want a
11 poke.

12 And the friend that I was with said that
13 it's a bag, do you want that put in a bag. And so as I
14 was walking outside the store heading back down the street
15 with my purchases and my poke, I started thinking about
16 this and all of a sudden this expression my grandfather
17 made started making sense to me, about this -- what a poke
18 was and I understood kind of the story there, about how
19 you don't buy a pig in a poke. And why won't you do that?
20 What's the point of that idiom that we have heard from
21 time to time. Most of us have probably heard that.

22 The point is that when something is inside
23 of a polk, inside of a package you can't see what you are
24 buying. If you are looking at something before it's okay
25 to put it in a poke afterward. But if somebody is trying

1 to sell you something in a poke, it may be something
2 that's got some defects in it. You don't have the whole
3 picture. Who would want to do that. And that's the
4 purpose of that expression.

5 I don't know if you are in the market to
6 buy a pig here, but the defendant wants to sell you one.
7 The difficulty at this time is the eyes and ears of that
8 pig may be sticking out of a polk, but there is a lot of
9 that pig you can't see at this point in time. And you
10 need -- and the decision and seriousness of this case, you
11 need to be able to see the whole pig. And to see the
12 whole pig you need to make a determination that allows you
13 to have all of those options available to you in the next
14 phase of the sentencing hearing. We need to see what
15 you're buying. Don't sell yourself short here. Don't buy
16 this pig in a poke at this point that they want to sell to
17 you.

18 Let's talk about some of these things.
19 There's mitigators. There's aggravators. We've heard
20 just a few minutes about each of one of those things. A
21 mitigator is not any kind of hard luck fact in a person's
22 life, it really isn't.

23 MR. SCHIECK: Objection, your Honor.

24 THE COURT: Sustained based on the fact
25 that the Supreme Court has said anything can be a

1 mitigator.

2 MR. OWENS: Anything can be a mitigator as
3 long as it fits the court's definition in this case, which
4 is in Instruction No. 7. Let's take a look at that
5 instruction.

6 Mitigating circumstances are those factors
7 which while they do not constitute a legal justification
8 or excuse for the commission of the offence in question
9 may be considered in the estimation of the jury in
10 fairness and mercy as extenuating or reducing the degree
11 of the defendant's moral culpability.

12 So mitigator has to be something that is
13 extenuating or reducing the degree of the defendant's
14 moral culpability. Now, there is a lot of sad things that
15 occur in people's lives, anybody life. But that doesn't
16 necessarily by the status of that event or the unfortunate
17 circumstances of that event necessarily mitigate the
18 culpability or reduce the culpability of an act by that
19 person.

20 In other words, there has to be some
21 causation, connection between that fact and the thing that
22 the person did before it becomes a mitigator.

23 MR. SCHIECK: Your Honor, that's not
24 correct.

25 THE COURT: The instructions will be given

1 to the jury.

2 MR. OWENS: So let's take a look at some
3 of these tings that are listed in Instruction 8. This is
4 not an exhaustive list, these are things that are put out
5 as to possibilities, not something that you have to accept
6 but something that you can certainly consider along with
7 anything else that you can come up with that you think
8 might be a mitigating circumstance.

9 Let's look at some of these and think
10 about it in terms of how they reduce the culpability of
11 Marlow Thomas for the crime he committed.

12 Number one, the murder was comitted while
13 Marlow Thomas was under the influence of extreme mental or
14 emotional disturbance or the influence of drugs. What did
15 we hear about that. Well, we had Eliza Bosley talk about
16 the defendant when she saw him seemed to be under the
17 influence of a controlled substance. And his mother said
18 he seemed to have his eyes glossy. But that's all we saw,
19 that's all that we've heard in this proceeding.

20 There was nothing about what kind of drug.
21 What the amount was. What the affects of that drug are on
22 the way that the defendant was thinking when he plunged
23 that knife time and time and time again into those two
24 victims, Matt and Carl. What is there about this supposed
25 control substance he was under the influence of that

1 caused him to go and commit that brutal act to get the
2 quick money that he wanted. Where is that nexus
3 connection that shows that that mitigates what he did.
4 There isn't any.

5 I mean that's a huge jump to say, well,
6 the person was under the influence of something and so now
7 they don't have the same culpability for that kind of
8 choice in their life. Not based on what we heard here.

9 Number (2) Marlow Thomas accepted
10 responsibility for the crime.

11 (3) He was cooperative with the
12 authorities, voluntarily gave a statement.

13 (4) Demonstrated or expressed remorse for
14 the incident.

15 All three of those things occurring after
16 the murder. Occurring after the murder, how does that
17 reduce his culpability for the murder. For this brutal
18 act that he did. And what are they really. What did he
19 really do there. Did he really take responsibility. He
20 doesn't come forward. He gets caught. When he gets
21 caught he doesn't give it up, he spins a story. What kind
22 of story? One that's going to put him in the best
23 possible light. I was there to get money. He handed it
24 to me. I really didn't want to kill anybody, but it
25 became self-defense and I was in a fight for my life.

1 He's not coming clean here. Yes, he's implicating himself
2 because he's been caught.

3 There's evidence against him, so he talks
4 to the police, but he does not accept responsibility. He
5 spins it. He was cooperative to talk with them, but the
6 statement that he's giving, once again, is in his own
7 interest. He's trying to sell them on this.

8 And any remorse, if you saw remorse in
9 there. I don't know where you would have seen that in
10 anything that was put before you in this proceeding. How
11 does that reduce his culpability.

12 He was raised without benefit of a father
13 figure. A lot of people are. Some people don't have
14 either parents. Maybe not biological parents. People are
15 raised in all kinds of circumstances, but where is that
16 connection, from not being raised your full younger life
17 by your father to that fact causing you to go out and
18 brutally stab and murder two people for money. Where is
19 that reduction of culpability.

20 Counsels other against criminal acts after
21 the fact. Suffered as a young child, got learning
22 disabilities, emotional disabilities. What evidence of
23 that was put before us, and where, again, does that
24 mitigate what he did here.

25 Even now we see an attempt to diminish his

1 responsibility for this crime. The defense attorney is
2 talking about the way the State wants you to view the
3 evidence. It didn't necessarily happen the way the State
4 wants you to view the evidence, and how the State wants
5 you to spin the evidence a certain way.

6 You look at Exhibit No. 22, what kind of
7 spin do you put on that. What kind of spin is that. The
8 physical evidence is what the physical evidence is in this
9 case. You know, you can talk about the statement of
10 Mr. Hall. You can talk about the other individuals, but
11 look at the physical evidence. Look at what is at the
12 scene. We know that there were three people that went up
13 there. Why three people to asked for your job back. Why
14 did he even leave a person in the car. Why take the other
15 person with you to go inside. Why do you need to do that.
16 Why do you need to be hanging around checking out the
17 place if all you want to do is get your job back. Why
18 take the gun.

19 That's why the defendant comes up with
20 that story of two guns Detective Mesinar is talking about.
21 He wanted David to believe him when he's telling the
22 story, I could have killed them with the gun, I had my gun
23 and Mr. Hall had his gun, and so I didn't really mean to
24 stab them so you've got to believe me the stabbing only
25 occurred in self defense. If I really wanted to kill them

1 -- there is no second gun. And there was no knife sitting
2 there between himself and Mr. Dixon where they both looked
3 at it and were going to go for it at the same time.

4 Look at the physical evidence in this
5 case, that didn't happen. That is no spin. How, yes,
6 he's under an individuals lure, a full-sized man capable
7 of putting up a considerable struggle and they did. But
8 to be able to accomplish what the defendant did took some
9 planning. He had to come in. He had to separate them,
10 get one first. He couldn't take them both on at the same
11 time. He had to get that knife, get the advantage of one,
12 get the advantage on the other guy, stabbing him any way
13 he could, in the sides in the backs of these individuals
14 to get control without leave a single bruise or mark or
15 cut upon himself. That doesn't happen in some restaurant
16 struggle for self defense like the defendant claimed. And
17 that couldn't require any kind of spin on the evidence to
18 know the premeditated nature of this crime that occurred.

19 Now, we heard from a number of people here
20 that talked about certain mitigation of the defendant. We
21 had David Hudson, Eliza Bosley, Shirley Nash, Charles
22 Nash, Darrell Thomas, family members. And what did we
23 hear from them. Some of them hadn't heard from him in 4
24 or 5 years. One of them grew up with him and saw him
25 every couple of days but couldn't remember the last time

1 he saw the defendant, that was Charles Nash.

2 We heard a series of what are excuses, not
3 mitigation, blame being cast on other individuals. The
4 mother, blame the mother, blame the father, blame the
5 crowd, blame Angela, blame drugs. What did we hear about
6 the mother. The mother was strict. Most of the time they
7 had a good relationship. She spanked him sometimes.
8 David Hudson told us that.

9 Eliza Bosley, older brothers were
10 favorites. She did the chores so he could play. She felt
11 bad for him. What a terrible thing to have a mother that
12 makes you do chores, that exercises discipline over you
13 when you get out of control.

14 Charles Nash said that he was neglected at
15 home, but he blamed -- he was blamed for things he didn't
16 do, and she was harder on Marlow. Well, what do we know
17 about Marlow, that she knew. Well, in 1990 he committed a
18 robbery. We had that brutal beating in 1996. The mother
19 was the one who dealt with the defendant at school. And
20 we are told by the Pastor, Darrell Thomas that the
21 defendant did get attention at home. He got attention at
22 home.

23 Paul Hardwick said he was a nice brother
24 who picked up from school. And Georgia Thomas talked
25 about beating him up all the time, and he didn't want to

1 work after he got out of prison -- that's the mother.
2 That's her perspective on what happened and everyone was
3 that just as she was a mother who didn't ignore him, she
4 was a hands-on mother.

5 He had a segregate father for a period of
6 time in Shirley's husband who used to take him places and
7 was involved in his life for a significant period of time.
8 We heard about the crowd he started with according to
9 David Hudson 2 years before the incident. We heard that
10 Shirley Nash said that this crowd was a problem for him,
11 and, yet, who is he with when he committed this 1990
12 attempt robbery of this man. It wasn't with the crowd.
13 It was with Sherman, his cousin. And who was he with when
14 he committed this murder? It wasn't with the crowd. It
15 was with his wife and his brother-in-law.

16 Charles Nash said he had his problems, the
17 people he was hanging around with. He was hanging around
18 with people that do drugs. Darrell said the wrong crowd
19 started in junior high. Why did he do that. Well, he was
20 asked and he didn't know why he was doing that. He didn't
21 really have a reason why. A lot of people hang with
22 people that are not a good influence on us, but where in
23 that is he saved from the responsibility or culpability
24 for the crime he committed. Nowhere.

25 We've got Angela. The worst they could

1 say about her, everyone we heard from today is that she
2 liked to drag people off. She was into drugs. She had a
3 bad attitude. They had a couple of arguments. The mother
4 didn't like her. He was doing good in prison, but he got
5 into drugs. That's the worse they could say about the
6 excuse of Angela.

7 We heard from David Hudson he started
8 reading the Bible again and getting religious. Darrell
9 Thomas said he received no communication or letters from
10 the defendant about religion.

11 The aggravators in this case are
12 established. They're establish by the documents before
13 you and in the certain instructions of the court.

14 Instruction 12, you are not to consider
15 the guilt or innocence of the defendant. That's been
16 decided as to that double homicide. That's one of the
17 aggravators proven.

18 The convictions that represent the two
19 crimes he engaged in, battery and robbery. They're there
20 before you. They're certified. They're proven
21 convictions of his conduct. The aggravators have been
22 established beyond a reasonable doubt.

23 Now, to be clear on what you are doing
24 here, you look at the aggravators. Those have been
25 established beyond a reasonable doubt. You look and see

1 if you find any mitigating circumstance. And then you
2 balance those out to determine whether the aggravators
3 outweigh the mitigating circumstances in this case. And
4 Mr. Schwartz has indicated that based upon the evidence
5 that you've heard the taking of the lives, there is no way
6 that any mitigators in this case could outweigh the
7 aggravating circumstances that you have before you. That
8 is a balancing process that you do. That's a balancing
9 process that allows us to get into the next phase of the
10 sentencing hearing with all four of the options in front
11 of you.

12 The options, all four, that allow you to
13 make a fair determination of sentence after you have heard
14 all of the evidence in this case, after you have seen the
15 whole pig. The defendant himself engaged in a balancing
16 process when he brutally took the lives of these two young
17 man. And he saw that he balanced their lives against a
18 few thousand dollars of money. Money covered in blood. We
19 heard some testimony about that today. That he balanced
20 against the lives of these two young men and found their
21 lives wanting, and not as valuable as this quick money
22 that he wanted.

23 You are going to do a balancing in this
24 case as well. What we ask you to do is balance the
25 evidence in a manner consistent with the evidence and that

1 is that the aggravators in this case in no way outweigh
2 the mitigators in this case, and that's true beyond a
3 reasonable doubt.

4 In the balance of this case the
5 aggravators are not out weighed, and you should so find so
6 we can proceed into the next phase of this trial -- the
7 sentencing hearing, having all those options available
8 when we hear the rest of the evidence.

9 Thank you.

10 THE COURT: Thank you, counsel.

11 At this time the clerk is going to swear
12 the bailiff to take charge of the deliberating jurors.
13 I'll tell you who our alternate jurors are. Our alternate
14 jurors will be taken under charge of either the executive
15 assistant or the law clerk, and the deliberating jurors go
16 to jury room. You'll have all the exhibits, plus, the
17 verdict forms, which you have and you will deliberate
18 either tonight until you reach a verdict, or if you are
19 not able to do so, you can deliberate until you decide you
20 want to go home and come back tomorrow morning, and either
21 conclude those deliberations or if you finish the
22 deliberations today as to aggravating, mitigating
23 circumstances then when you come back tomorrow we will
24 start some additional testimony, which will then be given
25 to you at that point in time to help you make your final

1 decision as to what the ultimate verdict in this case
2 should be.

3 Would you swear Jonathan, please.

4 THE CLERK: You solemnly swear that you
5 will keep this jury together in some private and
6 convenient place, that you will not permit any person to
7 speak to them, nor speak to them yourself unless by order
8 of the court except to ask them whether they have agreed
'9 upon a verdict, and return to this courtroom when they
10 have so agreed, so help you God.

11 THE BAILIFF: I will.

12 THE CLERK: You solemnly swear that you
13 will keep these alternate jurors together in some private
14 and convenient place, that you will not permit any person
15 to speak to them unless by order of the court, so help you
16 God.

17 EXECUTIVE ASSISTANT: I do.

18 THE COURT: Our alternate jurors who can
19 not be released because you still have to listen to
20 evidence tomorrow. Our alternate jurors are Herbert Rice
21 and Tamara Chiangi.

22 So Herb and Tamara, Diane will meet you at
23 that door and you'll go with her and the rest of you will
24 go with the bailiff.

25 Counsel please approach and give us your

1 phone numbers where we can reach you when the jury has
2 made a decision.

3 (Jury in deliberation.)

4 THE COURT: Good evening, ladies and
5 gentlemen. Welcome back to the State of Nevada versus
6 Marlow Thomas. The record will reflect the presence of
7 all parties and officers of the court, and our 12
8 deliberated jurors.

9 The first question I need to ask you is
10 has the jury chosen a foreperson, and if so, who is that
11 person.

12 JURY FOREPERSON: Connie Kaczmarek.

13 THE COURT: Has the jury reached a decision
14 on all six of the verdict forms that were submitted to the
15 jury?

16 JURY FOREPERSON: Yes, your Honor, we
17 have.

18 THE COURT: Would you please hand those
19 verdict forms to the bailiff. Thank you. All right. The
20 clerk will now read the verdict.

21 THE CLERK: District Court, Clark County
22 Nevada, State of Nevada, plaintiff, vs. Marlow Thomas,
23 defendant, Case No. C-136862, Department 15, special
24 verdict: We the jury in the above entitled case having
25 heard evidence in the above referenced matter in which the

1 defendant, Marlow Thomas, has previously been convicted of
2 Count (2) first degree murder with use of a deadly weapon,
3 as to Carl Dixon designated the aggravated circumstance or
4 circumstances which have been checked below have been
5 established unanimously and beyond a reasonable doubt.

6 The murder was committed by a person who
7 at any time before a penalty hearing is conducted is or
8 has been convicted of a felon involving use or threat of
9 violence to the person of another, to wit, in 1990 the
10 defendant was convicted of the crime of attempt robbery.

11 The murder was committed by a person who
12 at any time before a penalty hearing is conducted is or
13 has been convicted of a felony involving the use or threat
14 of violence to the person of another, to writ, in 1996 the
15 defendant was convict of the crime of battery, resulting
16 in substantial bodily harm.

17 The murder was committed to avoid or
18 prevent a lawful arrest or to affect an escape from
19 custody. The defendant has in the immediate proceeding
20 been convicted of more than one offense of murder in the
21 first or second degree, dated this 2nd day of November
22 2005, Connie Kaczmarek, foreperson.

23 Special verdict, we the jury in above
24 entitled case having heard evidence in the above
25 referenced matter in which the defendant, Marlow Thomas

1 has previously been convicted of Count (2) first degree
2 murder with use of a deadly weapon as to Carl Dixon, one
3 or more of the mitigator designate that mitigating
4 circumstance or circumstances, which have been listed
5 below, have been established: Excepted responsibility for
6 the crime, cooperated, but diverted the truth;
7 demonstrated remorse, defendant has counseled others
8 against criminal acts, defendant has suffered both
9 learning and emotional disabilities, defendant found
10 religion, father's denial of his son, Marlow, dated this
11 2nd day of November 2005, Connie Kaczmarek, foreperson.

12 Special verdict, we the jury in the above
13 entitled case having heard evidence in the above
14 referenced matter in which the defendant, Marlow Thomas,
15 has previously been convicted of Count (2) first degree
16 murder with use of a deadly weapon as to Carl Dixon, find
17 that the mitigating circumstances do not outweigh the
18 aggravating circumstances, dated this 2nd day of November
19 2005, connie Kaczmarek, foreperson.

20 The State of Nevada, plaintiff, vs. Marlow
21 Thomas, defendant, special verdict: We the jury in the
22 above entitled case having heard evidence in the above
23 referenced matter in which the defendant, Marlow Thomas,
24 has previously been convicted of Count (3) first degree
25 murder with use of a deadly weapon, as to Matt Gianakis

1 designated the aggravated circumstance or circumstances
2 which have been checked below have been established
3 unanimously and beyond a reasonable doubt.

4 The murder was committed by a person who
5 at any time before a penalty hearing is conducted is or
6 has been convicted of a felon involving use or threat or
7 violence to the person of another, to wit, in 1990 the
8 defendant was convicted of the crime of attempt robbery.

9 The murder was committed by a person who
10 at any time before a penalty hearing is conducted is or
11 has been convicted of a felony involving the use or threat
12 of violence to the person of another, to writ, in 1996 the
13 defendant was convict of the crime of battery, resulting
14 in substantial bodily harm.

15 The murder was committed to avoid or
16 prevent a lawful arrest or to affect an escape from
17 custody. The defendant has in the immediate proceeding
18 been convicted of more than one offense of murder in the
19 first or second degree, dated this 2nd day of November
20 2005, Connie Kaczmarek, foreperson.

21 Special verdict, we the jury in above
22 entitled case having heard evidence in the above
23 referenced matter in which the defendant, Marlow Thomas,
24 has previously been convicted of Count (3) first degree
25 murder with use of a deadly weapon as to Matt Gianakis,

1 one or more of the jurors designate that mitigating
2 circumstance or circumstances, which have been listed
3 below, have been established: He excepted responsibility
4 for the crime, cooperated, but diverted the truth;
5 demonstrated remorse, defendant has counseled others
6 against criminal acts, defendant has suffered both
7 learning and emotional disabilities, defendant found
8 religion, father's denial of his son, Marlow, dated this
9 2nd day of November 2005, Connie Kaczmarek, foreperson.

10 Special verdict, we the jury in the above
11 entitled case having heard evidence in the above
12 referenced matter in which the defendant, Marlow Thomas,
13 has previously been convicted of Count (3) first degree
14 murder with use of a deadly weapon as to Matt Gianakis,
15 find the mitigating circumstances do not outweigh the
16 aggravating circumstances, dated this 2nd day of November
17 2005, Connie Kaczmarek, foreperson.

18 Ladies and gentlemen of the jury are those
19 your verdicts as read so say you one, so say you all?

20 IMPANELED JURORS: (Yes.)

21 THE COURT: Before the verdict is recorded
22 in the minutes of the court, does either party wish to
23 have the jury individually polled.

24 MR. OWENS: No, your Honor.

25 MR. SCHIECK: No, your Honor.

1 THE COURT: The verdict on this phase of
2 the proceeding will be recorded by the clerk.

3 Ladies and gentlemen, we'll be in recess
4 now until 10:30 tomorrow morning. Tomorrow at 10:30
5 you'll hear additional evidence that when all of that
6 evidence comes in, then you'll be able to have the full
7 scope of all the information that's available to give to
8 you to reach your final decision in the case regarding
9 sentencing.

10 RECESS ADMONISHMENT

11 During the evening recess, you are
12 admonished: Not to talk or converse among yourselves or
13 with anyone else including without limitation, the
14 lawyers, parties and witnesses, on any subject connected
15 with this trial; or read, watch or listen to any report of
16 or commentary on the trial or any person connected with
17 this trial by any medium of information concluding,
18 without limitation, newspapers, television, the internet
19 and radio; or form or express any opinion on any subject
20 connected with the trial until the case is finally
21 submitted to you.

22 We'll be back in session at 10:30
23 tomorrow morning. Thank you.

24 (Whereupon, the hearing
25 concluded at 6:58 p.m.)

CERTIFICATE
OF
CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the
State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the
time and place therein set forth; that the testimony and
all objections made at the time of the proceedings were
recorded stenographically by me and were thereafter
transcribed under my direction; that the foregoing is a
true record of the testimony and of all objections made at
the time of the proceedings.



Sharon Howard
C.C.R. #745

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1 TRAN
2 CASE NO. C136862
3 DEPT. NO. XV

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4 DISTRICT COURT
5 CLARK COUNTY, NEVADA

6 * * *

7 **ORIGINAL**

8 THE STATE OF NEVADA,)
9 Plaintiff,)
10 vs.) REPORTER'S TRANSCRIPT
11) OF
12 MARLO THOMAS AKA MARLOW) PENALTY HEARING
13 DEMITRIUS THOMAS,)
14 Defendant.)

15 BEFORE THE HONORABLE SALLY LOEHRER
16 DISTRICT COURT JUDGE

17 THURSDAY, NOVEMBER 3, 2005
18 10:50 A.M.

19 APPEARANCES:

20 For the Plaintiff: CHRIS OWENS, ESQ.
21 DAVID SCHWARTZ, ESQ.
22 Deputy District Attorneys
23 For the Defendant: DAVID SCHIECK, ESQ.
24 DANIEL ALBREGTS, ESQ.
25 Attorneys-at-Law

Reported by: Mary Beth Cook, CCR #268, RPR

28

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LAS VEGAS, CLARK COUNTY, NEVADA
THURSDAY, NOVEMBER 3, 2005
10:50 A.M.

* * *
P R O C E E D I N G S
* * *

THE COURT: On the record outside the presence of Mr. Thomas who's being dressed out, but we do have counsel for both sides so we can address housekeeping matters.

MR. OWENS: We've probably got about 16, 17 witnesses, but four of them right now are by transcript. Those are Alkareem Hanifa, Marty Neagle, Margaret Wood, and Roger Edwards. These are people we haven't been able to locate. We got a line on Mr. Neagle finally today. The prison told us he no longer worked there, and our prison people showed up they said he did.

THE COURT: What a surprise.

MR. OWENS: We're going to use transcripts for them, and we're going to start with putting the records in through P & P, and then we're going to go through the prison incidents mostly. I don't think any of these are going to be very long.

THE COURT: Okay.

MR. OWENS: And we have the documents from last time that we intend to use. I was telling Mr. Schieck about those that we're going to move to use in this one which is Exhibits 100 and then 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 104, 105, 106 and 107 shall all prison disciplinary reports that were put in at the last proceeding.

THE COURT: Is that back from when he was in prison in the '90s?

MR. OWENS: Yeah, before the last trial.

THE COURT: Now you have new ones since then?

MR. OWENS: Yes. Those we've marked as Exhibit 116.

THE COURT: Have you guys taken a look at these exhibits?

MR. SCHIECK: We've seen the reports.

THE COURT: Have you seen the new ones?

MR. SCHIECK: Yes.

MR. OWENS: They've got copies. I have a certification from the prison on the top of those documents, and then I've got them tabbed according to year in one binder which we've marked as Exhibit 116, and the first document in there is

a summary document of all the reports.

THE COURT: Is it written in computer which not a human being on the face of the earth can read, or is it written in English?

MR. OWENS: It's in computer, but you have the reports to go along with it, and we're going to go into some of them with the witnesses, and I've got my own summary that I'll be using in the closing argument, my favorite summary.

THE COURT: Which is in English.

MR. OWENS: Yes. As a part of that which I've held out and marked as Exhibit 116A that's the first page of an appeal on a disciplinary report involving an Officer Shaffer that came with that same certification. I took out the page 2 because it mentions death row or being on the row. It's a response by the defendant in his appeal. If they want to include that they're welcome to do so, but I didn't feel it was appropriate to attach that. We're going to move those in as a group based upon the certification.

Then we've got a couple of witnesses that are going to talk about the prior criminal history as an adult, and then some that will be

talking about from juvenile, talking about the certifications, and between those they've got pretty much the entire criminal history in the PSI's in juvenile and adult court. And I think that's about it as far as the exhibits go other than the odd one.

THE COURT: We should get through all your witnesses today easily.

MR. OWENS: Yeah, I think so.

THE COURT: We should get through your four from the prison, we should get through them today easily. We'll take an hour lunch.

MR. SCHIECK: They're here, and I wanted to go down and talk with them.

THE COURT: You can talk with them during the lunch hour.

MR. SCHIECK: I have to advise the Court that for the record we're going to be objecting to the admission of the documents without having the declarant of the documents of all the reports come in to testify.

THE COURT: You've got to do that.

MR. SCHIECK: Just so you're aware.

THE COURT: You've got to do what you've got to do.

1 MR. SCHIECK: I need to do that when
 2 Mr. Thomas gets here so he can hear me that I'm
 3 objecting to the admission of those.
 4 THE COURT: He's just telling us what
 5 exhibits he's got.
 6 MR. SCHIECK: I'm giving the Court a
 7 heads up.
 8 MR. OWENS: One other matter, your
 9 Honor. I think we were talking about maybe not
 10 doing opening statements, which I'm comfortable
 11 with as long as the Court is going to advise them
 12 of the process now.
 13 THE COURT: Well, the instruction if we
 14 were in a regular trial and we'd gone through the
 15 trial and we were just going to start penalty,
 16 this is the only thing that I would tell them.
 17 Ladies and gentlemen, this is the penalty phase of
 18 the trial. You'll now hear opening statements
 19 from counsel. So we've already done that so I
 20 guess today I could say -- I'll tell them anything
 21 you want me to tell them. I don't want to tell
 22 them prejudicial stuff from one side or the other
 23 side. What I intended to tell them is welcome
 24 back to the penalty hearing. You've heard the
 25 statutory aggravating circumstances, you've heard

1 mitigating circumstances from the defendant and
 2 you've made that weighing. You now have four
 3 possible punishments which are available to you.
 4 The law now allows additional evidence to be
 5 submitted to you, and you're going to hear
 6 evidence from the State and you're going to hear
 7 evidence from the defense. When you've heard all
 8 that, the attorneys are going to do a closing
 9 argument, and then you'll retire to reach an
 10 appropriate verdict -- sentence in this case.
 11 What else do you want me to tell them?
 12 MR. SCHIECK: If you can specify to them
 13 that these are not additional aggravating
 14 circumstances, these are just other character
 15 evidence that they can consider.
 16 THE COURT: I was trying to stay away
 17 from these are his other bad acts just because
 18 that's got kind of a negative connotation to it,
 19 so that's why I said you're going to hear other
 20 evidence which may bear and may help you make a
 21 decision regarding sentencing. You're going to
 22 hear evidence from the State, you're going to hear
 23 evidence from the defense which may assist you in
 24 making an appropriate decision regarding
 25 sentencing.

1 MR. OWENS: Rule 250 it calls it
 2 evidence in aggravation, but that might be
 3 confusing based upon the fact they're using the
 4 same word.
 5 THE COURT: I'm going to say it's other
 6 evidence that exists.
 7 MR. ALBREGTS: Further evidence to
 8 consider which you make a decision as to the four
 9 penalties.
 10 THE COURT: That's the most benign way
 11 to tell them. And if you don't want to make
 12 opening statement, you certainly don't have to.
 13 You did cover -- both of you covered in your first
 14 opening what the obligations were and et cetera.
 15 If you want to make openings, you can; if you
 16 don't, you don't have to.
 17 MR. OWENS: With that instruction, I
 18 think we're fine. Is there any reason we can't
 19 deal with the admissibility of the documents now?
 20 THE COURT: Because Mr. Thomas isn't
 21 here.
 22 (Discussion off the record.)
 23 THE COURT: Mr. Schieck.
 24 MR. SCHIECK: Can we reflect that
 25 Mr. Thomas was not here for the previous

1 discussions, but it was just procedural matters,
 2 and I don't think that he needed to be present
 3 because it was just procedural matters.
 4 THE COURT: It was housekeeping, it was
 5 simply housekeeping as to what the witnesses are
 6 going to be and what the Court is going to do as
 7 an introductory statement to the jury, and it's
 8 not a criminal -- it's not the trial or hearing at
 9 all.
 10 MR. SCHIECK: No decisions were made by
 11 the Court.
 12 THE COURT: Absolutely. No decisions
 13 have been made by the Court.
 14 MR. SCHIECK: Thank you.
 15 (Pause in proceedings.)
 16 THE COURT: Good morning, Mr. Thomas.
 17 Good morning, Counsel. This is continuation of
 18 the penalty hearing in the State of Nevada versus
 19 Marlo Thomas. The record will reflect the
 20 presence of the parties and counsel, all officers
 21 of the court, the absence of the jury.
 22 Before we bring the jury in, gentlemen,
 23 let us try to admit our exhibits so, the State,
 24 which exhibits are you going to be admitting and
 25 let's do that outside the presence of the jury.

1 MR. OWENS: We have documents that were
2 admitted in the prior calendar proceeding. I
3 organized them into groups according to subject.
4 First of all, we have the prison records showing
5 disciplinary incidents before the penalty hearing.
6 100 is the summary, and Exhibits 89, 90, 91, 92,
7 93, 94, 95, 96, 97, 98, 99, 104 through 107.

8 THE COURT: Those are disciplinary
9 records from the prison system prior to these
10 murders; is that correct?

11 MR. OWENS: That's correct, your Honor.

12 THE COURT: Mr. Schieck, the State is
13 moving to admit Exhibits 100, which is the
14 summary, and 89 through 107 with a few numbers
15 out. Have you had a chance to review the
16 disciplinary records of your client from his prior
17 time at the Nevada Department of Prisons prior to
18 this murder?

19 MR. SCHIECK: Yes, I have, your Honor.

20 THE COURT: Are you objecting to the
21 introduction of these documents?

22 MR. SCHIECK: Yes, I am, your Honor.
23 We're objecting under NRS 52.235 and NRS 52.245
24 under the rules of evidence because the declarant
25 is not present and these are not the originals.

13

1 THE COURT: You're talking about.

2 MR. SCHIECK: It's the best evidence
3 rule. The original's required on any writing that
4 the State intends to introduce, and in the 52.245
5 is the admissibility of duplicates, and it says
6 they should not be admitted as an original in
7 circumstances that would be unfair to admit the
8 duplicate in lieu of the original.

9 We're objecting on that basis as well as
10 on the basis that these are hearsay documents
11 under both Nevada hearsay law and under the
12 confrontation clause. The declarant of each of
13 these statements should be available to be
14 cross-examined before they're admitted.

15 THE COURT: All right. Under the
16 hearsay definition on the prohibition against
17 hearsay, the statute specifically allows hearsay
18 in the penalty proceeding, so your objection under
19 52.235 is denied. Let me take a look at your
20 other objection under 52.245.

21 MR. SCHIECK: And 52.235, both of those
22 statutes.

23 THE COURT: Let's look at the definition
24 of the original as defined by the legislature. An
25 original of a writing or a recording is the

1 writing or recording itself or any counterpart
2 intended to have the same effect by a person
3 executing or issuing it. An original of a
4 photograph includes the negatives or any print
5 therefrom. If data are stored in a computer or
6 similar device, any printout or output readable by
7 sight, shown accurately to reflect the data, is an
8 original.

9 And it indicates under Chapter 52, To
10 prove the content of a writing, recording, or
11 photograph, the original is required except as
12 otherwise provided in this title. 52.245 says, In
13 addition to the situation governed by subsection
14 2, a duplicate is admissible to the same extent as
15 an original unless a genuine question is raised as
16 to the authenticity of the original; or in the
17 circumstances it would be unfair to admit the
18 duplicate in lieu of the original. And except as
19 otherwise provided in 247, a duplicate is
20 admissible to the same extent as an original if
21 the person or office having custody of the
22 original was authorized to destroy the original
23 after preparing the duplicate, and, in fact, did
24 do so.

25 And 52.247, subsection 2, any

15

1 rerecorded, copied or reproduced record specified
2 in subsection 1 is admissible to the same extent
3 as the original, regardless of whether the
4 original is available for inspection or has been
5 lost or destroyed, if the rerecorded copies or
6 reproduced record is sufficiently authenticated.

7 An enlargement or facsimile of a
8 rerecorded copy or reproduced record is admissible
9 to the same extent as the original.

10 Subsection 4 says, if the governmental
11 agency destroys any of its records and causes
12 those records to be recorded, copied or reproduced
13 pursuant to subsection 1 recorded, copied or
14 reproduced record shall be deemed a public record,
15 and the governmental agency shall render such
16 assistance as is necessary to allow any member of
17 the public access to the recorded, copied, or
18 reproduced record unless it is declared by law to
19 be confidential.

20 So I find no requirement that the prison
21 incident sheets -- do we have the originals or
22 photocopies?

23 MR. OWENS: These are photocopies.

24 THE COURT: I find no reason to question
25 the authenticity of the originals, and therefore

RA 000921

1 the Court is going to accept photocopies over your
2 objection.

3 MR. SCHIECK: Thank you, your Honor.
4 We're also challenging the contents of those
5 without the author being present to testify as to
6 the accuracy of the contents of the statements.

7 THE COURT: I think that I overruled
8 that because I said that written reports which are
9 hearsay are admissible in this proceeding, and
10 there's no requirement at a sentencing hearing,
11 whether it be in this format or whether it be in
12 the sentencing proceedings that the Court conducts
13 on a daily basis, that the people who write the
14 reports be present.

15 MR. SCHIECK: And we anticipate that the
16 State's going to offer another package of
17 documents relating to --

18 THE COURT: So 100, all those list you
19 gave me, 89 through 99, 104 through 107 are
20 admitted.

21 What other documents do you seek to
22 admit?

23 (Thereupon, State's Exhibit 89-100 &
24 104-107 were admitted into evidence.)

25 MR. OWENS: We had marked as exhibit for

17

1 identification No. 116, additional packet of
2 prison disciplinary reports for the years -- it
3 goes from '96 to 2004 with the summary page on
4 top. These are certified copies of records kept
5 in the ordinary course of the activities of the
6 public agency being the prison, and we've marked
7 as Proposed Exhibit 116A the first page of a
8 disciplinary appeal report for an incident
9 occurring back in 1998 as well. That report has a
10 second page, but we felt that the information
11 contained thereon, which is a statement by the
12 defendant, might be prejudicial to his case
13 because it mentions being on death row, but
14 they're welcome to attach that if they choose to
15 do so.

16 THE COURT: Mr. Schieck, are you
17 objecting to Proposed Exhibit 116 and 116A being
18 admitted?

19 MR. SCHIECK: On the same basis, your
20 Honor.

21 THE COURT: And on the same basis plus
22 additional fact that these are certified copies
23 your objection is overruled. 116 and 116A will be
24 admitted.

25 / / /

1 (Thereupon, State's Exhibit 116 & 116A
2 were admitted into evidence.)

3 MR. SCHIECK: We would not request that
4 the second page be included because it does
5 reference the fact that Mr. Thomas had received
6 the death penalty previously, and the jury is not
7 entitled to know that information.

8 THE COURT: That's nowhere listed in
9 116; is that correct?

10 MR. OWENS: I've been through it twice,
11 and I have not seen any reference to it. I called
12 Mr. Schieck about a month ago and invited him to
13 go through his packet, he's got a duplicate, and
14 look, and I don't think that he's discovered any
15 reference in there, and that's the best we can do.

16 THE COURT: Are there any other
17 documents that you're going to admit in this
18 phase?

19 MR. OWENS: Yes. We have Exhibits 85
20 and 86 which are juvenile certification order and
21 petition.

22 THE COURT: Are those certified copies?

23 MR. OWENS: No. We're going to be -- we
24 have witnesses here that are going to talk about
25 them.

19

1 THE COURT: To authenticate and talk
2 about them.

3 MR. OWENS: Yes.

4 MR. SCHIECK: We have the same objectio
5 of those without the declarant or the author of
6 the document being present as opposed to someone
7 summarizing.

8 THE COURT: Your objection is overruled.

9 MR. OWENS: An additional consideration
10 on that is that these are admitted because we had
11 custodian of records who testified previously and
12 laid a foundation for them in this proceeding;
13 that's why they're in evidence in this case. But
14 we are going to call some witnesses to talk about
15 them because we want --

16 THE COURT: 85 and 86 will be admitted.
17 They were admitted the last time around through
18 the custodian of records, and I don't find it
19 necessary to call the custodian of record back to
20 identify a document that was admitted at the first
21 trial which has been kept in the care, custody,
22 and control of the court and hasn't changed since
23 the last trial.

24 (Thereupon, State's Exhibit 85 & 86
25 were admitted into evidence.)

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1 MR. OWENS: The Court could take
2 judicial notice of these. These are juvenile
3 certifications that went up in the district court
4 under the case numbers appropriate.

5 THE COURT: The Court will also take
6 judicial notice that they're a matter of public
7 file here in the court system under the
8 appropriate case numbers.

9 MR. OWENS: And then we have Exhibits
10 87, 102 and 108, and these are -- well, it's a
11 PSI, two PSI's, and we do have a person --
12 custodian here, but there was a custodian that
13 testified last time from P & P as well and laid a
14 foundation on those. And furthermore, the Court
15 could take judicial notice of these documents.
16 108 is an incident report from the North
17 Las Vegas Police Department, and it's referenced
18 in the PSI's, and so the witness who testified
19 last time identified that as a document that was
20 associated with the information in the PSI's.
21 We're offering that at this time. I think last
22 time we called a witness based upon request from
23 the Court and the defense counsel as well. In
24 fact, they filed a motion to try to limit some of
25 the witnesses that we were going to call in this

21

1 proceeding. I don't think we're calling the
2 witness on this case. There was theft of a
3 bicycle. There was -- this involved a battery
4 that occurred. These are witnesses that we had
5 available to us and we chose not to call, so we're
6 going to offer that report in lieu of that
7 testimony.

8 THE COURT: All right.

9 MR. SCHIECK: Basically the same
10 objection to those, your Honor. They are
11 out-of-court statements. PSI's we know are full
12 of statements that the writing officer claims to
13 have obtained from any variety of people, and
14 clearly those denied the right to confrontation as
15 well as hearsay.

16 THE COURT: I understand your position.
17 The legislature requires the Department of Parole
18 and Probation to prepare presentence report. They
19 refuse to allow a sentencing court to sentence
20 until a presentence report has been written. It's
21 written at the request of the legislature, and
22 because it's written and mandated by the
23 legislature, I'm going to -- and it's given to
24 judges every day of the week to sentence people,
25 and there's no reason why the jury who are doing

1 the sentencing in this case should not receive
2 those prior presentence reports. So therefore 87
3 and 102 will be admitted. If 102 talks about the
4 incident and then they give a summary of the
5 incident and the backup documents from which they
6 get the summary is 108, the actual police report,
7 then 108 will be admitted also.

8 All right. Bring the panel in,
9 Jonathan.

10 (Thereupon, State's Exhibit 87, 102, 108
11 were admitted into evidence.)
12 (Whereupon, the jury entered
13 the courtroom.)

14 THE COURT: Good morning, ladies and
15 gentlemen. Welcome back finally to the State of
16 Nevada versus Marlo Thomas. I apologize for the
17 delay in getting started this morning, but now
18 we're finally here and ready to go.

19 The record will reflect the presence of
20 the parties and counsel, all officers of the
21 court, the full jury including alternate jurors.

22 You have now decided -- the deliberating
23 jurors have now decided what aggravating
24 circumstances exist, what mitigating circumstances
25 you found and done the weighing process and

23

1 determined that the mitigating circumstances do
2 not outweigh the aggravating circumstances and
3 therefore all four available statutory penalties
4 for first degree murder remain available to you as
5 the sentencing body. The law now indicates that
6 additional information will be given to you by
7 both the prosecution and the defense which may aid
8 you in reaching an appropriate verdict later today
9 or sometime tomorrow.

10 Counsel for the State, are you ready to
11 call witnesses?

12 MR. SCHWARTZ: Yes, Your Honor.

13 THE COURT: You may proceed.

14 MR. OWENS: Our first witness will be
15 Pat Smith, your Honor.

16 Whereupon,

17 PATRICIA SMITH,
18 was administered the following oath by the court
19 clerk.

20 THE CLERK: You do solemnly swear that
21 the testimony you give shall be the truth, the
22 whole truth, and nothing but the truth so help you
23 God.

24 THE WITNESS: I do.

25 THE CLERK: State your name and spell

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1 your last name for the record.

2 THE WITNESS: My name is Patricia Ann
3 Smith. P-A-T-R-I-C-I-A A-N-N S-M-I-T-H.

4
5 DIRECT EXAMINATION

6 BY MR. OWENS:

7 Q. You're employed for the Department of
8 Parole and Probation for Juvenile Services?

9 A. Juvenile justice, yes.

10 Q. And what do you do for the juvenile
11 division?

12 A. Currently I'm the record supervisor.

13 Q. And in preparation for your testimony
14 today, did you have occasion to review some
15 records for an individual named Marlo Demetrius
16 Thomas?

17 A. I did.

18 Q. And in particular that would be a
19 petition and a certification order?

20 A. Yes.

21 MR. OWENS: If I may approach, your
22 Honor.

23 THE COURT: You may.

24 BY MR. OWENS:

25 Q. You've got some documents you're looking

1 Q. And in that petition it lists the
2 history, juvenile criminal history, of the
3 offender usually?

4 A. The history of that charge and that
5 charge only.

6 Q. And it contains other information to
7 assist the Court in its determination?

8 A. Right.

9 Q. And the number on this particular
10 petition was J29999?

11 A. That's the case number.

12 Q. And I'm going to show you now what's
13 marked as Exhibit No. 86. This is a certification
14 order?

15 A. Correct.

16 Q. This is the order that the Court would
17 give as a follow-up to the petition?

18 A. Correct. It's a recommendation.

19 Q. And this is for Marlo Demetrius Thomas
20 also?

21 A. Correct.

22 Q. It's got the same case number?

23 A. Yes, it does.

24 Q. And this is the document that would
25 actually certify him as an adult to be treated as

1 at there. Those are some documents you brought
2 with you?

3 A. Right.

4 Q. I'm going to show you what's been marked
5 State's Exhibits 85 and 86, and ask if you
6 recognize those documents.

7 A. Yes, I do.

8 Q. Are those true and accurate copies of
9 the documents that we're talking about and the
10 documents on file with the juvenile services?

11 A. Yes, sir.

12 Q. And let's take them one at a time.
13 Exhibit No. 85, you've got your copy right there
14 to refer to?

15 A. Yes, I do.

16 Q. No. 85, for the record this is a
17 document that's simply entitled petition. What is
18 that petition?

19 A. Well, when people are juveniles commit
20 crimes and the district attorney's office wants to
21 prosecute them, they file a petition.

22 Q. And this is a document that's used to
23 take a juvenile offender and put them up into
24 adult court under certain circumstances?

25 A. It could be.

1 an adult for purposes of the charge contained
2 therein?

3 A. There is an order that's written by the
4 probation officer with a recommendation for
5 certification, yes.

6 Q. Now, you had mentioned before court that
7 you don't like to read?

8 A. I don't like to read in front of a bunch
9 of people.

10 Q. I told you I'd keep it to a minimum. If
11 you would for one moment turn with me to page 4 of
12 that certification order.

13 A. Okay.

14 Q. There's -- I'm referring down to the
15 second paragraph from the bottom there where it
16 begins "Mrs. Thomas reports"?

17 A. Right.

18 Q. This would be some information that was
19 received from the mother as a part of the report?

20 A. I would imagine. I didn't write this
21 report, so I would imagine that the probation
22 officer who wrote this report had spoke to the
23 mother.

24 Q. Can you just go ahead and read those two
25 paragraphs there on the bottom of the page for us?

1 MR. SCHIECK: For the record, we'd
2 object to the admissibility on something that she
3 imagines someone interviewed the mother and got
4 this information.
5 THE COURT: Your objection is noted but
6 overruled.
7 BY MR. OWENS:
8 Q. Go ahead.
9 A. Mrs. Thomas reports her relationship
10 with Marlo is very good and Marlo is a spoiled,
11 rotten, and somewhat independent. She rates her
12 degree of parental control as fair. Mrs. Thomas
13 states since Marlo's older brother is no longer
14 living in the home Marlo believes he is able to do
15 his dirt. Mrs. Thomas is not married to Marlo's
16 biological father Bobby Lewis who has been
17 incarcerated in Nevada prison system for the past
18 ten years on a charge of use of a deadly weapon.
19 Q. And then if we can turn to that next
20 page, page 5, up at the top and continue reading
21 there?
22 A. Mrs. Thomas states that there has been
23 no indication or suspicion Marlo has been involved
24 in drugs, but she does believe he will be getting
25 into drugs if he thinks he can make a quick buck.

29

1 She describes Marlo as a child who grew up too
2 fast, who is basically quiet, a loner or a
3 follower.
4 Q. If you turn back to page 2 there in the
5 copy that you have, and I'm going to put that on
6 the screen. We look there on page 2 and you look
7 over on page 3, it begins by going through the
8 facts of the charge for which he's being
9 certified; is that right?
10 A. Yes.
11 Q. And then down beginning with Paragraph 2
12 on the bottom of page 2 and then continuing on to
13 page 3, there's a history in there of his contacts
14 with the juvenile system to a certain extent?
15 A. Yes.
16 Q. Would that be accurate?
17 A. Yes.
18 Q. And then if we turn over to Exhibit
19 No. 85, we see a juvenile petition that you've
20 described. In fact, it's a whole series of
21 petitions?
22 A. That's correct.
23 Q. For different charges that the defendant
24 Mr. Marlo Thomas faced in juvenile court over a
25 significant period of time; is that correct?

1 A. Correct.
2 MR. OWENS: Thank you. That's all the
3 questions that I have.
4 THE COURT: Cross-examination, Counsel.
5
6 BY MR. SCHIECK: CROSS-EXAMINATION
7 Q. Mrs. Smith, you didn't prepare any of
8 these reports?
9 A. No, sir.
10 Q. You never interviewed any of the people
11 for this information?
12 A. No, sir.
13 Q. You never did any of the background to
14 determine whether any of this is accurate?
15 A. No, sir.
16 Q. In that petition does it indicate that
17 Mrs. Thomas had told the officer that Marlo grew
18 up too fast?
19 A. That's what I read, yes.
20 Q. You don't know what that means though?
21 You never talked to Georgia Thomas?
22 A. No, sir.
23 Q. You never talked to Marlo Thomas?
24 A. No, sir.
25 Q. You're basing your testimony solely on

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1 what you see prepared in some documents years ago
2 by someone else?
3 A. Yes, sir.
4 MR. SCHIECK: Thank you. No further
5 questions, your Honor.
6 THE COURT: Anything else?
7 MR. OWENS: No, your Honor.
8 THE COURT: Ladies and gentlemen, do yo
9 have any questions for Ms. Smith? All right.
10 Ms. Smith, thank you, ma'am for your testimony.
11 You're excused. Please don't discuss your
12 testimony with anyone other than the attorneys.
13 Counsel, you may call your next witness.
14 MR. OWENS: John Springgate, your Honor
15
16 JOHN SPRINGGATE,
17 was administered the following oath by the court
18 clerk.
19 THE CLERK: You do solemnly swear that
20 the testimony you give shall be the truth, the
21 whole truth, and nothing but the truth so help you
22 God.
23 THE WITNESS: I do.
24 THE CLERK: State your name and spell
25 your last name for the record.
THE WITNESS: John Springgate,

RA 000925

1 S-P-R-I-N-G-G-A-T-E.

2

3

4 BY MR. OWENS: DIRECT EXAMINATION

5 Q. Mr. Springgate, you're employed by the
6 Department of Parole and Probation?

7 A. Yes, sir.

8 Q. What's your position there?

9 A. Presently I'm a lieutenant.

10 Q. And back in the 1990's toward the end of
11 the 1990's, you had some responsibilities with
12 regard to presentence investigation reports?

13 A. That's correct.

14 Q. And you currently do as well?

15 A. I'm in supervision now.

16 Q. What's a presentence investigation
17 report?

18 A. It's a report prepared for the Court.
19 It delves into criminal history and social history
20 of the person about to be sentenced, makes a
21 recommendation for sentencing.

22 Q. And these are sometimes referred to as
23 PSI's?

24 A. Yes, sir.

25 Q. And so if somebody is charged with a

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1 crime and is convicted, then your department
2 prepares a report for the judge.

3 A. That's correct.

4 Q. And what's the purpose of that report?

5 A. The report is to make the Court familiar
6 with the person so that he can make -- he or she
7 can make the best decision possible.

8 Q. As far as sentencing?

9 A. As far as sentencing, yes.

10 Q. Can you give us an idea what sort of
11 information goes into a report and how that
12 information is obtained?

13 A. Yes. The information is gained from
14 files. We go to the NCIC, the FBI file, and that
15 relates to criminal history. We also have access
16 to CIJS and Scope reports and various other
17 separate for that. We also ask for criminal
18 history from the offender, and we get social
19 history from him and from any other reports that
20 are available.

21 Q. Then you put that into that report form
22 for the Court?

23 A. Yes.

24 Q. I want to show you a couple of documents
25 which have been marked as State's Exhibits

1 Nos. 102 and 87 and ask you if you recognize those
2 documents?

3 A. Yes, I do.

4 Q. Are those presentence investigation
5 reports that were prepared by your department?

6 A. Yes, they are.

7 Q. And, in fact, one of them shows a review
8 by yourself?

9 A. No, sir.

10 Q. Were you involved in the preparation of
11 either of these reports back then?

12 A. No, I was not. I was in a subsequent
13 one.

14 Q. A different report but one that we don't
15 have here?

16 A. Correct.

17 Q. And these are reports that were prepared
18 on the defendant, Marlo Thomas, Marlo Demetrius
19 Thomas?

20 A. Correct.

21 Q. They're both prepared on the same
22 individual?

23 A. Yes, they are.

24 Q. These are true and accurate copies of
25 the original reports that resided with your state

35

1 agency?

2 A. Yes, sir.

3 Q. Now, if I may, I'd like you to look at
4 the screen to your left there, and I'm going to go
5 ahead and place Exhibit No. 87 on our camera. Can
6 you see that there?

7 A. Yes, I can.

8 Q. This is a presentence report that was
9 prepared. Can you see the date there?

10 A. Yes.

11 Q. Tell us about that.

12 A. The date is November 20, 1990.

13 Q. And from this can you tell information
14 such as the charge that the report was prepared
15 on?

16 A. Yes. The charge was for attempt
17 robbery. The penalty for that would be one to
18 seven-and-a-half years in the Nevada Department of
19 Prisons.

20 Q. And then there's a lot of additional
21 personal information that's contained on that
22 first page?

23 A. Correct.

24 Q. And then going to page 2, we find a
25 number of identifying statistics for that

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1 particular individual?
 2 A. Yes.
 3 Q. Including his FBI and CII numbers?
 4 A. Right.
 5 Q. That's for purposes to make sure that
 6 you've got the right person in the report?
 7 A. Yes, sir.
 8 Q. Then on page 3 we begin a whole series
 9 of things that's referred to as a criminal
 10 history. Tell us about that.
 11 A. This is information gleaned from the
 12 sources I named earlier. It provides for the
 13 arrest date, the offense and the disposition.
 14 Q. And these are listed first in
 15 chronological order?
 16 A. Correct.
 17 Q. We have a heading that begins with
 18 juvenile arrest date?
 19 A. Yes.
 20 Q. That would show the date of arrest, what
 21 the charge was and then the disposition of that
 22 charge?
 23 A. Right.
 24 Q. And then if I can have you look two
 25 items down there, what's that second charge,

1 July 6th of 1984?
 2 A. That would be a charge of robbery
 3 amended to battery.
 4 Q. And the result was a formal probation
 5 and the treatment ending?
 6 A. Yes.
 7 Q. These dispositions are dispositions that
 8 occurred in juvenile court?
 9 A. Correct.
 10 Q. But you place these on this report even
 11 though this was an adult one so the judge would
 12 know about them?
 13 A. Right. That's usually very germane to
 14 what the judge may decide to do with this person
 15 especially under the age of 24.
 16 Q. I want to show you what's been marked as
 17 State's Exhibit No. 108. That's an incident
 18 report from the North Las Vegas Police Department?
 19 A. Yes.
 20 Q. That has reference to the second entry
 21 here on July 6th of 1984?
 22 A. That's correct.
 23 Q. This report contains the factual
 24 information and background that was the basis for
 25 the report that's provided for the judge in the

1 PSI?
 2 A. Yes, sir.
 3 Q. And that contains the history of what
 4 happened in that particular incident that began as
 5 a robbery and then was reduced to a battery; is
 6 that correct?
 7 A. Yes, sir.
 8 MR. OWENS: I think the Court was
 9 awaiting ruling on the use of this document 108 at
 10 this time. We'd ask to be able to publish that.
 11 MR. SCHIECK: We'd objected previously,
 12 your Honor, on the basis of hearsay and
 13 confrontation clause and the declarant is not able
 14 to be cross-examined.
 15 THE COURT: Your objections are noted
 16 and overruled. 108 will be admitted.
 17 (Thereupon, State's Exhibit 108
 18 was admitted into evidence.)
 19 BY MR. OWENS:
 20 Q. Then we go over to page 4 on that same
 21 document that we're looking at, No. 87, that 1990
 22 PSI. Once again, the criminal history of the
 23 defendant continues, and then we have something
 24 called a probation adjustment paragraph. Tell us
 25 what that is.

1 A. What the Court is being advised here in
 2 this report is what happened to this person in
 3 response to the criminal justice system's or
 4 juvenile justice system's attempt to rehabilitate
 5 this person, what his response was.
 6 Q. In other words, how he did on probations
 7 or treatments or incarcerations?
 8 A. Right. All these things are noted from
 9 the records delivered by juvenile court.
 10 Q. Then we have a section called the plea
 11 bargaining. This would show the nature of the
 12 agreement that caused the defendant to plead
 13 guilty to the charge?
 14 A. Right.
 15 Q. In this case that was a reduced charge?
 16 A. Right.
 17 Q. Then you have information about the
 18 offense itself?
 19 A. It's a summary, a narrative.
 20 Q. Information about the victim and then
 21 the defendant's statement. Tell us what that is.
 22 A. When the person is interviewed at the
 23 Clark County Detention Center or other place,
 24 sometimes in the office if they're not
 25 incarcerated, we indicate what their statement is.

1 They have the opportunity to make a statement to
 2 the Court.
 3 Q. And this particular incident involved a
 4 robbery that occurred in North Las Vegas, a
 5 gentleman at a convenience store in 1990; is that
 6 correct?
 7 A. Right, mm-hmm.
 8 Q. It contains some social information on
 9 the defendant; is that right?
 10 A. Yes.
 11 Q. And then eventually an evaluation and
 12 then a recommendation for the Court?
 13 A. Correct.
 14 Q. This particular report was prepared by
 15 Norma Price?
 16 A. Right.
 17 Q. And the person who prepared this report,
 18 you had an opportunity to review their testimony
 19 with regard to information they placed in this
 20 report at a prior hearing in this matter?
 21 A. Yes.
 22 Q. And did you acquaint yourself with the
 23 reaction of the defendant when the author of this
 24 report went to him and asked him to give
 25 information about his participation in the crime?

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1 A. Yes.
 2 Q. And do you remember who the officer was
 3 who prepared this report?
 4 A. Norma Price.
 5 Q. And what was the response of the
 6 defendant in this particular one? Was he
 7 cooperative with her?
 8 A. No.
 9 Q. What happened?
 10 A. I would refer to that statement.
 11 MR. OWENS: Court's indulgence. I'm not
 12 seeing the reference. I'll ask Mr. Schwartz to
 13 take a look for it. If we find it, we'll come
 14 back to it.
 15 BY MR. OWENS:
 16 Q. I want to show you on the screen what
 17 you've identified as Exhibit No. 102. This is
 18 another presentence report that was prepared, and
 19 can you see the date on that particular report?
 20 A. Yes, I can. That's June 6th of 1996.
 21 Q. This particular one involved charges of
 22 battery with substantial bodily harm?
 23 A. Yes.
 24 Q. And once again it follows the same
 25 format as the other one, but this one was prepared

1 about six years later, so it has some updated
 2 information?
 3 A. Mm-hmm.
 4 Q. As far as the criminal history of the
 5 defendant?
 6 A. Right.
 7 Q. And other matters that are contained
 8 therein; is that correct?
 9 A. It's updated, has all the old
 10 information and adds anything that's new.
 11 Q. And this report was prepared by Michael
 12 Compton?
 13 A. Correct.
 14 MR. OWENS: Court's indulgence for a
 15 moment, your Honor. Your Honor, we'll go ahead
 16 and pass the witness subject to.
 17 THE COURT: Any examination for
 18 Mr. Springgate?
 19 MR. SCHIECK: Yes, I do, your Honor.
 20 Thank you.
 21
 22 CROSS-EXAMINATION
 23 BY MR. SCHIECK:
 24 Q. Mr. Springgate, you didn't interview any
 25 of the people or prepare any of these documents;

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1 is that correct?
 2 A. Neither of those two documents, no, I
 3 did not.
 4 Q. You're just basing your testimony on
 5 what you read in here?
 6 A. Yes, sir.
 7 Q. You just have to assume that it's
 8 accurate?
 9 A. I am making that assumption.
 10 Q. Do you recall that Mr. Thomas at the
 11 time that this report was prepared was 17 years
 12 old?
 13 A. Yes.
 14 Q. And that he was sent to prison for a
 15 number of years at age 17?
 16 A. Yes.
 17 Q. Do you know how long he was sent to
 18 prison, what the sentence was?
 19 A. I believe his sentence was for six
 20 years, and I believe that he did five of those.
 21 Q. That would be an adult prison?
 22 A. Yes.
 23 Q. It's a 17-year-old juvenile going to an
 24 adult prison to serve a number of years?
 25 A. He was certified as an adult.

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1 Q. I understand that, but he was still a
 2 juvenile?
 3 A. Yes, sir.
 4 Q. Although certified for criminal justice
 5 purposes as an adult?
 6 A. Yes, sir.
 7 Q. Does it make him any older than he was
 8 when he went to prison?
 9 A. No, sir.
 10 Q. Isn't it true, and the report indicates,
 11 that the individual that was allegedly robbed was
 12 not injured at all; do you recall that?
 13 A. No, I don't recall -- I have reason to
 14 believe there was no lasting injuries, but to say
 15 he was not injured I don't think that's accurate.
 16 Q. If I can show you on the screen, would
 17 that help?
 18 A. Yes, sir.
 19 Q. Under victim information, what does it
 20 indicate?
 21 A. It says he was not injured and does not
 22 wish to speak in court.
 23 Q. He didn't even bother to come to court
 24 at the time of sentencing?
 25 A. He was a juvenile as well as I

1 understand.
 2 Q. The question was he didn't come to court
 3 at the time of sentencing?
 4 A. No, sir.
 5 Q. According to the report which you assume
 6 was accurate, he was not injured?
 7 A. Right.
 8 Q. And the defendant gave a statement,
 9 correct? Mr. Thomas gave a statement to the P & P
 10 officer; do you recall that?
 11 A. No, sir, I don't.
 12 Q. You didn't review the statement that
 13 Mr. Thomas gave?
 14 A. I believe I reviewed it sometime ago,
 15 but I don't remember right now. I'd be happy to
 16 look it over if you'd put it on the screen.
 17 Q. There's a summary of his statement there
 18 under defendant's statement. Can you see it?
 19 A. Yes, sir, I can.
 20 Q. Isn't it true that he indicates that the
 21 victim was trying to buy narcotics from him and
 22 his cousin?
 23 A. Right.
 24 Q. And he admitted that he took the
 25 victim's money and divided the cash?

1 A. Yes, that's what it says.
 2 Q. So it's more like a drug deal that went
 3 bad other than a robbery?
 4 A. I don't know.
 5 Q. You don't know because you haven't
 6 reviewed any other facts in the case? You haven't
 7 reviewed the reports?
 8 A. I did review the report.
 9 Q. Other than the PSI report?
 10 A. No, not beyond that.
 11 Q. And you didn't talk to the victim and
 12 ask him about that?
 13 A. No, sir.
 14 MR. SCHIECK: No further questions, your
 15 Honor.
 16 THE COURT: Any redirect, Mr. Owens?
 17
 18 REDIRECT EXAMINATION
 19 BY MR. OWENS:
 20 Q. That defendant's statement, that's the
 21 defendant's version of what happened?
 22 A. Right.
 23 Q. It's not necessarily the victim's
 24 version?
 25 A. Right.

1 Q. I found that reference we were talking
 2 about. It wasn't in Ms. Price's report. It was
 3 in the 1996 PSI, and the testimony I'm referencing
 4 is Mr. Compton who prepared that report.
 5 A. Right.
 6 Q. And for the record I'm referring to
 7 page 188 of the transcript from the prior hearing.
 8 Down at the bottom, Mr. Compton was
 9 asked, "When you interviewed the defendant, what
 10 was his attitude?" And his answer was, "He wasn't
 11 very cooperative. He didn't want to talk to me."
 12 He said that he didn't know why he was talking to
 13 me because he had more important things to worry
 14 about."
 15 Is that your understanding of the prior
 16 testimony?
 17 A. Yes.
 18 MR. OWENS: That's all that I have, your
 19 Honor.
 20 THE COURT: Any recross? Ladies and
 21 gentlemen, do you have any questions for
 22 Mr. Springgate from the Department of Parole and
 23 Probation? Mr. Schieck, any additional questions?
 24 MR. SCHIECK: No, your Honor.
 25 THE COURT: Thank you, sir, for your

1 testimony. You may be excused. Please do not
 2 discuss your testimony with anyone other than the
 3 attorneys.
 4 Counsel, you may call your next witness.
 5 MR. OWENS: Your Honor, the next witness
 6 will be another reading.
 7 THE COURT: That will be fine.
 8 MR. OWENS: It's Mr. Alkareem Hanifa who
 9 testified in a prior proceeding in this case, and
 10 we have Mr. Air shone it's con here to do the
 11 reading for Mr. Hanifa.
 12 THE COURT: Do you have a copy for me to
 13 follow along on here?
 14 Whereupon,
 15
 16 was administered the following oath by the court
 17 clerk.
 18 THE CLERK: You do solemnly swear that
 19 you will faithfully and accurately read the
 20 transcript of Alkareem Hanifa to the best of your
 21 ability so help you God.
 22 THE READER: I do.
 23 THE CLERK: I need your name.
 24 THE COURT: You have just sworn to read
 25 Mr. or Ms. Alkareem Hanifa's past testimony

1 correctly, and we need your name as the reader.
 2 THE READER: My name is Erdan Iscan,
 3 E-R-C-A-N I-S-C-A-N.
 4
 5 DIRECT EXAMINATION
 6 BY THE DISTRICT ATTORNEY.
 7 Q. Sir, I'm going to ask you some questions
 8 and then defense counsel will be given an
 9 opportunity to question you. If you can speak up
 10 into the microphone so all the members of the jury
 11 can hear, we'd appreciate that.
 12 Sir, I want to direct your attention to
 13 December the 28th, 1989. Were you staying at the
 14 Arrowhead Motel at 2403 Las Vegas Boulevard North?
 15 A. Yes, I was.
 16 Q. While you were in your room at the
 17 Arrowhead Motel on that date, did two people have
 18 occasion to knock on your door?
 19 A. Yes, they did.
 20 Q. What did these individuals want?
 21 A. They want to know did I want to buy any
 22 crack cocaine.
 23 Q. And what, if anything, did you say to
 24 them?
 25 A. I told them no.
 Q. What happened after you told these two

1 individuals no?
 2 A. When they attempted to walk over to the
 3 door, I attempted to close it behind their backs,
 4 and Marlo and the other guy pushed the door back
 5 and kicked the door back in and proceeded to give
 6 me a good whooping.
 7 Q. When you say Marlo and the other guy,
 8 did there come a time after the incident occurred
 9 that you learned the identity of both individuals?
 10 A. Yes, by the manager of the hotel.
 11 Q. And what did you learn the name of the
 12 individuals to be?
 13 A. One was named Marlo and the other one
 14 was named Champ.
 15 Q. Did Marlo appear to be the younger of
 16 the two or the older of the two?
 17 A. The younger.
 18 Q. Now, you testified that these two
 19 individuals forced their way into your motel room
 20 and began to beat you up; is that correct?
 21 A. That's correct.
 22 Q. Would you describe for the members of
 23 the jury what happened, what they did to you?
 24 A. When I attempted to -- when I told them
 25 I didn't want to buy any drugs and I attempted to

1 close the door, Marlo turned around with Champ and
 2 they forced their way back into the motel room
 3 kicking the door open, and I was pushed back. And
 4 I got into a fistfight with the Champ, the bigger
 5 of the two, at the time I was fight Champ, Marlo
 6 went into my pocket and attempted to take the
 7 money out of my pocket. At that time I was
 8 fighting Champ man to man, and Marlo was standing
 9 to the side. He ran outside the door as me and
 10 Champ were on the ground. He ran outside and
 11 picked up a boulder and attempt to pop -- bust me
 12 in my head with it. As I seen him having the
 13 boulder in his hand, he threwed it and I turned my
 14 head to the side. After he got the money out of
 15 my pocket, they walked out the room and left me
 16 inside the room by myself.
 17 Q. After they left is when you contacted
 18 the police?
 19 A. Yes. The assistant -- the manager of
 20 the hotel called the police for me.
 21 Q. Okay. Did you sustain any injuries as a
 22 result of what occurred to you on December the
 23 28th?
 24 A. Yes, I did. I broke my right wrist, my
 25 hand and I received a bump that you see on my

1 forehead -- that you see on my forehead now. I
 2 lost a couple of teeth in the front part of my
 3 mouth.
 4 Q. Are you certain that it was the
 5 individual named Marlo who had the boulder in his
 6 hand and threw it at your head?
 7 A. Oh, yes, definitely. I wasn't blind,
 8 and I wasn't drunk.
 9 Q. When you say boulder -- how big was this
 10 rock that was thrown? I'm sure the jury can --
 11 A. This big. He had it over his head, and
 12 I was laying on the ground fighting Champ, and I
 13 looked up and I saw him. He threw it down, he was
 14 dropping it, and I turned to the side and hit the
 15 floor this.
 16 Q. In view of the fact that this occurred
 17 in 1989, you would be able to recognize this
 18 fellow Marlo if you saw him again?
 19 A. Yes, I would.
 20 Q. Do you see him in the courtroom?
 21 A. Yes, I do.
 22 Q. Would you indicate where he's located
 23 and describe what he's wearing?
 24 A. Here.
 25 THE DISTRICT ATTORNEY: The record

1 reflect he is pointing to the defendant, your
 2 Honor.
 3 THE COURT: Record will so reflect.
 4 THE DISTRICT ATTORNEY: Thank you. No
 5 further questions.
 6 THE COURT: Cross-examination.
 7 THE DEFENSE ATTORNEY: Yes, briefly your
 8 Honor.
 9 Q. Mr. Kareem is it?
 10 A. Yes, it is.
 11 Q. Did you know Marlo before this incident?
 12 A. No, I didn't. I never met the man
 13 before in my life.
 14 Q. How did you come to identify him?
 15 A. Let me start the story.
 16 Q. Were you shown a police photo lineup?
 17 A. No, no.
 18 Q. Were you shown a live lineup?
 19 A. No.
 20 Q. Did the police tell you that they had
 21 arrested him?
 22 A. No. The police asked me to give a
 23 description of the individual who attempted to --
 24 who robbed me and who attempted to take my life.
 25 I gave them a physical description. They brought

1 the individual back to the motel room and asked me
 2 if this was the individual, and I pointed him out
 3 and said, yeah, this is him.
 4 Q. All right. So they brought him back.
 5 Was this daytime, nighttime when they had done
 6 this, when they had asked to you identify him?
 7 A. I thought it was nighttime, nighttime.
 8 The light was -- you could see very well.
 9 Q. So they brought one single individual to
 10 you and --
 11 A. Right.
 12 Q. -- and sat him in front of you. And
 13 this was how long after the attempt on your life
 14 as you explained it?
 15 A. About three hours.
 16 Q. About three hours or so?
 17 A. Yes.
 18 Q. And so they didn't -- there was nobody
 19 else there that they asked you to differentiate?
 20 A. No, no.
 21 Q. They just said is this the guy?
 22 A. Correct.
 23 Q. What was the name of this motel; do you
 24 remember?
 25 A. Arrowhead.

1 Q. And where's that located at?
 2 A. It's at close to Carey and Las Vegas
 3 Boulevard.
 4 Q. Carey and Las Vegas Boulevard?
 5 A. Yes.
 6 Q. Okay. So it's out there near Nellis Air
 7 Force Base?
 8 A. Right.
 9 Q. And you say it was a boulder this big?
 10 A. As big as my hand.
 11 Q. Is there a parking lot?
 12 A. Oh, yes.
 13 Q. Is there a parking lot there?
 14 A. Yes.
 15 Q. Has it got asphalt or is it a desert
 16 parking lot?
 17 A. Both.
 18 THE DEFENSE ATTORNEY: I have no furt
 19 questions.
 20 THE COURT: Redirect, Counsel.
 21
 22 REDIRECT EXAMINATION
 23 BY THE DISTRICT ATTORNEY:
 24 Q. Sir, you indicate that you were robbed.
 25 What was taken with you?

1 A. My wallet with all my ID. Basically the
 2 cash, \$350.
 3 Q. So your wallet, your ID and \$350 in
 4 cash?
 5 A. Correct.
 6 Q. Okay. Also, when Mr. LaPorta was asking
 7 you about the boulder that you saw the defendant
 8 had in his hand, was he holding it with one hand
 9 or with two hands?
 10 A. Two hands.
 11 Q. Okay, thank you.
 12 THE DISTRICT ATTORNEY: I have no
 13 further questions.
 14 THE COURT: Recross?
 15 THE DEFENSE ATTORNEY: No, no questions,
 16 your Honor.
 17 THE COURT: Thank you, Mr. Iscan, for
 18 reading the testimony of Mr. Hanifa. And you may
 19 be excused.
 20 Counsel, you may call your next witness.
 21 MR. SCHWARTZ: Your Honor, the State
 22 would call Cathy Frazier.
 23 / / /
 24 / / /
 25 / / /

1 Whereupon,
 2 CATHY FRAZIER,
 3 was administered the following oath by the court
 4 clerk.
 5 THE CLERK: You do solemnly swear that
 6 the testimony you give shall be the truth, the
 7 whole truth, and nothing but the truth so help you
 8 God.
 9 THE WITNESS: Yes.
 10 THE CLERK: State your name and spell
 11 your name for the record.
 12 THE WITNESS: Cathy Frazier, C-A-T-H-Y
 13 F-R-A-Z-I-E-R.
 14
 15 DIRECT EXAMINATION
 16 BY MR. SCHWARTZ:
 17 Q. Directing your attention to August the
 18 12th, 1998, where were you employed?
 19 A. At the Broadway at the Meadows Mall.
 20 Q. And was the Broadway a department store?
 21 A. Yes.
 22 Q. And do you recall where the Meadows Mall
 23 was located?
 24 A. Yes. On Meadows Lane.
 25 Q. That's here in Clark County?

1 A. Yes.
 2 Q. What type of job did you have at the
 3 Broadway?
 4 A. I did undercover security.
 5 Q. When you say undercover security, does
 6 that mean you were in plainclothes?
 7 A. Yes, sir.
 8 Q. Were you working on August the 12th,
 9 1988, in your capacity as an undercover security
 10 officer?
 11 A. Yes.
 12 Q. And did something unusual take place on
 13 that particular date?
 14 A. Yes. We had six juveniles, I believe
 15 they were juveniles, come in, and they were piling
 16 clothes by the door and shoplifting and taking
 17 them out of the store right before closing.
 18 Q. Did you make that observation?
 19 A. Yes, sir.
 20 Q. When you observed these six juveniles
 21 stealing clothing from the Broadway, what, if
 22 anything, did you do?
 23 A. I called for help, for backup, store
 24 managers and mall security, and we apprehended the
 25 individuals outside the store.

1 Q. Could you describe for the members of
 2 the jury what took place during your attempt to
 3 apprehend these individuals?
 4 A. We approached them outside, and they all
 5 took off in different directions running except
 6 for Marlo stayed behind, so I approached him and
 7 asked him to come into the store with me, and he
 8 told me no and told me to get out of his face,
 9 called me a bitch and punched me in the face.
 10 Q. You indicate the name Marlo. Did you
 11 ever come to learn the last name of this
 12 individual?
 13 A. Marlo Thomas.
 14 Q. Now, being 1988 do you think you'd be
 15 able to recognize this individual again if you saw
 16 him in the courtroom?
 17 A. Yes.
 18 Q. Would you look and see if you recognize
 19 anyone?
 20 A. Wearing the blue shirt sitting here in
 21 the middle at the defendant table.
 22 MR. SCHWARTZ: The record will reflect
 23 identification of the defendant, your Honor.
 24 THE COURT: Record will so reflect.
 25 / / /

1 BY MR. SCHWARTZ:

2 Q. After the defendant struck you in the
3 face, what happened next?
4 A. He struck another individual, a store
5 manager that was assisting me, knocked a couple of
6 his teeth out and then took off running across the
7 parking lot.

8 Q. Did there come a time a security car or
9 vehicle attempted to detain Mr. Thomas?

10 A. Mall security arrived in their vehicle
11 and they jumped out of the vehicle and tried to
12 help us pursue -- some of these individuals.
13 Somehow Marlo got into their vehicle and got away
14 in their vehicle, wrecking their vehicle and
15 disabling the vehicle.

16 Q. So he was not apprehended that day?

17 A. No, he wasn't.

18 Q. Did there come a time later on that you
19 had occasion to see the defendant again?

20 A. Yes. Approximately about two weeks
21 after that event, he showed up into the store
22 again where I worked and had some individuals with
23 him, and he was pointing me out to them and
24 following me around the store.

25 Q. What, if anything, did you do when you

1 A. I don't recall.

2 Q. But Marlo didn't run away; he stayed
3 there?

4 A. Yes, he stayed.

5 Q. Everything that happened after that was
6 after you approached him?

7 A. Yes.

8 Q. And attempted to have him apprehended or
9 something?

10 A. Yes.

11 MR. SCHIECK: No further questions, your
12 Honor.

13 MR. SCHWARTZ: No redirect, your Honor.

14 THE COURT: Ladies and gentlemen of the
15 jury, do you have any questions for Ms. Frazier?

16 I see there are none. Ms. Frazier, thank you for
17 your testimony. You may be excused. Please do
18 not discuss your testimony with anyone other than
19 the attorneys.

20 Counsel, you may call your next witness.

21 MR. SCHWARTZ: Paul Wheelock.

22 Whereupon,

23 PAUL WHEELOCK,

24 was administered the following oath by the court
25 clerk.

1 recognized the defendant and saw him pointing you
2 out to these other individuals?

3 A. I contacted Metro and my store manager
4 and advised them of what's going on. Metro came
5 down and apprehended him.

6 MR. SCHWARTZ: Thank you. I have
7 nothing further, your Honor.

8 THE COURT: Cross-examination, Counsel.

9 MR. SCHIECK: Just a couple, your Honor.

10
11 CROSS-EXAMINATION

12 BY MR. SCHIECK:

13 Q. Mrs. Frazier, you indicated that there
14 were six individuals that you initially saw?

15 A. Right.

16 Q. And when you approached, five of them
17 ran away?

18 A. Approximately five -- there was another
19 one that kind of stayed behind but wasn't really
20 close to us.

21 Q. Five that ran away they took the items
22 with them?

23 A. Pardon me?

24 Q. Did they take the items with them when
25 they ran away?

1 THE CLERK: You do solemnly swear that
2 the testimony you give shall be the truth, the
3 whole truth, and nothing but the truth so help you
4 God.

5 THE WITNESS: I do.

6 THE CLERK: State your name and spell
7 your last name for the record.

8 THE WITNESS: Paul Wheelock,
9 W-H-E-E-L-O-C-K.

10
11 DIRECT EXAMINATION

12 BY MR. SCHWARTZ:

13 Q. Sir, by whom were you employed back in
14 August the 1st of 1996?

15 A. State of Nevada Department of Prisons.

16 Q. In what capacity, sir?

17 A. At that time correctional officer.

18 Q. And did you become acquainted with an
19 inmate by the name of Marlo Thomas?

20 A. Yes, sir, I did.

21 Q. And would you be able to recognize Marlo
22 Thomas if you saw him again; do you think?

23 A. Looks like him setting right there in
24 the blue shirt, sir.

25 MR. SCHWARTZ: Would the record reflect

1 the identification of the defendant, your Honor.

2 THE COURT: Record will reflect that
3 that's who he believes Marlo Thomas is today.

4 MR. SCHWARTZ: Thank you, your Honor.

5 BY MR. SCHWARTZ:

6 Q. On August the 1st, 1996, did an incident
7 occur in the prison involving the defendant Marlo
8 Thomas?

9 A. Yes, sir.

10 Q. Could you relate to the members of the
11 jury what occurred?

12 A. Yeah. I was on the yard labor crew. We
13 were picking up the trash, and when we pulled up
14 to Unit 7, C33, 2, one of the wings right by the
15 door, one of the cells. As it turned out --
16 anyhow he started hollering out the window,
17 cursing, just being a jerk. Actually I went into
18 the unit and -- we were coming to get the garbage
19 out of the unit. The whole yard was in a lock
20 down. So basically I went over, tried to shut him
21 up, wasn't going to shut up, wanted to act bad and
22 break bad and decided he was going to take a swing
23 at me. I wound up putting him up against the wall
24 and did paperwork.

25 Q. You say did paperwork, what do you mean?

1 to him to provoke him?

2 A. Yeah. I drove up with two white guy on
3 a trash cart.

4 Q. And he was just trying to take trash out
5 of the area?

6 A. Yeah.

7 MR. SCHWARTZ: Thank you. Nothing
8 further, your Honor.

9 THE COURT: Cross-examination, Counsel.

10
11 BY MR. SCHIECK: CROSS-EXAMINATION

12 Q. You said the entire facility was on lock
13 down?

14 A. Yes, sir.

15 Q. That means everybody was locked into
16 their individual --

17 A. Everybody was supposed to be locked in
18 their individual cells.

19 Q. And Mr. Thomas was locked in his
20 individual cell?

21 A. Yes, sir.

22 Q. And your responsibility was to go in
23 there and collect the trash, take the trash out?

24 A. Yes, sir.

25 Q. And in order for this incident to

1 A. There was a write-up done,
2 informational.

3 Q. You indicated there was a state of lock
4 down at the time?

5 A. Yeah, the prison was in a lock down
6 state.

7 Q. What does that mean, lock down?

8 A. Everybody is locked down, every cell in
9 the yard is locked down, all the inmates were
10 locked in their house.

11 MR. SCHWARTZ: Court's indulgence for a
12 moment.

13 THE COURT: Certainly.

14 BY MR. SCHWARTZ:

15 Q. During this incident on August the 1st,
16 1996, were any threats made to you by the
17 defendant?

18 A. Oh, yeah. That's what started it.

19 Q. What kind of threats were made?

20 A. He was going to whip my white et cetera.
21 He was a little upset because the trash crew at
22 the time was all white and he didn't like that,
23 thought it was bad and made some pretty good
24 remarks.

25 Q. Had you done anything or said anything

1 happen, you had to, I assume, open Mr. Thomas's
2 door?

3 A. I did, sir. Yes, sir, I did. I wanted
4 to find out what was going on.

5 Q. You could have just picked up the trash
6 and left and ignored the comments that were being
7 made, couldn't you?

8 A. I could have.

9 Q. And isn't it true that it's very common
10 in a prison setting that there's a lot of yapping
11 going on and yelling back and forth between
12 everybody?

13 A. To an extent.

14 Q. To an extent. But you felt it was
15 necessary to go in there and open Mr. Thomas's
16 cell door or his house door and ask him to come
17 out?

18 A. Yes, sir, I did. I wanted to find out
19 what the problem was and if we needed to go any
20 further, I was going to get the S and E officers
21 down there.

22 Q. He was just talking, right?

23 A. No, he wasn't just talking, sir. He was
24 making some pretty gross threats.

25 Q. He was behind a locked door. The prison

1 was on lock down. If you would have just walked
 2 out of there, nothing would have happened.
 3 A. Probably until the next time.
 4 Q. He was locked behind his door. I mean,
 5 could he open that door from the inside?
 6 A. At the time I don't know whether he
 7 could have or not, sir.
 8 Q. Well, is that normal that inmates are
 9 able to open their own doors from the inside when
 10 they're in lock down?
 11 A. No. We were having problems with locks
 12 and stuff. I'm not going to say he could open the
 13 door, no, sir.
 14 Q. But you opened the door?
 15 A. Yes, sir.
 16 Q. And everything else went after that?
 17 A. Yes, sir.
 18 Q. Did you Mace Mr. Thomas?
 19 A. I believe I did shoot him with about a
 20 split second of Mace, yes, sir.
 21 Q. Is that right after you opened the door?
 22 A. No, no. Right after he took a swing at
 23 me.
 24 Q. Then you Maced him. And so he didn't
 25 hit you; he just took a swing according to you?

1 A. Yeah, he didn't hit me. He tried like
 2 hell.
 3 Q. Why didn't you close the door?
 4 A. Because he was already out the door on
 5 the tier.
 6 Q. But you asked him to come out the door?
 7 A. Exactly, because I was going to put him
 8 in a position and put handcuffs on him.
 9 MR. SCHIECK: Thank you. No further
 10 questions.
 11 THE COURT: Any additional questions?
 12 MR. SCHWARTZ: Just briefly, your Honor.
 13
 14 REDIRECT EXAMINATION
 15 BY MR. SCHIECK:
 16 Q. You said the defendant was making
 17 comments. Loud comments? Were they racial
 18 comments?
 19 A. They were real racial, sir.
 20 Q. Other inmates in the facility could they
 21 hear what the defendant was saying?
 22 A. Yeah.
 23 Q. Do you ever have problems because of
 24 racial confrontations up there?
 25 A. No, sir, not personally, no, I have

1 never had it.
 2 Q. Has the prison?
 3 A. Oh, yeah, over the years I'm sure they
 4 have.
 5 Q. Was that a concern of yours?
 6 A. At the time, no.
 7 MR. SCHWARTZ: May I approach the
 8 witness, your Honor?
 9 THE COURT: You may.
 10 BY MR. SCHWARTZ:
 11 Q. I'm going to show you what's been
 12 admitted as State's 104 and ask if you recognize
 13 this item, sir?
 14 A. Yes, I saw this.
 15 Q. What is that, sir?
 16 A. This is looks like a disciplinary form
 17 from the State of Nevada.
 18 Q. And is this the report or disciplinary
 19 report that was filled out in connection with the
 20 incident that you've testified to here today?
 21 A. Yes, sir, it was.
 22 MR. SCHWARTZ: Thank you. I have no
 23 further questions, your Honor.
 24 THE COURT: Any additional cross,
 25 Counsel?

1 RECROSS-EXAMINATION
 2 BY MR. SCHIECK:
 3 Q. Was Mr. Thomas handcuffed when you Mace
 4 him?
 5 A. No, sir.
 6 Q. In the disciplinary report you've got
 7 listed a witness, right, a Malone?
 8 A. That would have been an inmate if it's a
 9 Malone. Is that the name on it?
 10 Q. Yes.
 11 A. It's been awhile back.
 12 Q. That witness said he didn't see
 13 anything. Could Malone be an officer?
 14 A. I'm thinking Malone was an inmate.
 15 Q. And, in fact, there was a statement from
 16 Mr. Thomas that went in here? Mr. Thomas
 17 indicated that you were cussing at him and opened
 18 the door?
 19 A. He can indicate what he wants, sir.
 20 Q. You didn't say anything back to him
 21 before you opened the door?
 22 A. To my recollection I'm not going to say
 23 yes or no. I really can't recollect that far
 24 back.
 25 Q. You can't remember that.

1 MR. SCHIECK: I have nothing further,
 2 your Honor.
 3 THE COURT: Ladies and gentlemen of the
 4 jury, do you have any questions for Mr. Wheelock.
 5 Thank you, Mr. Springgate, for your testimony.
 6 You may be excused. Please do not discuss your
 7 testimony with anyone other than the attorneys.
 8 Let us be in recess until 1:30. During
 9 the lunch recess, you are admonished not to
 10 converse amongst yourselves or with anyone else on
 11 any subject related to or read, watch or listen to
 12 any report of or commentary on the trial or any
 13 person connected with the trial by any medium of
 14 information including, but not limited to,
 15 television, radio, or newspapers, or form or
 16 express any opinion on any subject connected with
 17 the trial until the case is finally submitted to
 18 you.
 19 We'll be in recess until 1:30. Thank
 20 you.
 21 (Whereupon, the jury retired
 22 from the courtroom.)
 23 THE COURT: Good afternoon. Welcome
 24 back to continuation of penalty hearing in the
 25 State of Nevada versus Marlo Thomas. The record

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1 will reflect the presence of the defense, all
 2 officers of the court, the full jury and alternate
 3 jurors. Now, if we can find the district
 4 attorney. We had trouble with the elevators
 5 today. We've had attorneys call us for the
 6 morning calendar because they were stuck in the
 7 elevator.
 8 (Pause in proceedings.)
 9 MR. SCHIECK: Can would approach for a
 10 second, your Honor?
 11 THE COURT: You may.
 12 (Off-the-record bench conference.)
 13 THE COURT: The record will now reflect
 14 the presence of the State of Nevada. Hope you
 15 guys didn't get caught in the elevators that were
 16 malfunctioning today, and welcome back to
 17 continuation of the penalty hearing in the State
 18 of Nevada versus Marlo Thomas.
 19 Counsel for the State, you may call your
 20 next witness.
 21 MR. OWENS: State calls Richard Johnson.
 22 THE COURT: Thank you.
 23 / / /
 24 / / /
 25 / / /

1 Whereupon,
 2 RICHARD JOHNSON,
 3 was administered the following oath by the court
 4 clerk.
 5 THE CLERK: You do solemnly swear that
 6 the testimony you give shall be the truth, the
 7 whole truth, and nothing but the truth so help you
 8 God.
 9 THE WITNESS: I do.
 10 THE CLERK: State your name and spell
 11 your name for the record.
 12 THE WITNESS: My name is Richard
 13 Johnson, R-I-C-H-A-R-D J-O-H-N-S-O-N.
 14
 15
 16 BY MR. OWENS: DIRECT EXAMINATION
 17 Q. You're employed by the Department of
 18 Corrections?
 19 A. That is correct.
 20 Q. How long have you worked there?
 21 A. I've been out there 14 years as of
 22 October.
 23 Q. And what are your responsibilities
 24 currently?
 25 A. Currently I'm assigned to a tower. I

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1 watch the perimeter fence on the outside.
 2 Q. And what kind of assignments have you
 3 had over the course of your employment with the
 4 prison system?
 5 A. Most have been high profile. I worked
 6 the psych ward in the back of the infirmary.
 7 Culinary on all three different shifts. I've
 8 worked lock down on day shift, swing shift and
 9 night shifts. Mostly I've done a little bit of
 10 time in what they call control post where you
 11 control all the movement on the yard.
 12 Q. I'd like to direct your attention to the
 13 9th day of August, 1993, when you became involved
 14 in an incident with Mr. Marlo Thomas.
 15 A. Yes.
 16 Q. Do you know Marlo Thomas?
 17 A. Yes, I do.
 18 Q. Who is that?
 19 A. It's the gentleman in the blue shirt
 20 over here at the defense table.
 21 MR. OWENS: May the record reflect
 22 identification of the defendant.
 23 THE COURT: Record will so reflect.
 24 BY MR. OWENS:
 25 Q. This was in 1993, August 9th. What was

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1 your assignment at that time?

2 A. In 1993 I was on the security squad
3 which they've renamed to the CERT Team, but at the
4 time it was referred to as the security squad. We
5 were the front line for handling incidents.

6 Q. What does that mean?

7 A. What it means is if there's a problem
8 we're like the team that they call to go over
9 respond to the problem and assess and deal with
10 the situation.

11 Q. And how are you different from a regular
12 officer?

13 A. We do a lot more paperwork training to
14 understand the training and a little more familiar
15 with a lot of policies on handling situations.

16 Q. Was there special equipment that you
17 use?

18 A. Some special equipment. We were trained
19 on Tazer. The Nova shield which is a curved
20 shield that has the strips on it. When you push
21 the button it works like a Tazer, and we were
22 chemical agents trained, and we did have some
23 formal training outside the institution that was a
24 part of the state, but we did have it.

25 Q. You were called the security squad?

1 uniform instead of regular uniform. And he began
2 telling me that, you know, I run this yard, you
3 don't run nothing, you know, and just basically
4 escalating the situation. Policy is --

5 Q. Let me pause you right there for a
6 second. The defendant just started talking to you
7 like that?

8 A. Yeah.

9 Q. Had you had conversations with him
10 before?

11 A. We had had conversations before. He
12 knew who I was, and I had worked in the units
13 before.

14 Q. And you started to tell us about your
15 policy.

16 A. The policy is on the open yard like that
17 when you had an inmate that would start getting
18 really loud and out of hand and inciting the
19 situation, to control the situation and deescalate
20 it, you take them and you remove them from the
21 yard and usually take them to the desk sergeant
22 for the day, and they get to decide whether the
23 situation is serious enough that, A, send them
24 back to their unit or take them up to visiting
25 holding which is the holding cells up by the

1 A. Yes, sir.

2 Q. Nowadays they call it the CERT squad?

3 A. Yes, sir. It's Correctional Emergency
4 Response Team.

5 Q. S-E-R-T?

6 A. C-E-R-T. S-E-R-T down south.

7 Q. What facility were you in back on this
8 date in 1993?

9 A. Ely Maximum Security Prison.

10 Q. You've identified Marlo Thomas. Had he
11 been an inmate there for a period of time?

12 A. Yes, he had.

13 Q. How long had you been dealing with him
14 at the time that this incident occurred?

15 A. Probably just a couple of months I'd
16 been on day shift.

17 Q. And tell us what happened.

18 A. Well, it was on day shift. It was
19 during -- back then Ely was a lot more open than
20 it is now. The units had yard time in the
21 mornings and in the afternoon. And it was in
22 morning yard and a bunch of the inmates were
23 together, some of his friends and stuff. And I
24 was coming through, and I had just recently been
25 put on to the security squad. We wear black

1 visiting room to where they can have a cooling-off
2 period and calm down before they return back to
3 their unit.

4 Q. What did Marlo Thomas's challenges to
5 you why was that a escalation of a situation?

6 A. Because he was trying to make himself
7 seem more important and more powerful on the yard.
8 It was a power play I perceived it as and
9 that's -- the more I talked to him and told him
10 that's not acceptable, the louder he got, and at
11 that point the best way to deal with it is to
12 separate them from their peer group and when you
13 separate them from their peer group they no longer
14 have to keep up appearances and usually they'll
15 calm right down, and from there it's up to the
16 shift sergeant what happens to them.

17 Q. So at first you try to talked to him
18 about it to calm him down?

19 A. Yeah.

20 Q. But that didn't work.

21 A. No.

22 Q. Why are you concerned about escalating
23 tensions among the inmates?

24 A. At the time we had two different units
25 that come out to the yard at the same time, so you

1 have a potential of 140 inmates out there, and a
2 little situation gets away, it could turn into a
3 big situation real fast. Anytime you have what
4 you perceive as a problem, you try to separate it
5 from the rest of the group so that everything --
6 takes the tension off the yard and everybody calms
7 back down.

8 Q. So is that what you tried to do at that
9 point?

10 A. That was my effort.

11 Q. What happened?

12 A. Well, the more I tried to talk to him
13 the more he got loud and abusive and started
14 telling me that I didn't run nothing, he runs this
15 yard. At that point I felt I needed to pull him
16 off the yard. So I had him turn around, cuffed
17 him up, took him to the shift sergeant. And as I
18 was escorting along with Officer Steve Leander who
19 was the other officer with him, he was making
20 threats, I'm going to beat you up, that kind of
21 thing. When we get the visiting hold, you've had
22 it.

23 Q. When you get to what?

24 A. Visiting holding you've had it.

25 Q. What's visiting holding?

1 from you and two officers stand on either side of
2 him and you give them specific directions. I'm
3 going to uncuff your hands, when I take this hand
4 loose, put it on the wall. When I take this hand
5 loose, put it on the wall. You have to do what
6 they call an unclothed body search to make sure
7 that they don't have any weapons or any kind of
8 contraband or anything -- they're not allowed to
9 have anything up in visiting holding so you take
10 everything away from them including the majority
11 of their clothes, their shoes and everything.

12 Q. What happened?

13 A. When I uncuffed his hand, I told him to
14 put his hand on the wall, and as soon as we
15 uncuffed his hand he spun around to swing on us,
16 and me and the other guard grabbed him and slammed
17 him to the floor and put the handcuff back on him.
18 And Senior Drake I believe it was that checked out
19 a Tazer from the control which is the electronic
20 device with the wands and they stood there with
21 that and we stood him back up and went through the
22 procedure with no further incident, closed the
23 door.

24 Q. Did you need to use the Tazer that
25 Officer Drake had?

1 A. It's the holding cells up by the
2 visiting room. It's like a little hallway that
3 has four different cells off of it on one side and
4 four cells on the other and they take inmates that
5 going into visiting room take them up there, and
6 they all have to be separated before -- you got
7 some behind glass booths and some that aren't, so
8 the ones that are going to be behind glass are in
9 the booths, and then the other ones will be kept
10 in the four holding cells until the visitors
11 arrive, and then they go into the visiting room
12 with them.

13 Q. How long did it take to get him up to
14 the holding area?

15 A. Just a few minutes. We took him up to
16 the sergeant's desk and the sergeant tried to talk
17 to him. He got disgusted with him. He said just
18 take him to visiting holding and let him cool off.
19 So we took him up to visiting holding.

20 Q. Was he continuing to threaten you during
21 that time?

22 A. Yes, he was.

23 Q. What happened when you got up there?

24 A. When we got up there, the normal
25 procedure you place him on the wall facing away

1 A. At that time we did not.

2 Q. You said that he tried to swing on you.
3 Can you show us what he did?

4 A. He was on the wall like this, had his
5 hands behind him. I told him to put his hand on
6 the wall and as soon as I uncuffed him and told
7 him to put his left hand on the wall, he went like
8 that and turned around to swing like that.

9 Q. Was he using a fist?

10 A. Yeah, he was. He still had the handcuff
11 on that hand.

12 Q. But he didn't strike you?

13 A. No. Because he was making his threats
14 and I'm familiar with him and I have dealt with
15 him before, and our training is you don't allow
16 them the opportunity, so if -- you have to be
17 prepared for it, and when it does happen you
18 generally won't get.

19 Q. Based upon your experience with
20 Mr. Thomas even in that two-month period that
21 you'd been there, you were expecting that he very
22 probably would do something like that?

23 A. Yes, because he was pretty high up --
24 had a lot of gang activity back then. I haven't
25 been on the yard in a few years, and we've been

1 locked down so there's really not any general
 2 population to speak of at Ely anymore.
 3 Q. And after the Tazer came out, then you
 4 were able to control him?
 5 A. After we put him back on the wall and
 6 Tazer on him, then he followed the directions.
 7 Q. And did you leave him in holding there
 8 for a period of time?
 9 A. I left him in visiting holding. I was
 10 not the officer that took him out. I believe that
 11 was kind of toward the end of my shift.
 12 Q. Did you prepare a disciplinary report?
 13 A. Yes, I wrote a notice of charges.
 14 Anytime they violate institutional policy, you
 15 write them up for a notice of charges, and you
 16 send it up to the shift sergeant and then they log
 17 it through to classification.
 18 Q. And then they follow up on that and see
 19 if there's going to be some disciplinary thing
 20 that happens?
 21 A. Yeah, they have a disciplinary committee
 22 and he goes in front of the disciplinary committee
 23 and they charge him with whatever they're going to
 24 charge him with.
 25 Q. I'm going to show you what's marked as

1 State's Exhibit -- there's a number of them here.
 2 100, this is a printout of the disciplinary
 3 history in the prison system for Marlo Thomas; is
 4 that correct?
 5 A. It's a copy of the original I believe is
 6 on -- they have one copy that's pink, one copy
 7 that yellow and one copy that's white.
 8 Q. This is for the dates -- lists all of
 9 his disciplinary problems from the 2nd of January
 10 of 1991 through the last page, No. 11, the 2nd of
 11 December, 1994.
 12 A. Right.
 13 Q. Does that look right?
 14 A. Yes.
 15 Q. And then behind that we have a number of
 16 disciplinary reports.
 17 For the record I'm going to state those,
 18 your Honor. It's 89, 90, 91, 92, 93, 94, 95, 96,
 19 97, 98, 99, 105, 106, 107 are the evidence
 20 numbers.
 21 Are those all disciplinary reports from
 22 that period of time?
 23 A. Yeah, they appear to be. I did spend --
 24 I broke my leg in a motorcycle accident, and they
 25 assigned me to clerical duty and administration

1 filing away these kind of reports and they're 1
 2 files.
 3 Q. When was that?
 4 A. That was about '94.
 5 Q. Came back about that time?
 6 A. Yes.
 7 Q. So you had some familiarity about these
 8 documents?
 9 A. Yes. These are disciplinary sections
 10 and what your sanctions are. These are initially
 11 the charges that -- the sergeant will assign from
 12 the report what charges they're supposed to be.
 13 These are just your standard disciplinary forms
 14 and the charges and then the disciplinary
 15 sanctions taken.
 16 Q. We look at the one on the top, the one
 17 that's a printout of all of the disciplinary
 18 problems, in Exhibit 100. For the record I'm
 19 going to go ahead and put that on the screen. Can
 20 you see that to your left there?
 21 A. Yes.
 22 Q. This is basically a summary list of
 23 those problems during that time; is that right?
 24 A. I guess it is.
 25 Q. And each one of these would have been

1 based upon a report, disciplinary report, like the
 2 document in front of you?
 3 A. It would be originally generated from a
 4 notice of charges that was written and filed and
 5 then forwarded by -- the sergeant will charge out
 6 what charges seem appropriate based on what he
 7 reads on the report, and then it's sent to the
 8 disciplinary committee, and it's up to them to
 9 decide what sanctions are necessary.
 10 Q. And the exhibits you were looking at
 11 there, those are some of the reports contained in
 12 this summary document but not necessarily all of
 13 them?
 14 A. They're some of them. They are.
 15 Q. One of those is the report that you
 16 prepared for the incident that you just told us
 17 about. I think it's No. 106.
 18 A. Yes, that is it. That's a copy of it.
 19 Q. That's the report that you filled out
 20 describing the event that you just testified about
 21 a minute ago?
 22 A. That's correct.
 23 Q. I'm going to put that on the screen for
 24 the record. That's No. 106.
 25 A. That's a photocopy of the original

1 document. The original document that I received
2 back was a yellow copy which comes back with the
3 copy of the disciplinary sanctions against him
4 that they took, and then they send that back to
5 the officer.

6 Q. Now, you say disciplinary sanctions.
7 What do you mean?

8 A. What kind of penalty was applied as a
9 disciplinary sanction. So it's like if --
10 sometimes they'll use loss of electrical
11 appliances for ten days or if they've been abusing
12 the phone system they'll get a loss of personal
13 phone calls for 30 days. Sanctions are based on
14 the severity of the incident.

15 Q. They have electrical appliances in their
16 cells?

17 A. Yes, they do. They earn those
18 privileges, and they also have to be able to
19 either have money on their -- placed in their
20 account so that they can purchase those through
21 the inmate canteen.

22 Q. So they have radios?

23 A. Yes.

24 Q. Televisions?

25 A. Yes, they do.

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1 Q. They have cable for the TV?

2 A. Yes, there's cable in all the cells.

3 Q. And telephone privileges?

4 A. Yeah, they have telephone that's brought
5 around. Depending on their custody level, they're
6 allowed -- like, general population inmate is
7 allowed to use the phone anytime they want to and
8 all the way down to like ag seg which is allowed
9 one phone call a week, and then like disciplinary
10 segregation where they're only allowed one phone
11 call a month.

12 Q. When there's a problem like this, they
13 might lose their radio for 30 days?

14 A. Right. Depending on the severity of the
15 incident and the frequency of the incident, they
16 will rely on previous disciplinaries to say, all
17 right, we did this twice and it seems not to have
18 the effect, then they'll do something different.

19 Q. Do you happen to know what happened on
20 this particular incident?

21 A. I don't remember. It's been eight
22 years.

23 MR. OWENS: Thank you. That's all I
24 have.

25 THE COURT: Cross-examination, Counsel.

1

2

CROSS-EXAMINATION

3 BY MR. ALBREGTS:

4 Q. Mr. Johnson, in 1993 Marlo was about 20
5 years old?

6 A. Yes, I believe so. I'm not aware of the
7 defendant's exact age. We don't get that kind of
8 personal information on them.

9 Q. Fair to say 20, 21?

10 A. He was probably about ten years younger
11 than me, and I was in my 30s back then, and he was
12 taller than me, wider through the shoulders than
13 me. He was a very big young man.

14 Q. I didn't ask you about being a big young
15 man.

16 A. You asked me --

17 Q. About his age.

18 A. His age, yeah.

19 Q. He was about 20, 21 years old?

20 A. As far as I could tell he appeared to be
21 in his mid 20s, yes.

22 Q. And the Ely institution at that time was
23 a maximum institution?

24 A. It's always been a maximum security, but
25 they've had all levels of custody there. Back in

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1 those days we had closed custody, medium custody
2 on the other side.

3 Q. So individuals with very severe criminal
4 backgrounds generally are placed up in Ely,
5 correct?

6 A. Yes.

7 Q. And that's where Mr. Thomas was at about
8 20 or 21 year old when you had this encounter with
9 him, correct?

10 A. Yes.

11 Q. Now, you said you had a policy that was
12 designed to handle these incidents that occurred
13 like you described in the yard, correct?

14 A. That is correct.

15 Q. And you have that policy developed
16 because those incidents are fairly common or occur
17 on a regular basis up there where you have to deal
18 with these type of incidents, correct?

19 A. Yes, they are.

20 Q. Not just Mr. Thomas but any inmate
21 that's up there in that facility, correct?

22 A. Not the -- being pulled off the yard for
23 getting loud and unruly, yes.

24 Q. And when he got pulled off the yard, you
25 said he was going to have an unclothed body

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1 search. That's also called a strip search, isn't
 2 it?
 3 A. Yes.
 4 Q. And that takes place even though he's in
 5 custody and even though they're regularly searched
 6 during count and during other things, correct?
 7 A. That's a normal routine policy because
 8 he is coming off of an unsecured yard where
 9 there's -- he's had contact with all the other
 10 inmates, and that's part of -- you take them back
 11 into controlled environment, you want to make sure
 12 that they don't have anything on them.
 13 Q. Right. That would involve a cavity
 14 search as well?
 15 A. No, it would not.
 16 Q. Not a cavity search, just a strip
 17 search?
 18 A. Just the clothing.
 19 Q. They would be put in that holding cell
 20 for a period of time with, what, just their
 21 underwear?
 22 A. Yes. They would be left in their boxer
 23 briefs. Their clothing and stuff would be rolled
 24 up with their shoes and set on the floor outside
 25 the door to be returned to them whenever they were

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1 removed from the.
 2 Q. Now, the yard up there is no longer
 3 open, so that sort of thing would not occur in Ely
 4 anymore, correct?
 5 A. Yeah, it does. We still have one yard
 6 that's open. We have one unit that gets yard
 7 time.
 8 Q. That's a unit of offenders who don't
 9 have as serious conviction as the other people?
 10 A. Not necessarily. What we have up there
 11 is a level system where you start out the most
 12 violent guys start out in level one, and as you
 13 behave yourself and don't get disciplinary
 14 sanctions you move on up, and by the time you get
 15 to level four then you're in the general
 16 population where you again have yard, tier time
 17 and all the other privileges that go along with
 18 proper behavior.
 19 Q. So that's only allowed then for those
 20 individuals who take those steps necessary --
 21 A. Yes, those are earned privileges.
 22 MR. ALBREGTS: I don't have anything
 23 further. Thanks.
 24 MR. OWENS: Couple follow-up questions.
 25 / / /

1
 2 REDIRECT EXAMINATION
 3 BY MR. OWENS:
 4 Q. How the inmates are treated, the
 5 policies you apply to them, it's not dependent on
 6 their conviction or their charge?
 7 A. No. Solely on their personal conduct.
 8 Q. On how they're acting?
 9 A. Yes.
 10 Q. How was Mr. Thomas acting?
 11 A. He was acting out, unruly and
 12 threatening.
 13 MR. OWENS: That's all I have.
 14
 15 RECROSS-EXAMINATION
 16 BY MR. ALBREGTS:
 17 Q. On this occasion, right, what you've
 18 described.
 19 A. On that particular occasion, yes, sir.
 20 MR. ALBREGTS: Nothing further.
 21 THE COURT: Ladies and gentlemen of the
 22 jury, do you have any questions for Officer
 23 Johnson? Officer, thank you, sir, for your
 24 testimony here this afternoon. You may be
 25 excused. Please do not discuss your testimony

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1 with anyone other than the attorneys.
 2 Counsel, you may call your next witness.
 3 MR. SCHWARTZ: State would call Wendy
 4 Cecil.
 5 Whereupon,
 6 WENDY GRAY,
 7 was administered the following oath by the court
 8 clerk.
 9 THE CLERK: You do solemnly swear that
 10 the testimony you give shall be the truth, the
 11 whole truth, and nothing but the truth so help you
 12 God.
 13 THE WITNESS: Yes.
 14 THE CLERK: State your name and spell
 15 your last name for the record.
 16 THE WITNESS: Wendy Gray W-E-N-D-Y
 17 G-R-A-Y.
 18
 19 DIRECT EXAMINATION
 19 BY MR. SCHWARTZ:
 20 Q. Ma'am, I referred to you as Wendy Cecil.
 21 Were you known as Wendy Cecil at one time?
 22 A. Yes.
 23 Q. Was that your maiden name?
 24 A. Yes.
 25 Q. And if you could speak up so the members

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1 of the jury could hear you, we'd all appreciate
 2 that, okay?
 3 A. Yes.
 4 Q. Let me direct your attention to 1996.
 5 Were you living here in Las Vegas back then?
 6 A. Yes.
 7 Q. And did you know an individual by the
 8 name of Carl Dixon?
 9 A. Yes.
 10 Q. How long had you known Carl Dixon?
 11 A. About a year-and-a-half.
 12 Q. Was he a friend of yours?
 13 A. Yes.
 14 Q. Were you aware of the fact that Carl
 15 Dixon was employed at the Lone Star Steakhouse?
 16 A. Yes.
 17 Q. Do you recall a conversation you had
 18 with Carl Dixon about a certain problem he was
 19 having with an employee at the Lone Star?
 20 A. Yes.
 21 Q. Do you recall the name of the employee
 22 that Carl was having this problem with?
 23 A. He said Thomas.
 24 THE COURT: Pardon?
 25 THE WITNESS: Thomas.

1 BY MR. SCHWARTZ:
 2 Q. Thomas?
 3 A. Yes.
 4 Q. And back in 1996 do you recall giving a
 5 statement to the police department concerning what
 6 you're going to be testifying to today?
 7 A. Yes.
 8 Q. And let me show you this statement and
 9 ask you if it appears to be the statement you gave
 10 to the police. Does that appear to be the
 11 statement you gave to the police?
 12 A. Yes.
 13 Q. Do you recall if during that statement
 14 that you gave to the police you gave them a first
 15 name of this Mr. Thomas?
 16 A. Yes.
 17 Q. What name did you give them?
 18 A. Thomas.
 19 Q. Let me show you page 3.
 20 THE COURT: Obviously that wasn't the
 21 right answer.
 22 BY MR. SCHWARTZ:
 23 Q. Your statement. Do you recall the name
 24 that you gave to the police?
 25 A. Yes. Thomas Marlo.

1 Q. You told them his last name was Thomas
 2 and when they asked for his first name, you said
 3 Thomas Marlo; is that correct?
 4 A. Yes.
 5 Q. Are you nervous today?
 6 A. Yes.
 7 Q. Please tell the members of the jury what
 8 Carl told you about the problem he was having with
 9 this Thomas Marlo or Marlo Thomas. What did Carl
 10 tell you?
 11 A. There was this Thomas.
 12 Q. You have to speak up. I can't hear you.
 13 A. The coworker at work caught him stealing
 14 money out of the drawer and he saw him do it and
 15 this man came over and put a knife up to his back
 16 and said if he said anything I'll kill you.
 17 Q. So Carl told you that this coworker,
 18 Thomas Marlo or Marlo Thomas, had been caught by
 19 Carl stealing money?
 20 A. Yes.
 21 Q. Was that at the Lone Star?
 22 A. Yes.
 23 Q. And that this Thomas Marlo or Marlo
 24 Thomas took a knife and put it up to Carl's back?
 25 A. Yes.

1 Q. Do you recall if Carl told you what type
 2 of a knife it was?
 3 A. No.
 4 Q. Let me show you a copy of a transcript
 5 of a prior proceeding on page 201, and do you
 6 recall -- just see if this refreshes your
 7 recollection. Relax.
 8 When he mentioned the type of knife it
 9 was that you testified as to what type of a knife
 10 it was?
 11 A. Yes. It was the steak knife.
 12 Q. A steak knife from the restaurant?
 13 A. Yes.
 14 Q. And what did Marlo Thomas say to Carl
 15 when he had this steak knife?
 16 A. That if he said anything he'd kill him.
 17 Q. If Carl said anything he would kill him;
 18 is that correct?
 19 A. Yes.
 20 Q. When Carl talked to you about the
 21 situation that existed at the Lone Star Steakhouse
 22 involving Carl and this individual Marlo Thomas,
 23 did Carl appear to be frightened?
 24 A. Yes.
 25 Q. Did Carl relate to you any premonition

1 that he had?
 2 A. Yes.
 3 Q. What did he say?
 4 A. He said -- I asked him if we could help
 5 him, and he said there was nothing we could do.
 6 This was a bad person and not to be messed with,
 7 this person, and that things were already going to
 8 be happen, set. It was going to come to him.
 9 Q. It was going to come to a head?
 10 A. Yes.
 11 Q. There was nothing that could be done to
 12 help Carl?
 13 A. Yes.
 14 Q. And he told you not to kind of try and
 15 help him because this guy was a bad person?
 16 A. Yes.
 17 Q. Did he also indicate to you that he's
 18 someone you don't mess with?
 19 A. Yes.
 20 Q. I'd like to show you a monitor and I
 21 apologize, but just do you recognize that
 22 individual, ma'am?
 23 A. Yes.
 24 Q. Who is that?
 25 A. Carl.

1 MR. SCHWARTZ: Thank you. I have no
 2 further questions.
 3 THE COURT: Cross-examination, Counsel.
 4 MR. SCHIECK: Yes, Your Honor.
 5
 6 BY MR. SCHIECK: CROSS-EXAMINATION
 7 Q. Is it okay if I call you Ms. Cecil for
 8 now?
 9 A. Yes.
 10 Q. You were a close friend of Carl Dixon
 11 and his family?
 12 A. To Carl, yes.
 13 Q. And you were aware of when he was
 14 killed?
 15 A. Yes.
 16 Q. You knew fairly quickly after his death
 17 that he'd been killed?
 18 A. The morning.
 19 Q. You knew the next morning?
 20 A. No, I knew the morning. It was on the
 21 news.
 22 Q. And why is it you waited over a year to
 23 go to the police and give a statement? If you had
 24 this very specific information, it seems kind of
 25 strange you didn't give a statement until --

1 MR. SCHWARTZ: Your Honor, I'll object
 2 to the use of "strange" by counsel.
 3 THE COURT: Objection is sustained.
 4 Please rephrase the question.
 5 BY MR. SCHIECK:
 6 Q. Can you explain that?
 7 A. I didn't go until I went to the funeral,
 8 and I just didn't know that this -- I didn't know
 9 anything about how bad the situation was.
 10 Q. You saw it on the news. Did you follow
 11 it on the news?
 12 A. No.
 13 Q. You didn't hear Marlo Thomas's name on
 14 the news?
 15 A. No.
 16 Q. But you waited until approximately
 17 February 1997 to give a statement to the police?
 18 A. They came and asked me to give a
 19 statement. I told his dad at the funeral that
 20 there was a problem -- that Carl had mentioned
 21 there was a problem before with this particular
 22 person.
 23 Q. But you never went down to the police
 24 before then and give them a name or anything like
 25 that?

1 A. No.
 2 Q. And when was this statement supposedly
 3 made? Can you give us a time frame?
 4 A. A few months after his murder.
 5 Q. No, no. When did Carl tell you about
 6 this incident?
 7 A. A week-and-a-half before he was
 8 murdered.
 9 Q. And was he indicating the person was
 10 working there when this happened?
 11 A. Yes.
 12 Q. So if Mr. Thomas wasn't working there at
 13 that time, might not have been him?
 14 A. Well, I knew him -- like I hadn't seen
 15 Carl for like two months, and previous of that he
 16 had worked with this particular person. He only
 17 named him as Thomas. I didn't know much about
 18 him. When I bumped into him, he was very scared,
 19 and I was kidding around with him.
 20 Q. And this is two months before? This
 21 would have been February of 1996?
 22 A. Last time I saw him was on December.
 23 Q. So it was December of 1996 when this
 24 conversation occurred?
 25 A. No. This conversation happened before

1 the week he was murdered.
 2 Q. So you saw him in December and then you
 3 saw him again a week before April 15th?
 4 A. Yes.
 5 MR. SCHIECK: No further questions, your
 6 Honor.
 7 MR. SCHWARTZ: Just a couple, your
 8 Honor.
 9
 10 REDIRECT EXAMINATION
 11 BY MR. SCHWARTZ:
 12 Q. In addition to relating the name as
 13 Thomas Marlo or Marlo Thomas, did Carl indicate
 14 whether this person was black or white?
 15 A. Not at the time.
 16 Q. Did you indicate that you first learned
 17 of Carl's death by watching the news on the day it
 18 happened, on April the 15, 1996?
 19 A. Yes. We were supposed to go to lunch
 20 that day.
 21 Q. So you had plans to meet Carl for lunch
 22 on that particular day?
 23 A. Yes.
 24 Q. Do you currently reside outside the
 25 state of Nevada?

1 A. Yes.
 2 MR. SCHIECK: Objection. Relevance,
 3 your Honor.
 4 THE COURT: Objection is sustained.
 5 BY MR. SCHWARTZ:
 6 Q. Did you leave because of this particular
 7 incident?
 8 MR. SCHIECK: Objection, your Honor.
 9 THE COURT: Overruled.
 10 THE WITNESS: Yes.
 11 MR. SCHWARTZ: Thank you. I have
 12 nothing further, your Honor.
 13 THE COURT: Recross.
 14 MR. SCHIECK: No, your Honor.
 15 THE COURT: Ladies and gentlemen of the
 16 jury, do you have any questions for Ms. Gray? I
 17 see there's no questions. Thank you, Ms. Gray,
 18 for your testimony. You may be excused. Please
 19 do not discuss your testimony with anyone other
 20 than the attorneys.
 21 Counsel, you may call your next witness.
 22 MR. SCHWARTZ: Gina Morris.
 23 / / /
 24 / / /
 25 / / /

1 Whereupon,
 2 GINA MORRIS,
 3 was administered the following oath by the court
 4 clerk.
 5 THE CLERK: You do solemnly swear that
 6 the testimony you give shall be the truth, the
 7 whole truth, and nothing but the truth so help you
 8 God.
 9 THE WITNESS: I do.
 10 THE CLERK: State your name and spell
 11 your last name for the record.
 12 THE WITNESS: My name is Gina Hain,
 13 G-I-N-A H-A-I-N.
 14
 15 DIRECT EXAMINATION
 16 BY MR. SCHWARTZ:
 17 Q. Was there a time when you were known as
 18 Gina Morris?
 19 A. Yes.
 20 Q. Was that your maiden name?
 21 A. Yes.
 22 Q. Where were you employed back in 1994?
 23 A. Ely State Prison.
 24 Q. And in what capacity?
 25 A. I was a correctional officer.

1 Q. And how long had you been employed at
 2 Ely State Prison back in 1994?
 3 A. I began employment May of 1991, so that
 4 would be approximately three years.
 5 Q. During your work as a corrections
 6 officer back in 1994, did you come in contact with
 7 an individual or an inmate by the name of Marlo
 8 Thomas?
 9 A. Yes.
 10 Q. Would you recognize Mr. Thomas if you
 11 saw him in court?
 12 A. Yes.
 13 Q. Could you look around and tell us if you
 14 see Mr. Thomas?
 15 A. I do. He's sitting right over there in
 16 the blue shirt.
 17 MR. SCHWARTZ: Record reflect the
 18 identification of the defendant, your Honor.
 19 THE COURT: Record will so reflect.
 20 MR. SCHWARTZ: Thank you.
 21 BY MR. SCHWARTZ:
 22 Q. During your work back in 1994, were you
 23 responsible for providing meals to inmates at Ely
 24 State Prison?
 25 A. Yes.

1 Q. Could you tell the members of the jury
2 how you go about providing meals to inmates at the
3 prison?
4 A. The officers serve the meals, but we
5 have to in certain particular units we have to
6 take extra security precautions, so we must wear a
7 vest and a helmet, use a shield when feeding them.
8 Also they have to have their light on. Before you
9 can approach their cell, they have to turn their
10 light on. You open up the food slot. You have to
11 physically be able to see the individual on the
12 other side.
13 Q. Could you describe this food slot to the
14 members of the jury?
15 A. The food slot it's just a flap that
16 comes down. You have to open it with a key and it
17 comes down about halfway point of the door, about
18 at your waist level, my waist level.
19 Q. And then you place the tray of food on
20 that food slot?
21 A. Yes, you do.
22 Q. And does the inmate then retrieve the
23 tray or the food?
24 A. Yes, he does.
25 Q. Let me direct your attention to April

1 A. Yes.
2 Q. What was your physical condition back on
3 April the 12th, 1994?
4 A. Well, I was pregnant at that time.
5 MR. SCHWARTZ: Thank you. I have
6 nothing further, your Honor.
7 THE COURT: Cross-examination.
8
9 CROSS-EXAMINATION
10 BY MR. SCHIECK:
11 Q. Were you wearing your shield at the
12 time?
13 A. No.
14 Q. What about your helmet?
15 A. No. We had glasses, goggles.
16 Q. I thought you said --
17 A. And we do wear a vest and, yes, I was
18 wearing the vest.
19 Q. I thought you said a vest, helmet, and
20 shield.
21 A. When the tray is placed, the officers
22 with the tray of food are the ones that use the
23 shield.
24 Q. And the routine was you would make sure
25 the lights are on inside and that the individual's

1 the 12th, 1994. Do you recall having contact with
2 the defendant wherein you were attempting to serve
3 him a meal?
4 A. Yes. I was actually trying to give him
5 some juice or Kool-Aid is what we call it at that
6 point in time. I seen Mr. Thomas, and he took a
7 cup and he had it full of a really bad-odored
8 substance, and he threw it at my face and hit my
9 face on the side. At that point in time, I walked
10 down to the sally port because it was burning my
11 face, and I asked to go to the infirmary because I
12 needed to clean off.
13 Q. How is it he was able to throw this
14 substance in your face? Are you down -- are you
15 crouched down when you're giving him the juice?
16 A. No. We have -- it's at my waist level,
17 but he took the cup and outside of the food slot
18 right outside of it and did that motion with it.
19 Q. Indicating a thrusting motion?
20 A. Yes.
21 Q. What did you believe the substance to
22 be? What did it smell like to you?
23 A. It smelled like urine.
24 Q. And you went and received some type of
25 medical attention for that situation?

1 on the other side?
2 A. Yeah.
3 Q. You're not sure exactly what the
4 substance was? You've just given us your best
5 information?
6 A. It smelled really strong, pungent odor,
7 real odored and it burned my skin.
8 MR. SCHIECK: No further questions, your
9 Honor.
10 THE COURT: Redirect.
11 MR. SCHWARTZ: Just a couple, your
12 Honor.
13
14 REDIRECT EXAMINATION
15 BY MR. SCHWARTZ:
16 Q. Was an incident report prepared by
17 yourself in connection with this particular
18 incident?
19 A. Yes.
20 Q. Let me show you State's Exhibit 98. Are
21 you able to identify that item?
22 A. Yes.
23 Q. Is that the incident report or portion
24 of it that was filled out in connection with this
25 particular incident?

1 A. Yes.
 2 Q. On that report is there an area where
 3 the inmate is allowed to give his statement as to
 4 what happened? And I'm directing your attention
 5 to the bottom of the front page. Is there a
 6 section there for the inmate's statement, No. 5?
 7 A. Yes, there is. Yes, there is.
 8 Q. If you look at that monitor to your
 9 left, the inmate statement reads, "I didn't throw
 10 no urine on her. The Kool-Aid cart was leaking.
 11 I tossed tea at the cart, and I wouldn't urinate
 12 in my cup. It may have splattered on her, but it
 13 was tea, not urine."
 14 Officer do you think it was tea that was
 15 thrown in your face?
 16 A. No.
 17 Q. Did the defendant say anything to you at
 18 the time he threw this liquid that you believe to
 19 be urine in your face?
 20 A. No.
 21 MR. SCHWARTZ: Thank you. I have
 22 nothing further, your Honor.
 23 THE COURT: Recross.
 24 MR. SCHIECK: No, your Honor.
 25 THE COURT: Ladies and gentlemen, do you

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1 have any questions for Gina Hain? Ms. Hain, thank
 2 you, ma'am, for your testimony here today. You
 3 may be excused. Please do not discuss your
 4 testimony with anyone other than the attorneys.
 5 Counsel, you may call your next witness.
 6 MR. OWENS: Your Honor, I believe this
 7 is another reading.
 8 THE COURT: All right, that will be
 9 fine.
 10 MR. OWENS: It will be Marty Neagle.
 11 That will be read by Mr. Iscan.
 12 THE COURT: If you would please be sworn
 13 again to read the testimony truthfully as recorded
 14 by Marty Neagle.
 15 Whereupon,
 16 ERCAN ISCAN,
 17 was administered the following oath by the court
 18 clerk.
 19 THE CLERK: You do solemnly swear that
 20 you will faithfully and accurately read the
 21 transcript of Marty Naegle to the best of your
 22 ability so help you God.
 23 THE WITNESS: I do.
 24 THE CLERK: State your name.
 25 THE WITNESS: NeagleMy name is Ercan

1 Iscan.
 2 DIRECT EXAMINATION
 3 BY THE DISTRICT ATTORNEY:
 4 Q. What is your business or opposition?
 5 A. I'm am a correctional sergeant at Ely
 6 State Prison.
 7 Q. How long have you been a correctional
 8 officer?
 9 A. Approximately 12 years and eight months.
 10 Q. And how about a sergeant? How long have
 11 you been a sergeant?
 12 A. Approximately six years.
 13 Q. Sergeant Neagle, do you know an
 14 individual by the name of Marlo Thomas?
 15 A. Yes, I do.
 16 Q. Do you see him court today?
 17 A. Yes, I do.
 18 Q. Please point to him and describe an
 19 article of clothing that he's wearing.
 20 A. Right here, brown shirt.
 21 THE DISTRICT ATTORNEY: May the recor
 22 reflect the identification of the defendant.
 23 THE COURT: The record will so reflect.
 24 BY THE DISTRICT ATTORNEY:
 25 Q. Sergeant Neagle, between 1991 and 1994,

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1 were you working as a sergeant at the Ely State
 2 Prison when the defendant Marlo Thomas was an
 3 inmate?
 4 A. Yes, I was.
 5 Q. As a sergeant what were your duties back
 6 then?
 7 A. Part of the time I was the property
 8 sergeant, and I believe part of the time I was the
 9 lockup sergeant.
 10 Q. Directing your attention to March 3,
 11 1994, did you have an incident where you had
 12 contact with the defendant?
 13 A. You're referring to the notice of
 14 charges that I did on the inmate?
 15 Q. Yes. Sergeant Neagle, I'm showing you
 16 State's Proposed Exhibit No. 97. Would you please
 17 take a look at that document and familiarize
 18 yourself with it. Do you recognize those
 19 documents?
 20 A. Yes, I do.
 21 Q. Are those documents that relate to an
 22 incident that you had with the defendant in
 23 March 3rd, 1994?
 24 A. Yes, they are.
 25 THE DISTRICT ATTORNEY: Move for their

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1 admission.
 2 THE COURT: Wait. What, 97?
 3 THE DISTRICT ATTORNEY: It says -- yes,
 4 97.
 5 THE COURT: Any objection to 97?
 6 DEFENSE ATTORNEY: If I may see it, your
 7 Honor, first.
 8 THE COURT: Yes, sure.
 9 DEFENSE ATTORNEY: I'm sure I've seen it
 10 before.
 11 THE COURT: Any objection?
 12 DEFENSE ATTORNEY: No objection, your
 13 Honor.
 14 THE COURT: Then Exhibit 97 will be
 15 admitted.
 16 BY MR. SCHWARTZ:
 17 Q. Do you have an independent recollection
 18 of this incident?
 19 A. Yes, I do.
 20 Q. Okay. Will you please tell us where was
 21 the defendant located when you had this contact
 22 with him?
 23 A. At Ely State Prison housed in Unit 3B
 24 which is a lockdown unit at the prison.
 25 Q. Was he out on the yard?

1 A. Yes, he was out on the recreation yard.
 2 Q. Were other inmates out there as well?
 3 A. Yes, they were.
 4 Q. Can you estimate how many?
 5 A. During that time frame they were allowed
 6 12 at a time out on the yard. At that particular
 7 time I don't know how many was out, up to 12.
 8 Q. Up to 12. Did you observe the defendant
 9 and other inmates engaged in some type of
 10 activity?
 11 A. I didn't personally see it, no. As a
 12 supervisor I was called to the incident. I would
 13 have been called over to where the incident took
 14 place.
 15 Q. So there were correctional officers who
 16 were supervising the defendant and other inmates
 17 on the recreation yard?
 18 A. Correct.
 19 Q. You received a call to respond to that
 20 area?
 21 A. Yes.
 22 Q. What was the reason for the call?
 23 A. Apparently a fight had taken place
 24 between two inmates on the yard.
 25 Q. Did the correctional officer indicate to

1 you who was involved in the fight?
 2 A. Once I got at the scene, sure, they
 3 would have told me who was involved in the fight.
 4 Q. Who was involved in the fight?
 5 A. Yeah, they would have told me who was
 6 involved in it.
 7 Q. Okay. The question is who was involved
 8 in it?
 9 A. I'm not sure.
 10 Q. Was the defendant involved in the fight?
 11 A. I don't believe he was in the fight.
 12 Q. Will you refer to your incident report?
 13 A. Okay.
 14 Q. Does your report reflect whether or not
 15 the defendant was fighting?
 16 A. No, it don't. It does reflect there was
 17 two other individuals fighting.
 18 Q. Okay. What happened when you arrived?
 19 A. From what I can recall, the inmates had
 20 already been placed onto the ground in the
 21 recreation yard. They were ordered to lay face
 22 down onto the ground. As a supervisor I'd get a
 23 team of officers together, go into the recreation
 24 yard, restrain the inmates, take them out of the
 25 yard individually, one at a time back to their

1 respective cells.
 2 Q. How were these inmates ordered to get
 3 down on the ground?
 4 A. Up above the recreation yard there's an
 5 officer who's assigned to a gun post who is -- he
 6 has a shotgun in his hand. So I imagine he gave
 7 them a verbal order to get on the ground. My
 8 report doesn't indicate if there was any shots
 9 fired or not.
 10 Q. It does not indicate whether shots were
 11 fired?
 12 A. No, it doesn't.
 13 Q. What happened when you arrived? Were
 14 all of the inmates on the ground?
 15 A. Excuse me. It does say that shots were
 16 fired on the recreation yard.
 17 Q. So that would suggest to us that the
 18 inmates did not comply with the verbal command --
 19 A. Correct.
 20 Q. -- and shots were fired from a shotgun
 21 in order to get their attention?
 22 A. Correct.
 23 Q. When you arrived did you assist other
 24 officers or did you supervise these officers in
 25 handcuffing the inmates down in the yard?

1 A. No, I would assist them in entering the
2 recreation yard, assign a group of officers to
3 each inmate to restrain them and escort them out
4 of the yard. I wouldn't physically put the
5 restraints on myself. As a supervisor I'd sit
6 back and make sure that things were done right.
7 Q. As you sat back, did you observe
8 officers trying to place handcuffs on these
9 inmates?
10 A. Yes, I did.
11 Q. Did you observe the defendant?
12 A. Yes, I did.
13 Q. What was he doing?
14 A. He was -- he was on the ground. When
15 the officers entered the recreation yard, I
16 believe he yelled several comments and tried to
17 entice the other inmates to jump up and assault
18 the staff members.
19 Q. Was that a volatile situation --
20 A. Yes, yes.
21 Q. -- with these inmates fighting?
22 A. Yes, it was.
23 Q. Did you have concern for the safety of
24 the inmates as well as the correctional officers?
25 A. For both, yes.

1 Q. This was a volatile situation especially
2 in light of the fact that a shotgun had to be
3 fired to get their attention?
4 A. Correct.
5 Q. Were these inmates who were down on the
6 ground in an agitated state?
7 A. Oh, yeah, sure. There would be -- there
8 was a lot of yelling, screaming, you know, a lot
9 of verbal abuse towards the staff members.
10 Q. Were you trying to maintain order and
11 extricate all of these inmates as quickly as you
12 could back to their cells?
13 A. Yes.
14 Q. When the defendant was trying to urge
15 these other inmates to rebel against these
16 officers, did you indicate in your report exactly
17 what he said?
18 A. Yes, I did.
19 Q. Did you include the defendant's words in
20 quotes?
21 A. Yes, I did.
22 Q. What exactly did he say?
23 A. He made the statement to the other
24 inmates, let's get up and kick these officers'
25 ass. I'll kill every one of you.

1 Q. When he said, "I'll kill every one of
2 you," who was he referring to?
3 A. The staff, the officers that entered the
4 recreation yard.
5 Q. And this is even while he was down on
6 the ground?
7 A. Right.
8 Q. Sergeant Neagle, I'd like to show you a
9 couple of documents. Now, you're familiar with
10 the general records at Ely State Prison?
11 A. Yes.
12 Q. Were you familiar with the recordkeeping
13 function as far as disciplinary violations?
14 A. Yes.
15 Q. Are you also familiar with the discharge
16 papers which were kept in an inmate's file?
17 A. No.
18 Q. Never seen them before?
19 A. I believe I've seen them. I don't think
20 I have a good understanding of them.
21 MR. OWENS: Court's indulgence one
22 moment. Much of the testimony is about documents
23 which are already in, so I'm kind of skipping
24 down.
25 THE COURT: All right.

1 MR. OWENS: Why don't we move over to
2 page 142. Exhibit No. 100 is admitted into
3 evidence.
4 Q. What is the date of the first charge.
5 A. January 2nd, 1991.
6 Q. How many pages of charges are indicated
7 on this?
8 A. Eleven pages.
9 Q. When was the last discharge -- I mean
10 violation?
11 A. November 6, 1994.
12 Q. I'm showing you State's Proposed Exhibit
13 No. 101. Will you take a look at these documents
14 just briefly to yourself?
15 A. Okay.
16 Q. Recognizing that you did not author any
17 of those reports, do you still recognize those as
18 official documents of the Nevada Department of
19 Prisons relating to the discharge of the defendant
20 Marlo Thomas?
21 A. Yes, I do.
22 Q. The first page, does it have a picture
23 on it?
24 A. Yes.
25 Q. Who is depicted in that photograph?

1 A. Mr. Thomas.
 2 Q. The defendant here in court?
 3 A. Yes, sir.
 4 Q. Is the first page entitled certificate
 5 of discharge?
 6 A. Yes, it is.
 7 Q. The following pages they all relate to
 8 his discharge?
 9 A. Yes, they do.
 10 THE DISTRICT ATTORNEY: Move for their
 11 admission.
 12 THE COURT: Any objection?
 13 DEFENSE ATTORNEY: No objection, your
 14 Honor.
 15 THE COURT: 101 will be admitted into
 16 evidence.
 17 BY THE DISTRICT ATTORNEY:
 18 Q. Let me just ask you briefly, when an
 19 inmate is incarcerated at Ely or any of the
 20 prisons within the department of prisons, are they
 21 given statutory good time credits?
 22 A. Yes, they are.
 23 Q. What are statutory good time credits?
 24 A. It's credits that inmates earn for being
 25 on good behavior which means they haven't gotten

1 in any type of trouble, been respectful to the
 2 officers and done what they're told. As long as
 3 they do that and abide by the rules of the prison,
 4 they earn good time. That good time may get an
 5 inmate out a lot earlier than it would if he's
 6 always in trouble. If he's always in trouble, he
 7 may end up doing day for day. For instance, if he
 8 has a five-year sentence, he may do all five years
 9 if he has bad conduct. If he had good conduct, he
 10 may do three years and ten months. It depends how
 11 much good time he earns.
 12 Q. If an inmate is charged with numerous
 13 violations, there are many different sanctions
 14 that can be imposed; is that right?
 15 A. That's right.
 16 Q. Including the loss of statutory good
 17 time credits?
 18 A. Correct.
 19 Q. On page 1 under certificate of
 20 discharge, does it indicate when the defendant was
 21 sentenced to prison?
 22 A. Yes, it does.
 23 Q. Okay. What was that date?
 24 A. November -- it looks like 29th, 1990.
 25 Q. When was he discharged?

1 A. The 8th day of October, 1995.
 2 Q. So he served almost the total of five
 3 years?
 4 A. Yeah. It looks like four years, 11
 5 months, close to four years and 11 months.
 6 Q. On page 2 does this document request
 7 that the inmate Marlo Thomas provide -- well, let
 8 me ask you this. Mr. Thomas was not paroled; is
 9 that right?
 10 A. That's right.
 11 Q. He was discharged meaning that he served
 12 all of his time?
 13 A. Yes, he did.
 14 Q. That would suggest to you that based
 15 upon the nine or 11 pages of sanctions that he
 16 lost all of his statutory good time credits?
 17 A. Yes, it would.
 18 Q. So he served the maximum term that he
 19 was sentenced to?
 20 A. Correct.
 21 Q. You indicated to us that had Marlo
 22 Thomas behaved and not lost his good time credits
 23 he would have served half the time?
 24 A. Probably a little bit more than half. I
 25 believe they can earn up to 20 days a month good

1 time.
 2 Q. But that didn't happen in Mr. Thomas's
 3 case?
 4 A. Apparently it didn't, no.
 5 Q. Does the second page of the document
 6 request a forwarding address?
 7 A. Yes, it does.
 8 Q. Did Mr. Thomas give a forwarding
 9 address?
 10 A. No, he did not.
 11 Q. He refused to give one?
 12 A. Yes, that's what it says.
 13 Q. On -- I lost track of the pages, but
 14 there's a document entitled Nevada Department of
 15 Prisons notification of registration and gun laws.
 16 A. Okay.
 17 Q. Do you see that document?
 18 A. Yes, I do.
 19 Q. When an inmate -- are you a peace
 20 officer?
 21 A. Yes, I am.
 22 Q. When an inmate or a person is convicted
 23 of a felony, are they entitled to carry firearms
 24 on their person?
 25 A. No, they're not.

1 Q. Is that a right that they lose as a
 2 result of their conviction?
 3 A. Yes, they do.
 4 Q. Does this document inform Marlo Thomas
 5 that he is not entitled to carry a firearm?
 6 A. Yes, it does.
 7 Q. On the next page is there an
 8 acknowledgment section which reads: The
 9 undersigned acknowledges receipt of a copy of the
 10 foregoing document of information --
 11 A. Yes, it does.
 12 Q. -- on this 8th day of October 1995?
 13 A. Yes, it does.
 14 Q. Is there a signature?
 15 A. Yes, there is.
 16 Q. Where is the signature?
 17 A. Marlo Thomas.
 18 Q. So he was advised that he could not
 19 carry a firearm?
 20 A. Yes.
 21 Q. Could not own a firearm?
 22 A. Yes.
 23 Q. Under any circumstances?
 24 A. Correct.
 25 THE DISTRICT ATTORNEY: That concludes

1 direct examination.
 2 THE COURT: Cross-examination, Counsel?
 3 DEFENSE ATTORNEY: Yes, Your Honor.
 4 BY DEFENSE ATTORNEY:
 5 Q. Good afternoon, Officer Neagle. You had
 6 testified to an incident where shots were fired on
 7 the yard and the defendant was maybe one of up to
 8 12 different inmates in the yard at that time.
 9 Was -- you also testified that the defendant
 10 became verbally abusive and made some threats.
 11 Was he the only one of the 12 people that was
 12 verbally abusive or made threats?
 13 A. No.
 14 Q. So some of the others were verbally
 15 abusive?
 16 A. Yes.
 17 Q. And some of the others made threats?
 18 A. Yes.
 19 Q. Did all of them -- were all of them
 20 verbally abusive?
 21 A. I don't recall if every one of them were
 22 verbally.
 23 Q. Were the majority verbally abusive?
 24 A. Yes.
 25 Q. Did the majority of those, up to 12

1 inmates, make threats?
 2 A. Yes.
 3 Q. Verbal abuse and threats to harm are not
 4 unusual in a prison setting, are they?
 5 A. No.
 6 Q. It's part of the job that you have to
 7 deal with on a daily base; is that not true?
 8 A. That's true.
 9 Q. The shots fired in the yard, those were
 10 by a correctional officer to the best of your
 11 knowledge?
 12 A. Yes.
 13 Q. All right. Are you familiar with the
 14 classification HRP or high-risk prisoner?
 15 A. Yes, I am.
 16 Q. Okay. To the best of your
 17 recollection -- well, strike that. You testified
 18 after reviewing some documents that Mr. Thomas had
 19 11 violations and that he was written up for; is
 20 that not correct?
 21 THE DISTRICT ATTORNEY: That's not --
 22 THE WITNESS: Eleven pages.
 23 BY DEFENSE ATTORNEY:
 24 Q. Oh, eleven pages?
 25 A. Eleven pages.

1 Q. All right.
 2 A. Each page with --
 3 Q. Each page had a number of violations; is
 4 that not correct?
 5 A. Correct.
 6 Q. Okay. That's quite a bit, isn't it?
 7 A. That's quite a few, yes.
 8 Q. Yeah. During the four years and ten
 9 months or 11 months that he was housed at Ely
 10 State Prison, were you there the whole time?
 11 A. Yes.
 12 Q. As a result of these 11 pages of
 13 violations, all right, was he ever classified as a
 14 high-risk prisoner?
 15 A. Not that I can recall, no.
 16 Q. Okay. As a result of these 11 pages of
 17 violations, were any criminal charges ever filed
 18 against him in a courtroom setting such as this
 19 where the State of Nevada was prosecuting him for
 20 criminal behavior or was all of this handled
 21 in-house?
 22 A. I have no idea if he was ever prosecuted
 23 for any of it.
 24 Q. For any of his behavior or not?
 25 A. Right.

1 Q. Do you think you would have known if the
 2 State of Nevada, the Department of Prisons, had
 3 had charges filed against him for prison behavior?
 4 A. If I was involved in the incident, yes,
 5 I would have known.
 6 Q. But to the best of your knowledge, no
 7 charges were ever filed in a criminal setting such
 8 as this against Mr. Thomas for prison behavior?
 9 A. I -- I do not know.
 10 Q. You don't recall?
 11 A. I don't recall.
 12 Q. All right.
 13 DEFENSE ATTORNEY: No further questions,
 14 your Honor.
 15 THE COURT: Anything else?
 16 THE DISTRICT ATTORNEY: No, your Honor.
 17 THE COURT: This isn't Sergeant Neagle,
 18 so, Mr. Iscan, thank you again, sir, for reading
 19 the prior testimony of Sergeant Neagle. You may
 20 step down.
 21 You may call your next witness.
 22 MR. OWENS: If he can trade places with
 23 Simone O'Connell we'd like to read the former
 24 testimony by Margaret Wood.
 25 THE COURT: The next witness by prior

1 sworn testimony will be Margaret Wood.
 2 Whereupon,
 3 SIMONE O'CONNELL,
 4 was administered the following oath by the court
 5 clerk.
 6 THE CLERK: You do solemnly swear that
 7 you will faithfully and accurately read the
 8 transcript of Margaret Wood to the best of your
 9 ability so help you God.
 10 THE READER: I do.
 11 THE CLERK: State and spell your name.
 12 THE READER: S-I-M-O-N-E O apostrophe
 13 C-O-N-N-E-L-L.
 14 THE CLERK: And the witness's name
 15 you're reading?
 16 THE WITNESS: Margaret Wood
 17 M-A-R-G-A-R-E-T W-O-O-D.
 18 THE COURT: Before we start reading the
 19 transcript from Margaret Wood, we have to have a
 20 brief break, so please go with the bailiff and
 21 we'll commence when you get back.
 22 (Whereupon, the jury retired
 23 from the courtroom.)
 24 (Whereupon, a recess was taken.)
 25 THE COURT: Good afternoon. Welcome

1 back to continuation of the penalty proceeding of
 2 the State of Nevada versus Marlo Thomas. The
 3 record will reflect the presence of the parties
 4 and counsel, all officers of the court and the
 5 full jury and alternate jurors.
 6 We have Ms. O'Connell here reading the
 7 prior testimony of Margaret Wood and, Counsel, you
 8 may proceed.
 9 MR. SCHWARTZ: Thank you, your Honor.
 10
 11 DIRECT EXAMINATION
 12 BY THE DISTRICT ATTORNEY:
 13 Q. By whom are you employed?
 14 A. Right now I'm at Southern Nevada
 15 Correctional Center, Nevada Department of Prisons.
 16 Q. And how long have you been so employed?
 17 A. Seven years.
 18 Q. During that seven-year period while you
 19 were employed with the Department of Prisons here
 20 in the state of Nevada, did you have come in
 21 contact with the inmate by the name of Marlo
 22 Thomas?
 23 A. Yes, I did.
 24 Q. Would you recognize Marlo Thomas if you
 25 saw him again?

1 A. Yes, I would.
 2 Q. Do you see him in the courtroom?
 3 A. Yes, I do.
 4 Q. Can you describe where he's located and
 5 what he's wearing today?
 6 A. Okay. He's right here. He's in tan.
 7 He's got a plaid shirt on.
 8 Q. Okay. Could you relate?
 9 THE COURT: The record will reflect --
 10 THE DISTRICT ATTORNEY: I'm sorry, your
 11 Honor.
 12 THE COURT: -- the identification of the
 13 defendant.
 14 THE DISTRICT ATTORNEY: Thank you.
 15 BY THE DISTRICT ATTORNEY:
 16 Q. Ms. Wood, would you relate to the
 17 members of the jury the contacts you've had with
 18 the defendant while in prison, the ones you can
 19 recall?
 20 A. I worked at Ely State Prison, and I was
 21 working in lockdown unit, and Mr. Thomas was an
 22 inmate in the lockdown unit.
 23 Q. What is a lockdown unit?
 24 A. It's where an inmate is being locked up.
 25 Q. And did you have any negative contacts

1 with the defendant while he was housed in the
 2 lockdown unit?
 3 A. Yes, I did.
 4 Q. Can you describe them, please.
 5 A. Inmate Thomas was very angry, and he was
 6 always calling me names. He was always calling me
 7 a slut and a whore, and he was always exposing
 8 himself to me and showing me his penis, and one
 9 time he told me to suck his dick.
 10 Q. I'm not trying to offend either yourself
 11 or the members of the jury or anyone else in this
 12 courtroom, can you relate -- when you say he
 13 exposed himself, could you relate to the jury how
 14 this was done and under what circumstances?
 15 A. Okay. In one incident I recall he had
 16 taken some cleaning supplies into his cell to
 17 clean his cell and he had a sponge and a cleaning
 18 brush and you know, we would give those items to
 19 him through the food slot, and when he finished he
 20 called me over there, and he had his penis on the
 21 food slot under the cleaning brush in hopes when I
 22 grabbed the cleaning brush I would grab him, and I
 23 did a notice of charges on him for that.
 24 Q. With regard to this feeding slot, could
 25 you describe it for the record?

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1 A. The food slot?
 2 Q. The food slot.
 3 A. It was a food slot that unlocked and you
 4 brought it down and you put the food through it or
 5 you put toilet paper through it or anything
 6 through it to the inmate.
 7 Q. Okay. So it's larger than what we would
 8 think of as a standard mail slot?
 9 A. Yes, it would be a little bit larger
 10 than that.
 11 THE DISTRICT ATTORNEY: I have no
 12 further questions.
 13 THE COURT: Cross-examination.
 14 DEFENSE ATTORNEY: Yes, Your Honor.
 15 BY DEFENSE ATTORNEY:
 16 Q. Is it officer?
 17 A. Yes, that is correct.
 18 Q. Okay. Good morning, officer.
 19 A. Good morning.
 20 Q. Are you presently working at Ely State
 21 Prison?
 22 A. No, I'm not.
 23 Q. But you had worked at Ely State Prison?
 24 A. Yes, I did.
 25 Q. How long had you worked at Ely State

1 Prison?
 2 A. I worked about five years in Ely State
 3 Prison.
 4 Q. And you testified that he was in
 5 lockdown; is that not correct?
 6 A. That is correct.
 7 Q. Can you describe physically what
 8 lockdown is like?
 9 A. Physically what lockdown is like, the
 10 inmate spends his time in the cell and the only
 11 time that he's taken out -- at that time the only
 12 time he was taken out is if he needed to make
 13 phone calls, legal or personal, and they were
 14 taken to the outside recreation yard. And at any
 15 other time they were locked in their cell during
 16 feeding and all other times.
 17 Q. Mm-hmm. When he's taken out to his --
 18 out into the yard for exercise or fresh air or
 19 whatever, is he taken out is he out there by
 20 himself?
 21 A. He would be out there with the same
 22 people that were categorized like him. Like, if
 23 he was a disciplinary detention, he would be
 24 outside with disciplinary detention people.
 25 Q. Was that what it is, disciplinary

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1 detention?
 2 A. Mm-hmm.
 3 Q. When he's taken from his cell to this
 4 area, is it not true that he's taken in waist
 5 changes, belly chains, leg irons?
 6 A. That is correct. Fully restrained.
 7 Q. Fully restrained. And does he remain in
 8 any restrained condition when he's out in the
 9 yard?
 10 A. No. They take the restraints off of him
 11 when he's in the yard.
 12 Q. Okay. Are there inmates though that are
 13 left with restraints on than when they're out in
 14 the yard because of their classification?
 15 A. Not to my knowledge.
 16 Q. Okay. To the best of your knowledge,
 17 there's not inmates who are allowed into a
 18 recreation or an exercise area where they're taken
 19 out by themselves?
 20 A. Yes. That would be considered a walk
 21 along inmate where he can't be put with any other
 22 inmates.
 23 Q. So there are classifications for that?
 24 In other words, there are procedures where you can
 25 isolate him from other inmates; is that not

1 correct?
 2 A. That could be correct, yes.
 3 Q. All right. So Nevada State prison Ely,
 4 the Ely location, has methods and procedures to
 5 isolate Mr. Thomas from other inmates?
 6 A. I don't know if Mr. Thomas was isolated
 7 from the other inmates.
 8 Q. No. They have methods and procedures by
 9 which you can isolate him from other inmates.
 10 A. Yes, they would, they could.
 11 Q. And when he's taken out in this walk
 12 along or in this -- with other restricted or
 13 disciplinary inmates -- how many officers take him
 14 from his cell?
 15 A. There are usually two officers.
 16 Q. And are these officers completely -- how
 17 would you say they're equipped in terms of their
 18 personal protection?
 19 A. Well, when I was there, they were
 20 dressed just like I am.
 21 Q. Just like you are?
 22 A. Mm-hmm.
 23 Q. Do you know, in fact, if they are
 24 dressed differently now?
 25 A. I'm aware that they did have different

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1 things that they wear now.
 2 Q. Okay. And what are those things if you
 3 know?
 4 A. I believe they wear a vest that protects
 5 them from being stabbed. I believe they wear a
 6 shield over their heads so that they can't have
 7 things propelled on them.
 8 Q. Do they wear any head gear or any --
 9 A. Yeah, head gear.
 10 Q. How about face shields?
 11 A. Yes, mm-hmm.
 12 Q. Anything like that? Okay. So is it
 13 safe to say that the Ely State Prison -- okay, are
 14 there methods and procedures in place whereby they
 15 can protect other inmates and guards and all
 16 guards also take extra precautions for unruly or
 17 disciplinary problems?
 18 A. Yes.
 19 DEFENSE ATTORNEY: No further questions.
 20 THE COURT: Anything else?
 21 THE DISTRICT ATTORNEY: Just briefly.
 22 BY THE DISTRICT ATTORNEY:
 23 Q. Ma'am, the Ely State Prison, you're not
 24 saying here today that prison guards are never
 25 assaulted because of the head gear they wear?

1 A. No, I'm not.
 2 Q. You're not saying because they have a
 3 face mask at a particular time that they're immune
 4 from being stabbed or cut or beaten up?
 5 A. No, I'm not.
 6 Q. In connection with the incident that you
 7 testified to, did you prepare a violation report?
 8 A. Yes, I did.
 9 Q. I'm showing you what has been marked as
 10 State's Proposed Exhibit No. 105 in context and
 11 ask you to look at the third page and ask you to
 12 read it to yourself. That appears to be the
 13 report you prepared in connection with the
 14 incident that occurred back in Ely State Prison.
 15 A. Yes, it is.
 16 Q. Did you indicate on that proposed
 17 exhibit the date when this incident occurred?
 18 A. Yes, I did.
 19 Q. What date did you affix to that
 20 document?
 21 A. January 19th, 1992.
 22 Q. At the time that document was prepared,
 23 was it the ordinary course of business for the Ely
 24 State Prison to keep these records?
 25 A. Yes, it was.

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1 THE DISTRICT ATTORNEY: Your Honor, the
 2 State would move for the admission of State's
 3 Proposed Exhibit 105.
 4 THE COURT: Any objection?
 5 DEFENSE ATTORNEY: No objection, your
 6 Honor.
 7 THE COURT: 105 will be admitted.
 8 BY THE DISTRICT ATTORNEY:
 9 Q. One final question, your Honor.
 10 Officer, Mr. LaPorta indicated to you through
 11 questioning that at the time this occurred Marlo
 12 Thomas was in lockdown; is that correct?
 13 A. Yes.
 14 Q. Ely State Prison was keeping him in
 15 lockdown?
 16 A. Yes, they were.
 17 Q. He was by himself. He didn't have
 18 access to other individuals at that particular
 19 time?
 20 A. He was alone in a cell.
 21 Q. Was that because of behavior that had
 22 occurred prior to his being put in lockdown?
 23 A. Yes. It was a disciplinary action.
 24 Q. So while these events occurred that
 25 happened to you or you were the victim of, they

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1 all occurred while he was in Lockdown?
 2 A. Yes, they did.
 3 THE DISTRICT ATTORNEY: Thank you.
 4 THE COURT: Any recross?
 5 DEFENSE ATTORNEY: Yes, Your Honor.
 6 BY DEFENSE ATTORNEY:
 7 Q. Officer, these incidents -- and I don't
 8 mean to be titillating here, but his showing his
 9 penis and calling you the slut and the whore, is
 10 he the one and only inmate who's ever done that
 11 that you've --
 12 A. No, he's not.
 13 Q. -- that you personally witnessed? So
 14 you've witnessed this on other occasions from
 15 other inmates, have you not?
 16 A. Yes, I have.
 17 Q. It's not unusual, is it?
 18 A. Not all of them do that. A very small
 19 amount does.
 20 Q. But it still happens --
 21 A. Yes, it does.
 22 Q. -- on occasion? All right. Also, I
 23 don't see in this where there was any physical
 24 aggression towards you to what you've testified
 25 to; is that not correct?

1 A. Yes, that's correct.
 2 Q. So he never got physically aggressive
 3 towards you?
 4 A. No, he didn't.
 5 Q. All right. And as to this lockdown just
 6 to be clear, there is an even higher
 7 classification where he's totally segregated; is
 8 that not correct?
 9 A. I'm --
 10 Q. Walk alone?
 11 A. Yes.
 12 Q. Okay. How much time does he spend in
 13 his cell if he was walk along status.
 14 A. I don't recall. As far as I know he
 15 wasn't on a walk-along.
 16 Q. All right. He wasn't, but I'm asking
 17 you in under a walk alone status or what they
 18 call, I believe, HRP, high-risk prisoner, how much
 19 time do they spend in their cell?
 20 A. I'm not certain.
 21 Q. All right. Does 23 hours ring a bell?
 22 A. I'm not certain.
 23 Q. They eat their meals in their cell;
 24 isn't that true?
 25 A. Yes, they eat their meals in their cell.

1 Q. All right. They're only allowed out
 2 briefly for 45 minutes for some exercise; isn't
 3 that true?
 4 A. I don't recall.
 5 Q. Okay.
 6 DEFENSE ATTORNEY: No further question
 7 your Honor.
 8 THE COURT: Thank you for reading the
 9 testimony of Margaret Wood.
 10 Counsel, you may call your next witness.
 11 MR. SCHWARTZ: Robert said lack.
 12 Whereupon,
 13 ROBERT SEDLACEK,
 14 was administered the following oath by the court
 15 clerk.
 16 THE CLERK: You do solemnly swear that
 17 the testimony you give shall be the truth, the
 18 whole truth, and nothing but the truth so help you
 19 God.
 20 THE WITNESS: I do.
 21 THE CLERK: State your name and spell
 22 your last name for the record.
 23 THE WITNESS: My name is Robert
 24 Sedlacek, S-E-D-L-A-C-E-K.
 25

1 DIRECT EXAMINATION
 2 BY MR. SCHWARTZ:
 3 Q. Sir, by whom are you employed?
 4 A. Department of Corrections in Ely,
 5 Nevada.
 6 Q. In what capacity?
 7 A. I'm a senior correctional officer.
 8 Q. How long have you been so employed?
 9 A. Going on about 15 years.
 10 Q. Were you working back on December the
 11 30th, 1994?
 12 A. Yes, I was.
 13 Q. And where were you working on that
 14 particular date?
 15 A. I was working in a lockdown unit and
 16 working the floor as a correctional officer.
 17 Q. Would that be at Ely State Prison?
 18 A. Yes.
 19 Q. And on that date did you come in contact
 20 with an individual by -- or inmate by the name of
 21 Marlo Thomas?
 22 A. Yes, I did.
 23 Q. Do you see Marlo Thomas in the courtroom
 24 today?
 25 A. Yes, I do.

1 Q. Can you point to where he's located and
2 describe what he's wearing?

3 A. Blue shirt on, sitting right over there.

4 MR. SCHWARTZ: Record reflect the
5 identification of the defendant, your Honor.

6 THE COURT: Yes, it will.

7 BY MR. SCHWARTZ:

8 Q. Officer, please describe what occurred
9 on December 30th, 1994, between yourself and
10 Mr. Thomas.

11 A. Well, we do a shower routine which we go
12 to the cell door, the inmate -- we open up a food
13 slot. Inmate sticks his hands out the food slot
14 behind him. We hook him up. We order him to
15 kneel down. The door comes open. We raise our
16 hand, the door comes open. We put legs on him.
17 We double lock them. We have the inmate stand up,
18 and two officers escort him to the shower, placed
19 him in the shower unhooked him. While he was
20 taking a shower, a cell search was conducted on
21 his cell and a few items were taken, and one of
22 them was a Cadillac.

23 Q. What do you mean by the term Cadillac?

24 A. A Cadillac is an inmate passing device.
25 They call it a car or a Cadillac where they can

1 officer in. I grabbed his other arm and pulled it
2 off the other side. Then because of me prying his
3 fingers off the other officer's arm, it gave him
4 an opportunity to try to get me close and try to
5 bite my arm or bite me on the hand or arm. And
6 finally got his arm spread apart so he couldn't do
7 that.

8 At that point we decided we'll give up
9 on this and let him go because we're both free
10 now. Let him go and he captured the food slot for
11 a period of time which means he just had his hands
12 out through the food slot holding onto the food
13 slot. There's a little shelf that we feed them
14 on, and he hung onto that for a period of time,
15 and eventually he gave it back to us. So we just
16 went back and closed it.

17 Q. So this confrontation you're describing
18 between the defendant, yourself, and the other
19 officer where the defendant tried to grab the
20 hands, was this through the food slot that this is
21 all taking place?

22 A. Yes, it was.

23 Q. And the cell door's actually locked at
24 this time?

25 A. Yes, it was.

1 send it out through the door and hook up between
2 two cells and they can pass small items around.

3 Q. Having a Cadillac or utilizing a
4 Cadillac, is that a violation of prison rules?

5 A. Yes, it is.

6 Q. So what happened next?

7 A. He had seen the officer take the
8 Cadillac, the two officers who did the cell
9 search. At that time they were fairly new
10 officers. At that time it was time to put him
11 back away, and he was raising all kinds of Cain
12 from the cell, being verbally abusive, calling
13 them names, telling them I'm going to get even, I
14 want my stuff back, that type of thing. And so me
15 and a more experienced officer went out, escorted
16 him back to the cell. When we placed him back in
17 the cell, of course kneeled down, took his legs
18 off. The door went shut, stuck his hands out
19 through the food slot, uncuffed him. At that time
20 he wheeled around and tried to punch out the food
21 slot, which I was far enough distance away he
22 couldn't quite reach me.

23 The officer with me grabbed his arm,
24 took it off to one side. I grabbed his other arm
25 because at that time he was trying to pull the

1 Q. With regard to that particular incident,
2 did you prepare an incident report?

3 A. Yes, I did.

4 Q. Showing you what has been admitted as
5 State's 99, just ask if you can identify that
6 particular item.

7 A. Okay. This is the disciplinary record
8 after he went to disciplinary which I was not a
9 part of his disciplinary. Another officer took
10 him to the disciplinary himself. The write-up,
11 the other officer that was involved with me done
12 the write-up courtesy, and then I guess my
13 misconduct report the last page you're looking at.

14 Q. What is the last page we're looking at?

15 A. That is a misconduct report or an
16 informative to follow up on the write-up so more
17 evidence of the write-up.

18 Q. Who prepared that report on the last
19 page.

20 A. I did.

21 Q. Have you had many dealings with the
22 defendant, sir?

23 A. Back then, yes, I did. I was in the
24 unit. That was my assigned position, quite a few
25 dealings with him.

1 Q. And how did the defendant feel about
2 prison rules?
3 A. Didn't like to go by many of them. A
4 rule was nothing to him.
5 Q. On this particular document, 99, we had
6 a similar document earlier and there's a spot
7 there, Section 5, which indicates the inmate's
8 statement. If you look at the monitor to your
9 left, do you see what the inmate statement was in
10 this particular incident?
11 A. Looks like he requested plea
12 negotiations.
13 Q. Thank you.
14 MR. SCHWARTZ: Nothing further, your
15 Honor.
16 THE COURT: Cross-examination.
17
18 BY MR. SCHIECK: CROSS-EXAMINATION
19 Q. This No. 99 is the disciplinary report
20 from the incident you just told us about?
21 A. Yes, it is.
22 Q. Marlo basically pled guilty and
23 requested negotiations?
24 A. Yes.
25 Q. As a result he was found guilty of one

1 of the offenses and then three others were
2 dismissed?
3 A. I never read the whole thing but, yeah,
4 that's what you're reading there, yes.
5 Q. His punishment was 60 days disciplinary
6 segregation?
7 A. Yes.
8 Q. I'll show it to you if you don't want
9 to -- there's different levels of violations there
10 at Ely State Prison, correct?
11 A. Yes, there is.
12 Q. There's a major violation?
13 A. Yes.
14 Q. And what are the other levels of
15 violations?
16 A. You've got a minor, major and what is
17 the medium one, medium or a mid-level violation.
18 I can't remember exactly what it's called.
19 Q. And a general?
20 A. And a general. That's the one.
21 Q. Is the general the lowest?
22 A. General is in the middle, minor is the
23 lowest and you've got the major.
24 Q. So there's just three levels?
25 A. Mm-hmm.

1 Q. Is that yes?
2 A. Yes.
3 Q. And so would you know what the different
4 codes are for the violations he was written up for
5 on this?
6 A. No. There's so many different codes or
7 violations that without reading them each time,
8 no. I don't memorize them.
9 Q. A Cadillac is sort of an inventive kind
10 of device for communicating or passing things back
11 and forth?
12 A. Yes, it is.
13 Q. If you're in a lockdown unit, you don't
14 have the ability to write a note and give it to
15 the other guy so --
16 A. No.
17 Q. And so you take a string or some
18 string-type device and tie it onto something
19 that's a little weighted and slide it under your
20 door?
21 A. Yes.
22 Q. And then the person that's receiving it
23 has some type of retrieving device to bring it in?
24 A. He has another Cadillac just like the
25 one that's thrown out. Usually it's like parts of

1 a sheet, strings out of a mattress or destroying
2 state property. They hardly ever destroy their
3 own property to make a Cadillac. They use state
4 property like a sheet, strings out of the mattress
5 that type of thing, and make their Cadillac out of
6 that, so that's what they are is homemade ropes
7 and strings.
8 Q. You're not supposed to have Cadillacs?
9 A. They're not allowed.
10 Q. Do you always write someone up when you
11 catch them with a Cadillac?
12 A. A good share of the time, not always.
13 It all depends on how the inmate a lot of times
14 reacts to that. If you take a Cadillac from an
15 inmate and you're allowed to just trash it, throw
16 it away, he doesn't have any response to that, he
17 accepts the rule at that point, we're fine with
18 that.
19 Q. So there's some discretion for the
20 officers when to write someone up and when not?
21 A. There is some.
22 Q. Depending on what the item is?
23 A. Yes.
24 Q. And how long have you been there at Ely?
25 A. I'm about four months short of 15 years.

1 Q. Have you been there since it opened?
 2 A. They opened phase two, the second phase
 3 of it. They opened it up in '90 sometime.
 4 Q. And the inmates that are in Ely now are
 5 on pretty much all lockdown except for one unit?
 6 A. All except for Unit 8. We've got one
 7 workers unit.
 8 Q. That's where the people that work in the
 9 kitchen or the bakery or the other type of things
 10 that they can do?
 11 A. Yes.
 12 Q. And they have a lot greater access to
 13 the yard and things of that nature?
 14 A. Yes, they do.
 15 Q. In fact, some of them can walk alone;
 16 like going to the bakery you can go alone if
 17 you're reporting to work?
 18 A. Yes, they can. They are supervised by a
 19 CP or a gun post, but other than that they're
 20 alone, yes.
 21 Q. So there's somebody watching them, but
 22 they're watching from the walkway?
 23 A. Yes.
 24 Q. But the people who are in lockdown they
 25 don't go anywhere without an escort?

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1 A. Not without an escort.
 2 Q. And you indicated that when you're
 3 taking them to the shower, for instance, it's two
 4 correctional officers that go to open the door?
 5 A. Yes. Two that have to handle the
 6 inmate. Once the door comes open, there has to be
 7 two officers present.
 8 Q. That is standard procedure?
 9 A. Standard procedure.
 10 Q. Always has been?
 11 A. Always has been in lockdown. There's
 12 different levels of -- there's single cell or
 13 movement with one officer, but it's in the other
 14 units. It's not called lockdown. It's called a
 15 form of GP treated similar to lockdown except for
 16 one officer.
 17 Q. Was anything else taken out of
 18 Mr. Thomas's unit during the shakedown?
 19 A. The only thing of interest was the
 20 Cadillac to him, so if there was it was -- it
 21 might be some trash. There's always some trash to
 22 pick up, empty containers or something like that.
 23 The only thing that was of interest to him was the
 24 Cadillac, so only thing that was ever written in
 25 the report so I can't recall.

1 Q. Are empty containers a violation of the
 2 rules?
 3 A. Yes, they are.
 4 Q. Do you write people up?
 5 A. If you can take and thin out some of
 6 their property and throw it away and they don't
 7 throw a fit and you don't have a lot of problems,
 8 they're not always written up, no.
 9 Q. In the lockdown unit when you take
 10 someone for their shower -- how often do they get
 11 to take a shower?
 12 A. Once every three days.
 13 Q. So once every three days when they go
 14 get their shower, how long do they have to be out?
 15 A. They get a ten-minute shower.
 16 Q. Then they go back to their cell?
 17 A. Yes.
 18 Q. Is it routine or was it routine at that
 19 time when you would take someone to the shower
 20 that you would go in and shake down his house?
 21 A. It was pretty much routine back then.
 22 We do it real consistently. There were times when
 23 other things would interrupt you where you'd have
 24 to miss a cell here or there, but it was pretty
 25 routine.

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1 Q. And so if you're going to take someone
 2 to the shower, the inmate would probably know his
 3 cell was going to get searched while he was taking
 4 a shower?
 5 A. Yes.
 6 Q. And it's not unusual that the inmate
 7 would be upset that the guards would go in and
 8 shake down his cell and throw away what they think
 9 they should throw away?
 10 A. There's a certain number that would,
 11 yes, but the biggest share, no, would not be
 12 upset. It was routine. It was accepted by them
 13 so.
 14 Q. And those food slots actually can be
 15 closed from the outside then?
 16 A. Yes.
 17 Q. When you say he captured the food slot,
 18 he just had his hands there so you couldn't close
 19 the door?
 20 A. Right. You'd have to close his fingers
 21 or hands in the door in order to close it, or
 22 expose yourself to him to get up there, and we
 23 already had a problem so we're going to keep our
 24 distance. We're not -- I'm not going to get back
 25 into that same situation.

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1 Q. And with your experience you figured it
 2 was just easier to just wait it out?
 3 A. Yes.
 4 Q. He's not going to capture --
 5 A. At that point it was easier to wait it
 6 out. Once we both got free, it was easy to wait
 7 it out.
 8 Q. Which is the smarter thing to do because
 9 he's going anywhere.
 10 A. Right.
 11 Q. Sooner or later he's going to give up?
 12 A. He's behind a locked door with an open
 13 food slot which we can stay away from.
 14 MR. SCHIECK: No further questions, your
 15 Honor.
 16 THE COURT: Redirect, Counsel.
 17
 18 REDIRECT EXAMINATION
 19 BY MR. SCHWARTZ:
 20 Q. Exhibit 99, you didn't -- in the
 21 analysis of what had happened, you didn't talk
 22 about the Cadillac. He was basically written up
 23 for attempting to bite you or the other officers?
 24 A. Yes.
 25 Q. Attempting to strike you or the other

1 A. He had a bad reputation among the
 2 correctional officers.
 3 Q. During your dealings with the defendant,
 4 did he ever express to you an interest in
 5 religion?
 6 A. No, not once.
 7 MR. SCHWARTZ: Thank you. Nothing
 8 further.
 9 THE COURT: Recross.
 10
 11 RECROSS-EXAMINATION
 12 BY MR. SCHIECK:
 13 Q. Your dealings were in '94 or '95?
 14 A. Yes.
 15 MR. SCHIECK: No further questions.
 16 THE COURT: Any questions for Officer
 17 Sedlacek. There are no questions for the officer.
 18 Thank you, Officer, for your testimony. You may
 19 be excused. Please do not discuss your testimony
 20 with anyone other than the attorneys.
 21 Counsel, you may call your next witness.
 22 MR. OWENS: We have one more reading,
 23 perhaps our last. Roger Edwards read by Ercan
 24 Iscan
 25 / / /

1 officer?
 2 A. Yes. The Cadillac was what caused him
 3 to expel at that point, but the write-up had to do
 4 with him trying to assault us.
 5 Q. How does an inmate get put in lockdown?
 6 What causes someone to be placed in lockdown?
 7 A. Can't get along with others, can't get
 8 along as well as with free staff, can't get along
 9 with other inmates.
 10 Q. And have you had many dealings with the
 11 defendant?
 12 A. In a GP unit or anything?
 13 Q. In Ely State Prison.
 14 A. Yes, yes. Yes, I have.
 15 Q. On one or two occasions is this the only
 16 incident that you can think of?
 17 A. There's been others, other occasions but
 18 nothing that he ever got ahold of or, and like you
 19 say a lot of verbal abuse, a lot of threats.
 20 Q. Does the defendant have a reputation or
 21 did he while you were there during this period of
 22 time did he have a reputation among the correction
 23 officers?
 24 A. Yes, he did.
 25 Q. Was it a good reputation?

1 Whereupon,
 2 ERCAN ISCAN,
 3 was administered the following oath by the court
 4 clerk.
 5 THE CLERK: You do solemnly swear that
 6 you will truthfully and accurately read the
 7 transcript of Roger Edwards to the best of your
 8 ability so help you God.
 9 THE READER: I do.
 10 MR. ALBREGTS: What page does this start
 11 on?
 12 MR. SCHWARTZ: 92.
 13 BY THE DISTRICT ATTORNEY:
 14 Q. Sir, please state your business or
 15 occupation.
 16 A. Right now I work for BHP Copper as an
 17 equipment operator. I left the Department of
 18 Prisons two years.
 19 Q. What did you do for the Department of
 20 Prisons?
 21 A. I was a correctional officer.
 22 Q. How long were you a corrections officer?
 23 A. A little over two-and-a-half years.
 24 Q. What were your duties as a correctional
 25 officer?

1 A. Safety and well-keeping of the inmates,
 2 health, things of that nature.
 3 Q. Did you work at a particular prison in
 4 Nevada State Prison system?
 5 A. Ely State Prison.
 6 Q. Did you work at Ely the entire
 7 two-and-a-half years?
 8 A. Yes, I did.
 9 Q. Would you describe Ely State Prison as a
 10 maximum security prison?
 11 A. Yes, it is.
 12 Q. What type of inmates are sent to Ely
 13 Prison?
 14 A. Everything from maximum general
 15 population inmates to death row, everything in
 16 between.
 17 Q. During your two-and-a-half years, were
 18 you generally familiar with the workings of the
 19 prison?
 20 A. Yes, very familiar. My wife and I both
 21 worked there.
 22 Q. Officer Edwards, will you please
 23 describe what type of amenities prisoners receive
 24 at the prison.
 25 A. They have three meals a day, bed,

1 blankets, televisions, coffeepots, radios,
 2 stereos. The cells are small. They're concrete
 3 and stainless steel. Stainless bed frame with
 4 mattress, stainless steel sink, stainless steel
 5 toilet. A light to the outside. Each cell has a
 6 light in it or window. They have lights in the
 7 cell that they can control and hot water and --
 8 Q. With respect to the electrical
 9 appliances, is there a limit on how many
 10 appliances that each inmate can have in their own
 11 individual cell?
 12 A. I believe there is. They can only have
 13 one of each. They can have one television, one
 14 radio/tape player, one coffee pot, hot pot type
 15 thing, one razor if it's an electric razor. They
 16 can't have multiples.
 17 Q. With respect to the televisions, are the
 18 inmates given cable TV?
 19 A. Yes, they are.
 20 Q. In their cell?
 21 A. They're given satellite cable TV.
 22 They're given education on -- I think it's three
 23 channels, but it's at least three channels of
 24 educational TV. They have a full educational
 25 staff there at the prison to do just about

1 anything college courses, high school courses, GED
 2 through college-level courses. That's the main
 3 function of the TV is education. They also get
 4 cable TV on top of that satellite TV, any program
 5 you guys watch.
 6 Q. With respect to contact with people who
 7 are on the outside of the prison, whether it be
 8 friends or relatives, what access do they have to
 9 those people?
 10 A. They have telephone access. They have
 11 access through the mail system. They have
 12 visiting privileges and access to have people come
 13 in and visit, personal type visits.
 14 Q. What about recreation? What type of
 15 amenities are they allowed?
 16 A. If they're general population, what --
 17 you'd say regular inmates, they have basketball, a
 18 full gymnasium setup, handball, baseball outside,
 19 everything furnished. And they get, depending on
 20 which part of the prison they're in, they get a
 21 set number of hours per day per week for that. In
 22 their units they have a recreation yard in their
 23 unit that they can play handball in or basketball
 24 right in their unit.
 25 Q. Are they also given access to spiritual

1 guidance?
 2 A. Yes, they are. Full-time Catholic
 3 priest there whose name is Father Kelly and he
 4 services there quite often. They bring other
 5 ministers and preachers five days a week for
 6 services.
 7 Q. What years did you work?
 8 A. I worked there '93 through June 26th of
 9 '95.
 10 Q. You say that your wife also worked
 11 there?
 12 A. Yes. She still works there. My wife is
 13 the administrative aide for the associate warden
 14 of programs.
 15 Q. Officer Edwards, when you worked as a
 16 correctional officer, were you personally armed?
 17 A. No, you don't carry arms with you. You
 18 don't carry the riot clubs or sticks. At that
 19 time we carried a flashlight and a pair of
 20 handcuffs. Now we don't carry handcuffs either.
 21 All we have is a flashlight. Most of the people
 22 will use a small light that's easier to carry.
 23 Q. How would you describe your job back
 24 then as a correctional officer as far as safety is
 25 concerned?

1 A. Main part of your job was to be safe, to
 2 make sure the inmates didn't hurt each other or
 3 didn't hurt the officers. It was more safety
 4 oriented than anything else.
 5 Q. Recognizing that you are one guard, how
 6 many inmates did you supervise at any one time?
 7 A. Standard unit holds 140 inmates, I
 8 believe, and the institution holds a thousand
 9 fifty total. At any one time you might have 200
 10 inmates on the yard and you're walking the yard as
 11 a search and escort officer or escort or whatever.
 12 Q. Generally speaking what was the ratio
 13 guard to prisoners?
 14 A. It's very low there. I believe the
 15 ratio is seven or eight inmates to one officer.
 16 Q. Did you consider your job to be
 17 hazardous?
 18 A. Yeah, I did. I thought it was the kind
 19 of a job you needed to stay on your toes. You
 20 needed stay alert.
 21 Q. And clearly the inmates at Ely State
 22 Prison were the worst of the worse?
 23 A. Yes, sir, they are.
 24 Q. When an inmate violates certain rules
 25 within the prison, is there a report which an

1 hearing which is the next level; is that right?
 2 A. Yes.
 3 Q. So the hearing officer has the option of
 4 resolving the issue himself or either himself or
 5 the inmate can recommend that it go to a full
 6 disciplinary hearing?
 7 A. Disciplinary committee.
 8 Q. And that is a committee comprised of
 9 several people who work in the prison?
 10 A. Yes.
 11 Q. They hear evidence and they determine
 12 whether or not the allegations re true?
 13 A. That's correct. They do the same thing
 14 a court does. The inmate has the opportunity to
 15 call witnesses on their behalf, have somebody
 16 there to represent them. It's basically the same
 17 system we use in a court of law.
 18 Q. Thereafter does the disciplinary hearing
 19 committee fill out a reform --
 20 A. Yes, they do.
 21 Q. -- a form reflecting their findings?
 22 A. Yes, they do.
 23 Q. You're familiar with all of these forms?
 24 A. Yes, I am.
 25 Q. These are forms which are kept in the

1 officer fills out?
 2 A. Yes, there is. It's a notice of
 3 charges. I found one in my file at home and
 4 brought it. It's a Nevada Department of Prisons
 5 Code of penal disciplinary form notice of charges.
 6 Q. Is that a document which the officer
 7 fills out?
 8 A. Yes, you do. Fill it out with the
 9 inmate's name, back number, current housing
 10 location, date, time and the report of the
 11 violation.
 12 Q. Thereafter after a notice has been filed
 13 and I take it the inmate is given a copy of the
 14 notice?
 15 A. Yes, he is.
 16 Q. Does a hearing officer conduct an
 17 investigation and make a disposition whether it be
 18 sanctions or referring it to a higher level?
 19 A. Yes, it does go that way. Notice of
 20 charges goes through shift supervisor, and that is
 21 a lieutenant, and he reviews it and signs it and
 22 sends it to the hearing officer, so it goes to a
 23 committee of quite a few people that's randomly
 24 selected.
 25 Q. Now we're talking about the disciplinary

1 ordinary course of business within the prison?
 2 A. They are.
 3 Q. Officer Edwards, I'm showing you State's
 4 Proposed Exhibits 92, 93, 95 and 98. If you would
 5 just briefly take a look at these documents. Do
 6 you recognize those documents generally as being
 7 documents that are kept in the ordinary course of
 8 business at prison with respect to violation by
 9 inmates as well as hearing officer reports and
 10 sometimes a summary of disciplinary hearings?
 11 A. Yes. Normally they keep these in a file
 12 in the records department in the prison, in each
 13 inmate's file.
 14 Q. Recognizing that you're not a custodian
 15 of records but you have seen these reports
 16 generally before and you know that these are
 17 official reports kept in the prison?
 18 A. Yes, I do.
 19 THE DISTRICT ATTORNEY: I move for the
 20 admission.
 21 THE COURT: Any objection to 92, 93, 95
 22 and 98?
 23 MR. ALBREGTS: Are we going to do the
 24 voir dire section?
 25 THE COURT: No. The Court has admitted

1 these.
 2 MR. SCHWARTZ: Page 101.
 3 BY THE DISTRICT ATTORNEY:
 4 Q. Do you know Marlo Thomas?
 5 A. Yes, I do.
 6 Q. Do you see him in court today?
 7 A. Yes, I do.
 8 Q. Please point to him and describe an
 9 article --
 10 A. Gentleman --
 11 Q. -- of clothing that he's wearing today.
 12 A. -- sitting right here in the brown
 13 pants, white shoes, checkered shirt buttoned to
 14 the top.
 15 THE DISTRICT ATTORNEY: May the record
 16 reflect the identification of the defendant, Marlo
 17 Demetrius Thomas.
 18 THE COURT: The record will so reflect.
 19 BY THE DISTRICT ATTORNEY:
 20 Q. Did you have contact with him at Nevada
 21 State Prison?
 22 A. Yes, I did.
 23 Q. I'd like to direct your attention to
 24 State's Exhibit No. 92. That is a summary of
 25 disciplinary hearings on the front page. Is that

1 yes?
 2 A. Yes, it is.
 3 Q. If you would turn to the back page, is
 4 that the notice of charges?
 5 A. Yes, it is.
 6 Q. Do you know Officer Cameron?
 7 A. I knew him, yes, I did.
 8 Q. He was a correctional officer at Ely
 9 State Prison?
 10 A. Mm-hmm, yes, sir.
 11 Q. Did he indicate which date this
 12 infraction occurred, maybe in the upper right-hand
 13 corner?
 14 A. April 27th, 1992.
 15 Q. Will you please read for us Paragraph 9
 16 which refers to the reporting employee statement,
 17 Officer Cameron?
 18 A. Paragraph 9, reporting employee's
 19 statement. On April 27, 1992, at approximately
 20 8:45 p.m., I, Correctional Officer Cameron,
 21 confiscated torn state sheets from Inmate Thomas,
 22 Back No. 32824, housed in 4B, Cell 32. After
 23 confiscating the Cadillac, Thomas became verbally
 24 abusive, Give me back my shit, you fucking bitch.
 25 I'm going to kick your ass, you bitch. That's

1 right, I'm getting out and I'm coming to Ely and
 2 I'm going to kick your motherfucking whore ass,
 3 then you'll call me daddy. End of report.
 4 Q. Is Officer Cameron a male or female
 5 officer?
 6 A. Officer Cameron was a female I believe.
 7 Q. Do you have back then -- did you have
 8 very many female correctional officers?
 9 A. No, sir, we didn't, very few.
 10 Q. I'd like to direct your attention to
 11 State's Exhibit No. 93 and specifically to the
 12 last page. Again, is that a notice of charges?
 13 A. Yes, sir, it is.
 14 Q. The correctional officer is Vern Kissel?
 15 A. Yes.
 16 Q. K-I-S-S-E-L?
 17 A. Yes, it is.
 18 Q. Did you know Officer Kissel?
 19 A. I know Officer Kissel now. I've known
 20 him for years.
 21 Q. Will you please read from Paragraph 9?
 22 A. Paragraph 9, reporting employee's
 23 statement. At approximately 1:30 p.m. on
 24 April 3rd, 1993, I, and there's a name marked out,
 25 officer something, standing about three feet

1 apart -- I can't make out that word.
 2 Q. No, I'm sorry. I think that you missed
 3 a line. I, Officer Vern Kissel, did observe
 4 Inmate Marlo Thomas.
 5 A. Let me start again. I did miss a line.
 6 It's my mistake. Paragraph 9, reporting
 7 employee's statement. At approximately 1:30 p.m.
 8 on April 3rd, 1993, I, Officer Vern Kissel, did
 9 observe inmates, Marlo Thomas, Back No. 32824,
 10 and -- this part's blacked out -- standing about
 11 three feet apart arguing. I seen Inmate Thomas
 12 pick up a chair and hit Inmate Duckett,
 13 D-U-C-K-E-T-T, and a fistfight started. I
 14 observed three inmates run over to help out in the
 15 fight. I kicked open the officer door and yelled
 16 for them to stop. The fight stopped instantly.
 17 Inmate Duckett walked to the sally port followed
 18 by three other inmates, Inmate Thomas staying
 19 where he was at. Thomas received a cut to the
 20 right cheek. There was a shank involved.
 21 Security squad found the weapon in the trash can
 22 in the sally port. End of statement.
 23 Q. What is a shank?
 24 A. A Shank is a prison-made weapon much
 25 like a knife you'd make out of scrap pieces you

1 might find in your garage or a broken piece of
 2 metal, some place or a -- a piece of glass filed
 3 down, piece of wood filed on concrete until it's
 4 sharp enough to cut you or stab you.
 5 Q. Now, Ely State Prison is your maximum
 6 security prison. There's one guard for every
 7 seven inmates. You do your best to maintain peace
 8 and tranquility at the prisons; is that right?
 9 A. That's correct.
 10 Q. Nevertheless, despite your efforts, do
 11 inmates still use their ingenuity in manufacturing
 12 weapons.
 13 A. They do, and it's amazing the kinds of
 14 weapons and things they can come up with.
 15 Q. In addition to your efforts, do inmates
 16 nevertheless engage in fights and use weapons
 17 against each other?
 18 A. Yes, they do quite often. They have a
 19 lot of altercations, a lot of fights, a lot of
 20 weapons are used.
 21 Q. Guards out on the grounds are unarmed?
 22 A. Yes, they are. We could not carry
 23 weapons. We don't carry any kind of self-defense
 24 things, only handcuffs.
 25 Q. Is it dangerous?

1 caused the firing of two 12-gauge shotgun rounds,
 2 one blank and 7 1/2 bird shot. Charges written on
 3 completion of investigation. Refer to Case File
 4 ES93-0119.
 5 Q. Is this sock containing rocks a type of
 6 blackjack item?
 7 A. It is worse than a blackjack because
 8 when you swing a sock full of rocks it stretches
 9 out about that far and that pile of rocks it can
 10 knock you out first hit. They're horrible.
 11 Q. And I'm going to refer you to State's
 12 Exhibit No. 98. That is a report which is
 13 generated by Correctional Officer Gina Boyter
 14 B-O-Y-T-E-R?
 15 A. Yes, it is.
 16 Q. If you would please turn to the final
 17 page, second to the last page. That is a notice
 18 of charges which was filed by Gina Boyter?
 19 A. Yes, it is.
 20 Q. Would you please read Paragraph 3.
 21 A. Paragraph 3, report of violation. At
 22 Ely State Prison on April 12, 1994, I,
 23 Correctional Officer Gina Boyter, was assigned to
 24 Unit 3B wing. While feeding Inmate Marlo Thomas,
 25 Back No. 32824, was given a dinner tray by myself.

1 A. Yes, it is. It can be.
 2 Q. I'd like to direct your attention to
 3 State's Exhibit No. 95, and if you would go to the
 4 last page which is the notice of charges. This is
 5 a report which was generated by Officer Gerald
 6 Thompson; is that right?
 7 A. Yes, it is.
 8 Q. Did you know Officer Thompson?
 9 A. Yes, I do.
 10 Q. This was back on August 24, 1993?
 11 A. Yes, it is.
 12 Q. Were you working in Ely back then?
 13 A. Yes, I was.
 14 Q. Were you personally familiar with this
 15 incident?
 16 A. No, I wasn't.
 17 Q. If you would read Paragraph 3 which is a
 18 report of a violation?
 19 A. Report of violation, Paragraph 3. On
 20 August 24, 1993, at approximately 8:10 p.m. on the
 21 Unit 1B tier, Inmate Thomas Marlo, Back No. 32824,
 22 did physically assault -- this part is blacked
 23 out -- with his fist and a sock containing five
 24 rocks approximately five inches in circumference
 25 violation of NRS 200.400. Thomas's actions also

1 Inmate Thomas then took his Dinner tray and
 2 propelled a cup of strong-odored urine at me which
 3 hit my face, hair, mouth and upper right side of
 4 my body. I then left the tier to go to the
 5 infirmary. End of report.
 6 Q. The last page, is that a list of medical
 7 charges which Officer Boyter incurred?
 8 A. It is. It is a list of restitution of
 9 medical services.
 10 Q. Did you know Officer Boyter?
 11 A. Yes, I did.
 12 Q. How well did you know Officer Boyter?
 13 A. Officer Boyter drove back and forth to
 14 work with me and my wife for about a
 15 year-and-a-half. She rode with us the day this
 16 incident happened.
 17 Q. Did you speak with Officer Boyter after
 18 this incident where urine was thrown at her?
 19 A. Yes, we did. When we got her to the
 20 parking lot and got in the car and went home, we
 21 talked about this all the way home that night.
 22 Q. How did it affect officer Boyter?
 23 A. Really demoralized her. This lady is a
 24 small lady. She's maybe five foot two, maybe
 25 weighs 100 pounds. At the time of the incident

1 she was about six months pregnant. It demoralized
 2 her terrible.
 3 Q. Thank you. You also had contact with
 4 the defendant; is that right?
 5 A. Yes, I did.
 6 Q. Were you one of the officers who was in
 7 charge of supervising Marlo Thomas?
 8 A. Yes, I was.
 9 Q. How much contact did you have with
 10 Mr. Thomas?
 11 A. For quite a while in lockdown, I had
 12 daily contact with him five days a week, eight
 13 hours a day.
 14 Q. He was eventually let out of lockdown to
 15 a general population unit. He wound up back in
 16 lockdown a short time later. He did his time
 17 there, went back to a general population unit and
 18 stayed there a short time and then went back to
 19 lockdown. He didn't stay on the yard very long.
 20 MR. SCHWARTZ: I think that should be an
 21 answer?
 22 THE COURT: I think that's a
 23 transcription error, so, Mr. Iscan, if you'd like
 24 to read that.
 25 THE READER: He was eventually let out

1 of lockdown. He wound up back in lockdown a short
 2 time later. He did his time there, went back to a
 3 general population unit and stayed there a short
 4 time and then went back to lockdown. He didn't
 5 stay on the yard very long. I was -- a year and a
 6 half, I dealt with him in lockdown and then for
 7 the next year, maybe 14 months, I dealt with him
 8 as a search and escort officer.
 9 BY THE DISTRICT ATTORNEY:
 10 Q. You had quite a bit of contact with him?
 11 A. Yes, I did.
 12 Q. How would you describe him as a security
 13 risk?
 14 A. High, maximum.
 15 Q. What do you mean by that?
 16 A. He was constantly assaultive and abusive
 17 of staff. Also assaultive and abusive of fellow
 18 inmates.
 19 Q. Did you take extra precautions?
 20 A. If he was in lockdown we wore safety
 21 glasses and wore bulletproof, knifeproof vests.
 22 We were not in physical contact with them unless
 23 they were in leg irons and handcuffs behind the
 24 back. Those were the rules.
 25 Q. Those were the rules which would apply

1 to the defendant?
 2 A. They applied to all inmates in lockdown,
 3 lockdown status.
 4 Q. What is lockdown status?
 5 A. Lockdown status is where they put
 6 assaultive, abusive inmates.
 7 Q. Can you tell us what percentage of the
 8 defendant's incarceration was spent in lockdown
 9 status?
 10 A. What percentage of inmates?
 11 Q. What percentage of the defendant's
 12 incarceration time was spent in lockdown.
 13 A. I have no idea. While I was there my
 14 period of time I would estimate over 80 percent
 15 was lockdown.
 16 Q. On September 17, 1993, you had contact
 17 with the defendant; is that right?
 18 A. Yes, I did.
 19 Q. You indicated to us earlier that you had
 20 a copy of that incident report.
 21 A. Yes.
 22 Q. At home in your file?
 23 A. Yes, I do. I found this in my file the
 24 night before we came to Las Vegas.
 25 Q. Do you keep copies of all of your

1 incident reports?
 2 A. I try to. Some of them were kept for AG
 3 referrals, but the ones I managed to keep I kept
 4 at home in a file.
 5 Q. What shift were you working on that
 6 date?
 7 A. Night shift, 4:00 in the afternoon until
 8 12:00 midnight.
 9 Q. What were you doing that evening?
 10 A. On this particular day, I was a floor
 11 officer in Unit 3.
 12 Q. Was the defendant housed in Unit 3?
 13 A. Yes, he was. He was housed in 3-B29.
 14 Q. Did you have contact with him that
 15 evening?
 16 A. Yes, I did.
 17 Q. Tell the jury about that contact.
 18 A. At this particular time my report of
 19 violation read, On September 17, 1993, at Ely
 20 State Prison, I, Officer Roger Edwards, had just
 21 got back from pushing the food carts onto the 4A
 22 wing from the culinary. At this time Officer
 23 David Oxborough told me to pick up the phone at
 24 Cell 4-A8. This is Inmate Thomas Marlo, 32824's
 25 cell. When I picked up the phone, Inmate Thomas

1 became abuse saying, Edwards, you bitch. I will
 2 get your ass someday, then we'll see you,
 3 motherfucker. Inmate then began throwing
 4 newspaper and other garbage onto the tier saying,
 5 Here, clean up after me, you motherfucker. I'll
 6 get the whole tier to go off, you asshole. This
 7 type of abuse continued for most of the night.
 8 When I swept the tier, there was an inordinate
 9 amount of trash in front of 4-A29.
 10 Q. With respect to the threats and
 11 vulgarities, do you remember those?
 12 A. Yes, I do. They're not normal behavior
 13 even for an inmate. That is not normal.
 14 Q. Did you take those threats seriously?
 15 A. Of course.
 16 Q. When he said that he was going to get
 17 the whole tier to go off, what was he referring
 18 to?
 19 A. There's 48 inmates housed on a tier,
 20 each individual cells. If one inmate can get the
 21 rest of the inmates on that tier to go off on the
 22 officer, you have a real bad tour of duty.
 23 Q. In what way?
 24 A. They throw things on the officers or
 25 they threaten you, cuss you, throw garbage out,

1 every way imaginable.
 2 Q. Thank you.
 3 THE DISTRICT ATTORNEY: That concludes
 4 direct examination.
 5 THE COURT: Cross-examination.
 6 DEFENSE ATTORNEY: Thank you, Judge.
 7 BY DEFENSE ATTORNEY:
 8 Q. Good afternoon, Mr. Edwards. How are
 9 you?
 10 A. Fine. How are you.
 11 Q. Good, very good. I have some questions
 12 of you. At the end of your direct testimony here
 13 today, you testified that threats and vulgarities
 14 were not a normal part of the prison, were not
 15 normal behaviors of inmates?
 16 A. It's as normal there as it would be
 17 here. It's not normal in public. It's not normal
 18 there. That is a small community.
 19 Q. Violent community?
 20 A. Small violent community.
 21 Q. The worst of the worse as was testified
 22 to?
 23 A. Yes.
 24 Q. And so if someone had testified here, a
 25 Department of Prisons employee, had testified that

1 it wasn't unusual to have threats and vulgarity
 2 displayed and directed at a prison employee, they
 3 would be mistaken?
 4 A. It happens quite often.
 5 Q. Okay. That's --
 6 A. -- but it is not normal.
 7 Q. All right, that's fine. Let me ask you
 8 about lockdown versus a classification called HRP
 9 which is high risk prisoner. Are you familiar
 10 with that?
 11 A. Yes, I am.
 12 Q. Are they the same classification and if
 13 not which is the highest security classification?
 14 A. The highest security classification is
 15 death row.
 16 Q. Well, I'm asking between lockdown and
 17 HRP. Please try to listen to my questions, and I
 18 asked you between lockdown and HRP which is the
 19 highest classification?
 20 A. It's HRP.
 21 Q. To the best of your knowledge, was
 22 Mr. Thomas ever classified HRP?
 23 A. Not that I know of.
 24 Q. You take different methods and
 25 procedures and precautions when somebody is

1 classified HRP as opposed to being placed in
 2 lockdown?
 3 A. You do.
 4 Q. Okay. Who --
 5 A. To deal with the nature --
 6 Q. All right. Who gets classified HRP
 7 generally speaking? What type of behaviors gets
 8 you classified as HRP?
 9 A. Officer assault is horrendous. An
 10 officer winds up in the hospital for the damage
 11 done to him. Any inmate assault where the inmate
 12 is maimed, that person would be classified.
 13 Q. By an inmate maimed, you mean an inmate
 14 other than the defendant in this situation?
 15 A. An inmate-on-inmate situation.
 16 Q. Okay.
 17 A. After the hearing, after the notice
 18 charges, the normal procedure he would get
 19 classified HRP.
 20 Q. Okay. Now, you testified during direct
 21 that during your employment there at Ely you were
 22 familiar with Marlo and that was because he was
 23 general population lockdown. General population
 24 lockdown is something along those lines?
 25 A. Mm-hmm, yes.

1 Q. But now you've also testified here just
2 a second ago that at no time was he classified an
3 HRP or high-risk prisoner, put into that
4 additional security situation; is that not
5 correct?
6 A. I --
7 Q. Yes or no.
8 A. I said not that I knew of.
9 Q. Not that you knew of, okay. Lockdown,
10 is that both an individual and maybe a living unit
11 status? In other words, can an individual be
12 placed in lockdown and can a wing or a living unit
13 be placed in lockdown?
14 A. Placed on lockdown status, yes.
15 Q. Both individual and let's say not
16 barracks, but let's say living quarters, a whole
17 wing?
18 A. A tier can be placed on lockdown status
19 at the discretion of the warden for safety or
20 security.
21 Q. All right. Is it not true that Ely
22 State Prison currently or while you were there
23 last always had at least a partial lockdown
24 situation, if not a total lockdown situation, for
25 its whole inmate population?

1 A. They've always had at least one
2 dedicated just to lockdown yes.
3 Q. When you say unit, are you talking about
4 a living unit?
5 A. A 48-person unit, yes.
6 Q. All right.
7 A. A 48-person tier.
8 Q. And to the best of your knowledge, is
9 that 48-person living unit maxed out, in other
10 words, are 48 people in lockdown?
11 A. Always. The entire institution is maxed
12 out.
13 Q. High-risk prisoner, are they ever --
14 they spend 20 -- is it not true that they spend
15 approximately 23 hours a day in their cell by
16 themselves?
17 A. Twenty-two to 23 hours, yes, sir.
18 Q. When they are allowed out of their
19 cells, they are shackled prior to being released
20 from that cell?
21 A. Yes.
22 Q. There are two officers present at the
23 time they are released?
24 A. Yes.
25 Q. And when the cell is unlocked, they are

1 completely shackled; is that not true?
2 A. Their hands are shackled through the
3 food slot. They're ordered to turn around and
4 kneel. Then the door is opened and their leg
5 shackles are put on them at that time. They're
6 helped to their feet and escorted to the yard.
7 Q. Okay. Now I'm talking about HRP's,
8 okay? Then they go into a concrete-enclosed yard;
9 is that not correct?
10 A. That's correct.
11 Q. And then a door is shut behind them and
12 secured?
13 A. Correct.
14 Q. And then these handcuffs are pulled off
15 of them; isn't that correct?
16 A. They remove the leg irons while they're
17 knelt at the doorway. The door is closed, they
18 stick their hands through the bars after the door
19 and you remove their cuffs. They're then put on
20 the yard.
21 Q. Then the shower it's a similar --
22 A. The same situation.
23 Q. How often a week are they allowed to
24 shower?
25 A. Every other day.

1 Q. Okay. And there's always two officers
2 who are in protective garb in attendance at all
3 times; is that not correct?
4 A. That's correct.
5 Q. How about medical and dental situations
6 where they need to see either a doctor or a
7 dentist? They are shackled while they're seeing
8 the doctor or dentist?
9 A. If the doctor or dentist requests the
10 shackles be removed, they're removed.
11 Q. That would be for purposes of treatment
12 only?
13 A. Right.
14 Q. Is there any time when those two
15 officers or if -- excuse me -- if need be more
16 officers are not present while the inmate is
17 seeing a doctor or dentist?
18 A. There are times that there will be four
19 or five officers present depending on the inmate,
20 whether he's HRP, lockdown. The minimum is two.
21 Q. And there are situations where you can
22 more than two on a particular inmate?
23 A. Yes, there are.
24 Q. If his behavior so calls for it?
25 A. Violence.

1 Q. All right. You described or testified
 2 during your direct that safety was an issue; is
 3 that not true?
 4 A. That's true.
 5 Q. All right. So you're always aware of
 6 what's going on around you. You also made a
 7 statement that today you're more aware, more
 8 oriented towards safety than what you were
 9 sometime in the past; is that not true? I mean,
 10 you made a statement during your direct testimony.
 11 A. As I get older I'm -- yeah.
 12 Q. That was --
 13 A. When I was --
 14 Q. That was a statement about you
 15 personally or about the prison itself?
 16 A. Myself personally and the prison also.
 17 Q. The prison has become a little more
 18 secure today?
 19 A. Yes, it is.
 20 Q. In other words, they've learned from
 21 their errors and their mistakes?
 22 A. Yes, they have.
 23 Q. You stated there were no arms, no guns
 24 or weapons allowed in the prison by the correction
 25 officers such as yourself. What about gas?

1 A. There were no --
 2 Q. Pepper spray?
 3 A. No guns or arms on the yard. There are
 4 guns in secured places. You do not walk the yard
 5 with guns, ammunition or any kind of weapon.
 6 Q. Is gas or pepper spray considered a
 7 weapon?
 8 A. You don't walk the yard with gas or
 9 pepper spray either.
 10 Q. Okay.
 11 A. That's kept contained in the secure
 12 areas.
 13 Q. Okay. Getting back to the 23 hours that
 14 the HRP prisoners put in who have earned that
 15 distinction, getting back to that, you testified
 16 as to what they have available to them, okay?
 17 Just what specifically does the State give an
 18 inmate when he arrives in terms of what's in his
 19 cell, not what can he have but what the State
 20 gives him?
 21 A. Blanket, sheet, mattress, toiletries
 22 inclusive, razor, toothbrushes, toothpaste. If he
 23 has no clothes, he's given clothes. If he
 24 requests a television in writing and he's an
 25 indigent inmate, the State gives him a television

1 set.
 2 Q. Well, will the State give him anything
 3 beyond a television if he's indigent such as a
 4 radio and everything else that you're --
 5 A. I don't know.
 6 Q. That you're testifying to? Okay. Now,
 7 the director of prisons approves that policy, does
 8 he not, as to televisions and so forth?
 9 A. That policy was approved before the
 10 current director of prisons.
 11 Q. But still, the director of prisons, not
 12 matter who it was, approved that along with maybe
 13 a committee or something?
 14 A. I would suppose.
 15 Q. All right.
 16 A. Through the legislature.
 17 Q. Okay. Is it not true during these
 18 hearings for incidents such as what you testified
 19 to that one of the forms of punishment is loss of
 20 appliances?
 21 A. Yes.
 22 Q. Loss of --
 23 A. Yes, it is.
 24 Q. All right. So in other words, you
 25 give -- allow a TV an inmate, you can attempt to

1 control his behavior by taking that television
 2 away from him for a week, 30 days, what have you;
 3 is that not correct?
 4 A. That's correct.
 5 Q. Is that the same for telephone
 6 privileges that are given to them?
 7 A. Yes, it is.
 8 Q. So they can lose their telephone
 9 privileges if they don't behave as they should?
 10 A. If they abuse the telephone they can
 11 lose their privileges to use the telephone.
 12 Q. You also testified during direct that at
 13 times you -- when you're out on the yard there can
 14 be up to 200 prisoners and they have various
 15 recreational activities the them, handball,
 16 basketball, things of that nature. That's not --
 17 isn't it true that's not available to high-risk
 18 prisoners, is it?
 19 A. No, not the high-risk or lockdown
 20 prisoners. They were restricted to the mini
 21 yards, the small yard.
 22 Q. And the high-risk prisoners are
 23 restricted even further to being by themselves in
 24 this concrete-enclosed yard?
 25 A. Correct.

1 Q. Have you seen that concrete-enclosed
2 yard?
3 A. Yes, I have.
4 Q. How big is that concrete-enclosed yard?
5 A. Roughly the size of this courtroom.
6 Q. And a great concrete wall surrounding
7 it?
8 A. Approximately 12-foot high concrete
9 walls.
10 Q. Uncovered, with the sky?
11 A. Right.
12 Q. They're in that enclosure as an HRP
13 classification for approximately 45 minutes a day?
14 A. One to two hours.
15 Q. One to two hours?
16 A. Yeah.
17 Q. Now, you've testified to a number of
18 incidents with other guards and your general
19 descriptives were those of assaultive behavior.
20 Can you define for this jury what you as a prior
21 correction officer in the prison what you mean by
22 assaultive behavior?
23 A. Any abusive verbal assault, any contact,
24 any propelling. If someone was to throw something
25 on me, I would consider that assaultive. If

1 someone was to talk derogatorily about my wife, my
2 family, myself, try to touch me I would consider
3 all that assaultive.
4 Q. But that's different than an actual
5 physical attack upon a guard; is that not true?
6 A. I believe physical assault, assault and
7 battery, is anytime you touch someone and you
8 don't request it.
9 Q. Not to get into the legal distinction
10 between assault and battery, but are there not
11 different charges that can be made towards a
12 prisoner who has threatened and been verbally
13 abusive versus a prisoner who has -- or an inmate
14 who has actually physically attacked a guard?
15 A. There's distinction, yes.
16 Q. So they're distinctive charges?
17 A. Yes.
18 Q. That can be made and filed against an
19 inmate; is that not correct?
20 A. That's correct.
21 Q. And all we heard during your testimony
22 was incidents of assaultive behavior; no incidents
23 where he had specifically attacked a guard; is
24 that not true?
25 A. I don't remember reading anything that

1 had physical attack.
2 Q. Okay. For the jury, can you describe
3 what a Cadillac is. During one of your incidents,
4 you had taken a Cadillac away from him.
5 A. The inmates will take a prison-issued
6 sheet and tear it into strips approximate a
7 half-inch wide and tie them together, tie a heavy
8 object on the end like a bar of soap, plastic sack
9 full of water or anything else, and send it out
10 from underneath their door and whip it around and
11 get it to another door where the other inmate will
12 reach out and get it, hook it to something and
13 pull it to their house, pull it in underneath the
14 door. There's two, three, four inches of space
15 between the doors depending on how the tier is
16 laid out, underneath that that they can do this.
17 That's a Cadillac. We call it a Cadillac because
18 it's a transportation thing.
19 Q. Now, is that an offensive weapon?
20 A. It can be, yes.
21 Q. Have you personally seen it used?
22 A. Yes, I have.
23 Q. As an offensive weapon?
24 A. Yes, I have.
25 Q. All right. And a shank, I think

1 everybody would know here that's a weapon you say
2 fashioned from scratch metal or something like
3 that?
4 A. Yes.
5 Q. You also testified that fights were
6 quite common in this prison setting?
7 A. Fights are common. Put over a thousand
8 men together in a contained area, you have fights
9 on occasion.
10 Q. Are shanks offensive?
11 A. Offensive.
12 Q. Offensive weapons, are they also
13 defensive weapons?
14 A. Suppose they could be.
15 Q. Isn't it true that all the incidents
16 that you testified to, that you read from the
17 incident reports, that only one officer who had
18 urine thrown on her, only one officer ever had to
19 go to the infirmary?
20 A. That is all I know of.
21 Q. All right. You also stated during your
22 testimony that oftentimes you keep notes for
23 yourself for --
24 A. Yes, I do.
25 Q. And that's for possible charges filed by

1 the attorney general's office; is that not
 2 correct?
 3 A. Not necessarily. I kept a daily diary
 4 of where I worked, who I worked with, if there was
 5 an incident that day I responded to, who was
 6 there.
 7 Q. If charges, criminal charges in court,
 8 are to be filed against an inmate, what
 9 institution, would it be the attorney general's
 10 office that would be the prosecutor in that
 11 situation?
 12 A. I have no idea.
 13 Q. All right.
 14 A. I know of cases at Ely where the
 15 district attorney has handled the charges if
 16 they're misdemeanor type charges.
 17 Q. Then you do know of situations where
 18 criminal charges were actually filed in a county
 19 or state court against an inmate at Ely?
 20 A. Yes.
 21 Q. All right. You know personally of those
 22 situations like that?
 23 A. Yes.
 24 Q. To the best of your knowledge, were
 25 criminal charges during anytime during Marlo's

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1 stay at Ely State Prison, filed with either the
 2 county prosecutor or the attorney general's office
 3 of the State of Nevada for behavior that arose out
 4 of activities while he was staying at Ely State
 5 Prison?
 6 A. I can't say.
 7 Q. To the best of your knowledge?
 8 A. That I know of? No. Of the incidents
 9 was involved in.
 10 DEFENSE ATTORNEY: No further questions,
 11 your Honor.
 12 THE COURT: Thank you again, Mr. Iscan,
 13 for reading.
 14 MR. SCHIECK: Can we approach, your
 15 Honor.
 16 THE COURT: You may.
 17 (Off-the-record bench conference.)
 18 THE COURT: Ladies and gentlemen, the
 19 officers who either testified live here today or
 20 through prior transcripts were testifying to
 21 behavior which occurred sometime between 1990 and
 22 1997.
 23 You may call your next witness.
 24 MR. ALBREGTS: Actually what we wanted
 25 was the date of the testimony.

1 THE COURT: They all testified at a
 2 proceeding which occurred on --
 3 MR. ALBREGTS: June 23, 1997.
 4 THE COURT: They all testified on
 5 June 23, 1997.
 6 MR. OWENS: Greg Freeman.
 7 Whereupon,
 8 GREGORY FREEMAN,
 9 was administered the following oath by the court
 10 clerk.
 11 THE CLERK: You do solemnly swear that
 12 the testimony you give shall be the truth, the
 13 whole truth, and nothing but the truth so help you
 14 God.
 15 THE WITNESS: I do.
 16 THE CLERK: State your name and spell
 17 your last name for the record.
 18 THE WITNESS: Gregory Freeman,
 19 G-R-E-G-O-R-Y F-R-E-E-M-A-N.
 20
 21 DIRECT EXAMINATION
 22 BY MR. OWENS:
 23 Q. Back in February of 1998, were employed
 24 by the Nevada Department of Prisons?
 25 A. Yes, sir.

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1 Q. Do you still work for that institution?
 2 A. No, I do not.
 3 Q. And what were you doing for the prison
 4 system back then?
 5 A. Back then I was a correctional officer
 6 trainee, and at that time I was a unit officer in
 7 Unit 2 I believe it was.
 8 Q. I think you remember the 21st of
 9 February 1998 an incident that occurred involving
 10 Marlo Thomas?
 11 A. Yes, sir.
 12 Q. Who is that?
 13 A. The defendant sitting right there in the
 14 blue shirt in the middle.
 15 MR. OWENS: Record reflect
 16 identification of the defendant.
 17 THE COURT: Record will so reflect.
 18 BY MR. OWENS:
 19 Q. How long had you been working in the
 20 prison system at that point in time?
 21 A. About seven or eight months.
 22 Q. What particular facility were you at?
 23 A. At the Ely State Prison.
 24 Q. What happened to you?
 25 A. That day to the best of my knowledge

1 Inmate Thomas had flooded out -- had begun
2 flooding the tier, and two other officers and I,
3 Officer Kevin McCord and Senior Officer Newstead,
4 had pulled Inmate Thomas out of his cell, and we
5 were escorting him into the shower, and when he
6 turned and spit at me and the spit hit the face
7 shield of the helmet and came up underneath around
8 the chin area and a little bit of it got into my
9 mouth.

10 Q. What happened?

11 A. Officer McCord and Senior Newstead
12 continued to put Inmate Thomas into the shower and
13 lock him into the shower, and then by direction of
14 Sergeant Axel I went to medical after that.

15 Q. Why did you go to medical?

16 A. Because it is standard procedure at the
17 prison that when some kind of bodily fluids are
18 exchanged or, you know, contact with bodily fluids
19 or unknown fluids or materials, then you go
20 through a standard series of blood draws to make
21 sure that no -- sorry. That no diseases or
22 anything is passed.

23 Q. To make sure you didn't get HIV or
24 something like that?

25 A. Correct.

1 Q. Why did he spit at you?

2 A. Earlier in the day he had asked for
3 kites. A kite is an inter-prison memo form and as
4 he had already been given kites earlier in the day
5 until it is -- it's an institutional procedure
6 that they're not allowed to have -- they're only
7 allowed to have so many of the different forms in
8 their possession, and he had not handed any back.
9 And Inmate Thomas also had a very -- every chance
10 he would get, he would put the kites or other
11 forms that we give him up in the window blocking
12 the view into their cell so you couldn't see what
13 they're up to. So until he handed some out, we
14 were not allowed to give him any more.

15 Q. Did you have some confrontation about
16 that with him about that?

17 A. Just -- I honestly do not remember if --
18 I'm sure there were words, but I can't promise.

19 Q. Did he seem upset about that?

20 A. Not until water started coming out from
21 under his door.

22 Q. Now, you mentioned that the flooding.
23 Tell us about that. What is that?

24 A. Flooding is they'll either take a towel
25 or one of their bed sheets, one of their jump

1 suits or whatever that'll plug the toilet up and
2 then they will just sit there and keep flushing
3 the toilet until it starts spreading water on the
4 tier. And then it is normal procedure that you
5 pull them out of their cell, put -- lock them in
6 the shower because then you have to clean up their
7 cell, clean up the tier and then you put them back
8 in their cell.

9 Q. How long does it take to clean that up
10 usually?

11 A. Depending on the extent of water,
12 usually sometimes 15 minutes, half hour. Just
13 depends on, like I said, how much water there is.

14 Q. How's that affect the other inmates in
15 the operation in that cell?

16 A. Well, if you are doing all the inmates,
17 they have to be officer escorted. If you're doing
18 showers, it stops the showers. Quite often the
19 water will go under another inmate's door, so
20 after we clean up one cell, then we have to put
21 that inmate back in the cell then turn around and
22 pull the other inmate out so their cell can be
23 cleaned.

24 Q. You said you were wearing some kind of a
25 face mask?

1 A. Yes, sir. Inmate Thomas was an HRP
2 which stands for high risk potential, and when
3 handling an HRP it was institutional procedure
4 that we wear a helmet with a face shield on it,
5 and unlike the normal lockdown inmate they had to
6 be -- a normal lockdown inmate had to be escorted
7 by two officers and an HRP had to be escorted by
8 three officers.

9 Q. But on this particular occasion the face
10 shield wasn't able to protect you?

11 A. I just didn't have it down over my head
12 quite far enough, down on my face far enough.

13 Q. I'm going to show you what's been marked
14 as State's Exhibit No. 116 which is for the record
15 a file folder containing numerous disciplinary
16 reports with a summary report on top; is that
17 right?

18 A. It appears so, yes.

19 Q. And have you had a chance to look at
20 this before, this particular packet?

21 A. I looked at that the other day. I
22 believe it was two days ago in your office.

23 Q. One of these reports is yours? That's
24 tabbed out on the right side there.

25 A. Yes, sir, that's my report.

1 Q. That's the report that you had filled
2 out on this particular incident, the disciplinary
3 violation report involving Mr. Marlo Thomas?
4 A. Yes, sir.
5 Q. And the effect of your report was that
6 he lost his use of electricals for 45 days or
7 suspended for 90 days?
8 A. No, sir. That's the previous report. I
9 believe it was the other direction.
10 Q. That was the previous report?
11 A. There it is. In his initial reading he
12 pled not guilty and then by the committee he was
13 found -- by the committee he was given 90 days
14 disciplinary segregation.
15 Q. What would that mean, disciplinary
16 segregation?
17 A. Well, disciplinary segregation means he
18 is not allowed to be in the general population of
19 the prison. He's kept in lockdown for a certain
20 amount of period as deemed by the disciplinary
21 committee, and in this case his time in
22 disciplinary segregation is extended 90 days.
23 Q. So he was already in segregation?
24 A. Yes, sir.
25 Q. And this extended it?

1 A. Extends it another 90 days.
2 MR. OWENS: Thank you. That's all the
3 questions I have.
4 THE COURT: Cross-examination.
5
6
7 BY MR. SCHIECK: DIRECT EXAMINATION
8 Q. Is it Mr. Freeman?
9 A. Yes, sir.
10 Q. After this incident did Mr. Thomas
11 apologize to you?
12 A. No, sir.
13 Q. And did you continue to work in the same
14 unit?
15 A. Yes, sir.
16 Q. And when did you leave?
17 A. Left the prison or the unit?
18 Q. The unit.
19 A. I believe it would have been around
20 another four months after that -- four or six
21 months after that when they did a shift rotation.
22 MR. SCHIECK: Thank you. No further
23 questions.
24 MR. OWENS: Nothing.
25 THE COURT: Ladies and gentlemen of the

1 jury, do you have any questions for Mr. Freeman?
2 Thank you, Mr. Freeman, for your testimony. You
3 may be excused. Please do not discuss your
4 testimony with anyone other than the attorneys.
5 Counsel, you may call your next witness.
6 MR. OWENS: Dave Williams.
7 Whereupon,
8 DAVID WILLIAMS,
9 was administered the following oath by the court
10 clerk.
11 THE CLERK: You do solemnly swear that
12 the testimony you give shall be the truth, the
13 whole truth, and nothing but the truth so help you
14 God.
15 THE WITNESS: Yes.
16 THE CLERK: State your name and spell
17 your name for the record.
18 THE WITNESS: David Williams, D-A-V-I-D
19 W-I-L-L-I-A-M-S.
20
21 DIRECT EXAMINATION
22 BY MR. OWENS:
23 Q. Mr. Williams, you're employed by the
24 Nevada Department of Corrections?
25 A. Yes, sir.

1 Q. Do you know Marlo Thomas?
2 A. Yes, sir.
3 Q. How do you know him?
4 A. He has been housed in units at Ely State
5 Prison that I worked in over the years.
6 Q. And you had an encounter with the
7 defendant, Mr. Thomas, back in October of 1998?
8 A. Yes, sir.
9 Q. And, in fact, there was a series of
10 things that happened about that time that involved
11 you?
12 A. Yes, sir.
13 Q. And culminated in a write-up on the
14 22nd of October of 1998?
15 A. Yes, sir.
16 Q. Marlo Thomas was an HRP at the time?
17 A. Yes, sir.
18 Q. And that stands for high risk?
19 A. High risk potential.
20 Q. High risk potential. Let me show you
21 what's been marked as State's Exhibit 116. You've
22 seen this before. It's a series of documents of
23 disciplinaries from the years 1996 up through 2005
24 involving Marlo Thomas?
25 A. Mm-hmm.

1 Q. You need to answer yes or no.
 2 A. Yes.
 3 Q. And some of these are tabbed out to the
 4 side with a sticker that says Williams.
 5 A. Yes.
 6 Q. Is that correct?
 7 A. Yes, sir.
 8 Q. And that -- those are some of the
 9 write-ups that you did on Marlo Thomas back at
 10 that particular time in 1998?
 11 A. Yes, sir.
 12 Q. And if you can, remembering back to the
 13 22nd of October of that year and the days leading
 14 up to that, tell us about what happened with
 15 Mr. Thomas.
 16 A. We had been having a lot of problems
 17 with Inmate Thomas. I think a lot of the problem
 18 stemmed from some disciplinaries that he had
 19 received, and his disciplinary sanctions involved
 20 certain restrictions like appliance restrictions,
 21 loss of TV, loss of electrical appliances, things
 22 like that. Those things were taken from him.
 23 On this one particular day, I believe it
 24 was October 22nd of '98, Thomas was in the shower.
 25 He had taken a shower, and at the end of his

1 shower time he refused to come out of the shower.
 2 He refused to comply with the restraint procedure
 3 that we have in order to restrain HRP inmates and
 4 return them to their cell, and we call it
 5 capturing the shower. He captured the shower for
 6 several hours.
 7 Finally it looked like Thomas was going
 8 to come out of the shower. He was going to go
 9 ahead and comply with the restraint procedure, so
 10 we went ahead and restrained him with the proper
 11 restraining procedures and we were escorting him
 12 back to his cell when he attempted to head butt
 13 me. And we were -- at that point we had to use
 14 some force, a minimal amount of force, and put him
 15 on the floor and put him down on the floor.
 16 Q. When you say that he attempted to head
 17 butt you, what exactly did he do?
 18 A. He dropped his head and charged me. It
 19 appeared that he was going to try and head butt me
 20 with his head. It's actually something that's
 21 pretty commonly done inside the prison because
 22 inmates very often are restrained with handcuffs
 23 behind their back and their head becomes a weapon
 24 at that point because they don't have their hands
 25 to use.

1 Q. Is it commonly done among all the
 2 prisoners or just some of the prisoners?
 3 A. Just some of the prisoners. Not all of
 4 them will do that.
 5 Q. Were you wearing protective clothing at
 6 the time?
 7 A. Yes, sir.
 8 Q. You say he was in the shower for several
 9 hours?
 10 A. You know, he captured the shower so many
 11 times that I can't remember that particular time
 12 how long he was in the shower, but I know there
 13 were times when Thomas was in the shower for many,
 14 many hours, many hours, most of the shift, most of
 15 the day. Other times he might only be there for a
 16 couple of hours. That particular time I don't
 17 recall now exactly how long he was in the shower
 18 before he eventually decided to comply with orders
 19 and come out.
 20 Q. Are they given a certain time limit when
 21 they go to the showers?
 22 A. Yes, sir. We give them about ten or 15
 23 minutes and I'm not sure. I believe the IP, the
 24 institutional procedure, back then if I recall
 25 correctly was ten minutes for a shower. A lot of

1 times we'll give them ten or 15 minutes, and then
 2 we cut the water off and tell them your shower
 3 time is up.
 4 Q. If they refuse to come out, you just
 5 would kind of wait them out?
 6 A. For a while we do. We'll talk to them,
 7 what's your problem, what's going on how, come you
 8 won't come out, what's going on here. And we
 9 listen to them and see if we can try and resolve
 10 whatever problems or issue that's creating the
 11 problem, that's causing the problem not to come
 12 out. A lot of times we're able to talk to the
 13 inmate and resolve the issue and go back to their
 14 cell without further issue or incident.
 15 Q. Over what period of time have you had
 16 interaction with Marlo Thomas?
 17 A. I'm sorry?
 18 Q. Over what period of time have you had
 19 interaction with Marlo Thomas in the system?
 20 A. Oh, many years. My first encounter with
 21 Mr. Thomas was back in -- gosh, way back, early
 22 '90s.
 23 Q. And what kind of an inmate is he?
 24 A. He's a dangerous inmate. He's high risk
 25 potential inmate. He's an HRP inmate. He's a

1 very dangerous inmate. He has a reputation for
 2 being a dangerous and aggressive type inmate.
 3 Very verbally abusive, threatening and he'll go so
 4 far as he goes beyond threats and actually attempt
 5 to physically harm staff.
 6 MR. OWENS: That's all I have, your
 7 Honor.
 8 THE COURT: Cross-examination.
 9 MR. SCHIECK: Can I have the Court's
 10 indulgence, please.
 11 THE COURT: You may.
 12 MR. SCHIECK: No questions, your Honor.
 13 THE COURT: Ladies and gentlemen, do you
 14 have any questions for Officer Williams? We have
 15 a question for Officer Williams. Jonathan, will
 16 collect the question.
 17 Counsel, will you approach, please.
 18 (Off-the-record bench conference.)
 19 THE COURT: Officer Williams, if you
 20 know, is Mr. Thomas still an HRP? If you don't
 21 know, don't guess. You're not with him anymore.
 22 THE WITNESS: What his classification
 23 status is here now that he's left Ely State Prison
 24 I don't know. When he left Ely State Prison, he
 25 was an HRP.

1 THE COURT: Okay. Thank you. Any other
 2 questions?
 3
 4 REDIRECT EXAMINATION
 5 BY MR. OWENS:
 6 Q. When would that have been?
 7 A. Gosh, when they transported him from Ely
 8 to here. I believe it was for this hearing. Must
 9 have been around a year ago or somewhere around a
 10 year ago, I would guess. He was HRP status at the
 11 time that he left Ely State Prison. What he is
 12 here at the facility he's housed in here now, I
 13 don't know.
 14 THE COURT: Anything else?
 15
 16 RECROSS-EXAMINATION
 17 BY MR. SCHIECK:
 18 Q. When he left Ely and came down to High
 19 Desert State Prison. When you say here, is that
 20 what you mean?
 21 THE COURT: You don't know where he
 22 went.
 23 THE WITNESS: He went from Ely I think
 24 he went to High Desert. I'm not sure. I know
 25 they transferred him south. We call it south. I

1 think he went to High Desert.
 2 BY MR. SCHIECK:
 3 Q. Was he housed in the unit that you were
 4 operating or in at the time he left, or was he in
 5 a different --
 6 A. I believe he was. If I recall correctly
 7 he was in my unit which is Unit 4. If I remember
 8 correctly, he was in that unit when he was
 9 transferred down here for this hearing.
 10 Q. But you don't know what his
 11 classification is down here?
 12 A. I don't.
 13 MR. SCHIECK: Thank you. Court's
 14 indulgence one second.
 15 BY MR. SCHIECK:
 16 Q. Would you say that most recently before
 17 he left up there from Ely that his behavior had
 18 improved, even though he was HRP that his behavior
 19 had improved?
 20 A. I could say that I don't recall having
 21 any serious incidents with him the last short time
 22 before he left Ely. I don't recall any serious
 23 violent instances that we had with him just prior
 24 to his leaving.
 25 Q. And the incident you talked about here

1 today was in April of 1998?
 2 A. I was thinking it was October of '98.
 3 Q. Excuse me, October.
 4 A. Yes, sir.
 5 Q. I have to put my glasses on to see the
 6 numbers. Thank you very much.
 7 MR. OWENS: One follow-up question.
 8
 9 RECROSS-EXAMINATION
 10 BY MR. OWENS:
 11 Q. You noticed maybe an improvement about a
 12 year ago when he was getting ready for this
 13 hearing?
 14 A. Yes, sir.
 15 MR. OWENS: That's all I have.
 16 THE COURT: Officer Williams, thank you,
 17 sir, for your testimony here this afternoon.
 18 You may be excused. Please do not discuss your
 19 testimony with anyone other than the attorneys.
 20 Counsel, you may call your next witness.
 21 MR. OWENS: Vanessa Heidt.
 22 VANESSA HEIDT,
 23 was administered the following oath by the court
 24 clerk.
 25 THE CLERK: You do solemnly swear that

1 the testimony you give shall be the truth, the
 2 whole truth, and nothing but the truth so help you
 3 God.
 4 THE WITNESS: I do.
 5 THE CLERK: State your name and spell
 6 your last name for the record.
 7 THE WITNESS: My name is Vanessa Heidt.
 8 V-A-N-E-S-S-A, last name Heidt H-E-I-D-T.

9
 10 DIRECT EXAMINATION

11 BY MR. OWENS:
 12 Q. You work for the Nevada Department of
 13 Corrections?
 14 A. Yes, sir, I do.
 15 Q. And how long have you worked there?
 16 A. Approximately five years, three months.
 17 Q. And your current assignment?
 18 A. Unit 2CD lockdown unit.
 19 Q. You know the defendant, Marlo Thomas?
 20 A. Yes, sir, I do.
 21 Q. How do you know him?
 22 A. I know him as an inmate as of until
 23 recently lived in 2 Charlie 27 I believe in my
 24 unit.
 25 Q. That's down at Southern Desert?

1 A. At High Desert State Prison he lived in
 2 my unit.
 3 Q. And in front of you there is a stack of
 4 disciplinary reports in Exhibit No. 116, and one
 5 of those reports, I think it's on the top right
 6 underneath that printout, is a report that you
 7 completed?
 8 A. Yes, sir.
 9 Q. And this was a report that you did in
 10 August of this year, 2005?
 11 A. Correct.
 12 Q. And this was one of several disciplinary
 13 reports that you had prepared on Marlo Thomas
 14 since that time?
 15 A. Yes, sir.
 16 Q. If we can, why don't we go back to
 17 August and tell us -- and I think this involved
 18 something on August 23rd of '05; is that correct?
 19 A. Pardon me?
 20 Q. August 23rd of this year, '05?
 21 A. Correct.
 22 Q. Tell us what happened.
 23 A. Give me just a moment if you will.
 24 Q. For the record you're going to read that
 25 to refresh your memory?

1 A. Yes, sir.
 2 Q. Okay.
 3 A. Okay, sir. This is in reference to
 4 blacking out his cell, covering cell windows
 5 causing zero visibility in the cell, and it's
 6 vital that we're able to see the inmates inside
 7 their cell at all times.
 8 Q. Tell us what happened.
 9 A. He was ordered to uncover it, and he
 10 failed to do so and he had been warned several
 11 times. At this point I put that August the 8th,
 12 August 9th, 10th, 15th, 16th, 17th and 18th where
 13 he was warned by myself, Senior Officer Holmes and
 14 Officer Ashcraft, and he refused to comply, and
 15 his reply was we could play this game all day, and
 16 he laughed and taunted and began 'citing the other
 17 inmates to conduct themselves in the same manner
 18 he was conducting himself.
 19 Q. When you say he began to 'cite the other
 20 inmates, what exactly was he doing?
 21 A. That's when he starts to speak to other
 22 inmates in other cells and basically will say
 23 things along the lines, yeah, we could play this
 24 game all day, we don't have to cover anything and
 25 making an example causing other inmates to become

1 excited and they start to follow that lead. Then
 2 they start covering their cell windows and not
 3 complying.
 4 Q. Had you been having some problems with
 5 him leading up to this incident?
 6 A. Leading up to this incident?
 7 Q. Yes.
 8 A. It was just your -- just noncompliance.
 9 Just not covering the window, not obeying a direct
 10 order to make visibility in his cell.
 11 Q. Were there things that happened that you
 12 did not write him up for?
 13 A. Yes, sir, there were.
 14 Q. What caused you to decide to write him
 15 up on this occasion when you hadn't written him up
 16 before?
 17 A. Because due to the fact he had been
 18 warned and told so many times that it just got to
 19 the point where he needed to have a write-up so
 20 there could be disciplinary process to go on, so
 21 he could be under the understanding it was
 22 unacceptable, too much zero visibility in his
 23 cell.
 24 Q. Have there been some reports or some
 25 additional violations since this one in August?

1 A. Yes, sir.
 2 Q. Tell us about that.
 3 A. I have two that were written on
 4 September the 28th. Both initially began with
 5 covering of the cell window, refusing to do so.
 6 At this point he threatened me and part of that
 7 threat was that he would F'ing kill me. I'll
 8 F'ing kill you. I was trying to get him to
 9 uncover his cell window because if I can't see
 10 inside I can't place a food tray in the food flap
 11 for safety and security purposes. So he was
 12 taunting me, being belligerent, calling me names,
 13 threatening to hurt me or to kill me, and so
 14 therefore I didn't open his food flap and he did
 15 not receive that meal. That's what that was in
 16 reference to, and that was on September the
 17 28th of '05. And basically the same thing on the
 18 other one, just verbal threats and belligerence.
 19 Q. What was the date on that one?
 20 A. The 28th of September 2005. This one is
 21 approximately 3:30 p.m.
 22 Q. Was there a time when he talked about
 23 testimony and this hearing and consequences about
 24 that?
 25 A. There were things that I had heard him

1 say that lead me to believe that it was in
 2 reference to this trial, yes.
 3 Q. Tell us about that. When was this?
 4 A. This was last Thursday, and I heard him
 5 screaming across the tier conversing with other
 6 inmates saying things along the lines -- they're a
 7 little profane. Is that okay?
 8 Q. Say it as accurately as you can remember
 9 it.
 10 A. He was just saying things such as, Well,
 11 that bitch is going to be at my trial, and she
 12 don't know shit. She's just going to lie, and
 13 when this trial is over there's going to be a war
 14 in here, which lead me only left to believe that
 15 he could possibly be speaking about this
 16 particular trial.
 17 Q. He said there's going to be a war in
 18 here after the trial?
 19 A. Correct.
 20 MR. OWENS: That's all I have.
 21 THE COURT: Cross-examination, Counsel.
 22 CROSS-EXAMINATION
 23 BY MR. SCHIECK:
 24 Q. Did you write him up for the incident
 25 that you just talked about, this last incident?

1 A. No, sir, I did not.
 2 Q. So there's no documentation on that?
 3 A. No, sir.
 4 Q. And the one on September 28th was as he
 5 was covering his window?
 6 A. Covering the back of his cell window,
 7 the one that would face outside.
 8 Q. So that's the cell window that faces
 9 outside into the yard?
 10 A. Correct.
 11 Q. And so that's when the sunshine would
 12 come in?
 13 A. Correct.
 14 Q. And I take it there's no curtains or
 15 anything that you could close, so if you wanted to
 16 take a nap to get the sun out of your cell?
 17 A. No, sir.
 18 Q. But there's still a window in the door
 19 to his house, correct?
 20 A. Correct.
 21 Q. And you can see through that; it's just
 22 dark in there?
 23 A. Yes, sir.
 24 Q. And you guys have control over the
 25 lighting?

1 A. Yes, sir, we can turn the night-lights
 2 on.
 3 Q. Inside?
 4 A. Inside the cell.
 5 Q. So there would be a way to see in there
 6 even though if it's --
 7 A. Not if it's covered. If they cover the
 8 cell light and the outside window, you can't see
 9 inside. It's difficult to see inside without a
 10 flashlight.
 11 Q. And if you wanted some privacy, that
 12 would be maybe the only way to get it would be to
 13 cover the outside window so it would be dark
 14 inside?
 15 A. Say again.
 16 Q. If you wanted some privacy so people
 17 couldn't look in?
 18 A. So they couldn't look in?
 19 Q. If you covered the window, it would be
 20 dark and you couldn't see what was going on
 21 inside?
 22 A. Yeah. Yes, sir.
 23 Q. And the one on September 8th was the
 24 same thing?
 25 A. 28th, yes.

1 MR. SCHIECK: Thank you. No further
2 questions.

3
4 REDIRECT EXAMINATION

5 BY MR. SCHIECK:

6 Q. Did you feel the Mr. Thomas's concern
7 was about his personal privacy?

8 A. No, sir. No, sir. I don't believe it
9 was about personal privacy at all for he kept his
10 cell that way only up until he needed something,
11 such as if he needed toilet paper or paperwork
12 that inmates typically will ask for. If it
13 pertained for a need that needed to be met, at
14 that point he would comply. The majority of the
15 time the cell was blacked out.

16 Q. In fact, he has a long history of
17 masturbating in front of the female employees at
18 the prison system, doesn't he?

19 A. I was forewarned about that by other
20 officers. I personally never had that experience.

21 Q. With that in mind, privacy probably
22 isn't an issue for him?

23 A. Well, privacy aside, at all times for
24 safety and security purposes we have to be able to
25 as officers see what they're doing at all times

1 Q. Would you say that the majority of the
2 inmates will do that?

3 A. No, not the majority. You'll have some
4 that for whatever reasons of their own are defiant
5 and just choose to conduct themselves in that
6 manner, and we just go along the process of
7 writing them up.

8 MR. SCHIECK: Thank you. No further
9 questions.

10 THE COURT: Ladies and gentlemen of the
11 jury, do you have any questions for Officer Heidt?
12 We've got a question.

13 Counsel, will you approach, please.

14 (Off-the-record bench conference.)

15 THE COURT: That question would be
16 better answered by someone that does
17 classification. Any other questions? Officer
18 Heidt, thank you, ma'am, for your testimony here
19 this afternoon. You may be excused. Please do
20 not discuss your testimony with anyone other than
21 the attorneys.

22 Counsel, you may call your next witness.

23 MR. OWENS: Fred Dixon.

24 / / /

25 / / /

1 and be able to count them, be able to see them to
2 open their food flap for the purpose -- whatever
3 purposes we have for pulling them out of their
4 cell.

5 Q. His communications with you at the time
6 you were telling him to uncover it would indicate
7 that he was being belligerent?

8 A. Correct. He would call me names and
9 taunt me.

10 MR. OWENS: Thank you.

11 THE COURT: Recross.

12 MR. SCHIECK: Yes, Your Honor.

13
14 RECROSS-EXAMINATION

15 BY MR. SCHIECK:

16 Q. Do other inmates block their window?

17 A. Yes, sir, they do.

18 Q. Do you write them all up?

19 A. Yes, I do.

20 Q. Every single time?

21 A. Not every single time. Every inmate is
22 given a fair opportunity to be warned, to be told,
23 and when it becomes a continual problem, then at
24 that point, yes, we do write them up. I write
25 them up.

1 Whereupon,

2 FRED DIXON,

3 was administered the following oath by the court
4 clerk.

5 THE CLERK: You do solemnly swear that
6 the testimony you give shall be the truth, the
7 whole truth, and nothing but the truth so help you
8 God.

9 THE WITNESS: I do

10 THE CLERK: State your name and spell
11 your last name for the record.

12 THE WITNESS: Fred Dixon, D-I-X-O-N.

13

14

15 BY MR. OWENS: DIRECT EXAMINATION

16 Q. You reside in Las Vegas?

17 A. Solomon, Kansas.

18 Q. You previously lived in Las Vegas?

19 A. Yes.

20 Q. How long were you a resident here?

21 A. Approximately 20 years.

22 Q. And you had a son who is the subject of
23 this proceeding?

24 A. Yes.

25 Q. The victim, it was Carl Dixon?

1 A. Yes.
 2 Q. Now, back in June of I believe it was
 3 1997, you testified in a hearing about your son?
 4 A. Yes.
 5 Q. And in preparation for that, you
 6 prepared a statement?
 7 A. Correct.
 8 Q. And that statement that detailed the
 9 impact that his death had upon your life?
 10 A. Yes.
 11 Q. And do you have that with you?
 12 A. I do.
 13 MR. OWENS: Court's permission I'd like
 14 to have him go ahead and read the statement.
 15 THE COURT: You may do so.
 16 THE WITNESS: Today I'm here again to
 17 represent my son, Carl Fredrick Dixon, as I did
 18 some ten years ago. Although my son would have
 19 now at this time been well into his adult life, I
 20 feel that I should speak as though I did ten years
 21 ago when the incident happened and try to express
 22 and give my expression of the sorrow and the loss
 23 I feel every day of my life without my son. So
 24 many thoughts went through my mind when I was
 25 preparing this -- prepared to attend this

1 proceeding, and as I said, this is a statement
 2 that I prepared for the first jury.
 3 And basically I remember Carl, of
 4 course, as a baby and remember the first time I
 5 took him to day care, how he cried when I left him
 6 and how joyful he was when I came to pick him up.
 7 When he first learned how to swim, how scared he
 8 was of the water; the first tooth he lost and put
 9 under his pillow to find the tooth fairy had left
 10 a quarter the next morning; how proud I was of him
 11 as a son when he was selected by Clark High
 12 School. Junior and senior year he was a member of
 13 DECCA and received many awards in marketing, and
 14 after graduating from Clark High Carl enrolled and
 15 attended UNLV and he majored in nuclear medicine.
 16 After completing his internship at UMC,
 17 Carl decided to take a break from school and go to
 18 work in the private sector, take a break from
 19 school. He had gone to college basically after
 20 high school.
 21 Carl was my only son. He lived with me
 22 for approximately two years, and we had become
 23 more than father and son; we had become best of
 24 friends. We'd go out to dinner, joke around, go
 25 to different events together, and there's so many

1 good memories of Carl there should have been many
 2 more memories, but those memories were stolen from
 3 myself and Carl's mother and Carl's sister.
 4 Carl's life was taken before he had a chance to
 5 meet and fall in Love with his dream girl. There
 6 will be no wedding for Carl, no children for Carl,
 7 and no grandchildren for me and Carl's mother to
 8 love.
 9 I've dedicated most of my entire adult
 10 life in the law enforcement profession retiring
 11 from North Las Vegas, and I'm here to tell the
 12 jury I don't know how many messages of death that
 13 I have delivered as a police officer to the
 14 families feeling compassion for them, trying to
 15 comfort them, but when the police officer came to
 16 me and told me my son was dead, it's a lot
 17 different to be on the receiving end. As I
 18 testify here in court today, I wish I could find
 19 words to better express my feelings of tragic loss
 20 of my son. It was caused by a person who is in my
 21 opinion the lowest form of social sewage --
 22 MR. SCHIECK: I'm going to object, your
 23 Honor, that's improper.
 24 THE COURT: Objection is noted. Sir,
 25 your comments are restricted to the impact that

1 your son's death has had on your family and any
 2 sentencing recommendation that you have for the
 3 jury.
 4 THE WITNESS: All right, thank you.
 5 Never a day goes by that I don't think
 6 of my son. I cannot even begin to imagine the
 7 horror and tremendous pain Carl endured and often
 8 wonder what my son was thinking of during his
 9 final moments. The impact Carl's death had on me
 10 he was a kind and gentle person, always willing to
 11 help others. A son that loved his mother, loved
 12 his father and loved his sister. He was a son
 13 that parents are proud of.
 14 I would like to close by telling a
 15 little story about my son, if that's permissible,
 16 as I did the first time.
 17 THE COURT: Certainly.
 18 THE WITNESS: Kind of give you an idea
 19 of the type of person he was, and I don't have to
 20 read this to tell you. But during the time of
 21 period when he was maybe 8th or 9th grade, he had
 22 a paper route. We lived out in apartments on
 23 Tropicana and Jones. It was kind of chilly, so
 24 Carl went in to roll the newspapers, and doing so
 25 he found an envelope on the floor. And when he

1 opened the envelope it contained a hundred dollar
2 bill. He, like all kids, Carl liked to buy
3 computer games and everything, but he completed
4 his paper route. Afterwards after completing his
5 paper route, he went to the apartment manager and
6 there was a number written on the outside of the
7 envelope which was an apartment number of the
8 complex. So the manager gave him the person's
9 name that lived in the apartment and he went to
10 the lady and asked her if she'd lost the hundred
11 dollars, which she had. And it was their grocery
12 money for the month. So she give Carl a \$10
13 reward for returning the \$100 that they
14 desperately needed for groceries.

15 But that was my son. He was a good son.
16 I loved him. His mother loved him, and I can't
17 even begin to express to you how much I miss him
18 and the loss I feel.

19 THE COURT: Thank you, sir.

20 BY MR. OWENS:

21 Q. Tell us how you found out about the
22 death of your son.

23 A. I was at home when one of the police
24 dispatchers called me because they knew my son was
25 working at the Lone Star and asked me if Carl was

1 working that day, and I said as far as I know he
2 was because I'd heard him get up and go to work.
3 And the dispatcher told me that I should probably
4 go to the restaurant because there had been a
5 terrible tragedy. I went to the Lone Star and was
6 met by three or four Metro officers. I don't
7 recall their names. And I inquired as to my son,
8 and one of the Metro sergeants talked to an
9 on-scene detective, and they came back and the
10 Metro sergeant said, man, your son's dead, and
11 that's how I found out about it.

12 Q. How did you feel?

13 A. Well, how do you feel when it's just
14 you're in a state of shock. You don't know,
15 excuse my French, what the hell happened. There's
16 officers around, and of course you want questions
17 answered. And for them to come up and say, man,
18 your son's dead, you know, there's so many
19 thoughts. I mean, it's just really unexplainable.

20 Q. You've witnessed the impact of this
21 death in the life of your wife and daughter?

22 A. My ex-wife and daughter.

23 Q. Tell us about that.

24 A. I think the impact of my daughter
25 especially, her and my son were, of course, very

1 close, and it comes around the holidays one of my
2 son's favorite holidays of course was Christmas,
3 and he was very close with his sister, and they
4 enjoyed the holidays together, and there's that
5 emptiness there. It will always be empty, and I
6 know the same way with my ex-wife. The holidays,
7 the birthdays and the family gatherings, and
8 there's always that one person that will never,
9 never, ever be there again.

10 Q. There's been an interval now about eight
11 years or so since the death. Are you still
12 feeling impact and effects from what happened?

13 A. You feel it every day of your life.
14 Sometimes I wake up at night and you'll dream --
15 I'll dream about him. I dream about things that
16 happened when he was a small child. I dream about
17 when we used to live back in Kansas when he was a
18 baby when I was holding him. I mean, you just
19 can't imagine -- it never goes away.
20 Psychologists will tell you there's a healing
21 period. Well, I don't know where they're going to
22 get their healing period from. It may get easier
23 to accept, but it's always there. You think about
24 it daily, every day. When I get up I have his
25 picture there in the bedroom, and he's there. You

1 think about it. You don't forget it.

2 Q. What did you do to deal with the
3 emotional and mental impact in your life?

4 A. Initially, of course, the police
5 department North Las Vegas they send you to
6 counseling. The counselors they send you on to
7 psychologist, psychologist sends you on to
8 psychiatrist. Psychiatrist wants to load you up
9 with whatever kind of medicine they can give you,
10 Prozac. They'll put you on anything to try to get
11 you straightened around.

12 I found out that chemicals is not the
13 answer. These are things that Prozac, these are
14 things that Valium or whatever that doesn't take
15 it away. You have to deal with it yourself. And
16 like I said, I deal with it every day of my life
17 the best way I can.

18 Q. How did Carl's death make you feel about
19 yourself and your life?

20 A. There was times where to be real honest
21 with you even today I could two cents about a lot
22 of things. It's when you lose your son, your only
23 son, and he was my life. I mean, that was what
24 will carry my namesake on, and there's times when
25 you really don't care about much of anything.

1 Like I said, it's easier to accept now.
 2 It would have been easier to accept as a death if
 3 he'd been killed in a car accident, he'd have died
 4 of cancer, something you can reason with. Not
 5 butchered on a bathroom floor. I mean, there's no
 6 explanation for that. There's no reasoning for
 7 that.
 8 MR. OWENS: Thank you.
 9 THE COURT: Cross-examination.
 10 MR. SCHIECK: No.
 11 THE COURT: Ladies and gentlemen of the
 12 jury, do you have any questions for Mr. Dixon?
 13 Mr. Dixon, thank you, sir, for your testimony.
 14 You may be excused. Please do not discuss your
 15 testimony with anyone other than the attorneys.
 16 Counsel, you may call your next witness.
 17
 18 MR. OWENS: Alexander Gianakis.
 19 Whereupon,
 20 ALEXANDER GIANAKIS,
 21 was administered the following oath by the court
 22 clerk.
 23 THE CLERK: You do solemnly swear that
 24 the testimony you give shall be the truth, the
 25 whole truth, and nothing but the truth so help you

1 God.
 2 THE WITNESS: I do.
 3 THE CLERK: State your name and spell
 4 your last name for the record.
 5 THE WITNESS: My name is Alexander
 6 Gianakis, G-I-A-N-A-K-I-S.
 7
 8
 9 BY MR. OWENS: DIRECT EXAMINATION
 10 Q. Just take your time, Mr. Gianakis.
 11 A. I'm sorry?
 12 Q. Just take your time. Your son was Matt?
 13 A. Matthew.
 14 Q. You testified in a prior hearing from a
 15 statement that you prepared talking a little bit
 16 about your son and what he was like. Do you have
 17 that statement with you?
 18 A. Yes, I do.
 19 Q. With the Court's permission again, if he
 20 can go ahead and read the statement?
 21 THE COURT: It that would be easier,
 22 sir, you may do that.
 23 THE WITNESS: Your Honor, members of the
 24 jury, the death of our son Matthew has left a void
 25 in our lives that can never be filled. When they

1 killed our son, they also killed us only we are
 2 dying a slow death a little bit each day. Death
 3 is so final it boggles the mind. We just can't
 4 get it through our heads that we'll never see our
 5 son alive again. We're still waiting for him to
 6 come bouncing through the front door into the
 7 house. A day without Matthew is like a day
 8 without sunshine. We miss his radiant smile, his
 9 tremendous sense of humor, his willingness to help
 10 when help was needed and most of all his
 11 companionship. Sure, we have memories of our son,
 12 okay. But you can't hug a memory, you can't kiss
 13 a memory, you cannot share in a memory's future
 14 aspirations.
 15 We also have the memory of our son lying
 16 in his coffin. That vision will haunt us the rest
 17 of our lives. Every time I think of the way he
 18 passed away, it gnaws at my insides, I
 19 hyperventilate for a moment or two. You know, in
 20 a way, strange as it may sound, I envy the
 21 defendant's parents. If they want to see their
 22 son, all they have to do is just go to the
 23 correctional facility where he's located. If we
 24 want to see our son, we have to go to the
 25 cemetery. Our ordeal will never be over until the

1 day we die.
 2 The Court can never know the devastation
 3 that this has brought upon my family and myself.
 4 We as civilized human beings living in a civilized
 5 society are responsible for our actions, whether
 6 they be good or bad and must face the
 7 consequences. I beg the Court, please don't
 8 forget this. Thank you.
 9 BY MR. OWENS:
 10 Q. Mr. Gianakis, how did you find out about
 11 Matthew's death?
 12 A. Well, when we came home that afternoon,
 13 there was a message on our phone unit to call the
 14 coroner's office. So we called the coroner's
 15 office, and I remember -- if I remember it
 16 correctly, they told us -- I don't know the exact
 17 words but to the effect that our son was there at
 18 the coroner's office. He was dead.
 19 Q. Did you know any of the details of
 20 anything at that point?
 21 A. Well, we knew -- our friends had told us
 22 there was a to-do at the Lone Star Restaurant
 23 where my son was working, but they didn't know the
 24 details, so we left it at that. So I went. I
 25 picked up my wife from work, and I told her what

1 had happened; that there was a problem at the Lone
2 Star. So we went home, and we figured if it was
3 serious maybe there would be a patrol car there to
4 notify what was known there. There was just a
5 message on the phone unit.

6 Q. Can you tell us about the emotional
7 impact that this death has had on your wife and
8 daughter?

9 A. Well, I can't say too much about my
10 daughter, but I will say this. She misses him
11 tremendously, that I know for sure. She resents
12 the fact that he's not alive to enjoy the company
13 of his niece and nephews. As far as my wife and I
14 go, my wife -- the other day I happened to mention
15 to my wife that I had a dream several nights prior
16 that there was a banging on the front door, and I
17 opened it and it was my son, and he had been away
18 for years. And I says to him, Matthew, where have
19 you been? Dad, I'm in trouble. I says, Matthew,
20 I don't care what kind of trouble you're in, come
21 on in, we love you.

22 And I mentioned that to my wife and lo
23 and behold she told me she had the same dream a
24 couple of days prior.

25 This should not happen to any parent

1 fact, we avoid driving by there because it brings
2 up memories of what happened.

3 And for me I think of that day it
4 happened why couldn't I have gotten a flat tire.
5 I was driving my son to work. If I would have
6 gotten a flat tire or even a traffic summons, my
7 son would be alive today. Sometimes I blame
8 myself for what happened.

9 MR. OWENS: Thank you for being here
10 today.

11 THE COURT: Counsel, do you wish to
12 inquire?

13 MR. SCHIECK: No.

14 THE COURT: Mr. Gianakis, thank you for
15 your testimony. You may be excused.

16 Counsel, you may call your next witness.

17 MR. OWENS: That's all the witnesses we
18 have.

19 THE COURT: All right. Mr. Schieck and
20 Mr. Albregts, I know you have some witness's here.
21 I don't know if they can stay over until tomorrow
22 or not, and I think that we probably need to take
23 a recess. If we were in recess until ten after
24 five, would you be able to then call those
25 witnesses that are here today and might not be

1 what happened to us. When people say time heals
2 all wounds, that's not so. This lives with you
3 until you die. My wife -- I'll read the
4 newspaper. I'll read where a young adult is
5 murdered. I think about my son. There are times
6 my wife and I want to go to the movies, but we're
7 afraid that the subject theme of the movie will
8 remind us of what happened to our son. There are
9 times we sit home, we look at his picture and we
10 think what would he be doing, what could have
11 been, what should have been, and then we remember
12 what happened and our eyes swell with tears. We
13 could be in a friendly conversation, a gathering
14 of friends, and certain words are said, places are
15 mentioned, and right away our thoughts go right to
16 our son.

17 It's actually too horrible for words, to
18 be perfectly frank. And nobody can imagine.
19 There are times when I'm just driving along the
20 street, driving along with the car, and I feel
21 happy and all of a sudden something trips my
22 psyche and I think -- my thoughts go to my son,
23 and right away I'm depressed. We used to frequent
24 the Lone Star Restaurant even before my son worked
25 there. We don't go there anymore. As a matter of

1 available tomorrow?

2 MR. SCHIECK: I'm not sure if we can,
3 your Honor. We need to discuss some things. We
4 will go ask and see what we can and can't arrange.

5 THE COURT: Then let's be in recess
6 until ten minutes after five. Same admonition
7 applies.

8 (Whereupon, a recess was taken.)

9 THE COURT: We're back on the record in
10 the State of Nevada versus March Thomas. The
11 record will reflect the parties and counsel, all
12 officers of the court and the absence of the jury.

13 We've been in recess for an excess of 20
14 minutes, and I need to know whether the defense is
15 ready to call any witnesses this evening. If
16 they're not, I need to excuse the jury.

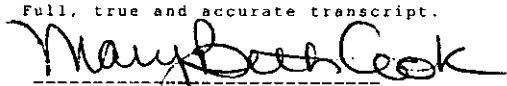
17 MR. ALBREGTS: Well, your Honor the
18 difficulty the defense is having, as you know, is
19 the logistics of all of this. Each time we've
20 tried -- and this certainly is the transport
21 officers' fault or any other fault. They've been
22 downstairs and we haven't have the ability to
23 pretrial.

24 THE COURT: You've had 20 minutes.
25 Mr. Schieck, do you wish to call a witness tonight

1 or not, because if you don't I need to recess the
 2 jury for the evening.
 3 MR. SCHIECK: We prefer not to call one
 4 tonight.
 5 THE COURT: All right. Then, Jonathan,
 6 please bring the jury panel in, and we will excuse
 7 them for the evening.
 8 (Whereupon, the jury entered
 9 the courtroom.)
 10 THE COURT: Good evening, ladies and
 11 gentlemen. Welcome back to the State of Nevada
 12 versus Marlo Thomas. The attorneys for the
 13 defense have tried to have contact with the people
 14 that they have had subpoenaed and brought here to
 15 testify for the first time. Even though the
 16 people have been here all day, at lunchtime it was
 17 a huge snafu, so bottom line is they're not ready
 18 to call a witness tonight. Tomorrow morning we
 19 need to be back here. We don't have a regular
 20 calendar on Friday morning, so we need to be back
 21 here at 8:30 tomorrow morning and get it to you by
 22 a reasonable time tomorrow.
 23 During the evening recess you are
 24 admonished not to converse amongst yourselves or
 25 with anyone else on any subject related to or

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1 read, watch or listen to any report of or
 2 commentary on the trial or any person connected
 3 with the trial by any medium of information
 4 including, but not limited to, television, radio,
 5 Internet or newspapers, or form or express any
 6 opinion on any subject connected with the trial
 7 until the case is finally submitted to you.
 8 We'll be in recess until 8:30 tomorrow
 9 morning. Thank you. You are excused. I need
 10 counsel to stay.
 11 (Whereupon, the jury retired
 12 from the courtroom.)
 13 THE COURT: The record will reflect that
 14 the jury has retired from the courtroom. So that
 15 we can get this production choreographed for
 16 tomorrow, what's your preference on where they
 17 leave these people, the four that have been
 18 subpoenaed to be down here?
 19 MR. SCHIECK: We prefer they leave them
 20 here so we can talk to them this evening.
 21 THE COURT: Are there going to be
 22 visiting hours at the jail tonight? Can these
 23 attorneys see these four people?
 24 COURT SERVICES: If they get booked in
 25 the jail, they'll be down in the booking area and

1 there's no visiting down in booking.
 2 THE COURT: They're going to be in
 3 booking. They're going to be in some kind of
 4 holding cell.
 5 MR. ALBREGTS: The other option if they
 6 get back here early enough that we get here at
 7 7:30 or something.
 8 MR. SCHIECK: Or we could talk to them
 9 now.
 10 THE COURT: You could talk to them now
 11 before they go back, but we need them back here
 12 tomorrow morning at 8:30. If you decide to
 13 release some of them, they'll tell you tonight
 14 which ones to bring back. You might not have to
 15 bring back all four. That's a perfect solution.
 16 We'll see you gentlemen back at 8:30, but we do
 17 need to roll right tomorrow at 8:30 with
 18 witnesses. Thank you.
 19 -ooo-
 20 ATTEST: Full, true and accurate transcript.
 21 
 22 _____
 23 MARY BETH COOK, CCR #268, RPR
 24
 25

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