

1 THE COURT: Before I call you as jurors I'd like to
2 apologize for not starting this morning at 9:00. The fault was
3 totally mine. Had an unfortunate accident which required me to
4 ...go all the way out to Tropicana and come back. Nobody's
5 fault; it happens. And I do apologize for it.

6 The Clerk will now draw twelve names. When your name is
7 called, please come forth.

8 THE CLERK: Alma Antonia Arriola, Badge No. 431,
9 A-R-R-I-O-L-A.

10 THE COURT: Please come forth and have a seat to my
11 right.

12 THE CLERK: Carl M. Jacintho, Badge No. 432, J-A-C-I-N-
13 T-H-O. Larry James Mitchell, Badge No....

14 THE COURT: Wait a minute. Mr. Jacintho, please come
15 and take a seat. Go on.

16 THE CLERK: Larry James Mitchell, Badge No. 433, M-I-T-
17 C-H-E-L-L; Carlos Rafael Guerra, Badge No. 434, G-U-E-R-R-A;
18 Peter Franklin Blazi, Badge No. 435, B-L-A-Z-I; Truman Albert
19 Pangburn, Badge No. 491, P-A-N-G-B-U-R-N; Allen Gene Reinken,
20 Badge No. 492, R-E-I-N-K-E-N.

21 THE COURT: Mr. Reinken, please take the first seat to
22 my right on the front row.

23 THE CLERK: Garrell Lee Boone, Badge No. 493, B-O-O-N-
24 E; Dwain Clifford Livingston, Badge No. 494, L-I-V-I-N-G-S-T-O-N;
25 Richard Allen Pearlstein, Badge No. 496, P-E-A-R-L-S-T-E-I-N;

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1 Gail Lynn Brush, Badge No. 497, B-R-U-S-H; William Charles
2 LeMaster, Badge No. 498, L-E-M-A-S-T-E-R.

3 THE COURT: Ladies and gentlemen of the entire panel,
4 those of you who are sitting in the jury box and those of you on
5 the outside, at this time I wish to say a few words to you and
6 also to all those members on the jury panel who are still outside
7 the rail. This Court, the lawyers and all persons present who
8 are involved in this case are deeply interested in this case
9 being heard and decided by a jury composed of twelve open-minded
10 people who are completely neutral and who do not have any
11 personal prejudice for or against either side.

12 In order to accomplish this it is necessary for me to ask
13 you some questions. Then each of the lawyers may also question
14 you. We have no desire to pry into your personal lives. Our
15 only objective is to determine whether or not there is any reason
16 that each of you cannot sit as a fair and impartial juror in this
17 case.

18 Those of you who are still outside the rail, please pay
19 attention, because I can almost assure you that prior to a jury
20 being selected one or more of you will be sitting in the jury
21 box.

22 It is important that you understand the significance of
23 full, complete, and honest answers to all of the questions that I
24 may ask you or that the lawyers may ask you that may touch upon
25 your qualifications as jurors in this case. I caution you not to

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1 try to hide or withhold anything which might indicate bias or
2 prejudice of any part by any of you. Should you fail to answer
3 truthfully or if you hide or withhold anything touching upon your
4 qualifications, that fact may tend to contaminate your verdict
5 and subject you to further inquiry even after you're discharged
6 as jurors.

7 If during the trial any of the attorneys or the defendants
8 should see you in the hall or anyplace, do not speak or smile or
9 say anything to you like "Good morning," please do not hold it
10 against them as they may not do so during the course of this
11 trial. And conversely, if you see them, please don't stop and
12 say, "Oh, it's a hot day today" or "it's a cool day," because
13 they'll stand right there and look at you and run right straight
14 and tell me. And I'm going to have to have another hearing
15 outside of everybody's presence.

16 The District Attorney has given you some nature of the case,
17 and there's some indications in your questionnaires. If there is
18 anybody here who thinks that they may know something about the
19 case at this time, please don't give me your reason, but just
20 stand and we'll take your name and your number.

21 Yes, ma'am.

22 PROSPECTIVE JUROR NO. 535: No. 535.

23 THE COURT: 535. And your name?

24 PROSPECTIVE JUROR NO. 535: Sharon Shepherd.

25 THE COURT: Yes, ma'am.

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1 PROSPECTIVE JUROR NO. 545: 545, my name is Michele...

2 THE COURT: Wait, wait, wait.

3 PROSPECTIVE JUROR NO. 545: 545.

4 THE COURT: I don't take shorthand. I did at one time,
5 believe it or not.

6 Yes, ma'am, name now?

7 PROSPECTIVE JUROR NO. 545: Michele LaRiene Taketa.

8 THE COURT: How do you spell your last name?

9 PROSPECTIVE JUROR NO. 545: T, as in Tom, A-K-E-T-A.

10 THE COURT: Yes, sir?

11 PROSPECTIVE JUROR NO. 523: I'm Bob Bornaise, 523.

12 THE COURT: And your name again, sir?

13 PROSPECTIVE JUROR NO. 523: Robert Bornaise. That's
14 B-O-R-N-A-I-S-E.

15 THE COURT: All right. Have a seat.

16 I'm going to admonish you at this time, please do not
17 discuss your feelings or thoughts with any of the jurors
18 concerning this matter.

19 For the entire panel I will be asking questions that are
20 already on your questionnaires. There are two reasons why I ask
21 questions, primarily to kind of get you relaxed and getting in
22 the habit of being in a courtroom and someone asking you
23 questions; and sometimes some of my lawyers--not necessarily
24 these--they pounce on you so quickly that they frighten you
25 sometimes. But by the time they get to you, I've had a chance to

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1 kind of calm you down.

2 And again, if you are selected as a juror in this case, the

3 only thing you'll be concerned with is the penalty hearing and

4 bringing back either a verdict of either death, life imprisonment

5 with the possibility of parole, or life imprisonment without the

6 possibility of parole. The reason why you are back here is

7 because we had some procedural irregularities in the last penalty

8 hearing, so our Supreme Court said we had to go back over it

9 again.

10 Let me see, Ms. Antonio. Is that correct?

11 PROSPECTIVE JUROR NO. 432: Alma.

12 THE COURT: All right. Ms. Alma, how long have you

13 lived in Clark County, Nevada?

14 PROSPECTIVE JUROR NO. 432: Excuse me, sir?

15 THE COURT: How long have you lived in Clark County,

16 Nevada?

17 PROSPECTIVE JUROR NO. 432: Over 30 years.

18 THE COURT: Are you married or single?

19 PROSPECTIVE JUROR NO. 432: Single.

20 THE COURT: Do you have any children?

21 PROSPECTIVE JUROR NO. 432: No, sir.

22 THE COURT: Outside what you've heard in the court

23 today, do you know anything about this case?

24 PROSPECTIVE JUROR NO. 432: No, sir.

26 THE COURT: Do you know any of the attorneys or

1 their clients?

2 PROSPECTIVE JUROR NO. 432: No, sir.

3 THE COURT: Do you know anyone in the district
4 attorney's office? *

5 PROSPECTIVE JUROR NO. 432: No, sir.

6 THE COURT: Did you recognize any of the persons whose
7 names were given to you as possible witnesses in this case?

8 PROSPECTIVE JUROR NO. 432: I've heard of Steve Wynn.
9 That's about it.

10 THE COURT: Ma'am?

11 PROSPECTIVE JUROR NO. 432: I've heard of Steve Wynn,
12 that I heard the people mention.

13 THE COURT: You don't know him personally?

14 PROSPECTIVE JUROR NO. 432: No, sir.

15 MR. WALL: Excuse me, your Honor. May I just ask that
16 she maybe hold the microphone a little closer so we can hear.

17 THE COURT: You have a very soft voice. So do I at
18 times. I will get real low, but -- and I'll see you folks --
19 please raise your voice.

20 Are you now involved in or have you ever been involved in
21 any law enforcement work?

22 PROSPECTIVE JUROR NO. 432: No, sir.

23 THE COURT: Do you have any close friends or relatives
24 who are members of any law enforcement agency?

25 PROSPECTIVE JUROR NO. 432: No, sir.

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8JD04150

1 THE COURT: Have you ever been or anyone close to you
2 ever been a victim of a crime?

3 PROSPECTIVE JUROR NO. 432: No, sir.

4 THE COURT: Have you ever served on a jury before?

5 PROSPECTIVE JUROR NO. 432: No, sir.

6 THE COURT: Ms. Alma, if you are selected as a juror in
7 this case, the State will require you to hear the evidence and
8 select a form of punishment that you may consider and then select
9 the one that you feel is most appropriate under the law and facts
10 of this case. Those three possible forms of punishment are:

11 (a) the imposition of the death penalty; (b) life imprisonment
12 without the possibility of parole; and (c) life imprisonment with
13 the possibility of parole. Do you understand, ma'am?

14 PROSPECTIVE JUROR NO. 432: Yes, sir.

15 THE COURT: In your present state of mind, can you, if
16 you are selected as a juror, consider equally all three possible
17 forms of punishment and then select the one that you feel is most
18 appropriate?

19 PROSPECTIVE JUROR NO. 432: Yes, sir.

20 THE COURT: Do you have any conscientious, moral
21 or religious objection to the imposition of the death
22 penalty?

23 PROSPECTIVE JUROR NO. 432: No, sir.

24 THE COURT: Where were you born?

25 PROSPECTIVE JUROR NO. 432: In Tijuana, Mexico.

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8JD04151

1 THE COURT: How long have you been in the United
2 States?

3 PROSPECTIVE JUROR NO. 432: Over 30 years.

4 THE COURT: What is your educational background?

5 PROSPECTIVE JUROR NO. 432: Mainly my school I did in
6 Mexico. But right now I'm going here to school to get my high
7 school diploma here.

8 THE COURT: All right. What has been your employment
9 for the last ten years?

10 PROSPECTIVE JUROR NO. 432: For the Clark County School
11 District. I work at Sunrise Acres Elementary School for eleven
12 years, and two years for Kirk Adams Elementary School.

13 THE COURT: What did you do there?

14 PROSPECTIVE JUROR NO. 432: I'm a teacher's aide.

15 THE COURT: What is your religious preference?

16 PROSPECTIVE JUROR NO. 432: Excuse me, sir?

17 THE COURT: What is your religious preference?

18 PROSPECTIVE JUROR NO. 432: I'm Catholic.

19 THE COURT: Do you attend mass regularly?

20 PROSPECTIVE JUROR NO. 432: Yes, sir.

21 THE COURT: How old are you?

22 PROSPECTIVE JUROR NO. 432: Forty-eight.

23 THE COURT: I don't recall whether I asked this
24 question but I'll ask it now: Do you know any of the persons
25 whose names were give to you as possible prosecution witnesses?

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1 PROSPECTIVE JUROR NO. 432: No, sir.

2 THE COURT: Do you have any close friends or relatives
3 who are involved in any law enforcement agency?

4 PROSPECTIVE JUROR NO. 432: No, sir.

5 THE COURT: Have you ever appeared as a witness in any
6 criminal case?

7 PROSPECTIVE JUROR NO. 432: No, sir.

8 THE COURT: Have you ever served on any grand jury?

9 PROSPECTIVE JUROR NO. 432: No, sir.

10 THE COURT: Have you ever served on any jury before?

11 PROSPECTIVE JUROR NO. 432: No, sir.

12 THE COURT: Have you ever been in military service?

13 PROSPECTIVE JUROR NO. 432: No, sir.

14 THE COURT: Can you and will you follow the Court's
15 instructions on the law even though you may disagree with those
16 instructions?

17 For everybody's concern, everybody will be asked that
18 question. And the reason being in the last few years we've had
19 such a high influx of courtroom cases. You can start with the OJ
20 Simpson case, and you come on down to Night Court and Divorce
21 Court, and Superior Court, and Law and Order, Homicide and God
22 knows what else.

23 But we see those programs and sometimes they tell you what
24 the law is and is not the law, sometimes it is the law for a
25 different jurisdiction. Most states have some laws that are

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1 different from others, although generically most are the same.
2 But we see those matters and the first thing we say, "That's the
3 law," and we go along with it, and go along with it, and go along
4 with it. And the first thing, we believe it.

5 So I'll ask you if you can set aside any convictions you
6 have as to what the law ought to be and follow the Court's
7 instructions as I give it to you?

8 PROSPECTIVE JUROR NO. 432: I think so, sir.

9 THE COURT: Do you know of any reason, whether I've
10 asked you or not, why you cannot sit as a fair and impartial
11 juror in this case?

12 PROSPECTIVE JUROR NO. 1: Not, really, sir.

13 THE COURT: Mr. Schieck? Mr. Wolfbrandt?

14 MR. WOLFBRANDT: Thank you, Judge. Good morning,
15 ma'am. I'm going to try and not to be redundant; but because of
16 the way you answered some of the questions on this jury
17 questionnaire, I've got to follow up and ask you some further
18 questions.

19 In response to one of the questions as to whether or ...

20 THE COURT: Please, Counsel, report the number so we
21 can all follow you.

22 MR. WOLFBRANDT: Certainly, it's Question Number 55.
23 You indicated that you might tend to give more weight or
24 credibility to police officer's testimony simply because they're
25 police officers. Now, although we don't expect any actual police

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1 officers to physically come in and testify, there is going to be
2 some prior testimony read to you that came from a police officer.

3 Your answer was that, yes, you would tend to give that more
4 credibility because they represent the law. That is your
5 opinion?

6 PROSPECTIVE JUROR NO. 1: Yes, sir.

7 MR. WOLFBRANDT: Do you feel that police officers make
8 mistakes or that they can lie?

9 PROSPECTIVE JUROR NO. 1: No, maybe I misunderstood the
10 question, but I understood that if a police officers would say
11 something that I automatically would say that he's saying the
12 truth. So I would believe what he says.

13 MR. WOLFBRANDT: Okay. Excuse me, Judge. The bottom
14 of page 8 and the top of page 9.

15 THE COURT: Number?

16 MR. WOLFBRANDT: 59, Question 59, B and C.

17 Ma'am, do you recall you were asked some questions regarding
18 the death penalty as to whether or not specifically if selected
19 as a juror you could consider equally all three possible forms of
20 punishment. Now, in your questionnaire you answered, no, but
21 this morning you answered, yes.

22 PROSPECTIVE JUROR NO. 1: I misunderstood the question.

23 MR. WOLFBRANDT: Okay. That's why I thought that
24 perhaps you maybe misunderstood the written question. You can
25 consider -- as you sit here right now, you don't have any

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1 preconceived ideas to what punishment you want to impose right
2 now, do you?

3 PROSPECTIVE JUROR NO. 1: I haven't really heard enough
4 to really say. Do you understand what I mean?

5 MR. WOLFBRANDT: Well, let me follow it up with some
6 other questions. You're not here to decide whether these two
7 individuals actually did the crime or not. That's already been
8 determined for you. Now, the fact that they've already been
9 convicted of a murder, or two murders actually, does that tend to
10 have you form an opinion in your mind as you sit here right now
11 as to which of those three punishments they should receive?

12 PROSPECTIVE JUROR NO. 1: Yes, sir.

13 MR. WOLFBRANDT: Okay. What is that opinion?

14 PROSPECTIVE JUROR NO. 1: Death penalty.

15 MR. WOLFBRANDT: Okay. Without hearing any evidence
16 whatsoever you already...

17 PROSPECTIVE JUROR NO. 1: That's why I asked.

18 MR. WOLFBRANDT: ...that would be your opinion?

19 PROSPECTIVE JUROR NO. 1: So far, yes, sir.

20 MR. WOLFBRANDT: All right. Is there anything that
21 would cause you to consider either of the other two penalties--
22 that being life without the possibility of parole, or life with
23 the possibility of parole?

24 PROSPECTIVE JUROR NO. 1: I would have to listen to the
25 rest, I mean.

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1 MR. WOLFBRANDT: But as you sit here right now, your
2 opinion would be is that they should get the death penalty, and
3 we have to convince you otherwise?

4 PROSPECTIVE JUROR NO. 1: Yes, sir.

5 MR. WOLFBRANDT: Judge, I would challenge for cause.

6 THE COURT: You join the challenge?

7 MR. WALL: Yes, I would, your Honor.

8 MR. SEATON: May I traverse, Judge?

9 THE COURT: Sure may.

10 MR. SEATON: You have the unfortunate problem of being
11 the first person to listen to all of these lawyers talk, but
12 somebody's got to be first. Let me talk to you just a little bit
13 about the questions that have been asked to you.

14 First of all, let me state something to you and see if you
15 agree with this. When we do a trial like this, and this is sort
16 of the second part of the trial, the trial's already happened;
17 they've been found guilty. You understand that?

18 PROSPECTIVE JUROR NO. 1: Yes, sir.

19 MR. SEATON: Okay. What we're doing now is trying to
20 determine what their penalty will be. It's still a trial.
21 There's going to be evidence put on before you so that you can
22 learn something about these two individuals, and you and any
23 other persons who might be placed on the jury can decide what
24 their penalties should be. Follow me so far?

25 PROSPECTIVE JUROR NO. 1: Yes, sir.

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1 MR. SEATON: The defense attorneys, there are four of
2 them here who are representing these two individuals, are
3 obviously--I mean this doesn't take a rocket scientist to figure
4 out--are going to be trying to convince you that you should come
5 back with one of the lesser penalties, like with the
6 possibility of parole or perhaps life without possibility of
7 parole, but certainly not the death penalty. You understand
8 that?

9 PROSPECTIVE JUROR NO. 1: Yes, sir.

10 MR. SEATON: And I can tell you as we stand here
11 talking now that myself, as a representative of the state, is
12 going to be suggesting to you that the death penalty is the
13 appropriate penalty.

14 Now, what the Judge and the attorneys are going to try to do
15 in this selection that we're going through is to find twelve
16 jurors who are capable of coming back with any of those
17 penalties. They're all sort of in neutral. They haven't heard
18 any of the evidence. They don't know anything other than the
19 fact that these two have already been found guilty of first-
20 degree murder.

21 And the defense attorneys would want you to be able to go
22 into the jury deliberation room and say to yourself, "Well, now
23 I've got to think about all the evidence I've just heard and
24 decide whether I'm going to give them the death penalty, life
25 with, or life without." And they would want you to honestly

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1 consider all three of those penalties just as I would. Do you
2 understand?

3 PROSPECTIVE JUROR NO. 1: Yes, sir.

4 MR. SEATON: You have suggested to Mr. Wolfbrandt that
5 as you sit here today you are leaning toward the death penalty,
6 and yet you have heard no evidence. My question to you is: Can
7 we assume that that isn't a foregone conclusion in your mind,
8 that you will listen to all of the evidence that we put on before
9 you make up your mind?

10 PROSPECTIVE JUROR NO. 1: Yes, sir.

11 MR. SEATON: Have you made up your mind now?

12 PROSPECTIVE JUROR NO. 1: No, sir.

13 MR. SEATON: Let me ask you the real key question.
14 Let's say that Ms. Arriola was sitting in the chair of Dale
15 Flanagan or Randy Moore. If you were on trial and you are facing
16 the death penalty, or life with, or life without, would you want
17 twelve jurors sitting on the jury panel that have your frame of
18 mind?

19 PROSPECTIVE JUROR NO. 1: Yes, sir.

20 MR. SEATON: You are that willing and that open to
21 listen to all of the evidence?

22 PROSPECTIVE JUROR NO. 1: Yes.

23 MR. SEATON: And you have no preconceived...

24 THE COURT: I'm sorry. Folks, I can't take nods. I
25 can't take uh-huhs and huh-uhs. It's either yes, or no. This is

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1 being recorded, and the recording machine will not take a nod.

2 PROSPECTIVE JUROR NO. 1: I'm sorry.

3 THE COURT: Was the answer to the last question a yes
4 or no.

5 PROSPECTIVE JUROR NO. 1: Yes.

6 MR. SEATON: You are open and objective right now?

7 PROSPECTIVE JUROR NO. 1: Yes, sir.

8 MR. SEATON: And you don't have any preconceived
9 notions?

10 PROSPECTIVE JUROR NO. 1: No, I don't.

11 MR. SEATON: Okay. Thank you. I would...

12 THE COURT: Mr. Wolfbrandt, any other questions from
13 her?

14 MR. WOLFBRANDT: Yes, sir.

15 THE COURT: And on the challenge?

16 MR. WOLFBRANDT: Yes, ma'am.

17 THE COURT: I'll have to make a ruling...

18 MR. WOLFBRANDT: I'm sorry.

19 THE COURT: I'll have to make a ruling as soon as you
20 get through on that.

21 MR. WOLFBRANDT: Let's see if I understood you
22 correctly, though. Despite the questions of Mr. Seaton, you
23 still are going to require that the defense convince you that the
24 penalty after this hearing should be something other than death?

25 PROSPECTIVE JUROR NO. 1: I would like to listen to the

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1 whole thing before deciding. You asked me as in general; that's
2 what I thought. But I would like to listen before make my
3 decision.

4 MR. WOLFBRANDT: You understand--or maybe you don't, so
5 I'm going to explain it you--that the death penalty is not
6 automatic in the state of Nevada. You do not have to impose the
7 death penalty in any case. Do you understand that?

8 PROSPECTIVE JUROR NO. 1: I didn't know that.

9 MR. WOLFBRANDT: Okay. Simply because somebody has
10 been convicted of murder, it's to the jury's sole discretion as
11 to what the penalty should be. Your hands are not tied. There
12 is no mandatory death penalty in the state of Nevada.

13 Okay. Do you understand that now?

14 PROSPECTIVE JUROR NO. 1: Yes, sir.

15 MR. WOLFBRANDT: Before you can even consider the
16 possibility of a death penalty, you as the jury would have to
17 determine that the State has proven beyond a reasonable doubt at
18 least one aggravating circumstance. Okay?

19 PROSPECTIVE JUROR NO. 1: Yes, sir.

20 MR. WOLFBRANDT: Now, will you hold the State to that
21 burden? In other words, will you require the State to prove to
22 you, if you're selected as a juror, to prove to you beyond a
23 reasonable doubt any aggravating circumstances that they've
24 alleged?

25 PROSPECTIVE JUROR NO. 1: Maybe I don't make myself

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1 clear, or I don't understand you, but I -- to me I would like to
2 listen and see if I'm selected. I can't say right offhand until
3 I -- I'm sorry, but I'm very nervous with this.

4 THE COURT: Please, don't be nervous. There are no
5 right or wrong answers.

6 MR. WOLFBRANDT: Relax, we don't...

7 PROSPECTIVE JUROR NO. 1: It's hard to explain what I'm
8 feeling right now, and I'm getting very nervous now.

9 MR. WOLFBRANDT: Okay. Well, just relax. In criminal
10 procedures, in criminal matters, do you understand the concept
11 that the State has the burden of proof, that they have to prove
12 the case to you as a juror?

13 PROSPECTIVE JUROR NO. 1: Yes, sir.

14 MR. WOLFBRANDT: Okay. All I'm asking is will you hold
15 the State to that burden and make them prove their case to you,
16 as opposed to making the Defense prove to you something else? In
17 other words, do you feel that the Defense has to prove anything
18 to you?

19 THE COURT: May see counsel at bench, please?

20 (Bench conference)

21 THE COURT: I have a little problem with your last
22 statement, sir. Until you are finished, you have a duty to
23 determine the mitigating circumstances. If you sat there and did
24 nothing and said nothing, this case would be reversed right
25 quick. So you do have a job to show mitigating circumstances.

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SA199

8JD04162

1 Yes, Ms. Mounts? Now, if you ask me for case law; I don't have
2 any case law. This just seems to me logically. Questions?

3 MR. WOLFBRANDT: I don't have to prove beyond a
4 reasonable doubt.

5 THE COURT: No, no, no, but he said "We got nothing to
6 do." You do have a job, at least putting on mitigating
7 circumstances. You're not going to sit there and do nothing.

8 (Bench conference concluded)

9 MR. WOLFBRANDT: Let me restate that, because I think I
10 actually misspoke there. What we anticipate will happen is in
11 penalty hearings such as this, the State goes first. They have
12 the burden of proving to you any aggravating circumstances that
13 they feel exist, and they have the burden of proving that to you
14 beyond the reasonable doubt. Do you understand that?

15 PROSPECTIVE JUROR NO. 1: Yes, sir.

16 MR. WOLFBRANDT: It would be your decision as a juror
17 to determine whether or not the State has in fact proven to you
18 any aggravating circumstances beyond a reasonable doubt, okay?

19 PROSPECTIVE JUROR NO. 1: Right.

20 MR. WOLFBRANDT: It is also the purpose of the defense
21 and the obligation of the defense to present to you any
22 mitigating circumstances--in other words, evidence that you might
23 consider in order to mitigate any of the three forms of
24 punishments that you may consider. Do you understand that?

25 PROSPECTIVE JUROR NO. 1: Yes, sir.

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8JD04163

1 MR. WOLFBRANDT: Now, the Defense is not held to the
2 same burden of proof. We do not have to prove to you beyond a
3 reasonable doubt any mitigating circumstances. Do you understand
4 that?

5 PROSPECTIVE JUROR NO. 1: Yes.

6 MR. WOLFBRANDT: Okay. Do you understand as well that
7 if you are selected as a juror and when you're deliberating, if
8 you determine that the State has in fact proven aggravating
9 circumstances, and further you find that in your mind there are
10 no mitigating circumstances, you still do not have to impose a
11 death penalty. You can consider and impose any of the other two
12 possible punishments. Do you understand that?

13 PROSPECTIVE JUROR NO. 1: Yes, sir.

14 MR. WOLFBRANDT: And are you willing to consider each
15 of the three possible punishments after you've heard all the
16 evidence and deliberated?

17 PROSPECTIVE JUROR NO. 1: Yes, sir.

18 THE COURT: Motion to discharge is denied. Please
19 continue.

20 MR. WOLFBRANDT: Is there anything about the nature of
21 the case itself as was described to you by Mr. Seaton that causes
22 you concern or difficulty in sitting as a prospective juror here?

23 PROSPECTIVE JUROR NO. 1: It's the first time I've been
24 here, so everything -- even though it wasn't a murder case I
25 would still be nervous just being here; that I don't really

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8JD04164

8JD04165

1 enjoy.

2 MR. WOLFBRANDT: I can appreciate that. What I'm
3 concerned with though, is there any -- I mean you heard the
4 factual pattern as described by Mr. Seaton. Did you not?

5 PROSPECTIVE JUROR NO. 1: Yes, sir.

6 MR. WOLFBRANDT: Okay. Is there anything about the
7 fact that this was a double homicide and that the victims were
8 relatives of Mr. Flanagan, does that cause you any concern or any
9 difficulty in you being seated as a perspective juror?

10 PROSPECTIVE JUROR NO. 1: No, sir.

11 MR. WOLFBRANDT: Have you ever had discussions, just
12 general discussions with friends or at social gatherings or
13 whatnot, about the death penalty?

14 PROSPECTIVE JUROR NO. 1: Occasionally, not often, but
15 I have had some, yes, sir.

16 MR. WOLFBRANDT: Do you have your own personal opinion
17 about the death penalty?

18 PROSPECTIVE JUROR NO. 1: Yes, sir.

19 MR. WOLFBRANDT: Has that opinion changed at all over
20 the years?

21 PROSPECTIVE JUROR NO. 1: I don't think so, sir.

22 MR. WOLFBRANDT: What type of case do you feel -- or
23 do you feel that there are certain cases that require the death
24 penalty?

25 PROSPECTIVE JUROR NO. 1: If a person is found guilty,

8JD04166

1 I imagine so.

2 MR. WOLFBRANDT: In other words, in your mind, even
3 though I've told you earlier that death penalty in Nevada is not
4 mandatory, in your personal opinion do you feel that there are
5 cases where in your mind the death penalty is mandatory?

6 PROSPECTIVE JUROR NO. 1: Well, I think if a person is
7 found guilty and a person is guilty. I think it should be a death
8 penalty; but like I said, I have to listen.

9 This is my first time. I'm sorry, I'm very nervous here.

10 MR. WOLFBRANDT: I understand that. You have to
11 equally understand our concern as well. Mr. Moore has been found
12 guilty of two murders. And what we want is a jury that is not
13 leaning one way or the other, but is going to consider and
14 consider all three forms of punishment and then make a decision
15 at the end.

16 But what I want to make sure is that is that you are
17 answering truthfully that your personal opinion is not such that
18 right now starting out of the blocks, because he is already
19 convicted of two murders, that the only option in your mind is
20 the death penalty.

21 PROSPECTIVE JUROR NO. 1: I would say, yes, sir.

22 MR. WOLFBRANDT: Judge, again I would renew my
23 challenge for cause.

24 THE COURT: Mr. Seaton. Please, let's not go back
25 through the whole scenario again.

1 MR. SEATON: No, I understand. The problem that we're
2 having here is there's probably a little bit of a language
3 problem as well as the nervousness? Am I correct in assuming
4 that?

5 PROSPECTIVE JUROR NO. 1: Yes, sir.

6 MR. SEATON: Okay. You know what? Let me tell you
7 something else. If you want to ask us any questions to
8 straighten out what we're saying, please feel free to. We can
9 talk back and forth here. This hopefully is more of a
10 conversation than lecture, but we need to tell you a little bit
11 about the law.

12 The law requires that the twelve people that go into the
13 jury deliberation room could actually think about all three
14 penalties; and as I listened to you answer Mr. Wolfbrandt just
15 now, it sort of sounded to me, and I think maybe to the Judge,
16 like you may have made up your mind--that in your mind if a
17 person is found guilty of first-degree murder and they actually
18 did it, then they should get the death penalty without much
19 regard to anything else.

20 And these two have been found guilty. They are guilty of
21 the crimes of killing Dale Flanagan's grandparents. We know that
22 today. And this jury, whoever it is that's chosen, can't
23 challenge that at all. It's just something that's a given right
24 now.

25 And what we want to know is, and maybe I can explain this a

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1 little bit more. You've heard aggravating circumstances and
2 mitigating circumstances, and this may help out the whole panel,
3 and you'll learn that we talk about this a lot at the very
4 beginning. And then once everybody understands the procedures,
5 we can go through the questions more quickly. That's why you're
6 sort of a guinea pig at this time, I know.

7 The aggravating circumstances are things that I, the State,
8 must prove to you beyond a reasonable doubt and must show you
9 that these things exist. And these are things that the Nevada
10 legislature has told us will make a first-degree murder case
11 worse than a normal first-degree murder case.

12 Just as an example, if a fireman or a policeman is killed in
13 the line of duty--and that wasn't the case here--that would make
14 it worse, and that would aggravate the first-degree murder case.
15 If torture was used, if it was done during a robbery, or a
16 burglary, or there are various things, that if those things are
17 present in a case, it makes the case worse, it aggravates it and
18 it allows the jury to think about the death penalty.

19 On the other side of the coin though, looking at it from
20 their perspective, there are mitigating things, things that say
21 good things about the Defendant. And the legislature has said it
22 can be anything--they got good grades in school, they were nice
23 to their friends, they belonged to certain clubs--just good
24 things that happened to the Defendant. And what this system of
25 ours requires you as jurors to do is it's sort of a threefold

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8JD04168

1 process, I think.

2 First, you've got to find a person guilty of first-degree
3 murder. That's been done in this case. Then you have to look at
4 the testimony I put on and decide have I proven to you that there
5 are aggravating circumstances beyond a reasonable doubt.

6 And assuming that you've done that and you agree that there
7 are one or more aggravating circumstances, then you look at
8 whatever evidence they might have put on, or even brought out in
9 cross-examination of the State's witnesses and decide: Are there
10 things that mitigate this crime? Are these otherwise nice
11 people, and they've led good lives and they have good friends,
12 and people care about them and whatever the mitigation might be?

13 And then the law requires you to weigh the mitigation,
14 whatever it is, whatever you've decided on against the
15 aggravation, whatever I've proven to you beyond a reasonable
16 doubt. And by the way, they don't have to prove the mitigation
17 beyond a reasonable doubt; they just have to show it to you.

18 You take those two things and you weigh them. And if the
19 aggravation outweighs, is more important than, the mitigation,
20 then the law says you are entitled to consider the death penalty,
21 not that you must give it.

22 So you can see there's a lot that we go through to get to
23 that point. If I don't show you aggravation beyond a reasonable
24 doubt, if the mitigation outweighs the aggravation, then you
25 can't give the death penalty. The law says you are not allowed

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SA206

8JD04169

8JD04170

1 to in that circumstance.

2 Do you follow everything that I've said so far?

3 PROSPECTIVE JUROR NO. 1: Yes, sir.

4 MR. SEATON: Okay. Are getting less nervous?

5 PROSPECTIVE JUROR NO. 1: Yes, sir.

6 MR. SEATON: Good, me too.

7 THE COURT: Excuse me, Mr. Seaton, just so we won't
8 have any mistake. When Mr. Seaton says "I," he means the State
9 of Nevada.

10 MR. SEATON: Yes, always that. So that sort of boils
11 us down to how you're going to conduct yourself in this
12 particular case. What all of us want, and we need to know if you
13 can agree with this, and it sort of sounds like maybe you're
14 having troubles with it. And maybe we're just not
15 communicating well, and that's what I want to make sure we're
16 able to do here.

17 What we all want in this case is when you're sitting on the
18 jury, Randy Moore and Dale Flanagan and their lawyers have to
19 feel like they've got a chance with you, that you might vote with
20 the possibility of parole, or without the possibility of parole.
21 Just like I have a right to feel that you might vote for the
22 death penalty. You see what I'm saying?

23 PROSPECTIVE JUROR NO. 1: Yes, sir.

24 MR. SEATON: And you before -- the reason I jumped up
25 and started chatting with you again is that you seemed to

1 indicated to Mr. Wolfbrandt that because a person is found guilty
2 of first-degree murder, you pretty much think that that ought to
3 be the death penalty.

4 Now, I'm not telling you to change your answer. The only
5 thing we want is the truth from you. And as the Judge said,
6 there are no wrong answers. Nobody is going to hold one answer
7 or another against you. We just want to find out how you're
8 feeling so that we all feel comfortable with you sitting on the
9 jury.

10 So I guess it boils down to the question of: As you're
11 sitting here now, would you be willing to listen to all of the
12 evidence before coming to any conclusion?

13 PROSPECTIVE JUROR NO. 1: I feel -- I mean, in general
14 what I feel is if a person is guilty of a crime, he should have
15 the death penalty.

16 MR. SEATON: Okay.

17 PROSPECTIVE JUROR NO. 1: That's my belief.

18 MR. SEATON: Would you be willing, depending on the
19 evidence that is being presented to you, to change that opinion,
20 and -- do they have the chance with you of the evidence coming
21 out in a certain way that you might vote for the life with the
22 possibility or without the possibility?

23 PROSPECTIVE JUROR NO. 1: I'd have to listen to the
24 rest, but I mean my general feeling is if somebody commits a
25 crime, kills somebody, I think that they should have the death

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8JD04171

8JD04172

1 penalty.

2 MR. SEATON: All right. Judge, my response is I don't
3 think enough has come out for a cause challenge at this time. I
4 leave it to the Court's discretion.

5 THE COURT: I'm going to sustain the challenge at this
6 time. I've heard her answers, and any burden that's put upon the
7 Defendants in this kind of a hearing puts the Defendant at a
8 disadvantage. The jury must set aside any convictions that they
9 may have and determine the case only from the evidence it hears
10 from the stand.

11 And with certain rare exceptions, I will tell the jury that
12 at the time when I read the instructions. But I think in this
13 case there may or may not be a language problem. I don't know.
14 But in all fairness to all parties concerned, I'm going to excuse
15 her.

16 Ms. Alma, thank you very much for coming down, and thank you
17 for your candor. Report back to the jury commissioner and tell
18 him I have excused you.

19 PROSPECTIVE JUROR NO. 1: Excused me?

20 THE COURT: Report back to the jury commissioner and
21 tell him I have excused you.

22 PROSPECTIVE JUROR NO. 1: Yes, sir, thank you.

23 THE COURT: And thank you very much for coming
24 down.

25 MR. SCHIECK: Your Honor, may we approach the bench for

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8JD04172

8JD04173

1 a second?

2 THE COURT: Yes, you may.

3 (Bench conference)

4 THE COURT: Before you start, there's something I want
5 to talk about. Ms. Mounts, please join us.

6 MS. MOUNTS: Sorry, your Honor.

7 THE COURT: (Indiscernible)

8 (Indiscernible colloquy)

9 UNIDENTIFIED COUNSEL: On the record that is the
10 dumbest thing I've ever heard.

11 THE COURT: I want you to understand that this is being
12 transcribed.

13 UNIDENTIFIED COUNSEL: I understand. That's why I
14 said it. I said the same thing to the Supreme Court in
15 argument.

16 THE COURT: I don't want to have any problems.

17 MR. SCHIECK: I don't know if you've noticed but the
18 Bailiff from Department IX has come down. Both Mr. Wolfbrandt
19 and I have matters trailing, and they're ready for us. The next
20 juror's going to be his anyway. Can I just be excused, go up and
21 take care of this matter, and then come back.

22 THE COURT: Oh, go right ahead.

23 MR. SEATON: I just wanted to let the Court know.

24 (Bench conference concluded)

25 (Mr. Schieck exits courtroom)

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SA210

8JD04173

1 THE COURT: The Clerk will now draw one additional
2 name.

3 THE CLERK: Jamil Ur Rehman, Badge No. 499, R-E-H-M-A-
4 N.

5 THE COURT: Mr. Rehman, please come forth and take the
6 seat just vacated.

7 Sir, how long have you lived in Clark County, Nevada?

8 PROSPECTIVE JUROR NO. 1: About eleven years.

9 THE COURT: Where were you born and raised?

10 PROSPECTIVE JUROR NO. 1: I was born in Pakistan.

11 THE COURT: Where in Pakistan?

12 PROSPECTIVE JUROR NO. 1: Opilahor, yes.

13 THE COURT: How long have you been in the United
14 States?

15 PROSPECTIVE JUROR NO. 1: Eleven years.

16 THE COURT: What is your educational background?

17 PROSPECTIVE JUROR NO. 1: I have a Bachelor's of
18 Science in computer science.

19 THE COURT: Was that your major in college?

20 PROSPECTIVE JUROR NO. 1: Yes.

21 THE COURT: Did you take any courses in what is know as
22 -- any law course in college?

23 PROSPECTIVE JUROR NO. 1: I've taken a criminal
24 justice, the freshman course.

25 THE COURT: And what college was that, sir?

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8JD04174

1 PROSPECTIVE JUROR NO. 1: Excuse me?
2 THE COURT: At what college?
3 PROSPECTIVE JUROR NO. 1: U.N.L.V.
4 THE COURT: Where did you graduate from -- let me
5 rephrase it. Which college did you graduate from?
6 PROSPECTIVE JUROR NO. 1: U.N.L.V.
7 THE COURT: Do you hold any other degrees?
8 PROSPECTIVE JUROR NO. 1: No.
9 THE COURT: What has been your employment over the last
10 ten years?
11 PROSPECTIVE JUROR NO. 1: I've been working for
12 Lockheed Engineering and Sciences Company as a computer
13 programmer.
14 THE COURT: And who do you work for now?
15 PROSPECTIVE JUROR NO. 1: I'm still working for them.
16 THE COURT: What is your religious preference?
17 PROSPECTIVE JUROR NO. 1: I am a Muslim.
18 THE COURT: Do you attend the mosque regularly?
19 PROSPECTIVE JUROR NO. 1: When I can, yes, I do.
20 THE COURT: How old are you, sir?
21 PROSPECTIVE JUROR NO. 1: I am thirty-one.
22 THE COURT: Are you married or single?
23 PROSPECTIVE JUROR NO. 1: I'm married.
24 THE COURT: Is your wife employed?
25 PROSPECTIVE JUROR NO. 1: No, she's not.

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1 THE COURT: Do you have any children?
2 PROSPECTIVE JUROR NO. 1: No.
3 THE COURT: Are you acquainted with either of the
4 Defendants or their attorneys?
5 PROSPECTIVE JUROR NO. 1: No.
6 THE COURT: Are you acquainted with any member of the
7 District Attorney's Office or anybody in the District Attorney's
8 Office?
9 PROSPECTIVE JUROR NO. 1: No.
10 THE COURT: Did you recognize any of the persons whose
11 names have been give to you as possible prosecution witnesses?
12 PROSPECTIVE JUROR NO. 1: No.
13 THE COURT: Are you now involved in, or have you ever
14 been involved in, any law enforcement work?
15 PROSPECTIVE JUROR NO. 1: No.
16 THE COURT: Do you have any close friends or relatives
17 who are members of any law enforcement agency?
18 PROSPECTIVE JUROR NO. 1: No, no I don't.
19 THE COURT: Have you ever appeared as a witness in any
20 criminal prosecution?
21 PROSPECTIVE JUROR NO. 1: No.
22 THE COURT: Have you ever served on any kind of a jury
23 before?
24 PROSPECTIVE JUROR NO. 1: No.
25 THE COURT: Have you ever been in the military service?

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8JD04177

1 PROSPECTIVE JUROR NO. 1: No, I haven't.

2 THE COURT: Can you and will you follow the Court's
3 instructions on the law even though you may differ with them?

4 PROSPECTIVE JUROR NO. 1: Depending on the
5 circumstances.

6 THE COURT: Would you mind explaining, sir?

7 PROSPECTIVE JUROR NO. 1: Like, personally I believe in
8 death penalty, but I know there have been crimes of passion where
9 people kill each other.

10 THE COURT: But my question's not on the factuals. I
11 will give you a set of rules to guide you by. Perhaps I can give
12 you -- this is perhaps the best example.

13 You have seen and you've heard so many times on T.V. and the
14 movies and God knows where else, "You can't convict me on
15 circumstantial evidence." I want you to understand that I would
16 instruct you that you can be convicted on circumstantial
17 evidence. And you've heard that so many times a lot of folks
18 believe that.

19 I'm asking you: Can you set aside any viewpoint that you
20 may have as to what the law should be, or what the law ought to
21 be, or what it is someplace else, and follow the Court's
22 instructions on the law?

23 PROSPECTIVE JUROR NO. 1: Yes, I can.

24 THE COURT: In the state of Nevada there are three
25 possible forms of punishment that the jury may consider and then

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1 select the one that they believe is the most appropriate under
2 the law and facts of this case. Those three possible forms of
3 punishment are: (a) the imposition of the death penalty;
4 (b) life imprisonment without the possibility of parole; and
5 (c) life imprisonment with the possibility of parole. Do you
6 understand that, sir?

7 PROSPECTIVE JUROR NO. 1: Yes, I do.

8 THE COURT: In your present state of mind, can you, if
9 you are selected as a juror, consider equally all three possible
10 forms of punishment and then select the one that you feel is
11 most appropriate?

12 PROSPECTIVE JUROR NO. 1: Say that again?

13 THE COURT: Do you have any conscientious, moral or
14 religious objections to the imposition of the death penalty?

15 PROSPECTIVE JUROR NO. 1: No.

16 THE COURT: You indicated a minute ago that you felt
17 that the death penalty was appropriate. We've just gone through
18 a series of questions from the juror before you on that aspect.
19 Do you understand that there must be a unanimous verdict of all
20 the jurors for either of those sentences, whether they be death
21 of life with or life without the possibility of parole?

22 PROSPECTIVE JUROR NO. 1: Yes.

23 THE COURT: And the jury must consider all those in
24 light of the evidence they hear from the stand. Both the State
25 and the Defendant is entitled to that aspect of it. Do you

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8JD04178

1 understand that, sir?

2 PROSPECTIVE JUROR NO. 1: Yes, I do.

3 THE COURT: And where you indicate you'll be that when
4 one has committed a murder, one -- of the death penalty is -- I
5 believe you indicated it was available or you believed in that.
6 Are you saying that you believe in mandatory death penalty?

7 PROSPECTIVE JUROR NO. 1: I feel, depending on the
8 nature of the crime. Like personally, I think people who kill
9 children should be executed.

10 THE COURT: That is not a point of this case. There
11 were no children killed. And even if there had been, the law of
12 this state requires the jury or whoever is selected as a jury to
13 hear all the evidence before it makes up its mind. And when you
14 back in the jury room to deliberate, we expect you to voice your
15 opinion and listen to the opinions of the others, so we may get a
16 fair and impartial verdict. Do you understand that, sir?

17 PROSPECTIVE JUROR NO. 1: Yes, I do.

18 THE COURT: Can you set aside any previous convictions
19 you may have on the issue of the death penalty and determine one
20 of the three causes I've just given you on the evidence you have
21 heard or will hear from the stand?

22 PROSPECTIVE JUROR NO. 1: Yes, I can.

23 THE COURT: Mr. Wolfbrandt? Oh, I have one more
24 question -- two other questions. If you were either of the
25 Defendants, would you want twelve people in your present state of

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1 mind to sit and judge your case?

2 PROSPECTIVE JUROR NO. 1: No, I wouldn't.

3 THE COURT: And why not, sir?

4 PROSPECTIVE JUROR NO. 1: Cause nobody wants to die.

5 THE COURT: Mr. Wolfbrandt?

6 MR. WOLFBRANDT: Thank you, your Honor.

7 THE COURT: Should I challenge or not?

8 MR. WOLFBRANDT: Yes, your Honor.

9 THE COURT: Ms. Mounts, you folks join in?

10 MS. MOUNTS: We do, your Honor.

11 THE COURT: Mr. Seaton?

12 MR. SEATON: What is the basis of the challenge?

13 THE COURT: The basis, Counsel, is that he's indicated,

14 one, he has a belief that if one is killed, one should get the

15 death penalty. And my further questioning on it, when I asked

16 him whether or not if he would sit in the place of the

17 Defendants, if he was asked if he were in his place, and he

18 wanted a jury to come forward with twelve folks like himself.

19 The record's there, Mr. Seaton, and his answer was, no, he

20 wouldn't. The question was why. Because of the death penalty.

21 So please see...

22 MR. SEATON: Do you think you would not make a fair and
23 impartial juror?

24 PROSPECTIVE JUROR NO. 1: I think I can make a fair and
25 impartial juror because I think analytically.

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SA217

8JD04180

1 MR. SEATON: I'm sorry, you think analytically?

2 PROSPECTIVE JUROR NO. 1: Yes.

3 MR. SEATON: That's what you said?

4 PROSPECTIVE JUROR NO. 1: Yes.

5 MR. SEATON: Okay.¹¹

6 PROSPECTIVE JUROR NO. 1: Cause I've been in the
7 computer profession for a long time.

8 MR. SEATON: Dale Flanagan and Randolph Moore may not
9 think analytically. They want to know they've got somebody on
10 the jury that might vote their way. Might you not vote their
11 way? Is that the likelihood that we're looking at here?

12 PROSPECTIVE JUROR NO. 1: That's one of the
13 possibilities, yes.

14 MR. SEATON: Okay.¹² It's a possibility. There's a
15 possibility you might not vote the way of the State as well, is
16 there not?

17 PROSPECTIVE JUROR NO. 1: Correct.

18 MR. SEATON: When you told the Judge that if you were
19 sitting in one of these two chairs here, you wouldn't want a
20 juror like yourself, how did you mean that? Can you explain that
21 for us?

22 PROSPECTIVE JUROR NO. 1: Well, like I said, nobody
23 wants to die, so I wouldn't want somebody just to execute me. If
24 I know I have done a crime, and I'm guilty of it, I'd rather
25 serve the time than to die.

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8JD04181

1 MR. SEATON: Sir, there are going to be twelve jurors
2 that ultimately sit in judgment of Mr. Moore and Mr. Flanagan.
3 What Mr. Flanagan and Mr. Moore are entitled to are twelve
4 people, all of whom could under the appropriate set of
5 circumstances, come back with a finding of something less than
6 death. Just as the State is entitled to have twelve people who
7 could possibly come back with a verdict of death, given the right
8 set of circumstances. Do you follow that?

9 PROSPECTIVE JUROR NO. 1: Yes, I do.

10 MR. SEATON: Do you agree with that?

11 PROSPECTIVE JUROR NO. 1: Yes, I -- that's what jury is
12 all about.

13 MR. SEATON: Okay. I think the last question that you
14 answered on the questionnaire was that you would want to rely on
15 seeing the evidence before you made any decision, something to
16 that effect. Is that correct?

17 PROSPECTIVE JUROR NO. 1: Correct.

18 MR. SEATON: And do you believe that truly?

19 PROSPECTIVE JUROR NO. 1: Yes, I do. I can't just sit
20 here and execute somebody. I'm going to have to think twice
21 about it.

22 MR. SEATON: I guess one of the things that I'm trying
23 to point out is that when twelve people are finally seated on
24 that jury, the very strong likelihood is that all twelve of them
25 will have the capacity, the ability, to render a death verdict

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1 against these two individuals. Is it that possibility that made
2 you say that you wouldn't want twelve people on the jury -- are
3 you saying that you'd want twelve people on the jury who didn't
4 believe in the death penalty at all if you were sitting in this
5 chair?

6 PROSPECTIVE JUROR NO. 1: Yeah, I guess. If I were
7 them, yes.

8 MR. SEATON: I don't know how analytical that it, but
9 it's pretty smart. But with it in mind that -- well, we've got
10 different interests here, the State and the Defense. The State
11 wants to see the death penalty carried out, the Defense does not.
12 Those are two diametrically-opposed propositions. Nobody's going
13 to be happy; nobody's going to have their jury. So I want to
14 reask the question with that in mind.

15 Let's assume, for example, that there are going to be twelve
16 people up there who are truly able to render any one of the three
17 decisions, and you're one of them. Now, if you were sitting down
18 in their chair, knowing that that's the way the jury is going to
19 be, would you be satisfied with the jury composed of twelve
20 people who were just like you are?

21 PROSPECTIVE JUROR NO. 1: I think I will be satisfied.

22 MR. SEATON: You would be satisfied?

23 PROSPECTIVE JUROR NO. 1: Yes.

24 MR. SEATON: And I would resist their challenge,
25 Judge.

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8JD04183

1 THE COURT: Okay. Any other questions on this one
2 issue?

3 MR. WALL: If I might just with some follow-up
4 questions. I think the record's clear, and that the challenge
5 should be sustained. If you want me to go further...

6 THE COURT: No, only if you feel you must go into it,
7 sir. I'm ready to render a decision. But if you feel you must
8 go into it further...

9 MR. WALL: Well, if you're considering sustaining the
10 objection, I don't need to go any further.

11 THE COURT: Counsel, whether I am or am not, you have a
12 right to give questions. Those are known as tactics.

13 MR. WALL: Then, yes, I would like to proceed further
14 on this issue, in this area.

15 THE COURT: You may do so.

16 MR. WALL: Mr. Rehman, earlier in the Judge's
17 questioning, you indicated that it kind of depended on the facts
18 in the case, that if this were a crime of passion then you could
19 see where a death penalty in your mind might not even be
20 appropriate at all. Okay. We understand this is not a situation
21 where this was a crime of passion, right?

22 PROSPECTIVE JUROR NO. 1: Okay.

23 MR. WALL: Okay. In fact, in the jury questionnaire on
24 page 7, as well as this morning, you've been given a set of
25 facts. Specifically directing the Court and everyone's attention

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1 to page 7 where...

2 THE COURT: May I have a question number on page 7?

3 MR. WALL: That's right -- it's the paragraph below the
4 heading, "Pretrial Publicity."

5 THE COURT: What's the number? Every question has a
6 number.

7 MR. WALL: Just above 58.

8 THE COURT: Thank you. That's much faster when you
9 look for 58 than number...

10 MR. WALL: Okay. Whether the Defense agrees with the
11 conviction is irrelevant for this proceeding. You were told in
12 the questionnaire that in this case Dale Flanagan and Randy Moore
13 have been convicted of killing Dale's grandparents, and that the
14 motive for that killing was to receive an inheritance. Now,
15 those are the facts of this case.

16 With those facts in mind, can you consider any of the other
17 possible punishments other than the death penalty? And because
18 we're not talking about the killing of a police officer, the
19 killing of a child. I mean, these are the facts that we're
20 talking about here.

21 So with those facts and the knowledge that those are those
22 facts, can you consider any of the other two possible
23 punishments?

24 PROSPECTIVE JUROR NO. 1: I think I can.

25 MR. WALL: Can you consider them equally?

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8JD04185

1 PROSPECTIVE JUROR NO. 1: I can consider them equally,
2 yes.

3 MR. WALL: The page before. I'm just going to move on.

4 THE COURT: What number on the page before?

5 MR. WALL: I guess -- we do have the challenge for
6 cause, and I'll submit that to the Court.

7 THE COURT: Denied. Now, it's your -- I have one more
8 question to ask. Mr. Rehman, do you know of any reason
9 whatsoever, whether I've asked you or not, why you cannot sit as
10 a fair and impartial juror on this case?

11 PROSPECTIVE JUROR NO. 1: No, I really don't.

12 THE COURT: Now, Mr. Wolfbrandt.

13 MR. WOLFBRANDT: It must be page 6 here, your Honor,
14 although there's no page num -- oh, there it is. Page 6, it's
15 got the note at the bottom of the page. But for the purpose of
16 this question, I'm on Question 38 at the top of the page.

17 THE COURT: Thank you.

18 MR. WOLFBRANDT: Okay. Now, that was where your
19 opinion of the criminal justice system, you answered you think
20 the system works very well if not abused by legal loopholes and
21 technicalities.

22 PROSPECTIVE JUROR NO. 1: Good.

23 MR. WOLFBRANDT: Now, sir, you heard the Court tell you
24 that the reason that we're here now and that there has been ten
25 years in between is because there have been some irregularities

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8JD04187

1 and that the Supreme Court has directed this new hearing. In
2 light of your answer to that question, does that -- going to
3 influence your decision in any way?

4 PROSPECTIVE JUROR NO. 1: No, but I'm just surprised it
5 took so long to get to this point.

6 MR. WOLFBRANDT: Okay. Now, you will not consider that
7 fact in any of your deliberations, will you?

8 PROSPECTIVE JUROR NO. 1: Oh, no. No.

9 THE COURT: Let me state for all concerned, you may not
10 consider those facts, that it's taken this long to get here.

11 MR. WOLFBRANDT: Thank you, Judge. And you're going to
12 put that totally out of your mind.

13 PROSPECTIVE JUROR NO. 1: Yes, sir.

14 MR. WOLFBRANDT: Okay. Now, you note at the very
15 bottom of that page, though, it said you also think a speedy
16 trial and capital punishment can save taxpayers a lot of money.
17 You understand that's not the interest of anybody here today?

18 PROSPECTIVE JUROR NO. 1: Yes.

19 MR. WOLFBRANDT: Okay. And whether that's your
20 personal belief or not, you can set that aside and then follow
21 the instructions of the Judge, won't you?

22 PROSPECTIVE JUROR NO. 1: Yes, I can. It's something I
23 picked up when I was taking my criminal justice class.

24 THE COURT: Now you know why we have three years of
25 law.

1 MR. WOLFBRANDT: You've got an older brother who's a
2 legal assistant?

3 PROSPECTIVE JUROR NO. 1: Yes.

4 MR. WOLFBRANDT: Okay. Is he here in Las Vegas?

5 PROSPECTIVE JUROR NO. 1: No. He works in Pakistan.

6 MR. WOLFBRANDT: Oh, in Pakistan.

7 PROSPECTIVE JUROR NO. 1: Yes, sir.

8 MR. WOLFBRANDT: Okay. Do you discuss with him at all
9 the differences in the legal system in Pakistan versus the legal
10 system here in the United States?

11 PROSPECTIVE JUROR NO. 1: I haven't met in a long time.
12 And he just started this legal work, what, two years ago.

13 MR. WOLFBRANDT: Yesterday, everybody was here for a
14 pretty fair amount of time, and then for some time this morning.
15 Before coming in here yesterday afternoon and then today, did you
16 discuss any of this case with any of the other prospective
17 jurors? Cause you all had some understanding as a result of the
18 questionnaire, did you have any conversations with any of the
19 other prospective jurors about this?

20 PROSPECTIVE JUROR NO. 1: Just briefly. I guess why it
21 took so long, cause we didn't know it was a re -- they're already
22 convicted. We were thinking they were being tried the first time
23 in ten years.

24 MR. WOLFBRANDT: Did you have any conversations with
25 any other prospective jurors who might have said that they knew

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8JD04188

1 facts about this case or that they were familiar with this case?

2 PROSPECTIVE JUROR NO. 1: No.

3 MR. WOLFBRANDT: Did any of those conversations with
4 any of the other prospective jurors have any impact where it
5 would influence your decision should you be selected as a juror
6 in this case?

7 PROSPECTIVE JUROR NO. 1: No.

8 MR. WOLFBRANDT: And the reason why I ask that is
9 because your decision is to be based solely upon the evidence
10 that you hear in the proceedings here and in conjunction with the
11 instructions that will be given by the Court.

12 PROSPECTIVE JUROR NO. 1: Correct, yes.

13 MR. WOLFBRANDT: Okay? And not about any discussions
14 you may have had previously or anything you may have read in the
15 newspaper. You understand that?

16 PROSPECTIVE JUROR NO. 1: Yes, I do.

17 MR. WOLFBRANDT: And can you...

18 THE COURT: Counsel, do you mean any discussion he may
19 have had with anyone else prior to the case going to the jury?

20 MR. WOLFBRANDT: Correct.

21 PROSPECTIVE JUROR NO. 1: Yes, sir.

22 MR. WOLFBRANDT: And you will -- and you can set any
23 other prior conversations you may have had, you can set that
24 aside and base your decision solely on this case -- on the
25 evidence in this case?

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1 PROSPECTIVE JUROR NO. 1: Yes, I can.

2 MR. WOLFBRANDT: Have you had any general discussions
3 about the death penalty among friends or church members, or
4 members of your belief?

5 PROSPECTIVE JUROR NO. 1: With friends, and also in a
6 debate at school -- in college. It was a speech class.

7 MR. WOLFBRANDT: In a speech class...

8 PROSPECTIVE JUROR NO. 1: Yes.

9 MR. WOLFBRANDT: ...you participated in a debate?

10 PROSPECTIVE JUROR NO. 1: Yes, I did. That was my
11 speech for the semester.

12 MR. WOLFBRANDT: Was that a topic that was assigned by
13 the teacher to everyone, or was that...

14 PROSPECTIVE JUROR NO. 1: Yes, it...

15 MR. WOLFBRANDT: ...a topic that you selected on your
16 own?

17 PROSPECTIVE JUROR NO. 1: I selected the topic.

18 MR. WOLFBRANDT: And were you -- in your speech, were
19 you advocating the death penalty or were you speaking against it?

20 PROSPECTIVE JUROR NO. 1: I was advocating it.

21 MR. WOLFBRANDT: And you had a choice of picking one
22 direction or the other? In other words, you could -- your choice
23 was to advocate the death penalty or to speak against it?

24 PROSPECTIVE JUROR NO. 1: It was up to me. Go either
25 way.

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8JD04190

1 MR. WOLFBRANDT: Okay. And did you select that
2 direction because that's your personal opinion?

3 PROSPECTIVE JUROR NO. 1: Yes.

4 MR. WOLFBRANDT: That is also consistent with your
5 beliefs and teachings in the Muslim faith, is it not?

6 PROSPECTIVE JUROR NO. 1: Yes. Part of it is.

7 MR. WOLFBRANDT: Has your opinion, your personal
8 opinion, about the death penalty and when it's appropriate ever
9 changed over the years?

10 PROSPECTIVE JUROR NO. 1: See, back then I used to
11 believe anybody who commits a murder should be executed. Over
12 the years I've seen or heard about so many crimes, crimes of
13 passion, and I've come to an understanding that sometimes we
14 should be lenient on people.

15 MR. WOLFBRANDT: So now you kind of believe that every
16 case should be determined on its own particular merits?

17 PROSPECTIVE JUROR NO. 1: Correct. It should be
18 treated as individual case.

19 MR. WOLFBRANDT: And that's your belief today?

20 PROSPECTIVE JUROR NO. 1: Yes.

21 MR. WOLFBRANDT: And as you heard some of my questions
22 earlier, do you understand that Nevada does not have a mandatory
23 death penalty?

24 PROSPECTIVE JUROR NO. 1: Yes, I can recall that.

25 MR. WOLFBRANDT: Okay. And do you agree with that, or

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8JD04191

1 can you live with that?

2 PROSPECTIVE JUROR NO. 1: I can live with it.

3 MR. WOLFBRANDT: Okay. In other words, in your mind,
4 do you have any set of facts that in your opinion requires a
5 death penalty and no other option?

6 PROSPECTIVE JUROR NO. 1: No, I don't have any.

7 MR. WOLFBRANDT: Actually, let me just focus it. With
8 the set of facts that you've been given for this case, in your
9 mind the death penalty isn't mandatory, is it?

10 PROSPECTIVE JUROR NO. 1: No, it's one of the options I
11 have.

12 MR. WOLFBRANDT: Okay. Thank you, your Honor. I'd
13 pass the prospective juror.

14 THE COURT: Mr. Wall.

15 MR. WALL: Thank you, your Honor. Mr. -- is it Rehman?

16 PROSPECTIVE JUROR NO. 1: Yes, Rehman.

17 MR. WALL: Okay. My name is Mr. Wall. I've got a
18 couple of questions to ask you. I know that probably by now as
19 the juror before you did, you may feel that after waiting for a
20 day and a half, you're the one in fact on trial.

21 The process of voir dire, which is what it's called, it's
22 Latin, and loosely translated means to tell the truth. This
23 process is designed not to change your opinions but just so that
24 we understand what they are. The Court has indicated there's no
25 right answers and no wrong answers. Everybody comes into this

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1 courtroom with a different set of life experiences. Now, all
2 we're trying to do is gage those and see what they are and share
3 some information with you while you share some with us to make a
4 decision on who should be jurors in this case. There's no right
5 answers or wrong answers.

6 Let me ask you this, first of all: You've been in Las Vegas
7 for about eleven years. Did you come here directly from Pakistan
8 eleven years ago?

9 PROSPECTIVE JUROR NO. 1: Yes, I did.

10 MR. WALL: Do they have the death penalty in Pakistan?

11 PROSPECTIVE JUROR NO. 1: They do.

12 MR. WALL: Do you know in what types of cases they use
13 it? Do they use it for all murder cases?

14 PROSPECTIVE JUROR NO. 1: From what I remember, for
15 heinous crimes like -- yeah, they use it for murder cases.

16 MR. WALL: Okay. I know that you said that at one time
17 at least you believed that in all murder cases, if a person's
18 convicted, found guilty, that they should receive the death
19 penalty. Did you bring that idea with you when you came from
20 Pakistan?

21 PROSPECTIVE JUROR NO. 1: Yes, I did.

22 MR. WALL: Okay. You've answered questions about
23 considering all three possibilities. And it's been explained to
24 you that there are three possibilities available to you. But as
25 you sit here now -- let me explain something to you. When our

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1 lawmakers here in Nevada decided what certain penalties should be
2 for certain crimes, for the crime of first-degree murder they
3 said there's generally two possible penalties: life in prison
4 with the possibility of parole someday, or life in prison without
5 the possibility of parole someday.

6 Now, if the State in a particular case alleged that there
7 were these aggravators, things that made the crime worse than a
8 first -- any other first-degree murder case, and proved those to
9 you beyond a reasonable doubt if you were a juror, then and only
10 then do you have three options: life imprisonment with the
11 possibility of parole, life imprisonment without or the death
12 penalty. Do you understand that?

13 PROSPECTIVE JUROR NO. 1: Yeah, I understand.

14 MR. WALL: Okay. So until anything is proven to you
15 beyond a reasonable doubt, you have two choices now. Does that
16 -- first of all, is that clear?

17 PROSPECTIVE JUROR NO. 1: Yeah, I can follow you, uh-
18 huh.

19 MR. WALL: And secondly, do you agree with that?

20 PROSPECTIVE JUROR NO. 1: To me a first-degree murder
21 is a premeditated murder, right? That's -- so there should be a
22 third option automatically.

23 MR. WALL: Okay. In fact, under our law that's not the
24 case. And when you answered the question before about I think
25 that -- and I'm paraphrasing, and if I'm not correct, tell me --

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8JD04194

1 I think that someone convicted of murder should get the death
2 penalty, but then sometimes there's crimes maybe committed in the
3 heat of passion, and maybe those I wouldn't consider the death
4 penalty on. Do you remember that?

5 PROSPECTIVE JUROR NO. 1: Yes, I did.

6 MR. WALL: Okay. Our law says that a crime committed
7 in the heat of passion is not even murder.

8 THE COURT: Counsel, it looks like the ones that's laws
9 other than that which is germane to this case.

10 MR. WALL: Okay.

11 THE COURT: That question has been decided by the jury
12 below.

13 MR. WALL: Right. I'm not for one moment inferring
14 that that applies to this case.

15 THE COURT: I understand, Counsel, but we have one set
16 of laws for this case, and we have to keep that in its
17 perspective.

18 MR. WALL: Okay. In this case, as you've been told, if
19 you were a juror, it wouldn't be your duty to decide whether Dale
20 Flanagan or Randy Moore are guilty or not. That's already been
21 done. And the crime for which they were convicted is first-
22 degree murder which involves an act of killing another human
23 being with premeditation.

24 And in this case, as you know already, that the victims were
25 Dale's grandparents. Even that set of circumstances -- and

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8JD04195

1 again, we're just trying to get your idea of what you think is
2 right. I'm trying to learn what your feelings are. Do you think
3 that a sentence of life in prison with the possibility of being
4 released on parole someday is a sentence that you could consider
5 just as you could consider death if you got to that point?

6 PROSPECTIVE JUROR NO. 1: If I do, I'm going to have to
7 see if they're released back into society, will they be a good
8 citizen then.

9 MR. WALL: In determining which one you think is the
10 right penalty, would you want some information other than the
11 crime itself about what kind of person Dale Flanagan is?

12 PROSPECTIVE JUROR NO. 1: I would like to know about
13 their moral characters, yes.

14 MR. WALL: That would make a difference to you in
15 deciding?

16 PROSPECTIVE JUROR NO. 1: It would certainly influence
17 my decision.

18 MR. WALL: But knowing what you know now, which is that
19 he has been convicted of first-degree murder for the death of his
20 grandparents, could you consider the possibility of sentencing
21 him to life in prison with the possibility of parole if you were
22 presented some evidence that showed you what kind of individual
23 he's been?

24 PROSPECTIVE JUROR NO. 1: Yes, I can consider that.

25 MR. WALL: Okay. Do you have any -- and the Judge may

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1 have asked you this question. I may have missed it. If he has,
2 I apologize. Do you have any friends or relatives who have ever
3 been accused of a crime?

4 PROSPECTIVE JUROR NO. 1: Yes, I do.

5 MR. WALL: Okay. Were they close friends or relatives?
6 People close to you?

7 PROSPECTIVE JUROR NO. 1: Yes.

8 MR. WALL: Has it been recently, here in Nevada?

9 PROSPECTIVE JUROR NO. 1: No, it was awhile back,
10 before I came.

11 MR. WALL: Before you came to Nevada?

12 PROSPECTIVE JUROR NO. 1: Yes.

13 MR. WALL: Okay. Back in Pakistan?

14 PROSPECTIVE JUROR NO. 1: Oh, it was here.

15 MR. WALL: Oh, it was here. In the United States?

16 PROSPECTIVE JUROR NO. 1: Yes.

17 THE COURT: Counsel, the Court asked him whether or not
18 there are any person who had been convicted. If he had any close
19 friends or relatives who had been convicted of a crime. And
20 there's a difference between being accused and being convicted.
21 And it does not -- the word, to be accused, does not have
22 anything to do with this case. These men have been convicted.
23 Anything that may have happened in between an accusation and a
24 conviction.

25 MR. WALL: I was just going to explore his opinions of

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1 the criminal justice system in light of those accusations made
2 against...

3 THE COURT: And I'm not going to go into those. If you
4 want to explore the criminal justice system on your own. In this
5 case, it's over with. I'm quite sure you sure can find someplace
6 to go out and debate it right and left, but I'm not going to have
7 it in this proceeding for facts that are not germane to this
8 proceeding.

9 MR. WALL: May I inquire of the prospective juror if
10 his opinions of the justice system in light of the accusations
11 made against friends or relatives, whether that's changed at all
12 his opinion of the system?

13 THE COURT: No, Counsel, I don't want to go into that,
14 because the accusation is indicated. If you want to repeat my
15 question without doing anybody -- if he has anybody who's
16 convicted, if he says, yes, it changes his opinion -- his answer
17 on that, I'll let you go into that. But the mere accusations are
18 not a part of this case. I'm not going to go into it.

19 MR. WALL: Okay. Mr. Rehman, were your friends or
20 relatives convicted of any crime?

21 PROSPECTIVE JUROR NO. 1: Yes, they were.

22 MR. WALL: Okay. And you said that was not here in the
23 State of Nevada?

24 PROSPECTIVE JUROR NO. 1: It was here.

25 MR. WALL: It was here in the State of Nevada. Do you

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8JD04198

1 remember how long ago that was?

2 PROSPECTIVE JUROR NO. 1: I'd say about right before I
3 came. So if I make, about '83.

4 MR. WALL: Was it here in Clark County, in Las Vegas?

5 PROSPECTIVE JUROR NO. 1: Yes.

6 MR. WALL: Did the fact that your friends or relatives
7 were convicted -- is there more than one?

8 PROSPECTIVE JUROR NO. 1: Just one.

9 MR. WALL: Just one. Is it a friend or a relative?

10 PROSPECTIVE JUROR NO. 1: Relative.

11 MR. WALL: Okay. Is the fact that a relative of yours
12 was convicted of a crime probably within this same building, does
13 that affect your ability at all to sit as a juror?

14 PROSPECTIVE JUROR NO. 1: No, it doesn't. I have
15 belief in the system.

16 MR. WALL: You have what?

17 PROSPECTIVE JUROR NO. 1: I believe in the system.

18 MR. WALL: Okay. Did you feel that your relative was
19 treated fairly by the system?

20 PROSPECTIVE JUROR NO. 1: He went through a trial, yes.

21 MR. WALL: He actually went through a jury trial?

22 PROSPECTIVE JUROR NO. 1: Yes.

23 MR. WALL: That was before you got here, so you didn't
24 attend?

25 PROSPECTIVE JUROR NO. 1: No.

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SA236

8JD04199

1 MR. WALL: Did the fact that your relative -- I mean,
2 did that in any way shape the way you feel about the criminal
3 justice system?

4 PROSPECTIVE JUROR NO. 1: No, it doesn't.

5 MR. WALL: Did you think that your relative was
6 convicted unfairly?

7 PROSPECTIVE JUROR NO. 1: I don't have all the facts at
8 the time -- from the time, but -- I don't have an answer to that.

9 MR. WALL: Okay. Do you still keep in contact with
10 your relative?

11 PROSPECTIVE JUROR NO. 1: Yes, I do.

12 MR. WALL: The one question, I think it was Question
13 No. 58 -- I'm sorry, 38, that you answered in the questionnaire
14 about capital punishment saves money, is that something that --
15 is that something you discussed during your speech class?

16 PROSPECTIVE JUROR NO. 1: That's something we discussed
17 during the speech class, and something I picked up in my criminal
18 justice class.

19 MR. WALL: Okay. Even if that were true, does that
20 affect your ability at all to sit as a juror?

21 PROSPECTIVE JUROR NO. 1: No, it doesn't.

22 MR. WALL: In this case?

23 PROSPECTIVE JUROR NO. 1: No.

24 MR. WALL: You wouldn't feel as though sitting in a
25 jury room, "You know, the death penalty will save us some money.

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8JD04200

1 I'm on the fence, and that's a consideration I'm going to use to
2 vote for the death penalty in this case"?

3 PROSPECTIVE JUROR NO. 1: No, it wouldn't influence my
4 decision.

5 MR. WALL: Okay. You wouldn't consider as a juror
6 returning a verdict of death so that the taxpayers in your
7 opinion can save some money?

8 PROSPECTIVE JUROR NO. 1: No.

9 MR. WALL: Okay. Thank you, Judge.

10 THE COURT: Mr. Seaton?

11 MR. SEATON: Judge, I have no further questions, and
12 I'd pass for cause.

13 THE COURT: And I thank you, sir.

14 We're going to adjourn at this time until 1:45. In the
15 meantime, it is your duty not to talk among yourselves or with
16 anyone else on any subject connected with this trial; read, watch
17 or listen to any report of or commentary on the trial by any
18 person or by any medium of information, including without
19 limitation newspapers, radio or television; or form or express
20 any opinion on any subject that is connected to this trial until
21 this case is finally submitted to you.

22 Those of you in the jury box recall where your seats are,
23 cause they'll be your seats until further order of Court. So
24 when you come back from lunch, these are your seats. Those of
25 you who are outside the jury box there, as usual, any seats you

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8JD04201

1 can find. We'll see you back here at 1:45.

2 THE BAILIFF: All rise.

3 THE COURT: Oh, will Prospective Juror 435 and 545
4 please remain?

5 THE CLERK: Which ones?

6 THE COURT: 535 and 545 -- and 523.

7 (Jury excused at 12:08 p.m.)

8 THE COURT: 535, 545 and 523. Those are the three
9 people who said they have some knowledge. All other jurors are
10 excused.

11 All right. As to you three prospective jurors, will you
12 take a seat right outside the hall, and we'll call you in
13 individually.

14 THE BAILIFF: Do you want them to remain outside in the
15 hallway?

16 THE COURT: Yeah, all three.

17 THE BAILIFF: Okay.

18 THE COURT: We'll call in one by one.

19 THE BAILIFF: Thank you.

20 THE COURT: Don't go anyplace.

21 Will Counsel stipulate to the absence of all jurors?

22 MR. SEATON: Yes, Judge.

23 MR. WALL: Yes, Judge.

24 MS. MOUNTS: Yes, sir.

25 MR. SCHIECK: Yes, Judge.

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SA239

8JD04202

1 THE COURT: let me say this off the record, please.

2 (Proceedings go off the record)

3 THE COURT: Bring in Juror 523. We'll start with him.

4 (Pause) Any seat. Any seat will be fine. Sir, might I have
5 your full name?

6 BADGE NO. 523: Robert Henry Bornaise.

7 THE COURT: You indicated that you had -- that you knew
8 something about this case. What is it that you know about this
9 case, sir?

10 BADGE NO. 523: I remember reading about it.

11 THE COURT: When was this?

12 BADGE NO. 523: Well, this was probably not too long
13 after it happened. I read usually everything in the papers, and
14 the gentleman on the end said if we remember anything to mention
15 it.

16 THE COURT: What do you recall about the case?

17 BADGE NO. 523: I remember that two people were slain.

18 THE COURT: We've had several cases in the last ten
19 years in which two people were slain.

20 BADGE NO. 523: Huh?

21 THE COURT: We've had several cases in the last ten
22 years...

23 BADGE NO. 523: Yes, I understand that, but I remember
24 at the time, whenever it was, I think it was in 1984 or '85, in
25 that area, that I remember that how it was covered, and I

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8JD04203

1 remember different portions at a time that I thought how gruesome
2 it was and everything. And he said if you remember anything to
3 tell you, and that's what I remember.

4 THE COURT: That's all right.

5 BADGE NO. 523: And I thought it was an awful...

6 THE COURT: We just want to find out what you
7 recall. What do you recall -- do you recall anything else about
8 the case?

9 BADGE NO. 523: No, I just know that they were slain
10 for -- by relatives at the time as I recalled. And it was for an
11 inheritance. I remember that.

12 THE COURT: Have you formed any conclusion as to what
13 the penalty should be?

14 BADGE NO. 523: I'm sorry?

15 THE COURT: Have you formed any conclusions as to what
16 their penalty should be?

17 BADGE NO. 523: I lean heavily towards one, yes.

18 THE COURT: Can you consider any of the other
19 penalties?

20 BADGE NO. 523: Probably not.

21 THE COURT: There are three of them.

22 BADGE NO. 523: Yeah. I filled out the questionnaire,
23 and I go for one. There's one question on there I put at the
24 end, and I thoroughly believe in that. I don't know the number,
25 cause I don't have the -- where it says it's out of the Bible.

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SA241

8JD04204

1 And the question on there was do you believe in an eye for an
2 eye.

3 MR. SEATON: It's Question 62, Judge.

4 BADGE NO. 523: And I really believe in that.

5 THE COURT: Is it my understanding that you cannot
6 consider any other of the two possible forms of punishment under
7 any circumstances?

8 BADGE NO. 523: I would go with the death penalty.
9 It's just my way of thinking. It's just my belief. And I don't
10 -- you don't say any one or the other. I've just been brought up
11 that way in my mind. I don't want to sound like -- I don't know
12 what it would sound like in a case like this, but that's my
13 belief.

14 THE COURT: Please, sir, it's...

15 BADGE NO. 523: I don't go to -- I'm sorry.

16 THE COURT: We're not here to question what you believe
17 or why you believe it. We're just happy that you're here and
18 being honest with us.

19 BADGE NO. 523: Well, I'm really trying to be honest
20 with you if I can.

21 THE COURT: And, Mr. Wolfbrandt?

22 MR. WOLFBRANDT: We challenge for cause, your Honor.

23 THE COURT: Did you want to challenge?

24 MR. SCHIECK: Yes, we would, your Honor.

25 MR. SEATON: No jurors.

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8JD04205

1 THE COURT: Thank you, sir. We're going to excuse you.
2 Report back to the Jury Commissioner and tell her that you have
3 been excused. And let me admonish you further. You're not to
4 discuss this case with anybody whatsoever until this case is
5 finally decided. Do you understand?

6 BADGE NO. 523: Yeah.

7 THE COURT: Okay. That includes personal -- or that
8 includes friends, relatives, wives, children, newspapers, radio.
9 Do you understand?

10 BADGE NO. 523: You don't want me to look at anything,
11 listen to anything.

12 THE COURT: You can look at what you want. Just don't
13 discuss it with anybody.

14 BADGE NO. 523: Just don't discuss it with anyone.

15 THE COURT: Yeah, until the case is finally settled.

16 BADGE NO. 523: Yeah. I'm sorry. I have a problem
17 with it.

18 THE COURT: Until the case is finally settled. Okay?

19 BADGE NO. 523: Oh, okay. I'm not.

20 THE COURT: That's all right.

21 BADGE NO. 523: You know, I just have a little problem
22 with my...

23 THE COURT: I speak a little fast sometimes, too, so
24 that's all right.

25 BADGE NO. 523: No, it's not that. It's just I have a

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SA243

8JD04206

1 problem up here sometimes, and it's -- now, do I come back
2 tomorrow, or what?

3 THE COURT: You go back to the jury room to the Jury
4 Commissioner and tell them that I have excused you...

5 BADGE NO. 523: Oh, okay.

6 THE COURT: ...from any further proceedings in this
7 case.

8 BADGE NO. 523: Okay. Now what -- thank you, your
9 Honor.

10 THE COURT: Juror No. 535. You're welcome, sir.

11 BADGE NO. 523: 523.

12 THE COURT: You're gone. 535.

13 Counsel, for your information, when you come to the sidebar,
14 it is being recorded.

15 MS. MOUNTS: Thank you.

16 THE COURT: Take any seat there. Take it right by the
17 microphone there. You're Juror 535, and may I have your full
18 name again?

19 BADGE NO. 535: Yes. Sharon K. Shepherd.

20 THE COURT: Ms. Shepherd, you indicated that you know
21 something about this case. What do you recall about this case?

22 BADGE NO. 535: I knew the Gordons. They lived a
23 couple blocks down the street from us. I ran into them all the
24 time at the grocery store. We'd patronize the same veterinarian.
25 My daughter worked for the veterinarian and knew Mrs. Gordon very

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SA244

8JD04207

81004208

1 well. Two of my children attended school with Mr. Flanagan. I
2 remember a lot of the neighbors who were very familiar with the
3 whole family, making comments about why the Gordons were killed,
4 what the grandchildren thought about it and how they reacted to
5 it. I think I would be very biased.

6 THE COURT: Mr. Wolfbrandt?

7 MR. WOLFBRANDT: Judge, I had this one marked from the
8 beginning, and we'd move for cause. Challenge for cause.

9 MR. WALL: We'd join her.

10 MR. SEATON: No traverse.

11 THE COURT: Thank you. Ms. Shepherd, thank you for
12 your candor and honesty. You are excused. Report back to the
13 Jury Commissioner and tell them I've excused you. However,
14 you're not to discuss this case with anybody until it's finally
15 submitted. That's friends, relatives, husbands and children and
16 newspapers and writers, nobody. Once this has been decided,
17 fine, you can talk about it all you want to.

18 BADGE NO. 535: Okay. Thank you.

19 THE COURT: Have a good day.

20 Juror No. 545. May I have your full name again, please?

21 BADGE NO. 535: Michele LaRiene Taketa.

22 THE COURT: Ms. Taketa -- Taketa?

23 BADGE NO. 535: Taketa.

24 THE COURT: You've indicated that you know something
25 about this case. Can you tell me what it is that you know?

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SA245

8JD04208

1 BADGE NO. 535: Well, I was here when the murders were
2 committed. I remember reading about it in the newspaper.

3 THE COURT: What do you recall?

4 BADGE NO. 535: What I recall was that it was a very
5 brutal murder, that drugs were involved. And I could be wrong,
6 and this is just what I remember. Basically that's it.

7 THE COURT: Have you formed any opinion as to what
8 these two gentlemen should receive as to -- what you read?

9 BADGE NO. 535: Not really.

10 THE COURT: Mr. Wolfbrandt, do you have any questions
11 you want to ask her?

12 MR. SCHIECK: I'll do this, your Honor.

13 THE COURT: Well, Mr. Schieck, glad to have you back.

14 MR. SCHIECK: Did you follow the case in the news when
15 it went to trial?

16 BADGE NO. 535: I did, yes.

17 MR. SCHIECK: I mean, did you see news reports as to
18 the outcome of the trial?

19 BADGE NO. 535: As far as them being convicted?

20 MR. SCHIECK: Yes.

21 BADGE NO. 535: Yes.

22 MR. SCHIECK: Okay. What about as to sentence?

23 BADGE NO. 535: No, I don't remember that.

24 MR. SCHIECK: Is there anything about the case, what
25 you heard about the case, or any conversations you had about the

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SA246

8JD04209

1 case that would cause you to prejudge what your decision would
2 be...

3 BADGE NO. 535: No.

4 MR. SCHIECK: ...in this hearing? That's all I have,
5 your Honor.

6 THE COURT: Ms. Mount, since we changed before, do you
7 want to change now? Your turn?

8 MS. MOUNTS: Thank you. Mr. Wall will question.

9 THE COURT: Mr. Wall.

10 MR. WALL: Actually I don't have any -- I mean, when
11 you raised your hand, was it just because you remembered the case
12 in the media or because you thought maybe, "What I remembered
13 about this case puts me in a different position from all the
14 other jurors in judging the facts"?

15 BADGE NO. 535: Yes. When he asked if there was -- if
16 I had some knowledge of the case, it was because I had followed
17 it in the newspaper. I was here when the murders occurred. And
18 that was why.

19 MR. WALL: Do you think the knowledge you might have
20 from following the case in the media puts you in a position in
21 your mind different from someone who has never heard of this
22 case?

23 BADGE NO. 535: No, because it's a penalty phase, and
24 not the actual trial where someone's guilt or innocence is
25 determined.

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8JD04210

1 MR. WALL: Okay. I'll pass, your Honor.

2 THE COURT: Mr. Seaton?

3 MR. SEATON: For purposes of what we're doing here,
4 I'll pass, Judge.

5 THE COURT: Thank you very much. You may go to lunch.
6 I'll see you back here at 1:45.

7 BADGE NO. 535: Okay. Do we come directly back to this
8 room or the jury room?

9 THE COURT: Yes, ma'am.

10 BADGE NO. 535: Okay.

11 THE COURT: What do you want, Mr. Bailiff?

12 THE BAILIFF: Yes, right here.

13 THE COURT: Right here. Remain outside that door until
14 you're called in.

15 Mr. Wall, you asked a question, and I stopped you and then
16 it went somewhere else. Do you want to make any further record?

17 MR. WALL: Well, because that's your -- the friend or
18 relative actually was convicted, it doesn't become an issue with
19 that juror. But as to those, it may become an issue in the
20 future. If someone is accused of a crime and either acquitted or
21 enters into some other agreement and has some connection with the
22 justice system, it was my intention to ask the juror questions
23 about whether that involvement in the system -- and maybe if
24 someone's wrongly accused and goes through the system and finally
25 the case finally gets dismissed, they may have formed an opinion

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8JD04211

1 about the system, the penalty systems, that jailed the person or
2 something. And I just wanted to inquire about that.

3 THE COURT: My viewpoint on it is that if that question
4 were asked at the beginning of the guilt phase, I wouldn't have
5 any problem with it. But it's not a question of one's being
6 accused. They have been convicted. And then when it gets the
7 guilt phase, I might wonder what you're asking about, but I
8 wouldn't let it in.

9 But this is not a question of anybody being accused of any
10 crime where their decision is going -- say you go free or not go
11 free. They're going to come out with one of three verdicts.
12 There's no ups or downs or anything else. That was the reason
13 why I stopped you on that question. Your record is made.

14 And by the way, anytime if I stop you and you want to make a
15 record later on, please be happy -- let me know and we'll do it
16 in this fashion.

17 MR. WALL: May I ask what the court's preference
18 would be if that issue should come up again in order
19 to just preserve it? Should I just mention a continuing
20 objection?

21 THE COURT: Counsel, I think once you've made the
22 motion on it, to continue to do so -- this is trial tactics.
23 You've got your record on it.

24 MR. WALL: Right.

25 THE COURT: And I've always put it as a trial counsel,

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8JD04212

8JD04213

1 unless the Judge tells me no, the better is my credibility to the
2 jury.

3 MR. WALL: Right.

4 THE COURT: And if you did it twelve times or fifteen
5 times and each time I tell you no, the jury's going to point a
6 finger, "Doesn't he know not to ask that question? The Judge
7 told him that." Your record's made.

8 MR. WALL: That's fine.

9 THE COURT: But if you want to, you may do so.

10 MR. WALL: No, I would prefer to do it outside the
11 presence at some later time.

12 THE COURT: Yeah.

13 MR. WALL: Just the way the Court's done it.

14 THE COURT: Talk to these jurors sometime. And that's
15 why I tell the jurors regarding the expressions I may have or the
16 objections I might have, don't take it as anything else.

17 Let's go to lunch.

18 MR. SEATON: May we leave our papers if we wish, Judge?
19 Will they be all right?

20 THE COURT: Everybody but you.

21 MR. SEATON: Okay. Thank you. I'll take the chance.

22 THE COURT: Lock the door to the jury room. We'll be
23 in recess. See you at 1:45.

24 (Recess taken at 12:21 p.m.)
25

1 COURTROOM.

2 BY MR. HANDFUSS:

3 Q CAN YOU GIVE ME SOME SORT OF IDEA FROM YOUR BACK
4 OF THE COURTROOM TO MY BACK, ALL THE WAY BACK TO THE
5 COURTROOM?

6 A APPROXIMATELY, TWO AND A HALF.

7 Q TWO AND A HALF TIMES THIS DISTANCE?

8 A YES.

9 Q WHEN YOU WENT IN THE TRAILER, WAS THE TRAILER JUST
10 OPEN, OR DID YOU NEED A KEY TO GET IN?

11 A IT WAS OPEN.

12 Q WAS THE FRONT DOOR JUST OPEN ITSELF, OR THE LOCK
13 WAS JUST OPEN?

14 A IT WAS UNLOCKED.

15 Q AND YOU WENT INTO THE TRAILER. DID YOU PULL THE
16 DOOR BEHIND YOU?

17 A YES, I DID.

18 Q SO, WHEN YOU WERE IN THE TRAILER GETTING THE TAPE
19 CASE, THE DOOR TO THE TRAILER WAS ACTUALLY CLOSED?

20 A YES, IT WAS.

21 Q BUT UNLOCKED?

22 A RIGHT.

23 Q WHILE YOU WERE IN THE TRAILER, YOU SAID YOU HEARD
24 A WINDOW BREAK; IS THAT RIGHT?

25 A HEARD TWO DEAD THUMPS.

1 Q DID YOU HEAR A WINDOW BREAK?

2 A AND I HEARD A WINDOW BREAK.

3 Q I AM NOT TALKING IN TIME. CHRONOLOGICALLY, YOU
4 DID HEAR A WINDOW BREAK?

5 A RIGHT.

6 Q YOU HEARD TWO THUMPS?

7 A RIGHT.

8 Q AND YOU HEARD A WOMAN SCREAM?

9 A RIGHT.

10 Q AND YOU HEARD FIVE OR SIX SHOTS?

11 A YES.

12 Q DID YOU ALSO SAY YOU HEARD A MAN SCREAM?

13 A I HEARD A MAN YELL.

14 Q IN BETWEEN THE TIME YOU HEARD THE WINDOW BREAK AND
15 THE LAST SHOTS BEING FIRED OR THE MAN YELLING, CAN YOU TELL
16 ME, APPROXIMATELY, WHAT DISTANCE IN TIME THIS WAS? DO YOU
17 THINK 60 SECONDS, 60 MINUTES WENT BY?

18 A 60 SECONDS IS CLOSER.

19 Q WERE YOU IN THE TRAILER ALL THAT 60 SECONDS?

20 A I HEARD THE LAST GUN FIRE AS I STEPPED OUT OF THE
21 TRAILER.

22 Q AND THEN, YOU SAW EVERYBODY RUNNING AWAY FROM THE
23 SIDE OF THE HOUSE?

24 A NO. THEN, I MADE A QUICK MOVEMENT TOWARDS MY CAR
25 TO GET OUT OF THERE.

1 Q AND THE CAR DIDN'T START?

2 A YES.

3 Q CAN YOU TELL ME WHO ACTUALLY STARTED THE CAR?

4 A JOHNNY RAY LUCKETT.

5 MR. HANDFUSS: COURT'S INDULGENCE FOR JUST A
6 SECOND.

7 BY MR. HANDFUSS:

8 Q NOW, AFTERWARDS, DID ROY MCDOWELL EVER SAY HE SHOT
9 ANYBODY IN THAT HOUSE THAT NIGHT?

10 A NO, SIR, HE DIDN'T.

11 Q DID ANYBODY ELSE SAY ROY MCDOWELL SHOT ANYBODY
12 THAT NIGHT?

13 A NO.

14 Q DID ANYBODY SAY ROY MCDOWELL HANDLED THE GUN IN
15 THE HOUSE THAT NIGHT?

16 A NO.

17 Q ON THE NOVEMBER 5TH MEETING, WAS MR. LUCAS THERE
18 IN MR. MOORE'S HOUSE?

19 A MR. LUCAS, ON NOVEMBER 5TH. I COULDN'T RECOLLECT.

20 Q AFTER YOU CAME BACK AFTER THE MURDERS ON NOVEMBER
21 5TH TO MR. -- I BELIEVE YOU SAID MR. MOORE'S APARTMENT?

22 A YES, SIR.

23 Q WAS THERE ANY BEER THERE?

24 A AFTER A LITTLE BIT, THEY WENT AND GOT SOME.

25 Q DO YOU RECALL APPROXIMATELY HOW MUCH THEY GOT?

1 A I THINK THEY BOUGHT A CASE.

2 Q DID YOU DRINK ANY OF THAT?

3 A APPROXIMATELY, ONE OR TWO BEERS.

4 Q JUST ONE OR TWO BEERS?

5 A YES.

6 Q DID YOU VISIT ROY MCDOWELL IN JAIL WHILE HE HAS
7 BEEN IN JAIL ON THESE CHARGES?

8 A NO, I DIDN'T.

9 Q DID YOU EVER REPORT THIS OR ANYTHING ELSE TO THE
10 SECRET WITNESS PROGRAM?

11 A NO, I DIDN'T.

12 Q HAVE YOU EVER OBTAINED ANY MONEY OR HAS ANY MONEY
13 EVER BEEN OFFERED TO YOU AS A RESULT OF YOUR OFFERING TO
14 TESTIFY OR GIVE ANY INFORMATION?

15 A NO, IT HASN'T.

16 Q CAN YOU TELL ME APPROXIMATELY HOW MANY ROOMS --
17 CAN YOU TELL ME HOW MANY ROOMS MR. MOORE'S APARTMENT HAS?

18 A FIVE.

19 Q HOW MANY BEDROOMS ARE THERE?

20 A TWO.

21 Q AND IS THERE A LIVING ROOM?

22 A YES.

23 Q KITCHEN?

24 A KITCHEN-DINING ROOM AND A BATHROOM.

25 Q THOSE ARE THE FIVE ROOMS?

1 A YES.

2 Q AND WAS EVERYBODY GENERALLY IN ONE LOCATION?

3 A YES. WAIT, WHAT NIGHT ARE YOU TALKING ABOUT?

4 Q NOVEMBER 5TH.

5 A NOVEMBER 5TH. EVERYONE WAS MOVING ABOUT THE
6 APARTMENT, BASICALLY, FROM THE LIVING ROOM TO SOMEWHERE, BACK
7 TO THE LIVING ROOM.

8 Q CAN YOU TELL ME, WAS THERE A MAIN PORTION OF THE
9 CONVERSATION TAKING PLACE IN ONE AREA?

10 A YES.

11 Q WHAT ROOM WAS THAT IN?

12 A THE LIVING ROOM.

13 Q AND CAN YOU TELL ME WHO WAS STANDING AROUND CLOSE
14 TO THIS MAIN PORTION OF THE CONVERSATION, APPROXIMATELY?

15 A EVERYBODY.

16 Q NOW, YOU SAID SOME PEOPLE WENT OTHER PLACES, INTO
17 THE BEDROOM OR --

18 A YEAH. FOR INSTANCE, IF I HAD TO GO TO THE
19 BATHROOM OR IF SOMEONE HAD TO GO TO THE BATHROOM, THEY WENT TO
20 THE BATHROOM. JOHNNY RAY AND ROY -- I AM SORRY, JOHNNY RAY
21 AND RANDY WENT IN RANDY'S BEDROOM MOMENTARILY AND MIKE WAS
22 BACK AND FORTH IN AND OUT OF HIS BEDROOM.

23 Q FROM WHERE YOU ARE SITTING, AND YOU GIVE ME
24 APPROXIMATE EXAMPLE, TO THE TABLE I AM SITTING AT, WHERE THE
25 OTHER BEDROOMS WERE AT IN THE APARTMENT?

1 A OKAY. IF I AM SITTING RIGHT HERE, YOU WOULD BE
 2 SITTING IN THE KITCHEN. THE BEDROOM WOULD BE -- ONE BEDROOM
 3 WOULD BE WHERE MR. SEATON IS AT. THE OTHER BEDROOM IS WHERE
 4 THE JUDGE IS AT AND THE BATHROOM IN BETWEEN.

5 Q WAS THE T.V. ON AT THAT TIME? DO YOU RECALL AT
 6 ALL?

7 A NO, I DON'T RECALL.

8 Q DO YOU RECALL WHETHER OR NOT A STEREO OR SOMETHING
 9 WAS ON?

10 A I AM SURE THERE WAS. THERE ALWAYS IS OR ALWAYS
 11 WAS.

12 MR. HANDFUSS: I HAVE NO FURTHER QUESTIONS.

13 MR. SMITH: MAY I HAVE A COUPLE PROMPTED BY
 14 COUNSEL'S QUESTIONS, YOUR HONOR, BRIEFLY?

15 THE COURT: YES.

16

17 CROSS-EXAMINATION (CONTINUED)

18 BY MR. SMITH:

19 Q MR. AKERS, WHEN YOU WERE QUESTIONED BY THE POLICE,
 20 YOU TOLD THEM ON AT LEAST ONE OCCASION THAT JOHN LUCKETT FIRED
 21 THE WEAPON; IS THAT CORRECT?

22 A YES, I DID.

23 Q IN GREAT PART THAT WAS TRUE BECAUSE YOU WERE
 24 AFRAID OF MR. MOORE AND MR. FLANAGAN; ISN'T THAT TRUE?

25 A COULD YOU REPHRASE THE QUESTION, PLEASE.

1 Q ONE OF THE REASONS THAT YOU TOLD THE POLICE THAT
 2 JOHN FIRED THE GUN WAS BECAUSE YOU WERE AFRAID OF MR. MOORE
 3 AND MR. FLANAGAN; ISN'T THAT TRUE?

4 A YES.

5 Q AND THE REASON THAT YOUR FEAR OF THEM PLAYED INTO
 6 IT IS BECAUSE IT BECAME VERY OBVIOUS TO YOU AFTER THE KILLINGS
 7 OCCURRED THEY WISHED TO PROTECT MR. WALSH; ISN'T THAT TRUE?

8 A YES.

9 Q THAT IS TRUE BECAUSE OF MR. WALSH'S CLOSE
 10 FRIENDSHIP PRIMARILY WITH MR. MOORE; ISN'T THAT TRUE?

11 A MR. MOORE, MR. WALSH CONSIDER THEMSELVES BROTHERS.

12 MR. SMITH: THANK YOU.

13 THE COURT: VERY WELL. ANY REDIRECT?

14 MR. HARMON: NO, YOUR HONOR.

15 THE COURT: OKAY. YOU MAY STEP DOWN.

16 MR. SEATON: BEFORE HE DOES, WE ARE THROUGH WITH
 17 THE EXAMINATION --

18 MR. POSIN: ONE FURTHER QUESTION.

19 THE COURT: COUNSEL, WE HAVE A SEQUENCE HERE.

20 MR. POSIN: I AM SORRY, MY APOLOGIES, YOUR HONOR.

21 THE COURT: I DON'T WANT TO PRECLUDE YOU FROM
 22 SOMETHING IF IT IS ABSOLUTELY IMPORTANT BUT WHAT IS THE NATURE
 23 OF THE QUESTION?

24 MR. POSIN: CONCERNS ITSELF ABOUT THE WITNESS'S
 25 LAST ANSWER AND I WANT TO MAKE CERTAIN THAT I UNDERSTOOD HIS

1 RESPONSE.

2 HE TESTIFIED THAT IN RESPONSE TO TWO OF THE PARTIES
 3 PRESENT THAT THEY CONSIDERED THEMSELVES BROTHERS. I WANT TO
 4 MAKE CERTAIN I UNDERSTOOD WHICH OF THE TWO PARTIES HE WAS
 5 MAKING REFERENCE TO.

6 THE COURT: I BELIEVE MR. MOORE AND MR. WALSH WERE
 7 THE INDIVIDUALS MENTIONED; IS THAT CORRECT?

8 THE WITNESS: YES, SIR, IT IS.

9 MR. POSIN: THAT'S ALL.

10 MR. SEATON: I UNDERSTAND THE WITNESS IS EXCUSED
 11 BUT THIS HAS TO DO WITH HIS TESTIMONY AND IT'S IN THE NATURE
 12 OF A MOTION TO THE COURT.

13 WHEN HE WAS BEING ASKED QUESTIONS I BELIEVE BY MR.
 14 SMITH, HE WAS ASKED WHERE HIS PLACE OF EMPLOYMENT WAS AND HE
 15 INDICATED AND I NOTED IMMEDIATELY A FLURRY OF WRITING AMONGST
 16 THE DEFENDANTS, AN OBVIOUS INTEREST IN THAT PARTICULAR FACT.

17 WE HAVE HERE A CASE, YOUR HONOR, WHERE I HAVE
 18 TALKED TO A NUMBER OF WITNESSES, I KNOW MR. HARMON HAS. MY
 19 EXPERIENCE IS THAT MANY OF THESE WITNESSES HAVE BEEN
 20 INTIMIDATED, IF NOT OUTRIGHT THREATENED, BY VARIOUS PEOPLE AND
 21 I AM NOT SUGGESTING THAT ANY OF THESE DEFENDANTS HAVE DONE SO.

22 BUT, OBVIOUSLY, IT WOULD BE IN THEIR INTERESTS
 23 THAT IT WOULD HAVE BEEN DONE IF IT HAS BEEN.

24 I AM VERY CONCERNED THAT MR. AKERS NOW IS AT A
 25 LITTLE MORE RISK THAN HE MIGHT HAVE BEEN BEFORE AND I WOULD

1 JUST ASK THE COURT TO ADMONISH ALL THE PARTIES, PARTICULARLY
2 THE DEFENDANTS, THAT THEY OR NO PEOPLE THROUGH THEM ARE TO
3 HAVE ANY KIND OF CONTACT WITH MR. AKERS OTHER, OF COURSE, THAN
4 THEIR DEFENSE ATTORNEYS WHO HAVE EVERY RIGHT TO SPEAK TO HIM
5 IF HE WISHES THEM TO.

6 I JUST THINK IT IS SOMETHING THAT IN THIS KIND OF
7 A CASE IS SO IMPORTANT WITH ALL THE THREATS OF KILLING AND
8 WHATNOT AND RETRIBUTION THAT HAVE GONE ON THAT WE JUST HEARD
9 FROM HERE TODAY, THAT EVERYBODY UNDERSTAND WHERE EVERYTHING IS
10 AND WHO WE ARE LOOKING AT IF SOMETHING SHOULD BE SAID OR
11 HAPPENS.

12 THE COURT: ALL RIGHT. THERE WOULD BE NOTHING
13 INAPPROPRIATE WITH WHAT YOU REQUEST, MR. SEATON. IT SHOULD BE
14 UNDERSTOOD THAT NO ONE EXCEPT COUNSEL SHOULD APPROACH MR.
15 AKERS DURING THE PENDENCY OF THIS ACTION.

16 I WOULD GO FURTHER TO SAY THAT IF THERE ARE ANY
17 ACTUAL THREATS OR PHYSICAL INJURY DONE TO THIS WITNESS OR ANY
18 OTHER AND IT CAN BE ATTRIBUTED TO ANY INDIVIDUAL, I WILL DO
19 EVERYTHING IN MY POWER TO SEE THAT INDIVIDUAL PAYS THE PRICE.

20 AND THAT IS NOT DIRECTED ONLY TO DEFENDANTS BUT
21 ALL INDIVIDUALS THAT MIGHT INHIBIT OR IN ANY WAY TRY TO
22 OBSCURE THESE PROCEEDINGS IN SUCH A MANNER.

23 INCIDENTALLY, FOR THE RECORD, MR. WATERMAN'S BEEN
24 PRESENT THROUGHOUT THESE PROCEEDINGS THIS AFTERNOON OBSERVING.

25 GENTLEMEN, IS THERE ANYTHING FURTHER?

1 MR. SEATON: NOT BY THE STATE.

2 MR. SMITH: YOUR HONOR, MAY I SAY SOMETHING?

3 THE COURT: YES, MR. SMITH.

4 MR. SMITH: IT IS ONLY REALLY PERTINENT TO THE

5 TESTIMONY OF MR. AKERS BECAUSE I THINK I AM IN A DIFFERENT

6 POSITION LEGALLY.

7 AND RATHER THAN BRIEF THIS ISSUE SOME LATER

8 TIME, THE COURT MAY WANT TO GO AHEAD, MAKE A RULING ON THIS

9 ISSUE DURING THE INTERIM. I UNDERSTAND THIS MATTER HAD BEEN

10 CONTINUED UNTIL THE 17TH.

11 THE COURT: YES. FOR THE RECORD, THAT IS A GOOD

12 POINT.

13 MR. SMITH: AT 10:00 A.M.?

14 THE COURT: THAT'S CORRECT.

15 MR. SMITH: I OBJECT TO THE ADMISSION OF ANY

16 TESTIMONY BY MR. AKERS AGAINST MR. LUCKETT IN THAT I DON'T

17 FEEL THAT THERE IS SUFFICIENT CORROBORATION UNDER THE

18 ACCOMPLICE STATUTE TO PERMIT ITS ADMISSIBILITY. JUST IN A

19 NUTSHELL AS THE COURT WILL RECALL ESSENTIALLY THE ONLY

20 EVIDENCE WHICH OR AT LEAST I BELIEVE WHAT THE COURT --

21 MR. HARMON: YOUR HONOR, PERHAPS THE WITNESS CAN

22 BE EXCUSED IF WE ARE GOING TO HAVE ARGUMENT.

23 THE COURT: LET ME SUGGEST THIS. THE POINT IS

24 WELL TAKEN. THIS IS NOT THE TIME FOR LEGAL ARGUMENT.

25 CERTAINLY, YOU WILL HAVE AN OPPORTUNITY TO MAKE THAT ARGUMENT.

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MR. SMITH: I WILL GO AHEAD, SUBMIT A BRIEF ON
THAT POINT, YOUR HONOR.

THE COURT: COURT IS ADJOURNED AT THIS TIME.

* * * * *

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

SHARON J. THIELMAN, CSR NO. 72

191

ORIGINAL

FILED IN OPEN COURT
JUN 13 1995 19

DISTRICT COURT

LORETTA BOWMAN, CLERK

CLARK COUNTY, NEVADA

By

Tim Hurd
Deputy

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THE STATE OF NEVADA,

Plaintiff,

vs.

DALE EDWARD FLANAGAN &
RANDOLPH MOORE,

Defendants.

Case No. C069269

Dept. No. XI

Docket "S"

BEFORE THE HONORABLE ADELIA D. GUY, III, DISTRICT JUDGE

JUNE 12, 1995

COURT'S DISMISSAL OF PROSPECTIVE JURORS;
END-OF-DAY PROCEEDINGS

APPEARANCES:

For the Plaintiffs:

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Deputy District Attorney
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Las Vegas, NV 89155

For Defendant Flanagan:

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REBECCA MOUNTS, ESQ.
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For Defendant Moore:

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1 MONDAY; JUNE 12, 1995; 2:23 P.M.

2

3 THE BAILIFF: All rise. Department XI is now in
4 session, the Honorable Addeliar D. Guy presiding.

5 THE COURT: Good afternoon. Please be seated.

6 Case No. C69269. Let the record reflect the presence of
7 counsel and the absence of the defendants.

8 Will the Clerk please call the roll call of the jury panel?

9 THE CLERK: Alma Antonio Aerolla [phonetic].

10 THE COURT: Please answer "present" when your name is
11 called.

12 (Clerk continues to call roll of prospective jurors)

13 THE CLERK: Joyce Norris Shields? (pause) Joyce
14 Norris Shields, Badge No. 495?

15 (Clerk continues to call roll of prospective jurors)

16 THE CLERK: Ronald Allen Shaner? (pause) Ronald Allen
17 Shaner, Badge No. 506?

18 THE COURT: Excuse me. Sir, please take off your hat.
19 It's not raining in here, I promise you.

20 Continue.

21 (Clerk continues to call roll of prospective jurors)

22 THE CLERK: Suzanne Renee Back? (pause) Suzanne Renee
23 Back, Badge No. 513?

24 (Clerk continues to call roll of prospective jurors)

25 THE CLERK: Jessie Lee Mitchell -- or Michell? (pause)

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1 Jessie Lee Michell, Badge No. 519?

2 THE COURT: Excuse me. What's that name again?

3 THE CLERK: Pardon?

4 THE COURT: May I have his name again?

5 THE CLERK: Jessie Lee Michell, M-I-C-H-E-L-L, Badge
6 No. 519.

7 Judge, part of these are on my list of absentees. I just
8 haven't had a chance to find them.

9 THE COURT: All right.

10 (Clerk continues to call roll of prospective jurors)

11 THE CLERK: Brenda Sue Kacheloni Noble [phonetic]?

12 (pause) That's on my list.

13 THE COURT: Number again?

14 THE CLERK: 541.

15 THE COURT: Okay.

16 (Clerk continues to call roll of prospective jurors)

17 THE CLERK: Lee G. Gibson? (pause) Lee G. Gibson,
18 Badge No. 547?

19 (Clerk continues to call roll of prospective jurors)

20 THE COURT: Mr. Bailiff, would you please go down to
21 the jury commissioner and look for Jurors 495, 513...

22 THE CLERK: Judge, 506, 513 and 519 were on my list.

23 THE COURT: That'll be 495, 541 and 547. See if
24 they're here. If they have not been excused -- 595 [sic], 540
25 [sic], 547. See if they're here or not. If they have not been

8JD04077

1 excused, have the magistrate issue an order to show cause why
2 they should not be held in contempt.

3 THE CLERK: 541 was on my list. 495 and 547 were not.

4 THE BAILIFF: 547 and 495?

5 THE COURT: That's Gibson and Scouse [phonetic]. Okay?

6 Ladies and gentlemen of the potential jury, I assemble you
7 here, because you've been sitting around all morning long
8 wondering what's happening. We have some small technicalities
9 which arose last week, and our Supreme Court halfway solved some
10 on last Friday, and I'm waiting for them to solve the rest of
11 them today. Fortunately or unfortunately, depending on how you
12 want to look at it, they are seeing this morning and hearing oral
13 arguments before the Supreme Court today. I understand that
14 hopefully before the day is out, they will help my problem down
15 here.

16 Inasmuch as you folks are so interested, one way or the
17 other I thought you might want to know what's happening and why
18 you've been sitting around and also for the bad news of why I'm
19 going to excuse you until 9:00 tomorrow morning. It's now 2:30.
20 It's too late to get started at this time; it wouldn't do
21 justice. It'd waste your time, my time. I'm quite sure you all
22 have something better to do than just sit around the courthouse.

23 So tomorrow morning, 9:00, same place, same time. Any
24 questions?

25 Yes, sir?

1 A PROSPECTIVE JUROR: I work at the Detention Center,
2 and I have to be there because of security problems. One of the
3 captains wants to know if I'll be getting out of this.

4 THE COURT: Tell the captain at this time you're like
5 every other citizen. The answer is "no" at this time.

6 I saw another hand. Yes, ma'am?

7 A PROSPECTIVE JUROR: Yes. I was told only a judge
8 could excuse me. I have two young children...

9 THE COURT: I'm a judge.

10 (Laughter)

11 PROSPECTIVE JUROR NO. 540: I have two young children.

12
13 THE COURT: Stick around, ma'am. We'll see.

14 PROSPECTIVE JUROR NO. 540: My husband is going out of
15 town.

16 THE COURT: Stick around, ma'am. We'll see. Anybody
17 else?

18 Let me tell you right now before we get further. It's like
19 the old saying, "To err is human": *To excuse is not the company*
20 *policy*. Everybody here has jobs; everybody here has family.
21 Some jobs are more important than others, but to each and every
22 single one of you, your job is the most important one going. And
23 unfortunately, I have strict guidelines under which I may excuse
24 you. And I try to be extremely strict on not excusing you.

25 So if you'll hold your requests (except for the one young

1 lady) until tomorrow, we'll try and get you out of here as fast
2 as we possibly can. You may give your numbers and names to the
3 jury commissioner, if that is it. But I'll tell you quite
4 frankly, to be quite honest with you, I excuse very few people.

5 Now, did I see two more hands? Yes, ma'am.

6 A PROSPECTIVE JUROR: Sir, I'm not sure if the case
7 that I'm going to be interviewed to sit on...

8 THE COURT: Well, ma'am, if you'll hold those kinds of
9 questions until tomorrow, fine. I don't know what you know, but
10 I don't want to hear anybody at this time.

11 A PROSPECTIVE JUROR: Well, I didn't know if I should
12 ask to be excused, because I know this man.

13 THE COURT: No, ma'am. No, ma'am. If you'll notice,
14 the Defendants aren't here. That's why I'm taking no legal
15 actions whatsoever. And they must be present for everything.

16 Anything else I can do--which so far as been 90 percent of
17 nothing? Then have a good night. See you tomorrow morning.

18 (Prospective jurors out at 2:32 p.m.)

19 THE COURT: Will counsel stipulate as to the absence of
20 the jury panel, with the exception of -- what's your name and
21 juror number, ma'am?

22 PROSPECTIVE JUROR NO. 540: My number's 540.

23 THE COURT: Speak real loud.

24 PROSPECTIVE JUROR NO. 540: My number is 540, Paula Ann
25 Anderson.

81004080

1 THE COURT: Yes, ma'am. Will counsel stipulate?

2 MR. SCHIECK: Yes, your Honor.

3 MS. MOUNTS: Yes, your Honor.

4 MR. SEATON: Yes, your Honor.

5 THE COURT: Yes, ma'am?

6 PROSPECTIVE JUROR NO. 540: The reason I'm asking you
7 to be excused is because I have two small children: one nine-
8 and-a-half months, one two-and-a-half years old.

9 The reason for this is it's a great hardship for me
10 to be here. My nine-and-a-half-month old was born with a birth
11 defect, and she's scheduled for surgery. She also has scheduled
12 therapy.

13 THE COURT: When?

14 PROSPECTIVE JUROR NO. 540: It's in August. However,
15 my husband is out of work; he's unemployed. He's traveling
16 around the country looking for a job. Basically I'm the sole
17 supporter of the family, and I am responsible for the children,
18 and this is a hardship for me. I'm under a lot of stress, and
19 doing this would even bring more stress upon me.

20 THE COURT: Would you step outside a second, down by
21 the door?

22 PROSPECTIVE JUROR NO. 540: Sure.

23 (Prospective Juror No. 540 exits courtroom)

24 THE COURT: What do you folks say?

25 MR. SEATON: No objection.

81004081

1 MR. WALL: We'd have no objection and submit it to the
2 Court.

3 MR. SCHIECK: We have no objection, your Honor.

4 THE COURT: I don't have any problem with excusing her.
5 I think I'll bring her back tomorrow when we have the Defendants
6 present and excuse her while they're here, unless you folks want
7 to at this time waive any defects on that.

8 MR. WALL: No, Judge, I think for this one instance, I
9 think that we would, on behalf of Mr. Flanagan, waive any defect
10 by not having him present for her to be excused, if there's a
11 hardship on her.

12 THE COURT: Mr. Schieck?

13 MR. SCHIECK: We would waive any defects, your Honor.

14 THE COURT: Bring her in.

15 (Prospective Juror No. 540 reenters courtroom)

16 THE COURT: May I have your name again?

17 PROSPECTIVE JUROR NO. 540: Paula Anderson.

18 THE COURT: Ms. Anderson?

19 PROSPECTIVE JUROR NO. 540: Paula Anderson.

20 THE COURT: Ms. Anderson, you may thank the counsel
21 present. They have agreed that you may be excused. Go back to
22 the jury commissioner and tell them I've excused you from any
23 further duty at this time. They will probably call you again in
24 four or five months, I'll tell you, to be quite frank about it.
25 Okay. And good luck to you.

8JD04082

1 PROSPECTIVE JUROR NO. 540: I have a question for you.
2 We might be relocating. If that's the case, at that time what
3 should I do--just tell them I'm relocating?

4 THE COURT: Being relocated where--out of the state?

5 PROSPECTIVE JUROR NO. 540: Uh-huh.

6 THE COURT: Well, ma'am, if you go out of state, you're
7 no longer in my jurisdiction.

8 PROSPECTIVE JUROR NO. 540: Well, I know. But if I get
9 called before, but I know I'm moving in the next month or so...

10 THE COURT: Well, let us cross that bridge when and if
11 we come to it.

12 PROSPECTIVE JUROR NO. 540: Okay. Thank you.

13 THE COURT: I don't like -- I can't answer the question
14 "what if." All right. Good luck to you.

15 PROSPECTIVE JUROR NO. 540: Thank you.

16 THE COURT: Please do not discuss this matter with any
17 of the other jurors.

18 (Prospective Juror No. 540 exits courtroom)

19 THE COURT: Before you go, this morning I indicated
20 that there was case law from my viewpoint on 37.585 -- or 34.585.
21 I was incorrect. I tried to find that case law. And the more I
22 thought about it, it was just the opposite.

23 The statute was brought in in 1969, because the Supreme
24 Court was hearing these writs and was hearing the other matters.
25 That's why we got the statute, because we were just losing cases

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1 right and left or losing control of them. The Supreme Court all
2 of a sudden found itself with more writs, particularly from Clark
3 and Washoe Counties, so they weren't able to get anything else
4 done.

5 So they didn't oppose the statute on it. And I can't recall
6 at this time whether they also encouraged or what on it. But
7 from our standpoint, it was just horrible. So I wanted to get
8 that part on the record, in case I mis -- if it goes to the
9 Supreme Court and you folks want to say, "Well, the judge said
10 this happened; we couldn't find any cases," I was incorrect on
11 that.

12 Any question on what I said?

13 MR. SEATON: Judge, before you leave, could I take care
14 of the housekeeping matter, the filing of the motion to use
15 reported testimony?

16 THE COURT: Yes, you may. I won't give you a decision
17 on it until the Defendants are present.

18 MR. SEATON: I've already given a copy to defense
19 counsel, Judge.

20 THE COURT: Thank you. Off the record.

21 (Proceedings concluded at 2:40 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

<i>Linda Kay Tom</i>	<i>June 12, 1995</i>
Signature of Transcriber/Verifier Federally Approved	Date

81004085

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ORIGINAL

FILED IN OPEN COURT

DISTRICT COURT JUN 12 1995 19

CLARK COUNTY, NEVADA LORETTA BOWMAN, CLERK

* By *Lina Ford* Deputy

1 THE STATE OF NEVADA,

2 Plaintiff,

3 vs.

4 DALE EDWARD FLANAGAN &
5 RANDOLPH MOORE,

6 Defendants.

* Case No. C069269

* Dept. No. XI

* Docket "S"

7 *****

8 BEFORE THE HONORABLE ADELIA R. GUY, III, DISTRICT JUDGE

9 JUNE 12, 1995

10 HEARING RE WRIT OF HABEAS CORPUS,
11 COURT'S JURISDICTION, ETC.

12 APPEARANCES:

13 For the Plaintiffs:

DANIEL M. SEATON, ESQ.
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Las Vegas, NV 89155

14 For Defendant Flanagan:

15 DAVID T. WALL, ESQ.
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17 Assistants Public Defender
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20 For Defendant Moore:

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MONDAY; JUNE 12, 1995; 9:00 A.M.

THE COURT: Please be seated, folks. State of Nevada vs. Dale Flanagan and Randolph Moore. Let the record reflect the presence of Defendant with counsel, District Attorney, officers of the court.

All right, folks. Please settle down.

Starting on my left, will you please stand, tell us who you are and who you represent?

Ma'am, court's in session!

Mr. Seaton?

MR. SEATON: Dan Seaton, Chief Deputy District Attorney, representing the District Attorney's Office, Judge.

MR. WALL: David Wall from the Public Defender's Office on behalf of Dale Flanagan.

MS. MOUNTS: Your Honor, Rebecca Mounts from the Public Defender's Office, also on behalf of Dale Flanagan.

MR. WOLFBRANDT: Lew Wolfbrandt representing Randy Moore.

MR. SCHIECK: David Schieck representing Randy Moore.

THE COURT: The status of this case is as follows. The Defendants filed writ of habeas corpus last week or week before, and the Court ruled upon it, denying their writ. Defendants then filed a partition for a writ of mandamus; the Supreme Court, on either Monday, Tuesday or Wednesday of last week, denied their

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1 writ of mandamus.

2 And in that writ of mandamus they state as follows:

3 "Specifically we note that the District Court's denial
4 of the petition for writ of habeas corpus is
5 independently appealable pursuant to NRS 34.575(1) and
6 it may appeal as generally an adequate remedy in the
7 ordinary course of the law that precludes the issuance
8 of an extraordinary writ."

9 It's my understanding that either Friday a notice of appeal was
10 filed with the Supreme Court pursuant to NRS 34.575.

11 For the record, a brief history of 34.575, we understand the
12 reading of the statute and what is hoped to accomplish.

13 At one time in this jurisdiction, defendants appealed
14 denials of writs of habeas corpus. The attorneys who had been
15 around for quite some time would file their writ perhaps a week
16 or so before the case was set for trial in the district court.
17 If the writ was denied, then sometime prior to trial they would
18 then file a notice of appeal from the writ with the Supreme
19 Court.

20 Counsel have indicated today that this Court no longer has
21 jurisdiction, based upon Roberts, 109 Nevada Advance Opinion 161,
22 (23083), decided November 29th, 1993. I won't go into the facts
23 of Roberts, because they are different here.

24 Upon the filing of the writ of habeas corpus, the court
25 denotes the district court lost jurisdiction. What that meant

81004089

1 insofar as a tourist town is concerned, where at that time most
2 of the victims were out of state, victims all of a sudden were
3 brought in and then sent back home. So the court had lost
4 jurisdiction.

5 At sometime thereafter (and I don't have the case number,
6 case notes here; this matter is just now being brought before the
7 Court) the decision has been made that defendants could not
8 appeal writs of habeas corpus. It was appealable but only at the
9 conclusion of the case.

10 Two reason: (1) it prevented description of the ordinary
11 flow of the case, and (2) if the defendant was found not guilty,
12 then of course the Supreme Court would not be burdened with
13 trying to decide the writ; it would be a moot question.

14 The State was permitted to file an immediate notice of
15 appeal, because if the writ's granted, the State is out of court.
16 There is nothing to go forward on; there would be no trial. So
17 the State would have suffered harm. And those are the different
18 positions.

19 I have been given NRS 34.075 [sic]. (pause) I will note
20 that 34.575(1) is almost identical to NRS 177.385. So let me
21 read NRS 34.575(1):

22 "An appellate who, after conviction or while no
23 criminal action is pending against him, has petitioned
24 the district court for a writ of habeas corpus and
25 whose application for the writ is denied may appeal to

1 the Supreme Court from the order and judgment of the
2 district court. But an appeal must be made within 30
3 days after service by the court or written notice of
4 entry of the order of judgment."

5 Paragraph 2:

6 "The State of Nevada is an interested party in
7 proceedings for a writ of habeas corpus. If the
8 district court grants the writ and orders the discharge
9 of or a change in custody of the petitioner, the
10 district attorney of the county in which application
11 for the writ was made, or the city attorney of the city
12 which is situated in the county in which the
13 application was made, or the attorney general on behalf
14 of the state may appeal to the Supreme Court for the
15 order of the district court within 30 days after the
16 service by the court or written notice of entry of the
17 order."

18 When you read those two, we find there is nothing new in it.
19 District attorneys may still file a notice of writ of appeal
20 immediately or within 30 days thereafter. Let me read it again.
21 As I stated, it's out of court; there's nothing pending. That
22 case has gone bye-bye.

23 And as is stated in here, that had granted a writ of habeas
24 corpus, this case, insofar as the defendants are concerned, has
25 gone bye-bye. The D.A. does nothing. So they may file. And in

1 a case where there is a trial to be going on, no trial.
2 Defendant is released from custody; he'd be long gone before the
3 D.A. may do anything. So the D.A. may do that.

4 The defendant's right of petition for an appeal is an
5 appealable order, as for any other order. But it's appealable
6 when there is no criminal action pending. In this case there is
7 a pending action. This matter is before this Court for a penalty
8 hearing. There has been no judgment on the penalty hearing. The
9 only judgment of the court, ruling has been on the writ of habeas
10 corpus. Where I don't have a written motion for this Court has
11 no jurisdiction, I believe--and correct me if I'm wrong, counsel
12 have made an oral motion. Is that correct?

13 MR. SCHIECK: I'm sorry, your Honor?

14 THE COURT: I don't have a written motion before me to
15 lose the jurisdiction, but I do have an oral motion. Is that
16 correct?

17 MR. SCHIECK: That's correct, your Honor.

18 THE COURT: Okay. That's for all the parties. Is that
19 correct?

20 MR. WALL: Well, it's correct also as to Mr. Flanagan.
21 There is no oral motion. It would be our position that the mere
22 filing of the notice of appeal divests jurisdiction, and then
23 there is no court to file a motion to.

24 THE COURT: Well, this court finds that your notice is
25 defective as (1) there is a criminal action pending against you,

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1 and I'm going to proceed, if there is no oral motion before me.
2 I'm going to presume that there is one or we wouldn't be
3 concerning this, because I think you would have had an order from
4 the Supreme Court staying it. But I have no order staying me or
5 anything else; I'm going to proceed.

6 I have in the meantime placed a phone call to the Supreme
7 Court, what their position is on it. And if they wish to stay
8 me, I have no problem.

9 Yes, sir?

10 MR. SCHIECK: Your Honor, just so the record's clear,
11 I'd like to point one thing out. In the statute that you read it
12 says "conviction or other action pending." It doesn't require
13 both; it requires one or the other.

14 THE COURT: It says "or while no criminal action is
15 pending."

16 MR. SCHIECK: Or.

17 THE COURT: "...while no criminal action is pending."
18 There is no conviction here for you to appeal. Your conviction
19 was made ten years ago, and that has been before the Supreme
20 Court at least once, and they denied that on appeal.

21 MR. SCHIECK: I would also point out, your Honor, that
22 there are other charges that these Defendants were convicted of
23 that have not been the subject of a remand for purposes of a new
24 penalty hearing--specifically robbery charges, burglary charges,
25 conspiracy charges--which those convictions are final and went to

1 the validity of the entire guilt phase; and therefore, it's our
2 position that the appeal divests this Court of jurisdiction.

3 THE COURT: Well, Counsel, the only thing this Court
4 has, that the Supreme Court are to determine, is a hearing for a
5 penalty hearing. It's not determining any other thing else, and
6 I have no jurisdiction to determine anything else. You have
7 filed two appeals. The Supreme Court has, on your first appeal
8 in 1991, granted your appeal insofar as the penalty phase was
9 concerned. And as I recalled last week as I quoted from the
10 opinion, it said there is overwhelming evidence of the
11 Defendants' guilt.

12 The United States Supreme Court came out with -- I forgot
13 the name of the case. I never could recall those things, even in
14 law school. I recall the facts of it.

15 MR. SCHIECK: Dawson vs. Delaware.

16 THE COURT: Dawson, thank you.

17 The Nevada Supreme Court on the second penalty hearing also
18 reversed for a new penalty hearing. In the meantime, Dawson came
19 out in the United States Supreme Court, so in 1993 the Supreme
20 Court granted a new appeal based upon that matter--which I've
21 already discussed, and let's not go any further with it.

22 Now, unless I'm ordered by the Supreme Court on a stay, we
23 will proceed with the jury trial. And that's about 15 minutes.

24 MR. WALL: May I ask the Court's permission to make a
25 record on behalf of Mr. Flanagan?

1 THE COURT: Yes, you may, sir.

2 MR. WALL: As to the procedural history, the Court is
3 correct. We went before the Supreme Court on a petition for a
4 writ of mandamus last week. It was filed on the morning of June
5 8th--last Thursday. The opinion that came down in the afternoon
6 of June 8th essentially says, "Mandamus is improper, because in
7 order for us to grant an extraordinary writ of mandamus, we have
8 to find that there is no other adequate remedy at law. And,
9 counsel for Petitioners Flanagan and Moore, you have an adequate
10 remedy. And that remedy is contained within 34.575(1)."

11 The Supreme Court in the three-paragraph opinion (1)
12 recognized that it was a postconviction writ of habeas corpus,
13 and (2) said "You have an immediate appeal under 34.575(1)."
14 This Court is saying today, "I don't think that statute applies
15 here," but the Supreme Court four days ago told us that it does,
16 and that essentially directed us to file an immediate notice of
17 appeal.

18 THE COURT: Counsel, I thought I read it to you once.
19 I'll read it to you again.

20 "Specifically we note that the District Court's denial
21 of the petition for writs of habeas corpus is
22 independently appealable pursuant to NRS 34.575(1) and
23 it may appeal as generally an adequate remedy in the
24 ordinary course of the law that precludes the issuance
25 of an extraordinary writ."

8JD04095

1 MR. WALL: Correct.

2 THE COURT: So it doesn't tell you that you have an
3 immediate right for an immediate -- it gives you a very general
4 rule of law. And in accordance with that I find it says "while
5 no criminal action is pending."

6 Go on further, Counsel.

7 MR. WALL: Judge, they told us that if it was -- let me
8 back up.

9 They never got to the merits of whether or not these
10 individuals should be granted a new guilt phase. They simply
11 said mandamus isn't right, because this is a postconviction
12 petition for relief and you can appeal it by direct appeal rather
13 than by an extraordinary writ.

14 THE COURT: Let me put it to you this way, Counsel.

15 MR. WALL: That's what the opinion says to me.

16 THE COURT: Okay. I've made my decision, first of all,
17 on that opinion. If it wrong, you all can always go up to the
18 Supreme Court and say, "Look here. The Court below refuses to
19 not proceed on the finding of this appeal." And I'm quite sure
20 if they interpret it the same way, they'll be happy to grant you
21 a written -- I'll be happy to continue this to next year.

22 MR. WALL: Let me make one other point, Judge, and
23 that's the Court's interpretation of Robinson. The language that
24 the Court used in Robinson did not appear to strictly construe
25 Robinson to the very facts presented in that case.

1 What they said was, and I'm quoting on page 1089:

2 "A timely notice of appeal divests the district court
3 of jurisdiction to act and vests jurisdiction in this
4 court."

5 --and a citation to the Rust, R-U-S-T, case.

6 THE COURT: I read Rust, by the way, and I was quite
7 surprised as what it didn't say. And I read it. It almost has
8 no bearing whatsoever to this matter.

9 MR. WALL: Right. It's a civil case that bears no
10 factual resemblance to this case or Robinson.

11 The point I want to make, Judge, is if you are saying "I
12 find this not to be a postconviction writ of habeas corpus that
13 you filed in my court and that I denied on June 6th..."

14 THE COURT: No, Counsel, I'm not saying that. What I'm
15 saying to you is very simple. Let me read it to you very
16 carefully again. And I think your record is made. And I also
17 would suggest to you that if you want to do anything about it,
18 the Supreme Court, you better get on the phone.

19 "An appellate who, after conviction or while no
20 criminal action is pending against him, has petitioned
21 the...court for a writ of habeas..."

22 And I'm saying to you there is a criminal action pending against
23 him, that being a penalty hearing -- against them, that being a
24 penalty hearing. Now, I think that point is pretty well clear.

25 MR. WALL: Well, let me make one final point if I

1 could, your Honor.

2 THE COURT: And if you want to go up any further, fine.

3 MR. WALL: If I could just make one final point?

4 The Court is saying that pursuant to that statute...

5 THE COURT: No, Counsel, quit.

6 MR. WALL: Judge?

7 THE COURT: No, no, no, no. I have said what I am
8 saying.

9 MR. WALL: Okay.

10 THE COURT: Now, you may interpret it any way you want
11 to, but I've said it three or four times. I don't need someone
12 to come in and tell me what I am saying.

13 MR. WALL: I apologize, your Honor.

14 THE COURT: Very clearly I read the statute to you, and
15 I said, very frankly, there is a criminal action pending--that
16 being a penalty hearing. Now, I don't want any interpretation of
17 saying what I'm saying. Now, you heard it. And as I told you
18 folks before, I have a very sad state of affairs nowadays when
19 the President of the United States speaks five minutes, takes Dan
20 Rather 15 minutes to tell us what he said in five minutes.

21 I think it's pretty clear what I said. And your record is
22 made. I'd like to get you a transcript of this.

23 How soon can you get me a transcript of this, please?

24 COURT REPORTER: This afternoon?

25 THE COURT: No, that'll be too late.

1 But you can go to the Supreme Court and tell them I am -- in
2 spite of your writ that you filed, the notice you filed, I am
3 going to proceed.

4 MR. WALL: Thank you, your Honor.

5 THE COURT: Sure.

6 It's now 9:25. We'll commence here at 10:30. That'll give
7 you plenty of time to get in touch with them.

8 D.A., anything you want to say?

9 MR. SEATON: Judge, there is--very briefly.

10 You have indicated that the language "while no criminal
11 action is pending" applies here. I agree wholeheartedly.

12 I also want to say that I believe the language "after
13 conviction" that's found in this statute does not apply. "After
14 conviction" requires a judgment of conviction. And while Mr.
15 Schieck is right that certain of the lesser crimes have a
16 judgment of conviction, which has always been upheld, the death
17 sentences do not.

18 Insofar as the death sentences are concerned, there is no
19 judgment of conviction, whereas there was in the Robertson case.
20 And that is a distinguishing feature in this case.

21 To use the Court's analogy, the reason that we're in this
22 procedural posture is because all of these appeals that used to
23 cut trials short, if this Court or the Supreme Court were to rule
24 differently, then this penalty hearing is going to get put off
25 for the appeal to be heard.

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1 Worse than that, every single time a jury came back with a
2 guilty verdict and you set a sentencing hearing somewhere down
3 the line, a writ could be filed in the interim. It would be
4 denied; an appeal could be taken prior to the sentencing hearing,
5 divesting the Court of jurisdiction. We would never get to
6 sentencing hearings.

7 So I just want to say, Judge, I think both of those
8 provisions are inapplicable, and I truly believe that what was
9 filed as a writ of habeas corpus could not have been entitled a
10 writ of habeas corpus, because those can only be filed after
11 judgment of conviction.

12 THE COURT: Let me state this to you. If I'm
13 incorrect--I doubt that I am--we're right back into chaos. Let's
14 take this case here for example. It's been almost ten years
15 since conviction, and I already have petitions before me trying
16 to find witnesses you can't find.

17 Now, we're concerned that every time a writ is granted -- is
18 denied, whether it be a week...everything's automatically stayed
19 upon the mere notice of an appeal being filed. This is what
20 happened here today; it's a great example.

21 I have a jury outside that's been given their questionnaires
22 that was requested by the defense. They've been given those;
23 they've filled them out, and I believe they were in the hands of
24 the defense on Friday (perhaps Thursday). I was asked at that
25 time whether I was going to allow time for counsel to read them.

8JD04100

1 I said, "Well, yes, I'll give you until Monday morning."
 2 Everything has gone forth. Witnesses have been summoned.
 3 And now all of a sudden counsel wishes to file a writ of habeas
 4 corpus, filed an appeal, and tell me I don't have jurisdiction.
 5 I was presumed -- because all they have is a notice that's been
 6 filed. There is no grounds or anything written. Given that they
 7 have 30 days in which to file it, this case would automatically
 8 be determined at this point. If they're smart, they would. And
 9 the District Attorney would file his answer. And the Supreme
 10 Court would try to find some time, with its busy schedule, to go.
 11 Let's just consider ordinary trials. In that period of
 12 time, generally three to six months or more, witnesses disappear,
 13 they die, they become disgusted with the system.
 14 So anyway, you have until 10:30 in order to get a stay.

15 THE BAILIFF: All rise.
 16 (Recess taken)
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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Linda Kay Don
Signature of Transcriber/Verifier
Federally Approved

June 12, 1995
Date

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ORIGINAL

FILED IN OPEN COURT

JUN 14 1995 19

DISTRICT COURT

CLARK COUNTY, NEVADA LORETTA BOWMAN, CLERK

By *[Signature]* Deputy

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THE STATE OF NEVADA,

Plaintiff,

vs.

DALE EDWARD FLANAGAN &
RANDOLPH MOORE,

Defendants.

*
* Case No. C069269
*
*
* Dept. No. XI
*
*
* Docket "S"
*

BEFORE THE HONORABLE ADELIAR D. GUY, III, DISTRICT JUDGE

JURY TRIAL -- PENALTY PHASE
(DAY 1, VOLUME I)

TUESDAY; JUNE 13, 1995

APPEARANCES:

For the Plaintiffs:

DANIEL M. SEATON, ESQ.
Deputies District Attorney
200 S. Third St.
Las Vegas, NV 89155

For Defendant Flanagan:

DAVID T. WALL, ESQ.
REBECCA A. MOUNTS, ESQ.
Deputy Public Defenders
309 S. Third St., #226
Las Vegas, NV 89101

For Defendant Moore:

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WILLIAM "LEW" WOLFBRANDT, ESQ.
302 E. Carson, #918
Las Vegas, NV 89101

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SA153

8JD04116

INSERTED

1 Corrected pages I-56 through I-60 for Day 1,
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3 Volume I, JUNE 13, 1995.
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PROSPECTIVE JUROR NO. 2 corrected to
reflect **PROSPECTIVE JUROR NO. 1**

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Proceedings recorded by electronic sound recording;
 transcript by electronic sound transcriber.

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8JD04119

1 TUESDAY: JUNE 13, 1995; 10:05 A.M.

2

3 (Prospective jurors out)

4 THE BAILIFF: Department XI is now in session, the
5 Honorable Judge Addeliar D. Guy presiding.

6 THE COURT: Please be seated.

7 Case No. C69269, State of Nevada v. Dale Flanagan & Randolph
8 Moore. Let the record reflect the presence of Defendants with
9 counsel, District Attorney and other officers of the Court.

10 We have several matters outside of the presence of the jury.
11 Who wants to get started first?

12 MR. WALL: I can, your Honor.

13 First of all I think we should probably make a record of the
14 fact that I'm sure the Court has received notice from the Nevada
15 Supreme Court denying the petition for writs of prohibition
16 and/or motions for stay. That came to our office about 4:30
17 yesterday afternoon, as I think at the very least we ought to get
18 that on the record that they did make that decision.

19 Secondly, there's an issue that has come up. One of the
20 State's witnesses, an individual by the name of Rusty Havens,
21 H-A-V-E-N-S, who testified at I believe the guilt phase in '85
22 and the penalty phase in '89 and is scheduled to testify probably
23 tomorrow, has acquired a new case and apparently had absconded,
24 and there was a bench warrant issued.

25 He was arrested probably late last week on the bench warrant

I-1

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8JD04119

1 as well as in the State's efforts to find him to have him
2 testify. It appears that the Public Defender's Office
3 represented him before he had absconded. It also appears that
4 the Public Defender's Office has to some extent at least
5 negotiated a deal for him on his new felony charges which I think
6 are burglary and forgery. I don't know the status of that deal
7 in light of the fact that he absconded.

8 He is on this morning before Judge Huffaker on the return of
9 the bench warrants. I have left instructions for our deputy who
10 will be present before Judge Huffaker this morning, left word
11 that he is a witness for the prosecution in this case, that we
12 need to cross-examine him, and that our office should withdraw
13 this morning. I left a message for Mr. Seaton and have since
14 talked to him, and I think he's informed of the deputy who's
15 going to appear in Department IX also of those facts.

16 I wasn't really aware that we--and when I say "we," the
17 public defender's office--had made at least a tentative
18 negotiation on behalf of Mr. Havens until this morning. When I
19 became aware that he was a public defender client, I did not
20 review the file.

21 I did not represent him in Justice Court, and I don't
22 believe Ms. Mounts did either. But I think because this case is
23 obviously going to be continued to be reviewed by other courts,
24 including the effective assistance of counsel and the fact that
25 the conflict may arise, I wanted to bring it to the Court's

I-2

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8JD04120

1 attention.

2 And I've brought it to Mr. Flanagan's attention this morning
3 as well as last night, and I don't know exactly what should
4 happen to preserve the record, whether he needs to waive any
5 conflict or not. But I think it needed to be on the record.

6 THE COURT: Mr. Seaton?

7 MR. SEATON: Judge, everything that Mr. Wall just said
8 is correct. I want to add to the record that I have not yet
9 spoken with Mr. Havens. I knew that he was in jail. I had not
10 until this morning spoken with any of our deputies about his
11 case. I was informed by Ms. Lynn Robinson this morning that a
12 tentative negotiation had been struck by Kim Maxson of our office
13 some time ago prior to his absconding.

14 When she read the file, the notes in the file to me, she
15 indicated that that deal was probably off and they were back at
16 square one. I told her to put the same sort of thing on the
17 record up in Department IX so that everybody would be aware that
18 no talking had gone on between counsel. I'm sure that until this
19 morning or yesterday that counsel for the defense had not done
20 anything with their deputies.

21 I've seen this sort of conflict arise before, and it is
22 always solved by the public defender getting off of the lesser
23 case, which is our plan this morning. The State certainly has no
24 objection to the defense cross-examining Mr. Havens with whatever
25 information they have independently gleaned or even gleaned from

I-3

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8JD04121

8JD04122

1 other deputies.

2 That's about all I have^{to} say on the matter.

3 THE COURT: Is he going to be brought down here today?

4 MR. SEATON: He will be -- I really haven't addressed
5 that problem. I just told Ms. Mounts this morning that I didn't
6 even plan on pretrialing him. I'm going to have an investigator
7 take a copy of his last transcript to him and let him read it;
8 and then whenever his testimony is ready to be had, which I would
9 agree with Mr. Wall should be sometime tomorrow, we'll just
10 simply have our investigators bring him over to the courtroom and
11 put him on the stand and ask him questions.

12 So the direct answer to your question is today, no, we don't
13 have any plans to bring him down here.

14 THE COURT: Well let me ask this then: What is it you
15 folks want me to do?

16 MR. SEATON: I think Mr. Wall's and my position was
17 just simply to apprise the Court of what's going on and make a
18 record of something that may come up in the future so that we
19 know precisely how we stand at this time.

20 THE COURT: Have him brought down here tomorrow morning
21 8:45, and we'll find out just what we're going to do with him.

22 MR. SEATON: We'll do that.

23 THE COURT: That's the best way on it, and then we'll
24 have that on the record here and go from there. If the public
25 defender is able to withdraw it, which I hope they can, then

1 that'll...

2 MR. SEATON: Could the...

3 THE COURT: ...solve that problem.

4 MR. SEATON: I'm sorry. Could the Court direct the
5 Court Services Officer at this time to make sure that he's
6 brought over? I think your say-so may have a little more...

7 THE COURT: I can direct him, sir, but I feel much
8 better with a written order.

9 MR. SEATON: Better with what, Judge?

10 THE COURT: A written order.

11 MR. SEATON: A written order? Do you want me to
12 prepare one for you?

13 THE COURT: You can do it during lunch hour.

14 MR. SEATON: Thank you, I will.

15 THE COURT: Just go over there, and they can do it
16 tonight.

17 Now, I'm going to take -- I missed my calendar. Do you have
18 a morning calendar for me with all those goodies on it that you
19 folks put on it? Thank you.

20 I have Defendant Flanagan's Motion to Prohibit Testimony by
21 the District Attorney to Summarize Witnesses' Testimony or in the
22 Alternative, to Disqualify District Attorney's Office. We've
23 made no decision on that.

24 MR. WALL: You have that on your calendar as
25 being on this morning?

I-5

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SA160

8JD04123

8JD04124

1 THE COURT: Yes.

2 MR. WALL: I think that's already been determined,
3 probably last week. I'm not sure why that's on there.

4 THE COURT: Well, tell me what it was, because my Clerk
5 didn't have a record of it except that's on my calendar. What
6 was our determination?

7 MR. WALL: I think we've probably taken care of that
8 issue.

9 MR. SCHIECK: I think informally the Court has notified
10 everybody that it was going to accept testimony from witnesses
11 that had appeared in the last penalty hearing. The State has
12 indicated--at least in chambers and will do so now on the record
13 --that we have no objection to the defense utilizing any of the
14 witnesses that they needed to read into the record this time who
15 had appeared at the last penalty hearing.

16 And at this time what I think Ms. Mounts did it on behalf of
17 one transcript and I did it on another, she took Mel Harmon's
18 transcript and sanitized it so that it doesn't appear that it
19 comes from any particular person, and we're going to call it a
20 court officer or something to that neutral extent. And she's
21 provided me with a copy of it.

22 I too have gone through the testimony of Dr. Green who is
23 unavailable and taken things out of it that wouldn't be
24 appropriate for this penalty hearing. The five of us had a
25 meeting -- yeah, the five of us had a meeting and decided what

1 should come out. I've redacted all of that and given them --
2 have I given you your copy yet? Yes, I've given them their copy
3 of it.

4 And so we think that all the reading part of it has been
5 virtually stipulated to and agreed to by the parties with the
6 knowledge that the Court was pretty inclined to let it come in
7 anyway.

8 THE COURT: Ms. Mounts, did you give it to Schieck?
9 And you've been standing and ready to go; and Mr. Schieck stood
10 up and you sat down.

11 MR. WALL: Well, I know.

12 THE COURT: You are not Ms. Mounts.

13 MR. SCHIECK: I've been standing longer now.

14 THE COURT: Are you Ms. Mounts?

15 MR. WALL: I'm sorry?

16 THE COURT: He is not Ms. Mounts.

17 MR. WALL: Oh, I'm sorry.

18 THE COURT: She was standing, and Mr. Schieck stood up
19 and she sat down, and I don't want to be accused of any sexual
20 harassment around here.

21 MS. MOUNTS: Thank you, your Honor.

22 Your Honor, we had met last week and had begun to go through
23 the transcripts. Included among that was Mr. Harmon's testimony.
24 It was my understanding that the Court had ruled, had basically
25 ordered us to get together because the Court was going to allow

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8JD04126

1 that testimony in.

2 Last week, your Honor, we were attempting to preserve our
3 objections that were made last time, and it is not our intention
4 at all to waive those objections to Mr. Harmon testifying that
5 were made prior to the 1989 penalty hearing. Judge, he
6 summarized the testimony of three witnesses and we have
7 confrontation rights as to those witnesses. We objected at the
8 time to his testimony and object now to his testimony being
9 reread into the record.

10 THE COURT: Just so we understand the text of what I
11 stated, I said to you folks if you wanted to preserve the
12 objections I have no problem with it. However, I would use the
13 testimony of those witnesses that he was going to summarize.

14 If they have been used, if they are unavailable and they
15 have been used, and the rights of cross-examination were upheld
16 at that time, they're not present now, then I have no problem
17 with that. But if you're going to make that objection, I'll tell
18 you again: We will use that testimony.

19 The effort here was to try and save time as it is a matter
20 of record what they said and what they didn't say. So any of you
21 folks, if any of you mind and to want to object to it, I'll
22 sustain the objection quite frank about it. And we'll use the
23 testimony.

24 MR. SEATON: We would just need to know that now,
25 because we have some redacting to do out of those larger

1 transcripts.

2 THE COURT: Well, I thought I'd said before, but if you
3 folks can't agree on a summary by somebody, and I think that was
4 my statement, I didn't care who it was, because all they're going
5 to do is read the testimony aloud. But if you can't agree upon
6 it, then fine; we'll use the testimony that was actually done in
7 court where there was cross-examination. That's the rules.

8 Mr. Schieck, now it's your turn, sir.

9 MR. SCHIECK: Well, first of all we'd join in what Ms.
10 Mounts said. And then I would add given the rules the Court has
11 laid down, from our standpoint it's preferable to do it the way
12 that we're going to do it after being with Mr. Seaton which is
13 read that redacted testimony.

14 THE COURT: Counsel, I understand that. You can't have
15 your cake and eat it too. If you're going to preserve your
16 objection, I'm going to grant you your objections. I'll sustain
17 them. And we'll use the testimony. That is a matter of the
18 transcription.

19 MR. SCHIECK: Well, it's not a matter of having our
20 cake and wanting to eat it too as much as wanting to do
21 everything possible in the best interest of our client. It's our
22 position that reading the entire testimony of all those witnesses
23 is the worst of all the alternatives and therefore...

24 THE COURT: Well, Counsel, that may be; I don't know.
25 All I'm saying to you is that you objected to Mr. Harmon's

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8JD04127

1 testimony, and you want to preserve that objection. And I have
2 no problem in sustaining that objection. I want you to
3 understand that; I have no problem with that. And we'll use the
4 testimony.

5 But you can't say we want to object, but we'll use it
6 because it may save some time. That's a tactical decision. And
7 I'm concerned with the legality of it. I have no problem using
8 the testimony. It makes a long proceeding, but I get paid by the
9 year, and I'll be here until January.

10 MR. SCHIECK: Your Honor, I think that...

11 THE COURT: Till December 31st anyway.

12 MR. SCHIECK: I think we've beaten this horse probably
13 long enough.

14 THE COURT: Yes. And my question again to you...

15 MR. SCHIECK: We agreed to use -- for Mr. Moore, agreed
16 to use the testimony of Mr. Harmon, redacted without reference to
17 Mr. Harmon...

18 THE COURT: Are you withdrawing your objections to it?
19 That's where your stay comes in.

20 MR. SCHIECK: That's where the problem comes in.
21 Based on everything that's been said, it's a tactical decision on
22 our part, given the position of the Court, to withdraw that
23 objection.

24 THE COURT: Ms. Mounts, will you folks withdraw
25 the objection?

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8JD04128

1 MS. MOUNTS: Your Honor, may we have the Court's
2 indulgence just a moment?

3 THE COURT: I want you to understand that I am willing
4 to grant your objections. Understand that. I am willing to
5 grant your objections, sustain them, and we'll use the testimony.
6 And if you don't want that, then of course you want Mr. Harmon's
7 redacted testimony. And it's not testimony. All he did was to
8 read and summarize the testimony that was given. I have no
9 problem with that. It's not something the Court is forcing you
10 into, because I will have no problem reading the complete
11 transcript and go from there--insofar as it does not interfere
12 with Dawson.

13 MR. WALL: Could we have the Court's indulgence for one
14 moment?

15 THE COURT: Uh-huh. I thought we made this square some
16 time ago.

17 (Pause)

18 While you folks are doing that, let me make a record here.
19 It isn't often I get a chance to make a record like this.

20 I received a fax from the Supreme Court, apparently on June
21 12th, and it reads as follows, dealing with Flanagan and Randolph
22 Moore:

23 "The Petitioner v. the 8th Judicial District Court
24 of the State of Nevada and therefore the County of
25 Clark, and the Honorable Addeliar D. Guy, District

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1 Judge, respondents, and the State of Nevada, a real
2 party in interest, filed June 12, 1995. Judith M.
3 Bloom from the Supreme Court. Order Denying Petition
4 for Real Prohibition.

5 "We have considered the petition on file herein
6 and we are not satisfied of this Court's intervention
7 by any extraordinary writ is warranted at this time.
8 Specifically we note that petitioners have an adequate
9 remedy in the ordinary course of the law in the form of
10 an immediate appeal.

11 "Further, petitioners note an appeal in the
12 postconviction matter did not divest this Court of
13 jurisdiction to conduct the new penalty hearing ordered
14 by this court. Accordingly we deny the petition.
15 CNRAP 31(b).

16 "Finally, we deny petitioner's alternative request
17 for a stay of proceedings in the district court, both
18 because we conclude that no stay is warranted at this
19 time and because the motion has not been properly
20 docketed in this court. It is so ordered."

21 Signed Steffen, Chief Judge, Young and Springer.

22 I've actually been upheld twice in one week, in seven days
23 by a court. I won't use Mr. Harmon's word either.

24 Anything? Ms. Mounts, please continue.

25 MS. MOUNTS: Thank you, your Honor. After conferring

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1 with Mr. Wall and Mr. Flanagan, we too would agree to use the
2 testimony, the prior testimony, of Mr. Harmon that we've agreed
3 upon with Mr. Seaton, which will delete all references to the
4 fact that it's Mr. Harmon.

5 THE COURT: All right. Let's have no problem, folks.
6 You keep telling me you want to preserve your objections to it,
7 and I'm telling you I will grant your objections.

8 MS. MOUNTS: We will withdraw those at this time, your
9 Honor.

10 THE COURT: Now, it's so nice.

11 MR. SEATON: Has Mr. Schieck withdrawn his, Judge?

12 THE COURT: Yes, he tried to get cozy though and tell
13 me basically what the Court said. So I want you to understand
14 this Court is not coerced, and I have no problem using the
15 transcript.

16 But it's a tactical decision he's decided -- they have
17 decided to make, and of course, I can't have any comment on that
18 one way or the other. But if he wants to make the objection,
19 this Court would be happy. I want him fully to infer you with a
20 capital H.

21 And that'll have nothing to do with the next two weeks
22 anyway. And Judge Becker will be so nice to take care of my
23 morning calendar, that I had thought we could get started this
24 morning at 9:00 -- yesterday morning at 9:00. It is now 10:20,
25 and we're still jawing back and forth.

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8JD04131

1 State's Motion to Use the Purported Testimony on the penalty
2 hearing--the State has on three people they tell me they can't
3 locate and the defense also has some people they can't locate. I
4 understand there were some objections made. If there are no
5 objections made, I'm going to grant both the State's Motion and
6 the Defense Motion.

7 MR. SEATON: The State has no objections.

8 THE COURT: Defense?

9 MR. SCHIECK: No objection.

10 MS. MOUNTS: No objection.

11 THE COURT: Is there anything else to come before this
12 Court now?

13 MR. WALL: Yes, your Honor.

14 THE COURT: Besides the jury?

15 MR. WALL: And part of it is -- I guess it's one of the
16 reasons that we're here at 10:20 instead of 9:00.

17 Our communications--and when I say "our" I'm talking about
18 both counsel for Mr. Flanagan, both counsel for Mr. Moore, and
19 probably also Mr. Seaton--have made...

20 (Pause, Court/Clerk colloquy not on the record)

21 THE COURT: Go ahead, sir.

22 MR. WALL: Our efforts to contact the jail in the last
23 four days...

24 (Pause, Court/Clerk colloquy not on the record)

25 THE COURT: Your contact with the jail. I'm listening

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8JD04132

1 to you, Counsel, go ahead.

2 MR. WALL: Apparently the jail is under the impression
3 that Messrs. Flanagan and Moore are under a death sentence at
4 this time; therefore, they are being held in a portion of the
5 jail where they are not allowed access to showers, shaves, things
6 like that, and it results in difficulties like the one we had
7 this morning.

8 The jail has indicated to everyone that if they were aware
9 from some official capacity that there was no death sentence at
10 this time hanging over these two individuals, they would put them
11 in a facility where we wouldn't have a delay like the one we had
12 this morning. We have been in contact with almost everyone over
13 there; but for some reason they're not willing to take our word
14 for the fact that the Supreme Court reversed the sentence of
15 death.

16 If there's a way for the Court to at least make contact with
17 the transportation officers to say, "Look, these guys do not have
18 a death sentence over them at this time, take it as an order or
19 whatever you want; therefore, they should be treated as such." I
20 know the Court isn't going to order the GL to do anything,
21 because you don't have the ability to, I don't think.

22 THE COURT: Oh, I have the ability and the power. As
23 long as it's in my jurisdiction...

24 MR. WALL: Well, then I'd ask for that.

25 THE COURT: ...and as long as it is a good kosher

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1 order. If it's a bad order, then of course I don't have any duty
2 to uphold.

3 MR. WALL: Then I'd ask the Court to order that the
4 Clark County Detention Center allow these individuals to shower
5 and shave to be presentable for court each day.

6 THE COURT: I'm not going to do that. But I will make
7 a request.

8 Inform your folks that the Supreme Court of the State of
9 Nevada has reversed the death penalty hearing -- or death
10 sentence on these two individuals and that that's what we're
11 doing now--we're going through a third penalty hearing to see if
12 another jury, what they might do on the three possible forms of
13 punishment, which of course is death or life with or life
14 without. That's the purpose of this hearing.

15 I would request, however, that you either do it in one of
16 two ways, and I don't care which. Make sure they are able to get
17 their showers and so forth. They may have to get up at 4:00 in
18 the morning or 5:00, like I do, in order to get it done; I don't
19 care. But they should be able to get their showers and come here
20 looking presentable and in a position that their counsel can sit
21 next to them.

22 OFFICER: I'll turn it into a court order, your Honor.

23 THE COURT: I've been defense counsel, and I know what
24 those jails will do to you sometimes--you can't get showers and
25 so forth. Your breath smells, your body smells, and you even

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8JD04135

1 know it yourself, and you can't get away from it.

2 Anything else?

3 MR. SEATON: One other thing, Judge.

4 THE COURT: You said that a few minutes ago.

5 MR. SEATON: No, I don't think that was me.

6 THE COURT: One is singular.

7 MR. SEATON: In a short while when we bring the jury
8 in, the Court is going to ask me to introduce myself and give a
9 few opening remarks, tell them...

10 THE COURT: Very briefly.

11 MR. SEATON: Very briefly.

12 In this case because of the nature of the ten years that
13 have passed and the nature of the facts originally, I would like
14 (as I did in the last penalty phase) to expand my remarks just
15 slightly so as to identify what these two did, what the other
16 four defendants did, and really not much more than that, but to
17 bring out fairly clearly what this case was all about so that the
18 jury, if they are triggered by any facts, it will come up during
19 our voir dire of them. It's going to take me maybe two minutes
20 longer than it might otherwise, but I just wanted to apprise all
21 the parties...

22 THE COURT: As long as you don't come out and say these
23 Defendants were found guilty by other jurors and the penalty
24 hearing -- no, I won't let you say this is the penalty hearing.

25 MR. SEATON: Oh, I don't want to -- no, I just wanted

1 to say that they had been found guilty by a jury before, and
2 that's the end of it.

3 THE COURT: And in the guilt phase.

4 MR. SEATON: In the guilt phase.

5 THE COURT: I have no problem with that. I said it
6 before because of submission of the Supreme Court.

7 MR. SEATON: Yeah. Of course, in the voir dire we're
8 going to have to explain to them that they're here for a penalty
9 hearing, but in the...

10 THE COURT: Counsel, I'll do that, and I think I'll do
11 it the way Mr. Howard suggested. There are procedural
12 irregularities. That's why I wouldn't use that word yesterday.

13 MR. SEATON: Yeah. No, I don't -- I'm not going to
14 talked about the procedures we've gone through.

15 THE COURT: I shall.

16 MR. SEATON: Yes, you will do that and we're going
17 to...

18 THE COURT: Before you even get up. And I'll also ask
19 anybody who recalls anything about this to stand and give me
20 their name and number. So when we get to them, I may give you an
21 individual voir dire on those.

22 MR. SEATON: Perhaps the Court could do that just as
23 soon as I'm through with my opening...

24 THE COURT: No, Mr. Seaton, I'll do it before you even
25 open your mouth.

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8JD04136

1 MR. SEATON: Okay. All right. However the Court wants
2 to do it.

3 THE COURT: Do you have anything else, sir, that you
4 want to say?

5 MR. SEATON: Well, the Court realizes how senile I'm
6 getting. I may have forgotten something, but I think not.

7 THE COURT: Mr. Seaton, I've known you for 20 years.

8 MR. SEATON: 25.

9 THE COURT: And that's a physical process that started
10 20 years ago!

11 MR. SEATON: I'll sit down.

12 THE COURT: You never had the last years in 20 years, I
13 don't know why you should get it now.

14 Next.

15 MR. WALL: I don't think there's anything else on
16 behalf of Mr. Flanagan.

17 THE COURT: Next.

18 MR. SCHIECK: Nothing, your Honor.

19 THE COURT: Bring in my jury, please.

20 Off the record.

21 (Colloquy not on the record)

22 (Jury in at 10:31 a.m.)

23 THE COURT: Case No. C069269, State of Nevada v. Dale
24 Flanagan & Randolph Moore. Let the record reflect the presence
25 of Defendants with counsel, District Attorney and other officers

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1 of the Court.

2 Will the Clerk please call roll call of the jury panel?

3 Please answer "present."

4 (Clerk calls roll of prospective jurors)

5 THE CLERK: Joyce Norris Skeels? (pause) Joyce Norris
6 Skeels, Badge No. 495?

7 THE COURT: An order to show cause will issue as to why
8 she should not be held in contempt.

9 No. 547 has already been excused.

10 (Clerk continues roll call of prospective jurors)

11 THE CLERK: Charles Neagle? (pause) Charles Neagle,
12 Badge No. 502?

13 (Clerk continues roll call of prospective jurors)

14 THE CLERK: Sheryl Lynn Koepke? (pause) Sheryl Lynn
15 Koepke, K-O-E-P-K-E, Badge No. 515?

16 (Clerk continues roll call of prospective jurors)

17 THE COURT: Wait one, wait one.

18 THE CLERK: Pardon?

19 THE COURT: May we have your badge numbers, please?

20 PROSPECTIVE JUROR #515: 515, Sheryl Koepke.

21 THE COURT: Have a seat.

22 PROSPECTIVE JUROR #502: And 502.

23 THE COURT: Have a seat.

24 (Clerk continues roll call of prospective jurors)

25

1 THE CLERK: Lee G. Gibson? (pause) Lee G. Gibson,
2 Badge No. 547?

3 (Clerk continues roll call of prospective jurors)

4 THE COURT: Mr. Bailiff?

5 THE BAILIFF: Yes.

6 THE COURT: You go down to that jury commission and
7 tell them I said the issue an order to show cause Juror 547, Lee
8 Gibson. You might check the jury room just to be sure before you
9 do that. If he's there, send him here.

10 THE CLERK: And 495.

11 THE COURT: Who?

12 THE CLERK: 495.

13 THE COURT: And also Juror 495. She was not here
14 yesterday either.

15 THE BAILIFF: 495?

16 THE COURT: Yes. Mr. Seaton, I am going to use your
17 suggestion and let you do it first, because they won't know
18 anything about it until you tell them about it first.

19 MR. SEATON: All right, Judge.

20 THE COURT: Not yet.

21 MR. SEATON: Oh.

22 THE COURT: Not yet, not ready.

23 Does either side wish to challenge any individual members of
24 the panel or the entire panel? State?

25 MR. SEATON: The State does not, Judge.

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8JD04139

1 MR. WALL: Not at this time on behalf of Mr. Flanagan.

2 MR. SCHIECK: Not at this time, your Honor.

3 THE COURT: The District Attorney will now state the
4 nature of this case to the prospective jurors whose names have
5 been called and also the names of the witness he intends to call.

6 MR. SEATON: Thank you, Judge.

7 Good morning, ladies and gentlemen. My name is Dan Seaton.
8 I'm a Chief Deputy District Attorney with the Clark County
9 District Attorney's Office, and I'm the individual who is going
10 to be prosecuting this particular case that some of you will be
11 chosen to sit upon.

12 There are a couple of reasons for my standing before you and
13 saying a few things to you this morning. One of them is to tell
14 you probably not much more than you read about the facts of the
15 case in the jury questionnaire that was given to you, but perhaps
16 just a little bit more, so that we can find out whether or not
17 any of you as some of you have already indicated remember
18 anything about the case.

19 The case happened ten years ago. Obviously many of you
20 weren't here, and some of you who were here might have heard
21 something and forgotten it. But we want to find out if any of
22 those memories are triggered at all for those of you who were
23 here at the time and had heard something about it.

24 So I'm sure you've been thinking about it since you did the
25 questionnaire; and when I'm through with my remarks, and indeed

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1 as we question you throughout this process, please be mindful of
2 trying to remember whether or not you do recall anything about
3 the case. And if you do, volunteer it to us and let us know.

4 The second thing I'm going to be doing this morning is
5 telling you the names of all of the witnesses that we originally
6 called at the first trial and finding out whether or not you know
7 any of those people, either personally or by reputation. I'm
8 also going to tell you the people that I intend to call in this
9 rather short hearing that we'll be having here before you at this
10 time. Those will be the same names, but I want to emphasize them
11 to you so that you're able to tell us whether or not you know any
12 of those folks.

13 The only other thing that I'm going to suggest to you at
14 this time is that as you have learned from filling out the
15 questionnaire that you were all-given, this is a death penalty
16 case. Our questions are going to be given to you in such a
17 manner so as to find out what you think about the death penalty,
18 whether you believe in it or not, and just what your attitudes
19 are about it.

20 Some of you probably haven't given it much thought
21 throughout your lives, and now is the time that you're going to
22 be getting a series of questions about it. And so be thinking
23 about that as well as we go through this process. And you'll be
24 able to hear some of the questions, many of which will be
25 repetitive, to understand what it is that we're inquiring about

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1 and what our interests are in asking you these questions.

2 Now, let me get back to the facts for just a moment if I
3 can. This is about a case that occurred on November the 5th,
4 1984. It was a killing that happened out on Washburn Road in the
5 northwest part of Las Vegas. The two gentlemen that are here
6 with us today, Dale Flanagan and Randy Moore, and four other
7 people went to Dale Flanagan's grandmother's house. And just so
8 you'll know, and you'll find out in a moment, this gentleman in
9 the striped shirt is Dale Flanagan (I know it's hard for many of
10 you to see). And the person sitting to his immediate left in the
11 plaid shirt is Randy Moore.

12 It was Dale Flanagan's grandparents who were killed. You
13 will learn that there was a trial in this matter and that they
14 were found guilty. Dale Flanagan was convicted of killing his
15 grandmother, Randy Moore of killing Dale's grandfather. And they
16 actually were found to be responsible for those acts, each of
17 them that -- that's the role that each of these gentlemen played
18 in this particular case.

19 There were four other individuals involved with them in the
20 killing. Their names were Johnny Ray Lockett, Roy McDowell,
21 Michael Walsh, and Tom Akers. Two of those individuals were
22 tried along with Mr. Flanagan and Mr. Moore. That would have
23 been Johnny Ray Lockett and Roy McDowell. They were all found
24 guilty.

25 We are here today to determine what the penalty will be for

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1 that killing for these two individuals, and the Judge will speak
2 to you a little bit more about that later in the proceedings.

3 You also need to know, I guess--and this is just simply to
4 trigger memories that you may have had from reading newspaper
5 articles or talking to friends or seeing it on TV--that of the
6 two that didn't go to trial, Michael Walsh plead guilty and was
7 sentenced to life imprisonment, and Dale -- I'm sorry, Mr. Akers
8 was -- he pled guilty to voluntary manslaughter, and in fact
9 you'll meet him; he'll be testifying here in the next couple of
10 days.

11 So that essentially are the facts -- those are the facts
12 that occurred in this particular case, and that's what I'm asking
13 you to search your memories to see if you remember anything
14 about.

15 I'm going to read a list of names. These are the names of
16 the witnesses who were called at the very first trial in 1985.
17 (Not only is my handwriting bad, but my eyes aren't so hot
18 either!)

19 These are the witnesses: Rusty Havens, Lisa Licata, Janelle
20 Gregor, Bob Manring, Yvonne Kaczamek, Tom Akers, John Lucas,
21 Angela Saldana, Mike Morlock, Sal Lavarro, Cindy Evans, Blake
22 Watson, Bud Inman, Wayne Wittig, Ron Flud, and a number of police
23 officers, among them Steve Winne, Dan Connell, Bob Rodreick, R.
24 Conboy, Bert Levos, Norm Ziola, Mike Geary, Alk Morales, Dr.
25 Sheldon Green, Kim Groover, and Richard Good. Those are all of

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1 the witnesses that were called at the trial in 1985.

2 In this hearing you are going to hear directly from, live
3 testimony that is, or the testimony will be read to you from a
4 prior hearing, the testimony of Rusty Havens, Dan Connell, Dr.
5 Green, John Lucas, Tom Akers, Angela Saldana, Wayne Wittig, Mike
6 Geary, Richard Good, and Johnny Ray Lockett.

7 Thank you very much.

8 THE COURT: Mr. Wall, you may introduce your co-counsel
9 and your client.

10 MR. WALL: Thank you, your Honor.

11 Good morning, ladies and gentlemen. My name is David Wall;
12 and along with Rebecca Mounts, we represent Dale Flanagan. Dale,
13 why don't you stand up and turn around?

14 Thank you very much.

15 THE COURT: Mr. Schieck, you want to introduce yourself
16 and your client?

17 MR. SCHIECK: Thank you, your Honor. Good morning,
18 ladies and gentlemen. My name is David Schieck; and along with
19 Lew Wolfbrandt, we represent Randy Moore in this case. Randy?

20 Thank you.

21 THE COURT: Swear them in, please.

22 THE CLERK: Would you all please rise and raise your
23 right hands?

24 (Clerk swears in prospective jurors)

25 THE CLERK: Thank you, you may be seated.

I-26

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1 DURING THE TIME THIS HOLE WAS BEING DUG, YOU HAVE
 2 INDICATED MR. FLANAGAN, MR. MOORE DUG THE HOLE.

3 THE WITNESS: MR. FLANAGAN, MR. MOORE AND MIKE
 4 WERE STANDING --

5 THE COURT: MIKE?

6 THE WITNESS: WALSH -- WERE STANDING
 7 APPROXIMATELY 10 TO 15 FEET AWAY FROM THE CAR. THERE WAS A
 8 SMALL HILL APPROXIMATELY THREE, FOUR FEET HIGH. THE HOLE WAS
 9 BEING DUG ON THE OTHER SIDE OF THE HILL.

10 THE COURT: SO, JUST THE THREE INDIVIDUALS YOU
 11 MENTIONED AND YOURSELF WERE PRESENT AT THAT TIME?

12 THE WITNESS: ALL FIVE OF THE DEFENDANTS.
 13 EVERYBODY WAS PRESENT. BUT ONLY THEY WENT TO THE HILL.
 14 EVERYONE ELSE STOOD BY MY CAR.

15 THE COURT: HOW FAR WAS YOUR CAR FROM THE PLACE
 16 THE HOLE WAS BEING DUG?

17 THE WITNESS: APPROXIMATELY 10 TO 15 FEET.

18 THE COURT: IN PLAIN VIEW?

19 THE WITNESS: YES, SIR.

20 THE COURT: PROCEED.

21 MR. HARMON: THANK YOU.

22 BY MR. HARMON:

23 Q MR. AKERS, WHAT HAPPENED AFTER YOU GOT BACK TO 337
 24 NORTH 13TH STREET?

25 A ALL FIVE OF THE DEFENDANTS AND MYSELF WENT IN THE

1 HOUSE. WE KNOCKED ON THE DOOR, AND MR. LUCAS OPENED THE DOOR.
 2 WE ALL WENT IN.

3 THE LONG RIFLE AND THE SAWED-OFF WERE PUT AWAY.

4 Q BY WHOM?

5 A BY RANDY MOORE.

6 Q WHAT HAPPENED THEN?

7 A THE .22 PISTOL WAS KEPT BY MR. FLANAGAN FOR
 8 APPROXIMATELY ANOTHER 20, 30 MINUTES. AND THEN, I DIDN'T SEE
 9 THAT.

10 Q DID YOU SEE A PURSE AT ANY TIME?

11 A I SAW A WALLET, FEMALE'S WALLET OUT OF A PURSE AND
 12 HAD VARIOUS FORMS OF IDENTIFICATION, A SMALL AMOUNT OF MONEY,
 13 APPROXIMATELY TWO TO THREE DOLLARS. IT WAS BLUE,
 14 APPROXIMATELY SIX INCHES LONG.

15 Q THE WALLET WAS BLUE?

16 A YES, SIR.

17 Q REMEMBER THE DENOMINATION OF ANY OF THE CURRENCY
 18 YOU SAW?

19 A ONE OF THE BILLS WAS A \$2 BILL.

20 Q DID YOU LEARN WHERE THIS WALLET HAD COME FROM?

21 A YES, SIR, I DID.

22 Q HOW DID YOU LEARN THAT?

23 A RANDY MOORE SAID.

24 Q WHERE EXACTLY WAS THE WALLET AND WHERE WERE THE
 25 OTHER PEOPLE WHEN YOU SAW IT?

1 A WHEN I SAW IT, IT WAS BEING HELD BY ROY MCDOWELL.

2 Q IN WHAT ROOM OF THE APARTMENT AT 337 NORTH 13TH
3 STREET?

4 A THE KITCHEN.

5 Q WHAT OTHER PERSONS WERE PRESENT IN THE KITCHEN?

6 A MYSELF, RANDY MOORE, DALE FLANAGAN, MICHAEL WALSH,
7 JOHNNY RAY LUCKETT, AND MR. LUCAS.

8 Q AND WHO SAID SOMETHING ABOUT WHERE THE WALLET HAD
9 BEEN OBTAINED?

10 A RANDY MOORE SAID THAT ROY MCDOWELL HAD TAKEN THE
11 PURSE OUT OF THE CLOSET AND TAKEN THE WALLET OUT OF THE PURSE.

12 Q DID ANYONE SAY WHOSE WALLET IT WAS?

13 A COLLEEN GORDON.

14 Q WHO SAID THAT?

15 A DALE FLANAGAN.

16 Q DID YOU HEAR ANYONE DESCRIBE, AFTER YOU HAD ARRIVED
17 BACK AT THE APARTMENT, WHAT HAPPENED INSIDE THE GORDON'S HOUSE?

18 A YES, SIR, I DID.

19 Q WHAT PERSONS WERE PRESENT?

20 A THE FIVE DEFENDANTS, MYSELF, AND MR. LUCAS.

21 Q WHAT PERSON OR PERSONS EXPLAINED WHAT HAPPENED AT
22 THE HOUSE?

23 MR. SMITH: YOUR HONOR, I WOULD REQUEST A LITTLE
24 MORE CLARIFICATION AS TO WHERE THE PRESENCE OF THESE PEOPLE.

25 I AM CONFUSED WHETHER THEY ARE PRESENT IN THE HOUSE OR PRESENT

1 WITHIN EARSHOT OF THE CONVERSATION.

2 THE WITNESS: IN THE KITCHEN.

3 THE COURT: THAT IS FINE.

4 BY MR. HARMON:

5 Q WHERE WERE THE FIVE DEFENDANTS, YOURSELF AND MR.
6 LUCAS?

7 A IN THE DINING ROOM-KITCHEN AREA. IT WAS A SMALL
8 AREA. IT WAS -- IT IS LIKE THE KITCHEN AND THE SHELVES, THE
9 REFRIGERATOR AND THE TABLE WERE ALL IN ONE ROOM, THE DINING
10 ROOM.

11 Q WITHIN EARSHOT?

12 A YES, SIR.

13 Q WHAT PERSON OR PERSONS EXPLAINED WHAT HAPPENED AT
14 THE GORDON'S HOUSE?

15 A IT WAS QUITE -- EVERYONE WAS TALKING QUITE FAST.

16 Q WHAT DO YOU MEAN BY EVERYONE?

17 A THE FIVE DEFENDANTS WERE TALKING AT A QUICK PACE.

18 THEY WERE LIKE EXCITED, A LOT OF ADRENALIN PUMPING.

19 Q EXPLAIN WHAT YOU HEARD AND TRY TO IDENTIFY WHO THE
20 SPEAKER IS?

21 A MICHAEL WALSH SAID HE BROKE THE WINDOW. HE HIT IT
22 TWICE WITH A PIECE OF BROOMSTICK WRAPPED WITH BLACK ELECTRICAL
23 TAPE. HE HIT IT TWICE. IT DIDN'T BREAK.

24 DALE FLANAGAN PUT HIS FIST THROUGH THE WINDOW.

25 THEN, DALE FLANAGAN WENT THROUGH THE WINDOW. RANDY MOORE

1 CLEARED THE REST OF THE GLASS --

2 MR. HANDFUSS: I AM SORRY TO INTERRUPT. WHO IS
3 SPEAKING NOW?

4 THE WITNESS: IT WAS DALE.

5 BY MR. HARMON:

6 Q DALE FLANAGAN?

7 A YES, SIR.

8 Q WHAT ELSE DID YOU HEAR? AND ALTHOUGH IT IS
9 DIFFICULT, PLEASE TRY TO IDENTIFY WHO MADE THE STATEMENT.

10 A OKAY. DALE FLANAGAN SAID HE GOT IN THE HOUSE
11 FIRST AND WENT DIRECTLY TOWARDS THE GRANDMOTHER'S ROOM. RANDY
12 MOORE SAID HE WAS IN THE HOUSE SECOND AND WAS POINTING THE
13 LONG RIFLE UP THE STAIRS WHERE THE GRANDFATHER SHOULD BE
14 COMING DOWN.

15 MIKE WALSH SAID HE TOOK THE GUN AWAY FROM JOHNNY
16 RAY, STUCK THE GUN THROUGH THE WINDOW, FIRED A SHOT AND HANDED
17 IT BACK TO HIM. JOHNNY RAY SAID HE GOT SCARED AND HE WENT --
18 HE WENT OUT TO THE FRONT BY MY CAR.

19 FROM THEN, ROY MCDOWELL THEN ENTERED. AND DALE
20 FLANAGAN WENT DIRECTLY TO THE GRANDMOTHER'S ROOM AND DALE SAID --

21 MR. HANDFUSS: I AM SORRY. I AM STILL CONFUSED AS
22 TO WHO IS TALKING.

23 THE COURT: I THINK YOU INDICATED ROY MCDOWELL
24 THEN ENTERED. I THINK PROBABLY YOU LOST CONTINUITY THERE.

25 THE WITNESS: ROY MCDOWELL SAID HE ENTERED THE

1 HOUSE. HE WAS THE FOURTH PERSON TO ENTER THE HOUSE.

2 BY MR. HARMON:

3 Q DID MR. FLANAGAN SAY WHAT HE DID AT THAT POINT?

4 A MR. FLANAGAN SAID HE GRABBED HIS GRANDMOTHER BY
5 THE LOWER JAW AREA AND PUT HER DOWN, BACK DOWN ON THE BED
6 AND SHOT HER.

7 Q DID HE SAY WHAT GUN HE USED TO SHOOT HIS
8 GRANDMOTHER?

9 A THE .22 REVOLVER PISTOL.

10 Q DID HE SAY HOW MANY TIMES HE SHOT HER?

11 A HE PROBABLY DID, BUT I DO NOT RECOLLECT.

12 Q DID ANYONE SAY WHAT HAPPENED TO MR. FLANAGAN'S
13 GRANDFATHER?

14 A RANDY SHOT ONCE. MIKE SHOT THROUGH THE WINDOW A
15 SECOND TIME.

16 THE COURT: THE QUESTION IS, DID ANYONE RELATE
17 WHAT HAPPENED TO THE GRANDFATHER?

18 THE WITNESS: YES, SIR.

19 BY MR. HARMON:

20 Q WHAT WAS SAID AND WHO IS THE PERSON WHO MAKES THE
21 STATEMENT?

22 A RANDY MOORE SAID THAT HE FIRED ONE SHOT AND FELT
23 AIR AND HEARD A BULLET GO BY HIS EAR. MICHAEL WALSH SAID THAT
24 HE HAD FIRED THE GUN THROUGH THE WINDOW.

25 FROM THEN, RANDY SAID HE FIRED A FEW MORE SHOTS.

1 ROY THEN SAID THAT HE WENT THROUGH THE HOUSE TRYING TO MAKE IT
2 LOOK LIKE AS MUCH A BURGLARY AS POSSIBLE IN THE SHORT TIME
3 THEY HAD.

4 Q DID MR. MCDOWELL SAY WHAT HE DID AS HE WENT
5 THROUGH THE HOUSE?

6 A MOVED SOME FURNITURE, SEARCHED THROUGH THE LIVING
7 ROOM CLOSET. THAT'S ABOUT ALL I CAN REMEMBER.

8 Q DID YOU HEAR ANYONE SAY WHO ACTUALLY SHOT MR.
9 GORDON, THE GRANDFATHER?

10 A RANDY SAID THAT RANDY SHOT HIM.

11 Q WHAT DID HE SAY ABOUT THAT?

12 A HE SAID, "HE WAS FURTHER DOWN THE STAIRS THAN I
13 THOUGHT HE WOULD BE AT THE TIME. I SHOT HIM, HE YELLED. HE
14 KEPT COMING. I HEARD A SHOT BEHIND ME, FELT THE AIR GO BY MY
15 EAR."

16 MIKE THEN STATED THAT HE HAD MADE THE SHOT. RANDY
17 THEN STATED THAT HE SHOT A FEW MORE TIMES MAKING SURE HE WAS
18 DEAD.

19 Q DID YOU LEARN WHO HAD ACTUALLY PICKED UP THE
20 WALLET FROM THE RESIDENCE?

21 A MR. ROY MCDOWELL.

22 Q DID HE TELL YOU THAT OR DID YOU HEAR HIM SAY THAT
23 IN YOUR PRESENCE?

24 A YES, SIR, I DID.

25 Q DID YOU SEE WHAT CONTENTS THERE WERE IN THE

1 WALLET?

2 A APPROXIMATELY, THREE CREDIT CARDS WITH COLLEEN
 3 GORDON'S NAME ON THEM, A FEW PIECES OF PAPER, SMALL AMOUNT OF
 4 MONEY, A COUPLE PIECES OF IDENTIFICATION.

5 Q YOU KNOW WHAT HAPPENED TO EITHER THE WALLET OR THE
 6 IDENTIFICATION?

7 A THEY WERE BURNED IN AN ASHTRAY IN THE KITCHEN
 8 TABLE.

9 Q DID YOU SEE THAT HAPPEN?

10 A YES, SIR, I DID.

11 Q DID YOU SEE WHAT PERSON OR PERSONS BURNED THE
 12 WALLET OR CONTENTS?

13 A THAT WAS RANDY.

14 Q RANDY MOORE?

15 A YES, SIR.

16 Q WHAT EXACTLY WAS BURNED? IS IT JUST THE CONTENTS
 17 OR BOTH THE WALLET AND THE CONTENTS?

18 A JUST THE CONTENTS. BASICALLY, THE PIECES OF
 19 IDENTIFICATION, ANYTHING WITH A NAME ON IT.

20 Q HOW LONG DID YOU REMAIN AT THE APARTMENT OF MR.
 21 MOORE AFTER THE SIX OF YOU HAD RETURNED?

22 A APPROXIMATELY, TWO HOURS.

23 Q DO YOU KNOW, BASED UPON WHAT YOU HAD HEARD ANYONE
 24 SAY, WHY THE GRANDPARENTS OF DALE FLANAGAN WERE KILLED THAT
 25 EVENING?

1 A YES, SIR.

2 Q HAVE YOU HEARD SOMEONE SAY WHY?

3 A YES, SIR, I DID. BECAUSE THEY HAD A WILL.

4 MR. PIKE: OBJECTION.

5 THE COURT: INDICATE WHO IS SPEAKING.

6 THE WITNESS: DALE FLANAGAN SAID THAT HIS
7 GRANDPARENTS HAD MADE A WILL LEAVING EVERYTHING TO HIM.

8 BY MR. HARMON:

9 Q WHEN DID HE MAKE THAT STATEMENT?

10 A APPROXIMATELY A MONTH BEFORE.

11 Q WAS THAT DURING THE SAME CONVERSATION THAT YOU
12 BEGAN YOUR TESTIMONY BY DESCRIBING?

13 A YES, SIR.

14 Q THAT WAS ALSO AT 337 NORTE 13TH STREET?

15 A YES, SIR.

16 MR. HARMON: MAY I HAVE THE COURT'S INDULGENCE?

17 BY MR. HARMON:

18 Q MR. AKERS, DURING THIS MEETING ABOUT A MONTH
19 BEFORE NOVEMBER THE 5TH, 1984, WAS JOHN LUCAS PRESENT?

20 A NO, SIR.

21 Q YOU KNOW A PERSON IDENTIFIED AS RUSTY HAVENS?

22 A YES, SIR, I DO.

23 Q WAS HE PRESENT AT THE RESIDENCE OF RANDY MOORE AT
24 337 NORTH 13TH STREET EITHER ON THE OCCASION YOU HAVE REFERRED
25 TO ABOUT A MONTH BEFORE, OR WAS HE THERE ON THE EVENING OF

1 NOVEMBER THE 5TH, 1984?

2 A HE WAS THERE THE MONTH BEFORE, BUT HE WASN'T THERE
3 ON THE 5TH.

4 Q ON THIS OCCASION, ABOUT A MONTH BEFORE NOVEMBER
5 THE 5TH, 1984, WAS THERE ANY DISCUSSION BY THE PERSONS PRESENT
6 ABOUT HOW THEY MIGHT ALIBI WHAT THEY WERE GOING TO DO?

7 A DALE FLANAGAN SAID THAT AFTER THE INCIDENT HE
8 WOULD BE SHOT. HE WOULD BE SHOT IN THE LEG. AND IT WAS TO BE
9 SAID THAT A BIG GREEN DODGE WITH TWO WHITE MALES AND ONE BLACK
10 MALE OR VICE VERSA -- I AM NOT POSITIVE -- WOULD BE RUNNING
11 OUT OF THE HOUSE.

12 WE WENT OVER THERE TO GET THE TAPES. DALE WALKED
13 OVER TO SEE WHAT WAS GOING ON, AND HE WAS SHOT IN THE LEG.
14 THEY GOT IN THE TRUCK AND LEFT. WE DIDN'T SEE THE LICENSE
15 PLATE BECAUSE IT WAS TOO DARK.

16 Q WHAT PERSONS WERE PRESENT AT THE APARTMENT AT THE
17 TIME MR. FLANAGAN MADE THAT STATEMENT?

18 A RUSTY, MYSELF, AND THE FIVE, ROY MCDOWELL, JOHNNY
19 RAY LUCKETT, DALE FLANAGAN, AND RANDY MOORE AND MICHAEL WALSH.

20 Q ALL FIVE DEFENDANTS WERE PRESENT ON THIS OCCASION
21 ABOUT A MONTH BEFORE NOVEMBER 5, 1984?

22 A YES, SIR.

23 Q DID MR. FLANAGAN AT ANY TIME EXPRESS THAT THERE
24 WAS ONLY ONE PERSON HE COULD REALLY TRUST?

25 A YES, SIR.

1 Q WHEN DID HE SAY THAT?

2 A ON THE MONTH BEFORE THE INCIDENT, ON THE MONTH
3 BEFORE.

4 Q WHAT DID HE SAY?

5 MR. POSIN: COULD WE ESTABLISH WHO WAS PRESENT, IF
6 YOUR HONOR PLEASE? IT WAS TESTIFIED IT WAS SAID ABOUT A MONTH
7 BEFORE. WE DON'T HAVE A PLACE.

8 THE COURT: I THINK THE MONTH BEFORE REFERENCES
9 THIS INITIAL MEETING.

10 MR. HARMON: IT DOES.

11 THE COURT: I THINK FOR CLARITY WE NEED TO
12 DETERMINE AT LEAST WHAT APPROXIMATE DATE WE ARE TALKING ABOUT.
13 AND THEN, WE CAN REFER TO IT AS THAT DATE, RATHER THAN A MONTH
14 BEFORE.

15 MR. HARMON: I DON'T KNOW IF HE CAN BE ANY MORE
16 SPECIFIC.

17 BY MR. HARMON:

18 Q CAN YOU TELL US WHAT DATE IT WAS WHEN YOU HAD THE
19 FIRST CONVERSATION?

20 A APPROXIMATELY, OCTOBER 7TH.

21 THE COURT: WELL, FROM THIS POINT ON, LET'S REFER
22 FOR PURPOSES OF THIS HEARING TO THAT FIRST MEETING AS THE
23 OCTOBER MEETING. BECAUSE WHEN YOU KEEP SAYING A MONTH BEFORE,
24 WE DON'T KNOW.

25 //

1 BY MR. HARMON:

2 Q AT THE OCTOBER MEETING, DID MR. FLANAGAN MAKE SOME
3 EXPRESSION THAT THERE WAS ONLY ONE PERSON HE COULD REALLY
4 TRUST?

5 A YES, SIR.

6 Q WHAT DID HE SAY?

7 A HE SAID THAT THE ONLY PERSON HE COULD REALLY TRUST
8 WAS RANDY MOORE, BECAUSE THEY WERE LIKE BROTHERS.

9 Q DID HE SAY WHAT HE WOULD DO IF ANYONE CROSSED HIM?

10 A HE SAID IF ANYONE CROSSED HIM, HE WOULD KILL THEM.
11 OR IF HE COULDN'T, RANDY MOORE WILL. OR IF BOTH OF THEM
12 COULDN'T, HE COULD FIND SOMEBODY THAT WOULD.

13 MR. HARMON: THAT CONCLUDES DIRECT, YOUR HONOR.

14 THE COURT: VERY WELL. GENTLEMEN,
15 CROSS-EXAMINATION WILL BE ALLOWED AT THIS TIME AT YOUR
16 PLEASURE. DO YOU CARE TO LEAD OFF, MR. KELESIS? IT IS YOUR
17 MOTION, MR. SMITH.

18 MR. SMITH: COURT MIND IF I STAND UP, YOUR HONOR?
19 I HAVE A BAD BACK.

20 THE COURT: QUITE ALL RIGHT.

21

22 CROSS-EXAMINATION

23 BY MR. SMITH:

24 Q MR. AKERS, YOU HAVE REFERRED TO TWO MEETINGS IN
25 WHICH THESE KILLINGS WERE DISCUSSED AMONG VARIOUS

1 CODEFENDANTS. ONE ON THE NIGHT IN QUESTION AND ONE SOMETIME
2 PRIOR. I TAKE IT, THOSE ARE THE ONLY TWO TIMES THAT SUCH
3 DISCUSSIONS WERE HELD?

4 A NO, SIR. DALE FLANAGAN MENTIONED ABOUT FIVE, TEN
5 TIMES THAT HE WOULD DO IT. BUT FROM WHAT I HAD HEARD FROM
6 PEOPLE THAT HAVE KNOWN HIM, HE HAD BEEN TALKING ABOUT THAT FOR
7 ABOUT TWO, THREE YEARS.

8 Q BUT AS FAR AS -- AS FAR AS YOU PERSONALLY BEING
9 PRESENT AND WHEN OTHER CODEFENDANTS WERE PRESENT AND LIKE A
10 GROUP MEETING, WERE THERE TWO OCCASIONS?

11 A YES.

12 Q BOTH OF THEM AT RANDY MOORE'S HOUSE?

13 A YES.

14 Q YOU MENTIONED ON THE FIRST MEETING RUSTY HAVENS
15 WAS PRESENT?

16 A YES, SIR.

17 Q AND THE WAY YOU DESCRIBED BOTH OF THESE MEETINGS,
18 BOTH OF THEM OCCURRED GENERALLY IN A SIMILAR FASHION. YOU
19 SHOWED UP AT THE HOUSE WITH DALE, YOU WENT INTO THE HOUSE, YOU
20 DRANK BEER AND THEN THERE WAS A DISCUSSION?

21 A YES, SIR.

22 Q I WANT TO ASK YOU ABOUT A VERY IMPORTANT POINT.
23 YOU MENTIONED THAT FIRST MEETING THAT JOHNNY LUCKETT WAS
24 PRESENT IN THE HOUSE. ARE YOU SURE ABOUT THAT?

25 A I AM NOT POSITIVE.

1 Q ARE YOU FAMILIAR OR HAVE YOU READ OR IN DEALING
 2 WITH THE POLICE A STATEMENT MADE BY RUSTY HAVENS WITH RESPECT
 3 TO THE FIRST MEETING?

4 A NO, SIR, I HAVEN'T.

5 Q WOULD IT SURPRISE YOU --

6 MR. HARMON: ARGUMENTATIVE OBJECTION.

7 MR. SMITH: I AM TRYING TO REFRESH HIS
 8 RECOLLECTION. HE STATED HE IS NOT POSITIVE.

9 THE COURT: I WILL ALLOW THAT.

10 BY MR. SMITH:

11 Q FOR PURPOSES ONLY OF REFRESHING YOUR RECOLLECTION
 12 AS TO WHAT MAY HAVE OCCURRED, WOULD IT SURPRISE YOU TO KNOW
 13 THAT RUSTY HAVENS MADE A STATEMENT THAT HE WAS PRESENT AT THAT
 14 FIRST MEETING, BUT THAT MR. LUCKETT WAS NOT PRESENT AT THAT
 15 MEETING?

16 A AT THAT TIME, MR. LUCKETT WAS STAYING AT MR.
 17 MOORE'S HOUSE. HE MIGHT OR MIGHT NOT HAVE BEEN THERE. BUT HE
 18 WAS STAYING THERE, SO --

19 Q BUT IN THINKING BACK DURING THE TIME THAT YOU WERE
 20 THERE AND THERE WAS DISCUSSION WITH DALE FLANAGAN AND/OR RANDY
 21 MOORE OR ANYBODY ELSE ABOUT KILLING THE GRANDPARENTS SOME
 22 MONTH BEFORE THIS OCCURRED, YOU CANNOT TESTIFY UNDER OATH WITH
 23 CERTAINTY, CAN YOU, THAT MR. LUCKETT WAS PRESENT DURING ANY OF
 24 THAT CONVERSATION IN THE ROOM WHERE HE COULD HEAR IT?

25 A NO, SIR.

1 Q SO, IN FACT, IT MAY WELL BE AS YOU SIT THERE AND
 2 RECOLLECT ON IT AND TESTIFYING UNDER OATH THAT YOUR BEST
 3 RECOLLECTION IS THAT HE WAS NOT PRESENT AT THAT TIME?

4 A I CANNOT SAY THAT EITHER.

5 THE COURT: HE MIGHT BE PUTTING WORDS INTO THE
 6 WITNESS'S MOUTH, BUT I DON'T KNOW IF IT IS ARGUMENT. LET'S BE
 7 MORE OBJECTIVE.

8 BY MR. SMITH:

9 Q CAN YOU TELL US WITH ANY CERTAINTY THAT YOU
 10 REMEMBER JOHNNY LUCKETT BEING PRESENT THERE DURING ANY OF
 11 THOSE FIRST CONVERSATIONS?

12 A NO, SIR.

13 Q NOW, HOW MANY TIMES HAVE YOU SUBMITTED YOURSELF TO
 14 INTERVIEWS IN THIS CASE BY ANY MEMBERS OF THE POLICE
 15 DEPARTMENT?

16 A THREE.

17 Q AND DO YOU RECALL WHEN THOSE OCCASIONS WERE?

18 A NOT THE EXACT DATES, NO, I DON'T.

19 Q ARE THOSE THE THREE WRITTEN STATEMENTS THAT HAVE
 20 BEEN PROVIDED TO US?

21 A YES, SIR, THEY ARE.

22 Q HAVE YOU TALKED TO ANY OTHER POLICE OFFICERS AFTER
 23 THAT LAST STATEMENT WHICH YOU REFERRED TO IN YOUR DIRECT
 24 EXAMINATION?

25 A NO, SIR, I HAVEN'T.

1 Q ARE THE ONLY AGENTS OF THE GOVERNMENT THAT YOU
 2 TALKED TO, TO THE BEST OF YOUR KNOWLEDGE, MR. HARMON AND MR.
 3 SEATON?

4 A SINCE THOSE THREE STATEMENTS, YES, THEY ARE.

5 Q HAVE YOU SUBMITTED TO A POLICE POLYGRAPH IN THIS
 6 CASE?

7 A NO, I HAVEN'T.

8 Q HAVE YOU SUBMITTED TO ANY POLYGRAPHS?

9 A NO, SIR, I HAVEN'T.

10 Q I DON'T RECALL YOU HAVING MENTIONED ANYTHING,
 11 DURING YOUR DIRECT TESTIMONY, THAT YOU EVER HEARD JOHN LUCKETT
 12 SAY WITH RESPECT TO THESE KILLINGS. HAS HE EVER MADE ANY
 13 STATEMENTS THAT YOU HEARD WITH RESPECT TO THESE KILLINGS?

14 A MOST OF -- ON THE DATE OF NOVEMBER 5TH, HE WAS
 15 VERY SCARED, VERY NERVOUS, DID VERY LITTLE TALKING. AND THE
 16 TALKING THAT HE DID WAS NOT DETRIMONY (SIC) OR IT WAS NOT
 17 IMPORTANT TO THIS CASE.

18 Q SO, HE NEVER MADE ANY STATEMENT THAT HE WAS GOING
 19 TO GO ALONG WITH ANY KILLING OR HE WAS GOING TO TAKE ANY
 20 AFFIRMATIVE ROLE IN THESE KILLINGS, DID HE?

21 A NO, SIR.

22 Q AFTER THE KILLINGS OCCURRED, CAN YOU RECALL ANY
 23 STATEMENTS THAT HE MADE WHICH YOU HEARD WHICH PERTAIN TO WHAT
 24 HAD HAPPENED?

25 A WOULD THIS BE ANY TIME AFTER OR JUST SHORTLY

1 AFTER?

2 Q ANY TIME AT ALL, EVER?

3 A WHENEVER --

4 Q HAS HE EVER SAID ANYTHING TO YOU OR ANYBODY ELSE
5 THAT YOU HEARD ABOUT THESE KILLINGS?

6 A WHENEVER WE WERE BOTH IN THE DETENTION CENTER
7 TOGETHER, HE MENTIONED ON ONE OCCASION THAT HE WAS THREATENED
8 BY HIS LIFE AND HIS MOTHER'S LIFE THAT IF HE DIDN'T GO ALONG,
9 HE WOULD LOSE EITHER HIS MOTHER OR HIS LIFE OR HIS MOTHER'S
10 LIFE OR BOTH.

11 Q DID HE -- I WANT YOU TO RELAX AND THINK. ARE
12 THERE ANY OTHER STATEMENTS AT ALL THAT YOU HEARD HIM MAKE
13 ABOUT HIS ROLE IN THIS, OTHER THAN WHAT YOU TESTIFIED TO?

14 A NOT THAT I COULD BE POSITIVE WITH.

15 Q NOW, YOU MENTIONED THAT ON THE EVENING IN QUESTION
16 THERE WAS SOME DISCUSSION AMONG THE VARIOUS CODEFENDANTS ABOUT
17 WHO WOULD DO WHAT, AND WHAT ROLE PEOPLE WOULD PLAY.

18 CAN YOU WITH CERTAINTY STATE UNDER OATH THAT
19 JOHNNY RAY LUCKETT WAS PRESENT ALONG WITH EVERYBODY ELSE
20 BEFORE YOU WENT TO THE HOUSE WHEN THESE DISCUSSIONS OCCURRED;
21 THAT IS, THAT HE WAS SITTING THERE AND LISTENING TO WHAT WAS
22 GOING ON?

23 A YES, SIR, HE WAS.

24 Q AND CAN YOU TELL ME A LITTLE MORE ABOUT THAT?

25 A COULD YOU, PLEASE, DIRECT QUESTIONS?

1 Q WHAT I AM TRYING TO FIND OUT IS WHAT,
2 SPECIFICALLY, CAN YOU TESTIFY UNDER OATH TO THAT HE HEARD?

3 A I WOULD IMAGINE THAT EVERYTHING I HAVE HEARD.

4 Q I DON'T WANT YOU TO IMAGINE. I KNOW IT IS
5 DIFFICULT, BUT IF YOU CAN. YOU HAVE STATED -- I KNOW YOU ARE
6 TRYING TO BE HONEST -- THAT PEOPLE WERE MOVING BACK AND FORTH,
7 IN AND OUT OF THE AREA WHEN CERTAIN DISCUSSIONS WERE HAD.

8 CAN YOU STATE UNDER OATH THAT HE WAS THERE AT ANY
9 SPECIFIC TIME AND OVERHEARD ANY SPECIFIC DETAILS BEING
10 DISCUSSED ABOUT HOW HE WAS GOING TO DO BEFORE THIS HAPPENED?

11 A I COULD NOT GIVE YOU SPECIFICS. BUT, TO THE BEST
12 OF MY RECOLLECTION, HE WAS THERE 90 PERCENT OF THE TIME I WAS
13 THERE.

14 Q NOW, DO YOU RECALL HIM TAKING A SHOWER THAT
15 EVENING?

16 A I RECALL HE WAS IN THE SHOWER WHEN WE GOT THERE,
17 AND GOT OUT ABOUT FIVE, TEN MINUTES AFTER WE GOT THERE.

18 Q DO YOU RECALL IF THERE WAS A SIGNIFICANT AMOUNT OF
19 DISCUSSION ABOUT WHAT WAS GOING TO HAPPEN WHILE HE WAS IN THE
20 SHOWER?

21 A I COULDN'T TESTIFY TO THAT.

22 Q CAN YOU SAY THAT THAT'S NOT TRUE?

23 A NO, I COULDN'T EVEN SAY THAT.

24 Q IT WAS SHORTLY AFTER HE GOT OUT OF THE SHOWER THAT
25 HE WAS CONFRONTED BY RANDY MOORE AND THEY WENT INTO THE

1 BEDROOM?

2 A YES, THAT IS TRUE.

3 Q IT WAS ONLY THEREAFTER THAT HE EVER TOOK
4 POSSESSION, THAT IS, PHYSICAL POSSESSION OF ANY WEAPON THAT
5 YOU SAW; IS THAT TRUE?

6 A YES, SIR, THAT IS TRUE.

7 Q APPROXIMATELY, HOW FAR WAS YOUR AUTOMOBILE LOCATED
8 FROM DALE FLANAGAN'S TRAILER OUT AT THE GORDON'S RESIDENCE?

9 A APPROXIMATELY, 25, 30, 35 YARDS.

10 Q TAKE YOUR TIME AND TELL ME HOW LONG WAS IT FROM
11 THE TIME YOU HEARD THE FIRST SHOT UNTIL YOU ARRIVED BACK AT
12 YOUR VEHICLE?

13 A NO MORE THAN THREE TO FOUR MINUTES.

14 Q WHAT DID YOU DO DURING THREE TO FOUR MINUTES IN
15 THE TRAILER?

16 A I STOOD THERE NOT ABLE TO MOVE, BECAUSE I WAS SO
17 SCARED.

18 Q WOULD IT BE POSSIBLE THAT IN TRUTH AND IN FACT YOU
19 ARRIVED BACK AT YOUR CAR WITHIN A MATTER OF 15 TO 20 SECONDS?

20 A I WAS MOVING QUITE QUICKLY, YES.

21 Q AND WHEN YOU GOT BACK TO THE CAR, MR. LUCKETT WAS
22 PRESENT AT THE CAR; ISN'T THAT TRUE?

23 A HE WAS NOT PRESENT AT THE TIME AT THE CAR. HE WAS
24 APPROXIMATELY 25 FEET, 30 FEET IN FRONT OF THE CAR.

25 Q BUT, HE WAS HIDING DOWN IN FRONT OF A BUSH?

1 A HE WAS KNEELING DOWN ON ONE KNEE, KIND OF FOOTBALL
2 TYPE STANCE, VERY NERVOUS AND VERY CAUTIOUS OF WHAT WAS GOING
3 ON AROUND HIM.

4 Q NOW, WAS HE IN BETWEEN THE CAR AND THE RESIDENCE,
5 OR WAS WHERE HE WAS KNEELING SOME OTHER PLACE?

6 A MY CAR BEING HERE, THE RESIDENCE BEING HERE, HE
7 WAS APPROXIMATELY THERE.

8 Q LET THE RECORD REFLECT THE WITNESS HAS INDICATED
9 APPROXIMATELY MIDWAY IN BETWEEN THE CAR AND THE RESIDENCE OFF
10 TO ONE SIDE?

11 A NOT QUITE MIDWAY. HE WAS CLOSER TO MY CAR THAN
12 HE WAS TO THE RESIDENCE.

13 Q WHEN HE SAW YOU, HE RAN OVER TO THE CAR?

14 A WHEN HE SAW ME, HE KIND OF MADE A MOTION HE WAS
15 GOING TO MOVE THE OTHER WAY AND THEN COMING TO MY CAR.

16 Q WHAT ARE THE TERMS OF YOUR AGREEMENT WITH THE
17 GOVERNMENT IN ORDER TO TESTIFY IN THIS CASE?

18 A THE TERMS OF MY AGREEMENT?

19 Q YES, SIR.

 A I HAVE FIVE YEARS PROBATION.

 Q IS THAT IT?

 THAT I WILL TESTIFY AS TRUTHFULLY AS POSSIBLE.

 MR. SMITH: I HAVE GOT NO FURTHER QUESTIONS.

 THE COURT: VERY WELL. NEXT DEFENSE COUNSEL

 RE TO CROSS-EXAMINE.

CROSS-EXAMINATION

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BY MR. KELESIS:

Q MR. AKERS, HOW OLD ARE YOU?

A 18 YEARS OLD.

Q YOU GRADUATED HIGH SCHOOL?

A NO, I HAVEN'T.

Q HOW FAR DID YOU GO THROUGH SCHOOL?

A I WAS KICKED OUT OF SCHOOL APPROXIMATELY ONE WEEK BEFORE THIS OCCURRENCE CAME UP.

Q WHY WERE YOU KICKED OUT OF SCHOOL?

A FOR NOT ATTENDING ALL OF MY CLASSES. ACTUALLY, MISSING ONE OF MY CLASSES A NUMEROUS AMOUNT OF TIMES.

Q ARE YOU WORKING?

A YES, SIR, I AM.

Q WHERE ARE YOU WORKING?

A WHERE I --

Q WHERE ARE YOU WORKING?

A I AM WORKING AT MT. CHARLESTON INN.

Q WERE YOU WORKING AROUND 11 -- NOVEMBER 5TH?

A NO, SIR, I WASN'T.

Q I AM GOING TO GO DOWN THE ROW OF THE CODEPENDANTS. HOW WELL DO YOU KNOW MICHAEL WALSH?

A NOT VERY WELL.

Q HOW LONG HAVE YOU KNOWN HIM?

A APPROXIMATELY, TWO TO THREE WEEKS BEFORE NOVEMBER

1 A YES.

2 Q HAD YOU BEEN DRINKING BEFORE YOU ARRIVED TO THE
3 RESIDENCE?

4 A NO, SIR.

5 Q WERE YOU DRINKING WHILE YOU WERE AT THE RESIDENCE?

6 A I IMAGINE I DRANK ABOUT A BEER.

7 Q WERE YOU TAKING ANY DRUGS?

8 A NO, SIR.

9 Q DO YOU USE DRUGS?

10 A AT THIS MOMENT, NO.

11 Q I AM NOT ASKING YOU AT THIS MOMENT. I AM ASKING
12 YOU --

13 A YOU SAID, DO I? AT THE OCTOBER MEETING, YES, I
14 DID. I SMOKED POT AT THE TIME.

15 Q AT THE OCTOBER MEETING?

16 A NOT AT THE OCTOBER MEETING, BUT AT THAT TIME I
17 DID.

18 Q HOW WELL DO YOU KNOW MR. MOORE?

19 A APPROXIMATELY, A MONTH AND A HALF, MAYBE EVEN TWO
20 MONTHS BEFORE THE NOVEMBER 5TH.

21 Q HOW WELL DO YOU KNOW MR. FLANAGAN?

22 A APPROXIMATELY, FOUR MONTHS BEFORE NOVEMBER 5TH.

23 Q WHERE DID YOU MEET MR. FLANAGAN?

24 A MET HIM AT A PARTY AT A GIRL CALLED CHRISTY
25 AVALA'S (PHONETIC) FRIEND OF MINE, HOUSE.

1 Q WHO IS THE FRIEND?

2 A CHRISTY AVALA.

3 Q WHERE DID YOU MEET MR. MOORE?

4 A AT CIRCUS CIRCUS.

5 Q YOU REMEMBER WHEN THAT WAS?

6 A NOT THE DATE.

7 Q WHERE DID YOU MEET MR. LUCKETT?

8 A AT RANDY'S HOUSE.

9 THE COURT REPORTER: YOUR HONOR, I HAVE RUN OUT
10 OF PAPER. MAY I HAVE A MOMENT?

11 THE COURT: WE WILL TAKE JUST A BRIEF RECESS,
12 15 MINUTES OR SO. AND I ASK THOSE THAT ARE PRESENT TO REMAIN
13 IN THE IMMEDIATE AREA. DON'T WANDER OFF.

14 (RECESS TAKEN.)

15 THE COURT: THE CONTINUATION OF CASE C69269, STATE
16 OF NEVADA VERSUS DALE FLANAGAN, RANDOLPH MOORE, JOHNNY
17 LUCKETT, MICHAEL WALSH AND ROY MCDOWELL. THE RECORD WILL
18 REFLECT THE PRESENCE OF EACH OF THE DEFENDANTS IN CUSTODY AND
19 THEIR RESPECTIVE COUNSEL PRESENT AND ACCOUNTED FOR. THE
20 RECORD WILL REFLECT THE PRESENCE OF MR. HARMON
21 REPRESENTING THE STATE.

22 MR. AKERS, YOU MAY RESUME THE STAND AND YOU ARE
23 ADMONISHED, SIR, THAT YOU ARE STILL UNDER OATH.

24 MR. KELESIS: I BELIEVE I WAS ASKING MR. AKERS
25 SOME QUESTIONS.

1 BY MR. KELESIS:

2 Q WHILE THESE INDIVIDUALS HAVE BEEN IN JAIL, HAVE
3 YOU BEEN TALKING WITH THEM?

4 A NO.

5 Q YOU HAVEN'T TALKED TO ANY ONE OF THEM WHILE THEY
6 WERE IN JAIL?

7 A JOHNNY RAY CALLED ME ONCE, TWICE.

8 Q SO, ONE IS MR. JOHNNY RAY LUCKETT?

9 A YES, SIR.

10 Q HE CALLED YOU HOW MANY TIMES?

11 A TWICE.

12 Q TWO TIMES?

13 A RIGHT.

14 Q WHAT DID YOU DISCUSS AT THAT TIME?

15 A OH, STUFF LIKE IF I HAD A JOB YET, WHAT KIND OF
16 ENGINE DID I HAVE IN MY EL CAMINO, IF I HAD MY FOUR-SPEED
17 TRANSMISSION PUT IN YET, IF I GOT THE POSI (PHONETIC) FIXED,
18 GENERAL THINGS ABOUT MY CAR.

19 Q YOU DIDN'T DISCUSS ANYTHING REGARDING THIS CASE?

20 A NO, SIR, WE DIDN'T.

21 Q DID YOU HEAR FROM ANY OF THE OTHER DEFENDANTS?

22 A NO, SIR, I HAVEN'T.

23 Q YOU GAVE HOW MANY STATEMENTS TO THE POLICE?

24 A THREE.

25 Q DO YOU REMEMBER YOUR DECEMBER 7TH, 1984 STATEMENT?

1 A WHICH STATEMENT WOULD THAT BE, FIRST, SECOND OR
2 THIRD?

3 Q THAT WOULD BE YOUR SECOND, I BELIEVE. THAT WOULD
4 BE YOUR THIRD.

5 A YES, SIR, I DO.

6 Q AND DO YOU RECALL IN THAT STATEMENT WHAT YOU HAD
7 STATED THAT -- DO YOU RECALL WHAT YOU HAD STATED THAT JOHNNY
8 RAY SAID REGARDING HIS INVOLVEMENT IN THE SHOOTING?

9 A NO, SIR, I DON'T.

10 Q WOULD YOU LIKE ME TO -- IF I SHOWED YOU THIS
11 STATEMENT, DO YOU THINK IT WOULD REFRESH YOUR MEMORY?

12 A YES, SIR, IT WOULD.

13 MR. KELESIS: MAY I APPROACH THE WITNESS?

14 THE COURT: YOU MAY.

15 MR. KELESIS: COUNSEL, IT IS ON PAGE SIX OF THE
16 THIRD STATEMENT, THE DECEMBER 7TH STATEMENT.

17 BY MR. KELESIS:

18 Q WHY DON'T YOU JUST READ TO YOURSELF. START FROM
19 HERE AND READ DOWN.

20 NOW, DOES THIS JAR YOUR MEMORY IN ANY WAY AS TO
21 ANY STATEMENTS MADE BY JOHNNY RAY IN YOUR PRESENCE?

22 A THE STATEMENT I MADE TO THE POLICE, I WAS VERY
23 NERVOUS.

24 Q I AM ASKING YOU, DOES THIS HELP YOUR MEMORY?

25 A TO ANYTHING THAT JOHNNY RAY SAID?

1 Q IN YOUR PRESENCE.

2 A I WAS TRYING TO EXPLAIN ON THAT -- ON THIS
3 STATEMENT.

4 Q JUST TELL ME, DO YOU RECOLLECT THIS STATEMENT THAT
5 YOU MADE HERE?

6 A YES, I DO.

7 Q DO YOU REMEMBER TELLING THE POLICE WHAT IS DOWN ON
8 THIS PAPER?

9 A YES, I DO.

10 Q WHAT DID YOU TELL THE POLICE?

11 A I TOLD THE POLICE JOHNNY RAY SHOT AT THE SAME
12 TIME THAT RANDY SHOT.

13 Q SO, YOU DID TELL THE POLICE THAT LUCKETT SHOT A
14 GUN, TOO?

15 A I DID TELL THE POLICE THAT.

16 Q NOW, AT THE TIME OF PRELIMINARY HEARING, YOU WERE
17 STILL IN CUSTODY OR UNDER ARREST. YOU WERE UNDER ARREST,
18 EXCUSE ME?

19 A YES, SIR.

20 Q YOU WERE NOT IN CUSTODY, WERE YOU?

21 A AT THE PRELIMINARY?

22 Q PRELIMINARY HEARING.

23 A NO, SIR, I WASN'T.

24 Q AND YOUR LAWYER WAS CHARLIE WATERMAN?

25 A YES, SIR.

1 Q WHO IS PRESENT TODAY?

2 A YES, SIR.

3 Q WHEN WERE YOU FIRST APPROACHED BY EITHER MR.
4 WATERMAN OR THE STATE AND INFORMED THAT THEY'RE POSSIBLY
5 NEGOTIATING THE CASE AS TO YOU?

6 A FOUR DAYS AGO.

7 Q WHO WAS IT THAT APPROACHED YOU?

8 A MY ATTORNEY, MR. WATERMAN.

9 Q AT THAT TIME, DID YOU SPEAK TO ANY OF THE DISTRICT
10 ATTORNEYS?

11 A AT THAT TIME, NO.

12 Q WHEN WAS THE FIRST TIME YOU SPOKE WITH THE
13 DISTRICT ATTORNEYS?

14 A YESTERDAY.

15 Q WHO WAS THAT?

16 A THAT WAS MR. SEATON.

17 Q WAS THAT AFTER OR BEFORE APPEARING BEFORE JUDGE
18 MOSLEY?

19 A YESTERDAY, IT WAS AFTER.

20 Q AFTER YOU APPEARED?

21 A YES, SIR.

22 Q WHAT DID MR. WATERMAN TELL YOU THE TERMS OF THE
23 NEGOTIATIONS WERE?

24 A MR. WATERMAN SAID THAT PROBATION WOULD NOT BE
25 GUARANTEED, BUT I WOULD TESTIFY AND PLEAD GUILTY TO A LESSOR

1 CHARGE OF VOLUNTARY MANSLAUGHTER.

2 Q WAS THAT EXPLAINED TO YOU THAT IT WAS
3 PROBATIONABLE AT THAT TIME?

4 A IT WAS EXPLAINED THAT IT WAS PROBATIONABLE.

5 Q WAS IT ALSO EXPLAINED TO YOU THAT IF YOU VIOLATE
6 YOUR PROBATION IN ANY WAY, YOU WILL GO BACK TO PRISON?

7 A FOR FIVE YEARS.

8 Q YOU COULD GO BACK TO PRISON?

9 A FOR FIVE YEARS OR THE REMAINDER OF MY SENTENCE.

10 Q WHEN YOU MET WITH MR. SEATON, DID THEY GIVE YOU
11 YOUR STATEMENTS AT THAT TIME TO REVIEW?

12 A YES, SIR, THEY DID.

13 Q AND YOU HAD AN OPPORTUNITY TO REVIEW ALL THREE OF
14 YOUR STATEMENTS?

15 A YES, SIR, I DID.

16 Q WHICH STATEMENT IS THE TRUTH?

17 A THE STATEMENT I SAID UP ON THE STAND UNDER OATH.

18 Q WHICH ONE OF THE THREE STATEMENTS IS THE TRUTH?

19 A WELL, THE FIRST TWO WERE BLUNT LIES.

20 Q HOW LONG WERE YOU WITH MR. SEATON YESTERDAY?

21 A APPROXIMATELY, 45 MINUTES TO AN HOUR.

22 Q HOW MANY TIMES DID YOU MEET WITH MR. SEATON?

23 A ONCE, PREVIOUS TO TODAY.

Q WHAT ABOUT MR. HARMON?

A HE WAS THERE, TOO.

1 Q YESTERDAY?

2 A YESTERDAY.

3 Q AND YOU ONLY MET WITH HIM ONCE?

4 A ONCE, PREVIOUS TO TODAY.

5 Q DID YOU MEET WITH EITHER OF THEM TODAY?

6 A I WENT IN AND HE TOLD ME --

7 Q WHO IS HE?

8 A MR. HARMON TOLD ME THAT I WOULD PROBABLY BE THE
9 FIRST PERSON ON THE STAND.

10 Q DID YOU GO OVER YOUR TESTIMONY THERE AGAIN?

11 A NO. WE DIDN'T GO OVER ANY TESTIMONY EVER.

12 Q YOU DIDN'T GO OVER YOUR TESTIMONY YESTERDAY?

13 A HE ASKED ME --

14 Q WHO IS HE?

15 A MR. HARMON TOLD ME TO TELL HIM EXACTLY WHAT I
16 THOUGHT IN MY OWN WORDS, AND THAT IS WHAT I SAID. WE DIDN'T
17 GO OVER ANYTHING. I JUST TOLD HIM IN MY OWN WORDS WHAT
18 HAPPENED.

19 Q THAT WAS YESTERDAY?

20 A THAT WAS YESTERDAY.

21 Q DID YOU TAKE YOUR STATEMENTS HOME WITH YOU LAST
22 NIGHT?

23 A YES. AND I HAVE COPIES OF THOSE, ALSO.

24 Q HOW MANY TIMES DID YOU REREAD YOUR STATEMENTS?

25 A LAST NIGHT?

1 Q YEAH.
2 A I DIDN'T.
3 Q HOW ABOUT TODAY?
4 A NO, I DIDN'T.
5 Q YOU JUST TOOK THEM HOME, TOSSED THEM OFF TO THE
6 SIDE?
7 A NO, I KNOW. I HAVE READ THEM BEFORE.
8 Q DO YOU HAVE THEM WITH YOU HERE TODAY?
9 A NO, SIR, I DON'T.
10 Q DID YOU DISCUSS THE NEGOTIATIONS WITH ANYBODY ELSE
11 AFTER YOU LEFT THE DISTRICT ATTORNEY'S OFFICE YESTERDAY?
12 A YESTERDAY?
13 Q YEAH.
14 A I THOUGHT IT WOULD BE NICE IF I TOLD MY MOM,
15 FATHER, STEPMOTHER, BROTHER.
16 Q DID YOU TELL THEM?
17 A I TOLD THEM THAT I HAD FIVE YEARS PROBATION.
18 Q DID YOU TALK TO ANY OF THE DEFENDANTS AND TELL
19 THEM?
20 A NO, SIR, I DIDN'T.
21 Q DO YOU DO MUCH SHOOTING?
22 A SHOOTING? AS IN LIKE --
23 Q GUNS?
24 A I GO DEER HUNTING APPROXIMATELY ONCE A YEAR.
25 Q DO YOU OWN A GUN?

1 A I HAVE A COLLECTION OF GUNS THAT WAS LEFT TO ME BY
 2 MY STEPPATHER.

3 Q AND YOU DO DEER HUNT?

4 A YEAH.

5 Q SKIN THE DEER?

6 A ONCE. I HAVE SHOT ONE DEER IN MY LIFE.

7 Q YOU SKINNED THEM?

8 A YES, I DID.

9 Q YOU WEREN'T AFRAID, THEN, WERE YOU?

10 A WHAT DO YOU MEAN?

11 Q ALL OF THAT BLOOD?

12 A IT BOTHERS ME.

13 MR. KELESIS: I HAVE NO FURTHER QUESTIONS.

14 THE COURT: ALL RIGHT.

15 MR. PIKE: THANK YOU.

16

17 CROSS-EXAMINATION

18 BY MR. PIKE:

19 Q MR. AKERS, HAVE YOU HAD ANY CONTACT WITH ANY OTHER
 20 INDIVIDUAL THAT YOU KNOW TO BE A WITNESS IN THIS CASE?

21 A YEAH. I HAVE ONE STANDING OUTSIDE.

22 Q OKAY. WOULD YOU NAME THOSE PEOPLE?

23 A RUSTY, MICHELLE, LISA LICATA, THAT WAS ABOUT IT.

24 Q WHEN WAS THE LAST TIME YOU TALKED WITH LISA LICATA
 25 ABOUT THIS CASE?

1 A LAST TIME I TALKED WITH HER ABOUT THE CASE WAS
2 ABOUT A MONTH AND A HALF AGO, TOO.

3 Q AND WHERE WAS THAT AT?

4 A ON THE TELEPHONE.

5 Q WHAT WAS THE SUBSTANCE OF THAT CONVERSATION?

6 A SHE ASKED ME IF I WAS DOING OKAY. I SAID, YES.

7 SHE ASKED ME IF EVERYTHING WAS GOING ON OKAY. I SAID I HADN'T
8 HEARD ANYTHING ELSE. THAT WAS THE EXTENT OF THE CONVERSATION
9 ABOUT THE --

10 Q NOW, HOW ABOUT RUSTY HAVENS, WHEN WAS THE LAST
11 TIME YOU TALKED WITH HIM?

12 A ABOUT TWO WEEKS AFTER I GOT OUT OF JAIL.

13 Q IS THAT BEFORE OR AFTER THE PRELIMINARY HEARING?

14 A AFTER.

15 Q WHAT WAS THE SOURCE OF THAT? WHAT WAS THE
16 CONTENTS OF THAT CONVERSATION?

17 A HE CALLED ME AND ASKED ME HOW I WAS DOING. I SAID
18 OKAY. HE THEN ASKED ME IF HIS NAME HAD BEEN BROUGHT UP. AND
19 I SAID I DON'T KNOW. AND THAT WAS ABOUT THE EXTENT OF THAT
20 CONVERSATION, BECAUSE I WAS WALKING OUT THE DOOR AT THAT TIME.

21 Q DID YOU EVER TALK WITH LISA LICATA OR RUSTY HAVENS
22 ABOUT YOUR -- THE POSSIBILITY OF ANY PLEA NEGOTIATIONS THAT
23 YOU MAY ENTER INTO?

24 A NO, I NEVER DID.

25 Q DID YOU EVER TELL THEM ABOUT THE CONVERSATIONS

1 THAT YOU TESTIFIED ABOUT IN COURT TODAY?

2 A NO, I DIDN'T.

3 Q WHEN WERE YOU FIRST APPOINTED AN ATTORNEY IN THIS
4 CASE, OR WHEN DID YOU FIRST RETAIN ONE?

5 A APPROXIMATELY TWO WEEKS BEFORE THE -- WELL,
6 APPROXIMATELY A WEEK AND A HALF BEFORE I WAS ARRESTED. MAYBE
7 NOT QUITE THAT LONG.

8 Q THAT WAS MR. WATERMAN?

9 A YES, SIR, IT WAS.

10 Q WHAT DATE WERE YOU ARRESTED?

11 A I DON'T KNOW THE EXACT DATE.

12 Q APPROXIMATELY, WHAT MONTH?

13 A IT WAS DECEMBER, APPROXIMATELY. THE 12TH OR 13TH,
14 APPROXIMATELY.

15 Q IT WAS SOMETIME AFTER THANKSGIVING AND BEFORE
16 CHRISTMAS?

17 A RIGHT. NO, SIR, I AM SORRY. I AM -- I MUST BE
18 MISTAKEN. I SPENT BOTH THANKSGIVING AND CHRISTMAS IN JAIL.

19 Q WHEN YOU WERE GOING -- LET'S GO BACK TO THE
20 WITNESSES THAT ARE OUTSIDE. HAVE YOU EVER TALKED ABOUT THIS
21 CASE TO MICHELLE GREY?

22 A NO, SIR, I HAVEN'T.

23 Q DEWANA MANNING, HOW WELL DO YOU KNOW HER?

24 A WHO?

25 Q DIANA?

1 A I DON'T.

2 Q YOU DON'T KNOW HER AT ALL?

3 A NO.

4 Q DURING THE TIME OF THIS ALLEGED FIRST
5 CONVERSATION, HOW MANY BEERS DID YOU DRINK?

6 A ONE.

7 Q YOU INDICATED THAT YOU HAD SMOKED SOME MARIJUANA.
8 HOW MUCH HAD YOU SMOKED?

9 A I DID NOT INDICATE THAT I SMOKED SOME MARIJUANA.
10 HE ASKED ME AT THE TIME DID I PRACTICE IT. AND I SAID I DID,
11 OCCASIONALLY. NOT AT THAT TIME.

12 Q WHAT OTHER DRUGS DID YOU OCCASIONALLY USE DURING
13 THAT TIME?

14 A THAT, APPROXIMATELY, IT. ALCOHOL AND POT.

15 Q ANY QUAAALUDES?

16 A NO, SIR.

17 Q ANY PCP?

18 A NO, SIR.

19 Q HAVE YOU EVER DONE PCP?

20 A NO, SIR.

21 Q HOW WAS THIS CONVERSATION BROUGHT UP ABOUT THIS
22 ALLEGED PLAN?

23 A BY MR. DALE FLANAGAN.

24 Q HOW -- DID HE JUST SAY, "I THINK I WILL GO OUT
25 AND KILL MY GRANDPARENTS TODAY"?

1 A FROM WHAT I UNDERSTAND --

2 Q NOT FROM WHAT YOU UNDERSTAND. TELL ME HOW IT WAS
3 BROUGHT UP?

4 A HOW IT WAS BROUGHT UP?

5 Q YES.

6 A HE HAD BEEN TALKING ABOUT IT FOR SEVERAL YEARS.

7 Q NO --

8 THE COURT: JUST A MOMENT.

9 MR. PIKE: NOT FROM WHAT YOU UNDERSTAND?

10 THE COURT: WHAT YOU KNOW, PERSONAL KNOWLEDGE.

11 THE WITNESS: PERSONAL KNOWLEDGE.

12 BY MR. PIKE:

13 Q WHAT YOU SAW AND WHAT YOU HEARD THAT NIGHT. I
14 WANT TO HEAR EXACTLY WHAT YOU REMEMBER DALE FLANAGAN SAYING
15 WHEN THAT FIRST WAS EVER MENTIONED IN YOUR PRESENCE?

16 A YOU WANT EXACT WORDS OF EXACTLY EVERYTHING DALE
17 FLANAGAN SAID?

18 Q YES.

19 A OKAY. HE STARTED OFF BY SAYING, "I WANT TO KILL
20 MY GRANDPARENTS."

21 Q MR. AKERS --

22 MR. HARMON: YOUR HONOR, HE HASN'T COMPLETED THE
23 ANSWER.

24 MR. PIKE: THAT WAS THE FIRST WORDS HE SAID? THAT
25 IS WHAT I AM ASKING FOR.

1 MR. HARMON: HE ASKED FOR HIM TO TELL US THE EXACT
2 WORDS, EVERYTHING THAT HE SAID. HE STARTED TO ANSWER, AND HE
3 CUT HIM OFF.

4 THE COURT: GO AHEAD AND FORM YOUR QUESTION ONE
5 MORE TIME AND LET THE WITNESS RESPOND.

6 BY MR. PIKE:

7 Q YOU INDICATED THE FIRST WORDS OUT OF DALE
8 FLANAGAN'S MOUTH ARE, "I AM GOING TO GO KILL MY GRANDPARENTS."

9 A I DIDN'T INDICATE THAT. "I WANT TO KILL MY
10 GRANDPARENTS."

11 Q IN WHAT CONTEXT DID HE BRING THIS UP?

12 A NO CONTEXT.

13 Q HE JUST CAME OUT OF THE BLUE AND HE SAID THAT?

14 A FROM --

15 Q I AM SAYING WHAT HAPPENED THAT NIGHT. THAT WAS
16 THE FIRST TIME YOU EVER HEARD THAT?

17 A IS THIS THE FIRST -- IS THIS THE FIRST MEETING,
18 OCTOBER MEETING OR NOVEMBER 5TH?

19 Q OKAY.

20 A WE WENT OVER THERE AND THEY WERE ALL THERE, WELL,
21 FOUR OF THE DEFENDANTS. I CANNOT SAY POSITIVELY IF JOHNNY RAY
22 LUCKETT WAS THERE. BUT THE FOUR DEFENDANTS WERE THERE TO
23 PLAN THE MURDER OF HIS GRANDPARENTS.

24 Q I AM NOT ASKING THAT.

25 MR. HARMON: HE ASKED FOR THE CONTEXT, AND IT WAS

1 GIVEN THE CONTEXT.

2 THE COURT: THAT WOULD BE THE CONTEXT. NOW, YOU
3 WANT TO ASK THE FIRST THING MR. FLANAGAN SAID.

4 BY MR. PIKE:

5 Q THE FIRST THING THAT HE SAID.

6 A I COULDN'T TELL YOU EXACTLY.

7 Q AND IT'S TRUE AT THIS TIME THAT YOU THOUGHT THEY
8 WERE JOKING; ISN'T THAT TRUE?

9 A YES, IT IS.

10 Q FOR QUITE SOMETIME YOU THOUGHT THEY WERE JOKING;
11 ISN'T THAT TRUE?

12 A YES, IT WAS.

13 Q AT THIS FIRST MEETING, DID YOU OBSERVE ANY OF THE
14 DEFENDANTS CONSUME ANY CONTROLLED SUBSTANCES?

15 A ALCOHOL.

16 Q ANYTHING ELSE BESIDES THAT?

17 A NO, SIR, I DIDN'T.

18 Q HOW ABOUT IN THE SECOND MEETING, WAS THERE ANY
19 ALCOHOL OR DRUGS IN THE NOVEMBER MEETING?

20 A THERE WAS PROBABLY ABOUT A WHOLE SIX-PACK OF BEER
21 BETWEEN US.

22 (MR. SEATON ENTERS THE COURTROOM.)

23 Q WHAT KIND OF BEER WAS IT?

24 A BUDWEISER.

25 Q IS THAT THE BRAND YOU USUALLY DRINK?

1 A I DON'T DRINK. AT THE TIME, I DID. AT THE TIME,
2 THAT WAS THE BRAND I USUALLY DRANK.

3 Q WAS THAT YOUR NORMAL BRAND?

4 A AT THAT TIME, IT WAS.

5 Q WHEN YOU WENT OVER TO THE 7-ELEVEN, WHO PAID FOR
6 THE GAS?

7 A DALE FLANAGAN.

8 Q WAS HE WORKING DURING THIS TIME?

9 A YES, HE WAS.

10 Q DID YOU GO OVER TO HIS PLACE OF EMPLOYMENT?

11 A MANY TIMES.

12 Q HOW WELL DID YOU KNOW DALE FLANAGAN?

13 A ABOUT FOUR MONTHS PREVIOUS. MAYBE EVEN FIVE
14 MONTHS PREVIOUS TO THE NOVEMBER 5TH INCIDENT.

15 Q WE GOT THAT TIME FRAME. HOW WELL DID YOU KNOW
16 HIM? WERE YOU FRIENDS? DID YOU GO PLACES TOGETHER? DID YOU
17 DO A LOT OF THINGS TOGETHER?

18 A HE CALLED ME, ASKED ME FOR A RIDE TO WORK, A RIDE
19 TO HIS GIRLFRIEND'S, CALLED ME, ASKED ME IF I WANT TO COME
20 OVER AND BULLSHIT, EXCUSE ME.

21 Q YOU SPENT TIME TOGETHER WITH HIM?

22 A YES, SIR.

23 Q WHO IS THE FIRST PERSON THAT YOU SAW WITH THE
24 WALLET?

25 A ROY MCDOWELL.

1 Q WHOSE DECISION WAS IT TO BURN THE WALLET?

2 A RANDY MOORE'S.

3 Q DID YOU EVER GO BACK TO THE SCENE WHERE THE
4 CARTRIDGES WERE THROWN AND ATTEMPT TO LOCATE THOSE?

5 A NO, SIR, I HAVEN'T.

6 Q WHEN YOU WERE PRESENT IN THE DISTRICT ATTORNEY'S
7 OFFICE GIVING A STATEMENT TO MR. SEATON AND MR. HARMON, WAS
8 THERE ANY TAPE RECORDING OR DICTATION DEVICES GOING THAT YOU
9 SAW?

10 A NO, SIR, THERE WEREN'T.

11 Q DO YOU KNOW IF THERE WERE ANY THAT YOU DIDN'T SEE?

12 A NO, SIR, I DON'T.

13 Q BASED ON YOUR TESTIMONY, THEN, YOU INDICATE YOU
14 DID NOT SEE ANYTHING THAT WENT ON INSIDE OF THE HOUSE?

15 A NO, SIR, I DIDN'T.

16 Q YOU GAVE THREE STATEMENTS. YOU INDICATED THAT YOU
17 HAD A COPY OF EACH ONE OF THOSE. WOULD IT BE FAIR TO SAY THAT
18 YOUR TESTIMONY OR YOUR STATEMENTS, THE CONTENTS OF YOUR
19 STATEMENTS, HAS VARIED SIGNIFICANTLY ON EACH OF THE THREE
20 PREVIOUS STATEMENTS?

21 A YES, IT WOULD.

22 Q AND VERY, VERY SIGNIFICANTLY TO THIS STATEMENT,
23 ALSO?

24 A YES, SIR.

25 Q YOU STATED THAT PART OF THE PLEA NEGOTIATIONS THAT

1 PROBATION WAS NOT GUARANTEED. WHAT DID YOUR ATTORNEY TELL YOU
 2 THE DISTRICT ATTORNEY WOULD DO AS FAR AS PROBATION WAS
 3 CONCERNED?

4 A STAND SILENT.

5 Q DID, IN FACT, THE PROSECUTOR STAND SILENT AT THE
 6 RENDITION OF SENTENCE?

7 A YES, THEY DID.

8 Q HE DID NOT AFFIRMATIVELY RECOMMEND PROBATION?

9 A NO, HE DIDN'T.

10 Q YOU INDICATED IN YOUR THIRD STATEMENT THAT RANDY
 11 MOORE WOULD DO SOMETHING IF DALE FLANAGAN WAS ARRESTED?

12 A YES.

13 Q WHAT WAS THAT?

14 A FIND OUT WHO GOT HIM ARRESTED AND KILL HIM.

15 Q THAT ISN'T WHAT YOU STATED IN YOUR STATEMENT.

16 A I COULDN'T COME UP WITH EXACT WORDS.

17 Q ISN'T IT TRUE THAT YOU STATED THAT DALE FLANAGAN
 18 STATED THAT IF HE WAS ARRESTED, THAT RANDY MOORE WOULD SHOOT
 19 AND KILL HIM?

20 A WELL, IF DALE FLANAGAN WAS ARRESTED AND RANDY
 21 MOORE COULD GET TO HIM, AND DALE FLANAGAN WAS SENTENCED TO
 22 PRISON, RANDY MOORE WOULD SHOOT AND KILL. AND DALE WOULD DO
 23 THE SAME FOR RANDY.

24 Q TO YOUR KNOWLEDGE, WERE ANY OF THE DEFENDANTS IN
 25 THIS CASE USING ANY NARCOTICS OR CONTROLLED SUBSTANCES ON A

1 REGULAR BASIS?

2 A ALCOHOL AND MAYBE POT.

3 Q THAT'S ALL YOU HAVE EVER SEEN ANY OF THEM USE?

4 A THEY TOOK SOME ACID ONE TIME.

5 Q WHEN WAS THAT?

6 A I COULDN'T TELL YOU A SPECIFIC DATE.

7 MR. SMITH: CAN WE KNOW WHO THEY ARE, PLEASE?

8 THE WITNESS: RANDY MOORE, DALE FLANAGAN.

9 BY MR. PIKE:

10 Q THAT WAS IN YOUR PRESENCE?

11 A YES.

12 Q DID YOU TAKE LSD WITH THEM?

13 A NO. I DIDN'T.

14 MR. PIKE: I HAVE NO FURTHER QUESTIONS.

15 THE COURT: ANY OTHER CROSS-EXAMINATION?

16 MR. POSIN: YES. JUST -- MOST OF THE TERRAIN HAS
17 BEEN COVERED.

18

19 CROSS-EXAMINATION

20 BY MR. POSIN:

21 Q DIRECTING YOUR ATTENTION TO THE MEETING, THE
22 NOVEMBER MEETING AT RANDY MOORE'S APARTMENT, YOU JUST

STIFIED THAT YOU THINK IT WAS A CASE OF BEER OR SIX-PACK OF
ER CONSUMED AMONG THE GROUP?

A YES.

1 Q WHO WAS THERE WHEN YOU GOT TO THE APARTMENT?

2 A LIKE I SAID, ME AND DALE FLANAGAN ARRIVED. RANDY
3 WAS THERE, JOHNNY RAY WAS THERE, AND MIKE WAS THERE. ROY
4 ARRIVED APPROXIMATELY TEN MINUTES LATER.

5 Q NOW, AT THE TIME YOU ARRIVED, DID YOU SEE ANY
6 EVIDENCE OF DRINKING, THEIR EMPTY CANS OR EMPTY BOTTLES?

7 A EVERY TIME I HAVE EVER BEEN AT THAT APARTMENT,
8 THERE WAS EMPTY CANS AND EMPTY BOTTLES.

9 Q SO, THERE WOULD BE NO WAY OF KNOWING HOW MUCH BEER
10 MAY HAVE BEEN CONSUMED PRIOR TO YOUR ARRIVAL AT THE APARTMENT?

11 A THERE IS NO WAY.

12 Q IS IT YOUR TESTIMONY, THEN, THAT ABOUT A SIX-PACK
13 OF BEER WAS CONSUMED AFTER YOU ARRIVED?

14 A RIGHT.

15 Q I THINK YOU TESTIFIED THAT YOU KNEW RANDY MOORE
16 FOR ABOUT -- MET RANDY MOORE ABOUT TWO AND A HALF MONTHS
17 BEFORE THE FIRST MEETING IN OCTOBER; WAS THAT YOUR TESTIMONY?

18 A RIGHT.

19 Q HOW WELL DID YOU COME TO KNOW RANDY MOORE?

20 A WENT OVER HIS HOUSE OCCASIONALLY ON FIRST NAME
21 BASIS. BUT I COULDN'T TELL YOU MUCH ABOUT HIS PAST.

22 Q DID RANDY MOORE'S BEHAVIOR OR Demeanor DIFFER
23 AFTER HE HAD BEEN DRINKING, THAN PRIOR TO THE TIME HE HAD BEEN
24 DRINKING?

25 A COULD YOU REPHRASE THAT?

1 Q DID RANDY MOORE ACT DIFFERENTLY AFTER HE HAD BEEN
2 CONSUMING ALCOHOL, THAN PRIOR TO THE TIME HE CONSUMED ALCOHOL?

3 A YES.

4 Q IN WHAT FASHION?

5 A GOT DRUNK.

6 Q DID IT DIFFER -- YOU TOLD US YOU KNEW HE CONSUMED
7 OR USED SOME SORT OF NARCOTICS; IS THAT RIGHT?

8 A YES.

9 Q DID HIS ATTITUDE DIFFER BEFORE AND AFTER, IF YOU
10 KNOW?

11 A REACTIONS SLOWED, MINOR THINGS.

12 Q NOW, AFTER WHEN YOU ATTENDED THE -- WHEN YOU WERE
13 IN HIS APARTMENT, THE OCTOBER MEETING, WERE YOU ABLE TO TELL
14 WHETHER HE HAD CONSUMED A LARGE QUANTITY OF ALCOHOL?

15 A TO MY NOTION OR TO MY KNOWLEDGE, HE DIDN'T.

16 Q HE DID NOT?

17 A HE DID NOT.

18 Q WERE YOU ABLE TO TELL WHETHER HE CONSUMED A
19 QUANTITY OF NARCOTICS?

20 A NO, NOT -- I WAS NOT ABLE TO TELL THAT.

21 Q THAT WAS THE OCTOBER MEETING. HOW ABOUT THE
22 NOVEMBER MEETING?

23 A BOTH THE SAME, NOT TO MY KNOWLEDGE.

24 Q YOU COULDN'T TELL US THAT HE WAS -- DID HE APPEAR
25 INTOXICATED?

1 A NO.

2 Q DID HE APPEAR GAY, LIGHTHEARTED, HAPPY?

3 A NO.

4 Q DID YOU EVER DISCUSS WITH HIM WHAT DRUGS HE HAD
5 TAKEN OR USED?

6 A NO, I HAVEN'T.

7 Q NOW, WHAT WAS IT -- DID YOU EVER SEE HIM USE ANY
8 DRUGS?

9 A LIKE I SAID, HE TOOK SOME ACID. AND I HAVE SEEN
10 HIM DRINK BEER AND SMOKE POT.

11 Q WAS HIS BEHAVIOR DIFFERENT AFTER YOU SAW HIM TAKE
12 ACID ON ANY OCCASION?

13 A I SAW IT ONCE. AND I WAS QUITE DRUNK AT THE TIME.
14 SO I WAS NOT OF -- I WOULD NOT BE ABLE TO TELL YOU, BECAUSE
15 I WOULD NOT BE ABLE TO.

16 Q SO THERE IS NO WAY OF YOUR KNOWING WHEN YOU
17 ARRIVED AT HIS APARTMENT AT THE -- IN NOVEMBER, OR THE
18 NOVEMBER MEETING, WHETHER OR NOT HE CONSUMED ACID OR HOW MUCH
19 ACID HE MIGHT HAVE CONSUMED PRIOR TO YOUR ARRIVAL?

20 A THERE IS NO WAY. I WOULDN'T KNOW.

21 Q THERE ALSO IS NO WAY OF YOUR ASCERTAINING HOW MUCH
22 BEER HE MIGHT HAVE CONSUMED PRIOR TO YOUR ARRIVAL?

A NO. WELL, HE WASN'T STUMBLING DRUNK.

Q BUT --

A HE MIGHT HAVE DRANK A COUPLE BEERS. BUT, LIKE I

1 SAID, THE MORE YOU DRINK, THE SLOWER YOUR REACTIONS GET. AND,
 2 OBVIOUSLY, THE BEST YOU CAN MANEUVER YOURSELF. AND HE WASN'T
 3 STUMBLING DRUNK. HE WASN'T FALLING DOWN. HE WAS MANEUVERING
 4 IN A REGULAR FASHION.

5 Q NOW, YOU TOLD US THAT ON THE WAY TO THE GORDON
 6 RESIDENCE, YOU STOPPED SOMEWHERE AND FIRED, OR RANDY FIRED A
 7 TEST SHOT?

8 A YES.

9 Q WHERE WAS THAT?

10 A THAT WAS DOWN AT THE END OF JONES. IF YOU TRAVEL
 11 DOWN JONES, AND NORTH -- IF YOU TRAVEL JONES NORTHWARD, IT
 12 TURNS TO DIRT. APPROXIMATELY, A MILE AFTER IT TURNED TO DIRT.

13 Q DID ALL OF YOU GET OUT OF THE CAR AT THAT TIME?

14 A EVERYONE GOT OUT OF THE CAR AND KIND OF DUCKED, SO
 15 NO ONE GOT HIT BY A BULLET IF THE GUN CAN'T -- DIDN'T WORK.

16 Q IS THAT THE ONLY WEAPON THAT WAS FIRED?

17 A YES.

18 Q DID RANDY FIRE IT?

19 A YES.

20 Q HE FIRED IT ONLY ONE TIME?

21 A YES.

22 Q DID ANYONE FIRE THE RIFLE, THE SAWED-OFF?

23 A NO.

24 Q HOW ABOUT THE .22?

25 A THE REVOLVER?

1 Q YES.

2 A NO.

3 Q DID YOU HAVE ANY CONVERSATION WITH RANDY WHILE YOU
4 WERE INCARCERATED, WHILE YOU WERE IN CUSTODY?

5 A NO, SIR, I DIDN'T.

6 Q DID YOU HAVE ANY CONVERSATION WITH RANDY SINCE YOU
7 WERE RELEASED FROM CUSTODY?

8 A NO, SIR, I HAVEN'T.

9 MR. POSIN: I HAVE NOTHING FURTHER OF THIS
10 WITNESS, IF YOUR HONOR PLEASE.

11 MR. HANDFUSS: YES, YOUR HONOR.

12

13 CROSS-EXAMINATION

14 BY MR. HANDFUSS:

15 Q MR. AKERS, ON THE NOVEMBER 5TH MEETING IN RANDY
16 MOORE'S APARTMENT, I BELIEVE YOU TESTIFIED THAT MR. FLANAGAN
17 SAID THAT ROY MCDOWELL WOULD BRING A .22 PISTOL; IS THAT
18 CORRECT?

19 A YES, SIR.

20 Q AND DID MR. FLANAGAN SAY THAT HE KNEW WHERE THAT
21 PISTOL WAS COMING FROM?

22 A NO.

23 Q HE DIDN'T KNOW WHERE ROY MCDOWELL GOT THAT PISTOL,
24 DID HE?

25 A HE SAID THAT IT HAD BEEN TAKEN FROM A HOUSE. BUT

1 HE DIDN'T KNOW WHERE IT WAS COMING FROM.

2 Q SO, HE DIDN'T SAY WHAT HOUSE IT WAS TAKEN FROM?

3 A NO, SIR. HE DIDN'T EVEN SAY THAT ROY TOOK IT.

4 Q HE DIDN'T EVEN SAY THAT ROY TOOK IT. WHEN DID YOU

5 FIRST MEET ROY MCDOWELL?

6 A APPROXIMATELY, FOUR, FIVE DAYS BEFORE THE OCTOBER

7 MEETING. MAYBE A LITTLE BIT MORE, MAYBE A LITTLE BIT LESS.

8 Q WHERE DID YOU MEET HIM?

9 A AT RANDY'S HOUSE.

10 Q DID YOU MEET HIM IN THE DAY OR AT NIGHT?

11 A IN THE EVENING.

12 Q DID YOU KNOW APPROXIMATELY WHAT TIME THAT WOULD BE

13 IN THE EVENING?

14 A I COULDN'T TELL YOU APPROXIMATELY WHAT TIME.

15 Q WAS IT CLOSER TO FIVE O'CLOCK, OR WAS IT CLOSER TO

16 TWO O'CLOCK IN THE MORNING?

17 A IT WAS CLOSER TO FIVE O'CLOCK IN THE AFTERNOON OR

18 IN THE EVENING.

19 Q WERE YOU DRINKING AT THAT TIME?

20 A NOT YET.

21 Q BUT YOU DRANK SOMETHING A LITTLE LATER, MEANING

22 BEER OR SOME TYPE OF ALCOHOL?

23 A YES.

24 Q THAT SAME NIGHT?

25 A YES.

1 Q DO YOU RECALL, APPROXIMATELY, HOW MUCH YOU HAD?

2 A APPROXIMATELY, FOUR OR FIVE BEERS.

3 Q DO YOU RECALL, APPROXIMATELY, HOW MUCH BEER WAS
4 PRESENT IN THE APARTMENT?

5 A NO, I DON'T.

6 Q DO YOU RECALL IF YOU HAD TO GO OUT OR SOMEBODY HAD
7 TO GO OUT TO BUY MORE BEER TO BRING IN?

8 A I COULDN'T TELL YOU.

9 Q YOU DON'T KNOW IF ANYBODY LEFT TO BRING IN MORE
10 ALCOHOL?

11 A NO.

12 Q CAN YOU TELL ME WHO WAS THERE WHEN YOU FIRST MET
13 ROY MCDOWELL?

14 A QUITE A FEW PEOPLE. I COULDN'T TELL YOU THE
15 NAMES, BECAUSE HALF OF THEM I DON'T KNOW.

16 Q HOW ABOUT THE ONES YOU DO KNOW?

17 A DALE WAS THERE, I WAS THERE, RANDY WAS THERE,
18 ROY WAS THERE, JOHNNY RAY WAS THERE, AND I AM NOT QUITE SURE
19 IF MIKE WAS THERE OR NOT.

20 Q AND THIS IS AT THE FIRST MEETING YOU EVER MET ROY
21 MCDOWELL; IS THAT RIGHT?

22 A YES.

23 Q DID ANYBODY TELL YOU THEY WERE GOING TO KILL
24 ANYBODY AT THAT TIME?

25 A NO.

1 Q ANYBODY SAY THEY WERE PLANNING TO KILL ANYBODY AT
2 THAT TIME?

3 A NO.

4 Q YOU SAID YOU FIRST HEARD THIS OCTOBER MEETING --
5 THIS WAS THE FIRST TIME YOU HAD HEARD ANY OF THE DEFENDANTS
6 POSSIBLY PLANNING TO KILL FLANAGAN'S GRANDPARENTS?

7 A NO, IT WASN'T.

8 Q WHEN WAS THE FIRST TIME?

9 A APPROXIMATELY, TWO MONTHS, ONE AND A HALF. TWO
10 MONTHS AFTER I HAD MET DALE, HE MENTIONED IN MY CAR THAT HIS
11 GRANDPARENTS HAD A LOT OF MONEY, AND HE THOUGHT HE MIGHT KILL
12 THEM.

13 Q DO YOU HAVE ANY IDEA WHAT MONTH THAT MIGHT HAVE
14 BEEN?

15 A I DON'T.

16 Q WHEN DID YOU MEET DALE?

17 A IT WAS A LITTLE BIT AFTER SCHOOL STARTED LAST
18 YEAR.

19 Q I HAVE NO IDEA WHEN SCHOOL STARTS. COULD YOU,
20 PLEASE, TELL ME?

21 A AROUND OCTOBER. IT WOULD HAVE BEEN EARLY OCTOBER.

22 Q OF THE SAME YEAR THAT THIS --

23 A 1984.

24 Q ON THE NOVEMBER 5TH MEETING AT RANDY MOORE'S
25 APARTMENT, YOU SAID THAT ROY MCDOWELL SHOWED UP APPROXIMATELY

1 TEN MINUTES AFTER YOU DID; IS THAT RIGHT?

2 A YES.

3 Q YOU WERE THERE BEFORE ROY MCDOWELL; IS THAT RIGHT?

4 A RIGHT.

5 Q AND WHO WAS IN THERE, TO THE BEST OF YOUR
6 RECOLLECTION? WHO WAS IN RANDY MOORE'S APARTMENT WHILE YOU
7 WERE THERE, BUT BEFORE ROY MCDOWELL SHOWED UP?

8 A ALL FOUR OF THE DEFENDANTS EXCLUDING ROY, MYSELF
9 AND MR. LUCAS.

10 Q I AM A LITTLE CONFUSED ABOUT YOUR ANSWER.
11 EVERYBODY WAS THERE EXCEPT MR. MCDOWELL?

12 A EVERYBODY, MIKE, RANDY, DALE, JOHNNY RAY, MYSELF
13 AND MR. LUCAS.

14 Q EXCLUDING ROY MCDOWELL?

15 A RIGHT. AND HE SHOWED UP ABOUT TEN MINUTES LATER.

16 Q WAS LUCAS THERE BEFORE YOU WERE?

17 A YES.

18 Q CAN YOU -- DO YOU KNOW APPROXIMATELY HOW LONG --
19 NEVER MIND.

20 AND IT WAS MENTIONED AT THAT TIME ON THE NOVEMBER
21 5TH MEETING THAT IT WAS POSSIBLE THAT THEY WERE GOING TO KILL
22 MR. FLANAGAN'S GRANDPARENTS; IS THAT CORRECT?

23 A YES.

24 Q AND YOU SAID THAT MR. FLANAGAN TOLD YOU THAT YOU
25 WERE GOING TO DRIVE; IS THAT RIGHT?

1 A YES. WELL, FIRST, HE ASKED ME TO USE MY CAR.
 2 THEN HE TOLD ME THAT I WAS GOING TO DRIVE.

3 Q WHAT DID YOU SAY WHEN HE ASKED YOU TO USE YOUR
 4 CAR?

5 A I TOLD HIM BOTH TIMES, I WANTED NOTHING TO DO WITH
 6 IT.

7 Q SO, HE ASKED YOU TO USE YOUR CAR. AND YOU SAID,
 8 "I DON'T WANT ANYTHING TO DO WITH IT"; IS THAT RIGHT?

9 A RIGHT.

10 Q HE SAID, "YOU ARE GOING TO DRIVE THE CAR"; IS
 11 THAT CORRECT?

12 A WELL, GIVE IT A FEW MINUTES BETWEEN, YOU KNOW.
 13 FIRST, HE ASKED ME IF HE COULD USE MY CAR. I SAID, "I DON'T
 14 LET PEOPLE USE MY CAR." HE TOLD ME I WAS GOING TO DRIVE.

15 Q SO YOU DIDN'T SAY YOU DIDN'T WANT ANYTHING TO DO
 16 WITH IT. YOU SAID --

17 A YEAH.

18 Q YOU SAID YOU DON'T WANT ANYBODY TO USE YOUR CAR;
 19 IS THAT RIGHT?

20 A I SAID, "I DON'T WANT NOTHING TO DO WITH IT, AND I
 21 DON'T LET ANYBODY USE MY CAR."

22 Q YOU SAID YOU DON'T WANT ANYTHING TO DO WITH IT,
 23 AND YOU DON'T LET ANYBODY USE YOUR CAR. YOU SAID BOTH THINGS?

24 A RIGHT.

25 Q AND A COUPLE OF MINUTES LATER, HE CAME OVER TO YOU

1 AND HE SAID, "YOU ARE DRIVING"?

2 A RIGHT.

3 Q DID YOU THINK THIS WAS SERIOUS?

4 A NO.

5 Q YOU THOUGHT IT WAS JUST A JOKE?

6 A I DON'T KNOW IF YOU CALL IT A JOKE. BUT I DIDN'T
7 THINK IT WAS SERIOUS.

8 Q WHAT WAS YOUR IMPRESSION WHEN HE SAID THIS?

9 A I DIDN'T BELIEVE HIM. I COULDN'T KILL MY
10 GRANDPARENTS, COULD YOU? I DIDN'T BELIEVE HIM.

11 Q YOU DIDN'T BELIEVE HIM. SOMEBODY TELLS YOU THAT
12 THEY ARE GOING TO GO OVER AND KILL THEIR GRANDPARENTS. YOU
13 SAY YOU DON'T WANT ANYTHING TO DO WITH IT; IS THAT CORRECT?

14 A RIGHT.

15 Q NOW, WHAT DID YOU NOT WANT ANYTHING TO DO WITH?

16 A ANYTHING THAT WAS GOING TO HAPPEN.

17 Q WHAT DID YOU THINK WAS GOING TO HAPPEN?

18 A I DIDN'T KNOW. BUT I DIDN'T THINK ANYBODY COULD
19 ACTUALLY KILL THEIR GRANDPARENTS.

20 Q WELL, I AM ASKING YOU THIS. IF IT IS JUST A JOKE,
21 YOU REALLY DIDN'T TAKE THEM SERIOUSLY; IS THAT CORRECT?

22 A RIGHT.

23 Q SO, THERE WAS REALLY NOTHING NOT TO GET INVOLVED
24 WITH; ISN'T THAT CORRECT?

25 A RIGHT. BUT, IF YOU --

1 THE COURT: HE CAN CONTINUE.

2 THE WITNESS: IF YOU HAVE SAID SOMETHING, WHETHER
 3 IT IS JOKING OR NOT, YOU STILL SAID IT, SO THERE IS SOMETHING
 4 TO DO WITH IT. WHETHER I BELIEVE IT OR NOT IS IRRELEVANT TO
 5 WHETHER HE SAID IT OR NOT.

6 MR. HANDFUSS: YOUR HONOR, THAT LAST PORTION WAS
 7 UNINTELLIGIBLE, AMBIGUOUS, VAGUE. AND I MOVE TO STRIKE THAT
 8 LAST PORTION. IT WAS NONRESPONSIVE TO THE QUESTION.

9 THE COURT: WELL, IT WAS RESPONSIVE. WHETHER IT
 10 WAS CLEAR OR NOT IS ANOTHER QUESTION. BUT, AGAIN, WE WILL
 11 JUST TAKE WHAT WE CAN MAKE SENSE OF AND GO LEAVE THE REST.
 12 BY MR. HANDFUSS:

13 Q MR. FLANAGAN ASKED YOU TO USE YOUR CAR. FIRST YOU
 14 SAID --- FIRST YOU DIDN'T WANT ANYTHING TO DO WITH IT. THEN,
 15 YOU THOUGHT YOU SAID THAT YOU DON'T LET ANYBODY USE YOUR CAR.
 16 YOU SAID, "I DON'T WANT ANYTHING TO DO WITH IT, AND I DON'T
 17 LET ANYBODY USE MY CAR." AND YOU THOUGHT HE WAS JUST
 18 JOKING?

19 A NOT WANTING ANYTHING TO DO WITH IT WOULD MEAN NOT
 20 LETTING HIM USE MY CAR.

21 Q SO, WHEN YOU SAID, "I DON'T WANT ANYTHING TO DO
 22 WITH IT," WHAT YOU REALLY MEANT WAS WHAT YOU ARE TALKING
 23 ABOUT, YOU DON'T WANT ANYBODY TO USE YOUR CAR; IS THAT RIGHT?

24 A I DON'T WANT ANYTHING TO DO WITH IT, AND I DON'T
 25 WANT ANYONE TO USE MY CAR.

1 Q A FEW MINUTES LATER, HE CAME OVER AND SAID YOU ARE
 2 GOING TO DRIVE?

3 A RIGHT.

4 Q HE TOLD YOU THAT?

5 A YES.

6 Q HE DIDN'T ASK YOU THAT?

7 A RIGHT.

8 Q WHAT DID YOU SAY?

9 A I DIDN'T SAY ANYTHING.

10 Q DID YOU TELL HIM YOU WERE GOING TO DRIVE?

11 A NO.

12 Q DID YOU TELL HIM YOU WEREN'T GOING TO DRIVE?

13 A NO.

14 Q WHAT HAPPENED WHEN EVERYBODY STARTED TO LEAVE?

15 A HE HAD A GUN.

16 Q I AM SORRY?

17 A HE HAD IT, A GUN.

18 Q DID HE POINT IT AT YOU?

19 A NO. HE TAPPED IT ON HIS LEG.

20 Q HE TAPPED IT ON HIS LEG?

21 A YES.

22 Q SO YOU FOLLOWED EVERYBODY OUT OF THE HOUSE; IS
 23 THAT RIGHT?

24 A RIGHT. I WASN'T BEHIND EVERYBODY. I WASN'T IN
 25 FRONT OF EVERYBODY. WE ALL WENT OUT OF THE HOUSE.

1 Q YOU WENT OUT TOGETHER?

2 A RIGHT.

3 Q THEN, YOU GOT IN BY THE DRIVER'S SIDE; IS THAT
4 RIGHT?

5 A YES.

6 Q AND YOU STARTED TO DRIVE. FIRST, YOU WENT TO
7 CIRCLE K OR 7-ELEVEN; IS THAT RIGHT?

8 A RIGHT.

9 Q AND THEN YOU SAID THAT SOMEBODY WAS GIVING YOU
10 DIRECTIONS?

11 A RIGHT.

12 Q WHO WAS GIVING YOU DIRECTIONS, AGAIN?

13 A MR. FLANAGAN.

14 Q YOU FOLLOWED THOSE DIRECTIONS?

15 A YES, I DID.

16 Q YOU HAD BEEN TO THE GORDON'S HOUSE PREVIOUSLY;
17 HADN'T YOU?

18 A YES, I HAD.

19 Q HOW MANY TIMES HAVE YOU BEEN THERE?

20 A 10, 20. I COULDN'T GIVE YOU A REAL DOWN-TO-EARTH
21 ANSWER.

22 Q WHEN YOU GOT TO THE GORDON'S HOUSE, YOU WENT OVER
23 TO THE TRAILER; IS THAT RIGHT?

24 A YES.

25 Q AND THE TRAILER IS WHERE MR. FLANAGAN WAS LIVING;

1 IS THAT RIGHT?

2 A YES.

3 Q AND WHO TOLD YOU TO GO OVER TO THE TRAILER?

4 A MR. FLANAGAN.

5 Q DID HE TELL YOU WHY?

6 A TO GET SOME TAPES.

7 Q DID HE TELL YOU WHOSE TAPES THEY WERE?

8 A THEY WERE HIS. I KNEW THEY WERE HIS.

9 Q DID HE TELL YOU WHICH TAPES?

10 A THE WHOLE TAPE CASE.

11 Q YOU HAD BEEN IN MR. FLANAGAN'S TRAILER PREVIOUSLY?

12 A YES.

13 Q YOU KNEW EXACTLY WHICH TAPE CASE?

14 A YES, I DID.

15 Q WHEN THEY LEFT THE HOUSE, ROY MCDOWELL DIDN'T HAVE
16 THE .22 PISTOL IN HIS POSSESSION, DID HE?

17 A NO, HE DIDN'T.

18 Q CAN YOU TELL ME, APPROXIMATELY, HOW FAR THE
19 TRAILER IS FROM THE HOUSE? IT IS YOUR GUESS, YOUR BEST GUESS.

20 A 50 FEET, 100 FEET BETWEEN THERE.

21 Q DO YOU KNOW, APPROXIMATELY, HOW LONG AN AVERAGE
22 CAR IS?

23 A YES, I DO.

24 THE COURT: COUNSELOR, IF WE ARE GOING TO USE SOME
25 REFERENCE FOR MEASUREMENT, LET'S USE THE LENGTH OF THE

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

RANDOLPH LYLE MOORE,

Appellant,

vs.

RENEE BAKER, WARDEN, and
ADAM PAUL LAXALT,
ATTORNEY GENERAL FOR
THE STATE OF NEVADA,

Respondents.

No. 66652

VOLUME 1 OF 5

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APPELLANT'S SUPPLEMENTAL APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of June, 2015. Electronic Service of the foregoing Appellant's Supplemental Appendix shall be made in accordance with the Master Service List as follows:

Steve Owens
Chief Deputy District Attorney

Felicia Darensbourg
An employee of the Federal Public Defender's Office

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~~#~~ 8/30/85
Motion in limine

1 LAS VEGAS, NEVADA, FRIDAY, AUGUST 30, 1985

2

3 THE COURT: C69269, STATE OF NEVADA VERSUS DALE
4 EDWARD FLANAGAN, RANDOLPH MOORE ALSO KNOWN AS SMITH, JOHNNY RAY
5 LUCKETT, MICHAEL WALSH AND ROY MCDOWELL. THE RECORD WILL
6 REFLECT THE PRESENCE OF EACH OF THE DEFENDANTS IN CUSTODY, MR.
7 PIKE REPRESENTING MR. FLANAGAN, MR. POSIN REPRESENTING MR.
8 MOORE, MR. SMITH REPRESENTING MR. LUCKETT, MR. KELESIS
9 REPRESENTING MR. WALSH, AND MR. HANDFUSS REPRESENTING MR.
10 MCDOWELL. THE RECORD WILL ALSO REFLECT THE PRESENCE OF MR.
11 HARMON AND MR. SEATON REPRESENTING THE STATE.

12 COUNSEL, I SEE YOU'RE RATHER INCONVENIENTLY JAMMED
13 IN THERE AT COUNSEL TABLE. WE DIDN'T REALLY ENTERTAIN THAT
14 PROBLEM.

15 IF YOU BEAR WITH US FOR THIS INTERIM PERIOD, WE
16 WILL TRY TO ARRANGE SOMETHING A LITTLE MORE COMFORTABLE IN THE
17 FUTURE.

18 THESE MATTERS ARE SET ON FOR MOTION IN LIMINE.
19 THE MOTION MADE ADDITIONALLY BY MR. KELESIS IS ON BEHALF OF
20 MR. WALSH AND JOINED IN BY THE OTHER DEFENDANTS THROUGH THEIR
21 ATTORNEYS.

22 I BELIEVE THERE IS SOME PRELIMINARY MATTERS TO
23 RESOLVE. ARE ALL PARTIES READY TO PROCEED?

24 MR. SEATON: YES, YOUR HONOR, THE STATE IS.

25 MR. KELESIS: YOUR HONOR, PRIOR TO PROCEEDING, ON

1 BEHALF OF MR. WALSH, I WOULD LIKE TO PUT ON THE RECORD WHAT WE
 2 HAD DISCUSSED IN CHAMBERS.

3 THE COURT: VERY WELL, MR. KELESIS.

4 MR. KELESIS: EARLIER, I DISCUSSED WITH YOUR HONOR
 5 IN CHAMBERS. AT THIS TIME, ON BEHALF OF MR. WALSH, WE WOULD
 6 INTEND AND WE WOULD DESIRE TO CONTINUE THIS HEARING BASED ON
 7 THE FACT OF SURPRISE, IN LIGHT OF THE FACT THAT WE WERE
 8 INFORMED YESTERDAY THAT MR. AKERS WILL BE TESTIFYING AGAINST
 9 THE REMAINING CODEFENDANTS IN THIS CASE.

10 WE DO HAVE SOME PRELIMINARY STATEMENTS THAT WERE
 11 PROVIDED WITH US IN DISCOVERY. HOWEVER, WE WOULD DESIRE TO
 12 PRESERVE AND RECEIVE ANY FURTHER STATEMENTS THAT AUGMENTED
 13 THOSE THAT WERE INITIALLY DELIVERED TO THE DEFENDANTS, AS WELL
 14 AS ANY ROUGH NOTES OF COUNSEL.

15 SECONDLY, I POINTED OUT TO THE COURT THE
 16 TRANSCRIPT FROM JUNE 26TH OF 1985, AT WHICH TIME MR. SEATON
 17 MADE REPRESENTATIONS FOR THE STATE WHICH WE BELIEVE OR, I
 18 SHOULD SAY, WHICH WE RELIED ON. AND, THAT IS, THAT THE
 19 INDIVIDUALS TESTIFYING ON BEHALF OF THE STATE AT THIS HEARING
 20 WOULD BE THOSE THAT DID TESTIFY AT THE PRELIMINARY HEARING.

21 MY UNDERSTANDING IS THE STATE HAS SUBPOENAED EIGHT
 22 WITNESSES, WHICH IS FIVE MORE THAN TESTIFIED AT THE
 23 PRELIMINARY HEARING.

24 AGAIN, ON THOSE GROUNDS, WE WOULD ASK FOR ANY
 25 FURTHER AND ADDITIONAL STATEMENTS MADE BY THOSE INDIVIDUALS.

1 AND, IN LIGHT OF THE FACT THAT WE ARE SURPRISED, AND I BELIEVE
 2 NOT PREPARED TO GO FORWARD WITH THIS HEARING AT THIS TIME
 3 UNTIL WE RECEIVE THE FURTHER INFORMATION.

4 THE COURT: VERY WELL.

5 MR. SMITH: YOUR HONOR, I WOULD LIKE TO SUPPLEMENT
 6 ON THAT. ON THE 7TH OF AUGUST WHEN WE ARRANGED THIS DATE FOR
 7 HEARING, WE HAD A CONFERENCE IN CHAMBERS WHICH WAS ATTENDED BY
 8 MR. SEATON.

9 AT THAT TIME, THERE WAS A REAFFIRMATION OF OUR
 10 UNDERSTANDING THAT ANY ADDITIONAL WITNESSES WHICH WERE KNOWN
 11 BY THE STATE, WHO WOULD BE CALLED UPON TO TESTIFY, WOULD BE
 12 PROVIDED TO US SO WE COULD SETTLE THE MANY COMPLEX PROBLEMS
 13 WHICH ARE PRESENT IN THIS CASE AT ONE TIME.

14 I SPECIFICALLY OBJECT TO ANY CONTINUANCE OF THE
 15 TRIAL DATE, BECAUSE MY CLIENT IS IN CUSTODY. I WOULD REQUEST
 16 IMMEDIATE PRODUCTION OF ANY NOTES WHICH ARE DISCOVERABLE WITH
 17 RESPECT TO ANY INTERVIEWS CONDUCTED INVOLVING THE VARIOUS
 18 WITNESSES WHOM THE STATE INTENDS TO CALL AT THIS HEARING OR AT
 19 TRIAL. I THINK WE ARE ALSO ENTITLED TO ANY WRITTEN STATEMENTS
 20 WHICH THEY HAVE MADE.

21 I WOULD REQUEST THE NAMES OF ANY AND ALL POLICE
 22 OFFICERS OR DISTRICT ATTORNEYS WHO WERE PRESENT WHEN ANY OF
 23 THESE WITNESSES GAVE STATEMENTS TO AGENTS OF THE GOVERNMENT.

24 ADDITIONALLY, I WOULD REQUEST ANY ADDITIONAL
 25 DISCOVERY, WHICH WOULD OTHERWISE BE PROPERLY OBTAINABLE BY US.

1 WE HAVEN'T RECEIVED ANY ADDITIONAL DISCOVERY IN THIS CASE
 2 SINCE THE FIRST PACKAGE. AND I AM AWARE THAT THIS IS
 3 GENERALLY AN OPEN FILE POLICY JURISDICTION, AND THAT SUCH
 4 MATERIAL SHOULD BE PROVIDED TO US IN THE ORDINARY COURSE.

5 AND, I CAN'T HELP BUT THINK WITH ALL THE
 6 CONTINUING INVESTIGATION AND INTERVIEWING THAT HAS BEEN GOING
 7 ON, THAT THE STATE IS NOW IN POSSESSION OF SUBSTANTIALLY MORE
 8 MATERIAL THAN WE HAVE RECEIVED.

9 THE COURT: WOULD THE STATE CARE TO RESPOND?

10 MR. SEATON: YES, YOUR HONOR. LET ME TRY TO
 11 RESPOND IN KIND OF THE WAY THEY ARE OBJECTING.

12 MR. KELESIS INDICATES HE WANTS A CONTINUANCE
 13 BECAUSE HE IS SURPRISED BY MR. AKERS. THIS IS NO DIFFERENT
 14 THAN A TRIAL. WE DON'T TELL DEFENSE ATTORNEYS WHAT WITNESSES
 15 WE ARE GOING TO PUT ON IN A TRIAL. WE GIVE THEM AN OPEN FILE
 16 DISCOVERY.

17 THEY HAVE ALL THE NOTES, ALL OF THE STATEMENTS
 18 MADE BY THOSE PEOPLE. AND WHEN THAT PERSON GETS ON THE STAND,
 19 THEY PULL OUT THAT PARTICULAR FILE, AND THEY CROSS-EXAMINE
 20 FROM IT. AND WE ARE AT NO DIFFERENT JUNCTURE HERE TODAY THAN
 21 WE WERE THEN.

22 AS A MATTER OF FACT, THEY ARE GETTING AN EXTRA BITE
 23 AT THE SO-CALLED APPLE AT THIS PARTICULAR JUNCTURE. MR. AKERS
 24 SHOULD BE NO SURPRISE WHATSOEVER TO THEM. THESE GENTLEMEN
 25 HAVE KNOWN ABOUT HIM SINCE YESTERDAY.

1 ONE OF THE DEFENSE COUNSEL EVEN ASKED ME IF MR.
 2 AKERS WOULD BE MADE AVAILABLE. AND I TOLD HIM I DIDN'T KNOW,
 3 THAT WOULD BE UP TO MR. WATERMAN. BUT THE STATE NEVER HAS ANY
 4 OBJECTION TO OTHER PEOPLE INTERVIEWING OUR WITNESSES.

5 AND THAT'S WHAT HE WAS AT THAT TIME. HE WAS ONE
 6 OF OUR -- ANOTHER ONE OF OUR WITNESSES. SO, HE HAS BEEN
 7 AVAILABLE FOR A DAY. HIS STATEMENTS TO THE POLICE HAVE ALWAYS
 8 BEEN AVAILABLE TO THESE PEOPLE.

9 AND AS A PART OF THEIR PREPARATION, THEY SHOULD
 10 HAVE ACKNOWLEDGED THAT ANY ONE OF THE DEFENDANTS COULD HAVE
 11 BEEN IN THIS POSITION, THAT THEY MIGHT HAVE TAKEN A PLEA
 12 BARGAIN AND BEEN IN THE POSITION TO TESTIFY FOR THE STATE.

13 THE LORD KNOWS WE HAVE HAD ENOUGH DEFENSE COUNSEL
 14 TALK TO US ABOUT IT, AND EVERYBODY IS AWARE THAT MIGHT HAPPEN.
 15 SO LACK OF PREPARATION FOR MR. AKERS CAN CERTAINLY NOT BE ANY
 16 REASON TO CONTINUE THIS PARTICULAR HEARING THAT WE ARE IN NOW.

17 IT IS ALSO COMPLAINED THAT WE ARE HAVING FIVE MORE
 18 WITNESSES AT THIS JUNCTURE THAN WE HAD AT THE PRELIMINARY
 19 HEARING. NOW, I DON'T HAVE ACCESS TO THE RECORD THAT MR.
 20 KELESIS IS TALKING ABOUT, NOR THE STATEMENT THAT I ALLEGEDLY
 21 MADE IN CHAMBERS ALONG WITH THAT WHICH MR. SMITH WAS STATING.

22 CERTAINLY, THEY HAD TO KNOW THAT I WAS SPEAKING IN
 23 GENERAL TERMS THAT THE PEOPLE WHO HAD TESTIFIED AT THE
 24 PRELIMINARY HEARING WOULD BE TESTIFYING AT THIS. OBVIOUSLY,
 25 AS THEY READ THROUGH THE DISCOVERY, THEY COULD DISCOVER JUST

1 AS EASILY AS MR. HARMON AND I DID THAT THERE WERE OTHER
 2 PEOPLE WHO HAD RECEIVED STATEMENTS FROM THESE PARTICULAR
 3 DEFENDANTS. AND THEY WOULD POTENTIALLY FALL UNDER THE
 4 CO-CONSPIRATOR RULE, AND WE, OBVIOUSLY, WOULD BE TESTING
 5 THEM TODAY.

6 FOR THEM NOT TO BE PREPARED FOR THAT IS TO SAY
 7 THEY WANT US TO PREPARE THEIR CASE FOR THEM, FOR US TO
 8 SPOON-FEED TO THEM THE LIST OF OUR WITNESSES. AND, I AM
 9 SORRY, WE ARE JUST NOT IN THE HABIT OF DOING IT, AND I DON'T
 10 PLAN TO BEGIN AT THIS TIME.

11 NOW, THE LAST THING THAT CAME UP WAS MR. SMITH'S
 12 REQUEST THAT WE TURN OVER OUR PERSONAL NOTES, OUR WORK PRODUCT
 13 TO HIM. I AM NOT ABOUT TO DO THAT. I HAVE NEVER DONE IT IN
 14 15 YEARS, AND THE DISCOVERY STATUTE DOES NOT REQUIRE ME TO.

15 MR. AKERS HAS MADE NO OTHER STATEMENTS, THAT I
 16 KNOW OF, TO LAW ENFORCEMENT AGENTS OTHER THAN TO MR. HARMON
 17 AND MYSELF, FROM WHICH WE BOTH TOOK NOTES YESTERDAY AND TODAY.
 18 AND I WASN'T IN ON THE MEETING TODAY, ONLY MR. HARMON WAS.

19 SO, THAT'S THE STATUS OF THINGS AS I SEE IT, YOUR
 20 HONOR. A MOTION FOR CONTINUANCE NOW IS ONLY TO POINT OUT
 21 DEFENSE ATTORNEY'S OWN INABILITY TO PREPARE PROPERLY FOR A
 22 CASE THAT, THROUGH THE OPEN FILE DISCOVERY, WAS STARING THEM
 23 RIGHT SQUARE IN THE FACE.

24 THE COURT: MR. SEATON, AS TO MR. SMITH'S CONCERN
 25 ABOUT DISCOVERY, GENERALLY, IS THEIR ADDITIONAL DISCOVERY TO BE

1 HAD HERE?

2 MR. SEATON: I WILL SAY RIGHT NOW, NONE TO MY
 3 KNOWLEDGE. AND I WILL HAVE TO ASK MR. HARMON IF HE IS AWARE
 4 OF ANY THAT SHOULD BE TURNED OVER TO THE DEFENSE COUNSEL.

5 MR. HARMON: NO, YOUR HONOR.

6 MR. SEATON: THE STATE HAS NO FURTHER DISCOVERY
 7 THAT WE ARE AWARE OF AT THIS TIME.

8 MR. HANDFUSS: YOUR HONOR, FIRST OF ALL, AS TO
 9 THIS BEING JUST LIKE A TRIAL; AS MR. SEATON KNOWS, IN A TRIAL
 10 WE ARE GIVEN A LIST OF WITNESSES THAT THE STATE MAY CALL.
 11 AND, IN THIS INSTANCE, MR. SEATON SAID THAT THE DEFENDANTS'
 12 DEFENSE COUNSEL WERE AWARE OF MR. AKERS' TESTIMONY YESTERDAY.
 13 I, MYSELF, AS THE COURT IS AWARE, AM IN A TRIAL IN FEDERAL
 14 COURT AND DID NOT FIND OUT ABOUT THIS UNTIL SEVEN O'CLOCK
 15 LAST NIGHT.

16 IN ADDITION, I DON'T THINK THAT IS PROPER TIMING
 17 FOR ME TO PREPARE FOR MR. AKERS, WHO IS OBVIOUSLY A CODEFENDANT
 18 AND IS GOING TO BE A KEY WITNESS IN THE STATE'S CASE.

19 SO, AS FAR AS GIVING NOTICE, THAT IS NOT PROPER
 20 NOTICE. JUST AS IN A TRIAL, IF ONE SIDE COMES UP AT THE LAST
 21 MINUTE OR THE STATE COMES UP AT THE LAST MINUTE TO ENDORSE NEW
 22 NAMES ON THE INFORMATION FOR WITNESSES, A LOT OF TIMES A
 23 CONTINUANCE IS GRANTED ON THAT BASIS.

24 AS TO MR. AKERS' TESTIMONY, I WOULD MOVE TO HAVE
 25 MR. AKERS NOT BE ABLE TO TESTIFY TODAY, BECAUSE OF THE LATE

1 NOTICE THAT MR. AKERS MAY TESTIFY.

2 IN ADDITION, AS TO WHETHER OR NOT MR. AKERS MADE
3 ANY FURTHER STATEMENTS, MR. AKERS HAS OBVIOUSLY BEEN TALKING
4 TO THE STATE AND THE STATE'S AGENCIES.

5 NOW, IT SEEMS HARD TO UNDERSTAND THAT MR. AKERS
6 HAS NOT MADE ANY OTHER STATEMENTS, OTHER THAN THAT THAT HAS
7 BEEN SUPPLIED IN DISCOVERY WHEN THIS CASE FIRST STARTED AND
8 DISCOVERY WAS GIVEN TO DEFENSE COUNSEL.

9 IF MR. AKERS DID NOT GIVE A WRITTEN STATEMENT
10 HIMSELF OR DID NOT SIGN A WRITTEN STATEMENT, IF THERE WAS NO
11 TRANSCRIPTION, IF THERE WAS NO RECORDING OF ANY STATEMENT
12 GIVEN TO THE STATE, THEN I WOULD SAY THAT THE ROUGH NOTES OR
13 THE NOTES OF THE STATE IN THIS CASE ARE NOTHING BUT ADOPTIVE
14 STATEMENTS OF MR. AKERS.

15 AND, UNDER THOSE CIRCUMSTANCES, WE WOULD BE
16 ENTITLED TO THOSE NOTES OR THOSE STATEMENTS, BECAUSE THAT IS
17 THE ONLY THING WE HAVE. AS TO MR. AKERS, I DON'T KNOW WHAT HE
18 IS GOING TO TESTIFY TO BASED UPON THE PRIOR DISCOVERY.

19 THE COURT: ALL RIGHT.

20 MR. PIKE: I JOIN IN THE PREVIOUS OBJECTIONS THAT
21 HAVE BEEN MADE AND ALSO CITE FOR AUTHORITY OF THE PRODUCTION
22 OF THE ORIGINAL ROUGH INTERVIEW NOTES THE CASE OF UNITED
23 STATES VERSUS HARRIS, LOCATED AT 543 F.2D 1247, NINTH CIRCUIT
24 CASE 1976. AND THAT FALLS UNDER THE NUMBER OF BRADY V.
25 MARYLAND IN UNITED STATES VERSUS LAYTON. THAT IS LOCATED AT

1 564 F.SUP. 1391.

2 THE COURT: MR. SMITH?

3 MR. SMITH: JUST TO CLARIFY A POINT. THE PURPOSE
4 OF THIS HEARING TODAY IS TO DETERMINE WHETHER OR NOT CERTAIN
5 STATEMENTS WILL BE ADMISSIBLE AT TRIAL. AND ALSO, TO CONSIDER
6 THE QUESTION OF WHETHER OR NOT A SEVERANCE IS IN ORDER, AT
7 LEAST, INSOFAR AS MY CLIENT IS CONCERNED.

8 AT THIS POINT, I AM GOING TO ARGUE THAT MR. AKERS
9 SHOULD NOT BE ALLOWED TO TESTIFY AGAINST HIM BECAUSE HE IS AN
10 ACCOMPLICE AND THERE IS INSUFFICIENT EVIDENCE TO CORROBORATE
11 HIS TESTIMONY. I CAN CERTAINLY CITE AUTHORITY FOR THAT.

12 BASED ON ADMISSIONS WHICH OTHER CODEFENDANTS HAVE
13 MADE, I THINK IT IS CLEAR THAT MR. AKERS AT SOME POINT WILL
14 BE ABLE TO TESTIFY AGAINST THEM BASED ON THEIR OWN ADMISSIONS.
15 I AND THE OTHER DEFENSE COUNSEL MAY BE IN A DIFFERENT POSITION
16 AS FAR AS THAT IS CONCERNED. BUT, I DON'T THINK THE QUESTION
17 AT LEAST INSOFAR AS I AM CONCERNED, THE QUESTION OF AKERS
18 TESTIFYING IS REALLY ALL THAT IMPORTANT.

19 WHAT I AM CONCERNED ABOUT, AND AS FAR AS MR.
20 LUCKETT IS CONCERNED, AND I THINK WE HAVE TO AGREE, THAT I AM
21 IN A POSITION -- A DIFFERENT POSITION THAN THE OTHER DEFENSE
22 COUNSEL IN THIS CASE, BECAUSE MR. LUCKETT HAS MADE NO
23 ADMISSIONS, WHEREAS, THE OTHER DEFENDANTS HAVE.

24 WHAT I AM PRIMARILY CONCERNED ABOUT ARE STATEMENTS
25 MADE BY MR. LUCKETT'S CODEFENDANTS WHICH WERE MADE OUT OF

1 COURT.

2 THAT IS THE ESSENTIAL THRUST OF MY PROBLEMS,
 3 WHETHER IT BE BASED ON THE CO-CONSPIRATOR EXCEPTION, THE
 4 CONFRONTATION CLAUSE, OR THE BRUTON PROBLEM.

5 THE COURT: WELL, THAT IS A SLIGHTLY DIFFERENT
 6 ISSUE HERE. IN READING THAT WHICH YOU SUBMITTED, IT OCCURRED
 7 TO ME THAT IT IS A MOOT POINT IF WE CONDUCT VOIR DIRE IN AN
 8 EXPEDITIOUS FASHION IN FAIRNESS TO YOUR CLIENT AND THE OTHERS.
 9 IF WE HAVE JURORS WHO, FIRST OF ALL, HAVE SAID THAT THEY HAVE
 10 READ THESE OUT-OF-COURT STATEMENTS, THE STATEMENTS THAT HAVE
 11 BEEN PUBLISHED IN THE NEWSPAPER; AND THEN, SECONDLY, CANNOT
 12 DISREGARD THEM, THEN WE HAVE COMMITTED ERROR RIGHT THERE IN
 13 IMPANELING THESE JURORS.

14 SO, THE QUESTION IS RENDERED MOOT IN A SENSE IF
 15 WE ACQUIRE A JURY THAT HAS NOT, IN FACT, BEEN EXPOSED TO THIS
 16 NEWSPAPER EXPOSE, IF I AM READING CORRECTLY YOUR CONCERN.

17 MR. SMITH: WELL, THAT IS A SEPARATE CONCERN. THE
 18 OTHER CONCERN, OF COURSE, INVOLVES THE STATEMENTS WHICH THE
 19 CODEFENDANTS HAVE MADE TO THE VARIOUS WITNESSES WHO WILL BE
 20 CALLED UPON TO TESTIFY THAT THE STATE WANTS TO PUT INTO
 21 EVIDENCE.

22 I MEAN, I THINK THE COURT, AT LEAST PRELIMINARILY,
 23 MADE A DECISION ON THE QUESTION OF CO-CONSPIRATOR EXCEPTION TO
 24 THE HEARSAY RULE. IT HAS NOT YET RULED ON THE BROADER SIXTH
 25 AMENDMENT CONFRONTATION ISSUES WHICH I HAVE RAISED, NOR HAS IT

1 HAD AN OPPORTUNITY TO HEAR ARGUMENT ON MR. AKERS' TESTIMONY
 2 UNDER THE ACCOMPLICE EVIDENCE QUESTION.

3 THE COURT: WELL, AT THIS TIME, WE ARE
 4 ENTERTAINING THE ISSUE OF WHETHER CERTAIN STATEMENTS WERE MADE
 5 IN FURTHERANCE OF A CONSPIRACY. THAT IS WHAT WE ARE HERE
 6 TODAY FOR. ESSENTIALLY, I WOULD REMIND COUNSEL, CONTRARY TO
 7 WHAT MR. SEATON MIGHT SAY, THIS IS NOT A TRIAL. THERE ARE
 8 SOME DISTINCT DIFFERENCES. NOW, I AM GOING TO RULE ON THE
 9 OBJECTIONS AS I HEARD THEM MADE.

10 MR. KELESIS IS CONCERNED ABOUT SURPRISE. AS I
 11 RECALL, AT THE TIME WE MET LAST ON THE RECORD, I ASKED COUNSEL
 12 TO TRY TO GET TOGETHER AND DETERMINE WHAT STATEMENTS WOULD BE
 13 REVIEWED.

14 I DID THAT IN ORDER TO EXPEDITE THESE PROCEEDINGS,
 15 SO AT LEAST WE WOULD ALL PRETTY MUCH KNOW WHAT WE WERE GOING
 16 TO DISCUSS. I MADE A LIST, TWO-PAGE DOCUMENT AND SUBMITTED IT
 17 TO ALL COUNSEL OF THE STATEMENTS THAT I WAS ABLE TO GLEAN FROM
 18 VARIOUS PROCEEDINGS EARLIER ON, THAT PROBABLY WOULD BE AT
 19 ISSUE.

20 I ASKED MR. SEATON TO ACCOMMODATE ME IN THAT
 21 REGARD. AND HE MADE THE STATEMENT THAT ALL THE STATEMENTS
 22 THAT WERE GOING TO BE ASKED TO BE ADMITTED AND TESTIFIED ABOUT
 23 WERE THOSE WHICH WERE CONTAINED IN THE PRELIMINARY HEARING
 24 TRANSCRIPT.

25 NOW, THAT SHOULD PUT COUNSEL ON NOTICE AS TO WHAT

1 WE ARE DISCUSSING. AT THAT TIME, I WAS NOT PARTICULARLY
 2 CONCERNED WITH WHAT WITNESSES WERE GOING TO BE CALLED.

3 SINCE THAT TIME, THERE HAVE BEEN SOME REVELATIONS,
 4 EVIDENTLY, WHICH NECESSITATES FROM THE STATE'S VIEW CALLING OF
 5 OTHER WITNESSES. MR. AKERS IS A NEWLY DISCOVERED MATTER.

6 AGAIN, I DON'T SEE WHERE THE SURPRISE IS COMING.
 7 MR. AKERS CERTAINLY HAS NOT JUST NEWLY ENTERED THIS CASE.

8 I THINK COUNSEL CAN UNDERSTAND, FROM THE
 9 TRANSCRIPT AND THE DISCOVERY THAT HAS BEEN HAD, WHAT HIS
 10 INVOLVEMENT IS. I DON'T KNOW WHAT OTHER WITNESSES ARE
 11 CONTEMPLATED BEING CALLED, SO I HAVE TO REQUEST MR. SEATON
 12 INDICATE TO ME WHO, IN ADDITION TO THE THREE THAT TESTIFIED
 13 AT THE PRELIMINARY HEARING, DO YOU INTEND CALLING?

14 MR. SEATON: YOUR HONOR, TO ACCOMMODATE THE COURT,
 15 I WILL TELL THE COURT AND COUNSEL THAT -- WE HAVE ALREADY TOLD
 16 THEM, MISS LISA LICATA WHO WAS THE INDIVIDUAL WHO DISCOVERED
 17 THE BODIES ORIGINALLY.

18 SHE HAS HAD AN OPPORTUNITY TO HAVE A COUPLE OF
 19 DISCUSSIONS WITH DALE FLANAGAN. ONE PRIOR TO THE KILLINGS,
 20 AND ONE AFTER THE KILLINGS.

21 AND, IF MEMORY SERVES ME CORRECT -- AND, BELIEVE
 22 ME, AT THIS POINT I AM GOING FROM MEMORY -- THOSE STATEMENTS
 23 OR ALLUSIONS TO THEM, AT LEAST, ARE CONTAINED IN HER WRITTEN
 24 STATEMENT, WHICH HAS BEEN PROVIDED TO DEFENSE COUNSEL BY
 25 DISCOVERY.

1 THE NEXT PERSON IS AN INDIVIDUAL BY THE NAME OF
2 WAYNE WITTIG. AND HE, ALSO, HAS HAD STATEMENTS WITH DALE
3 FLANAGAN AFTER THE KILLING. AND THERE WERE A SERIES OF
4 STATEMENTS THAT HE HAD WITH MR. FLANAGAN, IN WHICH PRETTY MUCH
5 THE GENERAL STORY, AS MOST OF US KNOW IT BY THIS TIME, CAME
6 OUT TO MR. WITTIG.

7 THOSE REVELATIONS ARE ALSO CONTAINED IN HIS
8 WRITTEN STATEMENT WHICH WAS MADE AVAILABLE TO DEFENSE COUNSEL
9 BY DISCOVERY.

10 WE HAVE AN INDIVIDUAL BY THE NAME OF RUSTY HAVENS
11 WHO IS PREPARED TO TESTIFY. RUSTY HAVENS WAS A PART OF THIS
12 GROUP OF DEFENDANTS WHEN IT WAS IN THE -- WHEN THEY WERE IN
13 THE PLANNING STAGES. AND HE HAS STATEMENTS MADE -- AS I
14 UNDERSTAND IT. I HAVE NOT SPOKEN WITH HIM. BUT I BELIEVE I
15 KNOW FROM MR. HARMON THAT HE MADE STATEMENTS. HE IS GOING TO
16 TELL US STATEMENTS MADE TO HIM BY MR. MOORE AND MR. FLANAGAN
17 REGARDING THE PLANNING STAGES, AND WHO WAS GOING TO DO WHAT
18 AND WHEN AND HOW.

19 THEN WE HAVE --

20 THE COURT: JUST A MINUTE. HOW DID THAT COME TO
21 LIGHT, TO WHAT EXTENT?

22 MR. SEATON: THAT IS AN INTERESTING ONE. IT SHOWS
23 THE COURT THE VERY DIFFICULTY THAT WE HAVE IN THIS CASE.

24 FIRST OF ALL, MR. HAVENS AND HIS STATEMENTS ARE
25 CONTAINED IN A WRITTEN DOCUMENT THAT WAS MADE DISCOVERABLE TO

1 THE DEFENSE ATTORNEYS. IT WAS -- I THINK IT WAS LAST NIGHT.
2 NO, THE NIGHT BEFORE LAST, IF I AM NOT MISTAKEN, THAT I, FOR
3 THE FIRST TIME IN A LONG TIME, REREAD HIS STATEMENT.

4 AND I DECIDED THAT IT WAS PROBABLY APPROPRIATE
5 THAT HE BE ONE OF THE PEOPLE TO TESTIFY HERE, BECAUSE HE HAD
6 CO-CONSPIRATOR STATEMENTS TO OFFER THIS COURT.

7 I WENT BACK THE NEXT MORNING AND TOLD MR. HARMON,
8 ASKED HIM ABOUT IT. HE, AS WELL, MISSED -- FAILED TO REMEMBER
9 MR. HAVENS. AND THE COURT NEEDS TO UNDERSTAND THAT MR. HARMON
10 AND I HAVE BOTH BEEN TAKEN UP IN CAPITAL MURDER CASES; ME, FOR
11 ABOUT THREE WEEKS, AND MR. HARMON, FOR A COUPLE OF WEEKS.

12 SO, WE ARE JUST NOW GETTING AROUND TO FINDING OUT
13 THESE THINGS. THE IMPORTANT THING TO NOTE, HOWEVER, IS THAT
14 MR. HAVENS AND HIS TESTIMONY WAS IN THE FILE OF EACH ONE OF
15 THE DEFENSE COUNSEL EVER SINCE DISCOVERY WAS GIVEN OUT.

16 WE, ALSO, HAVE MICHELLE GREY. SHE HAS SPOKEN TO
17 DALE FLANAGAN ON THREE DIFFERENT OCCASIONS PRIOR TO THE
18 KILLINGS, AND RECEIVED CERTAIN INFORMATION FROM HIM WHICH
19 INDICATED THAT HE WAS GOING TO KILL, AT LEAST, HIS GRANDFATHER
20 AT THAT TIME OR WANTED TO. AND SHE, ALSO, ASKED HIM ABOUT WHO
21 DID THE KILLING AFTER THE KILLINGS HAD TAKEN PLACE. AND IT IS
22 NOT SO MUCH AS RESPONSE, BUT THE MATTER OF RESPONSE, WHICH IS
23 SOMEWHAT INTERESTING IN THIS PROCEEDING.

24 SHE WAS KNOWN AS A WITNESS THROUGH DISCOVERY. AND
25 SHE HAS A WRITTEN STATEMENT THAT HAS BEEN MADE AVAILABLE TO

1 COUNSEL. IN FAIRNESS, IF MEMORY SERVES ME CORRECT, THE NATURE
2 AND CONTENT OF THESE CONVERSATIONS WITH MR. FLANAGAN DID NOT
3 APPEAR IN THOSE STATEMENTS.

4 IT WAS ONLY IN THE LAST DAY OR SO WHEN MR.
5 HARMON AND I CALLED HER IN TO INTERVIEW HER, AND I THINK WE
6 TALKED TO HER YESTERDAY, THAT WE FIRST LEARNED IN DEPTH WHAT
7 IT WAS THAT SHE HAD TO OFFER REGARDING THE STATEMENTS MADE TO
8 HER BY MR. FLANAGAN.

9 THE POINT NEEDS TO BE MADE, THOUGH, AT THIS
10 JUNCTURE THAT SHE AND HER RELATIONSHIP WITH DALE FLANAGAN WERE
11 CLEARLY KNOWN TO THE DEFENSE COUNSEL THROUGH DISCOVERY AT THIS
12 POINT IN TIME AND THROUGHOUT THE CASE.

13 THE OTHER INDIVIDUAL WE HAVE AND THE LAST ONE IS
14 DEWANA MANNING. SHE HAS CERTAIN STATEMENTS MADE TO HER BY MR.
15 WALSH AND MR. MOORE. AND SHE IS NOT -- SHE DOESN'T HAVE A
16 STATEMENT, AS I RECALL.

17 HOWEVER, SHE IS MENTIONED BY NAME IN OTHER
18 STATEMENTS MADE BY OTHER PEOPLE INCLUDING POLICE OFFICERS.
19 AND SO, HER CONNECTION WITH THE CASE, HER ABILITY TO BE
20 INTERVIEWED IS PRESENT.

21 I WOULD HAVE TO ACKNOWLEDGE THAT SOMEONE MAY NOT
22 READ HER PARTICULAR STATEMENT AND KNOW RIGHT OFF THE BAT THAT
23 SHE HAD CO-CONSPIRATOR STATEMENTS TO OFFER. AND, AS MR.
24 HARMON POINTS OUT TO ME NOW, SHE IS ENDORSED ON THE LIST OF
25 WITNESSES, WHICH IS ANOTHER IMPORTANT THING.

1 EVERY WITNESS WE ARE CALLING IS ON THE LIST OF
2 ENDORSED WITNESSES, WHICH ALL OF THE DEFENSE COUNSEL HAVE
3 EXCEPT RUSTY HAVENS, I AM TOLD. HOWEVER, HIS STATEMENT IS IN
4 THE HANDS OF COUNSEL.

5 SO, THOSE ARE THE WITNESSES THAT WE ARE PREPARED
6 TO OFFER THIS AFTERNOON. AND, VIRTUALLY, ALL OF THEM HAVE
7 STATEMENTS THAT ARE BEFORE DEFENSE COUNSEL. AND THROUGH THEIR
8 OWN DILIGENCE, THOSE DEFENSE COUNSEL SHOULD BE PREPARED TODAY
9 TO GO FORWARD ON THIS AND NOT BE SURPRISED BY ANY OF THE
10 TESTIMONY.

11 MR. HANDFUSS: EXCUSE ME, YOUR HONOR. I MIGHT
12 HAVE MISSED IT. BUT IN GOING OVER THE WITNESSES THE STATE
13 INTENDS TO CALL, AND AS TO WHO THEY MIGHT MAKE STATEMENTS
14 AGAINST, I DIDN'T HEAR ANY OF THE FACTS THAT THE WITNESSES
15 MIGHT MAKE A STATEMENT AGAINST MR. MCDOWELL; IS THAT CORRECT?

16 MR. SEATON: I DON'T KNOW. BUT, THAT IS NOT TO
17 SAY SOMEBODY WON'T SAY SOMETHING ABOUT HIM.

18 MR. HANDFUSS: I WOULD LIKE TO INFORM THE COURT
19 NOW, THAT IF THE WITNESSES GET UP AND TESTIFY AND THERE IS
20 NOTHING SAID AS TO MR. MCDOWELL, THAT I WOULD LIKE THE COURT
21 TO STRIKE ALL THAT TESTIMONY AS TO MR. MCDOWELL, AND ALSO TO
22 RENEW THE MOTION FOR SEVERANCE AND TO CONSIDER THAT, OF
23 COURSE, VERY SERIOUSLY, SINCE MR. MCDOWELL'S NAME HAS NOT COME
24 UP ONCE, AS FAR AS I CAN RECALL, IN THE WITNESSES NAMED.

25 THE COURT: WE WILL ENTERTAIN THE MATTER OF

1 SEVERANCE AT A LATER TIME.

2 MR. KELESIS: YOUR HONOR, OUR ORIGINAL OBJECTION,
 3 AS WELL AS -- I WOULD LIKE TO READ INTO THE RECORD WHAT
 4 TRANSPIRED BACK ON THAT DATE WHERE THE COURT ASKED, "MR. SEATON
 5 STATED, AND THERE ARE NO WITNESSES THAT WOULD COME WITHIN THE
 6 SPECTRUM THAT DID NOT TESTIFY AT THE PRELIMINARY HEARING?"

7 AND MR. SEATON STATED, "AT THIS JUNCTURE, NO."
 8 AND THE COURT, "ALL RIGHT. I WOULD ASK IF SOMETHING COMES IN
 9 IN THAT REGARD, THAT YOU MAKE IT KNOWN." MR. SEATON,
 10 "CERTAINLY, IF THERE IS A DRASTIC CHANGE."

11 WE HAVE ONE PERSON HERE THAT THERE IS NOT A
 12 WRITTEN STATEMENT, AND WE HAVE FOUR ADDED. AND IF THAT IS NOT
 13 A DRASTIC CHANGE. THIS IS A MURDER TRIAL. WE ARE TALKING
 14 ABOUT PUTTING PEOPLE ON THE STAND THAT ARE GOING TO
 15 ESTABLISH EVIDENTIARY ISSUE THAT GET STATEMENTS IN AGAINST
 16 THESE KIDS.

17 NOW, THIS IS DRASTIC, THREE TO EIGHT. AND,
 18 PEOPLE, I AM SUPPOSED TO SURMISE THAT THIS GUY FROM HIS
 19 STATEMENT IS GOING TO COME IN AND TESTIFY. A GUY WHO DOESN'T
 20 HAVE A WRITTEN STATEMENT. I AM SUPPOSED TO FIGURE ALL THIS
 21 OUT. I AM NOT ASKING THE STATE TO PREPARE MY CASE. I PREPARE
 22 MYSELF WELL.

23 THE COURT: WHICH PERSON ARE YOU INDICATING?

24 MR. KELESIS: WE WERE JUST TOLD --

25 MR. HARMON: DEWANA.

1 MR. KELESIS: SHE IS GOING TO COME IN AGAINST MY
2 CLIENT WALSH, PARTICULARLY.

3 THE COURT: MISS MANNING, ALL RIGHT.

4 MR. KELESIS: MR. HAVENS, WE ARE SUPPOSED TO
5 GUESS.

6 MR. HARMON: HAS GIVEN A STATEMENT.

7 MR. KELESIS: MISS GREY, WE ARE SUPPOSED TO KNOW
8 FROM THE STATEMENT.

9 NOW, THIS IS NOT A TRIAL, AS YOUR HONOR POINTED
10 OUT. THIS IS TO RESOLVE AN ISSUE OF LAW, AN EVIDENTIARY ISSUE
11 THAT THE STATE IS REQUIRED TO SHOW THAT A CONSPIRACY EXISTS.

12 AND THESE STATEMENTS WERE MADE IN COURT. AND WE
13 HAVE A RIGHT TO RELY ON THEM. AND WE DID RELY ON THEM. JUST
14 AS THEY RELY ON THEIR ENDORSEMENT, WE RELIED ON THESE
15 STATEMENTS. IF THAT IS NOT BEING SURPRISED, I DON'T KNOW WHAT
16 IS.

17 THE COURT: ALL RIGHT.

18 MR. HARMON: YOUR HONOR, IF I COULD SAY ONE OTHER
19 THING. IT SEEMS TO ME, THOSE WITNESSES WHO TESTIFIED AT THE
20 PRELIMINARY HEARING ARE SOMEWHAT ACADEMIC AT THIS POINT
21 ANYWAY, BECAUSE THEIR TESTIMONY IS ON THE RECORD.

22 IF WE HAD TO, WE COULD ARGUE THE LEGAL ISSUES FROM
23 WHAT MISS SALDANA AND WHAT MR. LUCAS HAVE ALREADY TESTIFIED
24 TO. BUT, YOUR HONOR, WE ARE RESPONDING TO DEFENSE MOTIONS.
25 AND, IF WE ARE GOING TO TRY TO DECIDE BEFOREHAND IN THIS CASE

1 WHAT EVIDENCE IS ADMISSIBLE, IT IS PARTICULARLY IMPORTANT THAT
 2 PEOPLE WHO DIDN'T TESTIFY AT THE PRELIMINARY HEARING TESTIFY
 3 AT THIS EVIDENTIARY HEARING, WHICH, IN FACT, WAS REQUESTED BY
 4 THESE GENTLEMEN, NOT US. THEY'RE THE MOVING PARTY.

5 WE ARE HERE BECAUSE THEY ASKED TO SEVER AND THEY
 6 ASKED TO EXCLUDE CERTAIN EVIDENCE.

7 THE COURT: ALL RIGHT, GENTLEMEN. AM I CORRECT IN
 8 ASSUMING, MR. HARMON, THAT THE FIVE WITNESSES THAT MR. SEATON
 9 HAS MENTIONED DID NOT TESTIFY AT THE PRELIMINARY HEARING?

10 MR. HARMON: YES, YOUR HONOR, THAT'S CORRECT.

11 THE COURT: ALL RIGHT, GENTLEMEN. ONE THING, MR.
 12 KELESIS, IN YOUR READING OF THE TRANSCRIPT, I DID ASK THAT
 13 THERE BE DIALOGUE BETWEEN COUNSEL. AND I DID THAT IN AN
 14 ATTEMPT TO SIMPLIFY THESE PROCEEDINGS. AND, AS I INDICATED
 15 A MOMENT AGO, SO THAT WE WOULD KNOW WHAT WE WERE GOING TO
 16 DISCUSS TODAY.

17 THE FACT THAT I ASKED COUNSEL TO COOPERATE IN THAT
 18 REGARD IN NO WAY IS RELEGATED TO THE IMPORT OF AN ORDER. IF
 19 YOU WANTED SUCH REDUCED TO AN ORDER, YOU SHOULD HAVE ASKED
 20 THAT ON THE RECORD, AND I WOULD HAVE ENTERTAINED IT. BUT, A
 21 REQUEST IS NOT AN ORDER.

22 IT DOES NOT CLOTHE COUNSEL AND THE DEFENDANTS WITH
 23 THE INDICIA OF A RIGHT. AND SO, I CAN'T GO ALONG WITH THIS
 24 THEORY THAT THERE IS SOME SORT OF A RIGHT MANDATED BY THE FACT
 25 I REQUESTED THAT THERE BE DIALOGUE BETWEEN COUNSEL.

1 I THINK THAT WITH THE EXCEPTION OF MISS GREY AND
 2 MISS MANNING, WHO POSSIBLY COULD BE A PROBLEM WITH RESPECT TO
 3 WHAT COUNSEL HAS ALLUDED TO, THE OTHERS ARE CERTAINLY OF NO
 4 SURPRISE TO ANYONE. AND I WOULD THINK WE WOULD BE READY TO
 5 PROCEED.

6 AS TO MISS GREY, MISS MANNING, WE WILL TAKE THAT
 7 AS IT COMES. I AM NOT SURE TO THE EXTENT THE STATEMENTS GO
 8 AND WHAT KIND OF CROSS-EXAMINATION MIGHT BE NECESSITATED. BUT
 9 AS TO LICATA AND WITTIG AND HAVENS, I BELIEVE, PLUS AKERS, AND
 10 THOSE WHO TESTIFIED AT THE PRELIMINARY HEARING, MY RULING IS
 11 THAT COUNSEL SHOULD NOT BE SURPRISED. THE DEFENDANTS ARE NOT
 12 PREJUDICED BY PROCEEDING AT THIS TIME. AND WE WILL PROCEED.

13 NOW, DO WE KNOW WHAT STATEMENTS WE ARE GOING TO
 14 ENTERTAIN HERE? DO YOU HAVE A LIST OF THOSE MATTERS THAT YOU
 15 ARE GOING TO BRING TO ISSUE?

16 MR. HARMON: YOUR HONOR, IT WAS OUR INTENTION JUST
 17 TO BEGIN TO CALL WITNESSES, SO THAT THE COURT AND COUNSEL CAN
 18 FIND OUT WHAT THEY KNOW.

19 BUT WE INTEND TO START WITH MR. AKERS. WE
 20 UNDERSTAND WHAT THE LEGAL ISSUES ARE. AND THE STATE'S FIRST
 21 BURDEN IS TO SHOW EVIDENCE OF A CONSPIRACY. IT SEEMS LOGICAL,
 22 THEN, TO START WITH ACCOMPLICE'S TESTIMONY.

23 THE COURT: ALL RIGHT, THEN.

24 MR. KELESIS: ON BEHALF OF MR. WALSH, WE MOVE TO
 25 EXCLUDE ALL WITNESSES.

1 MR. SMITH: I AM JUST WONDERING HOW THE COURT
2 WANTS TO PROCEED. I ASSUME THE COURT IS GOING TO MAKE RULINGS
3 ON ALL OF THESE VARIOUS STATEMENTS AS THEY COME IN. LET'S
4 SAY, AFTER A WITNESS TESTIFIES IN EACH, COUNSEL WILL BE GIVEN
5 OPPORTUNITY TO ARGUE WHETHER OR NOT THAT STATEMENT WILL BE
6 ADMISSIBLE OR THE TESTIMONY GIVEN WOULD BE ADMISSIBLE AGAINST
7 THE INDIVIDUAL CLIENT.

8 THERE IS GOING TO BE EIGHT WITNESSES. IT IS GOING
9 TO BE IMPOSSIBLE FOR COUNSEL TO ARTICULATE.

10 THE COURT: YOUR POINT IS WELL TAKEN. MAYBE WE
11 WOULD WANT TO ADDRESS IT PERIODICALLY.

12 MR. HARMON: DUE RESPECT, IT IS NOT WELL TAKEN AT
13 ALL. THEY ASKED FOR AN EVIDENTIARY HEARING. I THINK WE
14 SHOULD HEAR THE EVIDENCE. AND AFTER WE HAVE HEARD THE
15 EVIDENCE, THEN I THINK WE CAN ADDRESS THE LEGAL POINTS.
16 OTHERWISE, WE ARE DOING THIS IN A VACUUM.

17 THE COURT: WELL, THE DIFFICULTY THAT I AM
18 CONCERNED ABOUT, AND PERHAPS MR. SMITH IS, THAT ONCE WE HAVE
19 THIS GREAT BULK OF MATERIAL, THESE STATEMENTS THAT WERE MADE,
20 IT MAY BE DIFFICULT TO ARGUE THE PROS AND CONS RECALLING ALL
21 OF THE TESTIMONY.

22 MR. HARMON: JUDGE, WE HAVE EIGHT WITNESSES
23 OUTSIDE. IF WE ARE GOING TO STOP TO HAVE LEGAL ARGUMENT FROM
24 ALL OF THE ATTORNEYS HERE AFTER EACH WITNESS, THEN WE ARE
25 TALKING ABOUT KEEPING THESE PEOPLE AROUND FOR DAYS.

1 MR. SMITH: WHAT WE CAN DO AS AN ALTERNATIVE
2 SUGGESTION IS TO OBTAIN A COPY OF THE TRANSCRIPT OF TODAY'S
3 PROCEEDINGS. WE CAN DO THAT EXPEDITIOUSLY. BRIEF THE ISSUE
4 EXPEDITIOUSLY AND COME BACK FOR ANOTHER ARGUMENT.

5 THAT IS FINE WITH ME, TOO. BUT I CERTAINLY
6 EMPHASIZED IN MY MOTION I LIKE TO GET THE ISSUES RESOLVED
7 WELL IN ADVANCE OF TRIAL SO WE CAN HAVE AN OPPORTUNITY TO
8 PREPARE. MAYBE IT WOULD BE BETTER TO HANDLE IT IN THAT WAY
9 AND THE COURT COULD TAKE A LOOK AT EVERYTHING.

10 THE COURT: BOTH GENTLEMEN MAKE GOOD POINTS HERE.
11 IT IS JUST A MATTER OF WHAT IS THE MOST EXPEDITIOUS MANNER IN
12 WHICH TO PROCEED.

13 I WOULD ASK THAT THIS MATTER BE TRANSCRIBED AS
14 QUICKLY AS POSSIBLE, WITH THE UNDERSTANDING THAT THERE ARE
15 OTHER DEMANDS ON THE STENOGRAPHER'S TIME.

16 WE WILL PROCEED IN THE MANNER THAT YOU HAVE
17 SUGGESTED. AND I THINK THAT MIGHT BE AGREEABLE WITH MR.
18 HARMON AS WELL. WE WILL WORK FROM THE TRANSCRIPT. WE WILL
19 GET THE TESTIMONY OVER WITH, THE EVIDENTIARY PORTION OF THE
20 HEARING. AND WE WILL WORRY ABOUT ARGUMENT ON THE LAW AND
21 INTERPRETING WHAT WE HAVE IN THE WAY OF TESTIMONY.

22 ALL RIGHT. VERY GOOD, THEN. YOUR MOTION TO
23 EXCLUDE IS GRANTED. DO WE HAVE POTENTIAL WITNESSES IN COURT?

24 MR. POSIN: YOUR HONOR, TO SUPPLEMENT THE MOTION
25 TO EXCLUDE, AT THE TIME OF PRELIMINARY HEARING NOTWITHSTANDING

1 THE MOTION TO EXCLUDE BEING GRANTED THERE, THERE WAS A GREAT
2 DEAL OF INTERCOMMUNICATION AMONG THE WITNESSES, AFTER THE
3 WITNESSES HAD TESTIFIED, OUTSIDE THE COURT TO THE EXTENT THAT
4 THE BAILIFF BELOW FREQUENTLY HAD TO CAUTION THE PEOPLE IN THE
5 CORRIDOR.

6 WE WOULD ASK THE COURT POST A BAILIFF OUTSIDE, AS
7 WELL, SO THAT TO ENFORCE THE COURT'S ORDER THAT THERE BE NO
8 CONVERSATION WITH REGARD TO WITNESSES WHO HERETOFORE
9 TESTIFIED, WHO WILL HAVE TESTIFIED.

10 MR. SMITH: I WOULD ALSO LIKE TO INQUIRE IF AT THE
11 PRELIMINARY HEARING, ANY OF THESE NEW WITNESSES WHICH THE
12 STATE IS PRESENTING TODAY REMAINED DURING THE COURSE OF THE
13 PRELIMINARY HEARING, BECAUSE THE EXCLUSIONARY RULE WAS
14 INVOKED.

15 SEVERAL WITNESSES REMAINED. AND IT IS MY POSITION
16 THAT IF ANY OF THESE FIVE NEW WITNESSES WERE PRESENT
17 THROUGHOUT THE COURSE OF THE PRELIMINARY HEARING, THAT WOULD
18 BE A VIOLATION OF THE EXCLUSIONARY RULE, AND THEIR TESTIMONY
19 AT THE TRIAL SHOULD BE PRECLUDED.

20 THE COURT: THE EXCLUSIONARY RULE DOES NOT
21 CONTEMPLATE ALL THE TESTIMONY THAT MIGHT BE ELICITED IN FUTURE
22 PROCEEDINGS. THE EXCLUSIONARY RULE, TO MY WAY OF THINKING,
23 HAS TO DO WITH THE WITNESSES THAT WILL BE CALLED AT THAT
24 HEARING. THE FACT THAT SOMEONE MIGHT HAVE REMAINED IN THE
25 COURTROOM AND MAY LATER TESTIFY AT THE TRIAL IN THE DISTRICT

1 COURT LEVEL, UNLESS IT IS SPECIFICALLY FORBIDDEN, IT IS NOT
 2 INAPPROPRIATE.

3 MR. SEATON: IT IS A MOOT QUESTION. THE ONLY
 4 WITNESS WE HAD AT THE PRELIMINARY HEARING WHO DID NOT TESTIFY
 5 WHO WILL BE HERE TODAY IS LISA LICATA, AND SHE DID NOT REMAIN
 6 IN THE COURTROOM. WE OBSERVED THE EXCLUSIONARY RULE AT THAT
 7 TIME.

8 THERE WASN'T A PROBLEM OUT IN THE HALLWAY, AS MR.
 9 POSIN SUGGESTS. THE PROBLEM WAS WITHIN THE REALM OF THE
 10 COURTROOM ITSELF.

11 THERE WERE SIGNALS EVIDENTLY GOING BACK AND FORTH
 12 BETWEEN SPECTATORS AND WITNESSES. AND THE COUNSEL SAW IT,
 13 AND THE JUDGE SAW IT, AND CALLED A HALT TO IT.

14 WE HAVE GOT OUR WITNESSES OUTSIDE RIGHT NOW. OUR
 15 INVESTIGATOR, MIKE CALONIN (PHONETIC) IS OUT THERE WITH THEM.
 16 WE HAVE INSTRUCTED THEM TO SPEAK WITH NO ONE. AND WE HAVE
 17 INSTRUCTED HIM TO WATCH OUT TO SEE THAT THAT DOESN'T HAPPEN.

18 THE COURT: ALL RIGHT. I WOULD ASK IN DEFERENCE
 19 TO THE CONCERN EXPRESSED BY COUNSEL THAT THE BAILIFF GO OUT
 20 AND FURTHER ADMONISH THE POTENTIAL WITNESSES OF THE
 21 EXCLUSIONARY RULE, AND I WILL SPEAK TO THEM AS THEY TESTIFY.

22 I WOULD POINT OUT TO COUNSEL THAT IF THEY ARE
 23 GOING TO BURST AS SOON AS THEY GET OUT OF THIS COURTROOM AWAY
 24 FROM THE BAILIFF AS YOU SUGGESTED, MR. POSIN, THEY MAY WELL DO
 25 THAT. SO, THERE IS A LIMIT TO WHAT WE CAN CONTROL.

1 MR. POSIN: I UNDERSTAND THAT.

2 THE COURT: VERY WELL. YOU MAY CALL YOUR FIRST
3 WITNESS, COUNSEL.

4 MR. HARMON: THANK YOU. THOMAS AKERS.

5 MR. HANDFUSS: YOUR HONOR, JUST BEFORE -- WELL, IF
6 ONE COUNSEL MAKES AN OBJECTION AT THE PRELIMINARY HEARING, CAN
7 IT BE ASSUMED IT IS FOR ALL COUNSEL?

8 THE COURT: AT THIS HEARING?

9 MR. HANDFUSS: AT THIS HEARING.

10 THE COURT: YES. ARE WE -- HAVE WE SETTLED WHO
11 MIGHT BE THE PERSON WHO WOULD BE DESIGNATED TO MAKE THE
12 INITIAL OBJECTIONS?

13 MR. PIKE: I DON'T THINK WE CAN. WE ARE ALL
14 DEALING WITH DIFFERENT CLIENTS AND DIFFERENT INTERESTS.

15 I AM SURE WE WILL RESERVE OUR COMMENTS. BUT TO
16 RELEASE UNFETTERED CONTROL OF MY CASE, I AM NOT WILLING TO DO.

17 THE COURT: WE HAVE TO ARRANGE THAT AT THE TRIAL.

18
19 THOMAS LEWIS AKERS
20 WAS CALLED AS A WITNESS ON BEHALF OF THE STATE AND, HAVING
21 BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22
23 DIRECT EXAMINATION

24 BY MR. HARMON:

25 Q STATE YOUR NAME, PLEASE.

1 A THOMAS LEWIS AKERS.

2 Q SPELL YOUR NAMES FOR THE RECORD?

3 A MY FULL NAME?

4 Q YES.

5 A T-H-O-M-A-S, L-E-W-I-S, A-K-E-R-S.

6 Q MR. AKERS, WHAT IS YOUR AGE?

7 A 18 YEARS OLD.

8 Q DID YOU ON NOVEMBER THE 5TH, 1984 LIVE IN LAS
9 VEGAS, NEVADA?

10 A YES, I DID.

11 Q ON THAT DATE, AT ANY TIME, DID YOU GO TO THE
12 ADDRESS OF 337 NORTH 13TH STREET?

13 A YES, I DID.

14 Q IS THAT IN LAS VEGAS, NEVADA?

15 A YES, IT IS.

16 Q WITH WHOM DID YOU GO TO 337 NORTH 13TH STREET?

17 A MR. DALE FLANAGAN.

18 Q DO YOU SEE MR. FLANAGAN PRESENT IN THE COURTROOM?

19 A YES, I DO.

20 Q WILL YOU POINT TO HIM AND DESCRIBE HOW HE IS
21 DRESSED?

22 A HE'S SECOND ONE OVER FROM THE LEFT, AND HE IS
23 DRESSED IN BROWN PANTS AND BROWN SHIRT.

24 Q WILL YOU POINT TO HIM, PLEASE?

25 A HE IS RIGHT THERE.

1 Q AND YOU SAY, FROM YOUR LEFT HE IS THE SECOND ONE?

2 A YES, SIR.

3 Q MOVING FROM LEFT TO RIGHT?

4 A RIGHT.

5 MR. HARMON: YOUR HONOR, MAY THE RECORD SHOW THAT
6 THE WITNESS HAS IDENTIFIED DEFENDANT DALE FLANAGAN?

7 THE COURT: IT SHALL.

8 BY MR. HARMON:

9 Q MR. AKERS, HOW DID YOU AND MR. FLANAGAN GET TO 337
10 NORTH 13TH STREET?

11 A I HAD A 1971 CHEVY EL CAMINO I DROVE.

12 Q WAS THAT YOUR VEHICLE?

13 A YES, SIR.

14 Q CAN YOU TELL US ABOUT WHAT TIME YOU ARRIVED AT THE
15 ADDRESS WE HAVE REFERRED TO?

16 A OH, APPROXIMATELY FOUR O'CLOCK IN THE AFTERNOON.

17 Q HOW LONG DID YOU REMAIN AT THAT ADDRESS?

18 A APPROXIMATELY TWO, TWO AND A HALF HOURS.

19 Q DO YOU KNOW WHOSE RESIDENCE 337 NORTH 13TH STREET
20 WAS ON THAT DATE?

21 A YES, SIR. IT WAS MR. RANDOLPH MOORE.

22 Q WHEN YOU AND MR. FLANAGAN ARRIVED AT THE
23 RESIDENCE, WAS MR. MOORE PRESENT?

24 A YES, HE WAS.

25 Q WERE OTHER PERSONS ALSO PRESENT?

1 A YES, THEY WERE.

2 Q WILL YOU EXPLAIN WHO WAS PRESENT?

3 A MIKE WALSH, MYSELF, DALE FLANAGAN, RANDY MOORE,
4 JOHNNY RAY LUCKETT AND ROY MCDOWELL.

5 Q DO YOU SEE RANDY MOORE PRESENT IN COURT?

6 A YES, SIR, I DO.

7 Q WILL YOU POINT TO HIM AND DESCRIBE AS YOU LOOK AT
8 THE DEFENDANTS FROM LEFT TO RIGHT WHICH NUMBER HE IS?

9 A HE'S RIGHT THERE. HE IS THE THIRD ONE FROM THE
10 LEFT GOING TOWARDS THE RIGHT.

11 MR. HARMON: YOUR HONOR, MAY THE RECORD INDICATE
12 THAT THE WITNESS HAS IDENTIFIED DEFENDANT RANDOLPH MOORE?

13 THE COURT: MR. AKERS, IS IT THE YOUNG MAN SEATED
14 NEXT TO THE GENTLEMAN THAT YOU REFERRED TO EARLIER AS MR.
15 FLANAGAN?

16 THE WITNESS: YES, IT IS.

17 THE COURT: THE RECORD WILL SO REFLECT.

18 BY MR. HARMON:

19 Q YOU HAVE REFERRED TO MICHAEL WALSH. DO YOU SEE
20 HIM PRESENT IN COURT?

21 A YES, SIR. HE IS THE LAST PERSON ON THE LEFT OR
22 THE FIRST PERSON ON THE LEFT.

23 MR. HARMON: YOUR HONOR, MAY THE RECORD SHOW THAT
24 THE WITNESS HAS IDENTIFIED DEFENDANT MICHAEL WALSH?

25 THE COURT: IT MAY.

1 BY MR. HARMON:

2 Q YOU HAVE MADE REFERENCE TO JOHNNY RAY LUCKETT. IS
 3 HE PRESENT IN COURT?

4 A YES, SIR, HE IS.

5 MR. SMITH: I WILL STIPULATE TO THE IDENTIFICATION
 6 OF MR. LUCKETT, YOUR HONOR.

7 THE COURT: I WOULD LIKE TO KNOW WHO HE IS.

8 THE WITNESS: HE IS THE SECOND ONE FROM THE RIGHT
 9 GOING TO THE LEFT.

10 THE COURT: ALL RIGHT. THE RECORD WILL SO
 11 REFLECT. THANK YOU.

12 BY MR. HARMON:

13 Q YOU ALSO REFER TO ROY MCDOWELL. IS HE PRESENT IN
 14 THE COURTROOM?

15 A HE IS ALL THE WAY ON THE RIGHT. THE FIRST PERSON
 16 ON THE RIGHT.

17 MR. HARMON: MAY THE RECORD SHOW, YOUR HONOR, THE
 18 IDENTIFICATION OF DEFENDANT ROY MCDOWELL?

19 THE COURT: IT MAY.

20 BY MR. HARMON:

21 Q MR. AKERS, IS IT YOUR TESTIMONY THAT EACH OF THE
 22 DEFENDANTS YOU HAVE IDENTIFIED WAS PRESENT AT 337 NORTH 13TH
 23 STREET ON NOVEMBER THE 5TH, 1984 WHEN YOURSELF AND DEFENDANT
 24 FLANAGAN ARRIVED?

25 A YES, SIR.

1 Q WHAT HAPPENED AFTER YOU ARRIVED AT THE RESIDENCE
2 OF RANDY MOORE?

3 A WE WENT IN, AND I AM NOT REAL SURE, BUT I THINK WE
4 HAD A FEW BEERS AND SAT AND TALKED.

5 Q DID THERE COME A TIME WHEN DALE FLANAGAN BROUGHT A
6 PARTICULAR SUBJECT TO THE ATTENTION OF THOSE OF YOU WHO WERE
7 THERE?

8 A YES, SIR.

9 Q CAN YOU TELL US ABOUT HOW LONG THAT WAS AFTER YOUR
10 ARRIVAL AT THE RESIDENCE?

11 A BETWEEN 20 AND 30 MINUTES.

12 Q WERE ALL FIVE OF DEFENDANTS WHO WERE PRESENT IN
13 COURT STILL AT 337 NORTH 13TH STREET WHEN MR. FLANAGAN BROUGHT
14 SOMETHING UP?

15 A YES, THEY WERE.

16 Q WHAT DID HE SAY?

17 A HE WAS TALKING ABOUT MURDERING HIS GRANDPARENTS.

18 Q DID HE INDICATE WHEN THAT WAS TO HAPPEN?

19 A NO, HE DIDN'T.

20 Q DID YOU HEAR ANY DISCUSSION ABOUT WEAPONS OF WHICH
21 WERE TO BE USED?

22 A THEY SAID THAT THERE WOULD BE SOME.

23 MR. PIKE: OBJECTION AS TO "THEY." I ASK THAT IT
24 BE CHARACTERIZED AS TO WHAT EACH SPECIFIC PERSON STATED.

25 THE COURT: ALL RIGHT.

1 THE WITNESS: YES, SIR.

2 THE COURT: PROCEED WITH THAT UNDERSTANDING.

3 BY MR. HARMON:

4 Q YOU HAVE INDICATED "THEY SAID." CAN YOU TELL US,
5 MR. AKERS, TO THE BEST OF YOUR RECOLLECTION, WHAT PERSON OR
6 PERSONS EXPRESSED SOMETHING ABOUT GUNS OR WEAPONS, EXCUSE ME?

7 A DALE FLANAGAN SAID THAT ROY WOULD BE BRINGING A
8 .22 PISTOL. THERE WAS A .22 LONG RIFLE THAT WAS IN MR.
9 MOORE'S POSSESSION. AND I AM NOT SURE ABOUT THE SAWED-OFF.

10 Q WHEN YOU REFER TO ROY, TO WHOM ARE YOU SPEAKING?

11 A ROY MCDOWELL.

12 Q DID YOU SEE GUNS IN THE RESIDENCE THAT EVENING?

13 A NO, I DIDN'T.

14 Q WAS THERE ANY DISCUSSION AS TO HOW THIS OFFENSE OF
15 KILLING THE GRANDPARENTS OF MR. FLANAGAN WAS TO OCCUR?

16 A THEY DISCUSSED GOING --

17 MR. HANDFUSS: OBJECTION, YOUR HONOR.

18 THE COURT: PLEASE INDICATE WHO YOU ARE REFERRING
19 TO.

20 THE WITNESS: DALE DISCUSSED GOING IN THE BACK
21 DOOR.

22 BY MR. HARMON:

23 Q DALE FLANAGAN?

24 A DALE FLANAGAN. IT WAS DISCUSSED BY ROY THAT --
25 NO, IT WAS DISCUSSED BY RANDY THAT THE BACK DOOR WOULDN'T BE

1 GOOD, BECAUSE SOMEBODY MIGHT THINK THAT IF YOU ARE GOING IN
 2 THE BACK DOOR, YOU HAVE A KEY. THEN, OBVIOUSLY, THEY WOULD
 3 KNOW WHO YOU ARE.

4 Q WAS A DECISION MADE AS TO HOW ENTRY WOULD BE MADE
 5 INTO THE HOUSE?

6 A THROUGH THE WEST SIDE WINDOW.

7 Q DID YOU HEAR ANY DISCUSSION AS TO HOW?

8 MR. POSIN: YOUR HONOR, WE ARE GETTING INTO THE
 9 AREA OF DISCUSSION, RATHER THAN EDUCATING WHAT ANY OF THESE
 10 PRECISE INDIVIDUALS MADE WHICH STATEMENT.

11 THE COURT: WELL, ALL RIGHT. PROCEED.

12 BY MR. HARMON:

13 Q DO YOU RECALL WHO SAID THAT?

14 A DALE FLANAGAN.

15 Q DID ANYONE MENTION HOW ENTRY WOULD BE MADE THROUGH
 16 THE SIDE WINDOW?

17 A RANDY MOORE SUGGESTED THE WINDOW SHOULD BE BROKE.
 18 AND THEN, UPON ALL ENTRY WOULD BE MADE.

19 Q DID YOU HEAR ANYONE SAY HOW THE GRANDPARENTS OF
 20 MR. FLANAGAN WERE TO BE KILLED?

21 A MR. FLANAGAN SAID THAT IF IT HAD TO BE DONE, HE
 22 WOULD KILL THE GRANDMOTHER. AND, IF POSSIBLE, HE WOULD GET
 23 SOMEONE ELSE TO DO IT.

24 MR. MOORE SAID THAT IF IT HAD TO BE DONE, HE WOULD
 25 SHOOT THE GRANDFATHER. BUT, IF POSSIBLE, WOULD GET SOMEBODY

1 ELSE TO DO THAT.

2 Q DID YOU HEAR ANYONE SAY ANYTHING ABOUT TAKING
3 ANYTHING FROM THE GRANDPARENTS' RESIDENCE AFTER ENTRY WAS MADE?

4 A MR. FLANAGAN SAID THAT IT SHOULD BE MADE TO LOOK
5 AS MUCH LIKE A ROBBERY AS POSSIBLE. THE FURNITURE SHOULD BE
6 MOVED TO NEAR THE DOOR. AND ANY MONEY, COINS, \$2 BILL
7 COLLECTION, THEY WOULD TRY TO FIND THEM AND TAKE THOSE.

8 Q WERE YOU AT ANY TIME ASKED TO PARTICIPATE THAT
9 EVENING IN THIS?

10 A NOT AT THAT MOMENT.

11 Q CAN YOU TELL US APPROXIMATELY WHAT TIME AND NOW
12 THE EVENING YOU'RE REFERRING TO?

13 A IT GOT TO BE APPROXIMATELY 7:00, 7:30.

14 Q DID THERE COME A TIME WHEN YOU WERE ASKED TO
15 PARTICIPATE?

16 A APPROXIMATELY, TWO TO THREE WEEKS LATER.

17 Q BUT, MR. AKERS, PERHAPS YOU MISUNDERSTOOD MY TIME
18 FRAME. I AM DIRECTING YOU TO THE EVENING OF NOVEMBER THE 5TH,
19 1984. I AM NOT TALKING ABOUT THE FIRST TIME YOU HAD
20 CONVERSATION. I AM TALKING ABOUT THE VERY EVENING THAT THIS
21 OCCURRED.

22 MR. POSIN: IF I PLEASE, THE WITNESS TESTIFIED
23 THIS CONVERSATION WHICH HE RELATES TOOK PLACE NOVEMBER 5TH.
24 THAT WAS HIS BASIC TESTIMONY.

25 MR. HARMON: I HEARD HIM.

1 THE COURT: SO, WHAT IS YOUR QUESTION, MR. HARMON?

2 BY MR. HARMON:

3 Q SO, MY QUESTION IS DID HE UNDERSTAND THE TIME
4 FRAME TO WHICH I HAVE REFERENCED? I AM TALKING ABOUT THE
5 EVENING OF THESE OFFENSES.

6 A OKAY. COULD YOU REPEAT THE LAST QUESTION?

7 Q DID YOU MISUNDERSTAND WHEN I WAS ASKING YOU
8 ABOUT --

9 A YES.

10 THE COURT: ALL RIGHT. FOR CLARIFICATION, MR.
11 AKERS, WHAT YOU HAVE INDICATED, DO YOU KNOW WHAT DATE THAT
12 WAS?

13 THE WITNESS: I KNOW THE DATE. I DIDN'T
14 UNDERSTAND THE QUESTION.

15 THE COURT: ALL RIGHT. LET'S GET IT OUT SO WE ARE
16 ALL THINKING ALONG THE SAME LINES.

17 ALL THESE THINGS THAT YOU HAVE INDICATED THUS FAR,
18 DID THEY HAPPEN ON ONE EVENING?

19 THE WITNESS: YES, SIR.

20 THE COURT: WHAT DATE WAS THAT?

21 THE WITNESS: NOVEMBER THE 5TH.

22 THE COURT: OKAY.

23 BY MR. HARMON:

24 Q MR. AKERS, DID THERE COME A TIME WHEN YOU WENT
25 SOMEWHERE IN YOUR CHEVROLET EL CAMINO WITH THE OTHER FIVE

1 DEFENDANTS WHO ARE PRESENT IN COURT?

2 A YES, SIR.

3 Q WHERE DID YOU GO?

4 A WE WENT TO THE ADDRESS ON WASHBURN.

5 Q DO YOU KNOW THE EXACT ADDRESS?

6 A NO, SIR, I DON'T. IF I HEARD IT, I WOULD KNOW IT.

7 Q ARE YOU REFERRING TO 5851 WASHBURN ROAD?

8 A YES, SIR.

9 Q DO YOU KNOW WHO RESIDED AT 5851 WASHBURN ROAD?

10 A CARL AND COLLEEN GORDON.

11 Q DO YOU KNOW WHAT THEIR RELATIONSHIP, IF ANY, WAS
12 TO DALE FLANAGAN?

13 A GRANDPARENTS.

14 Q DO YOU KNOW ON WHAT DATE YOU WENT TO THEIR -- THAT
15 RESIDENCE?

16 A IT WAS DECEMBER THE 6TH, I THINK.

17 MR. HANDFUSS: YOUR HONOR, JUST TO CLARIFY THE
18 PROBLEM WE HAD BEFORE ABOUT THE DATE. IF I MAY JUST TAKE ONE
19 VOIR DIRE QUESTION. ALL I WOULD LIKE TO ASK MR. AKERS, IF THE
20 COURT WOULD ALLOW, WHEN HE TALKED ABOUT TWO TO THREE WEEKS
21 LATER, IS THIS NOW THE DATE HE THOUGHT HE WAS MENTIONING?
22 WHEN HE SAID TWO TO THREE WEEKS LATER, IS THIS THE INCIDENT?

23 MR. HARMON: YOUR HONOR, WE ARE GOING TO CLARIFY
24 THAT. THERE IS NO POINT FOR VOIR DIRE. I AM TRYING TO LAY
25 FOUNDATION MYSELF. THAT IS THE REASON I BACKTRACKED.

1 THE COURT: IF IT IS NOT CLEARED AT A LATER TIME,
2 WE WILL LOOK INTO IT.

3 BY MR. HARMON:

4 Q MR. AKERS, HAVE YOU PREVIOUSLY GIVEN A NUMBER OF
5 STATEMENTS TO REPRESENTATIVES OF THE LAS VEGAS METROPOLITAN
6 POLICE DEPARTMENT?

7 A YES, I DID.

8 Q HAS REFERENCE IN THOSE STATEMENTS BEEN MADE TO THE
9 DATE THAT YOU WENT TO 5851 WASHBURN?

10 A IN THE THIRD STATEMENT.

11 MR. HARMON: YOUR HONOR, MAY I HAVE THE COURT'S
12 INDULGENCE?

13 THE COURT: YES, YOU MAY.

14 MR. HARMON: MAY I APPROACH THE WITNESS?

15 THE COURT: YES.

16 BY MR. HARMON:

17 Q MR. AKERS, I AM SHOWING YOU A COPY OF A DOCUMENT
18 WHICH APPEARS TO BE A STATEMENT YOU GAVE TO REPRESENTATIVES OF
19 THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT. IS IT A
20 STATEMENT YOU GAVE?

21 A YES, IT IS.

22 MR. SMITH: MAY WE HAVE THE DATE, COUNSEL?

23 BY MR. HARMON:

24 Q DO YOU RECALL THE DATE ON WHICH YOU GAVE THIS
25 STATEMENT?

1 A 12-7-84.

2 Q DECEMBER 7TH, 1984?

3 A YES, SIR.

4 Q CAN YOU, BY REFERRING TO THIS STATEMENT, REFRESH
5 YOUR MEMORY AS TO THE EXACT DATE IT WAS THAT YOU AND THE FIVE
6 DEFENDANTS WENT TO 5851 WASHBURN ROAD?

7 MR. POSIN: THERE IS NO BASIS FOR THIS WITNESS'S
8 RECOLLECTION BEING REFRESHED. HE TESTIFIED TO DATE. AND I
9 DON'T KNOW WHETHER COUNSEL IS SEEKING TO IMPEACH HIM OR
10 RESURRECT OR ENHANCE HIS TESTIMONY. BUT WHEN A WITNESS
11 TESTIFIES FROM HIS OWN KNOWLEDGE AND OWN RECOLLECTION, THERE
12 IS NO REASON FOR HIS RECOLLECTION TO BE REFRESHED.

13 THE COURT: MR. AKERS, WOULD REVIEWING THAT
14 DOCUMENT REFRESH YOUR MEMORY AS TO DATES?

15 THE WITNESS: YES, IT WOULD.

16 THE COURT: ARE YOU UNSURE TO ANY EXTENT AS TO
17 WHAT THE DATES ARE WITHOUT REFERRING TO THE DOCUMENT?

18 THE WITNESS: IT WAS EITHER --

19 THE COURT: ANSWER MY QUESTION. ARE YOU UNSURE TO
20 ANY EXTENT TO WHAT THE EXACT DATES WERE CONCERNING THESE
21 EVENTS?

22 THE WITNESS: YES, SIR. TO WHAT THE EXACT DATES
23 ARE, I AM.

24 THE COURT: I WILL ALLOW HIM TO REFERENCE THE
25 MATERIAL.

1 MR. HARMON: THANK YOU, YOUR HONOR.

2 BY MR. HARMON:

3 Q MR. AKERS, WOULD YOU REFER TO THE TOP PART OF PAGE
4 FOUR OF THE STATEMENT YOU GAVE ON DECEMBER THE 7TH, 1984.
5 READ THAT TO YOURSELF AND TELL US IF THAT REFRESHES YOUR
6 MEMORY REGARDING THE DATE WHICH YOU AND THE OTHER FIVE
7 DEFENDANTS, WHO WERE PRESENT IN COURT, WENT TO 5851 WASHBURN
8 ROAD IN YOUR CHEVY EL CAMINO?

9 A YES, IT DOES.

10 Q WHAT WAS THE DATE?

11 A 11-5-84.

12 Q IS THAT NOVEMBER 5TH, 1984?

13 A YES.

14 Q NOW, YOU PREVIOUSLY GAVE TESTIMONY ABOUT
15 ENCOUNTERING CERTAIN PERSONS AT THE RESIDENCE OF RANDY MOORE?

16 A YES, SIR, I DID.

17 Q WHEN WAS IT THAT THE CONVERSATIONS OCCURRED TO
18 WHICH YOU HAVE PREVIOUSLY TESTIFIED?

19 A WHEN WAS IT?

20 Q YES.

21 A COULD YOU, PLEASE, REPHRASE IT?

22 Q SURE. YOU HAVE ALREADY TESTIFIED THAT ON A
23 PARTICULAR DATE THAT YOU TOOK MR. FLANAGAN TO THE RESIDENCE OF
24 RANDY MOORE. AND ALL FIVE DEFENDANTS, IN ADDITION TO
25 YOURSELF, WERE PRESENT AT THAT RESIDENCE, AND YOU HAVE

1 DESCRIBED CERTAIN CONVERSATIONS.

2 A YES, SIR.

3 Q CAN YOU TELL US WHEN THAT WAS, APPROXIMATELY, IN
4 RELATIONSHIP TO NOVEMBER THE 5TH, 1984?

5 A APPROXIMATELY, ONE MONTH BEFORE THAT.

6 Q THANK YOU. I WANT TO BE SURE YOU UNDERSTAND.

7 NOW, I AM ASKING YOU ABOUT NOVEMBER THE 5TH, 1984.

8 A OKAY.

9 Q WAS THAT THE SAME EVENING THAT YOU WENT TO 5851
10 WASHBURN ROAD?

11 A YES, SIR, IT WAS.

12 Q MR. AKERS, ON THAT DATE, DID YOU AGAIN GO TO THE
13 RESIDENCE OF RANDY MOORE?

14 A YES, SIR, I DID.

15 Q IS THAT AT 337 NORTH 13TH STREET?

16 A YES, SIR, IT IS.

17 Q IN LAS VEGAS, NEVADA?

18 A YES, SIR.

19 Q HOW DID YOU GET TO MR. MOORE'S RESIDENCE?

20 A BY MY 1971 CHEVY EL CAMINO.

21 Q THE SAME VEHICLE YOU HAD PREVIOUSLY REFERRED TO?

22 A YES, SIR.

23 Q DID YOU GO TO THE RESIDENCE BY YOURSELF OR WITH
24 SOMEONE ELSE?

25 A MR. FLANAGAN WAS WITH ME.

1 Q HE WAS, AGAIN, WITH YOU?

2 A YES.

3 Q WHAT HAPPENED AFTER THE TWO OF YOU ARRIVED AT THE
4 RESIDENCE OF RANDY MOORE?

5 A WE WENT INSIDE. WE DRANK SOME BEER. ROY MCDOWELL
6 SHOWED UP APPROXIMATELY TEN MINUTES AFTER WE DID.

7 DALE FLANAGAN SAID THAT IT WAS ON FOR TONIGHT.

8 Q WHAT OTHER PERSONS WERE PRESENT AT THE TIME DALE
9 FLANAGAN MADE THAT STATEMENT?

10 A MICHAEL WALSH, ROY MCDOWELL, DALE FLANAGAN,
11 MYSELF, RANDY MOORE, JOHNNY RAY LUCKETT AND I CAN'T REMEMBER
12 THE OTHER ONES NOW.

13 Q ARE YOU REFERRING TO JOHN LUCAS?

14 A YES, SIR, I AM.

15 Q WERE ALL THESE PERSONS PRESENT IN THE RESIDENCE AT
16 THE TIME MR. FLANAGAN SAID, "IT'S ON FOR TONIGHT"?

17 A YES, SIR, THEY WERE.

18 Q DID MR. FLANAGAN PROCEED TO EXPLAIN WHAT HE MEANT
19 WHEN HE SAID IT WAS ON FOR TONIGHT?

20 A YES, SIR, HE DID.

21 Q WHAT DID HE SAY?

22 A HE SAID THAT WE WERE GOING TO GO KILL THE
23 GRANDPARENTS.

24 Q WERE YOU ASKED TO BE A PARTICIPANT AT THAT TIME?

25 A I WAS TOLD I WAS GOING TO DRIVE.

1 Q WHO TOLD YOU YOU WERE GOING TO DRIVE?

2 A DALE FLANAGAN.

3 Q DID YOU WANT TO GO ALONG AT THAT TIME, SIR?

4 A NOT PARTICULARLY.

5 Q DID YOU GO ALONG?

6 A YES, SIR, I DID.

7 Q WHY?

8 A IT WAS MENTIONED THAT IF ANYONE CROSSED HIM, HE

9 WOULD GET VENGEANCE WITH THE MOST IMPORTANT PEOPLE IN THEIR

10 LIFE.

11 Q THAT WAS A STATEMENT MADE BY MR. FLANAGAN?

12 A YES, SIR, IT WAS.

13 Q DID YOU SEE GUNS AT THE RESIDENCE ON THIS DATE,

14 NOVEMBER THE 5TH, 1984?

15 A YES, SIR, I DID.

16 Q WHAT DID YOU OBSERVE?

17 A .22 CALIBER PISTOL, REVOLVER.

18 Q DID YOU SEE SOMEONE WITH THAT GUN?

19 A MR. DALE FLANAGAN.

20 Q DID YOU SEE WHAT HE DID WITH THE .22 CALIBER

21 REVOLVER?

22 A HE WAS TAPPING IT ON HIS LEG AT THE TIME.

23 Q DID YOU SEE WHETHER IT WAS LOADED WITH AMMUNITION?

24 A YES, SIR, IT WAS.

25 Q HOW DO YOU KNOW IT WAS LOADED?

1 A WELL, HE TOSSED IT TO ME BEFORE HE LOADED IT, AND
2 ASKED ME TO MAKE SURE IT WORKED. AND I THREW IT BACK, AND
3 SAID, "I DON'T KNOW IF IT IS GOING TO WORK OR NOT."

4 Q DID YOU SEE OTHER GUNS AT THE RESIDENCE THE
5 EVENING OF NOVEMBER 5, 1984?

6 A YES, SIR, I DID.

7 Q WHAT OTHER WEAPONS?

8 A .22 CALIBER LONG RIFLE, SEMIAUTOMATIC, IF I AM NOT
9 MISTAKEN.

10 Q DID YOU SEE WHO HAD THAT GUN?

11 A MR. RANDY MOORE.

12 Q DID YOU SEE A THIRD WEAPON?

13 A .22 CALIBER SAWED-OFF SINGLE SHOT RIFLE.

14 Q DID YOU SEE WHO HAD THAT WEAPON?

15 A MR. JOHNNY RAY LUCKETT.

16 Q DID YOU OBSERVE HOW MR. LUCKETT WAS ACTING ON THE
17 EVENING IN QUESTION?

18 A VERY SCARED, VERY NERVOUS. MAYBE PERHAPS HE HAD
19 BEEN THREATENED.

20 Q YOU ARE JUST SPECULATING THAT PERHAPS HE HAD BEEN?

21 A YES, SIR, I AM.

22 Q DID THERE COME A TIME WHEN YOU SAW MR. LUCKETT AND
23 MR. MOORE GO INTO SOME OTHER ROOM?

24 A YES, SIR. THEY WENT INTO RANDY'S BEDROOM.

25 Q DO YOU KNOW WHAT THEY SAID ONCE THEY WERE IN THE

1 BEDROOM?

2 A NO, SIR, I DO NOT.

3 Q DID EITHER MR. LUCKETT OR MR. MOORE HAVE A WEAPON
4 WHEN THEY WENT INTO THE BEDROOM?

5 A MR. MOORE HAD THE .22 LONG RIFLE.

6 Q HOW LONG WERE THEY IN THE BEDROOM?

7 A APPROXIMATELY, FIVE TO TEN MINUTES.

8 Q WHAT HAPPENED AFTER THE TWO MEN CAME OUT?

9 A JOHNNY RAY WAS REAL QUIET, REAL NERVOUS, I COULD
10 TELL. AND RANDY WENT ON ABOUT WHAT HE WAS DOING.

11 MR. POSIN: I DIDN'T HEAR THE LAST PORTION OF THAT
12 ANSWER.

13 THE WITNESS: RANDY WENT ON ABOUT WHAT HE WAS
14 DOING.

15 BY MR. HARMON:

16 Q DID YOU SEE MR. LUCKETT WITH THE SAWED-OFF .22
17 CALIBER SINGLE SHOT RIFLE BEFORE OR AFTER HE WENT INTO THE
18 BEDROOM WITH MR. MOORE?

19 A AFTER.

20 Q WAS THERE, DURING THE EVENING OF NOVEMBER THE 5TH,
21 1984, ANY DISCUSSION ABOUT HOW ENTRY WOULD BE MADE INTO THE
22 RESIDENCE OF MR. FLANAGAN'S GRANDPARENTS?

A COULD YOU REPHRASE THAT?

Q DID ANY OF THE PEOPLE THERE TALK ABOUT HOW THEY
WOULD GET INTO THE GRANDPARENTS' RESIDENCE?

1 A IS THIS ON THE NIGHT OF THE 5TH?

2 Q NOVEMBER 5TH, 1984.

3 A THEY SAID THEY WOULD --

4 MR. SMITH: LACK OF SPECIFICITY AS TO WHO SAID
5 WHAT.

6 BY MR. HARMON:

7 Q DO YOU REMEMBER WHO SAID THIS?

8 A DALE FLANAGAN AND RANDY MOORE WERE TALKING ABOUT
9 GOING IN THROUGH THE WEST WINDOW BY BREAKING IT AND THEN
10 GAINING ENTRY.

11 THE COURT: MR. HARMON, IF I MIGHT. PERHAPS SOME
12 INDICATION AS TO WHAT THE PHYSICAL LAYOUT OF THIS ROOM OR
13 HOUSE OR WHATEVER IS AND THE PROXIMITY OF THESE INDIVIDUALS
14 DURING THESE CONVERSATIONS. WE HAVE INDIVIDUALS SPEAKING TO
15 EACH OTHER, BUT I AM CURIOUS ABOUT WHERE THE OTHER
16 INDIVIDUALS ARE DURING THIS.

17 YOU MIGHT INDICATE -- ASK THE WITNESS HOW CLOSE.
18 ARE WE TALKING ABOUT A GROUP SITTING TOGETHER IN A ROOM? ARE
19 WE TALKING ABOUT PEOPLE SCATTERED THROUGHOUT THE HOUSE?

20 BY MR. HARMON:

21 Q DID YOU HEAR THE CONCERN THAT THE COURT HAS?

22 A YES, I DID.

23 Q CAN YOU ATTEMPT TO ANSWER HIS QUESTIONS?

24 A EVERYBODY WAS BASICALLY IN THE LIVING ROOM. A FEW
25 PEOPLE WOULD LEAVE TO THE BATHROOM OR GO TO ANOTHER ROOM OR

1 BACK AND FORTH. BUT EVERYBODY WAS BASICALLY IN THE LIVING
2 ROOM.

3 THE COURT: THIS IS NOVEMBER 5TH?

4 THE WITNESS: YES, SIR, IT IS.

5 BY MR. HARMON:

6 Q DID YOU SEE ANYONE ACTUALLY BRING A WEAPON TO THE
7 APARTMENT THAT EVENING?

8 A MR. ROY MCDOWELL BROUGHT THE .22 REVOLVER, PISTOL.

9 Q WAS THAT THE SAME WEAPON THAT WAS GIVEN TO MR.
10 FLANAGAN?

11 A YES, SIR, IT WAS.

12 Q DID YOU HEAR MR. MCDOWELL OR ANYONE ELSE SAY WHERE
13 THAT WEAPON HAD COME FROM?

14 A MR. MCDOWELL SAID THAT IT HAD BEEN STOLEN FROM A
15 HOUSE. I DO NOT KNOW THE ADDRESS OF THE HOUSE.

16 MR. HANDFUSS: YOUR HONOR, I MOVE TO STRIKE THAT
17 LAST RESPONSE AS IRRELEVANT TO THESE PROCEEDINGS.

18 THE COURT: MR. HARMON.

19 MR. HARMON: YOUR HONOR, WE DON'T HAVE A JURY
20 HERE. I AM NOT SURE WHETHER THE TESTIMONY DEVELOPED IS GOING
21 TO BE RELEVANT OR IRRELEVANT, BUT --

22 MR. HANDFUSS: MY PROBLEM IS --

23 MR. HARMON: IT OCCURS TO ME THAT IT PROBABLY IS
24 RELEVANT. IF A WEAPON IS GOING TO BE USED IN A MURDER, THEN
25 THE PARTIES THAT ARE USING THEIR HEADS DON'T WANT IT TO BE A

1 GUN THAT IS REGISTERED TO THEM OR OTHERWISE CONNECTED TO THEM.

2 MR. HANDFUSS: IT IS STILL NOT RELEVANT TO THE
3 PROCEEDING HERE. THIS IS EVIDENTIARY HEARING FOR SPECIFIC
4 PURPOSE. THERE IS NO JURY HERE.

5 BUT IF WORSE COMES TO WORSE, AND FOR SOME REASON
6 AT THE TIME OF TRIAL THIS PARTICULAR TRANSCRIPT HAS TO BE
7 INTRODUCED INTO EVIDENCE, EITHER FOR CROSS-EXAMINATION
8 PURPOSES OR OTHER PURPOSES, I DON'T THINK THAT PARTICULAR
9 QUESTION OR RESPONSE IS RELEVANT TO ANYTHING WE HAVE TO DO
10 HERE OR EVEN WOULD BE RELEVANT TO ANYTHING IN A TRIAL.

11 IN ADDITION, UNDER THE CODE, IT COULD BE CONSTRUED
12 AS EVIDENCE OF OTHER WRONGDOINGS, AND IT COULD BE EXCLUDED ON
13 THAT GROUND.

14 THE COURT: ALL RIGHT. MR. MCDOWELL, IT IS
15 SUGGESTED AT LEAST THROUGH THE LAST STATEMENT BY THE WITNESS,
16 BROUGHT THE .22 PISTOL TO THE HOME. ANY KNOWLEDGE HE HAS OF
17 THAT PISTOL GOES FURTHER TO SUBSTANTIATE THE FACT THAT HE HAD
18 POSSESSION OF IT AND KNOWINGLY BROUGHT IT TO THE RESIDENCE.

19 YOUR POINT IS WELL TAKEN THAT IT COULD BE
20 PREJUDICIAL AT A LATER PROCEEDING IF, IN FACT, SUCH WOULD
21 COME OUT. I DON'T KNOW THE CIRCUMSTANCES THAT MIGHT HAPPEN.
22 IF IT WERE TO HAPPEN, A MOTION TO SEVER OR TO EXCLUDE THAT
23 TESTIMONY WOULD BE APPROPRIATE.

24 AT THIS TIME, I AM NOT GOING TO RESTRICT THAT
25 EVIDENCE BASED ON YOUR MOTION FOR RELEVANCE, OBJECTION BASED

1 ON THAT. PROCEED.

2 BY MR. HARMON:

3 Q MR. AKERS, DID THERE COME A TIME WHEN YOURSELF AND
4 A NUMBER OF THE OTHER PEOPLE WHO WERE PRESENT AT 337 NORTH
5 13TH STREET LEFT THE APARTMENT IN YOUR CHEVY EL CAMINO?

6 A YES, SIR.

7 Q CAN YOU ESTIMATE ABOUT WHAT TIME IT WAS?

8 A APPROXIMATELY, 10:30, 11:00.

9 Q IS IT STILL THE EVENING OF NOVEMBER 5TH, 1984?

10 A YES, SIR, IT IS.

11 Q WHAT VEHICLE WAS USED?

12 A MY 1971 CHEVY EL CAMINO.

13 Q WHO DROVE THE VEHICLE?

14 A MYSELF.

15 Q WHAT OTHER PERSONS WERE PRESENT IN THE VEHICLE
16 WITH YOURSELF?

17 A DALE FLANAGAN, JOHNNY RAY LUCKETT IN THE FRONT
18 SEAT. RANDY MOORE, ROY MCDOWELL AND MICHAEL WALSH IN THE BACK
19 OF THE TRUCK.

20 Q YOU HAVE SAID THAT JOHN LUCAS HAD ALSO BEEN
21 PRESENT AT MR. MOORE'S APARTMENT. DID HE COME WITH YOU?

22 A NO, SIR, HE DIDN'T.

23 Q DID YOU SEE WHERE HE WAS WHEN YOU LEFT?

24 A ASLEEP ON THE RECLINER CHAIR.

25 Q WERE GUNS TAKEN WHEN THE SIX OF YOU GOT INTO YOUR

1 CHEVROLET EL CAMINO?

2 A YES, SIR.

3 Q WHO BROUGHT THE GUNS?

4 A DALE FLANAGAN HAD THE PISTOL, RANDY MOORE HAD THE
5 LONG RIFLE, AND JOHNNY RAY LUCKETT HAD THE SAWED-OFF.

6 Q DID YOU SEE WHERE THOSE GUNS WERE PLACED WHEN THE
7 PARTIES GOT INTO YOUR VEHICLE?

8 A DALE KEPT THE PISTOL. THE LONG RIFLE AND THE
9 SAWED-OFF, IF I AM NOT MISTAKEN, WERE PUT IN THE BACK.

10 Q WHAT HAPPENED THEN, SIR?

11 A WE PROCEEDED TO DRIVE TO 7-ELEVEN BY THE HOUSE,
12 GOT FIVE DOLLARS IN GAS. THEN WE DROVE DOWN JONES PAST THE
13 RESIDENCE, ALL THE WAY TO THE END OF JONES ABOUT A MILE AFTER
14 IT TURNS TO A DIRT ROAD.

15 THEN, RANDY MOORE TEST-FIRED A RIFLE. WE ALL
16 LOADED BACK IN THE CAR, WENT BACK, TURNED AND WENT TO THE
17 RESIDENCE.

18 Q YOU WENT TO WHICH RESIDENCE?

19 A DALE FLANAGAN'S GRANDPARENTS.

20 Q THE RESIDENCE AT 5851 WASHBURN ROAD?

21 A YES, SIR.

22 Q DID YOU KNOW HOW TO GET THERE FROM 337 NORTH 13TH
23 STREET?

24 A YES, I DID.

25 Q DID YOU PARK YOUR VEHICLE IN SOME PLACE WHICH WAS

1 CLOSE TO THE HOUSE?

2 A IT WAS THE NEXT LOT OVER, BUT IT WAS STILL THE
3 SAME PERSON'S PROPERTY.

4 Q WHAT HAPPENED THEN?

5 A I WAS INSTRUCTED TO GO TO THE TRAILER AND GET A
6 BOX OF TAPES, AND EVERYONE ELSE MOVED TOWARDS THE HOUSE.

7 I DIDN'T SEE THEM GET TO THE HOUSE, BUT I SAW
8 THEM ALL MOVING TO THE HOUSE.

9 Q YOU'RE REFERRING TO ALL FIVE DEFENDANTS?

10 A YES, SIR, I AM.

11 Q WHO INSTRUCTED YOU TO GO TO A TRAILER AND GET SOME
12 TAPES?

13 A DALE FLANAGAN.

14 Q WHAT TRAILER ARE YOU SPEAKING OF?

15 A HIS RESIDENCE IN THE NEXT LOT OVER.

16 Q FROM THE HOUSE OF HIS GRANDPARENTS?

17 A YES, SIR.

18 Q DID YOU, IN FACT, FOLLOW THOSE INSTRUCTIONS AND GO
19 TO HIS TRAILER?

20 A YES, SIR, I DID.

21 Q DID YOU GET SOME TAPES?

22 A YES, SIR, I DID.

23 Q WHAT TYPE OF TAPES ARE YOU TALKING ABOUT?

24 A CASSETTE TAPES TO BE PLAYED IN THE STEREO.

25 Q AFTER YOU GOT SOMEWHERE IN THE AREA OF THE TRAILER

1 OF MR. FLANAGAN, DID YOU HEAR ANYTHING?

2 A I WAS INSIDE THE TRAILER. I HEARD A WINDOW BREAK,
 3 TWO GUNSHOTS, A WOMAN SCREAM AND A MAN YELL AND,
 4 APPROXIMATELY, FIVE OR SIX MORE GUNSHOTS.

5 Q WHAT WAS YOUR REACTION, IF ANY, TO THIS?

6 A I WAS VERY SCARED. AND I LEFT THE TRAILER AT
 7 QUITE A PACE TOWARDS MY CAR.

8 Q WHAT WERE YOUR INTENTIONS AT THAT TIME?

9 A LEAVING.

10 Q WERE YOU ABLE TO LEAVE?

11 A NO, I WASN'T.

12 Q WHY?

13 A MY CAR WOULDN'T START.

14 Q DID YOU TRY TO START IT?

15 A YES, SIR, I DID.

16 Q EITHER AT OR SHORTLY AFTER THE TIME WHEN YOU
 17 DISCOVERED YOUR CAR WOULDN'T START, DID YOU SEE ONE OF THE
 18 OTHER DEFENDANTS NEARBY?

19 A JUST ABOUT THE TIME I GOT TO MY CAR, JOHNNY RAY
 20 STOOD UP AND WAS VERY SCARED, HAD SAWED-OFF IN HIS HAND.

21 Q WHERE WAS HE WHEN HE STOOD UP?

22 A HIDING BY SOME TUMBLEWEED BUSHES ON THE OUTSIDE OF
 23 THE FENCE.

24 Q CAN YOU TELL US WHAT THE APPROXIMATE TIME INTERVAL
 25 WOULD HAVE BEEN FROM THE TIME YOU HEARD THE LAST SHOTS UNTIL

1 YOU SAW MR. LUCKETT WITH THE SAWED-OFF RIFLE?

2 A ONE, TWO MINUTES AT THE MOST.

3 Q YOU SAY HE WAS ACTING VERY SCARED?

4 A YES, SIR, HE WAS SCARED.

5 Q WHAT HAPPENED, THEN, AFTER HE STOOD UP AND YOU SAW
6 HE WAS SCARED AND YOU SAW HE HAD THE SAWED-OFF WEAPON?

7 A I STILL TRIED TO START MY CAR. HE CAME OVER TO
8 THE CAR. AND HE SAID, "LET'S GET OUT OF HERE." I OPENED THE
9 HOOD AND TOLD HIM WHENEVER -- I TOLD HIM, "I WILL TELL YOU WHEN
10 TO START THE CAR." I BEAT ON THE BATTERY POSTS. AND I YELLED
11 AT HIM TO TRY TO START THE CAR. IT WOULDN'T START.

12 I BEAT ON THE BATTERY POSTS SOME MORE. I YELLED
13 AT HIM AGAIN, "START THE CAR." HE AGAIN TRIED AND THE CAR
14 STARTED.

15 Q EITHER AT THE APPROXIMATE TIME THE VEHICLE STARTED
16 OR SHORTLY AFTER THAT, DID YOU SEE ANY OF THE OTHERS?

17 A YES, SIR. I SAW THEM ALL COMING OUT OF THE FRONT
18 OF THE HOUSE. I DIDN'T SEE THEM COME OUT OF THE DOOR, BECAUSE
19 THERE WAS A GARAGE IN THE WAY. BUT THEY ROUNDED THE CORNER
20 WHERE THE GARAGE IS AT, AND THEY ALL RAN TOWARDS MY CAR.

21 Q WHAT PERSONS RAN TOWARDS YOUR CAR?

22 A IT WAS MIKE WALSH, ROY MCDOWELL, DALE FLANAGAN,
23 AND -- I AM SORRY. IT WAS MICHAEL, IT WAS DALE, ROY, AND
24 RANDY.

25 Q ALL FOUR OF THE DEFENDANTS WITH THE EXCEPTION OF

1 MR. LUCKETT?
2 A YES, SIR.
3 Q IS THAT CORRECT?
4 A YES, SIR.
5 Q IS IT YOUR TESTIMONY THAT THEY WERE COMING FROM
6 THE DIRECTION OF THE FRONT OF THE HOUSE?
7 A YES, SIR.
8 Q HOW WERE THEY MOVING?
9 A FAST, RUNNING.
10 Q ALL OF THEM?
11 A YES, SIR.
12 Q DID YOU SEE WEAPONS AT THAT TIME?
13 A DALE FLANAGAN HAD THE PISTOL, AND RANDY HAD THE
14 LONG RIFLE.
15 Q RANDY MOORE, YOU'RE REFERRING TO?
16 A YES, SIR.
17 Q WHAT HAPPENED THEN?
18 A DALE INSTRUCTED ME TO SHUT THE HOOD, GET IN THE
19 CAR. EVERYONE LOADED UP IN THE CAR AS PREVIOUS. I WAS
20 INSTRUCTED TO DRIVE DOWN THE ROAD, MAKE A RIGHT, TURN ON MY
21 LIGHTS, DRIVE SOME MORE, MAKE ANOTHER RIGHT, MAKE A LEFT, MAKE
22 A RIGHT.
23 Q WHO GAVE YOU THOSE INSTRUCTIONS?
24 A DALE FLANAGAN.
25 Q DID YOU FOLLOW THE INSTRUCTIONS?

1 A YES, SIR, I DID.

2 Q DID YOU DRIVE FOR A CERTAIN DISTANCE WITHOUT THE
3 LIGHTS ON?

4 A YES, SIR, I DID.

5 Q WHY DID YOU DO THAT?

6 A I WAS INSTRUCTED TO.

7 Q BY MR. FLANAGAN?

8 A YES, SIR.

9 Q DID YOU REACH A CERTAIN POINT WHERE YOU WERE TOLD
10 TO STOP?

11 A YES, SIR, I DID.

12 Q WHAT HAPPENED THEN?

13 A THEY GOT OUT OF THE CAR AND THREW THE SPENT
14 CARTRIDGES --

15 MR. SMITH: OBJECTION, AS TO WHO GOT OUT OF THE
16 CAR AND WHO THREW THE CARTRIDGES.

17 THE WITNESS: ALL SIX OF THE -- ALL FIVE OF THE
18 DEFENDANTS.

19 BY MR. HARMON:

20 Q DID YOU ALSO GET OUT OF THE CAR?

21 A YES, SIR, I DID.

22 THE COURT: FOR CLARIFICATION, ALL GOT OUT OF THE
23 CAR. ALL DIDN'T THROW CARTRIDGES, DID THEY?

24 THE WITNESS: NO, SIR.

25 THE COURT: LET US CLARIFY THAT. DO YOU KNOW WHO

1 DID?

2 THE WITNESS: DALE FLANAGAN AND RANDY MOORE.

3 BY MR. HARMON:

4 Q WAS THERE ANY CONVERSATION AT THAT TIME ABOUT WHAT
5 WAS TO BE DONE WITH THE THREE GUNS?

6 A MR. MCDOWELL WANTED THE .22 REVOLVER BACK, TO GET
7 RID OF IT. THEY WERE GOING TO BURY THE TWO RIFLES -- I AM
8 SORRY. DALE FLANAGAN AND RANDY MOORE WERE GOING TO BURY THE
9 TWO RIFLES BY A HILL. THEY DECIDED NOT TO DO THAT.

10 THEY ALL GOT BACK, ALL FIVE OF THE DEFENDANTS AND
11 MYSELF GOT BACK INTO THE CAR AND PROCEEDED TO 337 NORTH 13TH
12 STREET.

13 BY MR. HARMON:

14 Q BEFORE YOU WENT ONTO THE RESIDENCE OF MR. MOORE,
15 WAS THERE ANY EFFORT TO, IN FACT, BURY THE TWO RIFLES?

16 A THEY DUG A HOLE.

17 Q WHO?

18 A RANDY MOORE AND DALE FLANAGAN DUG A HOLE, DECIDED
19 IT WOULDN'T BE BEST TO BURY THEM.

20 Q AND THEN YOU PROCEEDED BACK TO 337 NORTH 13TH
21 STREET?

22 A YES, SIR, I DID.

23 Q WHAT HAPPENED AFTER YOU GOT BACK THERE?

24 THE COURT: MR. HARMON, I DON'T MEAN TO
25 INTERRUPT, BUT I AM TRYING TO FOLLOW THIS PROGRESSION.