

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Case No. 65916

**RESPONDENT'S APPENDIX
VOL. VI**

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

MARLO THOMAS AKA MARLOW
DEMITRIUS THOMAS,

Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT
OF
PENALTY HEARING

BEFORE THE HONORABLE SALLY LOEHRER
DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 1, 2005
11:00 A.M.

APPEARANCES:

For the Plaintiff: CHRIS OWENS, ESQ.
DAVID SCHWARTZ, ESQ.
Deputy District Attorneys

For the Defendant: DAVID SCHIECK, ESQ.
DANIEL ALBREGTS, ESQ.
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Reported by: Mary Beth Cook, CCR #268, RPR

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LAS VEGAS, CLARK COUNTY, NEVADA
TUESDAY, NOVEMBER 1, 2005
11:00 A.M.

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

THE COURT: We're outside the presence of the jury. Mr. Thomas, your attorney has informed me that you left your legal materials at Indian Springs. Would you please show me what you brought with you?

THE DEFENDANT: I didn't bring them.

THE COURT: You didn't you bring them? Where's your property?

THE DEFENDANT: It's bring them -- I didn't need them.

MR. SCHIECK: So you didn't bring them to court, but you brought them down.

THE DEFENDANT: Yeah.

THE COURT: To the Clark County Detention Center?

THE DEFENDANT: I didn't bring them to court, and I didn't bring them.

THE COURT: They're not at Indian Springs?

THE DEFENDANT: I'm at High Desert.

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THE COURT: Is there anything that you own at High Desert?

THE DEFENDANT: Yes.

THE COURT: What?

THE DEFENDANT: All my property, everything.

THE COURT: Including your legal papers?

THE DEFENDANT: Yeah. I didn't bring them with me.

THE COURT: So there was no need to send you back to Indian Springs -- to High Desert yesterday, was there?

THE DEFENDANT: No, ma'am.

THE COURT: All right. Don't lie to your attorney anymore so your attorney is making misrepresentations to the Court.

MR. SCHIECK: Your Honor, I can represent that if he didn't go back they would have rolled up his property -- the people that work out there would have rolled up his property as opposed to him being able to organize and put it together. I didn't realize that he wasn't going to bring any of it with him to court, but it certainly was much more --

THE DEFENDANT: It was my fault, your

1 Honor.

MR. SCHIECK: It was much better he was able to roll up his own property as opposed to them doing it, and that's based on my experiences with people that get transferred, but I did not realize he wasn't bringing anything down. I thought he would.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. Welcome back to Department XV and the penalty hearing in the State of Nevada versus Marlo Thomas. The record will reflect the presence of the parties and counsel, all officers of the Court and the full jury and alternate jurors.

Before we get started with the evidence in the case, there's a few pretrial instructions that I'd like to go over with you, and they're an abbreviated set of instructions because this is not a trial to determine whether these crimes occurred and who did them. This is a hearing to give you sufficient evidence so that you can make an informed decision regarding the appropriate punishment for the crimes which have already been

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committed and for which judgment has entered.

We ask that you base your decision regarding the sentencing solely upon the evidence which is brought out during this proceeding and the law that applies to that evidence without fear of criticism or popular opinion.

We also ask that you wait in forming your opinion as to what the sentence should be until after you've heard all of the evidence that's going to be presented both by the State of Nevada and by the defendant.

As we've told you in the jury selection process, the law in the state of Nevada requires that the jury set the punishment for first degree murder, and there are four possibilities which we've gone over and which were in the jury questionnaire. Those are a fixed term of years, life in prison with the possibility of parole, life without the possibility of parole or the death penalty.

And we're going to have two times that we ask you to make decisions in this case. The first time you'll be asked to make a decision will probably be tomorrow afternoon. In a death penalty hearing, which is what we call this, the

1 State alleges certain aggravating circumstances,
2 and they're going to put on evidence today and
3 synopsis of what the facts were and how this crime
4 occurred and what all those factors are. They're
5 also going to put on evidence of what the law
6 calls aggravating circumstances. And they're
7 going to tell you what those four aggravating
8 circumstances are.

9 The law requires that the decision as to
10 whether or not the State has proven to you one or
11 more aggravating circumstances has to be beyond a
12 reasonable doubt and it has to be by a unanimous
13 jury. And so at your first deliberation, you're
14 going to determine what aggravators exist, if any,
15 and the instructions that will be given to you
16 when you go out to deliberate on that will tell
17 you the definition of beyond a reasonable doubt
18 and things of that sort, and it will give you
19 those four aggravating circumstances. All 12 of
20 you who deliberate must find -- to establish an
21 aggravating circumstance all 12 of you have to
22 agree they exist, and the State proves that to you
23 beyond a reasonable doubt.

24 During this first portion the defense
25 will be calling witnesses to establish what are

1 believe. And it doesn't have to be unanimous.
2 Two of you don't have to agree on it. Three of
3 you don't have to agree on it. If one person
4 thinks there's something that's mitigating
5 circumstance, that one person can write it down,
6 and you can come down with a list -- an unlimited
7 list of what you consider to be the mitigating
8 circumstances.

9 The third thing that you will be
10 requested to do in your first deliberation is to
11 decide whether the aggravating circumstances
12 outweigh the mitigating circumstance, or whether
13 the mitigating circumstances outweigh the
14 aggravating circumstances. And that's a factual
15 finding that you must make, and that has to be a
16 unanimous decision by the jury.

17 After you've made those decisions,
18 you've found what the aggravators are, you've
19 listed all the mitigating circumstances, then you
20 do a weighing and a balancing test, and you
21 deliberate and you determine whether the
22 mitigators outweigh the aggravators or whether the
23 aggravators outweigh the mitigators. If the
24 aggravators outweigh the mitigators, then the
25 death penalty still remains an option. If the

1 called mitigating factors. The law does not
2 define mitigating factors, and anything that you
3 can think of and anything that the defense can
4 think of and anything the defendant can think of
5 can be a mitigating circumstance.

6 But your first decision in this case
7 will be has the State proven one or more
8 aggravating circumstances beyond a reasonable
9 doubt unanimously to the jury. Then the second
10 decision that you have to make is what mitigating
11 circumstances exist. And as I said, anything can
12 be a mitigating circumstance; the age of the
13 offender, the cultural, educational, family,
14 medical history of a defendant can be a mitigating
15 circumstance. Facts contained -- facts that you
16 find from the synopsis of one event can be a
17 mitigating circumstance; whether or not he's been
18 a good fellow in the prison system for the past
19 number of years can be a mitigating circumstance.
20 They're unlimited, and any one juror can find a
21 mitigating circumstance. In other words, there's
22 12 of you that are going to deliberate. A
23 mitigating circumstance can be anything that any
24 one juror thinks mitigates, and you will write all
25 of those down on a verdict form as to what you

1 mitigating circumstances outweigh the aggravating
2 circumstances, then when you go back to actually
3 determine the verdict, then there's only three
4 possible verdicts that are left, the term of
5 years, life with, or life without. So the first
6 deliberative process is where you have to
7 determine what the aggravators are, what the
8 mitigators are and which outweighs the other.

9 And in the penalty hearing, unlike the
10 trial, there will be a synopsis and a report done
11 by the lead detective on the case. Hearsay is
12 admissible which in an ordinary trial we don't
13 allow people to come in and testify about what
14 somebody else told them because that's hearsay,
15 and I'm sure that you're familiar with that from
16 television and books and movies and things like
17 that. In the trial that occurred some years ago
18 where Mr. Thomas was convicted, those things would
19 not be admissible. The actual witnesses who saw
20 what happened, who heard what happened, who were
21 involved in whatever happened, those witnesses
22 would have to come in and testify and did come in
23 and testify. In this proceeding you will be given
24 a synopsis and a summary by the people who were
25 involved in it but not necessarily by the direct

1 eyewitnesses, and that's admissible in the penalty
2 hearing.

3 You are admonished that no juror may
4 declare to a fellow juror any fact relating to the
5 case of his own knowledge, and if any juror
6 discovers during the trial or after the jury has
7 retired that he or any other juror has personal
8 knowledge of facts in controversy in this case, he
9 should disclose that situation to me in the
10 absence of the other jurors. This means that if
11 you learn during the course of the trial that you
12 were acquainted with the facts of the case or the
13 witnesses and you've not previously told us of
14 that, you must declare that fact to me. And the
15 way that you communicate with me throughout the
16 trial is through our bailiff. Our bailiff is
17 Jonathan Crenshaw. He's got the dark olive shirt
18 on in the back. He's with us whenever we're in
19 trial.

20 During the course of this penalty
21 hearing the attorneys for both sides, that's
22 Mr. Owens, Mr. Schwartz, Mr. Schieck,
23 Mr. Albregts, Mary Beth our court reporter, Teri
24 our court clerk and myself are not permitted to
25 converse with you. It's not that we're

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1 antisocial; it is simply that we are bound by
2 ethics in the law not to talk to you because to do
3 so might contaminate your verdict.

4 You are admonished additionally you are
5 not to visit the scene of any of the acts or
6 occurrences made mention of during this hearing
7 unless specifically directed to do so by the
8 Court, and I can tell you that we will not do
9 that. So tonight on your way home or tomorrow
10 morning on your way in, you'll not stop out at
11 this Lone Star and walk through the restaurant and
12 through the back rooms and find the back door and
13 things of that sort because that's doing an
14 investigation on your own.

15 The parties may sometimes present
16 objections to some of the questions that are asked
17 or documents or evidentiary things which are
18 offered. I may at times sustain those objections
19 or direct that you disregard certain testimony or
20 exhibits. You must not consider any evidence to
21 which an objection has been sustained or which I
22 have instructed you to disregard. It is the duty
23 of the lawyer to object to evidence which he
24 believes may not properly be offered and you
25 should not be prejudiced in any way against the

1 lawyer who makes objections on behalf of the party
2 which he represents. I may also find it necessary
3 to admonish the lawyers, and if I do you should
4 not show any prejudice to the lawyers or his
5 client because I found it necessary to admonish
6 him.

7 Throughout the trial if you can't hear a
8 question that's asked or an answer that's given,
9 please raise your hand. If I don't see your hand
10 up just say I didn't hear that or please repeat
11 that, and we'll ask that the question be repeated
12 or that the answer be repeated. If you wish you
13 may take notes. The bailiff has given you
14 notepads and pens or pencils. If you run out of
15 paper, he'll be happy to give you more. If your
16 pencil breaks or your pen runs out of ink, he'll
17 be happy to replace that so that you can write.

18 If you wish you may take notes to help
19 you remember what a witness has said. If you do
20 take notes, please keep those notes to yourself
21 until you and your fellow jurors go to the jury
22 room to decide the case. Don't let your
23 note-taking distract you so that while you're
24 writing down one answer three or four more
25 questions and answers go by and you have no

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1 recollection of those. When you go back to
2 deliberate, you should rely upon your own memory
3 of what was said and not be overly influenced by
4 the notes of the other jurors.

5 I've given you a little idea of what
6 decisions you're going to have to make and how the
7 evidence is and how the evidence is going to be
8 presented. In this hearing, just like in a trial
9 to determine whether the defendant is guilty or
10 not, the parties have the right to make opening
11 statements, and the State has the right to go
12 first because it's their burden in this penalty
13 proceeding to put on evidence first. The defense
14 then has the right to make an opening statement.
15 Then the State will call its witnesses, and the
16 State has to prove to you beyond a reasonable
17 doubt unanimously one or more aggravating
18 circumstances exist. And after they've called
19 their witnesses or when they call their witnesses,
20 the defense has a right to cross-examine those
21 witness. And after the State has put on its
22 witness, then the defense has the right to put on
23 its witnesses to rebut what the State has given
24 you and to give you any evidence that you might
25 consider to be in mitigation. And since they

1 don't -- they're not sitting in each of your
2 minds, they don't have any idea what you might
3 consider to be mitigation, so they will put on
4 everything that they reasonably believe that you
5 might consider would be mitigation.

6 At the close of the defendant's
7 mitigation evidence, the attorneys will be doing
8 some closing arguments. I'll read you
9 instructions of law that apply to aggravators and
10 mitigators, then you'll go out and make that
11 decision and come back with your decision, and
12 then we'll -- then if the death penalty is still
13 available, there will be additional testimony,
14 additional witnesses that are called, another set
15 of instructions and the attorneys will again give
16 you closing arguments, and in your second
17 deliberation you'll decide which is the
18 appropriate penalty you feel is right in this case
19 for Mr. Thomas.

20 Please remember that what is said in the
21 opening statements and in the closing argument is
22 not evidence. Those arguments are designed to
23 summarize and interpret the evidence for you and
24 show you how the evidence applies to the law and
25 how the law applies to the evidence. But please

16

1 remember what the attorneys tell you is not
2 evidence.

3 In most hearings or trials there's two
4 types of evidence, direct evidence and
5 circumstantial evidence. Direct evidence is
6 testimony by a witness about what that witness
7 personally saw or heard or did. Circumstantial
8 evidence is testimony or exhibits which is proof
9 of a particular fact from which if that fact is
10 proven you can infer the existence of the second
11 fact. Let me give you a real quick example.
12 Let's say that we're in a building and there's no
13 windows around here and so we don't see anything
14 and we don't hear anything other than what's going
15 on in here, and when we leave at noon or afternoon
16 or evening or sometime we go outside and there's
17 puddles in the street and when you're still up on
18 the higher floors you can see that there's water
19 on all the roofs and things of that sort. That
20 would be circumstantial evidence that it rained.
21 That would be circumstantial evidence that it
22 rained. You didn't see it rain, you didn't hear
23 it, you didn't see the lightning or hear the
24 thunder, but when you went outside and when you
25 looked out the window you could see -- the rain

1 wasn't coming down but from what you saw you can
2 infer by circumstantial evidence that it had
3 rained sometime while you were in the building.
4 You may consider both direct and
5 circumstantial evidence in deciding the case. The
6 law permits you to give equal weight to both types
7 of evidence but it is up to you to decide how much
8 weight to give to any particular piece of
9 evidence.

10 You must not be influenced in any degree
11 by any personal feeling of sympathy for or
12 prejudice against any party to the lawsuit for
13 each party is entitled to the same fair and
14 impartial consideration. No statement, ruling,
15 remark or facial expression which I may make
16 during the course of the trial is intended to
17 indicate my opinion as to what the facts are. You
18 are the ones who determine the facts. In this
19 determination you alone must decide upon the
20 believability of the evidence and its weight and
21 value. When you consider the weight and value of
22 the testimony of any witness, you may take into
23 consideration the appearance, the attitude and the
24 behavior of the witness, the interest the witness
25 in the outcome of the lawsuit, the relationship of

18

1 witness to any party to the lawsuit, the
2 inclination of the witness to speak truthfully or
3 not, the probability or improbability of the
4 witness's statements, and all other facts and
5 circumstances in evidence. Thus, you may give the
6 testimony of any witness just such weight and
7 value as you believe the testimony of that witness
8 is entitled to receive.

9 I may during the trial take notes of
10 what a witness is saying. You're not to make any
11 inference from this action on my part as I'm
12 required to be prepared for legal arguments of the
13 attorneys during the trial and for that reason I
14 may take extensive notes.

15 Again let me remind you that until this
16 case is submitted to you for your decisions, do
17 not talk to each other about it or about anyone
18 who has anything to do with it until the end of
19 the case when you go to the jury room to decide on
20 your verdicts. Do not talk with anyone else about
21 this case or about anyone who has anything to do
22 with it until this penalty hearing has ended and
23 you've been discharged as jurors. Anyone else
24 includes members of your family and your friends.
25 As I said yesterday, you can tell your employers

1 and your family that you've been chosen as a juror
 2 in a case and that the Court has told you that
 3 you'll probably finished up on Friday. Do not let
 4 anyone talk to you about the case or about anyone
 5 who has anything to do with it. If someone should
 6 try to talk to you about this case, please report
 7 that to me immediately by contacting our bailiff,
 8 Jonathan Crenshaw. Do not read any news stories
 9 or articles or listen to any radio or television
 10 report about the case or about anyone who has
 11 anything to do with it.
 12 Do not do any research or make any
 13 investigation about the case on your own. Do not
 14 make up your mind about what the verdict should be
 15 until after you've gone to the jury room to decide
 16 the case and you and your fellow jurors have
 17 discussed the evidence. It is important
 18 throughout the trial that you keep an open mind.
 19 At the end of these proceedings you will have
 20 to make your decision based upon what you recall
 21 of the evidence. You will not have a written
 22 transcript to consult, and it is difficult and
 23 time-consuming for the reporter to read back
 24 lengthy testimony; therefore, I would urge you to
 25 pay close attention to the testimony as it is

20

1 given.
 2 The attorneys have informed me that they
 3 are not opposed on either side to having family
 4 members present during the hearing, so I believe
 5 that at some times during these proceedings the
 6 family members of the Gianakis and Dixon family
 7 will be here, and sometimes the family members of
 8 Mr. Marlo Thomas will be here, and these people
 9 may also be testifying during this proceeding, but
 10 the parties have both agreed that family members
 11 may be present during the proceeding.
 12 Additionally, our Supreme Court has
 13 ordered, it started July 1st which is a new
 14 feature in criminal trials in Nevada, after the
 15 attorneys have concluded their questioning of the
 16 witness if there's a factual question that you
 17 would like answered which wasn't asked or if you
 18 need clarification of an answer given by a
 19 witness, you may submit such question to the
 20 bailiff in writing before the witness is excused
 21 from the courtroom. Sometimes because I've been
 22 doing it the other way for 12-and-a-half years
 23 sometimes I go to excuse a witness and I haven't
 24 asked you if you have questions for them, so don't
 25 let me do that. I still have to be reminded.

1 It's only October. I still have to be reminded
 2 that we've got a change in our procedure. So if
 3 you have questions for the witness, you write
 4 those questions down, put your name on the back of
 5 the question and when we get done with the witness
 6 and I say does any of the jurors have questions,
 7 you raise the hand the bailiff picks them up.
 8 He'll bring those questions to me, and I'll
 9 discuss your questions with the attorneys, and
 10 between all of us we'll determine whether it's a
 11 proper question to be asked or if another witness
 12 later in the trial will be covering the issue or
 13 the question that you have asked.
 14 Since the law requires that any question
 15 asked by any witness -- asked any witness comply
 16 with the rules of evidence, it is possible that
 17 the Court will deem your question inappropriate
 18 and therefore it may not be asked. You are not to
 19 draw any inferences or conclusions one way or
 20 other if a question is either asked or not asked.
 21 If your question is asked and answered, you're not
 22 to place undue weight on the responses to your
 23 question.
 24 Are there any other instructions the
 25 parties would like the Court to give before

22

1 opening statements?
 2 MR. SCHIECK: No, your Honor.
 3 MR. SCHWARTZ: No, your Honor.
 4 THE COURT: Then the State may proceed
 5 with opening.
 6 MR. SCHWARTZ: Thank you, your Honor.
 7 THE COURT: And, Mr. Schieck and
 8 Mr. Albregts, if you want to see what's on the
 9 screen.
 10 MR. ALBREGTS: Won't it come on this
 11 screen?
 12 THE COURT: Maybe it will. Magic things
 13 can happen. We have so much more high-tech stuff
 14 in this building that it's supposed to come up on
 15 the monitors, but I don't know if it will or not.
 16 (Discussion off the record.)
 17 THE COURT: Why don't we be in recess
 18 for about ten minutes. We're calling the JAVS
 19 man. That's the name of the equipment, and he's
 20 here in the courthouse hopefully all the time, and
 21 we haven't done the training on everybody. It's
 22 going to start two Fridays from now.
 23 (Whereupon, a recess was taken.)
 24 THE COURT: Good morning, ladies and
 25 gentlemen. We're back in session again on the

1 penalty hearing on the State of Nevada versus
2 Marlo Thomas. The high-tech man has been here and
3 we've almost got all of our jurors. The record
4 will once again reflect the presence of the full
5 jury and alternate juror.

6 Mr. Schwartz, if you're ready to proceed
7 and the equipment is all working, you may do so.

8 MR. SCHWARTZ: I don't know about the
9 equipment, but I'm ready, your Honor.

10 Counsel, Mr. Owens, ladies and
11 gentlemen, Monday, April the 15th, 1996, no doubt
12 you don't remember what you were doing that date,
13 and no doubt you don't remember where you were on
14 that particular date, and most certainly none of
15 you realized back on April the 15th, 1996, that
16 events were being set in motion by this defendant,
17 Marlo Thomas, that would make it necessary for all
18 of us to be here today. For on April the 15th,
19 1996, in a local restaurant, this defendant took
20 the lives of two young, innocent men in a most
21 horrific manner.

22 Monday morning, April the 15th, 1996,
23 began as a normal day in the lives of Carl Dixon,
24 age 23, and Matt Gianakis, age 21. Both young men
25 worked at the Lone Star Steakhouse located at 3131

1 The evidence will show that when Steve
2 Hemmes arrived for work he was wearing sandals.
3 Vincent Oddo, the manager, told Steven he had to
4 go home and change his shoes because wearing
5 sandals was a violation of the policy of the Lone
6 Star Restaurant. So Steve was going to go home,
7 change his shoes and then return for work.

8 The evidence will show that when Steve
9 Hemmes left the Lone Star at about eight,
10 8:10 a.m., he saw the defendant, Marlo Thomas, in
11 the parking lot with a young boy by the name of
12 Kenya Hall who was 15 years old at the time.
13 Steve Hemmes recognized the defendant because
14 there was a time when Marlo Thomas, the defendant,
15 had worked at the Lone Star Restaurant but he had
16 been terminated. Steve Hemmes exchanged a few
17 words with Marlo Thomas. Marlo Thomas asked Steve
18 Hemmes where he was going. He said he was going
19 home to change his shoes and then he'd be back to
20 work. The defendant asked Steve Hemmes about how
21 long are you going to be gone. He said about 20,
22 25 minutes. Steve Hemmes left the area of the
23 parking lot of the Lone Star Restaurant.

24 Now, the evidence will show that the
25 defendant arrived at the Lone Star with Kenya Hall

24

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1 North Rainbow on the corner of Rainbow and
2 Cheyenne here in Las Vegas. Both men went to work
3 shortly before 8:00 a.m. on that Monday morning.
4 Neither man realized that that would be the last
5 day he worked. Neither man realized that when
6 they left their homes that Monday morning, neither
7 man would ever see his family again.

8 MR. SCHIECK: Objection, your Honor.
9 That's improper. It's not opening statement,
10 that's argument.

11 THE COURT: Objection is sustained.

12 MR. SCHWARTZ: The evidence will show
13 that both men would be dead not because of some
14 horrific accident at the Lone Star Restaurant, but
15 because one man, Marlo Thomas, wanted them dead.
16 The evidence will show that by 8:00 a.m. on April
17 the 15th, both Matt Gianakis and Carl Dixon had
18 arrived at work at the Lone Star Restaurant. They
19 were preparing food in the kitchen. Vincent Oddo,
20 who is the manager of the Lone Star Restaurant,
21 was in the office performing his duties. A fourth
22 employee, Steve Hemmes, had also arrived at work.
23 So by about 8:00 a.m. that Monday morning, there
24 were four employees of the Lone Star at the
25 business.

1 in a green Mitsubishi vehicle driven by the
2 defendant's girlfriend, Angela Love. So three
3 arrived in that green vehicle sometime the morning
4 of April the 15th, 1996. The evidence will show
5 that before the defendant ran into Steve Hemmes he
6 and Kenya Hall had left the vehicle, and the
7 defendant told Angela to remain in the green
8 Mitsubishi.

9 When the defendant and Kenya Hall left
10 the car, the defendant took with him a handgun
11 which he loaded in front of Kenya Hall. The
12 evidence will show that after Steve Hemmes had
13 left the area the defendant and Kenya Hall went up
14 to the back door of the restaurant and were able
15 to enter into the Lone Star Restaurant. The
16 defendant and Kenya Hall walked past Matt and Carl
17 who were in the prep area preparing food and went
18 toward the manager's office, the office of Vincent
19 Oddo. The defendant, Marlo Thomas, knocked on the
20 door; Vincent Oddo answered the door, opened it
21 and was greeted by a handgun in his face being
22 held by this defendant, Marlo Thomas.

23 The defendant demanded money, and
24 Vincent Oddo went onto his knees, got down on the
25 ground, and opened the floor safe and removed

1 money. The evidence will show that the defendant
2 then gave the gun to Kenya Hall and told Kenya
3 Hall to get the money and then shoot Vincent Oddo
4 in the back of the head, and the defendant left
5 the area of the manager's office.

6 The defendant left the area of that
7 office to take care of a couple of loose ends,
8 Matt Gianakis and Carl Dixon. The evidence will
9 show that Vince Oddo opened the safe, put money in
10 bank bags which he then handed to Kenya Hall. The
11 monies totaled approximately \$7,000. Vince Oddo
12 is expected to testify that he then heard Matt
13 Gianakis screaming no, no, no, stop. Vince Oddo
14 is expected to testify that after hearing these
15 screams, Kenya Hall was distracted and went toward
16 the area where the screams were coming, and at
17 that point Vincent Oddo ran out of the restaurant,
18 ran across the street to an Albertson's where he
19 called 911.

20 The evidence will show that Matt
21 Gianakis, who had been surprised by the defendant,
22 was stabbed once in the back and once in the chest
23 with a kitchen knife taken from the Lone Star
24 kitchen. Though mortally wounded, Matt was able
25 to stumble out of the Lone Star Restaurant and go

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1 to a Rebel gas station which was next to the Lone
2 Star Restaurant where he collapsed into the arms
3 of Sidney Sontag but not before telling Sidney he
4 had been stabbed at the Lone Star, get help.

5 Ladies and gentlemen, the evidence will
6 show that Carl Dixon was cornered in the men's
7 rest room of the Lone Star Restaurant. Carl
8 fought for his life but being unarmed he was no
9 match for this defendant wielding that knife.
10 Carl Dixon was stabbed approximately 19 times in
11 the side, in the chest and stomach, several stab
12 wounds went into his heart and lungs and he also
13 had approximately 17 additional defensive wounds.

14 The evidence will show that after
15 committing these horrific crimes the defendant,
16 Kenya Hall left the Lone Star, got into the
17 vehicle being driven by his girlfriend Angela Love
18 and went to the defendant's aunt's house at 2505
19 Cartier in North Las Vegas. His aunt's name was
20 Emma Nash. The three, the defendant, Angela and
21 Kenya Hall, had stayed at Emma Nash's house the
22 evening before after having arrived from
23 Hawthorne, Nevada, where they were currently
24 living.

25 When the defendant, Kenya Hall and Love

1 arrived at Emma Nash's home, the defendant spoke
2 to Emma, his aunt, and to his cousin Barbara,
3 Barbara Smith. The defendant told them you
4 haven't seen me. The defendant had the murder
5 weapon with him, the knife, and he also had that
6 handgun, later discovered to be a Smith and Wesson
7 revolver. The defendant told his aunt that he had
8 done something which could land him in prison. He
9 had possibly killed two people but one got away,
10 but he hoped that the one who got away died.

11 Defendant gave Emma, his aunt Emma, and
12 Barbara a thousand dollars and instructed them to
13 give that money to his mother. He gave his aunt
14 the handgun and asked her to give that to his
15 cousin or her son Matthew, a present from his
16 uncle -- or his cousin. Defendant's bloody pants,
17 bloody shirt and shoes, murder weapon were thrown
18 in a desert area somewhere behind the home of Emma
19 Nash, and the evidence will show that the three,
20 defendant, Angela and Kenya Hall, then got into
21 that green Mitzubishi and headed back home to
22 Hawthorne, Nevada.

23 The Las Vegas Metropolitan Police
24 Department responded to the Lone Star Restaurant.
25 Carl Dixon's lifeless body was found in the men's

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1 rest room. Matt Gianakis was transported from
2 that Rebel gas station to I believe it was UMC
3 Hospital where he died later that afternoon or
4 that same day.

5 The police interviewed Steve Hemmes and
6 Vincent Oddo, and those two gentlemen gave the
7 police a suspect of these brutal murders, a former
8 employee of the Lone Star, the defendant, Marlo
9 Thomas. Police soon learned that the defendant
10 had a relative, an aunt, living in North
11 Las Vegas, and they went to speak with Emma Nash.

12 The evidence will show that Emma Nash
13 was very cooperative with the police. She lead
14 the police to the handgun that the defendant had
15 given her, and she lead the police or informed the
16 police of the area where she had seen bloody
17 clothing, the knife or certain property, discarded
18 by the defendant. She told the police that she
19 believed the defendant was heading for Hawthorne
20 and she described the vehicle that he was in.

21 The police put out an attempt to locate
22 on that Mitzubishi and attempted to locate Angela
23 Love, Marlo Thomas and Kenya Hall.

24 On that same day of April the 15th,
25 1996, at about 2:00 p.m. that afternoon, Trooper

1 David Bailey of the Nevada Highway Patrol received
2 a call that a car used in a double homicide in
3 Las Vegas was seen in the area of Hawthorne,
4 Nevada. Trooper Bailey is expected to testify
5 that when the green Mitsubishi was stopped -- he
6 was involved in the actual stop along with several
7 other officers from the Mineral County Sheriff's
8 Department, and he is expected to testify that
9 driving the car was Angela Love and in the front
10 seat was the defendant, Marlo Thomas, and in the
11 back seat was Kenya Hall.

12 And Trooper Bailey knew Kenya Hall from
13 Mineral County, from the high school there,
14 because Trooper Bailey was a basketball coach, and
15 he's expected to testify that Kenya Hall once
16 tried out for the track team, but he became
17 acquainted with young Kenya Hall, and Trooper
18 Bailey spoke to Kenya Hall. Kenya Hall cooperated
19 and agreed to talk to Trooper Bailey at the
20 Mineral County Sheriff's Office. Kenya Hall
21 wanted his mother present before he spoke with
22 Trooper Bailey. Trooper Bailey contacted the
23 defendant's mother and she arrived at the Mineral
24 County Sheriff's Office, and Kenya Hall gave a
25 statement in the presence of his mother to Trooper

1 at trial, and Judge Bonaventure, who was the judge
2 at the first trial, allowed that jury to hear the
3 testimony of Kenya Hall. It was done by someone
4 reading a transcript that had taken place of the
5 proceedings at the preliminary hearing. And you
6 will also have an opportunity to hear that
7 transcript being read to you at this penalty
8 phase.

9 Now, ladies and gentlemen, you all know
10 that at the conclusion of the guilt phase of that
11 trial back in 1997 the defendant, Marlo Thomas,
12 was convicted of robbery with use of a deadly
13 weapon, conspiracy, burglary, first degree
14 kidnapping with use of a deadly weapon and two
15 counts, two counts of first degree murder with use
16 of a deadly weapon and one count the victim was
17 Carl Dixon and in the other count the victim was
18 Matt Gianakis.

19 As Judge Loehrer has indicated to you
20 earlier this morning, your responsibility at the
21 first part of this penalty phase is to determine,
22 one, were aggravating factors proven by the State
23 of Nevada beyond a reasonable doubt. Two, were
24 any mitigating factors proven or shown and do the
25 aggravators outweigh the mitigators or do the

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1 Bailey.

2 The evidence will show that the
3 following day, the 16th of April, Crime Scene
4 investigator Yolanda McClary drove to Hawthorne,
5 Nevada, where she conducted a search of that
6 Mitsubishi automobile. Beneath the spare tire was
7 an Albertson's grocery bag containing a dark blue
8 pillowcase which contained approximately \$5,857 in
9 cash. The evidence will show that Kenya Hall
10 subsequently entered into a plea agreement with
11 the State of Nevada. He pled guilty to armed
12 robbery, a robbery with use of a deadly weapon and
13 agreed to testify at a preliminary hearing
14 conducted in this town against the defendant,
15 Marlo Thomas, and then again at the trial of Marlo
16 Thomas.

17 MR. SCHIECK: Your Honor, I'm going to
18 object to that. It's inaccurate.

19 THE COURT: Your objection is noted, and
20 if the document comes into evidence that agreement
21 then, of course, the jury will be able to review
22 it.

23 MR. SCHWARTZ: Thank you, your Honor.
24 Kenya Hall did testify at the
25 preliminary hearing but later refused to testify

1 mitigators outweigh the aggravators and make a
2 determination whether or not the death penalty is
3 available for one count of first degree murder,
4 the victim being Carl Dixon, or for the second
5 count of murder, the victim being Matt Gianakis.

6 Clearly for you to make an informed
7 decision, you must -- we must, the State must,
8 present some evidence from the original trial, so
9 you'll hear testimony from some of the individuals
10 who testified at that first trial, and some
11 transcripts might be read to you and offered into
12 evidence. But remember there is absolutely no
13 question of guilt. That finding was made
14 previously by another jury. This defendant was
15 found guilty of two counts of first degree murder
16 with the use of a deadly weapon.

17 The judge mentioned earlier in that
18 first phase you're to determine whether or not the
19 death penalty is available. If it is available,
20 then later on you'll make a decision based upon
21 four possible verdicts. If you find that the
22 mitigating circumstances outweigh the aggravating,
23 or you find there are no aggravating circumstance,
24 then you're limited to three choices, a term of
25 years, life imprisonment with parole or life

1 imprisonment without the possibility of parole.
 2 Ladies and gentlemen, the State has
 3 alleged, and I submit to you the State will prove
 4 beyond a reasonable doubt, the existence of four
 5 aggravating circumstances in this case. The first
 6 aggravating circumstance -- and these are
 7 statutory aggravating circumstances. They're in
 8 the statutes in the state of Nevada. First
 9 aggravating circumstance is that the murder was
 10 committed by a person who had previously been
 11 convicted of a felony involving the use or threat
 12 of the violence to the person of another. You
 13 will learn that in 1990, this defendant entered a
 14 plea of guilty to attempt robbery. That case
 15 involved the robbery of an individual by the name
 16 of Priestly Beltran. This defendant and another
 17 individual robbed Mr. Beltran. A knife was used
 18 in the commission of that particular robbery and
 19 it was to get a pay check or money that
 20 Mr. Beltran had after cashing his \$475 paycheck.
 21 Defendant was charged with robbery with use of a
 22 deadly weapon and was allowed to plead to a
 23 reduced charge of attempt robbery. The defendant
 24 was sentenced to six years in prison. That was
 25 1990. That was our first aggravating circumstance

1 with a promise to return I believe it was sometime
 2 in June for his sentencing. But before that
 3 sentencing in June, we have April the 15th, 1996.
 4 So while on bail after having been entered a plea
 5 or found guilty of a second felony, this defendant
 6 goes to the Lone Star, and you've heard what
 7 happened on April the 15th, 1996.
 8 The third aggravating circumstance that
 9 the State will prove beyond a reasonable doubt is
 10 that the murder was committed to avoid or to
 11 prevent a lawful arrest. Now, once the defendant
 12 and Kenya Hall had the money, Vince Oddo wasn't
 13 putting up any struggle. He emptied that safe,
 14 put it in bags, gave the money to Kenya Hall. So
 15 once they had the money, absolutely nothing
 16 prevented them from leaving the Lone Star
 17 Restaurant and not hurting anyone. But that
 18 wasn't good enough for the defendant. This
 19 defendant who had been in prison before had no
 20 intention of going back. He believed Vince Oddo
 21 might have recognized him as a former employee,
 22 and he ordered Kenya Hall to shoot Oddo in the
 23 head after receiving the money. And then the
 24 defendant went to the prep area where his intent
 25 was to tie up two loose ends, Carl Dixon and Matt

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1 that the State has alleged.
 2 The second aggravating circumstance --
 3 this may sound redundant because I'm going to
 4 repeat myself is that the murder was committed by
 5 a person who has previously been convicted of a
 6 felony involving the use or threat of violence to
 7 the person of another. You will learn that the
 8 defendant sustained a second felony conviction.
 9 When? March of 1996. Remember, April 15, 1996.
 10 In March of 1996, this defendant was convicted of
 11 battery with substantial bodily harm. In that
 12 case which occurred the month before these two
 13 killings, the defendant went into the home of
 14 Pamela Davis and Loletha Jackson with a gun. Now,
 15 he's been convicted back in 1990, but he has a gun
 16 in 1996. He fires that weapon into the back
 17 bedroom where his girlfriend, Loletha Jackson and
 18 her five-year-old child were laying down. He then
 19 took that gun, struck Loletha Jackson, knocking
 20 out several of her teeth and rendering her
 21 unconscious.
 22 Unfortunately before the defendant was
 23 sentenced for that crime that he committed in
 24 March 1996, a judge took a chance, allowed the
 25 defendant out on bail, a thousand dollars bail,

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1 Gianakis.
 2 Now, under the statutes of the state of
 3 Nevada, if the murder was committed to prevent the
 4 lawful arrest, that's a separate aggravating
 5 circumstance, in other words, the killing of
 6 someone so they couldn't later identify you.
 7 You've accomplished your aim, you've gotten the
 8 money. Why are you going to kill these people?
 9 So they can't identify you and testify later on.
 10 Vince Oddo is here. He's alive no
 11 thanks to this defendant. He will testify in this
 12 courtroom. Steve Hemmes is alive because he wore
 13 sandals to the Lone Star that day.
 14 The fourth aggravating circumstance that
 15 the State will prove beyond a reasonable doubt is
 16 that the defendant in the immediate proceeding
 17 been convicted of more than one offense of murder
 18 in the first degree or second degree, in other
 19 words, a double homicide, two lives taken. A jury
 20 has already made that decision. You have that
 21 fourth aggravating circumstance.
 22 Ladies and gentlemen, the evidence in
 23 this case will convince you beyond a reasonable
 24 doubt the four aggravating circumstances have been
 25 proven beyond a reasonable doubt. The evidence

1 will also show, ladies and gentlemen, that no
2 mitigating circumstances are present that outweigh
3 these aggravating circumstances, and that the
4 death penalty is certainly a viable option for you
5 to consider when you determine the appropriate
6 punishment for those two senseless and brutal
7 murders committed by this defendant.

8 Thank you, your Honor.

9 THE COURT: Counsel, do you wish to open
10 now or after the noon recess?

11 MR. SCHIECK: After the noon recess,
12 please, your Honor.

13 THE COURT: Let's be in recess now for
14 the noon recess. During the recess you're
15 admonished not to converse amongst yourselves or
16 with anyone else on any subject related to or
17 read, watch or listen to any report of or
18 commentary on the trial or any person connected
19 with the trial by any medium of information
20 including, but not limited to, television, radio,
21 or newspapers, or form or express any opinion on
22 any subject connected with the trial until the
23 case is finally submitted to you.

24 We'll be in recess until 1:30. Thank
25 you.

40

1 (Whereupon, a recess was taken.)

2 THE COURT: We are on the record in the
3 State of Nevada versus Marlo Thomas. The record
4 will reflect the presence of the parties and
5 counsel, all officers of the court, and the
6 absence of the jury. Mr. Owens.

7 MR. OWENS: Yes, thanks. Sorry we were
8 late, your Honor. We should probably make a
9 record. We agreed to have the family in here, and
10 there was some problems with that, so now they've
11 been excused. But we have two family members that
12 are not witnesses in the case, will not be
13 testifying, and, in fact, sat through the last
14 penalty hearing when it was held before because
15 they were not witnesses in the case.

16 THE COURT: The trial is open to the
17 members of the public. As long as the members of
18 the public don't interfere with the proceedings by
19 trying to talk to the defendant, then people can
20 be in here.

21 MR. OWENS: These are members of the
22 public at this point because they're not going to
23 be called as witnesses.

24 THE COURT: They can come in and sit
25 through the trial.

1 MR. OWENS: They were here last time.
2 THE COURT: Whoever they are, if they're
3 not going to testify they can come in.

4 MR. OWENS: Thank you, Judge.

5 THE COURT: Anything else?

6 MR. OWENS: Nothing, Judge.

7 (Whereupon, the jury entered

8 the courtroom.)

9 THE COURT: Good afternoon, ladies and
10 gentlemen. Welcome back to penalty hearing in the
11 State of Nevada versus Marlo Thomas. One person
12 is missing? We'll start when that person arrives.

13 (Pause in proceedings.)

14 THE COURT: The record will now reflect
15 the presence of the full jury and alternate
16 jurors. When we recessed for the noon recess
17 Mr. Schwartz had done the State's opening, and at
18 this time Mr. Schieck will give you the defense
19 opening.

20 MR. SCHIECK: Thank you, your Honor.
21 Good afternoon, ladies and gentlemen. We talked
22 yesterday during jury selection, and both
23 Mr. Albregts and myself got up here and told you
24 that Marlo was convicted of two counts of murder.
25 We admitted that. We admitted that he had been in

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1 prison on two previous convictions, so there
2 really is nothing new in the opening statement of
3 the State other than to fill in some of the facts
4 of the incident.

5 In the state of Nevada, the death
6 penalty is never required in any case, in any
7 murder case, whether it's one, two, three, four or
8 more. It's never required. The jury has to make
9 that decision. Now, a lot of that decision is
10 going to be based on looking at the facts of the
11 case, but we're not executing the facts of the
12 crime. We're talking about a human being, and
13 what we're going to try to do during our
14 presentation is present Marlo to you through
15 members of his family and other witnesses so that
16 you come to understand why we are here. There's a
17 big leap from when Marlo was a child until April
18 of 1996, and you need to understand Marlo and his
19 family and what transpired during that period of
20 time that caused us to be here.

21 We're going to present to you
22 information that we believe you should consider as
23 mitigating circumstances, but that's not our
24 decision; that's your decision. Mitigating
25 circumstance is a lot different from an

1 aggravating circumstance just so you understand
 2 the process. I know the Court went over this
 3 briefly with you, but I want to be sure that you
 4 understand from our standpoint what we're talking
 5 about. An aggravating circumstance has to be
 6 proven beyond a reasonable doubt, and it has to be
 7 unanimous. All 12 have to agree that that
 8 aggravating circumstance is proved.
 9 On the other hand, a mitigating
 10 circumstance there is no beyond a reasonable doubt
 11 burden of proof, there's no requirement that it be
 12 unanimous. Each of the 12 jurors that hear the
 13 case has the right to find a mitigating
 14 circumstance that the other 11 don't necessarily
 15 believe exist or they don't want to consider, but
 16 each juror makes that individual decision. And if
 17 you find that mitigating circumstance, that is
 18 what gets weighed against whatever the aggravators
 19 are that the State has convinced you of beyond a
 20 reasonable doubt. So hypothetically Juror No. 1
 21 could find that there were six mitigating
 22 circumstances and go through that weighing process
 23 based on what that juror found. Juror No. 4 may
 24 say there's only one mitigating circumstance and
 25 that's what I'm going to weigh against the

1 these witnesses is going to have a different
 2 perspective of their dealings with Marlo as he
 3 progressed through his adolescence and into his
 4 teen years and ultimately to the point where he
 5 was sent to prison for that first conviction.
 6 Each of them is going to have a different
 7 perspective as to what caused this situation to
 8 occur that caused Marlo to be where he's at now.
 9 Charles Nash, his cousin, is going to be
 10 an interesting witness in the fact that Charles
 11 Nash is the individual that got Marlo the job at
 12 the Outback. In fact, Charles Nash was good
 13 friends with Carl and Matt and would give Carl,
 14 Matt, and Marlo rides home; that they would
 15 socialize, and he never saw any problems between
 16 Marlo and Matt or Carl. And that's important
 17 because the State -- you need to understand this.
 18 We can't argue to you that Marlo is not guilty of
 19 these crimes. Can't do it. The State has
 20 presented what they feel the evidence is in the
 21 case that lead to the conviction but we're also
 22 going to be presenting testimony that mitigates
 23 against the culpability of Marlo in the commission
 24 of the crime, for instance, whether there was an
 25 intent to go in and commit a robbery or to kill

1 aggravators. So each juror makes that individual
 2 weighing process. If one juror believes that the
 3 mitigators outweigh the aggravators, you can't
 4 have a unanimous verdict of death, and therefore
 5 he's not death eligible. It's an individual
 6 decision for each juror, but it has to be
 7 unanimous in order to decide the aggravators
 8 outweigh the mitigators.
 9 And so as we present the witnesses that
 10 we're going to call and the testimony concerning
 11 Marlo and concerning the case, you need to keep in
 12 mind that each one of you needs to keep track of
 13 what you believe should be considered in
 14 mitigation of the sentence in this case. You all
 15 told us during jury selection that you would
 16 consider the forms of punishment, not just the
 17 death penalty, and that's what you do when you
 18 take the mitigators and weigh them against the
 19 aggravators.
 20 We expect that you're going to hear
 21 testimony from a number of members of Marlo's
 22 family, his mother Georgia Thomas, his brother
 23 Paul Hartwit, his brother Darryl Thomas, his aunt
 24 Shirley Nash, his cousin Charles Nash, his nephew
 25 David Hudson and his aunt Liza Bosley. Each of

1 anyone on that day, and Charles is going to
 2 provide some very interesting testimony in that
 3 regard.

4 Additionally, you're going to hear from
 5 Shirley Nash, his aunt. Marlo had lived with her
 6 for a while at a young age, and you'll hear about
 7 his background and her dealings with Marlo; that
 8 he would actually baby-sit at her house. Paul
 9 Hartwit is his younger brother by eight years. So
 10 Marlo was eight years old when the youngest boy
 11 was born, and you'll hear Paul's perspective of
 12 Marlo and what Marlo's dealings with Paul have
 13 been and a positive light in his life. And of
 14 course you'll hear from Georgia, his mother.

15 Our position at the end of this stage of
 16 the proceedings is that the mitigators outweigh
 17 the aggravators and that therefore he is not death
 18 eligible. We'll just go on the other three
 19 possible punishments. Thank you.

20 THE COURT: Thank you, Mr. Schieck.
 21 Counsel for the State, you may call your
 22 first witness.

23 MR. SCHWARTZ: Thank you, your Honor.
 24 State would call Steve Hemmes.
 25 / / /

1 Whereupon,
 2 STEVE HEMMES,
 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 last name for the record.
 12 THE WITNESS: Stephen Hemmes,
 13 S-T-E-P-H-E-N H-E-M-M-E-S.
 14 THE COURT: Ladies and gentlemen, can
 15 you still see the witness?
 16
 17
 18 BY MR. SCHWARTZ: DIRECT EXAMINATION
 19 Q. Sir, how old are you?
 20 A. Thirty-one.
 21 Q. And in April of 1996 were you employed
 22 at the Lone Star Steakhouse?
 23 A. Yes, I was.
 24 Q. And where is the Lone Star Steakhouse
 25 located?

1 Q. Who was Vince Oddo?
 2 A. The manager.
 3 Q. He's the manager at the Lone Star?
 4 A. Yes, one of the managers.
 5 Q. Let me direct your attention to the
 6 morning of April the 15th, 1996. Were you
 7 scheduled to work at the Lone Star that particular
 8 day?
 9 A. Yes, I was.
 10 Q. Did you, in fact, go to the Lone Star
 11 Restaurant that day?
 12 A. Yes, I did.
 13 Q. Do you know approximately what time you
 14 arrived at the Lone Star?
 15 A. About 7:50.
 16 Q. And did you go inside?
 17 A. Yes, I did.
 18 Q. Was the Lone Star open to the public at
 19 that particular hour?
 20 A. No.
 21 Q. And how is it you gained entry into the
 22 Lone Star that morning?
 23 A. Vince had let me into the prep cook
 24 area.
 25 Q. When you arrived and gained entrance

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1 A. 3131 North Rainbow.
 2 Q. Is that here in Clark County, Nevada?
 3 A. Yes.
 4 Q. What type of a job did you have at the
 5 Lone Star Steakhouse?
 6 A. I was a saute cook and a daytime
 7 dishwasher.
 8 Q. And during your employment at the Lone
 9 Star, did you become acquainted with a Carl Dixon
 10 and a Matt Gianakis?
 11 A. Yes.
 12 Q. How is it you became acquainted with
 13 those two individuals?
 14 A. We became friends by working together.
 15 Q. So both Carl and Matt worked at the Lone
 16 Star?
 17 A. Yes.
 18 Q. Do you know what type of a job Carl
 19 Dixon had at the Lone Star?
 20 A. He was a prep cook.
 21 Q. What about Matt Gianakis?
 22 A. Prep cook as well.
 23 Q. Did you become acquainted with an
 24 individual by the name of Vince Oddo?
 25 A. Yes.

1 into the Lone Star Restaurant, did you notice
 2 whether there were any other employees present
 3 besides yourself and Vince Oddo?
 4 A. Matt had just showed up.
 5 Q. Do you know if Carl Dixon was there?
 6 A. I didn't see him.
 7 Q. Could he have been there but in a
 8 different location of the restaurant?
 9 A. Yes.
 10 Q. After your arrival at the Lone Star, did
 11 there come a time when you had a conversation with
 12 the manager Vince Oddo?
 13 A. Yes. It was over my shoes. I wore the
 14 wrong shoes to work that morning.
 15 Q. What type of shoes were you wearing?
 16 A. Sandals.
 17 Q. What, if anything, did Vince Oddo say to
 18 you about your dress?
 19 A. That it couldn't be open-toed shoe; that
 20 it had to be all enclosed and go home and change
 21 my shoes and come back.
 22 Q. Did you indicate to Mr. Oddo that you
 23 would go home and change your shoes and then
 24 return to the Lone Star?
 25 A. Yes.

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1 Q. Did you leave the Lone Star Restaurant?
 2 A. Yes, I did.
 3 Q. Do you recall how you exited from the
 4 restaurant?
 5 A. I exited through the west door -- the
 6 back door of the building where the deliveries
 7 were made.
 8 Q. When you exited the Lone Star from the
 9 back door, did you see anyone?
 10 A. Yes.
 11 Q. Who did you see?
 12 A. I seen Marlo and one of his buddies that
 13 was with him.
 14 Q. When you say Marlo, do you see that
 15 individual in the courtroom today?
 16 A. Yes.
 17 Q. Could you point to where he's located
 18 and describe what he's wearing?
 19 A. Black vest or dark blue vest and blue
 20 shirt.
 21 MR. SCHWARTZ: The record will reflect
 22 the identification of the defendant, your Honor?
 23 THE COURT: The record will so reflect.
 24 BY MR. SCHWARTZ:
 25 Q. You indicate that in addition to seeing

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1 the defendant you saw in the company of another
 2 individual?
 3 A. Yes.
 4 Q. How would you describe the other
 5 individual?
 6 A. Tall skinny black male.
 7 Q. Do you know approximately how old that
 8 individual was?
 9 A. No.
 10 Q. Did he appear to be younger than the
 11 defendant?
 12 A. Yes.
 13 Q. How is it that on April the 15th, 1996,
 14 you knew the defendant?
 15 A. I had worked with him once before.
 16 Q. And where had you and the defendant
 17 worked?
 18 A. At the Lone Star, the same restaurant.
 19 Q. The same Lone Star located on Cheyenne
 20 and Rainbow?
 21 A. Yes.
 22 Q. Now, on this particular day, April the
 23 15th, 1996, was the defendant still employed by
 24 the Lone Star?
 25 A. No.

1 Q. Did you have a conversation with the
 2 defendant?
 3 A. Yes, out the back door as I was leaving.
 4 Q. What, if anything, did you say to the
 5 defendant?
 6 A. I told him I had to go home and change
 7 my shoes, and he told me that he was there to try
 8 to get his old job back, and that was basically
 9 it. He asked who the manager was at the time. I
 10 told him Vince. He called Vince a dickhead, and I
 11 told him all right, I'll be back. He asked me
 12 about how long I was going to be. I said about 20
 13 minutes. He said he'd see me when I got back and
 14 I jumped in my car and left.
 15 Q. How would you describe the defendant's
 16 demeanor when you met him in the parking lot after
 17 you left the Lone Star?
 18 A. Normal, calm.
 19 Q. How would you describe the demeanor of
 20 the other individual who was with him?
 21 A. Same way.
 22 Q. What was the defendant doing when you
 23 first saw him as you left the Lone Star
 24 Restaurant?
 25 A. He was walking to the other side -- to

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1 the north door of the building.
 2 Q. Is the north side the front?
 3 A. No. The north side is just another side
 4 door where deliveries were also made.
 5 Q. Was he walking toward that door with
 6 somebody else?
 7 A. Yes, with the gentleman that was with
 8 him.
 9 Q. As you left the area of the Lone Star,
 10 the parking lot, after you got into your car, did
 11 you see any other cars in the area that caught
 12 your attention?
 13 A. No.
 14 Q. After you got in your car and left the
 15 area, where did you go?
 16 A. To my house.
 17 Q. And do you know how long you stayed at
 18 your house?
 19 A. Just long enough to change my shoes and
 20 jump in my car and head back to work.
 21 Q. So when you left the Lone Star, about
 22 what time was it that you got in your car and
 23 actually drove away?
 24 A. Around 8:00.
 25 Q. And about what time did you arrive back

1 at the Lone Star?
 2 A. At 8:20.
 3 Q. Will you tell the members of the jury
 4 what happened when you arrived back at the Lone
 5 Star?
 6 A. I was -- I went to ring the back door
 7 buzzing to get back in. A cop was holding a gun
 8 on me, told me to come over to the car, put me in
 9 handcuffs, and that's when Vince Oddo had come
 10 running across the street yelling it wasn't him,
 11 it wasn't him, it was two black guys.
 12 Q. Vince Oddo is the?
 13 A. The manager.
 14 Q. Did there come a time after you returned
 15 to the Lone Star that you learned that Carl Dixon
 16 had been killed?
 17 A. Yes.
 18 Q. Did there come a time later that day
 19 when you learned that Matt Gianakis had been
 20 killed?
 21 A. Yes.
 22 Q. How did you feel upon hearing these two
 23 individuals had been killed?
 24 A. Sad but lucky to be alive.
 25 MR. SCHWARTZ: May I approach the

1 I'll pass State's Exhibit 77.
 2 We were going to have that screen
 3 turned, and I guess the gentleman who was here
 4 earlier forgot.
 5 THE COURT: In the meantime we've got
 6 the real picture and the old-fashioned way of just
 7 passing it down always works.
 8 MR. SCHWARTZ: I'll continue with my
 9 examination.
 10 THE COURT: As soon as they pass the
 11 picture around you can ask.
 12 BY MR. SCHWARTZ:
 13 Q. Mr. Hemmes, did you subsequently give a
 14 statement to the police after you arrived back at
 15 the Lone Star and realized what had happened
 16 there?
 17 A. Yes.
 18 Q. And did you tell the police about
 19 encountering Marlo Thomas and another individual
 20 outside the Lone Star on your way home?
 21 A. Yes.
 22 Q. And have you reviewed your prior
 23 testimony and your statements prior to testifying
 24 today?
 25 A. Yes.

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1 witness, your Honor?
 2 THE COURT: You may.
 3 BY MR. SCHWARTZ:
 4 Q. Sir, showing you first State's Proposed
 5 Exhibit 77, ask if you recognize the individual
 6 shown in that particular exhibit?
 7 A. Carl.
 8 Q. That's Carl Dixon?
 9 A. Yes.
 10 Q. And showing you State's Proposed
 11 Exhibit 78, ask if you recognize the individual
 12 shown in that exhibit?
 13 A. Matt.
 14 Q. Matt Gianakis?
 15 A. Yes.
 16 MR. SCHWARTZ: Your Honor, we would move
 17 for the admission of 77 and 78.
 18 THE COURT: 77 and 78 will be admitted.
 19 (Thereupon, State's Exhibit 77 & 78
 20 were admitted into evidence.)
 21 MR. SCHWARTZ: May I publish it to the
 22 jury, your Honor?
 23 THE COURT: Let's see if it works, keep
 24 our fingers crossed.
 25 MR. SCHWARTZ: While we're doing that,

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1 Q. Have you looked at them?
 2 A. Yes.
 3 MR. SCHWARTZ: I have nothing further.
 4 THE COURT: Cross-examination, Counsel.
 5
 6 BY MR. SCHIECK: CROSS-EXAMINATION
 7 Q. Mr. Hemmes, just so I understand, when
 8 you ran into Mr. Thomas and the other younger
 9 individual, Mr. Thomas said he was there to get
 10 his job back?
 11 A. Yes.
 12 Q. And he was calm and normal, both of them
 13 were calm and normal?
 14 A. Yes.
 15 Q. Not aggressive towards you whatsoever?
 16 A. No.
 17 Q. And that -- isn't it true that
 18 Mr. Thomas asked if the other manager Brian was
 19 working there?
 20 A. Yes, he did.
 21 Q. Was Brian a manager that worked there?
 22 A. He was a manager that worked there, but
 23 he wasn't there at the time.
 24 Q. Was he the manager that would have
 25 supervised Marlo when he was working; do you know?

1 A. It all depends on which manager wanted
 2 which shift.
 3 Q. You didn't see any gun or weapon or
 4 anything else on either of the individuals?
 5 A. No, I did not.
 6 Q. And you were aware that Marlo and Carl
 7 socialized outside of the workplace on occasion?
 8 A. I heard that they did one time.
 9 Q. And you never saw any problems between
 10 either Carl and Matt and Marlo?
 11 A. No.
 12 MR. SCHIECK: Thank you. No further
 13 questions, your Honor.
 14 THE COURT: Any redirect?
 15 MR. SCHWARTZ: No, your Honor.
 16 THE COURT: Ladies and gentlemen of the
 17 jury, do you have any questions for Steve Hemmes,
 18 if you do write them down. I see nobody is
 19 writing anything down. Thank you for your
 20 testimony here this afternoon. You may be
 21 excused. Please don't discuss your testimony with
 22 anyone other than the attorneys.
 23 Counsel, you may call your next witness.
 24 MR. SCHWARTZ: Thank you, your Honor.
 25 Vincent Oddo.

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1 Whereupon,
 2 VINCENT ODDO,
 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 last name for the record.
 12 THE WITNESS: Vince Oddo, V-I-N-C-E
 13 O-D-D-O.
 14
 15 DIRECT EXAMINATION
 16 BY MR. SCHWARTZ:
 17 Q. Sir, directing your attention to April
 18 of 1996, were you working at the Lone Star
 19 Steakhouse located at 3131 North Rainbow?
 20 A. Yes.
 21 Q. And how long had you been working there?
 22 A. Maybe a couple of years.
 23 Q. What was your position at the Lone Star?
 24 A. I was kitchen manager.
 25 Q. Directing your attention to April the

1 15th, 1996, were you working as kitchen manager on
 2 that particular date?
 3 A. Correct.
 4 Q. And do you know about what time you
 5 arrived for work that morning?
 6 A. About 6:00.
 7 Q. And what were your duties or
 8 responsibilities at about 6:00 in the morning on
 9 the 15th of April?
 10 A. Generally the first one there, just get
 11 everything ready to go. Employees don't get there
 12 until about eight, so I just start my day, get
 13 organized, make the phone calls if needed if any,
 14 just plan my day.
 15 Q. Who was scheduled to work at the Lone
 16 Star on the morning of April the 15th, 1996?
 17 A. Carl Dixon, Matt Gianakis and Steve
 18 Hemmes.
 19 Q. And what was Carl's position at the Lone
 20 Star?
 21 A. Prep cook.
 22 Q. And how about Matt Gianakis's position?
 23 A. Also a prep cook.
 24 Q. What did Steve Hemmes do at the Lone
 25 Star?

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1 A. He was dishwasher/prep cook.
 2 Q. With regard to Matt and Carl, did their
 3 duties early in the morning cause them to work in
 4 a certain area of the Lone Star?
 5 A. In the prep area.
 6 Q. And in that particular area would they
 7 have access to kitchen utensils like knives?
 8 A. Yes.
 9 Q. Would they be kept in that particular
 10 area of the restaurant?
 11 A. Pretty much where they're located, yes.
 12 Q. And what were you doing that particular
 13 morning?
 14 A. What time?
 15 Q. Well, after your arrival. Run us
 16 through your routine.
 17 A. 6:00, again, turn the lights on, walk
 18 around make sure everything is all right. Plan my
 19 day, get my prep list organized so by the time the
 20 guys walk in they know exactly what to do,
 21 everything is ready to go.
 22 Q. Does there come a time during your
 23 workday where you prepare certain foods or cut
 24 tenderloins?
 25 A. Part of my prep list my responsibility

1 was to cut tenderloins and prep the food for the
 2 restaurant for that day, correct.
 3 Q. Did you do it on that particular day?
 4 A. Yes.
 5 Q. And where would that take place?
 6 A. In the prep area.
 7 Q. Now, at about 8:00 in the morning, did
 8 Steve Hemmes, Carl Dixon and Matt Gianakis show up
 9 for work?
 10 A. Yes.
 11 Q. Did you have any particular discussion
 12 with Steve Hemmes?
 13 A. After Carl and Matt were already at
 14 work, Steve came in last, knocked on the back
 15 door. The door wasn't open so I was the only one
 16 to open the door. When I opened the door, he was
 17 ready to work, but he wasn't dressed properly. He
 18 had flip-flops on, don't quite remember exactly
 19 the shirt and pants he was wearing, but he had
 20 flip-flops on, inappropriate attire for work. So
 21 basically just sent him home, go home, change, and
 22 come on back to work.
 23 Q. Do you know about what time it was when
 24 Steve Hemmes was sent home to change his shoes?
 25 A. Eight, 8:15.

1 the information as far as what needs to be prepped
 2 their duties, responsibilities throughout the day.
 3 Once they started doing that -- they were great
 4 kids. You didn't have to worry about them. They
 5 went on on their own and did what they needed to
 6 do.
 7 8:00 comes around when I kind of make
 8 phone calls. Businesses are open. I order fish
 9 seafood, et cetera, et cetera, so I'm in the
 10 office making the phone calls. Don't remember
 11 quite the time, 8:15, 20, 30, I'm not sure. Just
 12 a regular knock on the door thinking it was either
 13 Carl or Matt because they're the only employees in
 14 the restaurant. I'm on the phone -- I don't know
 15 if I was on the phone or not. As I turned around
 16 to open the door just nonchalantly, a gun comes
 17 around the corner. Saw the gun, the hand and then
 18 him right behind it.
 19 Q. When you say him right behind it, who
 20 are you gesturing to?
 21 A. Marlo Thomas.
 22 Q. And where is Marlo Thomas located right
 23 now?
 24 A. Between the two attorneys right there.
 25 Q. What is he wearing today?

1 Q. Once Steve Hemmes had left the Lone
 2 Star, was there anyone else inside the Lone Star
 3 besides yourself, Matt Gianakis and Carl Dixon?
 4 A. No.
 5 Q. So at this time the Lone Star is not
 6 open to the public, is it?
 7 A. No.
 8 Q. Are the doors usually locked?
 9 A. Yes.
 10 Q. While the three of you were at the
 11 restaurant at the Lone Star, did something unusual
 12 take place?
 13 A. Say again.
 14 Q. While the three of you were at the Lone
 15 Star that particular morning, did something
 16 unusual take place?
 17 A. Yes.
 18 Q. Tell the members of the jury what
 19 happened.
 20 A. About 8:00 or so Carl, Matt, you know
 21 the story with Steve. He went home. Matt and
 22 Carl were doing their prep duties. Doors were
 23 locked. Between six and eight I do my schedule,
 24 organize things, what to do so when my prep guys
 25 get to work when they show up for work they have

1 A. Blue shirt and a dark blue vest.
 2 MR. SCHWARTZ: The record will reflect
 3 the identification of the defendant, your Honor.
 4 THE COURT: Record will so reflect.
 5 BY MR. SCHWARTZ:
 6 Q. After you observed the defendant with
 7 the gun, what happened next?
 8 A. Just totally shocked. First thing he
 9 said was something in the avenue of get all your
 10 money or go down to the safe and get the money or
 11 something in that form. My next reaction was to
 12 go down to the safe. That's all I quite remember
 13 as far as what he said just because my next
 14 reaction was to go down to the safe.
 15 Q. Did you go down to the safe and open the
 16 safe?
 17 A. Correct.
 18 Q. What happened after you opened the safe?
 19 A. As I opened the safe, Marlo Thomas and
 20 Kenya Hall must have switched or something, but as
 21 I'm down in the safe Marlo went into the back
 22 replaced by Kenya Hall. Now Kenya Hall is
 23 guarding me, so I'm down on the safe putting all
 24 the money in the bag, as much money as I can put
 25 them in two or three bags that I had. Everything

1 out of the safe and I stood up, and I basically --
 2 at that time he was just Kenya Hall. Had no idea
 3 where Marlo went. Basically what else do you want
 4 and I'm standing up, what else do you want.
 5 Q. Did you give this second individual the
 6 bag containing the money or bags containing the
 7 money?
 8 A. Correct. Yes.
 9 Q. At the time this was taking place, did
 10 you know the name of that second individual?
 11 A. No.
 12 Q. So you learned it later on?
 13 A. Correct.
 14 Q. When you were first confronted by the
 15 defendant and asked something to do with money,
 16 was Kenya Hall or the second individual with him
 17 at that time?
 18 A. No.
 19 Q. Do you know about how many bags of money
 20 you gave to this second individual?
 21 A. Three.
 22 Q. And at the time you gave the second
 23 individual the money, did he have a weapon?
 24 A. A gun.
 25 Q. Now, after you gave this second

1 A. Yes.
 2 Q. When this second individual who you've
 3 called Kenya Hall, you've named Kenya Hall, when
 4 he left the area what direction was he headed?
 5 A. Headed towards the prep area.
 6 Q. Was that the same general direction from
 7 which these screams or yells were coming from?
 8 A. Yes.
 9 Q. Then what did you do?
 10 A. I went towards the front of the
 11 restaurant.
 12 Q. Did you go outside -- did you leave the
 13 restaurant?
 14 A. Left the restaurant through the front
 15 door.
 16 Q. Where did you go?
 17 A. Across the street to Albertson's.
 18 Q. And what did you do at Albertson's?
 19 A. Ran in there screaming, went to the
 20 customer service thing and called 911.
 21 Q. Did there come a time after you called
 22 911 when you returned to the Lone Star?
 23 A. Was there a time that I returned to the
 24 Lone Star?
 25 Q. That you returned.

1 individual who you've called Kenya Hall the bags
 2 containing the money, what's the next thing you
 3 remember happening?
 4 A. After I gave him the bags of money, he
 5 really didn't know what to do, but at the time I
 6 heard in the background no, no, no, stop, stop,
 7 stop. At that time Kenya Hall turned around and
 8 kind of inched that way and trying to see what the
 9 heck was going on, and as he went that way I went
 10 the other way.
 11 Q. So you indicated you heard something to
 12 the effect of no, no, no, stop, stop, stop or
 13 words to that effect?
 14 A. Correct.
 15 Q. How would you describe the tone?
 16 A. Just asking for help in agony, just
 17 looking for something.
 18 Q. Was it screams or yells?
 19 A. Screaming, yelling, just looking for
 20 help.
 21 Q. Did you recognize the voice?
 22 A. Yes.
 23 Q. Whose voice was it?
 24 A. Matt's.
 25 Q. Matt Gianakis?

1 A. Yes.
 2 Q. What, if anything, did you see upon your
 3 returning to the Lone Star?
 4 A. Police officers, cop cars.
 5 Q. Did you have occasion to see Steve
 6 Hemmes?
 7 A. He was actually handcuffed by some of
 8 the officers because apparently by the time, like
 9 I told him to do, to come back to work everything
 10 was already taken care of. I was already at the
 11 Albertson's. When I came across he must have been
 12 on his way back to work. Apparently he walked to
 13 work. It wasn't that far of a walk, and he was in
 14 handcuffs.
 15 Q. Did you say anything to the police
 16 officers upon your arrival?
 17 A. Just told them who he was and my
 18 employee. I don't know what they thought who he
 19 was, but I was telling them who exactly he was.
 20 Q. Did there come a time when you gave a
 21 statement to the police?
 22 A. Yeah.
 23 Q. And described what had happened to you?
 24 A. Yes.
 25 Q. And have you since reviewed that

1 statement?
 2 A. Yes.
 3 Q. Do you know approximately how much money
 4 were in the bags that you gave to Kenya Hall?
 5 A. About \$3,500.
 6 THE COURT: In each bag or total?
 7 THE WITNESS: Total.
 8 BY MR. SCHWARTZ:
 9 Q. Did you recognize either the defendant
 10 or Kenya Hall when you saw them on April the 15th,
 11 1996?
 12 A. No.
 13 Q. Approximately how far, if you remember,
 14 is the prep room from where your office was
 15 located inside the Lone Star?
 16 A. 30 yards. The prep room kind of runs
 17 the width of the back of the restaurant, so it's a
 18 rather large prep room, but from where you first
 19 hit the prep room 30 yards.
 20 Q. During the time the defendant was in
 21 your office on April the 15th, 1996, did he ever
 22 ask you for his job back?
 23 A. No.
 24 Q. Was he there for a job interview?
 25 A. No.

1 Q. The interior for the most part?
 2 A. Yes.
 3 MR. SCHWARTZ: Your Honor, we'd move to
 4 the admission of State's 3.
 5 MR. OWENS: May we approach, your Honor?
 6 THE COURT: You may.
 7 (Off-the-record bench conference.)
 8 THE COURT: This exhibit was admitted,
 9 and it's No. 3, and you may display it to the
 10 witness and to the jury.
 11 MR. SCHWARTZ: Thank you, your Honor.
 12 With the Court's permission could Mr. Oddo step
 13 down?
 14 THE COURT: Certainly. And move it back
 15 far enough so they can see the bottom of it.
 16 BY MR. SCHWARTZ:
 17 Q. Can you kind of walk the jury through
 18 this exhibit?
 19 A. Walk through the exhibit?
 20 Q. Basically highlight it for the jury?
 21 A. This is the manager's office obviously.
 22 This is the back door. All employees at the time
 23 that I worked in the mornings all entered through
 24 the back door. It was -- again, it's the only
 25 door they enter coming into the restaurant. Kind

1 Q. Mr. Oddo, let me show you State's
 2 Exhibit 77 and ask if you recognize who's depicted
 3 in that exhibit?
 4 A. Carl Dixon.
 5 Q. And Exhibit 78?
 6 A. Matthew Gianakis.
 7 THE COURT: 77 is Carl Dixon and 78 is
 8 Matt Gianakis? You're offering those exhibits?
 9 MR. SCHWARTZ: They've already been
 10 admitted.
 11 BY MR. SCHWARTZ:
 12 Q. Sir, showing you State's Proposed
 13 Exhibit No. 3, I realize you haven't seen this in
 14 quite some time, just ask you to take a look at it
 15 and see if you recognize what is shown in this
 16 particular exhibit or this proposed exhibit?
 17 A. Do I recognize it?
 18 Q. Yes.
 19 A. Yes.
 20 Q. What do you recognize it as being?
 21 A. Basically an aerial view of the
 22 restaurant.
 23 Q. Is it a diagram of the Lone Star
 24 Restaurant?
 25 A. Correct.

1 of just follow my finger here coming through the
 2 back door coming across this way. Looks like this
 3 way is north. All of this is the prep area,
 4 sinks, kitchen, everything is all prep area,
 5 tables, supplies, et cetera, et cetera. I believe
 6 the cooler is back here.
 7 As you come in this way obviously you
 8 just make a right, and this is just one big long
 9 hallway. It kind of ends right here as far as the
 10 distinction between the front of the house and the
 11 back of the house. Front of the house, back of
 12 the house, restaurant terminology. It's not a
 13 door here or anything. It's just an open spot but
 14 met much the front of the house begins here. I
 15 spend most of my time back here. I was in the
 16 office 8:15 after everybody has already entered
 17 through this door being Carl and Matt. They were
 18 doing their stuff here. I'm over here making my
 19 phone calls about 8:15, 8:00.
 20 Once someone knocked on the door I was
 21 already in here. He must have obviously come in
 22 through the back door. I don't know for sure, but
 23 everything happened here. I never left this
 24 office until I left the entire building.
 25 Q. Can you show the jury how you got out of

1 the building?

2 A. Obviously made a left, came this way,
3 Kenya Hall went this way towards the back. I came
4 this way, and I believe I went around this way
5 because the front entrance is right here. There's
6 an emergency exit somewhere. I'm not quite sure.
7 It's not even described on here. It's on either
8 side, but from the office all the way through the
9 front of the house through the dining area and
10 right out through the front door. You can exit
11 the front door without a key, anything. It
12 self-locks. You can't enter it like that. You
13 need the key to get into it, but it self-locks.
14 You can exit the door with no problem.

15 Q. How would like Matt and Carl gain entry
16 to the Lone Star at 8:00 in the morning when they
17 showed up for work?

18 A. I was the only one in the building at
19 this time, and they come through this door and it
20 can only be opened from inside. I don't think it
21 has a key on the outside. At least it didn't
22 then, but once they're in they can open the door.
23 Obviously safety instructions don't open the door.
24 But once the three of us were already in, I mean
25 no one else can get in unless someone opens the

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1 door.

2 Q. You have no personal knowledge or do you
3 as to how the defendant gained entry to the Lone
4 Star that morning?

5 A. Just assuming.

6 Q. Can you show the members of the jury
7 where the rest rooms are located?

8 A. Right here.

9 Q. So they're fairly close to the prep
10 room?

11 A. Unfortunately with the prep room this is
12 like a dry storage area. There's a little door,
13 but you cannot get from the dry storage to the
14 bathroom. You have to go -- this is the prep
15 area. Come around through the kitchen which is
16 right here where we do all the cooking. You can
17 get through this way and into this way to both
18 bathrooms. You have to go again front of the
19 house, back of the house. You can actually get
20 from the back of the house right here. This is an
21 alleyway where everybody does all the cooking and
22 stuff. You can exit the kitchen into the front of
23 the house and there's just an open alleyway right
24 here to the bathrooms. So probably went this way
25 into the bathrooms.

1 Q. Where are the knives used in your
2 business? Where are they customarily kept or
3 where were they kept back then in 1996?

4 A. Generally two sets throughout the
5 restaurant. There's some generally right here
6 which is where a lot of cooking takes place.

7 Q. That's in the prep room?

8 A. This is actually on the line, so there's
9 some knives there on the line. But back in the
10 prep room there's generally one set, and I don't
11 know exactly where, but there's always a set in
12 the prep area as well.

13 Q. When you use the terminology on the
14 line, to those of us not in the restaurant
15 business what do you mean?

16 A. Sorry about that. On the line meaning
17 on the line where they do all the cooking.

18 Q. Thank you.

19 MR. SCHWARTZ: I have no further
20 questions, your Honor.

21 THE COURT: Cross-examination, Counsel.

22 MR. ALBREGTS: No questions.

23 THE COURT: Ladies and gentlemen of the
24 jury, do you have any questions for Mr. Oddo? Do
25 I get to ask a question? No? Darn. All right

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1 then, Mr. Oddo, I see there are no questions from
2 the jury. Thank you, sir, for your testimony here
3 this afternoon. You may be excused.

4 Counsel, you may call your next witness.

5 MR. SCHWARTZ: State would call Sidney
6 Sontag.

7 Whereupon,

8 SIDNEY SONTAG,
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, ma'am.

16 THE CLERK: State your name and spell
17 your first and last name for the record.

18 THE WITNESS: my name is Sidney C.
19 Sontag, S-I-D-N-E-Y S-O-N-T-A-G.

20

21 DIRECT EXAMINATION

22 BY MR. SCHWARTZ:

23 Q. Sir, directing your attention to Monday,
24 April the 15th, 1996, did you have occasion to be
25 at a Rebel gas station on North Rainbow and

1 Cheyenne?
 2 A. Yes, sir, I did.
 3 Q. And do you know approximately what time
 4 you arrived at that Rebel gas station?
 5 A. It was somewhere around eight, 8:15 in
 6 the morning.
 7 Q. And what was your purpose or what were
 8 you doing at that Rebel gas station at eight or
 9 8:15 in the morning on the 15th of April?
 10 A. I always stopped there to get a cup of
 11 coffee before I'd go to the gym which is basically
 12 right around the back.
 13 Q. While you were at the Rebel station that
 14 morning having coffee, did something unusual
 15 occur?
 16 A. Yes, it did.
 17 Q. Can you relate to the members of the
 18 jury what happened?
 19 A. While I was standing in line and
 20 basically a young man came stumbling into the door
 21 somewhat and looked around and mentioned that he
 22 had been stabbed at the Lone Star and would
 23 someone call the police. At that time I think
 24 most of us that were in there were probably
 25 thought this is kind of a joke or something, but

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1 he started walking towards me and asked me for
 2 help, and obviously I knew something was wrong
 3 because he started to fall. I caught him. He
 4 fell -- he was falling into a bag -- a rack of
 5 potato chips or something like that. I caught him
 6 and laid him down on the ground. I was a medic in
 7 the military for 20 years, and I realized that
 8 something serious -- that something serious had
 9 happened.
 10 Q. So what did you do at that time, sir?
 11 A. I asked a young Mexican-American boy if
 12 he knew CPR and he wasn't real familiar with it,
 13 so I started doing CPR on him.
 14 Q. Did anyone at the Rebel station if you
 15 know call the police?
 16 A. Yes, they did.
 17 Q. And did anyone take any precautions to
 18 protect the people inside?
 19 A. Well, I did. I told the clerks to
 20 immediately lock the door.
 21 Q. How long did you administer CPR on this
 22 particular individual?
 23 A. Approximately 20 minutes.
 24 Q. Could you describe his appearance as you
 25 observed him?

1 A. Well, when he walked in he was obviously
 2 in a little bit of a state of shock, but he was
 3 coherent enough to ask for help, but I could see
 4 that he was starting to lose some consciousness,
 5 and as he was walking towards me that's when he
 6 fell, and he was starting to lose it at that time.
 7 Q. Did he appear frightened?
 8 A. Yes.
 9 Q. During the time you administered CPR to
 10 this individual, did you notice any evidence of
 11 injuries on this young man?
 12 A. Yes, I did.
 13 Q. What did you notice?
 14 A. He had a chest wound that was bleeding.
 15 Q. While you were administering CPR to this
 16 individual, did there ever come a time when he
 17 spoke to you?
 18 A. Specifically, no, he didn't speak to me.
 19 He was just looking at me. The same way he was
 20 asking me for help he was looking at me. He was
 21 in a state of fright, shock, but he didn't speak
 22 any specific words that I can recall.
 23 Q. Other than the initial?
 24 A. Other than the initial when he walked up
 25 to me, "will you help me," and that's when he

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1 started to collapse.
 2 Q. And he also related that he had been
 3 stabbed at the Lone Star; is that correct?
 4 A. Yes, sir, he did.
 5 Q. Did there come a time when paramedics
 6 arrived at the Rebel gas station?
 7 A. Well, approximately 20 minutes later
 8 they arrived.
 9 Q. Do you know if this young man was alive
 10 at the time the paramedics arrived?
 11 A. Yes, he was.
 12 Q. And you base that upon your medical
 13 training in the military?
 14 A. Yes, sir, I did.
 15 Q. Did there come a time, sir, that you
 16 learned the individual whose life you attempted to
 17 save had, in fact, died?
 18 A. Yes, I did. I found that out a few days
 19 later.
 20 Q. Did there come a time when you met the
 21 family or parents of this young man?
 22 A. I met relatives of his. They came to
 23 see me at my work.
 24 Q. What was the purpose of them coming to
 25 see you?

1 A. To thank me for what I had done.
 2 Q. Did you ever learn the identity or name
 3 of this young man?
 4 A. Yes, I did.
 5 Q. Where what did you learn his name as
 6 being?
 7 A. To be Matthew.
 8 Q. Show you State's Exhibit 4 and ask if
 9 you are able to identify or recognize what is
 10 shown in this exhibit.
 11 A. Yeah. That's the side -- I would say
 12 the east side of the Rebel gas station, and that's
 13 the Lone Star Restaurant.
 14 Q. So the Rebel gas station is fairly close
 15 to the Lone Star Restaurant?
 16 A. Yes. It's right next to it.
 17 MR. SCHWARTZ: May I show this to the
 18 jury, your Honor?
 19 THE COURT: You may.
 20 BY MR. SCHWARTZ:
 21 Q. Mr. Sontag, did you testify at a prior
 22 trial regarding what you've testified today?
 23 A. Yes, sir, I did.
 24 Q. Have you had occasion to review either
 25 your trial transcript or statement you gave to the

1 your last name for the record.
 2 THE WITNESS: My name is David Bailey
 3 D-A-V-I-D B-A-I-L-E-Y.
 4
 5 DIRECT EXAMINATION
 6 BY MR. SCHWARTZ:
 7 Q. Sir, how were you employed in 1996?
 8 A. I was a trooper with the State of
 9 Nevada.
 10 Q. And how long had you been employed with
 11 the Nevada Highway Patrol back in 1996?
 12 A. Since August of 1993.
 13 Q. Direct your attention to April the 15th,
 14 1996. Were you working on that particular date?
 15 A. Yes, I was.
 16 Q. Were you in uniform?
 17 A. Yes, I was.
 18 Q. Were you in a marked police car?
 19 A. Yes, I was.
 20 Q. And what was your assignment on that
 21 particular day?
 22 A. My duty assignment was Hawthorne,
 23 Nevada. I was to patrol US 95 north and south and
 24 all connecting routes.
 25 Q. Directing your attention to about

1 police?
 2 A. Yes, I have.
 3 MR. SCHWARTZ: Thank you. I have no
 4 further questions, your Honor.
 5 THE COURT: Cross-examination, Counsel.
 6 MR. SCHIECK: No questions.
 7 THE COURT: Ladies and gentlemen, do you
 8 have any questions for Mr. Sontag? I see there
 9 are no questions. Mr. Sontag, thank you, sir, for
 10 your testimony here this afternoon. You are
 11 excused. Please don't discuss your testimony with
 12 anyone else except the attorneys.
 13 Counsel for the State, you may call your
 14 next witness.
 15 MR. SCHWARTZ: David Bailey.
 16 Whereupon,
 17 DAVID BAILEY,
 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

1 2:00 p.m. on April the 15th, 1996. Did you
 2 receive a call directing you to US 95 near mile
 3 marker MI46?
 4 A. Yes, I did.
 5 Q. And where is that location near?
 6 A. It is 4 miles south of Hawthorne going
 7 on US 95.
 8 Q. And do you know what the purpose of that
 9 call was?
 10 A. Yes, I do.
 11 Q. Can you tell the jury what the nature of
 12 the call was?
 13 A. Yes. We had received a attempt to
 14 locate on a vehicle that was travelling from
 15 Las Vegas, Nevada, towards Hawthorne that had been
 16 involved in a possible crime that had occurred in
 17 Las Vegas that day.
 18 Q. Do you recall what the description of
 19 the vehicle was as best of your recollection?
 20 A. Yes, I do. It was a green or light blue
 21 Mitsubishi Mirage.
 22 Q. And at about 2:00 p.m., did you have
 23 occasion to see that vehicle?
 24 A. Yes, I did.
 25 Q. Can you describe for the members of the

1 jury what you did after or upon seeing that
 2 particular vehicle?
 3 A. Yes. Upon identifying the vehicle
 4 traveling north on US 95 that afternoon, I made
 5 contact via radio with my sergeant and another
 6 trooper on duty, and we conducted a felony traffic
 7 stop about 4 miles south of Hawthorne, Nevada, at
 8 which time we closed down the roadway there so
 9 that no traffic would come into contact with that
 10 vehicle, and then had all the occupants of that
 11 vehicle exit with their hands above their heads.
 12 Q. Do you recall how many people were in
 13 the green Mitsubishi?
 14 A. Yes, sir. There was three.
 15 Q. And do you recall the names of the
 16 individuals that were inside that vehicle?
 17 A. Yes. There was one female, Angela
 18 Thomas; two males, Marlo Thomas and Kenya Hall.
 19 Q. Do you see Marlo Thomas in court today?
 20 A. Yes, I do.
 21 Q. Can you point to where he's located and
 22 describe what he's wearing today?
 23 A. He's the black gentleman sitting in the
 24 middle wearing a dark blue vest with a blue shirt.
 25 MR. SCHWARTZ: The record will reflect

1 Q. Did you also advise him of his rights as
 2 a juvenile?
 3 A. Yes, I did.
 4 Q. And did there come a time you actually
 5 interviewed or questioned Kenya Hall?
 6 A. Yes.
 7 Q. Who was present during that questioning?
 8 A. At that time there was several officers
 9 from the Mineral County Sheriff's Department along
 10 with myself, Kenya and his mother Denise.
 11 Q. Was that conversation or interview with
 12 Kenya Hall taped?
 13 A. Yes, it was.
 14 Q. And subsequently transcribed?
 15 A. Yes.
 16 Q. Where did the interview take place?
 17 A. It took place in the conference room at
 18 the Mineral County Sheriff's Department.
 19 Q. Did Kenya Hall appear to understand what
 20 his rights were and voluntarily give them up and
 21 agree to speak with you?
 22 A. Yes, sir, he did.
 23 Q. Was any coercion used upon Kenya Hall by
 24 yourself or other police officers?
 25 A. No, sir.

1 identification of the defendant, your Honor.
 2 THE COURT: Record will so reflect.
 3 BY MR. SCHWARTZ:
 4 Q. Now, regarding the individual that you
 5 identified as Kenya Hall, where was he located
 6 within the vehicle, if you recall?
 7 A. He was in the back seat of the vehicle
 8 at the time of the stop.
 9 Q. And did you recognize Kenya Hall when
 10 you saw him on April the 15th?
 11 A. Yes, I did.
 12 Q. How is it you were able to recognize
 13 Kenya Hall?
 14 A. While being assigned in Hawthorne, I
 15 also was a coach at the high school there in
 16 Hawthorne, Nevada, where I coached basketball and
 17 my wife was the track coach where Mr. Hall had
 18 attempted to join that track team, but he was
 19 eventually let go because of his attitude.
 20 Q. When you saw Kenya Hall on April the
 21 15th, 1996, did you speak with him?
 22 A. Yes, I did.
 23 Q. And did you advise him of his Miranda
 24 warnings?
 25 A. Yes, I did.

1 Q. Was his mother present during the entire
 2 interview?
 3 A. Yes, she was.
 4 Q. Did you make any promises to Kenya Hall
 5 to get him to talk to you?
 6 A. No, sir.
 7 Q. Can you briefly tell the members of the
 8 jury what Kenya Hall told you at that interview?
 9 MR. SCHIECK: Objection, hearsay. It
 10 denies the right to confrontation.
 11 MR. SCHWARTZ: Your Honor, we're in a
 12 penalty phase where hearsay is admissible.
 13 THE COURT: Objection is overruled. In
 14 the trial it would have been inadmissible, but it
 15 is admissible in this proceeding.
 16 THE WITNESS: Could you repeat the
 17 question, please.
 18 BY MR. SCHWARTZ:
 19 Q. Can you briefly tell the members of the
 20 jury what Kenya Hall told you during that
 21 interview back in 1996?
 22 A. Yes. During this interview I asked
 23 Mr. Hall what had transpired the day of the
 24 incident that occurred in Las Vegas, and Mr. Hall
 25 then explained to me that him, Mr. Marlo Thomas

1 and Angela had left Hawthorne, went down to
 2 Las Vegas. They had went to an individual's house
 3 by the name of Bobby who he did not know the last
 4 name of that, spent some time at that house. Then
 5 they went to a parking lot which was later
 6 identified as a Wal-Mart parking lot. They sat
 7 there, and at that time Mr. Hall and Mr. Thomas
 8 exited the vehicle, and they went to a restaurant
 9 where he said the name began with an L. He could
 10 not say the actual name of the restaurant at that
 11 time, and they entered the back door. Marlo
 12 knocked on the back door. A gentleman opened the
 13 back door. They exchanged some words as they knew
 14 each other. They then went into the restaurant
 15 where they -- Marlo forced an individual up
 16 against a wall where he looked like he appeared to
 17 be choking him. He then ordered the gentleman to
 18 open the safe. Marlo handed Kenya Hall a gun,
 19 told him to hold it to the gentleman's head and
 20 have him open the safe and get the money out and
 21 then Kenya said that Marlo left the office while
 22 he was there with the gun pointed at the
 23 individual, and he told the individual to get the
 24 money out of the safe, sit in the chair and that's
 25 when he heard things happening in the restaurant.

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1 And he turned to see what was going on, and the
 2 gentleman in the office ran.
 3 Q. Did Kenya Hall during this interview
 4 indicate that Marlo Thomas gave him any specific
 5 instructions as to what to do with that gun?
 6 A. Yes. He told him to put it to his head
 7 and told him to get the money and then shoot the
 8 guy.
 9 MR. SCHWARTZ: I have no further
 10 questions, your Honor. Thank you.
 11 THE COURT: Cross-examination.
 12 MR. SCHIECK: No questions, your Honor.
 13 THE COURT: Ladies and gentlemen, do you
 14 have any questions for Trooper Bailey? Trooper
 15 Bailey, I see there are no questions. Do you have
 16 any additional questions, Mr. Schwartz?
 17 MR. SCHWARTZ: No, your Honor.
 18 THE COURT: Trooper Bailey, you may be
 19 excused.
 20 MR. SCHWARTZ: Your Honor, I do have
 21 one. I'm sorry. I'd like to show Mr. Bailey a
 22 photograph.
 23 BY MR. SCHWARTZ:
 24 Q. While we're having the exhibit marked,
 25 Trooper Bailey or Mr. Bailey, Trooper Bailey, did

1 Kenya Hall ever tell you where he had obtained the
 2 gun?
 3 A. Yes. He got it from Marlo.
 4 Q. Did he indicate where Marlo had gotten
 5 the gun?
 6 A. No, he did not.
 7 Q. Did he indicate that the gun was loaded?
 8 A. No, he did not.
 9 Q. Let me show you what has been marked as
 10 State's 79, ask if you recognize this individual?
 11 A. Yes, sir. That is Kenya Hall.
 12 Q. Thank you.
 13 MR. SCHWARTZ: May I pass this to the
 14 jury, your Honor?
 15 THE COURT: You may.
 16 MR. SCHWARTZ: Your Honor, may we
 17 approach while the jury is looking at the
 18 photograph?
 19 THE COURT: You may.
 20 (Off-the-record bench conference.)
 21 THE COURT: Nobody has any questions fo
 22 Trooper Bailey, correct? We do have a question.
 23 You have to write it down and, Jonathan, will you
 24 please get it from one of our jurors.
 25 Mr. Schwartz, you can pick up your exhibit.

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1 Counsel, would you approach to review
 2 the question.
 3 (Off-the-record bench conference.)
 4 THE COURT: Trooper, do you know the
 5 nature of the relationship between Kenya Hall, the
 6 young man that you identified and knew, and Marlo
 7 Thomas?
 8 THE WITNESS: Yes. I believe that that
 9 was his brother-in-law.
 10 THE COURT: All right. Any questions --
 11 follow-up questions by the State or the defense?
 12 MR. SCHWARTZ: No, your Honor.
 13 MR. SCHIECK: No, your Honor.
 14 THE COURT: All right. Trooper Bailey,
 15 thank you for your testimony here this afternoon.
 16 You may be excused. Please don't discuss your
 17 testimony with anyone other than the attorneys.
 18 We'll be in recess until five minutes after three.
 19 You are admonished not to converse
 20 amongst yourselves or with anyone else on any
 21 subject related to or read, watch or listen to any
 22 report of or commentary on the trial or any person
 23 connected with the trial by any medium of
 24 information including, but not limited to,
 25 television, radio, Internet or newspapers, or form

1 or express any opinion on any subject connected
2 with the trial until the case is finally submitted
3 to you. We'll be in recess until five minutes
4 after three. Thank you.

5 (Whereupon, a recess was taken.)
6 -000-

7 ATTEST: Full, true and accurate transcript.

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10 MARY BETH COOK CCR #268, RPR

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1 CASE NO. C136862

2 DEPT. NO. XV

3

4 DISTRICT COURT
5 CLARK COUNTY, NEVADA7 THE STATE OF NEVADA,
Plaintiff,8) Reporter's Transcript
9 vs.) of
10) Penalty Hearing11 MARLO THOMAS,
Defendant.

14 BEFORE THE HON. SALLY LOEHRER, DISTRICT COURT JUDGE

15 FRIDAY, NOVEMBER 4, 2005

16 8:30 A.M.

18 APPEARANCES:

19 For the State: Chris Owens, Esq.
20 Dave Schwartz, Esq.
Deputy District Attorneys21 For the Defendant: Dave Schieck, Esq.
22 Dan Albregts, Esq.

25 Reported by: JoAnn Orduna, CCR No. 370

ORIGINAL

1 LAS VEGAS, CLARK COUNTY, NV. FRI, NOV. 4, 2005

2 8:30 A.M.

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NOV - 7 2005
PROCEEDINGS 20SHIRLEY B. PARRAGUIRRE, CLERK
BY *Shirley B. Parraguirre*

THE COURT: Good morning, DEPUTY

gentlemen. This is the penalty hearing in the State
of Nevada versus Marlo Thomas. Let the record the
presence of parties and counsel, all officers of the
court, the absence of the jury.Before the jury arrives this
morning, are there any matters we need to take care
of outside the presence of the jury?MR. SCHWARTZ: Not on behalf of the
State, Your Honor.MR. SCHIECK: Not that I'm aware of other
than the first witnesses needed an interpreter and I
don't see one.

THE COURT: Well, is it Spanish?

MR. SCHIECK: Yes.

THE COURT: He or she should be here at
8:30?

MR. SCHIECK: Yes.

THE COURT: Would you call the
interpreter's office?1 INDEX
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22 STATE'S EXHIBIT MARKED OFFERED ADMITTED
23 None

24

25

1 (Whereupon, part of the jury entered
2 the courtroom.)3 THE COURT: Thank you. As soon as we get
4 the other jurors, we'll be ready to roll.5 Have you had an opportunity to look
6 at these?

7 MR. ALBREGTS: Yes.

8 THE COURT: Are they okay with you?

9 MR. ALBREGTS: Nothing sticks out. It's
10 a qualified yes.11 THE COURT: Were they having any elevator
12 troubles when you guys came up?

13 THE JURY: No.

14 THE COURT: Good morning, ladies and

15 gentlemen. Welcome back to the continuation of the
16 penalty hearing in the State of Nevada versus Marlo
17 Thomas.18 The record will reflect the presence
19 of the parties and counsel, all officers of the
20 court and the full jury and alternate jurors.21 Yesterday when we recessed for the
22 evening, the State had concluded calling its
23 witnesses, and at this time the defense may call its
24 witnesses.

25 MR. SCHIECK: Damian Rivero, Your Honor.

1 THE COURT: Thank you. You're informed
 2 that Mr. Rivero speaks Spanish and this is the
 3 Spanish, English interpreter.
 4 THE INTERPRETER: Good morning.
 5 THE COURT: And his name is?
 6 THE INTERPRETER: Richard Evans.
 7 THE COURT: Richard Evans. He will be
 8 translating the questions that are asked by the
 9 attorneys and the answers given by Mr. Rivero.
 10 Are we gonna go and get this person
 11 down at Fremont Street or?
 12 THE CORRECTIONS OFFICER: I don't know.
 13 A couple more minutes. He's coming up from
 14 downstairs.
 15 THE COURT: I thought you told me they
 16 were here.
 17 MR. SCHIECK: That's what I was told,
 18 Your Honor.
 19 THE COURT: I guess we were all
 20 misinformed.
 21 MR. SCHIECK: Can we approach for just a
 22 second on a question?
 23 THE COURT: You may.
 24 (Whereupon, an off-the-record
 25 discussion was had at the bench.)

1 MR. SCHIECK: Can we approach again, Your
 2 Honor?
 3 THE COURT: You may.
 4 (Whereupon an off-the-record
 5 discussion was had at the bench.)
 6 THE CLERK: Come forward and take the
 7 witness stand. Remain standing and raise your right
 8 hand.
 9 (Whereupon, Damian Rivero was duly
 10 sworn to tell the truth, the whole
 11 truth and nothing but the truth.)
 12 THE CLERK: You may be seated. Please
 13 state your name, spell your first and last name for
 14 the record.
 15 THE WITNESS: Damian Rivera.
 16 THE CLERK: Spell both.
 17 THE WITNESS: D-a-m-i-a-n. R-i-v-e-r-o.
 18 THE CLERK: Thank you.
 19 THE COURT: Do you speak any English,
 20 sir?
 21 THE WITNESS: A little.
 22 THE COURT: Okay. You may proceed,
 23 counsel.
 24 MR. SCHIECK: Thank you, Your Honor.
 25 ///

1 DIRECT EXAMINATION
 2 BY MR. SCHIECK:
 3 Q. Mr. Rivero, obviously you're in custody,
 4 correct?
 5 A. Yes.
 6 Q. And where are you classified to, which
 7 prison are you in?
 8 A. Ely Prison.
 9 Q. And what is your conviction for?
 10 A. Robbery with use of a weapon.
 11 Q. And do you know Marlo Thomas?
 12 A. Yes, I know Marlo.
 13 Q. Do you see him here in court today?
 14 A. Yes.
 15 Q. And where is he seated?
 16 A. Next to you.
 17 Q. Okay. Where is it that you met Marlo?
 18 A. In the lock down, in the unit over there
 19 in Ely.
 20 MR. SCHIECK: Will the record reflect
 21 identification of the defendant?
 22 THE COURT: The record will reflect that
 23 the witness has identified the defendant.
 24 BY MR. SCHIECK:
 25 Q. And when were you in the same unit with

1 Mr. Thomas?
 2 A. Yes. I was with him in the same unit.
 3 Q. Do you recall when?
 4 A. For many years. 1998, 1999 and 2004.
 5 Q. During the times that you were housed
 6 with Mr. Thomas, did you ever see him have any
 7 problems with other inmates?
 8 A. No. Marlo's a person who avoids
 9 problems. With the officers as well as with the
 10 other prisoners.
 11 Q. You're aware that Mr. -- excuse me. I'll
 12 start over. Are you aware that Mr. Thomas has
 13 received numerous disciplinary write-ups for
 14 problems he's had with correctional officers?
 15 A. I don't understand. Can you give me the
 16 question again?
 17 Q. Are you aware that Mr. Thomas has a
 18 number of disciplinary write-ups at Ely State Prison
 19 for problems with correctional officers?
 20 A. I can say this: In comparison with the
 21 problems that have been with other prisoners,
 22 Marlo's problem is insignificant.
 23 Q. Are you saying that other inmates create
 24 more problems than Marlo does?
 25 A. Of course.

1 Q. Have you seen him have problems with
2 correctional officers?
3 A. I've never seen him with a serious
4 problem with the CO's.
5 Q. But you're aware he has had problems?
6 A. I've never seen him with a problem.
7 Q. Have you ever seen the correctional
8 officers mistreat Mr. Thomas?
9 A. Yes.
10 Q. Could you describe those?
11 MR. OWENS: Objection, foundation.
12 THE COURT: Yes. Let's get the time
13 frame.
14 BY MR. SCHIECK:
15 Q. When did you see that happen?
16 A. 1998 and 2004.
17 Q. What did you see in 1998?
18 A. Officer wrote the word nigger and showed
19 it to him.
20 Q. Wrote something down and gave it to Mr.
21 Thomas?
22 A. No. Just a short with him like that.
23 Q. Anything else in 1998?
24 A. No. In 2004.
25 Q. Okay.

10

1 A. I had a problem with the officers. Marlo
2 and I are friends. And an officer told him that if
3 he spoke with me, she was gonna make sure that he
4 would never leave that prison from HRP.
5 Q. That if he spoke to you that she would
6 make sure he stayed on HRP?
7 A. Yes, sir.
8 Q. Okay. Now, do you know why?
9 A. Because he spoke with me and we were
10 friends. There were problems between me and the
11 officers.
12 Q. Did Marlo give you any advice?
13 A. Marlo had given me good advice.
14 Q. What advice did he give you in 2004?
15 A. He said that it hurt him to see me having
16 problems with the officers.
17 Q. Did he tell you how to handle the
18 situation?
19 A. To avoid problems with officers.
20 Q. Did you follow his advice?
21 A. No.
22 Q. But he tried to stop you from having
23 problems with the officers?
24 A. Yeah, he tried to.
25 Q. And when was the last time you saw Mr.

1 Thomas?
2 A. In 2004.
3 Q. And that was up at Ely State Prison?
4 A. Yes.
5 MR. SCHIECK: No further questions, Your
6 Honor.
7 THE COURT: Cross-examination, counsel?
8 MR. OWENS: Yes.
9
10 CROSS-EXAMINATION
11 BY MR. OWENS:
12 Q. Mr. Rivero, you said that you're doing
13 prison time for robbery with use of a deadly weapon?
14 A. Yes, sir.
15 Q. And that's based upon a conviction that
16 you received back in 1994?
17 A. Yes, sir.
18 Q. In fact, you have two convictions, isn't
19 that true?
20 A. Two convictions, why?
21 Q. Isn't that true?
22 A. Yes.
23 Q. The other conviction's also for robbery
24 with use of a deadly weapon?
25 A. Yes, sir.

12

1 Q. A firearm?
2 A. Yes, sir.
3 MR. OWENS: That's all I have, Your
4 Honor.
5 THE COURT: Mr. Rivero, does Mr. Thomas
6 speak Spanish?
7 THE WITNESS: A little. The same as I
8 speak a little English.
9 THE COURT: Ladies and gentlemen of the
10 jury, do you have any questions for Mr. Rivero? All
11 right. The jurors have some questions for Mr.
12 Rivero.
13 MR. SCHIECK: Based on your questions may
14 I ask a question?
15 THE COURT: You may.
16
17 REDIRECT EXAMINATION
18 BY MR. SCHIECK:
19 Q. Are you and Mr. Thomas able to
20 communicate based on the limited language that you
21 have between each other?
22 A. Yes, we -- yes, we can communicate.
23 MR. SCHIECK: Thank you.
24 THE COURT: Were there other questions?
25 Oh, just one. Mr. Rivero, where were you in

1 relation to Mr. Thomas when you [REDACTED] nessed any
2 problems that Mr. Thomas had with officers?

3 THE DEFENDANT: The same unit. We lived
4 almost very close. We were like neighbors. In
5 1998, he lived in cell 18 and I lived in cell 23.
6 In 2004, he was in cell 17 and I was living in cell
7 19. Same unit.

8 THE COURT: And how did you and Mr.
9 Thomas communicate?

10 THE WITNESS: Because I speak a little
11 English and he more or less tries to understand me.

12 THE COURT: Thank you. Are there any
13 additional questions that the attorneys would like
14 to asked based upon the questions of the jurors?

15 MR. OWENS: No, Your Honor.

16 MR. SCHIECK: If I could just clarify the
17 question?

18 THE COURT: Yes.

19 BY MR. SCHIECK:

20 Q. There in the unit when you were with
21 there Mr. Thomas, are you able to speak through your
22 food slots and talk to each other?

23 MR. OWENS: Objection, leading.

24 THE WITNESS: Yes. We can talk through
25 the door, and we can talk through a probe versing

1 the electricity in the back part of the cell, and we
2 can speak through a speaker that has -- that are in
3 the cells. Okay. We can also communicate through a
4 line.

5 BY MR. SCHIECK:

6 Q. Through a cadeva (phonetic)?

7 A. Exactly.

8 MR. SCHIECK: No further questions.

9 THE COURT: Does the State have any
10 additional questions for Mr. Rivero?

11 MR. OWENS: No, Your Honor.

12 THE COURT: Mr. Rivero, thank you, sir,
13 for your testimony today. You may be excused.
14 Counsel may call your next witness.

15 MR. SCHIECK: Joey Sellers.

16 THE CLERK: Come forward please, sir.
17 Take the witness stand there. Remain standing and
18 raise your right hand. Raise your right hand.

19 (Whereupon, Ronnie Sellers was duly
20 sworn to tell the truth, the whole
21 truth and nothing but the truth.)

22 THE CLERK: You may be seated. State
23 your name and spell your name for the record. First
24 name and last flame.

25 THE WITNESS: Ronnie Sellers.

1 S-e-l-l-e-r-s [REDACTED]

3 DIRECT EXAMINATION

4 BY MR. SCHIECK:

5 Q. Is it Ronnie Joey Sellers?

6 A. Yes.

7 Q. Okay. And obviously you're in custody?

8 A. Yes, I am.

9 Q. Okay. And where are you assigned to be
10 housed?

11 A. Ely State Prison.

12 Q. Okay. And what is your custody status?

13 A. I don't understand the --

14 Q. Are you general population?

15 A. No. I'm a high risk inmate on
16 administrative segregation.

17 Q. Okay. And do you know Marlo Thomas?

18 A. Yes, I do.

19 Q. And how long have you known Mr. Thomas?

20 A. 15, 16 years maybe.

21 Q. And what are you in prison for?

22 A. Murder.

23 Q. And when was that?

24 A. In 1990.

25 Q. In 1990 you obviously either pled guilty

1 or were convicted of the crime?

2 A. Yeah, I was convicted in a jury trial.

3 Q. And did you go to Ely State Prison after
4 your conviction?

5 A. Yes.

6 Q. And is that where you met Mr. Thomas?

7 A. Yes, I did.

8 Q. Okay. At points in time were you housed
9 together or housed in the same unit?

10 A. Yes, several times.

11 Q. Okay. Can you tell us, if you can
12 recall, what times you were housed in the same units
13 with Mr. Thomas?

14 A. We were housed together in general
15 population when I first -- when I first met Marlo,
16 we were housed together in general population in
17 unit two which is just a regular unit. Then we were
18 housed together in unit three and unit four which
19 are segregation units. And, you know, I mean, it's
20 a small prison. You see each other all the time.

21 Q. Do you have any estimation of the years,
22 what years you were housed with him?

23 A. I would say over the past 15, 16 years
24 that we've known each other, maybe a total of three
25 years maybe.

1 Q. When was of the last you were housed
2 together?

3 A. I haven't been housed with Mar -- like
4 two or three days a couple of years ago, then they
5 moved me to another unit. I've not spoken to Marlo
6 personally except for that two or three days in
7 probably 12 years, 10 years maybe.

8 Q. When you were housed with him this last
9 time, did you have a chance to talk with him then?

10 A. No, not really. Not for very long. He
11 asked me if I'd be willing to do this and I told him
12 I would be.

13 Q. Have you ever seen him interact with
14 other inmates besides yourself?

15 A. Sure. Yes.

16 Q. Have you ever seen any problems?

17 A. No.

18 Q. What about interaction with correctional
19 officers?

20 A. Well, yes.

21 Q. Okay. What type of problems have you
22 seen?

23 A. I -- I don't know Marlo to be a bad guy
24 as bad guys go in prison.

25 MR. OWENS: Objection, nonresponsive

1 and --

2 THE COURT: Objection is sustained. The
3 last answer will be stricken.

4 MR. OWENS: Foundation, Your Honor.

5 BY MR. SCHIECK:

6 Q. The question was have you seen his
7 interaction with CO's?

8 A. Yes, I have.

9 Q. And what have you seen?

10 MR. OWENS: Foundational, judge.

11 THE COURT: Well, then we need to go year
12 by year if you can recall.

13 THE WITNESS: Okay. Year by year?

14 THE COURT: Or like the last time. You
15 said in the last 10 or 12 years you've only seen him
16 two or three days.

17 THE WITNESS: Yeah. With my interactions
18 that I've seen with Marlo would have been in earlier
19 times. From maybe '92 to '95. Around that time
20 when we were both housed in the same unit which was
21 unit three.

22 BY MR. SCHIECK:

23 Q. That's back -- and Marlo got out after
24 that to your knowledge?

25 A. We weren't on speaking terms the last

1 period that he was in prison, but yeah, I believe it
2 would have been around that time that Marlo was
3 released from prison.

4 Q. So what we're talking about is a period
5 from '92 to '95 that you saw any interaction with
6 the correctional officers?

7 A. Yeah. His cell was visible from my cell.
8 We lived on the same unit in, unit 3b. And I lived
9 downstairs and I believe Marlo would live in like
10 cell 28 or 29 which is upstairs, but you can look
11 directly at that cell and hear that cell.

12 Q. Did you ever see the CO's mistreat Marlo?

13 A. I -- I've -- I've seen them engaged in
14 conflicts with Marlo. Verbal conflicts and -- it's
15 hard for me to answer this question without
16 explaining, you know, the -- it's difficult to
17 understand how it is taken out of the context of
18 being in prison.

19 Q. Okay. Well, in what context are you
20 talking about being in prison?

21 A. Well, when you're in prison, things that
22 routinely happen in prison by prisoners and by
23 prison guards, when they're not seen in that context
24 by people that don't know that context, it's hard to
25 explain it to them. You know, the verbal abuse back

1 and forth, and, you know, baiting each other and the
2 antagonizing each other.

3 Q. When you say "back and forth", are you
4 saying that the verbal abuse goes both ways?

5 A. Absolutely.

6 Q. Okay. So correctional officers actually
7 abuse, verbally abuse inmates?

8 MR. OWENS: Objection, relevance.

9 THE COURT: Objection is sustained.

10 BY MR. SCHIECK:

11 Q. Have you seen that?

12 A. Sure.

13 MR. OWENS: Objection, relevance.

14 THE COURT: Counsel, what's the
15 relevance?

16 MR. SCHIECK: The relevance is, Your
17 Honor, it's gonna show that the reasons the inmates
18 respond back is because they've been baited by the
19 correctional officers.

20 THE WITNESS: Or and vice versa.

21 BY MR. SCHIECK:

22 Q. So it goes both ways?

23 A. Yeah. That's my whole point is that it's
24 an interaction.

25 MR. OWENS: Your Honor, we're not talking

1 about inmates. We're talking about Mr. Thomas.

2 THE COURT: That's correct. So let's
3 keep it with Mr. Thomas.

4 BY MR. SCHIECK:

5 Q. Have you seen it with Mr. Thomas?

6 A. Yes.

7 Q. And this is between '92 and '95?

8 A. Yes.

9 Q. And which unit were you in at that time?

10 A. We were in unit 3b.

11 Q. Is that a general population unit or a
12 lock down?

13 A. It's a lock down unit. I was housed
14 downstairs in the high risk section of that unit.
15 Marlo was housed upstairs where he was allowed to,
16 you know, go to the recreational yard with other
17 prisoners and stuff like that.

18 Q. Okay. And you're in Ely right now?

19 A. Yes. Well, I'm at High Desert right now,
20 but I'm assigned to Ely.

21 Q. You're most recently in Ely, you're down
22 here to testify?

23 A. Yes, sir, that's correct.

24 Q. And you're in the HRP unit up there now?

25 A. Yes. Yes, I am.

1 Q. How often are you allowed out of your
2 cell?

3 A. I'm allowed out of my cell one our a day
4 for yard and every third day for shower.

5 Q. And when you say "yard", what type of
6 yard do you go to?

7 MR. OWENS: Your Honor, I'm gonna object
8 to the relevance of what his particular recreational
9 exercise is.

10 THE COURT: Your objection is noted. If
11 it's the same yard that anybody else in HRP at Ely
12 would go to, then I think he's qualified to describe
13 what the yard looks like. But if there's multiple
14 yards and they all look different, then I suppose
15 he's not.

16 BY MR. SCHIECK:

17 Q. Are there different HRP yards?

18 A. They're all the same. It's built on a
19 model. Every unit's exactly the same. I've been on
20 every yard available at Ely State Prison.

21 Q. And what are the HRP yards like?

22 A. It's sort of shaped like a -- like a
23 triangle, but it's rounded off at the end. It takes
24 40 laps to make a mile. It's concrete, you're by
25 yourself, there's a gun tower right above the yard

1 and --

2 Q. When you say "it takes 40 laps to make a
3 mile", are you talking walking around the yard?

4 A. Yeah. Driving the perimeter of the yard,
5 it takes 40 laps to make one mile.

6 Q. How do you know that?

7 A. From jogging laps on the yard.

8 Q. Okay. But you're by yourself?

9 A. By myself. I haven't been allowed on
10 their recreation yard with another prisoner since
11 May of 1992.

12 Q. Is that standard for HRP?

13 A. Well, there wasn't any HRP at that time.
14 It was -- I was one of the first HRP's. Yeah, it's
15 standard. It's part of the trip.

16 Q. That's the way it is now?

17 A. Yes.

18 Q. Is there a basketball court in the yard?

19 A. Yeah, there's a basketball court.

20 Sometimes there's a basketball, sometimes there's
21 not. There's a chin-up bar.

22 Q. Okay. And that's it?

23 A. That's it.

24 Q. That's all the recreation you have then?

25 A. Whatever you brought out there with you

1 as far as entertaining yourself is what you got.

2 Q. You mean like a radio or something and --

3 A. In your cell you can, but not on the
4 yard. There's nothing on the yard. You have to be
5 strip searched going to the yard and strip searched
6 coming from the yard. You're escorted by three
7 officers, you know, wearing helmets and bullet proof
8 vests and stuff. You're handcuffed behind your
9 back, you're shackled and there's a chain on the
10 handcuffs.

11 Q. And you get a total of one hour?

12 A. One hour every day.

13 Q. And then you get a shower every third
14 day?

15 A. Every third day you get a shower, yes.

16 Q. Is that taken out of the hour that you
17 would normally --

18 A. No, no, no. That's a separate thing.

19 You know, they take you to the shower the same way.

20 MR. SCHIECK: No further questions, Your
21 Honor.

22 THE COURT: Cross-examination, counsel?

23 CROSS-EXAMINATION

24 BY MR. OWENS:

25 Q. Why are you HRP?

1 A. I'm HRP for leadership a security
2 threat group.

3 Q. "Leadership of a security threat group."
4 What does that mean?

5 A. It means I'm -- I don't have any hole
6 time. I'm in the hole for safety and security of
7 the institution.

8 Q. And what does it mean that you're in the
9 leadership of the threat group? What is that?

10 A. Ask the warden. I don't know what he's
11 talking about.

12 Q. But that's just what they say?

13 A. I wish they wouldn't say that, but yeah,
14 that's what they said.

15 Q. And that's the reason that you're in this
16 particular type of custody?

17 A. This time, yeah, yeah. That's why I'm
18 being retained. I mean, there's behavior prior to
19 this, but this is the reason they kept me on that
20 with that hole time.

21 Q. How many convictions do you have?

22 A. I really can't answer that. It's several
23 though.

24 Q. Did you lose count at some point?

25 A. Yeah.

1 Q. What are they for?

2 A. Murder, drug trafficking, battery,
3 weapons, conspiracy to traffic drugs, things of that
4 nature.

5 Q. How many times have you been in and out
6 of prison?

7 A. I've been in and out of prison twice. I
8 came at 17 in Illinois and I've been here since I
9 was 22 I guess.

10 Q. You said there was a time when you
11 weren't on speaking terms with Marlo Thomas. When
12 was that?

13 A. During a conflict between my group and
14 the blacks at Ely.

15 Q. What is your group?

16 A. I don't know. Whites. White people.
17 And we just -- we weren't on friendly speaking
18 terms.

19 Q. And that would have been back in the
20 early '90s?

21 A. It would have been in the early '90's,
22 yes, sir. Towards the mid '90s maybe. '94, '95.

23 Q. You're currently at High Desert?

24 A. Yes.

25 Q. Is that where they were housing you in

1 preparation for coming to this hearing?

2 A. Yes.

3 Q. And do you know a Vanessa Heidt, one of
4 the security officers, cert officer?

5 A. Wouldn't know her if she was standing
6 next to me. I've never seen her or talked to her or
7 anything.

8 Q. Did you hear Marlo Thomas make threats
9 against some of the cert officers or correction
10 officers there?

11 A. No. But I've heard many people say that
12 Marlo's made threats. I have never heard Marlo make
13 threats. That's what they do. That's a routine
14 thing in prison, he threatened.

15 That's -- that's what you do when
16 you're angry and they want to do something to you,
17 they say you threatened them. It's the kind of
18 thing that, you know, if you assault somebody,
19 they're assaulted, you know, there's evidence of
20 that. A threat is, you know, it's a threat.

21 Q. They just make that stuff up?

22 A. Absolutely. No question. Not all -- I'm
23 not saying all of them do. I'm saying there's a
24 certain kind of people when their feelings are hurt,
25 when they create a verbal confrontation and they

1 feel that their dignity has been offended, that's
2 what they do.

3 MR. OWENS: That's all I have, Your
4 Honor.

5 THE COURT: Redirect?

7 REDIRECT EXAMINATION

8 BY MR. SCHIECK:

9 Q. Just to clarify one point. This is Marlo
10 sitting next to me?

11 A. Yes, it is.

12 MR. SCHIECK: No further questions. The
13 record reflect the identification of the defendant?

14 THE COURT: The record will so reflect.

15 Ladies and gentlemen of the jury, do you have any
16 questions for Mr. Sellers? I see there are no
17 questions. Mr. Seller's you may be excused. Thank
18 you.

19 THE WITNESS: Okay.

20 THE COURT: Counsel, you may call your
21 next witness.

22 MR. SCHIECK: Jaime Jackson.

23 THE CLERK: Please come forward, sir.

24 Have a seat and raise your right hand. Raise your
25 right hand, please.

1 (Whereupon, Jaime Jackson was duly
2 sworn to tell the truth, the whole
3 truth and nothing but the truth.
4 THE CLERK: You may be seated. Please
5 state your name and spell your name for the record,
6 and spell Jaime, please.

7 THE WITNESS: Jaime Jackson. J-a-i-m-e.
8 J-a-c-k-s-o-n.

9 THE CLERK: Thank you.

10
11 DIRECT EXAMINATION

12 BY MR. SCHIECK:

13 Q. Mr. Jackson, what are you in prison for?

14 A. Robbery.

15 Q. And where are you housed at?

16 A. Right now at High Desert. Before that I
17 was housed at Nevada State Prison, NSP.

18 Q. That's up in Carson City?

19 A. Yes.

20 Q. Prior to that where were you housed at?

21 A. Ely.

22 Q. Ely State Prison?

23 A. Yeah.

24 Q. And then you moved to -- when did you

25 move to Nevada State Prison?

1 A. About three months. Three, four months
2 ago.

3 Q. And you're only down here at High Desert
4 to testify in this case?

5 A. Yes.

6 Q. Okay. Do you expect you'll be going back
7 to Carson City?

8 A. Yeah.

9 Q. Do you know Marlo Thomas?

10 A. Yes.

11 Q. And do you see him here in court?

12 A. Yes.

13 Q. And where's he at?

14 A. Sitting on your right, on your right
15 side.

16 Q. Okay, thank you.

17 MR. SCHIECK: The record will reflect
18 identification of Mr. Thomas?

19 THE COURT: Record will so reflect.

20 BY MR. SCHIECK:

21 Q. And how old were you when you went to
22 prison?

23 A. When I first went to prison, I was 12
24 years old. I turned 13 in the intake unit.

25 Q. And from the intake unit where were you

1 classified to

2 A. SDCC.

3 Q. Southern Desert?

4 A. Yes.

5 Q. And did you eventually wind up at Ely?

6 A. Over the years, yeah.

7 Q. When did you first meet Marlo?

8 A. Had to be like seven or eight years old.

9 Q. Seven or eight years ago?

10 A. Seven or eight years old.

11 Q. Okay. You knew him before you went to
12 prison?

13 A. Yes.

14 Q. And then you met him again in prison?

15 A. Yes.

16 Q. Okay. When did you meet him in prison?

17 A. August of '97.

18 Q. Okay. And what prison were you in at
19 that time?

20 A. SDCC.

21 Q. Southern Desert Correctional Center?

22 A. Yes.

23 Q. Were you ever housed in Ely with Mr.

24 Thomas?

25 A. Yes. A few times.

1 Q. Mr. Thomas is older than you?

2 A. Yes.

3 Q. Do you know how much older?

4 A. About seven, eight years.

5 Q. Did Mr. Thomas ever give you advice?

6 A. Oh, all the time.

7 Q. While you were in prison?

8 A. Yeah.

9 Q. Would he help you out?

10 A. Yeah. Most of the time, yes.

11 Q. Is it -- what's it like to go to prison
12 at age 13.

13 MR. OWENS: Objection, relevance.

14 THE COURT: Objection is sustained.

15 BY MR. SCHIECK:

16 Q. What type of advice would more Marlo give
17 you?

18 A. Mainly good advice, you know, like --

19 Q. Okay. Let's talk about when would he
20 give you advice?

21 A. Like about if I was about to do something
22 wrong, you know, he'd try to tell me not to do it.
23 You know, things of that nature.

24 Q. I mean, how would he do that?

25 A. Oh, he would talk to me and calm me down,

1 you know, and make me see, you know, things from a
2 different standpoint.

3 Q. Would you say he had a positive effect on
4 you?

5 A. Yes.

6 Q. Did he -- I mean, did it diffuse
7 situations when he would talk to you?

8 A. Oh, all the time. It wasn't just one or
9 two. It was numerous.

10 Q. Have you ever seen Mr. Thomas have
11 problems with any other inmates?

12 A. No.

13 Q. Have you ever seen him have problems with
14 correctional officers?

15 A. A lot of times.

16 Q. During what period of time?

17 A. On and off, you know. I couldn't just
18 specifically put a date on it.

19 Q. Now, you indicated that he had talked you
20 out of doing things, but yet you say he's had
21 problems with correctional officers?

22 A. Not problems as in him doing something to
23 the correctional officer but as in correctional
24 officer doing something to him.

25 Q. What type of things?

1 A. You know, enticing him, giving him false
2 write-ups, things like that.

3 Q. Were you housed in the same unit with him
4 when these things would happen?

5 A. Yes. Like I said, a couple of times.

6 MR. SCHIECK: Thank you. Nothing
7 further, Your Honor.

8 THE COURT: Cross-examination?

9 MR. OWENS: Yeah.

10
11 CROSS-EXAMINATION

12 BY MR. OWENS:

13 Q. When you went to prison that first time,
14 that was for assault with a deadly weapon?

15 A. Yes, for aiding and abetting assault.

16 Q. And you got probation on that charge?

17 A. Yeah, after I did prison time.

18 Q. Well, you got probation?

19 A. Yeah.

20 Q. And then you messed up?

21 A. Yeah.

22 Q. And then you got the sentence imposed?

23 A. Yes.

24 Q. How many convictions do you have?

25 A. I believe I have four.

1 Q. How many times have you been in and out
2 of prison?

3 A. Four.

4 Q. Four times. So assault with a deadly
5 weapon, burglary and robbery with deadly weapon?

6 A. Yes.

7 Q. Was firearms involved with these?

8 A. The first and the third.

9 Q. The assault with deadly weapon and the
10 robbery with deadly weapon?

11 A. Yes.

12 Q. And it was because of these other
13 incidents that your probation was revoked on that
14 first charge, that assault with a deadly weapon?

15 A. Yes.

16 MR. OWENS: That's all I have, Your
17 Honor.

18 THE COURT: Do you want to redirect
19 counsel?

20 MR. SCHIECK: No, Your Honor.

21 THE COURT: Ladies and gentlemen of the
22 jury, do you have any questions for Mr. Jackson?
23 There's one question for Mr. Jackson.

24 Counsel, approach, please.

25 (Whereupon, an off-the-record

1 discussion was had at the bench.)

2 THE COURT: Mr. Jackson, did Marlo ever
3 talk to you about religion?

4 THE WITNESS: Yes.

5 THE COURT: Or anything similar to
6 religion?

7 THE WITNESS: Yes.

8 THE COURT: Additional questions based on
9 the jurors questions, Mr. Schieck?

10 MR. SCHIECK: No, Your Honor.

11 THE COURT: And Mr. Owens?

12 MR. OWENS: No, Your Honor.

13 THE COURT: All right. Mr. Jackson,
14 thank for your testimony. You may be excused.
15 Counsel may call your next witness.

16 MR. SCHIECK: Anthony Floyd, Your Honor.

17 THE CLERK: Come forward, please, sir.

18 Take the witness stand, remain standing and raise
19 your right hand. Raise your right hand, please,
20 sir, and remain standing.

21 (Whereupon, Floyd Anthony was duly
22 sworn to tell the truth, the whole
23 truth and nothing but the truth.)

24 THE CLERK: Thank you. You may be
25 seated. Please state and spell your name for the

1 record.
 2 THE WITNESS: Floyd Anthony. F-l-o-y-d.
 3 A-n-t-h-o-n-y.
 4 THE COURT: Wait a minute. Floyd's your
 5 first name?
 6 THE WITNESS: Yes, ma'am.
 7 THE COURT: And how do you spell Floyd?
 8 THE WITNESS: F-l-o-y-d.
 9 THE COURT: Okay. And then Anthony is
 10 your last name?
 11 THE WITNESS: Yes, ma'am.
 12 THE COURT: And how do you spell that?
 13 THE WITNESS: A-n-t-h-o-n-y.
 14 THE COURT: Thank you.

DIRECT EXAMINATION

17 BY MR. SCHIECK:
 18 Q. Mr. Anthony, you're in prison?
 19 A. Yes, sir.
 20 Q. Okay. And what are you in prison for?
 21 A. Robbery with use of a deadly weapon.
 22 Q. And when did you go to prison?
 23 A. In 1993.
 24 Q. And where are you assigned to be housed
 25 at?

1 A. At first I was in NSP and I got assigned
 2 to Ely State Prison.
 3 Q. Are you still assigned to Ely State
 4 Prison?
 5 A. Yes, sir, at the moment.
 6 Q. And you're down at High Desert now to
 7 testify?
 8 A. Yes.
 9 Q. And after you testify, do you expect to
 10 go back to Ely?
 11 A. Yes, sir.
 12 Q. Do you know Marlo Thomas?
 13 A. Yup.
 14 Q. How long have you known Marlo?
 15 A. I'd say for almost, almost 14 years.
 16 Q. Do you see Mr. Thomas in court?
 17 A. Yes, sir, I do.
 18 Q. Where's he at?
 19 A. Sitting right next to you.
 20 MR. SCHIECK: The record will reflect
 21 identification of Mr. Thomas?
 22 THE COURT: The record will so reflect.
 23 BY MR. SCHIECK:
 24 Q. Did you know Mr. Thomas before you went
 25 to prison or after you went to prison?

1 A. Before I went to prison.
 2 Q. So you had some contact with him before
 3 going to prison?
 4 A. Yes, sir, I did.
 5 Q. Did you hang out together or did you just
 6 know him?
 7 A. Hanged out. I know him.
 8 Q. And when you got to prison, were you ever
 9 housed together in the same unit?
 10 A. Yes, sir, I was.
 11 Q. Okay. And where was that?
 12 A. In unit three.
 13 Q. At?
 14 A. At Ely State Prison.
 15 Q. And when was that?
 16 A. That was in 1998.
 17 Q. Were you ever housed in any other units
 18 with Mr. Thomas?
 19 A. Yup. Unit four, unit two.
 20 Q. And what's your custody status right now?
 21 A. I'm on level two in Ely. ESP.
 22 Q. Which is a general population?
 23 A. Yes, sir.
 24 Q. So you're not HRP?
 25 A. No, I'm not.

1 Q. Have you and Marlo talked recently?
 2 A. No, we haven't.
 3 Q. When was the last time you saw Marlo?
 4 A. In January.
 5 Q. Of this year?
 6 A. Yes, sir.
 7 Q. Have you ever known Marlo to have
 8 problems with any other inmates there at the prison?
 9 A. No, I don't.
 10 Q. What about with correctional officers?
 11 A. (Positive nod of the head.)
 12 Q. Is that a yes?
 13 A. Yes, sir.
 14 Q. And when and where did you aware of those
 15 problems?
 16 A. In ESP in the hole.
 17 Q. And what type of problems did he have
 18 that you're aware of.
 19 A. Minor problems but nothing major, you
 20 know, but problems also it's provoked at times.
 21 Q. When you say provoked, what are you
 22 talking about?
 23 A. Well, you know, provoked where --
 24 MR. OWENS: Objection, foundation.
 25 THE COURT: Sustained.

1 BY MR. SCHIECK:

2 Q. When were you aware that he was provoked
3 by correctional officers and what unit were you in?

4 A. I believe there was several incidents,
5 different units.

6 Q. Can you give us a time frame?

7 A. I don't probably remember the time frame.

8 Q. What units then?

9 A. It was in unit four, unit two, unit
10 three, different units.

11 Q. Okay. And you said you were in unit
12 three in 1998?

13 A. Yes, I was.

14 Q. Okay. When were you in unit two with
15 Marlo?

16 A. I would say like '99, 2000.

17 Q. And what about unit four?

18 A. Unit four, like around 2001.

19 Q. Did you ever realize that you might have
20 to come to court and testify about these incidents?

21 A. Not exactly.

22 Q. I mean, you weren't keeping track of the
23 dates?

24 A. No, sir.

25 Q. Can you just generally tell us what kind

42

1 of provocation you're talking about?

2 A. Provocation.

3 MR. OWENS: Not just generally talking
4 about it. I'd like to hear specifics.

5 THE COURT: Specific. Tell us
6 specifically. Tell us specifically what you
7 remember.

8 BY MR. SCHIECK:

9 Q. Specifically what do you remember about
10 incidents of provocation from correctional officers?

11 A. Well, there's been several of them. Do
12 you know what I'm saying? I don't quite remember
13 date and time, name of officers. Do you know what I
14 mean?

15 Q. Just tell us if you remember what
16 happened, what they did.

17 A. Well, speaking from my experiences?

18 THE COURT: No. You're supposed to tell
19 us what you saw between Marlo and the corrections
20 officers, not what they did to you.

21 BY MR. SCHIECK:

22 Q. What you saw or heard.

23 A. Well, you know, you got officers who like
24 to call people by other names, you know, disrespect.

25 MR. OWENS: Objection. That's not

1 specific -- not responsive.

2 THE COURT: Objection is sustained. The
3 last answer is stricken.

4 BY MR. SCHIECK:

5 Q. Well, what type of names would they call
6 Marlo?

7 A. Names as far as, you know, like PCs, PC,
8 or names to try to -- you know what I'm saying?
9 Deflate his character like what he in prison for,
10 things like that.

11 Q. Anything else that you can remember?

12 A. Not quite.

13 Q. Has Marlo ever talked to you or given you
14 advice about anything?

15 A. Yes, he did.

16 Q. What type of advice would he give you?

17 A. You know, basically incident I remember
18 when my mom passed in 1998.

19 Q. And what advice did he give you then?

20 A. Well, you know, I was on -- when my mom
21 passed, I was on downward spiral, thought the whole
22 world was against me. Do you know what I'm saying?

23 I was ready to really just trip out,
24 you know, thought there wasn't nothing to live for
25 no more. And he spoke to me and let me know, do you

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1 know what I'm saying, that I still got a chance and
2 I still got my kids out there and everything like
3 that and basically changed my whole, changed my
4 life, do you know what I'm saying, because now I
5 could be on my way out the door.

6 Q. On parole?

7 A. Yes, sir.

8 MR. SCHIECK: No further questions, Your
9 Honor.

10 THE COURT: Cross-examination?

11 CROSS-EXAMINATION

12 BY MR. OWENS:

13 Q. How many convictions do you have?

14 A. I got two.

15 Q. Do you have a robbery with deadly weapon
16 conviction, two of them actually in 1993; isn't that
17 correct?

18 A. Right.

19 Q. You also had a possession of stolen
20 vehicle conviction?

21 A. Right.

22 Q. And a possession of stolen property
23 conviction?

24 A. Right.

1 Q. So that would be four
 2 A. You're talking about two different
 3 incidents or just --
 4 Q. Or convictions, is that right?
 5 A. Right.
 6 Q. And how many times have you been in and
 7 out of prison?
 8 A. This is my second time back.
 9 Q. When did you come back?
 10 A. 1993.
 11 MR. OWENS: That's all I have, Your
 12 Honor.
 13 THE COURT: Any redirect?
 14 MR. SCHIECK: Nothing further, Your
 15 Honor.
 16 THE COURT: Ladies and gentlemen of the
 17 jury, do you have any questions for Mr. Anthony?
 18 There's no questions, Mr. Anthony, thank you. You
 19 may be excused.
 20 Counsel may call your next witness.
 21 MR. SCHIECK: Just one second, Your
 22 Honor. Warden Neven, Your Honor.
 23 THE CLERK: Come forward, please, sir,
 24 and take the witness stand. Remain standing and
 25 raise your right hand.

1 (Whereupon, Dwight Neven was duly
 2 sworn to tell the truth, the whole
 3 truth and nothing but the truth.)
 4 THE CLERK: You may be seated. Please
 5 state your name and spell your name for the record.
 6 THE WITNESS: Name is Dwight Neven.
 7 THE CLERK: Spell your first and last
 8 name.
 9 THE WITNESS: D-w-i-g-h-t. And the last
 10 name, N-e-v-e-n.
 11 THE CLERK: Thank you.
 12
 13 DIRECT EXAMINATION
 14 BY MR. SCHIECK:
 15 Q. And could you tell us where you're
 16 employed and what your position is?
 17 A. I'm employed at the High Desert State
 18 Prison as the warden.
 19 Q. And how long have you been the warden
 20 there at the prison?
 21 A. About a year now.
 22 Q. And where were you employed prior to
 23 that?
 24 A. The Ely State Prison.
 25 Q. And what was your position at Ely State

1 Prison?
 2 A. I was associate warden of operations.
 3 Q. How long did you hold that position?
 4 A. Oh, roughly 10 years. 10, 11 years.
 5 Q. And prior to that, what was your
 6 employment?
 7 A. I worked at Ely State Prison, I was a
 8 correctional lieutenant.
 9 Q. So how long in total were you at Ely
 10 State Prison?
 11 A. '90 through -- 14 years.
 12 Q. And then you came down to High Desert?
 13 A. Yes.
 14 Q. Do you know Marlo Thomas?
 15 A. Yes, I do.
 16 Q. Do you see him here in court today?
 17 A. Yes do I.
 18 Q. And where's he seated?
 19 A. He is seated to your right, sir.
 20 MR. SCHIECK: Record reflect the
 21 identification of Mr. Thomas?
 22 THE COURT: The record will so reflect.
 23 BY MR. SCHIECK:
 24 Q. You're aware or are you aware that Mr.
 25 Thomas has received a number of disciplinary

1 write-ups while he's been in prison?
 2 A. Yes, I am.
 3 Q. If I were to show you this stack, would
 4 you accept that that's at least his latest set of
 5 write-ups?
 6 A. Yes, I would.
 7 Q. Would you say that in the past he's been
 8 a behavioral problem at Ely State Prison?
 9 A. Yes, I would.
 10 Q. Is this an inordinate amount of write-ups
 11 or are there other inmates that get just as many?
 12 A. Mr. Thomas wouldn't have the record, but
 13 that -- that on average would be inordinate.
 14 Q. And did you have dealings with him while
 15 he was up there at Ely State Prison?
 16 A. Yes, I have.
 17 Q. And in what capacity?
 18 A. Well, I believe when I first met Thomas,
 19 I was lieutenant, just making normal rounds and
 20 normal day-to-day shift operations type thing.
 21 As the associate warden of
 22 operations, I oversaw the day-to-day operations of
 23 the facility. One of my requirements was to hold
 24 regular HRP reviews with Mr. Thomas.
 25 Q. How would he behave during those HRP

1 reviews?

2 A. Mr. Thomas was always very respectful and
3 civil to me.

4 Q. And what's the purpose of an HRP review?

5 A. Well, an HRP is -- it's a very highly
6 restricted status within the prison and we require
7 six-month reviews, check on their health, see how
8 they're doing, ascertain whether they need some
9 mental health intervention, things like that.

10 Kind of give them some goals to try
11 to achieve to possibly get off of that status. See
12 if they had any problems.

13 Q. And he was always very courteous during
14 these briefings?

15 A. To me, yes, sir.

16 Q. Are you aware of when you were up at Ely
17 of any grievances or kites that Marlo had filed
18 concerning his treatment by correctional officers?

19 A. I couldn't recall specifically. I -- in
20 15 years in this department, I probably received
21 hundreds of thousands of those things, but I
22 couldn't recall specifically.

23 Q. Hundreds of thousands of complaints about
24 treatment by correctional officers?

25 A. No, no. Between grievances related to

50

1 property issues, grievances related to food,
2 grievances related to medical care, kites requesting
3 special permission to purchase items off of our
4 canteen. Some of them were complaints against
5 staff, but I would say the majority are procedural
6 type requests and things like that.

7 Q. And where is Mr. -- or where was Mr.
8 Thomas most recently being held?

9 A. Prior to coming to court?

10 Q. Yes.

11 A. At the High Desert State Prison.

12 Q. While you were warden?

13 A. Yes.

14 Q. Did you have any dealings with him during
15 that time?

16 A. I haven't had any interaction with Mr.
17 Thomas since his arrival here.

18 Q. Have you received any information of
19 misbehavior from him?

20 A. I'm aware of an issue involving a
21 particular officer, a female officer, Officer Heidt.

22 Q. What issue is that?

23 A. I believe it had to do with some sexually
24 stimulating activities. That's my recollection.

25 Q. Could it have to do with blocking his

1 window?

2 A. I couldn't recall specifically.

3 Q. Is that an uncommon occurrence that an
4 inmate will block their outside window with some
5 type of covering?

6 A. Is it uncommon.

7 MR. OWENS: Your Honor, I'm gonna object
8 to the vagueness of the question as to whether it's
9 unusual as to what that means. Unusual in what
10 context.

11 MR. SCHIECK: I'll rephrase.

12 BY MR. SCHIECK:

13 Q. Is it uncommon?

14 A. No.

15 Q. That's violation of regulation though?

16 A. Yes, it is.

17 Q. Is that a general violence?

18 A. Violation of rules, yes, generally.

19 Q. I mean, it's not a major violation,
20 disciplinary purposes?

21 A. No, it wouldn't be.

22 Q. And often times -- are those always
23 written up?

24 A. I would say probably not. Most often
25 they're, the inmates are asked to take it down and

52

1 they take it down and they're given a warning.

2 In some events they may even, if
3 it's repeated, just do what's called a misconduct
4 report which would not necessarily be a disciplinary
5 action, but it would be a step before. It's kind of
6 a written warning if you will.

7 Q. While you were at Ely -- I want to focus
8 on Ely sat this point. I mean, was it uncommon that
9 inmates would be loud and profane?

10 A. It's pretty common. It's pretty common
11 within the prison.

12 Q. How would you -- do you have an opinion
13 as to how Marlo's been doing most recently?

14 A. Well, within the last year, no real
15 opinion. However, while he's been at High Desert, I
16 would have to say nonproblematic overall.

17 Q. In your experience as the associate
18 warden at Ely and dealing with HRP inmates and other
19 inmates, have you found whether or not as an inmate
20 grows older they become less of a problem?

21 A. Yes, I have.

22 Q. Why is that?

23 A. They -- I guess they surrender to the
24 system. You can't win. I remember mean, officers
25 are always there. And even if officers move on or

1 leave, there's always another officer to replace
2 them.

3 Q. Do you think it has anything to do with
4 maturity?

5 A. To some extent, yeah.

6 Q. Do you have any recollection of how old
7 Marlo was when he first got up there to Ely the --

8 A. No, I don't.

9 Q. Would you recall whether he seemed
10 younger or?

11 A. Well, obviously. 15 years ago, yeah. We
12 were all younger.

13 Q. 15 years younger than he is today?

14 A. Yes.

15 Q. Did they offer anger management classes
16 there at Ely?

17 A. Yes, they do.

18 Q. Is it mandatory or voluntary that an
19 inmate take those classes?

20 A. Voluntary.

21 Q. Are you aware of whether or not Marlo has
22 taken some anger management classes?

23 A. I'm not aware.

24 Q. I'm gonna ask you some general questions
25 about Ely State Prison.

1 A. Okay.

2 Q. And there is just based on most recently
3 when you were there.

4 A. Okay.

5 Q. What are the -- there's a visiting room,
6 correct?

7 A. That's correct.

8 Q. Okay. For an HRP inmate, what are his
9 visiting rights?

10 A. Noncontact.

11 Q. And when you say noncontact, can you
12 describe how that visit would take place then?

13 A. His visitor would arrive, would be seated
14 in a small area, probably two times the size of a
15 standard phone booth, maybe three times the size of
16 that. The inmate would be on the other side behind
17 glass and they'd have to speak through a speaker box
18 that's installed between the windows.

19 Q. So there's no actual contact between the
20 inmates and his visitor?

21 A. That's correct.

22 Q. Are there restrictions on when they can
23 have visits?

24 A. My recollection is there is specific
25 days. I believe it was Wednesdays and Thursdays

1 were their visiting days.

2 Q. But the HRP inmate is not allowed any
3 contact with let's say his family who's up to visit
4 him, there's no contacts?

5 A. No contact with family. Certain
6 exceptions are made for attorneys however.

7 Q. How does a person get off HRP at Ely?

8 A. By maintaining a just -- well, the start
9 is they have to be disciplinary free for at least a
10 year.

11 Q. And if you're taken off HRP, what would
12 the next classification be for an inmates?

13 A. Normally they would be in an
14 administrative segregation status for a period of
15 time.

16 Q. How would that change the visiting for an
17 inmate if he went from HRP to administrative
18 segregation?

19 A. He's be permitted contact visit.

20 Q. And when you say contact visit, can you
21 describe that visiting procedure?

22 A. He'd be permitted to go actually into the
23 visiting room, be able to greet his visitors, have a
24 handshake, a hug at the start of the visit and go to
25 the table and basically interact freely without any

1 division between them.

2 Q. Except for the table?

3 A. Except for the table, correct.

4 Q. And would it be -- are there rules as to
5 staying on one side of the table and --

6 A. Yeah. They'd have to be on opposite
7 sides of the table. If they wished to get
8 refreshments, the inmate would have to request

9 permission and go up to the vending machines and
10 point out particular items he may want. He would
11 tell his visitor and the visitor would be required
12 to get up separately and go purchase the items and
13 bring them back.

14 MR. SCHIECK: Nothing further, Your
15 Honor.

16 THE COURT: Cross-examination?

17 CROSS-EXAMINATION

19 BY MR. OWENS:

20 Q. You said that being profane is somewhat
21 common in the prison or I think you said not
22 uncommon?

23 A. It is not uncommon, no.

24 Q. And when you say it's not uncommon, what
25 does that mean? I mean, what percentage of the

1 population engages in this, and when you say
2 profane, what are you talking about?

3 A. Oh, heck yeah. I'm talking about cuss
4 words I imagine. It's almost their own little
5 language sometimes within prison, you know.

6 Instead of saying could you please
7 pass me the butter, they might say something like
8 would you please pass me the damn butter, you know.
9 So that's the language of the yards.

10 Q. Mr. Schieck was holding a court's exhibit
11 showing to you a number -- or State's Exhibit No.
12 116, that being a series of prison incident reports
13 involving Mr. Marlo Thomas for some period of time,
14 and you thought that that was quite a few
15 disciplinary reports?

16 A. Yes, I did.

17 Q. When you talk about profanity, in saying
18 that that's not uncommon, you didn't mean profanity
19 towards the prison officials or officers?

20 A. Actually, that's pretty common, too, but
21 they're subject to disciplinary actions when they do
22 it in a manner that is offensive.

23 Q. How about things like this, and excuse
24 this verbiage if you will, don't you believe me that
25 I will have sex with you, I could rape you.

1 February 6th of 1998.

2 February 22nd of '98. You punk ass,
3 fucking bitches. You better hope I never get around
4 to you close, then we'll see.

5 Later that same year, no, bitch,
6 you're just a dick sucking bitch ass. Hey,
7 Lancaster, grabbing his genitals, don't ignore me,
8 you slut.

9 Going up into '99, you fat cow, you
10 must like golden showers, you bitch better get used
11 to more, you hoe.

12 September. Come today shift, you
13 punks, I'll fuck you up. Come to day shift, you
14 punk ass bitches, I'll knock your teeth out, punks.

15 September of '99, you punk, I can't
16 wait until you take me to the showers. I'll kill
17 you, punk. First I'll fuck you, then I'll kill you,
18 punk. Just give me a chance and I'll fucking knock
19 your teeth out you fucking punk bitch.

20 And we've got some more memorable
21 comments involving a Ms. Buckmeyer. Do you know
22 her, another guard?

23 A. (Negative nod of the head.)

24 Q. Now we're in the year 2000. Ms.
25 Buckmeyer, you whore, fucking, cunt, bitch. I know

1 you do all the police. Old fat pussy, come to the
2 shower and suck me, whore. Come to the shower. It
3 goes on like that. And all of these threats and
4 profanity to prison officers and guards.

5 Would you call that common?

6 A. No.

7 Q. That wouldn't be common?

8 A. No, that would not be common.

9 Q. And in fact, it may result in a write-up?

10 A. I would expect it to involve a write-up.

11 Q. But you said that a lot of these things
12 that happen the officers don't write up the
13 prisoners?

14 A. No, I said covering up a window.

15 Q. Covering on a window. So if they wrote
16 up a prisoner for covering up a window, it's
17 probably because there have been some problems.
18 They probably warned them a bunch of times and they
19 were being obstinate?

20 A. That would be my opinion, yes.

21 Q. So included in this discipline problem
22 that the defendant has been that's in front of you
23 there, there's probably a lot of incidents where
24 there were violations and just no reports were
25 written up?

1 A. Exactly. That would be typical. This
2 would -- normally -- I would say normally an officer
3 when he writes a violation on an inmate, it has
4 reached a magnitude where it could not be handled in
5 any other way and it had to become more formalized.

6 Q. Now, you said that you had had these HRP
7 meetings with people that were on this high risk
8 potential yearly?

9 A. Six month reviews.

10 Q. So twice a year?

11 A. (Positive nod of the head.)

12 Q. And with regard to Mr. Thomas, was that
13 the extent of your association or knowledge of him
14 was when you had these bi-yearly reviews or did you
15 have some interaction with him other times?

16 A. Other times when we were shaking the unit
17 down, on occasion come over, look at maintenance
18 issue, things like that.

19 Q. Do you find that in these interviews when
20 you're reviewing this HRP status with the inmates
21 that they tend to be courteous with you?

22 A. I -- about 99.9 percent of my
23 interactions with inmates are courteous.

24 Q. They want something from you?

25 A. Pretty much.

1 Q. And it wouldn't serve m to be
2 discourteous, would it?

3 A. No. I kind of have their lives in my
4 hand.

5 Q. Are you aware in your conversations in
6 talking with the defendant that he knew a couple of
7 years ago, a year, year and a half, couple of years
8 that this hearing would be coming up?

9 A. I couldn't make a statement one way or
10 the other. I don't --

11 Q. Well, certainly any change in conduct
12 over that period in time could be attributed to the
13 fact that he wants something now?

14 MR. SCHIECK: Calls for speculation, Your
15 Honor.

16 THE COURT: Objection is sustained.

17 MR. OWENS: That's all I have, Your
18 Honor.

19 THE COURT: Redirect?

20 MR. SCHIECK: No, Your Honor.

21 THE COURT: Ladies and gentlemen of the
22 jury, do you have any questions for Warden Neven?
23 We have questions.

24 Counsel, would you approach, please?
25 (Whereupon, an off-the-record

1 discussion was had at the bench.

2 THE COURT: Warden, what exactly did you
3 use as a reference with regard to HRP review? What
4 reports or input from staff or wherever you got them
5 on these six month reviews?

6 THE WITNESS: We would like at the
7 disciplinary records. There were also
8 representatives. His case worker was present in the
9 panel. Also, usually the unit sergeant or the unit
10 supervisor was there also and they provided input as
11 well.

12 THE COURT: And if he was courteous or
13 respectful during the HRP interviews, why was he
14 still considered HRP?

15 THE WITNESS: Well, he was considered HRP
16 because of his assaultive history. And again, it
17 requires a minimum of one year disciplinary free for
18 him to get off of HRP. And he never quite ever made
19 that one year. So whenever he received another
20 write-up, his year would start again.

21 THE COURT: Additional questions?

22 MR. OWENS: Yes.

23 ///

24 ///

25 ///

1 EXAMINATION

2 BY MR. OWENS:

3 Q. What percentage of the prison population
4 is HRP?

5 A. Oh, the math. There are 20 out of about
6 1100 up there.

7 MR. SCHIECK: While we're waiting, can we
8 ask?

9 THE COURT: Do we have more questions?
10 Oh, okay. I'm sorry. Go ahead. Yes, you can ask
11 more questions.

12 EXAMINATION

13 BY MR. SCHIECK:

14 Q. The last HRP review you had with Mr.
15 Thomas up at Ely, do you recall the results of that?

16 A. My last one, my recollection is he got to
17 like 11 months or so without a write-up and had a
18 pending notice of charges. So we postponed the
19 review until the outcome of that notice charts that
20 was pending. That's my recollection.

21 THE COURT: Do you have additional
22 questions?

23 (Whereupon, an off-the-record
24 discussion was had at the bench.)
25

1 THE COURT: Warden, how long has Marlo
2 been on HRP status while -- 'til you left Ely?

3 THE WITNESS: I would have to say years.
4 I couldn't be specific without reviewing his file,
5 but it was -- it was several years.

6 THE COURT: And would continuing to write
7 him up for minor infractions, keep him on HRP
8 status?

9 THE WITNESS: Yes, it would.

10 THE COURT: Any additional questions?

11 MR. SCHIECK: If I can just clarify?

12 THE COURT: You may.

13 EXAMINATION

14 BY MR. SCHIECK:

15 Q. Even a general violation if you get one
16 within that one-year period, you start your one year
17 over again?

18 A. That's correct.

19 Q. No matter how minor it was, it's still a
20 disciplinary write-up?

21 A. Well, if we get into our disciplinary
22 procedure, there are ways that pleas could be
23 negotiated, we could resolve issues without actually
24 finding of guilt on those.
25

1 So it has to be actual finding of
2 guilt in a violation, but essentially any write-up,
3 minor, general or major, the time would start again.

4 THE COURT: Mr. Owens?

6 EXAMINATION

7 BY MR. OWENS:

8 Q. Is an HRP status different than the
9 sentence than an inmate has received?

10 A. Yes, it is.

11 Q. So regardless of what kind of a sentence
12 they receive, they may or may not be on HRP?

13 A. Correct.

14 Q. And whether they are on HRP or not just
15 depends on their own conduct while they're in there?

16 A. For the most part. Sometimes on occasion
17 we might receive someone that came directly to us
18 from the Clark County Detention Center Facility and
19 they had some issues related to escape attempts,
20 things like that, and often we would just put them
21 into that status.

22 But for the most part, it's dictated
23 by our population, whether they get into that
24 status. And it's often difficult. It's not the
25 first time you do something you end up there. Often

1 they'll go through a disciplinary segregation status
2 and during that status, they accrue additional
3 write-ups or more serious charges and then we find
4 that we have to kick in to the next level which is
5 HRP which ups the type of security measures we
6 employ when we are dealing with them.

7 MR. OWENS: Thank you.

8 THE COURT: Mr. Schieck, do you have any
9 additional questions?

10 MR. SCHIECK: No, Your Honor.

11 THE COURT: Warden Neven, thank you for
12 your testimony here today. You may be excused.
13 Counsel may call your next witness.

14 MR. SCHIECK: Georgia Thomas.

15 THE CLERK: Are you Mrs. Thomas?

16 THE COURT: No.

17 THE CLERK: Ms. Thomas, please take the
18 witness stand, remain standing and raise your right
19 hand. Remain standing and raise your right hand.

20 (Whereupon, Georgia Thomas was duly
21 sworn to tell the truth, the whole
22 truth and nothing but the truth.)

23 THE CLERK: You may be seated. Please
24 state your name for the record.

25 THE WITNESS: Georgia Thomas.

1 THE CLERK: Thank you.

2 THE COURT: You may proceed, counsel.

3 MR. SCHIECK: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. SCHIECK:

7 Q. When you testified before, you had
8 indicated that Darryl, Marlo and Larry had seen Mr.
9 Lewis abuse you?

10 A. Yes, they have.

11 Q. Okay. The three of your four boys had
12 seen this?

13 A. Yes. The oldest ones.

14 Q. Okay. Darryl's a pastor?

15 A. Yes, he is.

16 Q. Marlo's in prison?

17 A. Yes.

18 Q. Where's Larry?

19 A. He's in prison.

20 Q. So two out of the three that observed the
21 abuse are in prison?

22 A. Yes. Wait a minute. You said two?

23 Q. Marlo and Larry?

24 A. Yes.

25 Q. Have you gone to Ely to visit Marlo?

1 A. No, I haven't.

2 Q. Why not?

3 A. Because Marlo asked me not to.

4 Q. Did he tell you why he didn't want you to
5 see him?

6 A. He didn't me to see him in the condition
7 that he was in.

8 Q. What condition was that?

9 A. I -- I think because he was locked up and
10 I don't know whether he was in the chains and stuff.

11 Q. Did you write and talk to him on the
12 phone?

13 A. Yes.

14 Q. You were asked some questions about a
15 juvenile report where you had indicated that Marlo
16 was normal and wasn't having any problems at home.

17 Would you always tell the truth to
18 the juvenile authorities when they would question
19 you about what was going on with Marlo?

20 A. Yes, I did.

21 Q. That was your best recollection of what
22 was going on?

23 A. Yes.

24 Q. You understand the State is seeking the
25 death penalty?

1 A. Yes.

2 Q. And how do you feel about that?

3 A. I don't like it. I feel that no one but
4 God have the right to take a life. I feel that if
5 the State takes Marlo's life, they gonna turn around
6 and do exactly what Marlo did. And that's not
7 right. Only God has that right to take a life.

8 Q. Do you know that Marlo killed two people?

9 A. Yes, I do.

10 Q. How do you feel about that?

11 A. I feel very bad. I feel very bad about
12 that. When -- if I could -- if I could bring them
13 back, the two young men's that he took their lives,
14 I would do that.

15 My heart goes out to the two
16 mother's that -- that lost their son. I can -- I
17 don't know how they feel, but I can imagine how they
18 feel. I am so sorry. If I could bring them back, I
19 would.

20 MR. SCHIECK: No further questions.

21 THE COURT: Cross-examination?

22 MR. SCHWARTZ: No.

23 THE COURT: Ladies and gentlemen of the
24 jury, do you have any questions for Mrs. Thomas? I
25 see there are no questions.

1 Mrs. Thomas -- all right. We do
2 have a question. Thank you, Ms. Thomas. You may be
3 excused.

4 Counsel, you may call your next
5 witness if you have any additional witnesses.

6 MR. SCHIECK: No additional witnesses.

7 THE COURT: The State wish to call
8 rebuttal witnesses?

9 MR. SCHWARTZ: No, Your Honor.

10 MR. SCHIECK: However, Mr. Thomas wants
11 to allocute.

12 THE COURT: Ladies and gentlemen, at a
13 penalty proceeding, the defendant is given the
14 opportunity if he chooses to do so to make an
15 unsworn statement which is called an allocution.
16 And let me tell you just a little bit about that.

17 And the reason that the law allows
18 the defendant to give that unsworn statement to you
19 in allocution is simply so that the people who have
20 to decide the sentence which are you jurors, have an
21 opportunity to hear from the defendant.

22 He's -- in a trial, of course, he
23 was not required to testify and nobody can ask him
24 questions and things of that sort, but the court
25 system thinks for about the last 400 years that it

1 is appropriate that the sentencing body actually
2 hear from the defendant before they do so.

3 So Mr. Thomas, if you'd like to make
4 an unsworn statement to the jury, this is your time
5 to do so.

6 THE DEFENDANT: Yes, ma'am. Excuse me.
7 My name is Marlo Thomas. I've been sitting here for
8 four or five days and I didn't know what I was gonna
9 say to those families that has lost their sons
10 because of me.

11 I have made a terrible mistake. I
12 know it's hard to forgive me of my faults. I'm not
13 expecting you and your family to forgive me. I
14 understand that you are frustrated and angry and you
15 probably hate me, but I say -- I want to say three
16 things that I'm gonna speak about.

17 I'm gonna speak about being
18 apologetic, I'm gonna speak about having remorse,
19 I'm gonna speak about plans for my future.

20 As a man and as a child, my mother
21 told me and my brothers there's gonna come a time in
22 my life that, all lives that we're gonna have to
23 face responsibility. And I'm gonna do that today.

24 I am the man that caused your family
25 pain and grief. I am so sorry. I'm heart broken

1 because I am not that person that I understand that
2 you think I am. I'm not that man that I used to be
3 nine years and 7 months.

4 There's not a day that don't go by
5 that I don't think of Matt, that I don't think of
6 Carl. I was wrong and I accept responsibility. No
7 one is at fault except me.

8 If you find it in your hearts, not
9 now, but maybe to understand that I had anger issues
10 and I took something so precious. And I can
11 understand that God put them two individuals on this
12 planet and I shouldn't have done what I done.

13 And I say today that you -- I would
14 never do -- if I could take back what I'd done, if
15 there was a -- you have a wish, a wish line, I would
16 be in the front of the line and I would be on my
17 hands and knees begging, give me that one wish, and
18 that would be to be your son, your brother, your
19 uncle back. I would bring these two individuals
20 back if I could. But I can't. You must believe me
21 when I say I would do this.

22 I'm only a human being that made a
23 terrible mistake. I made several mistakes in my
24 life that I regret, but the biggest one I made was
25 in April.

1 I have done good my life that it
2 seems to fail to talk about. I have been bad in my
3 life. That's all to talk about.

4 But the good thing in my life is I
5 speak today and I accept responsibility to everybody
6 in this courtroom that I am the man that's at fault
7 and please forgive me.

8 And I'm only human, but you can say
9 what you want to say, but I have a heart. I have a
10 conscience, I have feelings and my conscience tells
11 me to speak the truth. The old Marlo would just sit
12 here and not said a word and hid behind others, but
13 I'm not gonna do that. I'm sorry.

14 I understand you not -- I'm -- I
15 understand you will not expect me to be forthcoming
16 and you expect me to be someone that's hard and a
17 terrible person, but you must believe your son's was
18 good people, and I was wrong.

19 That's all I have to say and I leave
20 it up to you, but I apologize. And there's not a
21 day that don't go by every second, every minute that
22 I do not think of these individuals that is not here
23 today. They remain in my mind, they remain in my
24 thoughts, they remain in my sleep and they remain in
25 my heart. I was not raised like that, but I had no

1 right.

2 But in the future plan, I would
3 continue to try to speak to other youngsters. I'm a
4 well man like I have been doing. I'm not -- I'm
5 very emotional. I'm an emotional person, and I
6 react to certain things that I shouldn't react to,
7 but I ask you to understand in my future plans if
8 given more that I would never hurt no human being
9 the way I did.

10 And I understand that God is the
11 only person that can take a human being's life and
12 give life. I stole two precious lives. And I have
13 a heart. I'm not a senseless person.

14 But that's all I would have to --
15 that's all I have to say, Your Honor.

16 THE COURT: Thank you. Does the State
17 wish to call any rebuttal witnesses?

18 MR. OWENS: No, Your Honor.

19 THE COURT: All right. Ladies and
20 gentlemen, we will take a 15 minute recess. We'll
21 be in recess until 25 minutes to 11:00.

22 During this recess, you're
23 admonished to talk or converse among yourselves or
24 with anyone else on any subject connected with this
25 trial.

1 Don't read, watch or listen to any
2 report of or commentary on the trial or any person
3 connected with this trial by any medium of
4 information, including, without limitation,
5 newspapers, television, internet and radio.

6 Don't form or express any opinion on
7 any subject connected with the trial until the case
8 is finally submitted to you.

9 We'll be in recess until 10:35.

10 Counsel, I need you to remain.

11 (Whereupon, the jury exited the
12 courtroom.)

13 THE COURT: The record will reflect that
14 the jury has retired from the courtroom. The clerk
15 is handing proposed jury instructions to the defense
16 and the State. Let's go over these jury
17 instructions while the jury is at recess.

18 The first instruction is standard,
19 it's now my duty to instruct you in the law. The
20 second, if in these instructions is standard. The
21 third instruction states that the trial jury shall
22 fix the punishment for every person convicted of
23 murder in the first degree. The jury shall fix the
24 punishment at one through four.

25 Let's all make sure that those are

1 the proper statutory penalties available in this
2 case, so we have no error.

3 MR. SCHIECK: There are two counts, Your
4 Honor. Should we tell them that it's up to the
5 court to decide consecutive or concurrent? Because
6 if it's in term of years, he could get 200 years as
7 opposed to a hundred years.

8 THE COURT: Well --

9 MR. SCHIECK: I think they need to
10 understand that.

11 MR. OWENS: Your Honor, I think the other
12 instructions explain that and they can argue it
13 certainly, but this is a penalty --

14 THE COURT: Somewhere there was an
15 instruction, but I don't know if we gave it to them
16 in this group that says it's up to the court to
17 determine whether sentence should run concurrent or
18 consecutive.

19 MR. SCHIECK: I don't think it was in the
20 first set because we didn't talk about sentencing in
21 the first set.

22 THE COURT: It might be in this group
23 that I didn't give, but it was -- I know I read it.
24 Oh, at the end of this one it says, Each count
25 carries the same sentence and the district court

1 judge determines whether the sentence is on two
2 counts or consecutive or concurrent.

3 So do you have any problem with that
4 being in there.

5 MR. OWENS: Saying that the court's gonna
6 run it concurrent or consecutive?

7 THE COURT: Right.

8 MR. OWENS: I just think that's a matter
9 for argument, Your Honor.

10 MR. SCHIECK: Why can't we instruct? If
11 it's proper to argue it, why can't we argue to it in
12 instruction?

13 MR. OWENS: Your Honor, there's all kinds
14 of things that can happen after their verdict and --

15 THE COURT: Well, actually --

16 MR. OWENS: That's why this case got
17 reversed last time.

18 THE COURT: Well, actually, there's two
19 verdict forms, correct?

20 MR. OWENS: Right.

21 MR. SCHWARTZ: Yes.

22 THE COURT: There's one for Matt Dixon --
23 for the sentence for Matt Dixon and there's one
24 sentence for -- excuse me. Matt Gianakis and
25 there's one sentence for Carl Dixon. So no, I don't

1 think it's necessary to do that. They have to find,
2 they have to impose the sentence for each of these
3 murders. And so Instruction No. 3 is accurate,
4 absolutely as written, correct?

5 MR. SCHIECK: As written, yes, but they
6 don't understand that you can run them consecutive
7 or concurrent.

8 THE COURT: Yeah. And if we run them
9 consecutive and he gets the death penalty, they're
10 gonna kill him twice? That makes no sense at all.

11 And if he's gonna get life without
12 the possibility of parole, he's gonna do two life
13 sentences without the possibility of no parole? It
14 makes no sense at all.

15 So your objection is noted and
16 overruled.

17 No. 4 defines eligibility when a
18 minimum of 40 years has been served. Doesn't mean
19 he would be paroled and but only that he would be
20 eligible. Life with the possibility of parole is a
21 sentence which could provide that he would be
22 eligible for parole after a period of 40 years. It
23 doesn't mean he would be paroled.

24 Life without the possibility of
25 parole means exactly what it says, he would not be

1 eligible for parole. And if you sentence the
2 defendant, you must assume that the sentence would
3 be carried out.

4 Any objection to 4, counsel?

5 MR. SCHIECK: No, Your Honor.

6 THE COURT: 5.

7 MR. SCHIECK: Although he'd actually have
8 to make parole twice in order to get out in 40
9 years, but I don't think that's a big issue at this
10 point.

11 THE COURT: 5. In the penalty hearing,
12 evidence may be presented concerning aggravating and
13 mitigating circumstances relative to the offense and
14 any other evidence that bears on the defendant's
15 character associated is admissible.

16 MR. SCHIECK: No objection.

17 THE COURT: 6. The law does not require
18 the jury to impose the death penalty under any
19 circumstances, even when the aggravating
20 circumstances outweigh the mitigating circumstances,
21 nor does the defendant require of themselves any
22 mitigating circumstances in order to be sentenced to
23 less than death.

24 No problem with that one?

25 MR. SCHIECK: No, Your Honor.

1 THE COURT: 7. Any aspect of the
2 defendant's character or record and any of the
3 circumstances of the offense, including any desire
4 you may have to extend mercy to the defendant which
5 a jury believes is a basis for imposing a sentence
6 less than death, may be considered a mitigating
7 factor. Any one of them may be sufficient standing
8 alone to support a decision that death is not the
9 appropriate punishment in this case.

10 Any problem with that one?

11 MR. SCHIECK: Well, the fact that it
12 refers to mitigating factor might confuse them, but
13 I think that we can argue around it.

14 THE COURT: All right. The next one, the
15 jury's instructed that in determining the
16 appropriate penalty to be imposed in this case that
17 it may consider all evidence introduced from
18 instructions given at the penalty hearing phase of
19 these proceedings and the evidence introduced in the
20 trial in the matter.

21 MR. SCHIECK: No objection.

22 THE COURT: All right. Credibility,
23 believability is a stock instruction.

24 Although you are to consider the
25 evidence.

1 Reasonable common sense instruction
2 is 10.

3 During the course of proceeding,
4 testimony may have been elicited regarding a prior
5 penalty hearing, you are hereby instructed that you
6 are not to consider during your deliberations any
7 evidence, statements or references regarding any
8 prior penalty hearing or sentence.

9 I think the trial's been really
10 clean about that, but I think it's probably good to
11 give that instruction since the parents did testify
12 that they had addressed the jury.

13 MR. SCHIECK: And since then, we went
14 back to prison after the -- he went to prison after
15 the trial, they must know there was a penalty
16 hearing.

17 THE COURT: 12. During your
18 deliberation, we have all the exhibits, your verdict
19 must be unanimous.

20 13. Now we will listen to arguments
21 from counsel, and then the two verdict forms.

22 Counsel for the State, you are
23 familiar with the proposed instructions 1 through 13
24 inclusive.

25 Are there any additional

1 instructions not contained in 1 through 13 which the
2 State wishes to give?

3 MR. OWENS: No, Your Honor.

4 THE COURT: Are there any instructions in
5 1 through 13 that the State opposes giving?

6 MR. SCHWARTZ: No, Your Honor.

7 THE COURT: And counsel for Mr. Thomas,
8 you're familiar with proposed Instructions 1 through
9 13 inclusive other than the argument that you have
10 made on No. 3 regarding consecutive and concurrent
11 sentencing.

12 Are there any other instructions
13 that you wish given not included in 1 through 13?

14 MR. SCHIECK: No, Your Honor.

15 THE COURT: Are there --

16 MR. SCHIECK: Except as otherwise argued.

17 THE COURT: Are there any instructions
18 that you not want given in 1 through 13?

19 MR. SCHIECK: No, Your Honor.

20 THE COURT: All right. Then those are
21 the jury instructions and I will read instructions
22 at 10:35.

23 All right. We'll be in recess for
24 five minutes.

25 (Whereupon, a short recess was had.)

1 THE COURT: Good morning, ladies and
2 gentlemen. Welcome back to the continuation of the
3 penalty hearing in the State of Nevada versus Marlo
4 Thomas.

5 The record will reflect the presence
6 of parties and their counsel, all officers of the
7 court, and the full jury and alternate jurors.

8 The parties have concluded
9 presenting the evidence that each side wishes to
10 present during this penalty proceeding, and now it
11 is my duty to again instruct you on the law that
12 applies to this portion of the proceeding.

13 You all have a copy of the
14 instructions and you may take those back with you
15 when you go to deliberate.

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

21 You must not be concerned with the
22 wisdom of any rule or law stated in these
23 instructions. Regardless of any opinion you may
24 have as to what the law ought to be, it would a
25 violation of your oath to base a verdict upon any

1 other view in the law than that given you in the
2 instructions of the court.

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

12 The trial jury shall fix the
13 punishment for every person convicted of murder of
14 the first degree. The jury shall fix the punishment
15 at one, a definite term of 100 years with
16 eligibility for parole beginning when a minimum of
17 40 years has been served; or two, life imprisonment
18 with the possibility of parole with eligibility for
19 parole beginning when a minimum of 40 years has been
20 served; three, life imprisonment without the
21 possibility of parole which means exactly what it
22 says, that the defendant shall not be eligible for
23 parole; or four, death.

24 A prison term of 100 years with
25 eligibility for parole beginning when a minimum of

1 40 years has been served does not mean that the
2 defendant would be paroled after 40 years but only
3 that he or she would be eligible for parole after
4 that period of time.

5 Life imprisonment with the
6 possibility of parole will be sentenced to life
7 imprisonment which provides that the defendant would
8 be eligible for parole after a period of 40 years.
9 This does not mean that he would be paroled after 40
10 years but only that he would be eligible for parole
11 after that period of time.

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

15 If you sentence the defendant to
16 death, you must assume that the sentence will be
17 carried out.

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

23 The law does not require the jury to
24 impose the death penalty under any circumstances,
25 even when the aggravating circumstances outweigh the

1 mitigating circumstances. Nor is the defendant
2 required to establish any mitigating circumstances
3 in order to be sentenced to less than death.

4 Any aspect of the defendant's
5 character or record and any of the circumstances of
6 the offense, including any desire you may have to
7 extend mercy to the defendant which a jury believes
8 is a basis for imposing a sentence of less than
9 death, may be considered a mitigating factor. Any
10 one of them may be sufficient standing alone to
11 support a decision that death is not the appropriate
12 punishment in this case.

13 The jury is instructed that in
14 determining the appropriate penalty to be proposed
15 in this case, that it may consider all evidence
16 introduced and instructions given at the penalty
17 hearing phase of these proceedings and the evidence
18 introduced at the trial in this matter.

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

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

6 Although you are to consider only
7 the evidence in the case in reaching a verdict, you
8 must bring into consideration of the evidence your
9 every day common sense and judgment as reasonable
10 men and women. Thus, you are not limited solely to
11 what you see and hear as the witnesses testify. You
12 may draw reasonable inferences from the evidence
13 which you feel are justified in the light of common
14 experience, keeping in mind that such inferences
15 should not be based on speculation or guess. Your
16 verdict may never be influenced by prejudice or
17 public opinion. Your decision should be the product
18 of sincere judgment and sound discretion in
19 accordance with these rules of law.

20 During the course of these
21 proceedings, testimony may have been elicited
22 regarding a prior penalty hearing. You are hereby
23 instructed that you are not to consider during your
24 deliberations any evidence, statements or inferences
25 regarding any prior penalty hearing or sentence.

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

6 Your verdict must be unanimous.
7 When you have agreed upon your verdict, they should
8 be signed and dated by your foreperson.

9 Now you will listen to arguments of
10 counsel who will endeavor to aid you to reach a
11 proper verdict by refreshing in your mind of
12 evidence by showing the application thereof to the
13 law.

14 But whatever counsel may say, you
15 will bear in mind that it is your duty to be
16 governed in your deliberation by the evidence as you
17 understand it and remember it to be and by the law
18 as given to you in these instructions with the sole,
19 fixed and steadfast purpose of doing equal and exact
20 justice between the defendant and the State of
21 Nevada.

22 Then behind those instructions
23 there are two verdict forms. There's a verdict form
24 to Count II for Carl Dixon and a verdict form for
25 Count III for Matthew Gianakis.

1 Counsel for the State, are you ready
2 to close?

3 MR. OWENS: Yes. Thank you, Your Honor.
4 Daniel Hawthorne in his book to Scarlet Letter
5 wrote, No man for any considerable period can wear
6 one face to himself and another to the multitude
7 without finally getting bewildered as to which may
8 be the true.

9 And in this particular case, we have
10 seen two faces from the defendant Marlo Thomas. And
11 what we're going to be talking about in the next few
12 minutes is what the true face of Marlo Thomas really
13 is. He has a face that he wants you to see. It's a
14 face of remorse; it's a face of a man with a mother,
15 with a family, with friends; it's a face of a man
16 who is telling you that he deserves your mercy, that
17 he deserves society's mercy to the things that he
18 has done.

19 Is that the real Marlo Thomas or is
20 the real Marlo Thomas another face that's maybe not
21 so apparent, maybe not so visible when we look at
22 the defendant or hear him talking or hear from his
23 family.

24 But the face that's his real face,
25 which is the one that he lives every day of his

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1 life, the one that he shows in his current
2 environment, the one that he shows to the guards and
3 other people, the track record that he has
4 established throughout his life.

5 It was once said that it's difficult
6 to hear what a person's saying sometimes if their
7 actions speak louder than their words.

8 Words are easy. Anybody can come up
9 with words. If they're good, they might be able to
10 generate a tear or two.

11 But how they really are, what they
12 really think, what they really feel comes through in
13 most of our experience, through their actions. And
14 when we're judging a person, we tend to look at all
15 of those things to determine what the truth is.

16 Not all people are two-faced, but
17 the defendant in his current circumstances certainly
18 has a reason to be two-faced. And as we're going to
19 see, he does have the two faces. And one of them is
20 false, one of them is a fraud.

21 And the real face of Marlo Thomas
22 does not deserve mercy. The real face, the real
23 person of Marlo Thomas does not earn your mercy.

24 So let's talk about what we know
25 about the defendant, things that we've heard

1 throughout the course of this trial. You know, it
2 was interesting, both Mr. Thomas, his mother that he
3 parroted a minutes later when he gave his little
4 statement there, only God can take a life.

5 We're hearing that he found
6 religion, but, you know, in his whole statement,
7 that's the only thing that he said, and he's trying
8 to tell you that you're not God and you shouldn't be
9 taking a life.

10 How does the true Marlo Thomas feel?
11 That only God's can take a life? Who took the lives
12 of Matt Gianakis and Carl Dixon? Was that God?
13 That was Marlo Thomas who made himself God over
14 their lives that day.

15 And what kind of a trial did they
16 receive from the defendant in that kitchen, in that
17 bathroom, in that blood with that knife going up and
18 down and up and down?

19 You know, the mother, Georgia, seems
20 like a nice person. And if you look at the records,
21 and we're gonna talk about those in a minute, she
22 was a hands-on mother. She wasn't a neglectful
23 mother. She's saying now that maybe she could have
24 been better. But what mother doesn't feel that way?

25 She said that if you take Marlo's

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1 life, the State will be doing exactly what Marlo
2 did. Was that true? I mean, look at us here.
3 We've had a hearing for days, the evidence has been
4 presented, he's had counsel, you've been able to
5 look, to deliberate, you can consider in a calm
6 environment, you can weigh in a calm environment,
7 you can determine what's best having his life in
8 your hands. And how is that the same with the trial
9 that Marlo gave these two young men cut down in the
10 prime of their lives? I mean, it was a trial that
11 lasted about 15 seconds.

12 How did they plead their case as
13 that knife was coming up and down? Well, we know.
14 We know because that's all we've heard. One of
15 them, you heard Matthew, no, no, no, no, stop, stop
16 stop, stop. That's all the plea that they got.

17 And then the verdict was in, the
18 sentence was in. The execution of that sentence was
19 in about five seconds later. That's the trial that
20 they received.

21 And what were their crimes? What
22 were their crimes? The defendant had a falling out
23 with Matthew Dix -- with Carl. He's really talked
24 about how they knew each other and they're all
25 buddies, he wouldn't do this kind of thing and then

1 he talked about how it was self defense to the
2 police and he would never do this.

3 But we heard that he had some
4 problems with Carl and some animosity anyway. And
5 more importantly than that, they had something that
6 he wanted and they stood between him and that, and
7 that was the money. That was their crime. They
8 were there. He didn't like at least Carl and he
9 wanted the money.

10 The State will be doing exactly what
11 Marlo did? Hardly.

12 You know, we have processes in
13 society, we have laws in society. We're a society
14 of law, we're a society of justice, we're a society
15 of on occasion mercy as well. All of that is built
16 into the system. And that's what we're seeing here
17 today. And this jury speaks for that society.

18 And there are people who live in our
19 society who do not deserve to live in our society,
20 who have forfeited that opportunity, that privilege
21 of life. And Marlo Thomas is one of those.

22 And then society can judge, can
23 judge in a fair hearing and do what it feels is
24 appropriate.

25 In this case, ladies and gentlemen,

1 what's appropriate, what's going to put things back
2 in place, what's going to do justice in this case is
3 the imposition of finding this jury that what
4 happened to these two young men in the big scheme
5 and picture of everything else you know about the
6 defendant, the death penalty is the appropriate
7 punishment under these circumstances.

8 No, no, no, stop, stop, stop. We've
9 got Matthew running over to the convenience store,
10 can you help me. And they tried, but it wasn't
11 enough. And it's hard -- I mean, you can't evaluate
12 this without going back to what brought us here, the
13 actions of the defendant and what these young men
14 went through at that time.

15 You know, there's a lot of ways to
16 die. Even criminal ways to die. They're not all
17 the same. You've got to think about the suffering,
18 the horror that Carl and Matthew went through at the
19 time of their deaths. And what a horrendous thing
20 that was.

21 I mean, Carl, as that knife came
22 down again and again and again and he got his hands
23 up and he tried the best he could to protect himself
24 in that bathroom and that knife came down and sliced
25 his arms and sliced his hand, and it sliced every

1 other thing t he could keep putting up in front
2 of that trying to protect himself from that ugly,
3 ugly instrument, that boning knife. All to no avail
4 because eventually it found his vital organs and
5 then he was left there in his own blood while the
6 defendant went stalking Mr. Gianakis.

7 Mr. Gianakis maybe here for a little
8 while after he was stabbed figured out how to get
9 away, knew he was stabbed, did he know he was
10 mortally stabbed, did he know he was going to die?

11 What were Carl's last thoughts as he
12 laid there on the floor bleeding out? He knew he
13 was dying. He was in pain. Was he thinking of his
14 family? Was he thinking of his mother? Was he
15 thinking of the people that he loved?

16 And this was an outstanding young
17 man. Both of them were. He had plans, he had a
18 future, he had things that he wanted to do. He'd
19 been going to school very diligently. He deserved
20 an opportunity to live his life.

21 What was he thinking about the
22 things that he couldn't do at that point in his life
23 as his -- as his force of the way because of that
24 money that the defendant wanted.

25 19 stab wounds to the left side of

1 his chest. Think about what force it takes to do
2 that and how long it takes to do that and what the
3 intention of the wielder of that knife would be.

4 19 times besides all the other
5 times. Three stab wounds to the right side of the
6 chest, nine stab, cutting defensive wounds to the
7 left arm, a defensive wound to the tip of the left
8 middle finger, six defensive wounds to the right
9 hand, stab wound to the left thigh.

10 You have the diagram and evidence
11 before you. What a mosaic of violence is portrayed
12 by that diagram of the body of Carl Dixon.

13 Mr. Gianakis, you heard from his
14 family; a nice young man, well liked. What were his
15 plans? What was his potential for life that was cut
16 down? He for a period of time might have thought
17 that he was going to be okay. He didn't die right
18 away.

19 He ran for his life in horror
20 thinking that any minute the defendant could be
21 right behind him and finish it, but he was finished
22 anyway. And at some point that must have dawned on
23 him on the floor of that convenience store, stab
24 wounds to the chest, stab wound to his back, both of
25 them mortal.

1 And what is the face of Marlo
2 Thomas? Let's take a look at some of the other
3 evidence that we've seen over the last couple of
4 days.

5 You know, we started out -- in the
6 first phase you saw a couple of judgments of
7 convictions, those are Exhibits 88 and 103, and you
8 heard about a couple of attempt robberies.

9 And there was questions that were
10 asked some of the witnesses by the defense attorney,
11 you know, gosh, you know, he went to prison and that
12 was his first robbery and, you know, the suggestion
13 there is about what an unfair thing that was, but at
14 that point in time that's about all that you knew
15 about him, but we didn't have the whole big out
16 of the bag at that time. We didn't get to see the
17 whole thing.

18 Now we're in phase two and you can
19 kind of see that it wasn't an unfair thing because
20 there's a whole bunch more stuff that you didn't
21 know about and it all creates a pattern that gives a
22 picture who the true Marlo Thomas is and why the
23 system has dealt with him the way that it has. If
24 anything, it has been much too lenient with him.

25 And we've got Exhibits 87 and 102.

1 Now not every single conviction or disposition is
2 marked and in front of you, but Exhibits 87 and 102
3 which came in yesterday are those PSIs that John
4 Springate testified to you. These are the documents
5 prepared by the Department of Parole and Probation
6 that set out a bunch of different factors for the
7 court to consider when it's doing its sentencing.
8 And it's got information in there that will help you
9 as well.

10 One was done in 1990 and the other
11 one was done in -- sometime after that. Let's see.
12 1996. You've got the dates on them and they're
13 packed with information.

14 And one of the things that's in
15 there is a chronology of the criminal history of the
16 defendant up to those points this time.

17 You also have some documents
18 identified by the witness that testified from
19 juvenile who said that these were the certification
20 documents. You'll see the stack of petitions in
21 there of every time -- not every time, but most of
22 the times that it was brought up for some crime he
23 committed as a juvenile.

24 And then that whole history is
25 repeated in that certification order which you also

1 have. So let's take a look at that criminal
2 history.

3 Defendant was born in 1972. His
4 criminal history begins in 1984. At least that's
5 the first one that we have a record of. And that
6 involved a battery where he struck one of his
7 teachers.

8 And there's a pattern to this that
9 you're gonna see here about acting violently and
10 physically towards other people; assaultive
11 behavior. Even up to the most recent stuff with him
12 in prison while he's HRP, he's an assaultive person.
13 And if he's got a weapon available to him, he will
14 use it. That's the pattern.

15 July 6th, 1984 was a robbery that
16 was amended to a battery. The victim there was a
17 William Howe.

18 That same date a battery occurred
19 where he struck a student.

20 And we have September of '84, a
21 battery on Sharon Robinson.

22 Then September, evading a police
23 officer.

24 November 7th, trespassing and
25 battery. It was a battery of a Maria Gonzalez.

1 May 8th, 1985, disorderly conduct.
2 And look at the dispositions down on the right side.
3 And all this information is on those reports. You
4 can take them out and look at them.

5 And look what's happening with him.
6 Look at all the chances that he gets. Judicial
7 reprimand, formal probation, formal probation,
8 formal probation, dismissed, dismissed, he had a
9 wardship with the court, he was on probation.

10 Continuing August of '85, there's a
11 trespass. He gets probation.

12 '85, a battery again against Walter
13 McKay. That charge is ultimately dismissed.

14 October of '85 -- you know, a lot of
15 these probations, they'll keep them on probation for
16 a period of time and then eventually dismiss the
17 charge against them and --

18 MR. SCHIECK: I'm gonna object, Your
19 Honor. There's no evidence of that in the record.

20 MR. OWENS: Well, there is actually. All
21 they have to do is take a look at the reports and
22 they'll see a lot of that in there.

23 THE COURT: Well, the jury can look at
24 the reports. And if it's there, it's there. And if
25 it isn't, then Mr. Owens can't be testifying about

1 it.

2 MR. OWENS: Then in October of 1985, he
3 committed a battery on four people; Rebecca Neckle,
4 Marcy Washburn, John Kettel and Sharon Robinson.
5 Was probation and then a dismissal.

6 There was a battery in '86. Two of
7 them, March 4th, March 14th. One was denied, the
8 other was dismissed.

9 There was a grand larceny June of
10 1987. He was sent to the third cottage and Nevada
11 Youth Training Center.

12 And you see a progression of
13 dispositions in trying to deal with him and getting
14 him to act appropriately.

15 Continuing in '87, July, we've got a
16 battery with a deadly weapon now against Jerry Reed.
17 That's eventually dismissed.

18 A battery with substantial bodily
19 harm on Cathy Barthus. That's the one you heard
20 about in the first hearing. And that was shortly
21 before. Let's see. It was 1998. For that he was
22 committed to the Nevada Youth Training Center.

23 Then we had in '88 a grand larceny,
24 a grand larceny auto and a battery. Once again,
25 send him back to Nevada Youth Training Center.

1 1989 was when he was released from
2 the training center. That was in May 25th, and we
3 don't have anything else going on then until for
4 about six months.

5 And then in December we've got a
6 battery. This time it's on his nine year old cousin
7 and another individual.

8 The next date we've got a robbery
9 against Alkarem Hanifa. And he's certified as an
10 adult on that charge. And the result of that is he
11 spends now three weeks in adult custody in the adult
12 jail. And that's the end of that disposition on
13 that particular charge. And you heard the testimony
14 read to you from Alkarem Hanifa about what had
15 happened to him in this particular incident.

16 At this point in time, you're gonna
17 find a report in there, a summary report in the
18 certification hearing detailing his activities. 13
19 arrests for battery, including battery on a staff
20 person in one of the facilities that he was sent to
21 for rehabilitation, to the point where they couldn't
22 keep him in there anymore.

23 In January 4th of 1990, we have the
24 robbery charge that we talked about in the first
25 hearing, certified as an adult.

1 had a possession of stolen
2 vehicle. He got credit for time served on that.
3 Obstructing a public officer.

4 The robbery case of Beltrain
5 (phonetic) in 1990. That's the one where we heard
6 that he went to prison on. So it's not like he just
7 did a robbery and all of a sudden went to prison.

8 He was let out on bail on that
9 charge of the battery that we heard about with Ms.
10 Jackson and then just a short time after he was let
11 out, he committed that robbery of Mr. Beltrain. I'm
12 sorry.

13 There was a later offense, Aletha
14 Jackson in 1996. After he got out of prison, he
15 committed that battery against her in that incident
16 that we heard evidence on.

17 And then it was only a short time
18 after he was let out on bail for that that he
19 committed the instant offense, the murder of the two
20 young men that we're looking at here, that occurring
21 on April 17th of 1996.

22 That's his history in the criminal
23 justice system through the juvenile and through the
24 adult courts. And that tells us a lot about the
25 what kind of an individual he is from his actions.

1 I mean, he can say anything he wants.

2 And if you look at those reports,
3 and you'll see on the PSI, he says things in here to
4 the court similar to what heard today. Just give me
5 another chance, I know I can do better, this isn't
6 the kind of thing I do, I was raised better than
7 this, have mercy on me. You'll see that in there 15
8 years ago.

9 And then you see him coming back
10 after probation, after probation, after probation,
11 after rehabilitation programs and just doing the
12 same thing. This is a pattern going back years and
13 years and years where the defendant was saying one
14 thing but doing another.

15 And where he's been most recently
16 has been in the Nevada State Prison system. He's
17 been in there a couple of times. He went in there
18 for that robbery in 1990, got out, continued with
19 his criminal conduct, did the murder, did battery
20 with substantial bodily harm.

21 And then we've got a history here
22 that starts, and it's not all in here, but you have
23 this one exhibit which is Exhibit No. 100 that we
24 talked about that tracks his history, that first
25 term in prison. And you have some incident reports

1 for that. And we called some of the witnesses from
2 the prison systems on that, but not all of them.

3 And a lot of those involve assaults
4 where he took swings, tried to strike, tried to
5 batter, tried to injure people in the prison system.

6 And then we've got this packet that
7 was put out in the second phase here which is marked
8 as No. 116 which is a whole stack of disciplinary
9 things found by year going back to 1996 with a
10 summary on the top. And you heard from the warden
11 today that this is an unusual size of
12 disciplinaries.

13 You know, you've got, you know, 1100
14 people in the system and 20 of them that are HRPs.
15 The Defendant's one of 20 HRPs for assaultive
16 behavior. If you don't get a disciplinary report
17 for a year, you don't have to be an HRP. You've got
18 a thousand and 80 inmates apparently that are able
19 to do that. You're able to go year after year
20 without getting any write-ups. The defendant can't
21 go for months or even days sometimes without getting
22 write-ups.

23 And this is important because once
24 again, you know, we can sit here and listen to the
25 defendant and say, you know, maybe he seems sincere,

1 maybe he's really remorseful, maybe he's really
2 sorry but what is his conduct telling us? What does
3 his conduct tell us about how his attitude was
4 before he committed this murder? And very
5 significantly, what's his attitude been since then?
6 How has he been conducting his life? Where is the
7 remorse in his life? Where is the desire to change
8 his life around?

9 Let's take a look. In '96, we've
10 got the one battery that we've heard about. '97
11 we've got another battery. We've got a lot of other
12 things in between where he's just simply refusing to
13 comply with regulations and having problems and
14 difficulties with the officers in the prison.

15 He's not a person that wants to be
16 told what to do. He's a person that wants to have
17 his own way. When he can have his own way, he's
18 gonna get his own way, he's gonna batter people to
19 get his own way. And the only thing that prevents
20 him from doing that is when he's in lock down which
21 is where they've been keeping him the whole time
22 he's been in prison. And it comes through.

23 I'm not gonna go through all the
24 abusive language. Unhappily we had to do that a
25 little while ago with the warden. This is egregious

1 verbal thing. It's one thing to be profane. And
2 this is just the tip of the iceberg of the kind of
3 stuff that he says, with the threats that he makes
4 to the prison personal.

5 When you go through this packet,
6 you're gonna find many, many more incidents of
7 threats and this type of language to the people that
8 are there working in the system, and all these other
9 things that he does to cause problems and try to
10 incite other prisoners.

11 They say he gets along with other
12 prisoners. Well, those are his buddies. He's kind
13 of a leader there. He's in there and he's inciting
14 them to do inappropriate things also. And that
15 comes through again and again and again.

16 And the prison guards take him
17 seriously in his threats. It's not like he's just
18 talking because not only does he threaten to kill
19 them and do things to them, but from time to time
20 when you look at that when he gets a chance, he
21 actually acts on it. He takes swings at them, he
22 spits on them, he throws urine on them, he head
23 butts them. So they take him very seriously.

24 You'll see tons and tons of reports
25 in there of him exposing himself to the women, the

1 female personnel in there, and refusing to do things
2 that they say and is constant, constant refusal to
3 accept the situation that he's in.

4 There was a forgery incident that he
5 was convicted of in the prison system there of
6 disciplinary proceeding; there was a filing false
7 grievances was the charge in there that you're gonna
8 see.

9 '98, '99, this is all after his
10 conviction in this case. This is what he's doing up
11 there. They've got him in lock down, he can't have
12 the association with the other inmates. This is his
13 own choice. This is how he chooses to live his life
14 up there by his conduct.

15 '99, he's lying, he's continuing to
16 have problems, he's threatening guards. Continuing
17 to threaten personnel, continuing work stoppage,
18 blocking his windows, exposing himself.

19 And they don't write him up every
20 time. It's only if there's been repeated conduct
21 that they finally start doing these reports. They
22 find contraband in his cell.

23 We heard about things that he had
24 that he wasn't supposed to have, when the guards
25 would take it from him, he would get upset, he would

1 get physical and spit on them and he would try to
2 head-butt them.

3 They found a razor blade in his
4 personal mail, they found a homemade knife, more
5 threats. This just goes on and on and on.
6 Contraband, destroying notices, refusing to give
7 urine samples that they ask him for, work stoppage.

8 He's just being as big a problem as
9 he can be within the constraints that they put him
10 on up at the prison.

11 There's an old Amish saying, I think
12 it's Amish, fool me once, shame on you; fool me
13 twice, shame on me.

14 The defendant, Mr. Marlo Thomas, has
15 fooled the system. Not once, not twice, not three
16 times, but again and again and again and again.

17 I mean, maybe, maybe he's not really
18 fooling them. I mean, the judges look at it, but
19 there's compassion in the system, too. You can see
20 that. There's mercy. You can see all the chances
21 that he's had.

22 Maybe they thought he probably won't
23 do better but let's give him this chance. And maybe
24 they weren't fooled, but they still gave him his
25 chance and he violated it. And they gave him his

1 chance and he violated it.

2 And what happened? What was the
3 result of all of that mercy that was given to the
4 defendant? Suffering by a lot of different people
5 and the death of these two fine young men. That was
6 the price of mercy for the defendant.

7 You heard from the family members
8 the other day, heard again from the mother Georgia
9 today. What'd they talk about how they knew him?

10 You know, Charles Nash hadn't seen
11 him in a while, couldn't remember the last time he'd
12 seen the defendant. They'd grown up and been
13 together every day.

14 The one individual Paul Hardwick
15 said he wrote a letter a year ago. The mother said
16 she hasn't been to visit him. There's a record of
17 visits, but she said oh, I write him lots of
18 letters. Well, how much contact have they really
19 had with him? How much concern do they really have
20 for him?

21 What we heard really yesterday was
22 just a lot of opportunities the family was giving us
23 to blame other people. His mother, his father, the
24 crowd, the drugs. Today we hear about the system.

25 And one reason you got all these reports because if

1 it was just one or two guards they'd say well, it's
2 just a personality problem. But when you look
3 through all those, you just read different guard
4 after different guard all having problems with him.
5 The problems not with the guards, the problems not
6 with the system. The problems with Marlo Thomas.

7 And still yet today he can say, you
8 know, I've learned my lesson, you know, I'm trying
9 to do better, I'm deserving of mercy.

10 But what are his actions saying?
11 He's trying to say well, maybe the guards have a
12 problem. He get's along with everyone else, maybe
13 it's just the guards. Maybe the guards make things
14 up is what all these young men told us today. You
15 know, it's the guards, it's the guards. It's not
16 Marlo, it's the guards. But he wants you to think
17 that he's taking responsibility.

18 And how much does his family really
19 know about this young man when they get up yesterday
20 and they say about his, the trouble he was getting
21 into. And we've just seen it now.

22 I mean, there were are dozens of
23 these batteries in violence that was going on from
24 the time that he was about 12 or 14, 12 years of
25 age, and yet what was the family telling us

1 yesterday when they heard about the murders? It
2 doesn't sound like Marlo we're told by Mr. Hudson.
3 He wouldn't do something like that, Shirley Nash
4 says. Charles Nash says it's not him, you've got
5 the wrong person. I know him and that's not him.

6 That's what they want you to believe, but
7 you hadn't seen the whole pig yesterday. That's not
8 him, you've got the wrong person.

9 It is him. It's him to a 'T' when
10 you look at that whole record. They said he started
11 getting into fights, that's normal. We were told he
12 was a typical kid, a little trouble. He started
13 acting out is what we were told.

14 Acting out. Acting out. They said
15 he got in some school fights. Back and fourth, back
16 and forth, back and forth with the court system.
17 He's back again now.

18 And you need to sentence Marlo
19 Thomas for the person that he really is, and that's
20 the person that is shown through his actions.

21 Think of all the chances that he's
22 had. It's not an individual that just came out and
23 slapped him out the first time. It's really
24 important to think about all of the opportunities
25 that he's had to reform his conduct even after these

1 murders occurred. And that has happened.

2 Is there a place for mercy? There
3 is a place for mercy certainly. There are
4 individuals with truly extenuating circumstances
5 that impact what they did, that have put themselves
6 in a position where mercy should operate.

7 But mercy shouldn't be a freebie for
8 anybody that has a mouth and vocal cords and can get
9 up and say I'm sorry, if I could change it, I would,
10 or it shouldn't be a freebie for anybody that
11 happens to have a mother that loves him and cares
12 about him or family members who feel that same way.
13 It's something that should be earned.

14 Mercy should be for the individual
15 that has true remorse for what they did. It should
16 be for the individual that want to make a change in
17 their life, who wants to restore as much as they can
18 the harm that they have done, who wants to become a
19 different person, who has become a different person,
20 who truly recognizes the depth of the wrong that
21 they have done and has other factors or
22 circumstances perhaps that mitigate or explain why
23 this thing happened.

24 We don't have that here. All we
25 have is lip service. Now, it's easy to say in a

1 position that you might find yourselves in at this
2 point, because giving the death penalty is a hard
3 thing. You know, that's the most serious punishment
4 we're looking at here. And that requires a real
5 moral effort to do that.

6 Now, it's discussed -- I wasn't here
7 for all the voir dire, but that's something that's
8 discussed extensively in voir dire and everyone's
9 have had to look at their consciences I'm sure over
10 the last few days to consider that and that consider
11 that punishment.

12 It is a hard thing and so it's
13 natural as human beings to look for reasons to not
14 impose that. And that's what should happen.

15 We should look at everything. We
16 should be as careful as we can possibly be before
17 that penalty is imposed. But in our desire as human
18 beings, in our generally forgiving natures, we need
19 to be careful that that seriousness of that
20 punishment doesn't make us look for cop outs or an
21 easy reason so we can grab on to to give the
22 defendant something less than what he truly
23 deserves.

24 I mean, it's easy to say well, he
25 got up and said he was sorry, you know, a person's

1 that's sorry, he shouldn't get. That's lip
2 service. Anybody can get up and say that. Anybody
3 can do that.

4 But has the defendant really turned
5 his life around? Has he really shown a true sorrow?
6 No. His life to him is a big joke. Maneuvering the
7 system, maneuvering people, taking the swings when
8 he can get them, that's the life that he's living,
9 that's the remorse that he has for what he's done.

10 What's he doing productively with
11 his life? What is his life? Who is he? What's he
12 producing? What does he believe in? Where is he
13 going?

14 His life is doing disciplinary
15 infractions and having problems with those that are
16 charged to take care of it. That's it. That's the
17 remorse that he shows, that's his change of life,
18 that's his life plan.

19 Now, some people say sometimes that
20 it might be a worse punishment to give a person life
21 in prison without the possibility of parole than the
22 death penalty. And for many people, that is
23 probably true because for most people, if they did
24 something wrong like this, they would feel so
25 horrible that they would punish themselves and they

1 would punish themselves again and again and again.

2 And the defendant tried to say that
3 that's what's happening with him, that he always
4 thinks about them every day and every moment, but
5 his conduct doesn't indicate that at all. It
6 doesn't indicate that at all. And once again,
7 that's lip service.

8 And the people that would truly feel
9 bad about that having the whole life time to sit in
10 agony, that might be -- maybe that is the worse
11 punishment. But you can't think in that way when
12 you're dealing with people that commit crimes like
13 this.

14 Criminals don't think that way.
15 They don't feel natural remorse, they don't feel
16 sorry, they don't worry about consequences. They
17 just worry about what they want. They are selfish
18 to the extreme. It's a me, me, me, me world.

19 So you can sit and say let's just
20 leave him in there for the rest his life and let him
21 stew, there's not gonna be any stewing with Marlo
22 Thomas. He'll be the person laughing all the way to
23 the bank or laughing all the way back to the prison
24 system because he doesn't think like regular people
25 think. And that's important to remember that.

1 How does he think You can see it.
2 You can see it in how he is living his life and how
3 he has been living his life in the prison.

4 Yeah, okay, so maybe he told some
5 other inmates to stay out of trouble, Maybe he
6 talked to a couple of nephews, hey, don't get in
7 trouble.

8 You know, a lot of things, is he
9 sorry for what he did or is he sorry for being in
10 this position? Is he really sorry for what he did
11 or is he sorry that his mother had to come in and
12 testify?

13 You know, is he really sorry about
14 what he did when he was trying to tell these other
15 people to stay out of trouble or is he just telling
16 him that things will go better for them if they do?

17 Everything in his life other than
18 this lip thing coming out from him would indicate
19 that there is no sorry and no remorse whatsoever.

20 Don't take the easy way out in this
21 case. If you listen to everything and you feel that
22 mercy is appropriate, so be it. But if you consider
23 all the facts and circumstances in this case and you
24 discuss it among yourselves and you find the real
25 face of Marlo Thomas, you will find that mercy is

1 not appropriate in this case, that the appropriate
2 punishment in this case is the death penalty.

3 We talked briefly at the last time I
4 was talking in my remarks about this money, this
5 blood money. This is the reason. The defendant
6 took these two lives because he decided that they
7 were not as valuable as this green stuff right here.
8 To him in that moment, he just didn't care because
9 he always subordinates other people's desires and
10 lives to his own, for his own gratification.

11 Quick money. His mother said in one
12 of the reports, you can see it in there in those
13 PSIs, quick money is enough to get the defendant
14 going. He weighed the lives of Matthew and Carl and
15 he just didn't care. Now you are weighing the life
16 of the defendant.

17 And ladies and gentlemen, he is
18 found wanting. What do you put on that scale, on
19 that scale of justice?

20 On the one side, you have two lives
21 where all the potential, and we had heard the
22 fathers talk. You got Matthew and Carl on there and
23 with them you've got their parents, you've got their
24 siblings. You've got the lives ruined, the bigger
25 picture, the friends, the things that didn't happen

1 for these you men and the things that will never
2 happen.

3 You heard Mr. Gianakis talk about
4 grandchildren. You heard Mr. Dixon talk about that
5 and the hopes that he's never gonna have any
6 grandchildren that he always thought he would have
7 with his only son.

8 Tremendous, tremendous destruction
9 on that side of the scale. What is going to be put
10 on the other side of the scale to balance that, to
11 make it just?

12 The only thing that can go on there
13 that's going to balance that is the life of the
14 defendant. A life is not an automatic thing. Life
15 is a privilege. We live in society. How we conduct
16 ourselves is a privilege. And that privilege stops
17 when we hurt other people.

18 And what the consequences that has
19 to be taken, the resort that has to be taken to
20 protect ourselves and to do justice is the subject
21 of why we're here today.

22 Are you gonna put a term of years up
23 there? Are you gonna put a life sentence up there
24 for Mr. Marlo Thomas and say that that's gonna
25 balance the scales in this case? Whether another

1 individual a little bit of mercy might make the
2 difference if they earned it, but that didn't happen
3 here. He didn't kill one person, he killed two
4 persons. He's battered many people.

5 We've got Mr. Gianakis had that
6 dream even now all these years later, eight, nine
7 years, and he still sees his son calling out to him
8 telling him that he's in trouble and that he needs
9 help, but he can't help him. He even says he feels
10 a little guilty.

11 Can you imagine that, for you to
12 conceive of that, that maybe if he had a flat tire
13 leaving him at work or something else had happened
14 that this wouldn't have happened. And he lives with
15 that guilt. He lives with that. It's unimaginable
16 the suffering here.

17 There is a place for mercy, but not
18 in this case, ladies and gentlemen, not for Mr.
19 Thomas.

20 It's not just to protect society,
21 it's not just for punishment, but it's to say
22 something about what we as a society value as human
23 life.

24 That's what the death penalty does.
25 It says what value society places upon human life.

1 And what esteem do we hold it? don't do it in
2 every murder case. We do it in the worst of the
3 worst. This is the worst of the worst.

4 This is a case where the death
5 penalty is appropriate. And by your verdict of
6 death, you will slow the value that we do place on
7 the life, not only of these young men but of every
8 innocent life that is taken in this kind of a brutal
9 command.

10 We ask you to come back with that
11 punishment because when you consider all the
12 evidence and discuss it, you will find that it is
13 the appropriate punishment. It's the only one that
14 fits this, all the things that happened occurred in
15 this case.

16 Thank you.

17 THE COURT: Thank you. Counsel for the
18 defense, are you ready to close?

19 MR. ALBREGTS: Yes.

20 THE COURT: You may proceed.

21 MR. ALBREGTS: As you might imagine, I've
22 been thinking a long time about what to say to 12
23 people who I met five days ago that might make them
24 consider not granting the State's wish to execute
25 Mr. Schieck's and I's client.

1 They don't have a class for this in
2 law school, there's no legal treatise, there's no
3 text that tells you what to say, what to do, how to
4 ask people to consider life. So I thought long and
5 hard, did my best and now I'm gonna try to do it.

6 They're telling you that Mr. Thomas
7 does not deserve to live in society. And I suggest
8 to you that no matter what of the verdict forms you
9 choose, which of the four, that Mr. Thomas will not
10 ever, ever live in society again no matter what you
11 do,

12 And I'm not suggesting that you
13 sentence him to a term of life, I'm not suggesting
14 that you sentence him to a term of life with any
15 possibility of parole, although if you looked at the
16 instruction, even if you did that, the chances of
17 his being released are slim and most likely not.

18 Now I'm asking you to consider not
19 to allow the State to execute him, to allow him a
20 chance at life.

21 And the fact, the irony of that,
22 with what he did to Carl and Matt is not lost on me.
23 It's not lost on Mr. Schieck, it's not lost on Marlo
24 Thomas. With the nature of the crime and the nature
25 of the emotions in this case, it's gravely

1 difficult.

2 We cannot imagine what these
3 families have gone through. Those of you without
4 kids, you know. Those of you with kids, you really
5 know.

6 But what we told you at the start of
7 the trial, it was gonna generate emotions, passion,
8 and I tell you now maybe hate. And you'll hear
9 that, I'm sure, passion, emotion, those things in
10 the rebuttal closing. You'll probably hear them
11 during the course of my closing.

12 And you people have the unenviable
13 task of trying to sort that out, separate yourself
14 from it and decide what is right in a very difficult
15 situation in this case.

16 I would ask you now to set all that
17 aside. And I've decided all too often lawyers sit
18 up here and tell you what you need to think, what
19 you need to do, and what you need to consider. But
20 I'm not gonna do that.

21 I'm simply gonna ask you when you
22 make your decision about life or death, when you
23 decide whether or not the State should execute
24 Marlo, just consider the things that I'm gonna talk
25 to you.

1 I'm gonna ask you to think about it
2 also when you hear Mr. Schwartz do his rebuttal
3 closing and think about it when you're back there
4 doing deliberating. That's all. Just give it some
5 consideration.

6 Because in our system of laws which
7 makes us a country unlike any other, even a person
8 who did what Marlo Thomas did, something
9 unimaginable, he's entitled to that, and so that is
10 all I ask you to do.

11 So what I ask you to think about, I
12 would ask you to think first of all about his
13 upbringing. Let me be clear to you people: None of
14 this is an excuse. It's not an excuse. It's not.
15 And Marlo tells you that. Tells you this morning,
16 don't blame my upbringing, don't blame my mother.

17 But I think that you at least need
18 to consider in your heart of hearts when you decide
19 are we going to execute this man, that being the
20 State of Nevada, gonna execute this man.

21 He was the third of four boys, he
22 was his mother's baby for a short period of time.
23 His father didn't think he was his father so his
24 father shunned and denied that little boy. I can't
25 think of anymore difficult thing for a young man

1 being brought up, but that was state of Marlo's
2 life as a young boy.

3 His father was abusive to his
4 mother. He saw and knew violence from the very
5 start.

6 In fact, you heard it one time when
7 his father was beating his mother and Marlo tried to
8 jump in. From the beginning all he knew was
9 violence. And that father finally perpetrated
10 violence on another and went to prison for the rest
11 of his life and Marlo never saw him again. That
12 left a single mother raising three and then four
13 boys, the first two who were a little older than
14 Marlo.

15 I'm not here to make value judgments
16 on Mrs. Thomas or anybody else, but it's something
17 you need to consider that leads us here today.

18 Think about her job back then. She
19 was a custodian and ultimately a custodian at a high
20 school. She told you she worked swing shift, 3:00
21 to 11:00, to make ends-meet to be able to feed,
22 cloth and house those boys. She went to work,
23 school when Marlo came home from school.

24 Marlo's mother was working during
25 the hours that Marlo was home. His brothers watched

1 him. The one you heard testify, the pastor, was
2 five, six years older, the oldest.

3 We also heard that the brothers
4 fought. On one occasion, we heard that at least in
5 one of those fights Marlo was hit in the head with a
6 fire extinguisher. All he knew growing up was
7 violence. These aren't brothers fighting like
8 normal brothers do. These escalate.

9 How much guidance did he have in
10 that household? How much direction did he have?
11 How much love did he feel?

12 These are things that you at least
13 need to consider before you decide to let the State
14 execute Marlo. And in fact, at least one of you,
15 maybe more, found in the first stage that the denial
16 of the son at least was a mitigating factor.

17 He turns to the wrong crowd, he has
18 behavioral problems in school and he clearly has
19 learning and emotional disabilities. You'll see in
20 the records there that he was sent to the behavioral
21 services academy, a special school. At least one of
22 you found, and maybe more, that that also was a
23 mitigating circumstance as well.

24 He did not want to be there. He
25 asked his mother to send him home, let him go back

1 to the regular school. She did not, and he felt
2 like she did that because she didn't love him.

3 And you also heard that when P.J.,
4 Paul, his little brother was born, he became the
5 focus of all of her attention. And he did start to
6 act out. He started by hitting or kicking a
7 teacher, by committing other acts and other crimes
8 as a juvenile.

9 We can play arm chair psychiatrist
10 all we want and say it was the family, it was the
11 search for love. I'm not here to tell you any of
12 that. I don't know.

13 But there are things that turned
14 this little boy into this man. You heard about the
15 Meadows Mall incident in which the security guard
16 was punched by a young teenage Marlo. Marlo didn't
17 have the criminal sophistication enough to run. All
18 of the other boys, except she said one kind of
19 stayed off on the fringes, all of them ran. Marlo
20 didn't even have the sophistication to do that. He
21 stood and fought like he saw from the day he could
22 remember.

23 Then you heard about the Arrowhead
24 Hotel incident, with the gentleman who said that he
25 was beaten and robbed. And what was the testimony

1 that we read in? He said that the other individual
2 who was with Marlo was older and was the one who was
3 doing the initial beating. He did say Marlo came in
4 later, but this is the type of role models that
5 Marlo had in his life. And he was in the system.
6 He was in the juvenile system. You've got the
7 records.

8 You know, his mother can't remember
9 the statement she told them years and years ago.
10 When you bring your common sense and life
11 experiences with you -- and I suggest that you think
12 maybe she wasn't as forthcoming to those people,
13 people she didn't know, trying to raise four boys by
14 herself. Maybe she wasn't as forthcoming telling
15 them these things about what Marlo had went through.

16 Is she gonna tell them that she was
17 a poor mother? Is she gonna tell them she beats him
18 and doesn't love him? Probably not.

19 These aren't excuses because his
20 actions can't be excused, but it certainly should be
21 considered. And I'm not here to blame the system,
22 I'm not here to blame anybody else. It is what it
23 is.

24 Prosecution would tell you oh, maybe
25 the system was too lenient on him. I would suggest

1 that the system was not too lenient on Marlo the
2 first time he went into the adult system. That's
3 the young adult that little boy turned into.

4 He was certified up from juvenile
5 court to adult court at the age of 17. A judge
6 listened to the evidence and decided it was
7 appropriate. And I'm not gonna sit here and try to
8 claim it wasn't.

9 And as a 17 year old, he was
10 sentenced to six years in prison. And not just any
11 prison, but the maximum security facility that
12 you've heard more about in the last two days than
13 you probably ever would have dreamed of up in Ely
14 Nevada where you get tough or die.

15 MR. OWENS: Your Honor --

16 MR. ALBREGTS: Where you do what it takes
17 to survive.

18 MR. OWENS: I hate to interrupt, but
19 there's no evidence that the judge sentences a
20 defendant to a particular prison.

21 THE COURT: Your objection is noted. And
22 for the jury's sake, courts only sentence people to
23 prison. The prison system sends them to whichever
24 facility that deem is appropriate.

25 MR. ALBREGTS: And if inferred that, I

1 misspoke, but I apologize. But he was sentenced to
2 four to six years. Certainly not too lenient. And
3 he ended up in Ely.

4 A lot of what the prosecution has
5 argued to you and I suspect will argue to you that
6 they believe justifies death is the prison conduct.

7 I suggest before you decide on death
8 that you look at the context of where Marlo was, of
9 what it is like in that place and what people do to
10 get by.

11 I'm not here to tell you that it's
12 not Marlo's fault, it's the CO's fault. That's not
13 it at all. But I would suggest as you saw, that
14 CO's coming come in all different shapes, sizes and
15 attitudes. Some are professional, do their jobs
16 well like the individual who sat up there and said,
17 you know, he had his hands on the food tray door and
18 I just waited it out. He's not going anywhere.
19 He's behind a locked door. And eventually he got
20 tired, situation defused.

21 You have CO's who say he wouldn't
22 come out of the shower, I tried to talk him out,
23 doesn't happen so we wait and he eventually comes
24 out.

25 And then you have your CO's like

1 officer Whelock if you recall, the first
2 individual. He tells you that he's simply picking
3 up trash. And we know that it's not uncommon in
4 these maximum security facilities for inmates to
5 yell out, for inmates to say things, to make cat
6 calls. And he tells you Marlo Thomas behind bars
7 makes a couple comments about why aren't there any
8 white guys -- or black guys on your trash detail.

9 And what does Whelock do? He opens
10 the locked door and goes in and confronts him. He's
11 pushing his buttons. Now, is every CO like that?
12 Of course not. You saw plenty during the course of
13 the testimony who were not.

14 And the prosecution on their list of
15 things lists he tried to batter Whelock. But put it
16 into that context and that then tells you how many
17 of these other things, some serious, some not so
18 serious, how many have that context that we don't
19 know, that we'll never know here, sitting here
20 getting just a slice of the life of Ely max?

21 And when you consider that context,
22 consider it before you make the decision to let the
23 State put Marlo to death.

24 You need to look at the age he was
25 sent to prison, the nature of the prison that he

1 served his prison time. The nature of the system,
2 that often attributes to the behavior.

3 Should we order the State to kill
4 him because of that behavior? The vast majority of
5 it was from 1990 to 1996 when a kid not much older
6 than that gets sent there. Is it his fault? Could
7 he have stopped it? Sure. But that's where he
8 found himself and that is what made him the man that
9 led him to do the things, horrible things in the
10 Lonestar Steak House and led him to continue to act
11 this way in prison.

12 We know it's not just Marlo. In
13 fact, I believe one of the officers testified it's
14 almost normal the sort of acting out many of the
15 things you see. The paper on the windows, the
16 failure to follow orders, the verbal abuse of the
17 guards. And you heard some of the inmates say some
18 of the CO's treat you with respect, there's no
19 problem, but some of them push those buttons and
20 they want you to use the response to that button
21 pushing to sentence Marlo to death.

22 You know, Marlo, if you have any
23 question about that, is not the reason for protocol.
24 Marlo isn't the reason that they wear masks and
25 vests and that they make you stick your arm out the

1 door, so they can cuff you and they cuff your
2 legs. That protocol is there because that is prison
3 and there are many others in the same situation as
4 Marlo.

5 And to twist it for the purposes of
6 trying to give him the death penalty by saying
7 that's just Marlo and nobody else believes the facts
8 and what prison is like.

9 The write-ups are discretionary,
10 depending on the attitude of the guards you heard,
11 depending on the attitude of the inmate. And at
12 least one if not more of the guards said, you know
13 what, if the inmate had a decent attitude, I might
14 not write him up at all.

15 Just like the little boy who was not
16 sophisticated enough to run away from the security
17 guard at the Meadows Mall, Marlo doesn't have the
18 attitude to not get these write-ups. And so every
19 CO, when something happens with Marlo, it gets
20 written up.

21 That contributes to the folder you
22 see behind me and the folder described by the warden
23 that said it's not the record, but it's certainly
24 not the norm.

25 And the State brings the most

1 egregious few incidents, as if the crimes themselves
2 do not stir enough emotion, enough passion to whip
3 you into a frenzy to order death. They bring the
4 most three or four egregious things all of which
5 happened in the early '90s. The urine incident, the
6 other incidents that you remember when he was a
7 young kid. And they tell you that he can't go any
8 period of time that's any length without a write-up.
9 But we just heard this morning from the warden
10 himself that he thought at least one time Marlo had
11 gotten 11 months and gotten a small write-up and he
12 was back to HRP.

13 This is a guy who's fooled the
14 system? The foolers of the system are the ones that
15 can manipulate the guards, that can keep them from
16 writing up things, that can change their attitude
17 like that in order to skate along and minimize what
18 that file looks like behind me.

19 Marlo was not a manipulator of the
20 system.

21 Before you make your decision on
22 death based upon those prison records, we would ask
23 you to consider that context. And that's the Marlo
24 that's released in '96. A young man who knew
25 nothing but a lot of violence from growing up and

1 was put into prison at 17.

2 And I'm not gonna talk to you much
3 about the crime at Lonestar. There's no need to.
4 It's horrible, it's vicious. There's no
5 explanation, but I'd you to consider one thing
6 regarding that. Was there premeditation? Did Marlo
7 go into that Lonestar intending to kill those two
8 young men or anyone?

9 And I think reasonably if he did,
10 then that decision on death is easier. But if he
11 didn't, if it happened in just a fiddle rage during
12 the course of something that nobody will ever really
13 know what went on in there and there wasn't
14 premeditation, then maybe death isn't for him.

15 They tell you that whenever he has a
16 weapon available he uses it. That's what Mr. Owens
17 just told you. We know he had a gun when he went
18 into the Lonestar. He didn't use it. He used a
19 weapon of opportunity, the knives that were there
20 being cut up or being used to cut up the meat.

21 And we have some fairly credible
22 evidence that he was at least acquaintances with
23 Carl and that he knew Matt.

24 Now, we have Wendy Cecil Grey
25 testify yesterday about an incident. I don't doubt

1 for a moment that woman's sincerity. But what I'm
2 about to say shouldn't be interpreted as me doubting
3 her sincerity, but I'd ask to you consider the
4 nature of what she said. It was very vague. It was
5 either Thomas Marlo or Marlo Thomas, she wasn't
6 sure, it was Thomas she kept calling him.

7 She said she went to the funeral
8 shortly thereafter and saw the family but waited
9 seven or eight months before she ever contacted
10 anybody and said, hey, you know what, this guy had
11 an axe to grind with Carl.

12 But what else do we know? We know
13 that Charles Nash who got Marlo the job at the
14 Lonestar testified that he and Carl were friends.
15 In fact, Carl would come over and they'd play
16 dominoes and cards. And on occasion Marlo was there
17 and that he gave them both rides home.

18 But more importantly, Mr. Hemmes,
19 the man in the sandals who got to go home that day,
20 he told you that he didn't see any animosity at all
21 between them.

22 So the evidence certainly seems to
23 indicate not what Wendy said, but that he knew him
24 and at least was an acquaintance.

25 There doesn't appear to be any

1 evidence of premeditation at all but rather
2 something happening inside of that steak house that
3 lets open the flood gate of rage, anger, and
4 violence from Marlo such that he committed such
5 horrible and heinous acts. We'd ask you to consider
6 that factor in making your decision on death.

7 After the crime, he made an effort
8 to leave with the other two, and he went back to his
9 aunt's and cousins who are now deceased. And you
10 heard some testimony that they were very upset and
11 when he saw them crying, he started crying.

12 And I suggest that after the rage
13 and the anger had subsided, Marlo started realizing
14 what he had done and seeing his family members
15 brought that home.

16 He cooperates when they're arrested,
17 he accepts responsibility, something that at least
18 one of that you thought was mitigation. He
19 cooperated and he did divert the truth when he was
20 in that meeting and he showed remorse.

21 And I asked the officer whether he
22 remembers Marlo having a tissue. And he didn't.
23 And that was fair. That was a long time ago. But I
24 urge that you if you doubt the fact that Marlo had a
25 tissue in his hands when he was giving that

1 statement, go back and look at the tape. If you
2 have any doubt that that's what's there, do it.

3 And that's the same tissue that
4 Marlo Thomas had today as he spoke to you and cried,
5 something the prosecutor wants you to believe is an
6 act. That's the same remorse that he showed here
7 today that he had the day of the incident when he
8 realized what had happened and he talked to the
9 police. Some of you also found that to be a
10 mitigating factor as well.

11 I'm not here to tell you how to
12 judge Marlo's allocution. The prosecution says that
13 there are the two faces of Marlo. And I simply
14 would suggest do you think Marlo is that good of an
15 act? Do you think Marlo can summons those emotions?

16 Marlo tells you it's only recently
17 that he's been able to start coming to grips with
18 these feelings and these emotions. He never asked
19 you for another chance. He simply told you that
20 what he was feeling, what he was thinking, how sorry
21 he was and how if he could undo it, he would.

22 Someone that has these attributes,
23 are they worth saving? Are they worth keeping them
24 alive? It's a decision you all will have to make.

25 What has he done since he went to

1 prison the second time around? Those closest to him
2 see a change. His family members, they see a
3 mellowed Marlo, a less hateful Marlo, a less angry
4 Marlo. Very true, they have not had the contact
5 with Marlo or at least much contact from the last
6 few years. But he's in Ely, these are working class
7 folks, that's a long way away and Marlo told his
8 mother don't come see me like this, I don't want you
9 to come up here. But they've written and they've
10 had brief discussions.

11 It will be for to you decide if it's
12 a family asking for mercy or if Marlo really has
13 changed. If he's sentenced to death, you'll never
14 know.

15 We know he's counseled young P.J.
16 his little brother, cousins saying don't go in my
17 foot steps, you don't want to go this way.

18 He's counseled those in jail. You
19 heard about the young man this morning. His mother
20 died in prison, he thought he had nothing to live
21 for, he was gonna act out and Marlo sat him down and
22 tried to explain to him that he did have something
23 to live for and because he didn't act out he may get
24 paroled soon.

25 You see that he's acting out less

1 and less over the years in prison. And you heard
2 Warden Neven talk about that. People get socialized
3 to the prison life for lack of a better word. They
4 get used to it. They surrender to the system. They
5 realize they can't win. Their maturity to a certain
6 extent contributes to that and he sees that in
7 Marlo.

8 And prosecution would have you
9 believe that not only is Marlo such a good actor, he
10 can pull off what he did to you this morning and
11 show those raw emotions, it's something that you
12 don't show in prison, and that he's trying to clean
13 himself up and be good for this hearing, that
14 everything that we talk about with this declining
15 incidents in prison and all these good things that
16 the families say, that's just an act for you people.

17 That the prosecution on the other
18 hand brings in CO Heidt and says oh, no, he says
19 there's going to be problems in here, he gets back,
20 something's gonna happen.

21 Do you sentence Marlo to death
22 because of her testimony? Is she a CO with an axe
23 to grind with Marlo, maybe a legitimate axe? Is she
24 a CO like Whelock who opens the locked cell door and
25 goes in to push buttons?

1 Warden Neven hadn't heard any of
2 that stuff. And I suggest that if it's a serious
3 security threat, he likely would have heard about it
4 as the warden of the prison.

5 And then there's our witnesses we
6 brought in this morning; four young men in chains.
7 You know, I'd love to call Marlo's neighbors and
8 friends and business people and clergy and other
9 folks, but that's just not in Marlo's benefit for
10 the last 15 years. Those are the people he was
11 brought to be with when he was this age and those
12 are people who have become his peers. And no matter
13 what do you in this case, that is the condition he
14 will be in for the rest of his life.

15 And they didn't say it's all the
16 COs, they didn't say it's not Marlo's fault, but
17 they gave you a little flavor and context for what
18 it's like in there, the context that you should
19 really suggest that it wasn't gonna do that, but I
20 would ask you to look at when you look at this
21 prison record and decide is that the reason to
22 execute Marlo.

23 So then why execute Marlo?
24 Prosecution tells you to put things back in place,
25 to balance the senseless death of two young men with

1 their whole lives in front of them. And they tell
2 you the only balance is with Marlo's life.

3 I would suggest some other things
4 maybe that you might want to consider. Nothing you
5 do will ever bring back those boys. Nothing you do
6 will never repair the devastation of those families
7 felt.

8 Killing Marlo will not ease the pain
9 of the families and the loved ones. It won't make
10 the dreams go away. Not even time can do that. The
11 families told you that themselves.

12 And they are right. They never get
13 to see their sons, they can't visit them, they can't
14 touch or hold them, they can't even have a phone
15 visit with them. But killing Marlo will not undo
16 that. And that's a hard thing to get over.

17 If it were my kids, I don't know if
18 I could. I'm sure if it were your kids, you
19 couldn't either. And that's where the separation as
20 a juror of the pain and emotion has to occur, so
21 that you can make a just decision.

22 If it brought them back, Marlo would
23 be at the front of that wish line asking to take his
24 life to bring them back, but he can't do that.

25 Killing Marlo will not be a gift to

1 the victims, be revenge and retribution. You
2 think that carries the day, then you'll do your
3 verdict accordingly.

4 Why else? Deterrence? We really
5 thinking other young men in Marlo's situation or
6 other young men who described by Mr. Owens who have
7 that penchant for crime are gonna look in the paper
8 and say, well gees, they're gonna execute another
9 guy, I don't think I'll commit crimes. No. The
10 deterrence has to come from elsewhere. It has to
11 come from family, from role models, from people
12 spending time with kids and other folks.

13 Is it because the prison can't keep
14 'em? Is it because he's a danger to everybody in
15 the prison or us? Well, we know he's not a danger
16 to us.

17 Those transport officers showed you
18 they can protect society. If you sentence him to
19 prison for the rest of his life, he's not going
20 anywhere. They've kept them for the first six years
21 on his first sentence and they've kept him since
22 1996.

23 And for all the awful things the
24 prosecution tells you he's done, he's never even
25 really seriously injured anybody in prison. The

1 only one that was injured in a couple fights was
2 Marlo Thomas.

3 The prosecution tells you he's not
4 productive. Do you kill him for that? There's only
5 so much productivity you can have in an
6 eight-by-eight cell, but he's made efforts. He's
7 counseled his cousin, his little brother, other
8 inmates.

9 And we've seen that as the bad
10 behavior in prison declines, the productivity, at
11 least as far as he can be productive, increases.

12 Do we execute him for taxpayer
13 considerations, why live out the rest of his life?
14 I won't even dignify that with further argument.

15 You know, if he changed a year ago,
16 a month ago, a week ago, that's change. And if we
17 execute him, he'll never have the ability to change
18 and be productive or to continue to change and be
19 productive.

20 The other option is life in prison.
21 They tell you that that's not gonna be anything for
22 him, that that's not gonna be a big deal for a guy
23 like Marlo to be in a small concrete cell, little or
24 no visits, certainly contact visits, your food put
25 through a slot, any time you leave a protocol being

1 followed, and the idea of never ●ting out, every
2 day thinking about his crime, every day thinking
3 about Matt and every day thinking about Carl.

4 I would suggest that you consider
5 that perhaps this is just punishment in this case,
6 that perhaps that is what ought to happen.

7 And we can talk about amenities and
8 the right to have a little TV and the right to have
9 a radio and the right to have a phone call, but you
10 are still told when to wake up, when to go to sleep.

11 And like Warden Neven said and Marlo
12 has shown in the last couple of years, the outbursts
13 are declining, he's getting older, he's maturing and
14 he's gonna conform just like they always do.

15 You may not find it ironic, but I
16 find it ironic that the State asks you to allow them
17 to execute Marlo to show the value of Carl and
18 Matt's life. That execution will not show the value
19 of life. It will just be another person who is
20 killed.

21 Before you let the State execute
22 him, we'd ask you to consider these things, and it's
23 humbling to me to be before you and to ask you that
24 when I know Marlo didn't give those two boys that
25 chance. That alone shouldn't be enough because

1 neither of those persons have gotten that and I
2 can't sit here and tell you anything that is gonna
3 bring them back. We'd ask you to consider these
4 things for sentencing Marlo to death if that's what
5 you choose to do.

6 And the DA's gonna have a chance
7 right now because I'm sitting down, to arouse your
8 passions, to arouse your sense of injustice for what
9 happened to these two kids and certainly has the
10 evidence for it. I'm not gonna lie to you about
11 that. And I cannot respond.

12 But when they ask you to execute or
13 let the State execute Marlo, I would ask you to
14 consider some of the things that we've said here and
15 please stop the death and consider life.

16 THE COURT: Thank you, counsel. Does the
17 State wish to rebut?

18 MR. SCHWARTZ: Yes, Your Honor. Counsel,
19 Judge Loehrer, Mr. Owens, ladies and gentlemen of
20 the jury, let me make some comments with regards to
21 some of the things that Mr. Albregts has just said
22 to you.

23 He talks about the manner in which
24 inmates are fed with having to put their hands or
25 chained and having put their hands through that food

1 slot I believe ●'s called and the way they're
2 chained and transported. And it's not just Marlo,
3 but it's everybody, everybody in Ely State Prison.

4 But you heard from the warden, the
5 warden at High Desert, and he talked about the
6 prison population. 1100 inmates, 20 are high risk
7 potential. So Marlo the defendant is one of 20 out
8 of 1100 inmates. If that were his class standing at
9 a high school, he'd be a valedictorian candidate.

10 He talks about how nice he is, how
11 pleasant he is when he interviews with the warden.
12 He interviews twice a year. And as the warden said,
13 I hold certain things that they want. The warden
14 has the ability to get him off of HRP.

15 Does he have the ability to behave
16 himself? Certainly. If he wants to, if it's in
17 Marlo's best interest.

18 Mr. Albregts said that the defendant
19 has changed. The defendant has told you today that
20 he has changed, that he is remorseful, that he is
21 sorry for what he did and he has this little tissue
22 and tears come trinkling down his eyes. So he's
23 changed today, five days after the trial that's
24 going to determine his life began.

25 But what happened Thursday at High

1 Desert? What did he tell the inmates on the tear
2 when he saw that Officer Haight walked by? That
3 bitch is going down and testify against me. This is
4 last Thursday. That bitch is going down and testify
5 against me and she's gonna lie. And when we get
6 back here, there is gonna be a war. He's changed
7 all right.

8 Now, Wendy testified yesterday that
9 she had heard -- or had a conversation with Carl a
10 week or two before he was murdered. 19 stab wounds.
11 Premeditation is a conscious decision to end the
12 life of a human being. 19 stab wounds in the chest.
13 Excuse me. A total of 37 stab wounds. Perhaps the
14 defendant was just trying to wound Carl Dixon.

15 But Wendy talked about how he was
16 afraid of this guy Thomas Marlo or Marlo Thomas and
17 he's a guy not to mess with and he had some kind of
18 a premonition that it was gonna come to a head. And
19 he relayed an incident to Wendy about a steak knife
20 being put to the back of Carl Dixon.

21 Wendy says she told Carl's father at
22 the funeral about what had happened, but it's
23 conceivable that at the time she saw the broadcast
24 the suspect wasn't identified or she didn't hear who
25 it was and she just figured well, maybe it was some

1 other incident.

2 But it's your common sense that
3 controls here. You can determine whether or not
4 Carl when he talked about Marlo Thomas or Thomas
5 Marlo was talking about this defendant.

6 Mr. Albregts talks about how the
7 defendant cooperated with the police and how he
8 accepts responsibility and how he's not
9 sophisticated, how he stood there when that security
10 officer came, Ms. Barfuss, while the others ran. He
11 wasn't a sophisticated criminal. He punched her in
12 the face, then he got into the security car and
13 drove off, crashed the car and then he ran. I guess
14 he became to sophisticated a couple of minutes
15 later.

16 Kenya Hall's statement to Trooper
17 Bailey on page 23, Trooper Bailey's asking Kenya
18 Hall, what did the defendant say you should do, this
19 unsophisticated individual, just say that it was me,
20 Kenya Hall that was there and I kind of stabbed the
21 two guys and I kind of robbed the place and stuff
22 and the defendant told me that hey, I'd just get 20
23 or 30 years. So now he's trying to have Kenya Hall
24 take the blame for what he did inside that
25 restaurant.

1 Mr. Albregts indicates that Mr.
2 Owens suggested that the defendant is acting and
3 that he's not sophisticated enough to be an actor.
4 He's on trial for his life. He's gonna say whatever
5 it takes to help you give him a sentence other than
6 death.

7 But if they are tears, are they
8 tears for Matt and Carl or are they tears for
9 himself and the situation that he's in today?

10 Not a day goes by that I, the
11 defendant, don't think about Matt and Carl. I think
12 about Matt and Carl every second of the day.

13 That prison packet that was shown to
14 several of the witnesses, and this just covers a
15 certain span of years, what does the defendant have
16 time to think about Carl and Matt?

17 When an individual kills another
18 individual or individuals, as is this case, is an
19 immediate revulsion about the act, the nature of the
20 crime. But as time goes by, eight years, maybe more
21 in this particular case, the dead victims cease to
22 exist as identifiable figures. They cease to be a
23 part of every day reality and we inevitability turn
24 away from the past towards the ongoing reality, the
25 penalty hearing, what we've been doing for the last

1 five days.

2 And the ongoing reality involves the
3 defendant, the criminal. He now becomes the focus.
4 He sits surrounded by his two attorneys who are
5 assisting him, he becomes the focus of your
6 attention.

7 Please, ladies and gentlemen, do not
8 forget Matt Gianakis, do not forget Carl Dixon.
9 Marlo Thomas is their murderer.

10 The defendant does not deserve your
11 sympathy, your good will, your compassion, your
12 mercy, and most certainly he does not deserve your
13 leniency.

14 Think of the devastation that this
15 defendant has caused. Think of the affect that this
16 defendant's actions had upon Matt's father, his
17 mother, brother and sister. Think of the affect
18 that this defendant's actions had on the family of
19 Carl Dixon.

20 Eight years later these families
21 still have to deal with this defendant's selfish,
22 senseless and cruel brutality. You weigh those
23 affects that this defendant's carnage has caused
24 when one of you talks about sparing his life. Think
25 about that.

1 Think about his ordering Kenya Hall
2 to shoot the manager Vince Oddo in the back of the
3 head when one of you thinks about or talks about
4 sparing this defendant's life.

5 Think about the defendant's criminal
6 activity before he went to prison, think about his
7 behavior while he's been in prison.

8 Think of those two photographs of
9 those two young men, two young innocent, handsome
10 men when you talk about, if anyone of you talks
11 about sparing the life of this defendant.

12 Ladies and gentlemen, some cases
13 call for the imposition of the death penalty. This
14 case screams of the imposition of the death penalty.

15 Think about how the defendant shot
16 into the bedroom of Loletha Jackson as she lay with
17 her five year old child shortly after he got out of
18 prison if one of you thinks about sparing the
19 defendant's life.

20 Enough is enough. This defendant
21 must be held accountable for his life of crime and
22 the two brutal murders that he committed.

23 Think about the last person Carl
24 Dixon saw before his death. It wasn't his mother
25 and it wasn't his father. The last person Carl saw

1 before his death was the cold, cold eyes -- were the
2 cold, hard eyes of Marlo Thomas, the defendant, his
3 executioner.

4 Someone once said by his actions
5 shall you know him. Those photographs of the crime
6 scene tell you all you need to know about this
7 defendant.

8 The suffering he has caused tells
9 you all you need to know about this defendant and
10 what the appropriate punishment should be.

11 Think about Carl Dixon, a student of
12 nuclear medicine at UNLV who interned at UMC when
13 someone talks about sparing the defendant's life.

14 Think about Fred Dixon, a police
15 officer, usually goes to the homes of people to
16 inform them of deaths of family members or friends
17 when he received word of his son's death when
18 someone talks about sparing the defendant's life.

19 Think about Fred Dixon trying to
20 comprehend, who said he could probably deal with his
21 son dying from cancer or some other type of disease
22 or an accident, but trying to comprehend or
23 understand why his son was butchered on the bathroom
24 floor at the Lonestar restaurant when all he was
25 trying to do was earn some money before he continued

1 his college education. Think about that when one of
2 you talks about sparing the defendant's life.

3 Think about Alexander Gianakis who
4 envies the defendant's family because they can go
5 see if they want, they can go see the defendant in
6 prison while he and his wife can only see their son
7 by going to the cemetery.

8 Think about the guilt Mr. Gianakis
9 feels about driving his son to work that morning.
10 Think about the message Mr. Gianakis received when
11 he got home, a recording on his phone from the
12 coroner's office. Think about that when you think
13 about or talk about sparing this defendant's life.

14 Mr. Gianakis testified yesterday
15 about what could have been and what should have been
16 in the life of his son, Matt Gianakis.

17 This defendant denied those families
18 a life of joy and instead this defendant has given
19 those families nothing but deep, deep sorrow and
20 constant pain. It's as if he has thrust that knife
21 into the families of Carl and Matt. Think about
22 that when you decide on an appropriate punishment.

23 The defense counsel suggests a life
24 in prison with parole or without parole is
25 punishment enough. And you heard a lot about prison

1 life from defendant's witnesses and from the correction
2 officers.

3 But with all due respect, counsel is
4 wrong based upon the evidence you heard at this
5 penalty hearing. Defense counsel asked you to give
6 the defendant a chance at life. What chance did he
7 give those two young men?

8 A third man got away, Vince Oddo.
9 If it were up to this defendant, there'd be three
10 photographs on that screen.

11 This defendant based upon the
12 evidence has been given way too many chances.

13 Defense counsel talks about life in
14 prison, that small cell, the chains that high risk
15 prisoners have to wear and how they're transported
16 and the visiting room is kind of small and there's a
17 screen or a glass partition that would separate the
18 inmate from any visitor that he might have and that
19 it's just such a horrible, horrible existence.

20 What would Carl's parents give to be
21 able to go up to Ely State Prison and see their son
22 Carl?

23 What would Matt's family give to be
24 able to see Matt being in prison, being anywhere but
25 being alive?

1 The evidence tells you that this
2 defendant has forfeited his right to live and to
3 breath by his own actions.

4 Mr. Albrechts wants you to blame the
5 State, blame the correction officers. He says he's
6 not making any excuses but then he rattles off a
7 list of excuses. But it's his own fault, the
8 defendant's fault why we're all here today and no
9 one else's.

10 If this case does not call for the
11 imposition of the death penalty, what case does? Do
12 you need three pictures up here? Do you need four?
13 Do you need seven?

14 And the truth and justice of two
15 very important things in any criminal proceeding,
16 the truth is based upon the evidence, this defendant
17 is a brutal, brutal murderer.

18 He has also been convicted of two
19 violent felonies. One using a knife and one a gun.
20 He also robbed a man and again an excuse. Mr.
21 Albrechts talks about that incident in the motel
22 where an older man came in and young Marlo was
23 standing outside. See he, it's the crowd that
24 causes him to get into trouble. But the old man
25 instigated it, but the older fellow was involved in

1 a tussle with the victim wherein defendant went
2 outside and got a boulder and tried to crush his
3 skull. But the defendant wasn't involved. He was
4 just following someone.

5 He threatened Carl Dixon with a
6 knife weeks before the murder based upon the
7 evidence. To list all the
8 disciplinary problems he has, we'd be here all day.
9 He cares about no one but himself. Now that's the
10 truth based upon the evidence.

11 What about justice? Truth has no
12 meaning unless justice goes with it. This is the
13 part of the proceedings, this is the phase that
14 deals with justice.

15 How do you do justice to the facts
16 of this particular case, ladies and gentlemen?
17 There is not one thing that can be done by way of
18 punishment if this defendant commits a crime while
19 in prison serving a life sentence, life without
20 parole for example.

21 What are they gonna do to him?
22 Sentence him to another life sentence? Take away
23 his television? Take away his radio?

24 The facts or the fact that he -- the
25 fact that he hasn't killed or seriously injured

1 anyone in prison yet should not make you feel too
2 comfortable based upon his track record.

3 Is this defendant worth that risk?
4 The answer is no based upon the evidence.

5 Will this defendant kill or
6 seriously injure anyone in prison if he's sentenced
7 to life without the possibility of parole? No one
8 can answer that question.

9 Will this defendant kill or
10 seriously injure anyone if the imposition of the
11 death penalty is given and carried out? Certainly
12 not.

13 Someone once said that cruelty has a
14 human heart. And those photographs inside the rest
15 room at the Lonestar Steak House certainly,
16 certainly make that statement true.

17 His prior records tells you what the
18 appropriate sentence should be. With all due
19 respect, his lack of sincere remorse, his behavior
20 in prison, his countless victims tell you what the
21 appropriate punishment should be.

22 The evidence tells you that this
23 defendant has earned the death penalty not once but
24 twice.

25 Does he do anything constructive in

1 prison? Well, assaults guards, he floods tears,
2 he exposes himself, throws urine in the face of a
3 female correction officer, doesn't follow
4 instructions.

5 You heard Correction Officer Dave
6 Williams describe the defendant as very aggressive
7 and dangerous. You heard from Correction Officer
8 Gina Morria who was pregnant at the time when she
9 tried to -- you know, there's no suggestion that she
10 was doing anything to egg him on, to press his
11 buttons. She's trying to give this guy some juice.
12 She's being nice and decent and he throws a cup of
13 urine in her face.

14 Think about his threats to Officer
15 Vanessa Heidt last Thursday out at High Desert when
16 he yelled bitch, you're going down to testify
17 against me in my trial, there's going to be a war
18 here when I get back.

19 Think about those threats of
20 intimidation when one of you talks about sparing his
21 life, that he's changed, he's a different person
22 now.

23 He hasn't been written up
24 significantly in the last six months, seven months,
25 or whatever his time has been at High Desert. Is

1 there a reason? Maybe he didn't know Officer Heidt
2 was gonna hear what he had to say or maybe he
3 thought that would intimidate her and she wouldn't
4 come down here and testify against him showing his
5 recent problems, recent problems. So if he comes in
6 and says hey, I'm a changed man, Officer Heidt says
7 well, recently he's done this and this and this.
8 Perhaps that was his manner of trying to intimidate
9 and cause her not to come down here.

10 But there's gonna be a war when he
11 goes back based upon his statement at the prison.
12 Do you think he'll make good on that threat? Well,
13 he made a threat against Carl two weeks before Carl
14 was killed.

15 We know the defendant was terminated
16 from the Lonestar. Did Carl tell on him? We don't
17 know. Did the defendant carry out that threat
18 against Carl? The evidence certainly tells you that
19 the killing of Carl Dixon was different than the
20 killing of Matt Gianakis.

21 Matt Gianakis, as horrific as it is,
22 received two stab wounds. Carl Dixon, 37. I submit
23 to you, ladies and gentlemen, the killing of Carl
24 Dixon was personal.

25 How many lives has this defendant

1 altered or changed because of what he has done? He
 2 counsels people. There was evidence I think a
 3 couple of days ago that he has found religion, he
 4 has found God. You heard numerous correction
 5 officers, you heard these four inmates come up here
 6 and no one volunteered the word religion until Mr.
 7 Schieck asked one of them, does he ever talk about
 8 religion and the fellow said yes. That was it.

9 Do you believe that this defendant
 10 has found religion? Is he counseling inmates on
 11 religion?

12 You heard from several members of
 13 his family, and I'm sure that was a horrible thing
 14 for them to have to do. Can't imagine what they're
 15 feeling today.

16 But based upon the evidence, the
 17 family really doesn't know the defendant. He's
 18 fooled them. He's fooled them for his own selfish
 19 purposes. He's fooled the judge who let him out ten
 20 days before he killed Matt and Carl.

21 Don't let him fool, ladies and
 22 gentlemen. Don't let justice be robbed in the name
 23 of mercy. Put an end to his list of victims.

24 This defendant, his family told you
 25 that he has found God and you heard it through the

1 testimony of all these witnesses. The only thing he
 2 is concerned with is not religion, it's not being a
 3 better person, but himself. What can he do for
 4 himself? What can Marlo do for Marlo?

5 You have seen what this defendant is
 6 capable of doing. You have seen how this defendant
 7 has shown his appreciation to being given a second
 8 and a third chance.

9 Carl Dixon and Matt Gianakis know
 10 all too well that how this defendant behaves when
 11 he's given the opportunity a second or third chance.

12 Think about what this defendant told
 13 Kenya Hall to do once he got the money from Vince
 14 Oddo, shoot him in the back of his head.

15 The evidence tells you that this
 16 defendant is very, very violent and dangerous. The
 17 evidence tells you that he has absolutely no regard
 18 for the value of human life and that he is beyond
 19 any rehabilitation.

20 The evidence tells you that these
 21 two young men suffered a slow and painful death and
 22 the punishment should fit the crime.

23 This defendant could have taken the
 24 money from the Lonestar restaurant and left along
 25 with Kenya Hall. He chose to silence all the

1 witnesses and was able to silence two
 2 permanently, but one got away. He made those
 3 choices. He must be held accountable for what he
 4 has done.

5 I know you've been very patient and
 6 I'll be done shortly. Mr. Albregts talked about
 7 deterrence and how nobody is gonna be deterred based
 8 upon what happens to the defendant today.

9 How does Mr. Albregts know that?
 10 Well, there's a story about lighthouses on the water
 11 on the East Coast, West Coast. And you only hear
 12 about the ships that crash into these lighthouses,
 13 but the hundreds of thousands of vessels that go by
 14 and are protected and saved because of those
 15 lighthouses, we don't know about. And we don't tear
 16 down lighthouses because there's no proof that it
 17 saves ships.

18 You don't know if one person is
 19 deterred by the imposition of the death penalty or
 20 100 persons are deterred from committing these kind
 21 of crimes because of capital punishment.

22 We sure as heck know the defendant
 23 will do everything he can to avoid that punishment.
 24 Deterrence is achieved by the severity of punishment
 25 and it's important for the image of the criminal

1 justice system and those who view how it works that
 2 they understand that lines are drawn that you just
 3 simply cannot walk over.

4 And on April the 15th, 1996, this
 5 defendant stepped way over the line. A sentence of
 6 death will go out and be a message and might, might
 7 deter future Marlo Thomas's of this world.

8 Will it bring Carl Dixon back? No.
 9 Will it bring Matt Gianakis back? No. Will it end
 10 all the senseless violence in this community and
 11 elsewhere? No.

12 But will a sentence of death ensure
 13 to you that that murderer never ever kills or hurts
 14 another individual again? You bet it will.

15 You should use the criminal justice
 16 system to protect society from dangerous people.
 17 Preserving the life of a brutal murder compromises
 18 the value of life.

19 And with all due respect to what Mr.
 20 Albregts said, how ironic he felt it was that the
 21 State is suggesting that the imposition of the death
 22 penalty shows that we do value human life, I'm not
 23 suggesting, I'm telling you, it does.

24 Capital punishment is an expression
 25 of society's moral outrage for particularly heinous

1 crimes. And capital punishment essentially an
2 order of society that allows its citizens to rely
3 upon the legal system rather than self-help.

4 Nobody went out and did anything to
5 this defendant because of what he did to these two
6 young men. We've had a trial. We're having a
7 penalty hearing.

8 A free society requires of you
9 jurors, vigilance, courage, strength and resolve in
10 making the decision that has to be made today. You
11 can sentence this defendant to life without the
12 possibility of parole and be done with it.

13 But with all due respect and based
14 upon all the evidence that you heard at this
15 preliminary -- I'm sorry. This penalty hearing,
16 that would not be appropriate.

17 The worst possible crime deserves
18 the worst possible punishment. And failure to
19 condemn crime, that is the effect of condoning it.

20 To those who argue against a capital
21 punishment, and some of you during jury selection
22 said you believe in capital punishment but you
23 didn't know if sitting on the jury you could make
24 that decision. Nobody is suggesting that it's an
25 easy one to make.

1 The State is asking that you make it
2 not because I say so or Mr. Owens says so, but
3 because the evidence warrants it.

4 What is gained by taking the life of
5 a killer is that society is saying that it respects
6 human life and that it cannot overlook the cruel and
7 brutal act of a person like the defendant in
8 senselessly taking two innocent lives. It's the
9 only way as I said earlier to ensure that a killer
10 never kills again.

11 And if human life is to be held
12 sacred as it must be, then the law forbidding the
13 taking of a human life must also be held sacred.
14 And the only way that that can be achieved or make
15 sacred is to entitle the law to inflict the penalty
16 of death.

17 Someone said that a human -- the
18 capacity for good makes the death penalty tragic,
19 but our human capacity for evil makes it necessary.

20 What the State is asking you to do
21 today is to do justice to the facts of this case and
22 return a verdict based upon what you heard the last
23 few days.

24 Every one of you knows a crime like
25 this and a history like this and a prison record

1 like this deserves the ultimate punishment.

2 You are sitting in judgment of an
3 uncaring, very violent and brutal and remorseless
4 killer based upon the evidence. The defense is
5 looking for just one of you to feel sorry for the
6 defendant.

7 MR. SCHIECK: I'm gonna object to what
8 the defense is looking for, Your Honor.

9 THE COURT: Objection's sustained. That
10 comment is stricken.

11 MR. SCHWARTZ: Stay strong, stay focused
12 and stay united when you return your verdict.
13 Everyone knows that the decision you're about to
14 make today is a difficult one. Weighing the worth
15 of anyone's life has got to be a gut wrenching thing
16 to do.

17 Each and every one of you told us
18 when we were selecting this jury that you believe
19 people should be held accountable for their actions
20 and you believe in the appropriate case that you
21 could return with a verdict of death.

22 You have been given an abundance
23 amount of evidence to warrant the imposition of the
24 death penalty.

25 Now's the time for you to set aside

1 your emotions, sympathy, compassion or fear and make
2 a decision based upon the facts of this case. This
3 hearing is not a place for anger. I'm not angry, I
4 don't expect you to be angry.

5 It's not a place for revenge. The
6 State's not seeking revenge. You should not be
7 seeking revenge. It's a place for justice.

8 Tell this defendant that you have
9 the courage to make that important decision today.
10 Go back into that deliberation room and discuss the
11 verdict and return into this courtroom and in one
12 voice tell this defendant that the verdict must be
13 death not once but twice for what he did to Carl
14 Dixon and Matt Gianakis.

15 Aristotle once said what is justice
16 to give each man his due. Ladies and gentlemen, on
17 behalf of the State of Nevada, I'm asking you to
18 give this defendant his due for what was done to
19 Matt Gianakis and Carl Dixon on April the 15th,
20 1996.

21 You go back into your deliberation
22 room and you sit down and you begin to talk about
23 the case and what the appropriate punishment will
24 be.

25 Please don't ever forget who this

1 defendant is and don't ever forgive what he has done.

2 Thank you for your patience.

3 THE COURT: Thank you, counsel. The
4 clerk is gonna swear our bailiff to take charge of
5 our deliberating jurors and our alternate jurors
6 will go with the executive assistant. And the
7 deliberating jurors will return to this courtroom
8 when they have reached a verdict.

9 THE CLERK: Raise your right hand.
10 (Whereupon, the bailiff was sworn in
11 to take charge of the jury.)
12 (Whereupon, the executive assistant
13 was sworn to take charge of the
14 alternate jurors.)

15 THE COURT: All right. Mr. Bryce and
16 Mrs. Giangi, again you are the alternate jurors. If
17 you would go with the law lady that will come around
18 the corner to pick you up, I would appreciate that.

19 Counsel, do you still have the same
20 telephone numbers?

21 MR. SCHWARTZ: Yes, Your Honor.

22 MR. OWENS: Yes, Your Honor.

23 THE COURT: And Mr. Schwartz, you don't
24 have any cell phone number. So I think it's gonna
25 be necessary for you to stay at the office today so

1 we can reach you.

2 MR. SCHWARTZ: I'll be there.

3 THE COURT: We're in recess.
4 (Whereupon, a recess was had while
5 the jury deliberated in reaching a
6 verdict.)
7

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

9 
10

JO ANN ORDUNA

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