

1 structural error, and the whole trial -- the guilt
2 phase of the trial should be reversed on that
3 alone without any need of any showing of
4 prejudice. I cited that authority in the reply
5 brief.

6 THE COURT: Let me ask you this:
7 Obviously the Nevada Supreme Court doesn't know
8 about that yet?

9 MS. THOMAS: It was raised partially in
10 the first appellate brief. The Nevada Supreme
11 Court only said, We find the issues to be without
12 merit, so it is impossible to know did they not
13 reach that issue, the full merits, because trial
14 counsel failed to object, or because the briefing
15 wasn't complete, or -- I have no idea the basis of
16 their reasoning. I don't think the issue was
17 fully briefed. I don't think all the
18 constitutional issues presented that we have
19 included here were presented in the first appeal.
20 I think that that error alone is enough to reverse
21 the penalty here, or, excuse me, the guilt phase
22 here, without any need of an evidentiary hearing.

23 THE COURT: So, again, and this is what
24 it appears as though you represented to me, that
25 defense counsel was required to make objections

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1 when the judge was not on the bench and the jury
2 was not in the courtroom, and just basically tell
3 the court reporter what their objections were?

4 MS. THOMAS: Right.

5 THE COURT: And no ruling was made on
6 the objections?

7 MS. THOMAS: There were, I believe, two
8 instances where apparently Judge Mosley went back
9 and must have consulted with the court reporter or
10 something, the transcript shows that. I don't
11 have the page citations before me. But the
12 transcript does show there were a couple of times
13 where they basically went in to clean up the
14 record a bit down the road. But in most of the
15 instances, the objections were never ruled upon
16 during trial.

17 THE COURT: So, in other words, if you
18 had a hearsay objection, the defense counsel was
19 not allowed to stand up and say, Objection,
20 hearsay?

21 MS. THOMAS: Right. And there were a
22 few times during trial that defense counsel did
23 object, but nearly all of their objections were
24 done at the break to the court reporter.

25 I've been practicing for a little over

1 ten years now, and I've never seen anything like
2 it before, and I believe I'll never see it again.
3 I think it is prejudicial not just because defense
4 counsel is not getting their objections ruled
5 upon, but also because there is a jury over there
6 who is not having any clue about what is going on
7 as to why defense counsel are sitting on their
8 hands, and why the prosecutor is getting to object
9 continuously and to have that disparate treatment
10 of the parties during trial, it is just unheard
11 of.

12 Even given that situation, I think it
13 further illustrates Mr. Posin's ineffectiveness.
14 I know that if I were trial counsel, and given
15 that opportunity to present objections without
16 offending the judge, without offending the jury, I
17 would be filling up the record at every
18 opportunity.

19 THE COURT: I thought you were going to
20 say you would have taken it straight up on a writ.

21 MS. THOMAS: Absolutely. Before trial,
22 absolutely, it would have been up on a writ.

23 But during trial, Mr. Posin, you see the
24 other defense attorneys in the case entering their
25 objections, and sometimes Mr. Posin joins in, but

1 most of the time he just doesn't appear to be
2 present. To me, other most -- it is not just that
3 he didn't do anything during trial, it is that he
4 introduced the most damning evidence in the case
5 against his own client.

6 THE COURT: Right.

7 MS. THOMAS: As you read the record, it
8 is clear that he got confused between the
9 evidentiary hearing and the trial. He thought
10 evidence of devil worshipping had already been
11 introduced, when, in fact, it had not, and he
12 introduced that evidence against his own client.

13 Again, I don't know that that is
14 something that we need to have an evidentiary
15 hearing on, but I think it is very prejudicial,
16 and I realize the Nevada Supreme Court has
17 previously ruled that the introduction of the
18 devil worshipping evidence by itself during the
19 guilt phase was not sufficient for reversal. I
20 don't believe they considered the ineffectiveness
21 issue. I don't believe they considered the fact
22 that it was Mr. Posin who was the person
23 introducing this testimony that was very -- to say
24 that your client is a devil worshipper as some
25 kind of defense or -- I can't imagine what a jury

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21 issue. I don't believe they considered the fact
22 that it was Mr. Posin who was the person
23 introducing this testimony that was very -- to say
24 that your client is a devil worshipper as some
25 kind of defense or -- I can't imagine what a jury

1 must be feeling when they are hearing that
2 evidence and seeing it come in through defense
3 counsel.

4 I don't think it is enough for defense
5 counsel just to show up at a trial and join in the
6 objections of the other attorneys without ever
7 hiring their own investigator, without seeming to
8 do any of the significant work that needs to be
9 done on behalf of that individual client. And I
10 think where that really is illustrated in this
11 case is when you look at the severance motions and
12 the severance proceedings where Mr. Posin is
13 joining in the objections, primarily for Mr. Pike,
14 who represented Mr. Flanagan. But he never
15 articulates the individual prejudice to Mr. Moore
16 that existed based upon the admissions made by
17 Mr. Flanagan.

18 I think when you take all of that
19 together, it creates a very different picture of
20 what the Nevada Supreme Court was looking at when
21 they said that there was overwhelming evidence. I
22 think it is also important to remember that this
23 is not the typical felony murder case. This is
24 not kids going into a robbery to rob -- to rob a
25 home or a convenience store, and a burglary

1 adjacent to that, and then a killing happened in
2 the course, which is the normal felony murder.

3 THE COURT: Uh-huh.

4 MS. THOMAS: Under the State's theory,
5 this was a robbery and a burglary committed in the
6 course of a murder. Their theory was that this
7 was a premeditated planned murder, and the robbery
8 and burglary were done just to make it look like
9 it was a cover up, just to throw the police onto a
10 different send, essentially.

11 That's a very different situation than
12 arguing the typical felony murder, and I think
13 that argument concerning the aggravators wasn't
14 presented to the Nevada Supreme Court in the way
15 that other cases happened -- have considered that
16 issue.

17 I think basically what this comes down
18 to is, accepting the State's theory is true, it is
19 essentially a bunch of kids who got together, who
20 were drunk, who were high, who talked about doing
21 something, and my feeling is that it just kind of
22 got carried away, and as can happen with teenage
23 kids, it is like no one stood up to say no, we're
24 just kidding around, we're not serious, and it
25 just went too far, accepting all of the State's

1 allegations are true.

2 But what hasn't happened here is
3 Mr. Moore has never had a fair opportunity to
4 present his defense with a defense attorney acting
5 as a defense attorney should. And in this case,
6 aside from all of the individual errors, which I
7 submit are enough for a new trial, are enough for
8 a showing that Mr. Moore was prejudiced. This is
9 at the level where it was almost worse than having
10 no attorney at all. And at some point an
11 attorney's representation can be so bad, so poor,
12 that it is just enough to say this isn't fair,
13 this isn't how the system is supposed to work, and
14 we need to reverse it on that alone.

15 But I think, you know, as said
16 throughout the petition, there were very specific
17 issues, and I think the evidence would have looked
18 far different to the Nevada Supreme Court had
19 those issues been properly presented.

20 I would like to talk briefly about
21 Mr. Schieck, and, I agree, Mr. Schieck is a very
22 good attorney. And I also agree that attorneys
23 can make strategic decisions regarding what issues
24 to raise, what issues not to raise at a brief or
25 at trial, but we can't guess about what

1 Mr. Schieck knew and what he didn't know. And,
2 for instance, I raised some issues concerning jury
3 selection.

4 One concerned an implied bias and one
5 concerned the qualifications of jurors that they
6 be able to equally consider the death penalty
7 issues of that sort. It may be that Mr. Schieck
8 didn't raise those issues because he didn't
9 recognize them as issues. He wasn't aware of the
10 law in that area, he simply overlooked it, or
11 something of that sort. That is an entirely
12 different issue than whether he recognized the
13 issue and decided not to raise the issue as a
14 matter of strategy and tactic, and I think the
15 only way to find that out is to call Mr. Schieck
16 as a witness and to ask him.

17 I don't think it needs to be a lengthy
18 proceeding. I think it can probably be done
19 within an hour or so. But I think that having
20 Mr. Schieck look at the issues that were raised
21 and say, Yeah, I did that as a matter of strategy
22 or, No, I messed up, I didn't see that.

23 You know, and Mr. Simon is right, I do
24 think good attorneys make mistakes and good
25 attorneys can be ineffective.

1 THE COURT: Okay. So Mr. Simon thinks I
2 shouldn't have an evidentiary hearing at all,
3 so -- and it appears as though I've heard you
4 think I need to have an evidentiary hearing as to
5 Mr. Schieck's decisions during the third penalty
6 phase.

7 MS. THOMAS: That's correct. And --

8 THE COURT: How about Mr. Posin? I
9 mean, are you suggesting that his conduct is just
10 so egregious that we don't even have to have an
11 evidentiary hearing?

12 MS. THOMAS: It sounded to me that the
13 State has conceded that.

14 THE COURT: Well, they have, but they
15 believe that you haven't met the prejudice prong.

16 MS. THOMAS: And the prejudice I think
17 that we don't necessarily need an evidentiary
18 hearing on that at all. I think we could brief
19 that out, we could have an extended argument on
20 that.

21 THE COURT: Okay.

22 MS. THOMAS: If the State is conceding
23 that the facts alleged against Mr. Posin are true,
24 then I don't think there is a need for an
25 evidentiary hearing.

1 THE COURT: Well, I think they are true.
2 I mean, they were cited for the record, in my
3 opinion, in every instance.

4 Do you agree with that?

5 MR. SIMON: Oh, not entirely, but I
6 would like to clarify some of the factual matters,
7 so why don't I let Ms. Thomas finish, and then I
8 will state what I would like to say.

9 THE COURT: Okay. That's fine.

10 MS. THOMAS: Essentially that many of
11 the issues I think are legal issues. The merits
12 can be addressed. Certainly I don't think it is
13 an answer to say, Well, the Nevada Supreme Court
14 has ruled this way once and so we never need to
15 address the issue again. We know from the Fiford
16 (phonetic) decision from a host of -- most
17 recently -- oh, I wish I were better with case
18 names, Haberstrone (phonetic), and some of the
19 more recent, Bennett. The Nevada Supreme Court
20 changes its mind at times, and I think recognizing
21 when they are affirmative in their prior decisions
22 and making those challenges is an important part
23 of a death penalty litigator's job.

24 I also think that there are certain
25 issues that the Nevada Supreme Court has firmly

1 established on, but the Federal courts have never
2 really taken an in-depth look at the issue. And,
3 for instance, the constitutionality of the Nevada
4 death penalty scheme is one that the Nevada
5 Supreme Court has said over and over again, Our
6 scheme is fine. The Federal courts have never
7 really looked at that issue, and I think it is
8 incumbent upon death penalty litigators to
9 continue to press those issues until we have a
10 firm answer, not just from the Nevada Supreme
11 Court, but also from the Federal courts.

12 And so -- but, again, those are legal
13 issues that I don't know that we necessarily need
14 to have an evidentiary hearing on, so I'll submit
15 it at that.

16 THE COURT: So basically you want me to
17 grant an evidentiary hearing as to the third
18 penalty phase and Mr. Schieck's conduct, and
19 whether he didn't recognize these issues or he did
20 recognize them, and he made a strategic decision
21 not to raise them?

22 MS. THOMAS: Right. And the same would
23 go for the direct appeal from the judgment of
24 conviction as to the guilt phase issues. If we
25 can locate those attorneys, and I'll certainly do

1 my best to do so. Simply to determine did they
2 ignore issues that happened in the trial as a
3 matter of strategy and tactics or was it that they
4 weren't aware of the legal authority pertaining to
5 a certain issue where they just didn't see it as
6 an issue.

7 THE COURT: Let me ask you this: They
8 got that -- they got his death sentence reversed.

9 MS. THOMAS: Right. And I agree, that's
10 significant.

11 THE COURT: That's pretty effective.

12 MS. THOMAS: Absolutely.

13 THE COURT: So I guess I'm trying -- I'm
14 grappling with what was ineffective if the goal is
15 to get the death sentence vacated, they got it
16 vacated, are you suggesting that they should have
17 raised other issues?

18 MS. THOMAS: That's correct, Your Honor.
19 I think it is also important here, the procedural
20 history here is a little odd.

21 THE COURT: Well, I have Flanagan, too.

22 MS. THOMAS: Right.

23 THE COURT: And so --

24 MS. THOMAS: And what happened here is
25 Mr. Flanagan's attorney finished their briefing

1 prior to Mr. Moore's attorneys on direct appeal.

2 THE COURT: They are back up at the
3 Supreme Court.

4 MS. THOMAS: Right. They are a little
5 ahead of us here.

6 And because Mr. Posin was withdrawing
7 and because of the changes in counsel that
8 occurred, and so essentially Mr. Flanagan had his
9 death penalty reversed on reasons that were more
10 than apparent, like going to apply to Mr. Moore
11 before the briefing in Moore's case was even done.
12 Those decisions were not issued on the same day.

13 THE COURT: Okay.

14 MS. THOMAS: They were issued several
15 months apart. And so the fact was that Mr. Moore
16 knew his penalty was going to get reversed without
17 basically doing any work on that issue. If I were
18 in that situation and had a co-defendant's penalty
19 getting reversed on grounds that I knew fully
20 applied to my client, I would probably make that a
21 very small part of my brief so that I could
22 dedicate the rest of the brief to the guilt phase
23 issues, which I didn't know would be getting
24 reversed.

25 THE COURT: Oh, I see.

1 MS. THOMAS: You know what I mean?

2 THE COURT: Yeah.

3 MS. THOMAS: It is a given that the
4 death sentence -- I actually had this situation in
5 the Dorian Daniel case recently. The U.S. Supreme
6 Court came out with *Rain versus Arizona*; judge
7 sentencing was bad. So I devoted a small portion
8 of that brief to the penalty phase, and the bulk
9 of that brief to the guilt phase because I knew
10 the penalty phase was going out. And as a result,
11 I got both the guilt phase and the penalty phase
12 reversed. And I think that's what should have
13 been happening here.

14 THE COURT: Okay. Thank you.

15 MS. THOMAS: So I think they should have
16 been focusing on the guilt phase issues, as well.

17 And as to Mr. Posin, if the State is
18 contesting facts that are in the petition
19 concerning Mr. Posin's ineffectiveness, then I
20 think we need to have an evidentiary hearing
21 concerning those facts. If they are conceding
22 that the facts are as stated, but there is no
23 prejudice, then I don't think we need an
24 evidentiary hearing.

25 MR. SIMON: Okay. I have several things

1 I would like to respond to, Your Honor.

2 As Ms. Thomas has indicated, the Supreme
3 Court already had before it that Judge Mosley
4 ordered the defense counsel to object not in the
5 presence of the jury. They -- they held that
6 there was no merit to that. They didn't expound
7 upon it, but nonetheless, that is law of the case.

8 THE COURT: I guess I'm just concerned,
9 because I just -- I mean, I can't even remember --
10 I mean, I've read these cases. I couldn't tell
11 you what the makeup of the court was in the '80s
12 when they went up there, but I just would -- I
13 mean, our Supreme Court now would pound on a
14 District Court judge. That's my opinion.

15 So they didn't say anything about it, We
16 think this is not good conduct, we -- because
17 sometimes they tell us, you know, We caution this
18 type of stuff, and they caution District Court
19 judges throughout the state, We don't like this
20 behavior, even though we're not going to reverse
21 it, don't do it.

22 There was nothing like that?

23 MR. SIMON: Not that I recall. I don't
24 remember seeing anything like that in it.

25 But be that as it may, that is the law

1 of the case.

2 THE COURT: Okay.

3 MR. SIMON: Ms. Thomas in suggesting
4 that we don't need a file law of the case, cites
5 the Bennett case.

6 Now, I'm very familiar with Bennett,
7 because I did the evidentiary hearings and the
8 postconviction argument on that. The Supreme
9 Court of Nevada did not change their mind on
10 Bennett. What happened in Bennett is that when we
11 did extensive evidentiary hearings on that with
12 probably the finest postconviction counsel in
13 Nevada, Michael Pescetta arguing against me, he
14 brought in a very remote issue that they hadn't
15 entered before. The very remote issue that
16 Mr. Pescetta brought into the case that Judge
17 McGroarty seized upon for his ruling was that
18 after Edward Bennett had been sentenced to death,
19 there was an inmate in the Clark County Detention
20 Center, who was for a time a cell mate with
21 Mr. Bennett's co-defendant, the young man by the
22 name of Beason. Beason and Bennett were about 19
23 years old at the time of the crime.

24 They were from the American Forks area
25 of Utah. They did drugs together, they were into

1 satanic studies, hard rock, they wanted to be
2 musicians. They went down to San Diego to
3 Bennett's sister. On their way back, they ran out
4 of money in Las Vegas, and they decided they
5 wanted to know what it would be like to kill
6 another person, and they also needed money.

7 So they decided to accomplish both goals
8 at once, and they looked over a couple of
9 convenience stores, decided to rob one on the
10 northeast corner of Maryland Parkway and Sahara.
11 They went in there, Bennett shot the young woman
12 clerk in the head with a .45 caliber semiautomatic
13 and killed her. Beason took the gun and shot and
14 wounded a young man who just happened to be in the
15 store, but he got away and was later a witness.

16 Beason and Bennett were eventually
17 tracked down when Bennett was bragging to one of
18 his acquaintances up in American Fork about what
19 they had done. At the time the case came to
20 trial, Beason made a deal and got, I believe, it
21 was life without. Bennett went to trial and got
22 the death penalty. Mel Harmon's theory was that
23 Bennett was deserving of the death penalty because
24 he was actually the shooter of the deceased.

25 When Beason was in jail in a cell with

1 an individual, the individual later claimed that
2 Beason told him that although Bennett was the
3 shooter, that he, meaning Beason, was the one who
4 had actually conceived of this idea.

5 We don't -- we have no way of knowing
6 what Beason really said, because Beason committed
7 suicide in prison. But be that as it may, this
8 individual in the jail claimed that Beason told
9 him that he was the actual planner of the
10 incident, and this was after the jury had come
11 back with a death penalty for Bennett.

12 There was an indication that the State
13 had some awareness of this, and they did not turn
14 this over to the defense. So Mr. Pescetta's
15 argument against me to Judge McGroarty was that
16 the State had committed a Brady violation because
17 they were not forthcoming with this allegedly
18 exculpatory information from this jailhouse snitch
19 who said Beason said he planned it. And the
20 theory as to why that was exculpatory was that
21 Bennett was not deserving of the death penalty
22 when Beason wasn't, because Beason was the one
23 that planned the case.

24 I obviously disagreed and argued, but
25 that's what Judge McGroarty ruled upon. The

1 Supreme Court of Nevada did not change their mind
2 in Bennett. They were faced with Judge
3 McGroarty's ruling of the Brady violation under
4 those specific facts. They didn't change their
5 mind. They didn't draw away from the law of the
6 case.

7 Let me go on and just mention a couple
8 other things, because we've argued this pretty
9 extensively. The witchcraft evidence, it wasn't
10 brought into the case by Mr. Posin. It was
11 brought into the case, as the Supreme Court of
12 Nevada has observed, by a co-defendant who
13 introduced it in the case to show that he was less
14 culpable than these other actors, Flanagan and
15 Moore.

16 The other individual, I don't remember
17 which co-defendant it was, but one of the
18 co-defendants introduced this to indicate that he
19 was acting under the influence, and I don't know
20 if you would say fear, but under the influence of
21 Flanagan and Moore. It was a co-defendant that
22 brought the witchcraft in.

23 THE COURT: Right. I thought,
24 Ms. Thomas, your argument about the bad defense
25 was when Mr. Posin asked one of the percipient

1 witnesses he brought out, Oh, I'm afraid of
2 Mr. Moore.

3 MR. SIMON: Right.

4 THE COURT: And Mr. Posin asked a
5 question he didn't know the answer to, Why are you
6 afraid of him, and they went into this whole,
7 Well, he brought a shotgun, and he tried to shoot
8 me with a shotgun on two different occasions.
9 See, I didn't hear you talk about that this
10 morning.

11 MS. THOMAS: Your Honor, if I may just
12 very briefly here. I believe it was during the
13 cross-examination of Angela Saldona (phonetic),
14 who was Flanagan's girlfriend. Mr. Posin said,
15 Just a moment ago you were talking about the
16 witchcraft, the devil worshipping, and got into
17 that evidence. I don't have the documents here
18 with me. I can certainly bring it --

19 THE COURT: I just thought that your
20 argument regarding Mr. Posin bringing in this
21 horrible evidence against his own client was when
22 he asked the witness why are you afraid of
23 Mr. Moore, and all of that wonderful evidence came
24 in about why he was afraid of Mr. Moore.

25 MS. THOMAS: And I agree, that was

1 absolutely a problem. But it was also a problem
2 the co-defendants were introducing this evidence
3 against him, which is why they should have been
4 severed, but I believe the very first introduction
5 of this evidence came in --

6 THE COURT: With Ms. Saldona?

7 MS. THOMAS: During her
8 cross-examination.

9 THE COURT: Okay.

10 MR. SIMON: Okay. The witchcraft also
11 came in another way. Mr. Seaton argued it in his
12 argument, which was the reason the first death
13 penalty was reversed. But what I'm trying to
14 point out here is that I don't think we can blame
15 Mr. Posin for injecting witchcraft evidence. It
16 certainly appears from Ms. Thomas' allegations
17 against Mr. Posin, which I don't entirely disagree
18 with, that he was fumbling and stumbling and doing
19 a poor job.

20 THE COURT: Uh-huh.

21 MR. SIMON: However, for purposes of the
22 record, I don't want to go on the record as saying
23 that I concede that Mr. Posin is ineffective.
24 What I'm conceding is that she has made a prima
25 facie showing that he was ineffective.

1 THE COURT: Okay.

2 MR. SIMON: I think there is a little
3 bit of a difference there, and I want to clarify
4 that.

5 THE COURT: Well, let me ask you this:
6 She has cited to many instances where she believed
7 him to be ineffective.

8 MR. SIMON: Correct.

9 THE COURT: Do you want to stipulate to
10 that? I guess that's the question. Because if
11 you stipulate that those particular instances that
12 she has pointed out in her petition did amount to
13 a prima facie showing of ineffective assistance, I
14 think I just need to hear whether the prejudice
15 prong was met.

16 MR. SIMON: I'm inclined to agree.

17 THE COURT: Okay.

18 MR. SIMON: The thing I'm comfortable
19 with, Your Honor, is we've got a deputy in our
20 office now that is supposed to do all the death
21 penalty cases. I volunteered to do more, because
22 I did Flanagan several years ago, and I'm fairly
23 familiar. Quite honestly, it's been about three
24 years since I read the trial transcript. What
25 Ms. Thomas is saying about Mr. Posin sounds

1 correct to me. But without sitting down and
2 reading the trial transcript, which I will do if
3 you schedule an evidentiary hearing, I don't want
4 to stipulate to each and every one of those
5 things. I think they are correct, but I'm not
6 prepared to stipulate at this point in time,
7 because my memory is not that good going back
8 three years.

9 THE COURT: Okay.

10 MR. SIMON: I will read the trial
11 transcript again if you set an evidentiary
12 hearing. And by the time of an evidentiary
13 hearing, having read the trial transcript again at
14 that point, if I find that all of Ms. Thomas'
15 allegations are correct, then I would stipulate at
16 that time.

17 What I'm stipulating to now is that to
18 the best of my recollection, it sounds to me like
19 Mr. Posin didn't do a very good job. I do think
20 that the main thrust of our concern here should be
21 whether the defendant was prejudiced. I've
22 already argued that. There is just one other fact
23 that I would like to clarify.

24 Ms. Thomas, again, is trying to argue
25 that they should -- the defense attorneys should

1 have attacked the robbery and burglary
2 aggravators. Now, I mentioned the Bennett case,
3 because they were aggravators in that case. The
4 facts obviously were different, but as far as the
5 burglary goes, there is no difference, because
6 these perpetrators broke into the house, Flanagan
7 climbed through the window to go into the bedroom
8 and killed his grandma. That is a burglary no
9 matter what way you look at it. So the burglary
10 was clearly a proper aggravator. It was a
11 distinct crime that was committed.

12 The robbery, I think that was probably a
13 separate crime, too, because they did take
14 property of the deceased, whether their primary
15 motive was to cover up the murder, make it appear
16 as though strangers did it or not, which was
17 certainly true, I don't think matters. They
18 killed people, took their property, that is a
19 robbery. And going into the house to kill the
20 grandmother was clearly a burglary in addition to
21 murder, so I don't think there would have been any
22 point in counsel having attacked the robbery and
23 burglary as aggravators. I think they are clearly
24 appropriate under the facts of this case.

25 THE COURT: Okay.

1 MS. THOMAS: Your Honor, I'm happy to
2 submit it. If I can just clarify on the felony
3 murder, my point is that on most felony murder
4 cases --

5 THE COURT: It happens in --

6 MS. THOMAS: Right. It is -- the murder
7 is incidental to the robbery. Here we have the
8 robbery is incidental to the murder. I don't -- I
9 can't think of the Nevada Supreme Court addressing
10 that specific issue.

11 Both as to the guilt phase in addressing
12 the overwhelming evidence, but also as to the
13 application of the aggravating factors.

14 THE COURT: Okay. The first issue, the
15 ineffective assistance of counsel at the first
16 trial, I agree that there's been a prima facie
17 showing of ineffective, but it appears as though
18 everybody has agreed. If Mr. Simon agrees that
19 the facts as stated in the instances as pointed
20 out by Ms. Thomas, we don't have to have an
21 evidentiary hearing on that issue. I would just
22 allow you additional time to brief the second
23 prong, the Strickland test.

24 And so how much time do you want to do
25 that, because I don't want to grant an evidentiary

1 hearing if you are going to read the trial
2 transcript and tell me, I agree with everything
3 she said. And, I mean, you've already indicated
4 there is a prima facie showing.

5 MR. SIMON: Sure, there is. It is going
6 to take me a while to read the trial transcript,
7 Your Honor, because I've got a lot of other things
8 I've got to do. I have two cases -- I have an
9 evidentiary hearing to put on next week, and
10 another matter I've got to argue next week. I
11 probably need a couple months to sit down and read
12 the trial transcript.

13 MS. THOMAS: They are pretty lengthy,
14 yeah.

15 THE COURT: How long was it?

16 MS. THOMAS: The total record I had was
17 78 volumes.

18 THE COURT: Wow.

19 MS. THOMAS: But a lot of that is the
20 first penalty phase and the second penalty phase,
21 and I think I have some duplicative volumes in
22 there, and so it is not quite that big, but it is
23 still --

24 THE COURT: Where do you keep it all.

25 MS. THOMAS: I rent a storage unit,

1 truck it back and forth. But, yeah, that was part
2 of the reason it took me so long to do the
3 petition was just going through 78 volumes of
4 records, let alone other files. So I agree, it
5 will take a couple of months to get that far.

6 MR. SIMON: Why don't we put it over
7 into October, Your Honor, and that will give me
8 plenty of time to read the trial transcript.

9 I think probably he was ineffective,
10 but, you know, I'm not comfortable stipulating to
11 things that I haven't read within the last couple
12 of years.

13 THE COURT: No, and I agree. And it
14 appears as every instance Ms. Thomas cited to the
15 record. So maybe instead of reading the entire
16 trial transcript, you look at her citations to the
17 record and see if it just accurately reflects --

18 MR. SIMON: Well, I'm -- with all due
19 deference to the Court, I want to read the whole
20 thing so I can have it in context.

21 THE COURT: I agree. And I'm glad you
22 volunteered to keep this case.

23 MR. SIMON: You are glad, not me.

24 THE COURT: I would hate to think of
25 somebody coming in fresh to all this.

1 MR. SIMON: Well, that was my thinking
2 at the time.

3 THE COURT: You are very kind. They are
4 lucky to have you.

5 MR. SIMON: Thank you.

6 THE COURT: And then I think I -- I
7 believe I have to grant an evidentiary hearing as
8 to the other issues, as well, so 39 through 42.

9 MS. THOMAS: Okay.

10 THE COURT: But I think I would like to
11 do it all at the same time.

12 MS. THOMAS: Right.

13 THE COURT: And so what I'm going to do
14 is kick it to October to tell me whether we need
15 to, I guess, bring Mr. Posin in and have him
16 testify. If not, then we'll just proceed with the
17 other three lawyers.

18 MR. SIMON: Well, if we're going to do
19 evidentiary hearings on all this, let's kick it
20 out a little bit further so I can prepare the
21 whole thing.

22 THE COURT: Actually, I want to set it
23 for a status check.

24 MR. SIMON: Okay. That's fine.

25 THE COURT: Right. I won't make you go

1 and do your evidentiary hearing in October. Once
2 you come back in October and say, I've read the
3 record, I agree with Ms. Thomas, and I will
4 stipulate to every instance that she said, or I'll
5 only stipulate to this. Okay. We don't have to
6 deal with Mr. Posin, but can you both brief the
7 issue of prejudice and whether the second prong of
8 Strickland was met, and then we'll set out the
9 evidentiary hearing on the other issues.

10 MR. SIMON: Okay. That's fine.

11 THE COURT: So October, you want the end
12 of October?

13 MR. SIMON: Probably the middle, because
14 at the end of October, I'm going to start fishing
15 again.

16 THE CLERK: October 19th at 11:00
17 o'clock.

18 MR. SIMON: Thank you, Your Honor.

19 THE COURT: You bet.

20 MS. THOMAS: Thank you.

21 MR. SIMON: What time was that, 11:00
22 again.

23 THE CLERK: 11:00 again.

24 THE COURT: We give you special
25 settings.

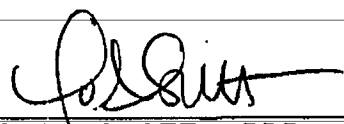
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COUNTY OF CLARK) SS:

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JO A. SCOTT, RPR, CCR NO. 669

1 CASE NO. C069269

2 DEPT. NO. 12

FILED

Dec 27 12 03 PM '05

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DISTRICT COURT

Shelly B. Humphreys
CLERK

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CLARK COUNTY, NEVADA

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* * * * *

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8 STATE OF NEVADA,

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Plaintiff,

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vs.

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RANDOLPH MOORE,

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Defendant.

ORIGINAL

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REPORTER'S TRANSCRIPT

15

OF HEARING IN RE

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STATUS CHECK

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BEFORE THE HONORABLE MICHELLE LEAVITT
DISTRICT COURT JUDGE

19

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DATED TUESDAY, OCTOBER 19, 2004

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REPORTER BY: JO A. SCOTT, RPR, CCR NO. 669

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COUNTY CLERK

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1 LAS VEGAS, NEVADA; TUESDAY, OCTOBER 19, 2004

2 11:15 A.M.

3 -oOo-

4

5 THE COURT: State of Nevada versus
6 Flanagan. Did I lose Mr. Potter? Okay. I did.
7 I'm just going to take -- he left.

8 MS. THOMAS: I'm sorry, Your Honor. I
9 talked with Mr. Potter, and he thought that it was
10 actually on calendar for Moore. He didn't think
11 there was actually anything pending on Flanagan.

12 THE COURT: Yeah, there is.

13 MR. SIMON: Your Honor, we had it on
14 today for Moore, Your Honor.

15 THE COURT: I spoke to him, and I told
16 him we were trailing it until Mr. Owens got here.
17 Okay. But that's okay.

18 MS. THOMAS: He was just confused. I'm
19 sorry.

20 MR. SIMON: It is the same case number.

21 THE COURT: I know. And so sometimes
22 that's the confusion. But I know you two are both
23 here on Mr. Moore; is that correct?

24 MR. SIMON: Correct, Your Honor.

25 MS. THOMAS: That's correct.

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1 THE COURT: Mr. Simon, I got your brief,
2 but I think that Ms. Thomas is going to need more
3 time.

4 MS. THOMAS: I am. I received it
5 yesterday when I returned from a trip. If I could
6 have 60 more days?

7 THE COURT: Absolutely.

8 MR. SIMON: Yeah. I would like the
9 argument date set 30 days after Ms. Thomas' brief
10 so I will have a chance to review it.

11 THE COURT: Sure.

12 MR. SIMON: And for the record, Your
13 Honor, I had indicated to the Court that I would
14 read the trial transcripts since our last
15 appearance and let Your Honor know where the State
16 stood as to the effectiveness prong of Strickland.

17 I have read the trial transcript and
18 while I do not agree with much of what Ms. Thomas
19 said, I find that counsel's performance was
20 marginal, at best, and troubling.

21 THE COURT: Okay.

22 MR. SIMON: So I would prefer that the
23 Court directly address the prejudice prong as we
24 know under Strickland the court can address either
25 prong first, and I think the prejudice prong is

1 the State's strongest argument here.

2 THE COURT: And I assumed that based
3 upon the brief you submitted to the Court.

4 MR. SIMON: Right. That's fine.

5 THE COURT: But I appreciate. So the
6 State is sort of conceding the first --

7 MR. SIMON: It is marginal. I think
8 whether or not counsel was actually ineffective
9 would be for the Court to decide, but I found the
10 performance troubling. Although I didn't agree
11 with much of what Ms. Thomas said, I found a
12 couple incidents that she didn't even mention
13 where he did -- the counsel did things that didn't
14 make much sense that were to his client's
15 detriment.

16 THE COURT: Ms. Thomas missed a couple
17 things?

18 MS. THOMAS: And if we could incorporate
19 the ones he found, we would be happy to do so.

20 THE COURT: I'm just so surprised to
21 hear that.

22 MR. SIMON: She is very thorough, but I
23 found another couple other incidents.

24 THE COURT: Okay. So 60 days from today
25 Mr. Moore's brief will be due in response to the

1 State's brief on prejudice.

2 THE CLERK: That will be December 19th
3 at 9:15.

4 THE COURT: And then 30 days we'll have
5 the hearing.

6 THE CLERK: We can have the hearing on
7 January 20th at 11:00 o'clock.

8 MS. THOMAS: Your Honor --

9 THE CLERK: Is that okay?

10 MS. THOMAS: Yeah. I leave for New York
11 the following day, but I will be here that day.

12 THE CLERK: Well, we could make it the
13 18th.

14 MS. THOMAS: If that's acceptable with
15 the Court, that would be great.

16 THE COURT: Okay. January 18th at
17 11:00 o'clock for the hearing.

18 MR. SIMON: That would simply be
19 argument, right, Your Honor?

20 THE COURT: That's correct.

21 MR. SIMON: And we do have some other
22 issues that have not been resolved, but I would
23 suggest to the Court that we keep everything
24 together.

25 THE COURT: Okay.

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MS. THOMAS: Thank you.

MR. SIMON: Thank you very much.

* * * * *


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COUNTY OF CLARK) SS:

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IN THE EIGHTH JUDICIAL DISTRICT COURT

COUNTY OF CLARK, STATE OF NEVADA

2005 JAN -6 P 3:49

RANDOLPH MOORE,

Petitioner,

vs.

E.K. MCDANIEL, Warden of
the NEVADA STATE PRIZON at
ELY, NEVADA; FRANKIE SUE
DEL PAPA, Attorney General,
State of Nevada; and THE
STATE OF NEVADA,

Respondents.

COPY

CASE NO.: C069269
DEPT. NO.: XII

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE MICHELLE LEAVITT
DISTRICT COURT JUDGE

THURSDAY, OCTOBER 6, 2005

Reported by: Gina M. Shrader, RPR, CCR No. 647

1 APPEARANCES:

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616 South 8th Street
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1 LAS VEGAS, NEVADA; THURSDAY, OCTOBER 6, 2005

2 9:15 A.M.

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5 THE COURT: State of Nevada versus
6 Randolph Moore, C069269.

7 Mr. Moore is not present. He is in the
8 Nevada Department of Corrections.

9 We are here just for a decision, and
10 getting everybody back up to speed regarding the
11 finding that this was a new rule, and we had had
12 further discussions about whether --

13 Where is he going?

14 CORRECTIONS OFFICER: To the rest room.

15 THE COURT: -- had further discussions
16 regarding whether this case fits within one of the
17 two exceptions, as announced in Colwell, and I
18 think I announced that I didn't think it fit within
19 the first exception, but I thought there was a
20 possibility that it fit within the second
21 exception, and so I wanted an opportunity to look
22 at that further.

23 Does either side wish to say anything
24 further?

25 MR. SIMON: Just very very briefly, Your

1 Honor.

2 The last time we were in court, Your
3 Honor expressed concerns about the Supreme Court of
4 Tennessee case, Middlebrooks and, quite honestly, I
5 hadn't really studied it prior to our last session,
6 but since our last session, since your Honor was
7 concerned, I did study it.

8 There's a very marked distinction
9 between Middlebrooks and our case that brings, I
10 think, Moore much closer to McConnell, than it is
11 to Middlebrooks.

12 In Middlebrooks, the jury specifically
13 acquitted the defendant of premeditated murder. We
14 had discussed previously that in McConnell, the
15 Supreme Court noted that McConnell had admitted
16 premeditation.

17 As we all agreed, our case wasn't
18 squarely the same as McConnell, because Mr. Moore
19 never admitted premeditation, but as I pointed out
20 to the Court, there was an abundance of evidence in
21 the record that there was premeditation, and I
22 think that distinguishes Moore from Middlebrooks.

23 That's all I wanted to add.

24 MS. THOMAS: Your Honor, certainly
25 Middlebrooks has been followed in Tennessee in the

1 cases that we cited in our reply brief thereof, and
2 there are other cases in which Middlebrooks has
3 been followed, where the defendant was not
4 acquitted under a felony murder theory.

5 I think both, based upon the reasoning
6 of McConnell itself; the Wyoming decision; and the
7 subsequent Tennessee decisions, that McConnell
8 should be applied.

9 THE COURT: I went back -- and -I've
10 read McConnell so many times now -- but I went back
11 and reread it to, you know, kind of get a feel.

12 And I note it would have been much nicer
13 if the Supreme Court told us what they were going
14 to do in the post conviction setting, but they said
15 they wanted to wait until the appropriate case came
16 before them, and it was appropriately briefed.

17 But, to me, it appeared as though they
18 were clearly saying that, you know, our capital
19 sentencing scheme was unconstitutional, and I don't
20 think anyone would disagree with that.

21 And I think just based upon McConnell,
22 that the second exception applies, and it
23 implicates the fundamental fairness of the trial,
24 and without which the likelihood of an accurate
25 conviction is seriously diminished.

1 So based upon that, I'm assuming that
2 the State's going to probably want to take it up
3 now.

4 MR. SIMON: We've got several cases, and
5 this is one of them.

6 That is correct.

7 THE COURT: Well, I just -- you know,
8 when thinking through this, and how to proceed,
9 because now, I don't know -- are you going to
10 proceed on any of the other issues?

11 MR. SIMON: I don't think we can, Your
12 Honor.

13 THE COURT: I don't think you can
14 either.

15 MR. SIMON: Because your ruling today
16 makes moot the unresolved issues.

17 The unresolved issues were ineffective
18 assistance of counsel to the third penalty phase,
19 which only went to the penalty, and ineffective
20 assistance of counsel on the appeal. I think all
21 we're talking about here is penalty.

22 The guilt finding has been affirmed over
23 and over again. That's not at issue.

24 So since Your Honor has ruled that
25 McConnell is retroactive, that would vitiate the

1 death penalty in this case.

2 So I think the Court could probably
3 draft an appropriate final order that the State
4 could then appeal from. I don't think we get to
5 the ineffective assistance at the penalty phase.

6 THE COURT: I thought it made the issues
7 moot, but I thought this was the case that I
8 allowed you to also raise guilt-phase issues.

9 MS. THOMAS: Your Honor, my memory is
10 that the only portion of the guilt phase of the
11 trial -- I agree, this would render everything else
12 in the penalty phase moot.

13 THE COURT: Right.

14 MS. THOMAS: On the guilt phase, we
15 dealt with ineffective assistance of trial counsel,
16 but the remaining issue of ineffective assistance
17 of appellant counsel.

18 That's an issue I don't believe that was
19 ever resolved.

20 THE COURT: I guess maybe you need an
21 opportunity to think about it, and see if there's
22 anything else we need to resolve, because I thought
23 this would make everything else moot. The State
24 could take the petition up to the Supreme Court.

25 I assumed the State was going to take it

1 up.

2 MR. SIMON: That's correct, Your Honor.

3 THE COURT: -- was going to take it up.

4 MR. SIMON: Can we have a very brief
5 recess so I can consult with Ms. Thomas, and see
6 where we're going on this?

7 MS. THOMAS: Sure. I certainly wouldn't
8 be opposed, if they want to go up on that part of
9 the appeal. It's a very concrete issue.

10 THE COURT: That needs to be resolved.

11 MS. THOMAS: It does. Absolutely. I've
12 got that in other cases. I would be happy to get a
13 decision on that, and I think it would resolve a
14 lot for a lot of other cases, but I also think we
15 can address the appellate counsel issue.

16 THE COURT: If you could chat about what
17 you think would still be left, and then we can set
18 it for whatever we need to do next.

19 (Whereupon a brief recess was taken.)

20 THE COURT: Back on record with
21 Mr. Moore.

22 You've had an opportunity to discuss
23 that there's one more issue of ineffective
24 assistance of counsel after the original guilt
25 phase; is that correct?

1 MS. THOMAS: That's correct, Your Honor.

2 MR. SIMON: Yes.

3 THE COURT: And that the attorney is now
4 deceased.

5 MS. THOMAS: That's correct, Your Honor.

6 THE COURT: So I think we've come to the
7 conclusion that they are all legal issues, and they
8 can be decided without an evidentiary hearing, and
9 both sides agreed with that, correct?

10 MS. THOMAS: Yes.

11 MR. SIMON: Correct, Your Honor.

12 I would like to note one other thing,
13 for the record.

14 There are a few other issues that we
15 didn't reach. That's ineffective assistance of
16 counsel at the third penalty phase, and ineffective
17 assistance of counsel on the appeal from the third
18 penalty phase. But it's my feeling that those
19 issues were raised moot when Your Honor decided the
20 McConnell issue in favor of the defendant.

21 THE COURT: So I'm going to take that
22 last issue under advisement, and give you a ruling
23 by minute order, and I'll assign someone to prepare
24 the Court's order.

25 And then at that point, you'll have a

1 final order that can be appealed by the State,
2 correct?

3 MR. SIMON: Thank you, Your Honor.

4 MS. THOMAS: And if I can assist counsel
5 as well on the trial counsel issues.

6 THE COURT: That's right.

7 MR. SIMON: You're anticipating the
8 Court's ruling.

9 THE COURT: No. I already ruled that
10 trial counsel was not --

11 MR. SIMON: Okay.

12 THE COURT: -- ineffective, and that
13 there was no --

14 MR. SIMON: Okay -- no, no, no. That's
15 not the way you ruled.

16 THE COURT: I found that there was no
17 prejudice.

18 MR. SIMON: Exactly. Thank you.

19 THE COURT: Because the State
20 stipulated.

21 MR. SIMON: I didn't stipulate he was
22 ineffective. I stipulated that his performance was
23 troubling, and I thought we might want to go
24 directly to the prejudice phase.

25 THE COURT: That was my recollection.

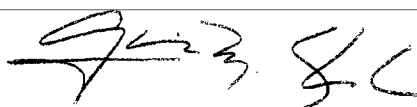
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MR. SIMON: Thank you, Your Honor.

THE COURT: Something to that effect.

-oOo-

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
PROCEEDINGS.



Gina M. Shrader, CCR 647, RPR

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DEC 16 2009
Ann L. Blum
CLERK OF COURT

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TRAN

 **COPY**

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C-069269
)	
vs.)	DEPT. XII
)	
RANDOLPH MOORE,)	
)	
Defendant.)	

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

TUESDAY, DECEMBER 1, 2009
TRANSCRIPT OF PROCEEDINGS
ARGUMENT/DECISION

APPEARANCES:

For the State:	STEVEN S. OWENS, ESQ. Deputy District Attorney
----------------	---

For the Defendant:	CHRISTOPHER R. ORAM, ESQ.
--------------------	---------------------------

RECORDED BY: KERRY ESPARZA, COURT RECORDER

5

TUESDAY, DECEMBER 1, 2009 AT 10:41 A.M.

THE COURT: State of Nevada versus Randolph Moore, C-069269. Mr. Moore is not present. He's in the Nevada Department of Corrections and Mr. Oram, you're his new attorney?

MR. ORAM: Yes, Your Honor. And he wants to -- my understanding, from my discussions with him, and a memo in the file, is that he does not want to be present at these hearings. And so, I would prefer that for all hearings, if there are any further hearings, that we just continue on like this without his presence.

THE COURT: Okay. Then his presence will be waived. We are down to -- and I hope the parties agree. We are down to claim 40 and 42.

MR. ORAM: Correct, Your Honor.

THE COURT: And both sides agree?

MR. OWENS: Yes.

THE COURT: All right. And Mr. Oram and I know it was -- it was very well briefed and it's my understanding that you did not want to supplement.

MR. ORAM: It was my understanding that from what I looked at -- first of all, Your Honor, what I've looked at -- Ms. JoNell Thomas is a very thorough attorney.

THE COURT: Absolutely.

MR. ORAM: And so, I was not aware of any further supplement that was necessary. When I've reviewed this file, really what I saw -- if I may just go into argument; is that possible, Judge?

THE COURT: Absolutely.

1 MR. ORAM: With regard to argument 40, it seems to me that Ms.
2 Thomas has raised these issues. It has been thoroughly briefed both by Ms.
3 Thomas and by the State of Nevada and I can go through each one of them. I
4 know the Court has already done so.

5 THE COURT: Uh huh.

6 MR. ORAM: I would be regurgitating what is in here, and I've got notes
7 on it if the Court wants to hear it, but it seems to me that she makes claims --
8 Ms. Thomas makes claims that would need to be proven outside of the record.
9 In other words, she claims that Mr. Schieck and Mr. Wolfbrandt did not bring
10 certain witnesses forward; didn't have a mitigation expert; didn't bring people
11 forward to talk about his prior beatings when he was a toddler, a baby, a child,
12 all of those different matters that she has claimed did not occur.

13 I would think all of that would require an evidentiary hearing where
14 I would need to question Mr. Schieck as to why he didn't bring these people
15 forward and to question Mr. Wolfbrandt as to why a mitigation expert wasn't
16 hired; perhaps they have reasons. I do not know. I have talked to Mr. Schieck
17 about the matter but what -- the ultimate thing I would be requesting today is
18 an evidentiary hearing so that we can resolve the issues and put Mr. Schieck
19 and Mr. Wolfbrandt on the stand and ask them why these certain things were
20 not accomplished.

21 THE COURT: Okay. Cause you agree 40 and 42 all deal with ineffective
22 assistance of counsel at the third penalty phase and appeal --

23 MR. ORAM: From the death sentence.

24 THE COURT: -- from the third penalty phase.

25 MR. ORAM: Yes. And that is limited issues, and what is contained in

1 here on those two issues is all I believe that I was entitled to argue, and that it
 2 was pretty clear to me from reading the Supreme Court decision, they
 3 remanded it; you made your decision. Those are the only two matters not --
 4 that have not been heard. The only other thing I would say, Your Honor, is if
 5 you do elect to have the evidentiary hearing, I think I need an investigator just
 6 for the limited purpose of finding out when she says -- when Ms. Thomas
 7 makes the claim, specifically, about all the abuse and family history.

8 I would think, in order to establish that, I would need to show that
 9 at least I, as competent post conviction counsel, because he has a right to
 10 effective assistance of post conviction counsel because he is sentenced to
 11 death, that at least I've done my job and tried to obtain this information.

12 So, what I would be asking for today is -- I know the Court has
 13 reviewed 40 and 42. I would ask, based on those issues, that we have an
 14 evidentiary hearing set and I receive an investigator for limited fees that I could
 15 ask Mr. Christensen for so that we could investigate and see what failures
 16 occurred.

17 THE COURT: Okay. Cause it appears to me -- is it claim 40 and 42?
 18 Basically incorporate, by reference, all the other claims.

19 MR. ORAM: Yes; they do. They reference numerous other claims. I
 20 think much of what Ms. Thomas was doing when I went back and I looked at
 21 those other claims, a lot of them are jury instruction type arguments. For
 22 example, she -- Ms. Thomas argues that there were no pretrial motions and no
 23 efforts on appeal to raise the death penalty scheme in Nevada as
 24 unconstitutional.

25 Now I usually raise those issues, and as the Court knows that has

1 always been denied. It's always been denied and so he hasn't raised it. I'm
 2 sure I would ask him that question: Why didn't you raise it? And then we'd
 3 have the argument that it was raised on post conviction and it was ineffective
 4 not to, however, I don't know how the Court would find it was ineffective not
 5 to because the law is that --

6 THE COURT: What it is.

7 MR. ORAM: Yes; that the death penalty is Constitutional at this time.
 8 So, it seems that there's a lot of incorporation of other issues, but what I saw,
 9 more than anything, from reading this, was the failure to properly bring forth
 10 mitigation evidence, properly filed pretrial motions. In the third penalty phase,
 11 Ms. Thomas raises the fact that prosecutorial misconduct was prevalent in the
 12 case and a motion should have been filed pretrial -- those type of things, Your
 13 Honor.

14 THE COURT: And some of those things, in my opinion, dealt with the
 15 guilt phase.

16 MR. ORAM: Okay.

17 THE COURT: I'm sorry -- yeah, the guilt phase --

18 MR. ORAM: Yeah; the guilt phase.

19 THE COURT: -- and not the penalty phase. So if you want me to just go
 20 through each claim because I count 18 claims. but those 18 claims have
 21 several subparts.

22 MR. ORAM: Yes, Your Honor.

23 THE COURT: So as to claim 40, and again this is trial counsel at the 3rd
 24 penalty phase. The first issue was failure to hire a mitigation expert and did
 25 little, if any, mitigation investigation. However, there's a failure to identify

1 what mitigation investigation or evidence counsel failed to conduct or, you
2 know what, before I do this, Mr. Owens, I apologize. Do you want to address
3 the Court?

4 MR. OWENS: Well, briefly, there are a number of issues and I'll just kind
5 of focus on what Mr. Oram has and that's specifically these -- this additional
6 mitigation evidence. I think it's at the end of claim 40 where they talk about
7 how abused he was. They're not entitled to an evidentiary hearing on these
8 claims unless they give specific factual allegations not belied by the record
9 which, if true, would entitle them to relief.

10 I've gone back and looked in the record. I believe the allegations
11 here are very bare, conclusory. They don't name particular witnesses who had
12 come forth and testify to these facts, and frankly, they're belied by the record.
13 There were three penalty hearings here. Randolph Moore's mother testified
14 that there was only one physical abuse that she witnessed and that caused her
15 to separate and divorce from that man.

16 And so, much of the penalty hearing talked about how great
17 Randolph Moore did in school and how he excelled in music and was in
18 accelerated classes and there were other problems in his life-- that he got into
19 alcohol and he married too early and they elicit a lot of that information, but to
20 the extent they're claiming, you know, some numerous years after the crime,
21 that he was abused greatly as a child, that's frankly, belied by the record.

22 And before we would -- before they'd be entitled to an evidentiary
23 hearing, I think they got to come forth with some proffer. Where did they get
24 that information from? Who do they think they're going to put on the stand to
25 testify to that? Randolph Moore's never said anything like that. He's spoken

1 of the juries. He's had opportunity to do so and for that reason I don't think
2 they're entitled to an evidentiary hearing on any of these claims. They're either
3 -- were previously denied by this Court or by the Nevada Supreme Court on the
4 merits, therefore, they're not really going to be ineffective assistance of
5 counsel claims and -- or they're just bare and conclusory and not specific
6 enough to warrant relief on.

7 MR. ORAM: Judge, I would just briefly reply by, assuming arguendo, the
8 State is correct with their allegation. One, we haven't, at least I haven't been
9 given an opportunity to have an investigator to find out what those claims
10 would be.

11 To a certain degree, because I'm coming on the case, I agree with
12 Mr. Owens when he says: In the writ itself, and I presume that's what he's
13 saying. It doesn't say who these witnesses would be. I looked for that and so
14 that's why I asked -- I would need an investigator, because I don't -- I can't say
15 to the Court: Jane Doe would say.

16 THE COURT: I mean, this was a 100 and --

17 MR. ORAM: It's huge.

18 THE COURT: -- 200 pages.

19 MR. ORAM: Yes.

20 THE COURT: But you're asking me to, I guess, allow you to start over?

21 MR. ORAM: Not start over, but just figure out --

22 THE COURT: But --

23 MR. ORAM: -- how I would obtain those witnesses. In other words,
24 what I've done, Judge, is I -- I have spent time reading the case so I could
25 understand the case, what -- and I've talked to Mr. Moore, but I haven't had -- I

1 don't have an investigator and I don't have the ability to find out who those
2 people would be. I've contacted the only witnesses I could, which would be
3 Ms. Thomas and Mr. Schieck to ask them, you know, what had happened in
4 the case; what went wrong; why things were not done. But again, I don't
5 have a witness.

6 In other words, if the Court said to me: Who would you call if Mr.
7 Owens makes that claim? I would not be able to tell you who I could call.
8 That's why I would need an investigation. But my bigger concern, Your Honor,
9 is that --

10 THE COURT: But there was testimony from his mother.

11 MR. ORAM: That's true; there was.

12 THE COURT: And she testified that she divorced.

13 MR. ORAM: Yes; and there was also quite a bit of mitigation testimony
14 read into to the record from the second penalty phase to the third penalty
15 phase and it would be a claim that it -- they should have really gone out and re-
16 interviewed those people and obtain those people and actually put them live on
17 the witness stand, and so, that was something that caused me concern. I
18 think that sort of dovetails into what Ms. Thomas has done.

19 But my concern would be to deny this without an evidentiary
20 hearing. It may be just this whole juggling that we've seen back and forth from
21 the Court's between U. S. Supreme Court, the Nevada Supreme Court, from
22 the District Court's to the Nevada Supreme Court, and I would think that
23 probably, out of the abundance of caution, I think we're entitled to it, but out
24 of the abundance of caution that we should have the evidentiary hearing, make
25 a decision.

1 Mondays and Wednesdays; the are civil calendars, and Tuesdays and
2 Thursdays are criminal calendars. And sometimes during the
3 course of the motions that are made, I'm required to see or hear
4 a lot of the evidence that you're going to hear.

5 And also, in the same light now, if you should see me
6 writing, please do not feel that the evidence being offered is
7 most important because the Judge is taking notes. I may not be
8 taking notes on this case but just jotting down something about
9 another case that I just happened to remember, or something I may
10 be writing to myself, my wife said be sure and bring home some
11 dog food tonight.

12 So I do not have any idea of how this is going to run. Next
13 week is tough; I read the 10:00 calendar; that would depend on
14 how wordy my civil lawyers are and how wordy I might get, but
15 we'll try and get you as fast as possible at 10:00 a.m. If I can
16 see that my calendar is going to be an exceptionally long
17 calendar, we will extend it a little bit. I won't have you come
18 here if I possibly can.

19 We work as a rule from 10:00 a.m. to 11:45 a.m., we take two
20 hours off for lunch, and then we come back, and we will be
21 working until 4:00 p.m. If you wonder why we have two hours off
22 for lunch, because that's the time I'm giving to try and read
23 some of the materials these lawyers write me to read for the next
24 day or the day following. I also have those things Judges must
25 do from a legal standpoint. And sometimes, particularly during

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1 the summertime, it's almost impossible to eat down here in an
2 hour's time.

3 Do you folks need a little time to arrange your notes?

4 MR. SEATON: Yes, Judge.

5 THE COURT: How much time do you want?

6 MR. SEATON: 15 or 20 minutes probably.

7 THE COURT: Okay. Oh, please remain seated until the
8 alternates and jurors are excused. You're lucky, folks, who were
9 not picked here, or unlucky as the case may be.

10 On behalf of the State of Nevada, I want to thank you very
11 much for coming down. I apologize for the last ten minutes.
12 Report back to the jury commissioner and tell him I've excused
13 you from any further jury duty. We're going to take about a 15-
14 minute recess to give the attorneys some time to arrange their
15 notes for the opening argument.

16 In the meantime, it is your duty not to talk among
17 yourselves or with anyone else on any matter pertaining to this
18 trial; read, watch or listen to any report of or commentary on
19 the trial by any person or by any medium of information,
20 including without limitation newspapers, radio or television; for
21 or express any opinion on any matter pertaining to this trial
22 until it is finally submitted to you. See you back in here in 15
23 minutes by the clock above your head.

24 (Jury out at 11:15 a.m.)

25

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8JD04866

1 THE COURT: Will counsel stipulate as to the absence of
2 the jury?

3 MR. SEATON: Yes, Judge.

4 MR. SCHIECK: Yes, your Honor.

5 THE COURT: I would like to finish up at least the
6 arguments and one or two witnesses' testimony.

7 MR. SEATON: I believe we can. We've got Dan Connell
8 standing by outside; he shouldn't be too long. And then we're
9 going to read in Dr. Green's testimony. I even have Rusty
10 Havens, the individual from jail, standing by, and a couple of
11 other witnesses. We'll fill up the time between now and 1:00
12 p.m.

13 THE COURT: Okay. We'll be in recess.

14 MR. WALL: Okay.

15 MR. SEATON: Thank you, Judge.

16 MR. SCHIECK: Thank you.

17 (Recess taken)

18 (Proceedings reconvened and jury in at 11:42 a.m.)

19 THE CLERK: All rise. Department XI is again in
20 session.

21 THE COURT: Please, be seated. Continuation of State
22 vs. Flanagan and Moore. Let the record reflect the presence of
23 counsels, District Attorney, and officers of the court.

24 Will counsel stipulate to presence of the jury?

25 MR. SEATON: Yes, Judge.

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1 MR. WOLFBRANDT: Yes, your Honor.

2 MR. SEATON: Yes, your Honor.

3 THE COURT: Mr. Seaton.

4 MR. SEATON: Thank you, Judge.

5 PLAINTIFF'S OPENING STATEMENT

6 Well, good morning. I know you're all thinking it's about
7 time we got started. And it is. We are going to get started.
8 And as we have been suggesting to you throughout the jury
9 selection, we're here on a very important mission--something that
10 should be taken in all seriousness.

11 Two people have been murdered. There are others, but two
12 people in this courtroom have been convicted as murders of those
13 first two people.

14 What I'm going to tell you now is what happened at the jury
15 trial, the testimony that came out of the jury trial--the
16 testimony that you're going to hear today and probably some of
17 next week (I would guess Monday) as far as the State's case is
18 concerned.

19 And I'm going to try and explain to you what that last jury
20 heard and what it was that caused them to be able to return the
21 verdicts of guilty that you are now aware of exist against Mr.
22 Flanagan and Mr. Moore. In doing that probably the first thing I
23 should do for you is try to let you know who the you know who the
24 parties are.

25 In my opening remarks, how many days ago, I mentioned

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1 various names of the individuals who were involved with this and
2 what their sentences were. I'm going to go back through that
3 again a little more slowly this time and with a little more
4 detail, because that's some of the evidence that you'll be
5 hearing.

6 Again, so no one forgets, gentleman in the red tie--Dale
7 Flanagan; the gentleman sitting immediately to his left in the
8 brown coat--Randy Moore. They are the Defendants. They are the
9 convicted murderers.

10 They had four friends which are among the most important
11 names that I could tell you at this time. There was Johnny Ray
12 Luckett. There was Michael Walsh, Roy McDowell, and Tom Akers.
13 Of that group you're going to meet Tom Akers. He'll be taking
14 the stand probably on Monday--definitely on Monday--and he'll be
15 testifying.

16 He will tell you of his and others' roles were in this
17 scenario. And I'm going to be telling you now what he has
18 testified to in the past and what I expect him to testify to
19 before you all.

20 Those six young men, and they were all 18/19 years old at
21 the time. The time, by the way, is November the 5th, 1984.
22 Actually it started a couple of months before that. You're going
23 to learn that these individuals, these defendants, were typical
24 young men. They liked baseball; they like going to the lake;
25 they had moms and dads; they'd gone to school--done a lot of the

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1 things that all normal kids do.

2 You're also going to learn that there was a dark and deviant
3 side to these young men--a side which the evidence is going to
4 show is unimaginable to most of us. Many of the jurors, as they
5 were being selected, expressed the wonderment of what happened in
6 this case.

7 What happened in this case is that somewhere in September or
8 October of 1984, these people got together, and they started
9 discussing how to get rid of Dale Flanagan's grandparents. You
10 see, he was mentioned in the will (or at least so he thought).

11 He thought that there was going to be a \$200,000 insurance
12 policy. He thought that the house--and it was a nice house,
13 you'll see photographs of it--would ultimately come to him. He
14 thought the R.V. trailer, which they were nice enough to let him
15 live in, would be his someday, and all of their personal
16 belongings. As the grandson he thought he would ultimately gain
17 from their demise.

18 Which perhaps brings us to Carl and Colleen, his
19 grandparents, 57 and 58 years old. He was an air traffic
20 controller ready for retirement, ready for the good life. They
21 lived at 5851 Washburn Road, way out in the Northwest part of
22 town. In those days it was really out in the toolies. It was
23 somewhere north of Tonopah and East of Jones is its general
24 location so that you might know.

25 And they were just living normal, everyday lives that people

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8JD04870

8JD04871
1 like them live. These people started talking about how to do this
2 dastardly dead. And you're going to hear about a couple of
3 meetings that were had where the planning was gone into. It was
4 being decided who would do what.

5 And there was a very--if not stupid--sophisticated plan. It
6 was one with detail to it. Everyone had their role to play out.
7 And you'll learn that most of the roles were played out quite
8 similarly to the way they were planned.

9 One of the problems from Dale Flanagan's point of view was
10 that he couldn't do this by himself. He needed help. He needed
11 someone to, of course, give him support. He needed wheels to get
12 out there (his car was inoperable), and he needed guns.

13 And so he called upon this amazing circle of friends to help
14 him. And amazingly they agreed. These young men agreed to go
15 kill someone else's grandparents.

16 They got together and decided that Tom Akers was going to
17 drive his car. He had an El Camino that you'll hear about. And
18 they would use that car to transport them out to the house one
19 evening.

20 Michael Walsh was going to take a stick that they had that
21 had tape on the end of it, and he was going to use it to break in
22 a side window of the house so that they could gain entrance.

23 Ray McDowell was going to bring, you'll hear it referred to
24 as a toy, a .22 caliber pistol. And he was going to go into the
25 house after the shootings and after the window was broken and

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8JD04871

1 make it look like a burglary by ransacking portions of the house.

2 Johnny Ray Luckett was going to take a rifle that they had.
3 It was a sawed-off .22 caliber single-shot rifle. And he was
4 going to back up Randy Moore in the killing of Dale Flanagan's
5 grandfather, Carl Gordon. Randy Moore, to do the act that he was
6 contemplating doing, had a semi-automatic long-barreled .22
7 rifle. His job, as I said, was to kill the grandfather.

8 Dale Flanagan, after the window was broken was going to
9 enter into it and go to wherever his grandmother was and kill
10 her. That's what they discussed.

11 And on November the 5th, 1984, unbelievable as it seems,
12 they got into Tom Akers' car. Now, I need to tell you where they
13 were. They were over on North 13th at Randy Moore's apartment.

14 And there was another person at that location at that time.
15 His name is John Lucas. And you're going to hear from John
16 Lucas. He will tell you what went on before and after all of
17 this occurred. John got left out. He stayed at the house,
18 locked the door behind everybody, went to sleep; and when they
19 came back they woke him up, and he let them in.

20 When they got into Akers' car, they started driving out
21 toward Washburn Road. It was 11:00 or 12:00 at night. The
22 Gordon's were peacefully sleeping in their own beds, oblivious to
23 what fate awaited them.

24 On the way out to the Washburn address they wanted -- I
25 think it was Randy Moore wanted to make sure that the guns

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8JD04872

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1 worked, or at least the gun that he was handling, the .22 long-
2 barreled semi-automatic rifle. They stopped and he went out into
3 the desert and fired it, and it worked. Boy, did it work!

4 They got back into the car. They went to the Washburn
5 address. They parked the car.

6 You're going to be able to see some pictures and some
7 diagrams that fairly clearly establish where all of these things
8 occurred--where the car was parked, what it was in relationship
9 to the house, where the trailer was in relationship to
10 the house. Because Tom Akers' job, once he drove everybody
11 there, was to go to the trailer while the other five went to the
12 house.

13 His job was to go into the trailer and to get to some audio
14 tapes--music, rock and roll. These young killers had the
15 presence of mind to know that they wanted to listen to some music
16 after they did whatever they were going to go do. And so he did
17 that. He went to the house -- I'm sorry, to the trailer.

18 While he was at the trailer and everyone else had left and
19 headed over toward the house, he heard some things. He heard
20 window breaking. He heard a woman scream. He heard a couple of
21 three shots. He heard a man yelling. And he heard six or seven
22 other shots. He got scared to death. He ran back to the car.
23 He tried to start it. You'll learn that he was out of there.
24 One way of the other, whether they were with him or not, he was
25 gone.

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8JD04873

1 While he was trying to start his car, it wouldn't start of
2 all things. It wouldn't turn over. Johnny Ray Luckett came on
3 the scene carrying the very short-barreled .22 rifle that he had
4 been assigned to back up Randy Moore with. And he too seemed a
5 little bit nervous. And together they tried to start the car.
6 And they did.

7 And about the time they started the car, up came the other
8 four gentlemen. They came from the front of the house, 5851
9 Washburn. And they were all excited and agitated, and they got
10 in the car, and off they went.

11 On the way home, back to the North 13th apartment of Randy
12 Moore, they stopped and decided to bury the cartridges that they
13 had and the rifles out in the desert and the pistol. Well, some
14 of the bullets and cartridges they did bury. For whatever reason
15 they decided not to bury the rifles. And they decided that what
16 they would do instead is get rid of them at some other location.

17 They got back into Tom Akers' El Camino, and they went home.
18 They went back to Randy Moore's apartment; and John Lucas, as I
19 said before, let them in. And he's going to tell you that they
20 were really agitated. They were excited; they were talking; they
21 were doing a lot of things. And they had things with them.

22 And they went to the kitchen table, and they all got around
23 the kitchen table, and one of them had a women's wallet. And
24 they went through that wallet, and it had identification and
25 cards and things like wallets normally do. They burned that

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8JD04874

8JD04875

1 stuff. And if I remember right, it had \$8 in it--\$8. They took
2 that \$8 and went to the store and bought some beer so they could
3 drink some beer while they were listening to their rock and roll
4 after they just brutally murdered two people.

5 John Lucas will tell you that they described what they had
6 done. They talked about their various roles, and it was pretty
7 much like they had planned. They went up to the window, and
8 Randy Moore had Dale Flanagan's knife, and he tried to cut out --
9 or he did cut out the screen that was over the window. Remember
10 the knife, because we're going to come back to it; it's an
11 interesting part of this case.

12 He cut the screen out, and they took the stick that they had
13 with them, and it took several thumps, but they finally broke the
14 window in.

15 Now, before we get into the house understand this--that the
16 way the Gordon's lived, it was a two-story house. If you go into
17 that window that we're talking about and you make an immediate
18 turn to your right, you're walking right into the bedroom of Mrs.
19 Flanagan. And just immediately before you walk into that
20 bedroom, to your left are stairs that go up stairs where Mr.
21 Flanagan was sleeping. They were both asleep when this was going
22 on.

23 So the window was broken was broken, and Dale indicated that
24 he went into the window. He turned right. He walked past the
25 stairway. He walked into his grandmother's bedroom, and she was

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8JD04875

1 just awakening. She'd been sound asleep, getting up probably
2 from the noise and the commotion just some ten or fifteen feet
3 away from her.

4 And he told these guys is what he did was he jumped on the
5 bed and he put his hand over her mouth, and he shot her. He shot
6 his grandmother three times in the head. And he killed her.

7 Randy Moore in the meantime stayed outside, and he was
8 looking through the window and watching what was happening. The
9 lights come on. And he said the grandfather started to come down
10 the stairs, obviously. There's a lot of noise now.

11 And as he came down the stairs Randy Moore squeezed off
12 seven rounds or more, because he hit the grandfather seven times.
13 A bullet was fired from Johnny Ray Lockett's gun, as well. The
14 grandfather, as you're going to see from the pictures, fell at
15 the bottom of the stairs. His wife was already laying on the
16 bed, deceased.

17 The testimony that you're going to hear, somebody's going to
18 read Dr. Green's testimony to you from the last hearing. You're
19 going to hear that Mr. Gordon would have had the capacity to
20 crawl the short distance from the bottom of the stairs to where
21 his body was ultimately found in the doorway of his wife, going
22 toward his wife's room, into his wife's room

23 Randy Moore--this fellow right here in court, Randy Moore--
24 said to one of these people (or to all of them probably), and I
25 want to you to listen to these words, because they are the words

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8JD04876

1 that we are going to prove character with, not just the killing,
2 but the state of mind that a person has after that.

3 He said words to this effect. The grandfather was squirming
4 on the floor, and so I went up to him and put another one in his
5 head. Now, there wasn't a bullet in the grandfather's head, but
6 that was his state of mind. That's what he said; that's what he
7 believed happened. And we can only take his words at face value.

8 Roy McDowell in the meantime had gone into the living room
9 area where Dale Flanagan instructed him there would be a purse
10 found in the upper reaches of the closet. And he went in there,
11 and he found the purse. He took the wallet that I've told you
12 about from the purse. He pushed furniture around and moved
13 things around (maybe other people helped him; I'm not sure about
14 that), and then he made it look like a burglary.

15 And Johnny Ray Lockett had fired the other shot in backing
16 up Randy Moore in the killing of the grandfather. That's what
17 these individuals did. That's who they are.

18 The knife--now I told you I'd get back to the knife. The
19 knife was dropped by the side window, left there by these foolish
20 young people. And the police, when they came to investigate the
21 scene, they found that knife. This knife was a knife that was
22 fairly distinctive. It was bought a Cutlery World at the Meadows
23 Mall. Dale Flanagan, by the way, worked at McDonald's in the
24 Meadows Mall, very close to where Cutlery World is.

25 During the course of the investigation, there was a

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8JD04877

1 detective by the name of Burt Levos. Okay. Burt had occasion to
2 go to the trailer where Dale Flanagan still lived after the
3 killings. And he had a conversation with Dale, and he told him
4 that they'd found a knife out there. And I don't recall the rest
5 of the conversation, but the important part of it is that Dale
6 became aware that they had this knife that he knew belonged to
7 him and could be traced to him.

8 And so he got ahold of Tommy Akers. Tommy Akers, if you'll
9 remember, is the guy with the El Camino who did the driving and
10 got the tapes. He took Tommy Akers over to the Meadows Mall to
11 Cutlery World and gave Tommy Akers \$35, and he had him go into
12 the mall, into the Cutlery World, and purchase another identical
13 knife. And he went back and kept that at his trailer.

14 Enter a woman--a girl at that time--by the name of Angela
15 Saldana. Angela will testify before you. She had just become
16 the girlfriend of Dale Flanagan. And they had a nice
17 relationship going on. She didn't know -- she knew about the
18 killings, but she didn't know who had committed the killings.
19 But Dale was talking to her and telling her different things, and
20 one day he showed her this new knife that Tom Akers had bought
21 for him over at the mall, and he said something to the effect of,
22 "Look at this. The cops think they have my knife, but here it
23 is."

24 And she said, "But that looks brand new." And he said,
25 "Well, I know that, but they don't know it, and they'll never

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8JD04878

1 know." I think this was a week after the killing, thereabouts;
2 and he was still putting on some sort of a cover-up.

3 The guns were finally disposed of. My memory's going to
4 fail me now. I think it was John Lucas and Randy Moore took the
5 guns, and they went out to an area of Lake Mead called the
6 Cliffs, very popular place with a lot of the kids. And they took
7 the guns, and they threw them off the cliffs out into the water.
8 And later John Lucas (if I'm right as to that's who it was, and
9 I'm pretty sure it was), he, in being interviewed by the police,
10 told them that the guns would be located out there. And they got
11 Park Service Ranger divers to go out. And, lo and behold, they
12 found the two .22 caliber rifles that had been used in this
13 killing.

14 We know that independent of what anybody said, because the
15 first witness you're going to meet is an individual by the name
16 of Dan Connell. And Dan is a criminalist, an I.D. specialist
17 with the Las Vegas Metropolitan Police Department. He went to
18 the scene out at the Gordon's house right as soon as they knew
19 about the killing, and he collected evidence.

20 He created a scene diagram that you'll be seeing. He
21 collected bullets and bullet casings, samples of blood, all sorts
22 of things, the knife, anything he could find that was valuable to
23 the solution of this case. And he took the bullets and the
24 bullet casings and turned them over to an individual, who you
25 will not meet, but you will hear about his testimony--a man by

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8JD04879

1 the name of Richard Good; he also works in the Criminalist
2 Bureau. And he is a firearms examiner. And he has the capacity
3 to take bullets which have been fired and found either on the
4 floor or in somebody's body and match those up, or attempt to
5 match those up, to particular guns. And he also has the ability
6 to take the casing, which is the little part of the bullet that
7 had the gunpowder in it that's left over after the gun is fired,
8 and match those to particular guns. And he did that in this
9 particular case.

10 And his testimony was that insofar as the bullets he
11 recovered are concerned, they were consistent with the semi-
12 automatic rifle that Randy Moore had been carrying and shooting.
13 He couldn't say for sure, because the bullet were too badly
14 deformed, and so he couldn't make a positive identification. He
15 was able to take the casings, however, and match the casings
16 directly to that gun. And his testimony was that there was no
17 doubt that that gun had fired the casings.

18 (Pause)

19 I better see where I am. I'm going to forget something
20 here.

21 (Pause)

22 Back to Angela Saldana. Angela, Dale's girlfriend at the
23 time, was having a discussion with Dale on December the 5th, one
24 month after the killings. And Dale at that time was upset with
25 her, and they were discussing her prior relationships with other

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8JD04880

1 men. And he was upset. And he was obviously upset anyway
2 because of what he had done a month earlier.

3 And somewhere along the line he just blurted out words to
4 the effect again, "Well, how do you like this? I did it. I
5 killed my grandparents." And she later, of course, came in and
6 testified to that in front of the last trial and will come here
7 before you and testify to somewhat the same thing.

8 The arrests--for whatever note you might take of this--Dale
9 Flanagan was arrested on December the 9th, 1984. Luckett and
10 McDowell were arrested on December the 20th, 1984. Tommy Akers
11 on that same date, December the 20th; Walsh on the 22nd of
12 January, 1985; and Moore on the 23rd, the next day. And
13 interesting, about Randy Moore, he was arrested while in Mexico
14 on the run; he was headed south and trying to get away, but he
15 was arrested and brought back to this jurisdiction.

16 The trial was had, as you've all heard, in 1985. These two
17 defendants -- let me back up.

18 Tommy Akers, you're going to learn--the driver of the El
19 Camino--pled guilty to voluntary manslaughter. And he testified
20 for the State. He was put on probation. He served five years
21 probation, and he has now been taken off of probation. And
22 you'll see that he's pretty well straightened his life out.

23 Michael Walsh pled guilty to murder of the first degree, and
24 he received concurrent life sentences with the possibility of
25 parole, I think. We're going to have the judgements of

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1 conviction, and you'll be able to see for yourselves exactly what
2 that was, but it was something in that ballpark.

3 These two gentlemen and Johnny Ray Lockett and Roy McDowell
4 were taken to that trial in November of 1985 -- and it wasn't in
5 November, sometime in 1985. They were all found guilty, and they
6 were all found guilty of exactly the same thing.

7 They were all found guilty of three conspiracies: a
8 conspiracy to burglarize the house, a conspiracy to rob with the
9 use of a deadly weapon on the property of the Gordons, and a
10 conspiracy to murder the Gordons. They were also convicted of
11 the burglary, of the robbery with use of a deadly weapon. And
12 they were convicted, each of them, of the murder of Carl Gordon
13 and the murder of Colleen Gordon.

14 Roy McDowell received -- and I'm going to get this wrong
15 again; I think he received lives without the possibility of
16 parole, as did Johnny Ray Lockett, but Johnny Ray's were a little
17 stiffer than Roy's. I think Johnny Ray got consecutive, and Roy
18 got concurrent, but again we'll look at that when we get down to
19 it.

20 And what we have left are these two individuals who now need
21 to be sentenced in 1995.

22 You've been hearing a lot about aggravating circumstances,
23 and we've been withholding from what the particular aggravating
24 circumstances are in this case, and we must do that out of
25 necessity in the jury selection period. Now I'm going to tell

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8JD04882

8JD04883

1 you what the aggravating circumstances are which in the State's
2 view, and if you so decide, aggravate this first-degree murder
3 case to the extent that you will be able to view it as a death
4 penalty case, and you will be able to deliberate as to that
5 particular issue.

6 There are four. The first one was -- and I'm not going to
7 read them as they are stated in the paperwork. You're going to
8 get a formal reading of them in your instructions, but they are
9 worded something like this.

10 The first one is that these two men, by murdering each of
11 the grandparents, created a risk of great harm to someone else.
12 Well, they killed Colleen Gordon and created a great risk of harm
13 to Carl. And they killed Carl and created a great risk of harm
14 to his wife.

15 Another aggravating circumstance that we have is that they
16 committed the murders while during the course of a burglary. And
17 they've already been convicted of the burglary.

18 The other, the third one, is that they committed the murders
19 during the course of a robbery. And they've already been
20 convicted of the robberies.

21 And the last is for the purpose of monetary gain. And as
22 you're going to hear, Dale truly believed that he was going
23 to gain monetarily from having done this--and not only
24 monetarily, but with some other goods. And Randy believed
25 that Dale was going to share this--not only with Randy, but

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8JD04883

8JD04884
1 with the other four codefendants.

2 That's the evidence. That's what this case is all about.
3 You're now going to hear evidence a little bit today, some on
4 Monday probably, maybe a little bit even on Tuesday, and then
5 we'll argue to you.

6 Please, listen to it carefully. Listen to both sides.
7 Listen to whatever the Defense has to say about their case.
8 You're ultimately going to weigh it against the things that I
9 have said. And I'm sure once you've done all of this, you'll
10 come to the one and only appropriate decision that really, truly
11 fits not so much this case, but those two individuals right
12 there.

13 Thank you, very much.

14 DEFENDANT FLANAGAN'S OPENING STATEMENT

15 MS. MOUNTS: Ladies and Gentlemen, a Clark County jury
16 did in fact convict these two men in the murders of Carl and
17 Colleen Gordon, occurring on or about November 5th, or 6th of
18 1984. That was nearly eleven years ago, when these boys were
19 teenagers. They are now men.

20 Quite frankly in that regard it is a little difficult to
21 know exactly what to say at this point. The reason that I say
22 that is that there is not a cold, emotionless, mental calculation
23 that you can make and come up with an appropriate decision in
24 this case. This is an emotional type of proceeding.

25 The jury's verdict of guilt as you've heard so many times is

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8JD04884

8JD04885

1 not the subject of this proceeding. What is the subject of this
2 proceeding is your determination as to how and by what means they
3 may spend the rest of their lives in prison.

4 As you've been told, the hearing will be conducted somewhat
5 like a trial. We'll have opening statements now and then the
6 witnesses as Mr. Seaton talked about. Then the Defense will call
7 witnesses, and you'll be instructed on the law. Then you will
8 retire to reach your verdict.

9 I am confident that after all of that has passed, you will
10 find that the only punishment that serves the ends of justice in
11 this case, the only logical and appropriate punishment to impose
12 on these two men, eleven years after the murders and ten years
13 after the jury's verdict, is to send them to prison for life.

14 The State will be calling a number of witnesses who knew
15 these two as boys, who knew them on or about the 5th and 6th of
16 November 1984. We will be calling a number of witnesses who knew
17 them somewhat as boys, but know them also as men, know the people
18 they have become, and can shed light on the men that they are
19 now--the men who stand before you to be judged.

20 There is so much more, ladies and gentlemen, to these men
21 than what you will hear about what transpired on or around
22 November 5th and 6th of 1984. You will hear from the State's
23 evidence a portion of the canvas. Granted, it is the portion
24 that gets them before you for this proceeding, but there is so
25 much more to these two men that you have yet to hear about. And

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8JD04886
1 those are the things that the Defense witnesses will be talking
2 to you about.

3 On behalf of Dale, we will be calling a number of witnesses,
4 one of which will be the Reverend Dean Haywood. Reverend
5 Haywood, as you will learn, is a retired Episcopalian minister.
6 And he will come before you and talk to you about the ten or so
7 years that he has known Dale. He will tell you about the
8 guidance and counseling he has provided for Dale over the course
9 of the last ten years.

10 Along that same vein, Jan Hoffman will be called as a
11 witness. She similarly will talk to you about the relationship
12 that she has with Dale now. She will talk to you about the
13 correspondence that she's had with him for a number of years, the
14 very special relationship that she shares with him, and the
15 special relationship that Dale shared with her husband who is now
16 deceased. The testimony of her husband, Chaplain Gary Hoffman,
17 who died of a heart attack, as you will learn, several years ago
18 will reproduced for you from a prior proceedings.

19 Also through the use of a prior testimony we will be using
20 that of Mary Howard. Mary Howard is Dale's paternal grandmother.
21 She had testified previously about the relationship she had been
22 able to formulate with Dale since the time of his incarceration.

23 The testimony of Bud Lavity will also be introduced. As you
24 will learn, Bud Lavity was a guard at the Nevada State prison in
25 Carson City for about a year or a year and a half while Dale and

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8JD04886

1 Randy were incarcerated there. And he will tell you that during
2 the time that he had contact with them, they were virtually
3 trouble-free inmates. They were model prisoners who didn't
4 really cause anyone any trouble at all. And we will be asking
5 you at the conclusion of his case to consider his testimony very
6 carefully.

7 Also we will be calling Colleen Flanagan McWhirter, who is
8 Dale's younger sister by three years. She will tell you about
9 what Dale is like as a brother. She will paint a portrait of an
10 older brother who was caring and compassionate and in her words,
11 "always there for her."

12 She will tell you also a number of things that will be very
13 hard for you to hear, but also very necessary for you to hear.
14 She will talk to you in detail about the manner in which she and
15 Dale suffered as children at the hands of a very abusive, rage-
16 filled, violent father. She will explain to you what that was
17 like.

18 It is important for you to understand that, ladies and
19 gentlemen, because you cannot understand the man that sits in
20 front of you without understanding the boy who grew up in that
21 environment. You cannot understand him without understanding
22 that. And you cannot judge him without weighing that very, very
23 carefully.

24 Careen will tell you about that boy. She will tell you
25 about the boy who moved out of the family home at the age of 15

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8JD04887

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1 because he was so tired of his father's abuse, who moved out at
2 15 to face the world on his own, to go to tenth grade and support
3 himself in a full-time job and take care of himself and face life
4 alone as a boy, as an adolescent.

5 It is no secret, ladies and gentlemen, that we will be
6 asking you at the conclusion of this case to deal compassionately
7 with Dale. As I mentioned earlier, it is a very emotional type
8 proceeding.

9 And I would ask you, I would implore you, as you listen to
10 the evidence do to so with both your heads and your hearts. I
11 submit to you that you will need both in a couple of days when it
12 comes time to judge him.

13 Thank you.

14 DEFENDANT MOORE'S OPENING STATEMENT

15 MR. SCHIECK: Good afternoon, ladies and gentlemen.
16 Yes, it is afternoon. It was morning when Mr. Seaton started,
17 and we've reached the afternoon now.

18 Quickly let me just reintroduce myself. My name is David
19 Schieck; and along with Bill Wolfbrandt, we represent Randy
20 Moore.

21 Let me remind you, as the Judge recited to when he gave you
22 your general instructions, that what you hear from the attorneys
23 in the case is not evidence. The recital from Mr. Seaton in his
24 opening statement is not the evidence in the case. The evidence
25 that you will hear and consider is the evidence that will come

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SA901

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8JD04889

1 from the witness stand.

2 Likewise, Mr. Seaton's summary of what the law is with
3 respect to the aggravating circumstances they've alleged is just
4 that. It's his summary. The law in the case will be given to
5 you by Judge Guy at the conclusion of the case in the form of
6 formal jury instructions. It is from those instructions that you
7 will make the decision that has to be made in this case. And to
8 do so you apply the facts you hear from the witness stand and the
9 evidence that's admitted and apply the law to those facts.

10 As I stand before you here this afternoon, we're in a unique
11 procedural posture. As a defense attorney I would like nothing
12 better than to stand before you right now and argue the guilt or
13 innocence of my client, but I can't do that, because we are
14 constrained that you must accept the fact that a prior jury has
15 convicted Randy Moore in this case. Just as you are constrained
16 by that unique procedural posture, so are we. We have to accept
17 that and not stand before you and argue guilt, even though we
18 would all like to do that.

19 The facts of the conviction are not what we're here about,
20 because of the unique procedural posture. What we're here about
21 is what is the appropriate punishment to be imposed in this case.
22 And during the four days of jury selection, you've heard the
23 three possible forms of punishment over and over and over again,
24 and I just want to emphasize to you that those are three forms of
25 punishment. There's not two that are punishment, and one that is

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8JD04889

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1 not punishment. They are all are punishment. And you're
2 choosing between three severe punishments in this case.

3 In a capital case such as this there is really a two-prong
4 mechanism that the Judge will tell you about at the conclusion of
5 the case and which was touched upon in jury selection. One prong
6 is a very mechanical approach: Are there aggravating
7 circumstances, and are those aggravating circumstances outweighed
8 by mitigating circumstances? Very mechanical yes or no answers
9 to those questions.

10 And then there's a discretionary prong, or discretionary
11 component, to the process, and that is: Once you are allowed to
12 consider the death penalty, should we or should we not impose it?
13 There are no instructions to tell you how to make that decision
14 or whether to make that decision. You're just told you have the
15 discretion to consider that possible punishment.

16 We will presenting evidence that is consistent with the
17 evidence that has been described by Mr. Mounts here this
18 afternoon. Bud Lavity also is acquainted with Randy Moore and
19 will describe his relationship while Randy was incarcerated. He
20 will tell you that Randy was--for lack of a better term--a model
21 inmate, cooperative, no problems whatsoever.

22 You'll be hearing from a friend of Randy from back while he
23 was in Junior High School and High School by the name of Shelly
24 Balanger. She's also stayed in contact with Randy over the
25 passage of these last years. And she'll be able to describe to

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1 you not only Randy the boy, but Randy the thirty-year-old man.

2 We'll hear from Randy's mother, Lindy Moore, who will talk
3 about his childhood and what he went through as he was growing
4 up, some of the difficulties in his life and some of the
5 achievements in his life prior to November of 1984.

6 You will hear that Randy, just as with Dale, has no prior
7 significant history. And the reason I use those exact words,
8 "prior significant criminal history," because you will be told at
9 the conclusion of the case that that is in fact a statutory
10 mitigating circumstance that you must consider.

11 Likewise, youth is a statutory mitigating circumstance that
12 you will be told to consider in this case.

13 You will also be told that any other factor, whether it has
14 to do with the circumstances of the case or of the character or
15 of the background or of the recent past of these two young men,
16 can be considered by you as a mitigating circumstance.

17 The law in the state of Nevada provides that a jury can
18 decide that anything they want can be a mitigating circumstance.
19 It is not a mutually exclusive list. This jury or any jury in a
20 case like this can consider anything they want to be a mitigating
21 circumstance. And the Judge will instruct you at the conclusion
22 of the case as to the process for determining the mitigating
23 circumstances.

24 I can briefly summarize for you that unlike the aggravating
25 circumstances which must be proven beyond a reasonable doubt

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1 unanimously to the jury, mitigating circumstances do not have to
2 be proven beyond a reasonable doubt and do not have to be proven
3 unanimously. In other words, any one single juror can decide in
4 their mind that there is the presence of one or more aggravating
5 circumstances, whether or not any other juror agrees with that
6 decision.

7 That juror then must make and engage in the weighing process
8 of his or her individual mitigating circumstances against
9 whatever aggravating circumstances the entire panel has found
10 unanimously.

11 One final point before I end, mitigating circumstances are
12 not excuses for the commission of a crime, they are not
13 justification for commission of a crime, and they are not a
14 defense to the commission of a crime. They are simply items
15 offered to the jury to decide the appropriate punishment in a
16 case. We do not expect that the jury will go back and find that
17 because there are mitigating circumstances that somehow the crime
18 should be excused, justified, or found not to have been
19 committed.

20 What we do ask is that you find that those mitigating
21 circumstances compel a sentence of life in this case.

22 Thank you, very much.

23 THE COURT: Mr. Seaton?

24 MR. SEATON: Call Dan Connell.

25 DANIEL M. CONNELL, PLAINTIFF'S WITNESS, SWORN

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SA905

8JD04892

1 THE CLERK: Thank you. You may be seated.

2 DIRECT EXAMINATION

3 BY MR. SEATON:

4 Q Would you please state your name and spell your last
6 name for the Court Recorder?

6 A Daniel M. Connell, C-O-N-N-E-L-L.

7 Q And what is your profession or occupation, Mr. Connell?

8 A Currently employed part-time with the Las Vegas
9 Metropolitan Police Department as a latent print examiner.

10 Q You say currently. How long have you been employed
11 with them?

12 A Since late November of last year. I retired from the
13 Las Vegas Metropolitan Police Department April of 1994.

14 Q And for how long a period of time had you worked for
15 them?

16 A Twenty-eight years.

17 Q In what capacity?

18 A As a patrol officer, in the Detective Bureau and 22
19 years in the Criminalistics Bureau.

20 Q What is the Criminalistic Bureau?

21 A The Criminalistics Bureau is that part of the
22 department that pertains to crime scene investigation and the
23 examination of evidence collected by personnel within the
24 Criminalistics Bureau and/or officers within the department or
25 other agencies.

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SA906

8JD04893

8JD04894

1 Q Okay. And during your 22 years, a good portion of that
2 time was spent doing those sorts of things by yourself?

3 A That is correct.

4 Q On November the 5th, 1984, were you so employed?

5 A I was.

6 Q And did you go to a residence located at 5851 Washburn
7 Road?

8 A I did.

9 Q And that was here in Clark County, Nevada?

10 A That is correct.

11 Q When you went into the -- after you finished your
12 investigation, did you prepare a diagram?

13 A Yes, I did, and that was for another hearing.

14 Q Yes. And is this diagram, which has been marked as
15 State's Exhibit 87, is that the diagram which you made for that
16 other hearing?

17 A Yes, it is.

18 Q And this was the exhibit that was utilized in that
19 other hearing?

20 A That is correct.

21 Q It's a little dog-eared now. While you were there, did
22 you take a number of photographs of the address, 5851 Washburn,
23 both inside the house and outside?

24 A I did.

25 Q Okay. And we have utilized those photographs to some

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SA907

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8JD04895

1 extent in prior hearings?

2 A That is correct.

3 Q Just in your own words, very broadly describe that
4 house and the interior of it.

5 A Okay. The house is equivalent to about a two-story-
6 plus house. It was at the end of a dirt road at the time,
7 Washburn Avenue. It faced to the north. The entrance to the
8 house was from a driveway that led to the garage. The house was
9 then primarily in the back of the garage. As you went into the
10 house, which would have been -- the door was at the northeast
11 corner of a living room/dining room area. As you entered this
12 area, which contained the dining room area and the living room,
13 it was a vaulted ceiling. There was a second floor which
14 contained a bedroom on the back half of the house. There was
15 another bedroom down on the first floor. The first floor also
16 contained a kitchen, utility room and laundry area.

17 Q We'll get to this in a moment. Go ahead.

18 A The dining area was immediately -- may I refer to the
19 diagram?

20 Q What I was going to do, and perhaps this would be a
21 good time, is I want to show the jury pretty much what this place
22 looked like, both by the use of the diagram, Exhibit 87, and the
23 exhibits that I'm holding in my hand now, and have you come down
24 in front of the jury and use both of those to explain as rapidly
25 as possible what the scene looked like.

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SA908

8JD04895

8JD04896

1 Would you look at these photographs, which I'll read into
2 the record are Exhibits 1, 14, 15, 18, 21, 41, 43, 44, 49, 51,
3 62, 69, 71, 79 and 80? First of all, look at those and tell us
4 if those indeed do depict the scene at the time you went out
5 there and did your investigation.

6 A Yes, with the exception of No. 62 and No. 71, which
7 were taken by a -- they're aerial photographs and they were taken
8 by a person known as Ken Parsons the following day, which would
9 have been on the 7th.

10 Q You're familiar with what those photographs -- the
11 exhibit that you just mentioned?

12 A Yes, I am.

13 Q And do they relate to the scene?

14 A Yes, they do.

15 Q They are indeed the aerial photographs of the area the
16 house is located in, are they not?

17 A That is correct.

18 Q Taking those photographs, would you step down in front
19 of the jury and -- let's do it this way. First of all, carry
20 them all with you if you would, Mr. Connell. And we've got a
21 large jury here so we'll have to show the same photograph perhaps
22 in two or three different segments. What I'd like you to do is
23 use the photographs and just describe each one, show it to the
24 jury, perhaps show on the diagram, where it's applicable, how
25 that photograph relates to the diagram. And as you're doing it,

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8JD04897

1 tell us what significance the photograph had for you as an
2 investigator of this particular crime scene.

3 A The first photograph is indicated the front -- the
4 first photograph is indicated as the front of the residence.

5 Q And where is the front entrance of the residence on
6 Exhibit 87?

7 A This would be the front entrance. On the diagram the
8 garage is not shown or the driveway. So this would be the garage
9 and this would be the front entrance. The photograph was taken
10 looking this way.

11 Q So the entrance would be off to the right of the
12 diagram?

13 A That is correct.

14 Q All right. Thank you.

15 A The front door entrance would be right here. And in
16 the photograph the front door entrance would be in this spot
17 right over here.

18 Q The bottom right-hand corner of the -- or left-hand
19 corner of the photograph?

20 A Yes.

21 Q Okay. The next photograph, is that No. 4?

22 A It would be No. 14.

23 Q 14. If there are two there that seem to depict the
24 same scene but from different angles, let's show them at the same
25 time if we can.

IV-123

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SA910

8JD04897

1 A I'll go with these next two first.

2 Q All right.

3 A No. 14 shows the west side of the residence,
4 specifically the west living room window. It shows a bush there;
5 it is circled indicating the window area. That would be this
6 window right here that's indicated on the diagram, and that would
7 be the southwest window of the living room.

8 Q And the next two pictures I believe are different
9 pictures of the same window?

10 A No. 15 and No. 18 are photographs of that same window,
11 They are indicating the condition...

12 Q Just a little slower if you can.

13 A They're indicating the condition of the window itself.

14 Q And what was the condition of that window?

15 A The solar screen was cut and the glass was broken out
16 of the window.

17 Q All right. What is the next photograph in order if you
18 would, please?

19 A The next photograph is No. 21, and that is showing the
20 entrance into the downstairs bedroom. It indicates the stairway.
21 It also indicates blood spatter that is located on the wall.
22 That is -- be the south wall of the living room, leading up to
23 the second floor.

24 Q Point to that on the diagram 87 if you would, please.

25 A And it also shows the position of the male victim.

IV-124

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SA911

8JD04898

1 That would be this area right in here. This would be the stairs
2 that are indicated in the photograph. The blood spatter is in
3 this particular area. And the male victim, shown here, is on the
4 floor.

5 Q All right. If we can see the next picture, please.

6 A The next picture, No. 41, is showing the top torso and
7 the head of the male victim plus the legs of the female victim,
8 which she was on the bed in the downstairs bedroom.

9 Q On the diagram it shows the location of the two bodies.
10 Is that as accurately drawn as you could make it relative to the
11 positions that they were actually found in?

12 A That is correct.

13 Q All right.

14 A No. 43 shows the back and head area of the male victim,
15 specifically indicating an apparent bullet wound graze that is
16 located up on his shoulder.

17 Q Is everyone getting enough time to see these?

18 A No. 44 again is showing the head area of the male
19 victim. This was primarily for identification purposes. It also
20 indicates the one foot -- it would be the right foot of the
21 female victim.

22 No. 49 would be showing the head area of the female victim,
23 specifically what appears to be a black stain on her clothing.
24 That is the purpose for the ruler in the photograph, to show the
25 size, the relative size.

IV-125

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SA912

8JD04899

8JD04900

1 Q Do you, of your own knowledge, know what that black
2 stain was?

3 A It appeared to be a sooty stain similar to gunpowder.

4 Q When you shoot guns they leave a gunpowder residue?

5 A They can, yes.

6 Q Go ahead to the next picture.

7 A Okay. No. 51 is the overall bedroom area, showing this
8 portion right here, specifically how the female victim was
9 located on the bed. There's also a string in the photograph too
10 that was placed there by myself to determine possible bullet
11 directory of a projectile that struck the bedroom door.

12 No. 62 is a photograph that I had referred to that was taken
13 by Ms. Parsons. It shows the overall layout of the house, where
14 it sits on the lot, the condition of the area surrounding it,
15 which was basically at that time open desert.

16 No. 69 will be another exterior photograph. This is showing
17 the west side of the house, primarily the location of the trailer
18 in relationship to the house itself. No. 71 is again another
19 aerial photograph looking towards the front of the house. This
20 again was taken on the following day.

21 No. 79 is a photograph of the closet area in the living
22 room, which is indicated right here on the diagram. No. 80 is a
23 second photograph showing that same area, only slightly closer.

24 Q You may resume your seat. Does that conclude the
25 photographs?

IV-126

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SA913

8JD04900

8JD04901

1 A Yes, it does, sir.

2 Q While you were doing your investigating, did you try to
3 determine how the people who had done the killing got into the
4 house? Point of entry I believe they call it.

5 A Yes, we did.

6 Q Okay. What did you determine?

7 A Let me point to the diagram. This window was most
8 likely a point of entry into the residence itself. The window
9 was broken out from the exterior, inside. The majority of glass
10 was on the interior side.

11 Q While you were there, did you collect certain evidence?

12 A Yes, I did.

13 Q For example, did you locate a knife?

14 A Mr. Rodreick, who was also with me at that time,
15 collected the majority of the evidence at the first response.

16 Q All right. Did you see a knife being collected by Mr.
17 Rodreick?

18 A Yes, I did.

19 Q And where was it found?

20 A That knife was located on the ground, outside that west
21 living room window. I believe it's marked as "knife" here on the
22 diagram.

23 Q All right. Thank you. Showing you what has been
24 marked as Exhibit 91A, does that appear to be the knife that Mr.
25 Rodreick found?

IV-127

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SA914

8JD04901

1 A As I recall, it does. Let's see. A western -- yes.

2 Q Thank you very much. Did you locate certain firearms
3 evidence such as bullets or bullet casings?

4 A Yes.

5 Q And again, is this Mr. Rodreick who does most of the
6 collecting?

7 A Yes, he did all the collecting of evidence that day.

8 Q Were you the senior crime scene investigator out there
9 at the time?

10 A I think that part of it was divided between myself and
11 Mr. Rodreick.

12 Q All right. How many casings -- how many casings were
13 ultimately found in this case?

14 A If I recall, I believe there was five.

15 Q And where were they located?

16 A They were located -- as it may indicate on the diagram,
17 they were located in this area here, plus the window, and I
18 believe one was outside.

19 Q So there was one outside, one, I think you were
20 pointing on the window, like a sill or...

21 A There were two of them that were located in the window
22 sill area.

23 Q Okay. And then several others that were located just
24 inside the window area?

25 A That is correct.

IV-128

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SA915

8JD04902

1 Q And how about bullets? How many bullets were found?

2 A There was one initial bullet that was found between the
3 male victim's legs. There were two other bullets that were
4 recovered from the bedcovers that were impounded from the bed in
5 this bedroom.

6 Q And all of those bullets and casings were taken into
7 evidence and then given to an individual by the name of Richard
8 Good. Is that true?

9 A That is correct.

10 Q Who is Mr. Good?

11 A Mr. Good is the firearms examiner for the Las Vegas
12 Metropolitan Police Department.

13 Q And did he go ahead and examine these particular items?

14 A Yes, he did.

15 Q When you were in the house, did you note any areas
16 which appeared to have been ransacked?

17 A The only areas of disturbance that we noted in the
18 house, and that included the garage area, the first floor plus
19 the second floor bedroom area, was the living room closet area.

20 Q Describe what you saw. Or is that pretty well shown in
21 the photographs that you have shown the jury before of that
22 closet area?

23 A Yes.

24 Q Just very briefly describe it.

25 A Several items of clothing were pulled out of there.

IV-129

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SA916

8JD04903

8JD04904

1 There was a purse that was located and its contents dumped in
2 this area of the living room floor. I think it's -- okay. It's
3 indicated right here.

4 Q Where it says "purse" on the diagram?

5 A Where it says "purse."

6 Q When looking through the purse and the items which have
7 been strewn about in the area of the purse, did you find any
8 evidence of a woman's wallet?

9 A No.

10 Q Or any identification at all?

11 A No.

12 Q With regard to Mr. and Mrs. Gordon, did you have an
13 opportunity to look at their bodies there at the scene?

14 A Yes.

15 Q Could you make any sort of a determination as to the
16 nature and the extent of their injuries?

17 A Their injuries all appeared to be as a result of
18 gunshots.

19 Q How many gunshot injuries did you see relating to Mrs.
20 Gordon?

21 A I don't recall the number other than the fact that they
22 were to the head.

23 Q There was more than one?

24 A I believe there may have been.

25 Q Okay. And how about the gunshot wounds to Mr. Gordon?

IV-130

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SA917

8JD04904

8JD04905

1 Can you remember how many and roughly what part of the body were
2 they on?

3 A The exact number, no. As I indicated in one of the
4 photographs, there was the grazed one to the shoulder. There
5 were I believe a couple wounds to the abdomen, the neck and the
6 back.

7 MR. SEATON: That concludes direct examination, Judge.

8 THE COURT: Mr. Wall?

9 MR. WALL: We have no questions, your Honor.

10 THE COURT: Mr. Schieck?

11 MR. SCHIECK: No questions, your Honor.

12 THE COURT: Thank you, sir. You are excused.

13 THE WITNESS: Thank you.

14 THE COURT: Monday morning, 10:00. In the meantime, it
15 is your duty not to talk among yourselves or with anyone else on
16 any matter pertaining to this trial; read, watch or listen to any
17 report of or commentary on the trial by any person or by any
18 medium of information, including without limitation newspapers,
19 radio or television; form or express any opinion on any matter
20 pertaining to this trial until it is finally submitted to you.

21 Have a nice weekend. See you Monday morning at 10:00.

22 THE BAILIFF: Leave your notebooks in your chairs.

23 (Jury out at 12:54 p.m.)

24 THE COURT: Will counsel stipulate as to the absence of
25 the jury?

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SA918

8JD04905

8JD04906

1 MR. SEATON: Yes, Judge.

2 MR. WALL: Yes, your Honor.

3 MR. SCHIECK: Yes, your Honor.

4 THE COURT: I have been given what purports to be a set
5 of instructions that don't have any paper clips on them.

6 MR. SEATON: Oh, there should have been one paper clip
7 on one of the instructions.

8 THE COURT: Let me give them back to you, Mr. Seaton.
9 If you'll hang on them until the end of the time. I got too much
10 stuff around. I don't want to lose them.

11 MR. SEATON: Do you not want them today?

12 THE COURT: No, I just want to be sure they're ready.
13 Anything before me?

14 MR. SEATON: Judge, I want to make one more little bit
15 of a record, adding on to what I talked about earlier today, and
16 it has to do with the psychologist that evidently the Defense is
17 going to call.

18 By this time I have been able to read less than half of the
19 fairly lengthy report. One of the things that bothers me most
20 about the late notice that the state got on this--and frankly the
21 defense should be complaining about this too--we didn't ask the
22 jurors any questions at all about areas of medicine, areas of
23 psychology, other than "Did you take classes"--none of the things
24 that we would typically ask in a sanity kind of a hearing.

25 I know this isn't an insanity thing. I'm just bothered by

IV-132

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SA919

8JD04906

8JD04907
1 that. My thoughts still aren't complete on this, because it's so
2 new, but I just...

3 THE COURT: ...if you read the report -- I believe you
4 were going to have a copy for me this morning. This afternoon?

5 MR. SEATON: I will have one to you momentarily.

6 THE COURT: Make it momentarily then.

7 MR. SEATON: I will.

8 THE COURT: For the record too, we are using a new
9 marking on the old exhibits that will conform to this hearing.
10 See you Monday morning at 10:00 hopefully. Have a nice weekend.

11 MR. SEATON: Thank you, Judge.

12 THE BAILIFF: All rise.

13 (Proceedings concluded at 12:56 p.m.)

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IV-133

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SA920

8JD04907

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CERTIFICATION

8

9

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

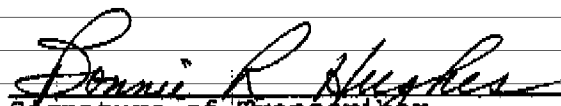
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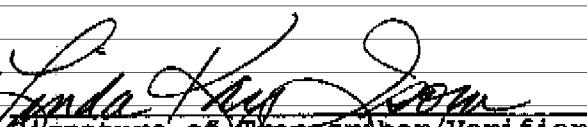

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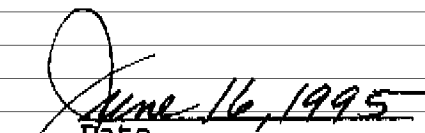
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SA921

8JD04908

CASE NO. C069269

DEPT. NO. 12

FILED

Dec 27 11 57 AM '05

DISTRICT COURT
CLARK COUNTY, NEVADA

CLERK

* * * * *

STATE OF NEVADA,
Plaintiff,

vs.

RANDOLPH MOORE,
Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT

OF HEARING IN RE

ARGUMENT: DEFENDANT'S WRIT OF HABEAS
CORPUS/REMAINING ISSUES

BEFORE THE HONORABLE MICHELLE LEAVITT
DISTRICT COURT JUDGE

DATED TUESDAY, JULY 13, 2004

REPORTER BY: JO A. SCOTT, RPR, CCR NO. 669

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 Las Vegas, Nevada 89101

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1 LAS VEGAS, NEVADA; TUESDAY, JULY 13, 2004
2 11:17 A.M.

3 -oOo-

4 THE COURT: Good morning. State of
5 Nevada versus Randolph Moore, C069269.

6 Go ahead and state your appearances.

7 MS. THOMAS: JoNell Thomas on behalf of
8 Randolph Moore. He is in custody at the Nevada
9 State Prison.

10 MR. SIMON: Leon Simon and Sonia Jimenez
11 on behalf of the State of Nevada.

12 THE COURT: Thank you.

13 And I'm attempting to do something about
14 the temperature.

15 MR. SIMON: Good.

16 THE COURT: So I understand it might be
17 a little bit uncomfortable.

18 Go ahead. Do you want to start off?

19 MS. THOMAS: Yes, Your Honor.

20 As I understand it in conversation with
21 Mr. Simon, and we've made some agreements as far
22 as recognizing that a large number of issues here
23 really concern legal issues and not so much
24 factual matters, and those don't need to be the
25 subject of an evidentiary hearing.

1 THE COURT: I would agree with that.

2 MR. SIMON: Uh-huh.

3 MS. THOMAS: It's as almost all of the
4 issues are, for instance, both standalone claims
5 and as instances of ineffective assistance of
6 counsel. Our good cause for presenting the issues
7 as standalone claims falls under -- the argument
8 is that because he received ineffective assistance
9 of counsel, the merits of those issues should be
10 heard, so they are very intertwined.

11 Essentially that leaves us with four
12 primary issues, which is: Counsel from the first
13 trial for the guilt phase was ineffective.

14 THE COURT: Mr. Posin.

15 MS. THOMAS: Mr. Posin.

16 That the counsel on direct appeal as it
17 concerns the guilt phase, Mr. Leeds and Mr. Airs
18 (phonetic) were ineffective, and then Mr. Schieck
19 was ineffective during the third penalty hearing,
20 and on appeal from the third penalty hearing.

21 So essentially four different instances.
22 I don't want to speak for Mr. Simon, so I will
23 allow him to address the issues as he sees it
24 concerning trial counsel.

25 I've tried in the past to locate

1 Mr. Airs and Mr. Leeds, but I haven't done so in
2 about a year. I was informed that one of them was
3 deceased, and I don't recall which. I believe it
4 was Mr. Leeds. As far as having an evidentiary
5 hearing where they were -- if they were to come in
6 to testify about strategic decisions or tactical
7 reasons for not raising certain issues, that could
8 be difficult, but I can certainly try to secure
9 their attendance.

10 I did talk with Mr. Schieck, and he, of
11 course, is available. So that, essentially, I
12 think it may make more sense for Mr. Simon to
13 discuss what he sees is the scope of the
14 evidentiary hearing on the first guilt phase.

15 THE COURT: Okay. Because I think she
16 accurately boiled it down to what the issues were.
17 I mean, I know they're -- quite frankly, I enjoyed
18 these briefs. I don't normally get such --

19 MR. SIMON: I'm glad you enjoyed them.

20 THE COURT: I mean, I shouldn't say I
21 enjoyed them. I thought they were intellectually
22 challenging, and so I appreciated both sides'
23 briefs, because they were -- the issues were very
24 well-briefed.

25 But I think she really succinctly drew

1 out what the issues were. I agree that they are
2 intertwined, but I think it all boils down to the
3 ineffective assistance of counsel issues.

4 MR. SIMON: Well, Your Honor, the first
5 thing I would like to say is I think Ms. Thomas is
6 getting ahead of herself when she starts talking
7 about the evidentiary hearing. My understanding
8 is that Your Honor has to decide today whether an
9 evidentiary hearing is necessary, and I would like
10 to address that.

11 THE COURT: Okay.

12 MR. SIMON: Ms. Thomas and I have agreed
13 that the specific issues we're talking about today
14 are 39, 40, 41, and 42, that's ineffective
15 assistance of the original trial counsel, Murray
16 Posin; 40 is the alleged ineffectiveness of
17 Mr. Schieck at the third penalty phase; 41 is the
18 alleged ineffectiveness of Mr. Leeds and Mr. Ains
19 on the first appeal; and 42 is the alleged
20 ineffectiveness of Mr. Schieck on the appeal from
21 the third death penalty.

22 I would like to briefly address each of
23 these. Now, as I mentioned before, Ms. Thomas
24 does a very thorough job. There are multiple
25 issues here. Some of the issues I think have no

1 merit is the allegation. Now, what Ms. Thomas has
2 done is she's taken a shotgun approach here, and
3 she has pretty much incorporated her entire
4 petition into her claims of ineffective assistance
5 of counsel in these four categories.

6 She alleges that Mr. Posin was
7 ineffective because he didn't challenge the
8 aggravator of risk of death to more than one
9 person. Supreme Court in Nevada in this case
10 upheld that aggravator. So even if he had more
11 vigorously attacked it, it wouldn't have made any
12 difference. I don't think there is any merit to
13 that.

14 She also alleges that he didn't
15 vigorously attack the aggravators for burglary,
16 robbery, and the alleged doubling up of the
17 aggravators, which were also used to support the
18 felony murder theory.

19 Our Supreme Court in a number of cases,
20 Bennett, which I handled, upheld the burglary and
21 robbery. I believe in -- I believe Pasanecy
22 (phonetic) was the case in which they upheld the
23 doubling up, as defense counsel refers to it, of
24 aggravators also used for felony murder. Those
25 issues have been resolved by the Supreme Court and

1 other cases contrary to Ms. Thomas' position.

2 So it wouldn't have mattered if Mr.
3 Posin had pursued them. It would have been the
4 same result. As we all know, there are two prongs
5 to Strickland. You must show ineffectiveness, and
6 you must show prejudice. So even if Mr. Posin
7 would have vigorously advocated those issues,
8 there is no prejudice, because our Supreme Court
9 has ruled to the contrary in this case and other
10 cases.

11 Ms. Thomas also claims that he should
12 have raised a diminished capacity defense. State
13 of Nevada does not recognize the diminished
14 capacity defense. She alleges that he should have
15 objected to having to share the peremptory
16 challenges with the co-defendant. Nevada Revised
17 Statute 175.041 requires that co-defendants share
18 their peremptory challenges.

19 She also alleges that he should have
20 sought a change of venue. Well, Nevada Revised
21 Statute 174.455, Paragraph 2 requires that before
22 a party can move for a change of venue, they must
23 try to seat a jury and not be able to do so. That
24 didn't happen. They not only seat one jury in
25 this case. Subsequent to Mr. Posin's involvement,

1 they seated two more juries. They were able to
2 obtain jurors who promised to be fair and
3 impartial in Clark County. There was no legal
4 cause for change of venue.

5 Ms. Thomas alleges throughout her
6 petition and in these subcategories that the
7 various attorneys should have objected to the
8 constitutionality of Nevada's death penalty
9 statutes. The Nevada death penalty statutes have
10 been upheld over and over again by our Supreme
11 Court. There wouldn't have been any point to
12 doing that. He cannot be ineffective for not
13 having challenged laws that have been upheld by
14 our Supreme Court over and over again.

15 Similarly, Ms. Thomas alleges that
16 Mr. Posin should have objected because the case
17 was tried before an unfair tribunal because judges
18 are elected. Our Supreme Court in a fairly recent
19 case, State versus Aberstraw (phonetic)
20 specifically rejected the proposition that the
21 fact that judges are elected constitutes an unfair
22 tribunal. None of those claims have any merit
23 whatsoever.

24 But now that I've listed those, I will
25 say in all candor to the Court, I think Ms. Thomas

1 has made out a prima facie showing that Mr. Posin
2 was ineffective. Without taking all the other
3 claims she's stated, what she has stated in some
4 is that he pretty much didn't do much of anything
5 during the trial except sit there. So I think
6 there has been a prima facie showing that
7 Mr. Posin was ineffective.

8 Now, if we needed to pursue that, it
9 would be appropriate to have an evidentiary
10 hearing, put Mr. Posin on the stand, and ask him
11 why he didn't do the various things. Whether he
12 had any strategic reasons or not, I don't know.
13 It seems doubtful, but I think he should have the
14 opportunity to explain if we get to that.

15 Now, I would submit to the court that we
16 don't need to reach that, because I don't think
17 Ms. Thomas has made a showing that she can meet
18 the second prong of Strickland. I think she has
19 made a prima facie case showing that Mr. Posin was
20 ineffective, but I don't think that she has shown
21 that that prejudiced the defendant.

22 Under Strickland, the defendant is
23 prejudiced if, but for counsel's ineffectiveness,
24 there is a reasonable probability that he would
25 have received a more favorable result. I don't

1 think she can show that in this case. I don't
2 think she has shown that in this case.

3 The Supreme Court of Nevada has twice,
4 on its first appeal and I believe it was a third
5 appeal, referred to the overwhelming evidence of
6 guilt. In 112 Nevada 409, Page 1420, the Supreme
7 Court stated: We characterize the evidence
8 against Flanagan and Moore as overwhelming in our
9 first opinion in this case. There is no reason to
10 change that characterization now, nor has either
11 appellant disputed the weight of the evidence
12 against it.

13 The Supreme Court of Nevada then goes on
14 to outline the nature of the evidence. There were
15 several young people involved in this conspiracy
16 and in the crime, and it seems to me, having been
17 involved in criminal law for many, many years,
18 that the more people that are involved in a crime,
19 the more likely it is that the police will solve
20 the crime and bring the perpetrators to justice.

21 Several of the people involved in this,
22 either directly or peripherally testified against
23 the two primary defendants, Flanagan and Moore at
24 trial. They testified to the conspiracy to commit
25 the crime, they testified to admissions that both

1 Flanagan and Moore made after the crime. After
2 the crime, Moore told some of the group of this --
3 these young people who were committing burglaries
4 and doing drugs and alcohol together, that he had
5 killed the grandfather, which, indeed, was the
6 State's theory of the case.

7 The physical evidence, although
8 Ms. Thomas will certainly indicate that there were
9 some discrepancies that could have been brought
10 out, the physical evidence basically supported the
11 State's theory of the case and the admissions and
12 the testimony of the co-conspirators and of
13 hangers onto the group. They found the murder
14 weapons thrown in the lake where they had disposed
15 of them. There was overwhelming evidence of
16 guilt.

17 Also, we have had 36 jurors have all
18 unanimously voted for the death penalty, and
19 arguably on the first case, Mr. Moore didn't have
20 effective counsel. I don't see any way that you
21 can argue that he didn't have effective counsel
22 once David Schieck came into this case.

23 Ms. Thomas has alleged in two of her
24 claims, I believe that's 40 and 42, that
25 Mr. Schieck was ineffective at the third penalty

1 phase and on the appeal from the third penalty
2 phase. I'm astounded by that claim. Mr. Schieck
3 is one of the best criminal defense attorneys in
4 the State of Nevada. He may be the very best
5 appellate attorney. In fact, in this case, he
6 went to the Supreme Court of the United States on
7 a writ of certiorari --

8 THE COURT: I know.

9 MR. SIMON: -- after the second death
10 penalty, and he got it reversed. I'm astounded
11 that Ms. Thomas would accuse him of being
12 ineffective.

13 Now, I know that her answer is going to
14 be that although he's a good lawyer, even the best
15 of lawyers sometimes make mistakes. Well, I don't
16 see that she has pointed out anything here that
17 Mr. Schieck could have done and should have done
18 that would have made a difference had he done it.

19 Basically what Ms. Thomas is accusing
20 Mr. Schieck of is that he didn't do all of the
21 things that she is now arguing. She has had --
22 she has got 40-some claims in her petition.

23 Now, she accuses both Mr. Schieck and
24 the two first appellate lawyers, Leeds and Airs,
25 of being ineffective because they didn't raise all

1 of these claims on appeal, including some of the
2 claims that I've already alluded to that I think
3 clearly had no merit. But I think the thing we
4 have to keep in mind is what kind of job did these
5 three appellate lawyers do for the defendant.
6 Leeds and Airs got his first death penalty
7 vacated. Mr. Schieck got his second death penalty
8 vacated.

9 Now, as Your Honor and Ms. Thomas and I
10 all know, the Supreme Court of Nevada and the
11 Supreme Court of the United States both feel that
12 effective appellate advocacy includes the weeding
13 out of some claims that are not necessarily
14 frivolous in order to focus on the claims that
15 have the best chance of winning. I think all
16 three of these appellate lawyers did a commendable
17 job of weeding out.

18 THE COURT: Well, I think the record
19 should reflect, too, that the Nevada Supreme Court
20 has a page limit.

21 MR. SIMON: Well, that's true, too,
22 although Ms. Thomas often gets permission to
23 exceed it, because she wants to be very thorough.

24 THE COURT: Well, sometimes she doesn't
25 get permission, right?

1 MR. SIMON: Well, sometimes she gets
2 permission to go over, but not by as much as she
3 wants.

4 THE COURT: Because I've read decisions
5 where she wasn't given permission.

6 MR. SIMON: I know.

7 The Supreme Court of the United States
8 case, of course, is Jones V. Barns, which we've
9 cited. That is 463 U.S. 745, 1983 case.

10 But my favorite case, and I'm sure
11 Ms. Thomas' not favorite case, is Hernandez versus
12 State, 117 Nevada 463, 2001. Hernandez follows
13 Jones V. Barns in stating that appellate counsel
14 is most effective when they weed out nonfrivolous
15 issue, not just frivolous ones, but nonfrivolous
16 ones, and focus on the best issues.

17 The reason I like Hernandez so much is
18 because the Supreme Court is talking about JoNell
19 Thomas. That's one where she came in with one of
20 her gigantic briefs, and they limited her to I
21 think it was 80 pages on that particular one.

22 But I think appellate counsel was
23 effective. They got good results for Mr. Moore,
24 they weeded out the issues. That's all we can ask
25 of them. I don't think we have an issue here on

1 effective assistance of appellate counsel.

2 About the third penalty phase, that's
3 where Mr. Schieck represented Randolph Moore.
4 There were ten witnesses called by the defense,
5 Flanagan and Moore together at the third penalty
6 phase. If memory serves me correct, four of them
7 were joint witnesses who had good things to say
8 about both Flanagan and Moore. In addition to
9 that, the co-defendant Flanagan called four
10 witnesses on his own behalf, none of whom hurt
11 Mr. Moore, and Mr. Moore called two witnesses.

12 Mr. Schieck, as well as being a very
13 outstanding appellate lawyer, is also a very
14 capable trial lawyer. They once again suffered
15 the death penalty. Was that Mr. Schieck's fault?
16 Not at all. That was based on the facts of the
17 case.

18 I've been practicing criminal law here
19 in Las Vegas for over 30 years, both as a defense
20 attorney and as a prosecutor, and I think all of
21 us who are familiar with criminal practice know
22 that when you are a defense attorney, you get some
23 cases that you are just not going to win.

24 My first year as a deputy public
25 defender, I tried 12 cases to a jury. Three of

1 those cases involved defendants who were caught in
2 the act of committing either robberies or
3 burglaries. The policeman actually caught them at
4 the scene of the crime. I lost all three of those
5 cases. I felt bad at the time. I went on to win
6 four out of the remaining nine. But now that I've
7 been around awhile, I realize that short of
8 getting a nutcase on the jury, there is no way I
9 would have one those cases, and I think that we're
10 looking at the same thing here.

11 Mr. Moore, as I stated a bit ago, was
12 unanimously found eligible for the death penalty
13 by 36 jurors. I don't think that Ms. Thomas has
14 met the prejudice prong on the third penalty phase
15 by showing what Mr. Schieck could have done and
16 should have done that would have rendered a
17 different result probable.

18 So, in short, I would like to suggest to
19 the Court that there is no merit at all to the
20 claims of ineffective appellate counsel, either
21 Leeds and Airs or Mr. Schieck. I also don't think
22 that there is any legitimacy to the claim that
23 Mr. Schieck was ineffective at the third penalty
24 phase.

25 In candor to the court, I think

1 Ms. Thomas has made a prima facie showing Mr.
2 Posin was ineffective, but I think the problem
3 there is I don't think she has made a showing that
4 but for his ineffectiveness, a more favorable
5 result was reasonable probable.

6 THE COURT: Okay. How much of that do
7 you agree with?

8 MS. THOMAS: I agree that Mr. Posin was
9 ineffective.

10 THE COURT: Okay. Now, because I agree
11 that you've made a prima facie showing that he's
12 ineffective. I'm quite surprised at some of the
13 stuff that I read that went on during the guilt
14 phase of that trial.

15 I mean, do you believe we have to have
16 an evidentiary hearing and why?

17 MS. THOMAS: There are some issues I
18 don't think we need an evidentiary hearing on.

19 THE COURT: Okay.

20 MS. THOMAS: I believe it is Claim 16
21 that concerns Judge Mosley's ruling that defense
22 counsel were obligated to make objections outside
23 the presence of the court, outside the presence of
24 the jury while the prosecutor remained free to
25 make objections. To me, that amounts to

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

4 PROSPECTIVE ALTERNATE JUROR NO. 2: I do not.

5 THE COURT: Mr. Wall?

6 MR. WALL: Thank you, your Honor.

7 MR. WALL: Okay, your Honor.

8 Mr. Marten, first of all referring to your questionnaire.
9 In Question 56 about how you feel the crime problem is handled in
10 the community, you said, "I don't feel we as a community are
11 either aggressive or relaxed in approaching the issue."

12 Can you tell me what you meant by that?--if you remember. I
13 know it's been a week.

14 PROSPECTIVE ALTERNATE JUROR NO. 2: It's been a week.
15 Yes, it has.

16 What I meant by aggressive or relaxed, I don't think that
17 our city -- and I don't read the paper for its crime content
18 often. I don't think the city aggressively is in a position of
19 fighting crime, nor do I feel that there's any publicity to the
20 contrary that says we're relaxed and we're a wide open city.

21 MR. WALL: Do you think the crime problem is handled
22 adequately?

23 PROSPECTIVE ALTERNATE JUROR NO. 2: Well, quite
24 frankly, sir, being involved in the businesses that I have, I
25 think probably 90 percent of the general public that is

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1 functioning in a business fashion today is not cognizant to
2 everything that goes on around them.

3 MR. WALL: Your questionnaire indicated that you were a
4 grand jury witness at one time.

5 PROSPECTIVE ALTERNATE JUROR NO. 2: That's correct.

6 MR. WALL: Can you tell me a little bit about that
7 factual scenario?

8 PROSPECTIVE ALTERNATE JUROR NO. 2: The scenario of the
9 case and my involvement?

10 MR. WALL: Yes.

11 PROSPECTIVE ALTERNATE JUROR NO. 2: I was a new home
12 sales person in Denver in the very early '80's. I had sold a
13 home to a gentlemen and his family. The gentlemen was accused
14 and tried and convicted of conspiracy to murder his wife for
15 insurance purposes. And I witnessed the individual with the
16 hired assassin on location in our community, and I was called
17 upon to witness the association of the two people together.

18 MR. WALL: As a witness did you witness any portion of
19 the crime being committed?

20 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

21 MR. WALL: Was it solely a conspiracy charge, the plan,
22 or was the murder actually carried out?

23 PROSPECTIVE ALTERNATE JUROR NO. 2: Oh, the murder was
24 carried out.

25 MR. WALL: Okay. Your personal knowledge as a witness

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8JD04803

1 was as to the association between the two conspirators?

2 PROSPECTIVE ALTERNATE JUROR NO. 2: That's correct.

3 MR. WALL: Because you had seen them together at
4 sometime.

5 PROSPECTIVE ALTERNATE JUROR NO. 2: That's correct.

6 MR. WALL: Did you testify at the trial as well?

7 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, I did.

8 MR. WALL: Probably testified several times, then. At
9 the grand jury...

10 PROSPECTIVE ALTERNATE JUROR NO. 2: Deposition, trial.

11 MR. WALL: Okay. How long ago was that?

12 PROSPECTIVE ALTERNATE JUROR NO. 2: Late '70's, early
13 '80's. It'd be early '80's--'80, '81.

14 MR. WALL: Do you know whether or not the jury in that
15 case imposed a penalty?

16 PROSPECTIVE ALTERNATE JUROR NO. 2: I don't believe --
17 I don't know.

18 MR. WALL: Okay.

19 PROSPECTIVE ALTERNATE JUROR NO. 2: I don't -- once I
20 testified, I was out of the situation. I know that the
21 individual that actually carried out the slaying turned state's
22 evidence against the conspirator, and they both spent time.

23 MR. WALL: Do you know if Colorado has the death
24 penalty?

25 PROSPECTIVE ALTERNATE JUROR NO. 2: I do not know.

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8JD04804

1 MR. WALL: At that time at least?

2 PROSPECTIVE ALTERNATE JUROR NO. 2: Right.

3 MR. WALL: During that case did you form in your own
4 mind an opinion of what either or both of those individuals ought
5 to be sentenced to?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: I don't believe I
7 did. I know I was quite grieved by the man that I sold the home
8 to that he would set his family up for that situation.

9 MR. WALL: I'm sorry.

10 PROSPECTIVE ALTERNATE JUROR NO. 2: Go ahead.

11 MR. WALL: Was the victim a family member of that
12 person?

13 PROSPECTIVE ALTERNATE JUROR NO. 2: It was his wife.

14 MR. WALL: Did you know her?

15 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, I did.

16 MR. WALL: Having been closer to a homicide situation
17 between family members than most people ever get, do you think
18 that will have any impact on your ability to be fair to both
19 sides in this case?

20 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

21 MR. WALL: During that case did you ever think one of
22 these guys ought to get the death penalty for what they did?

23 PROSPECTIVE ALTERNATE JUROR NO. 2: It never really
24 came to my forethought. I was more concerned with the people
25 left and their condition. There were two young boys involved

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1 under the age of three, and I was more concerned with the young
2 boys then to live with their grandparents.

3 MR. WALL: Let me ask you this: Do you favor the death
4 penalty? Are you in favor of it?

5 PROSPECTIVE ALTERNATE JUROR NO. 2: I believe in it. I
6 wouldn't I'm in favor of it. I believe in it.

7 MR. WALL: Okay. And you told the Judge that maybe
8 when this process started, you had been leaning toward a sentence
9 of life in prison with the possibility of parole, but you told
10 him you could consider all three.

11 PROSPECTIVE ALTERNATE JUROR NO. 2: Uh-huh.

12 MR. WALL: Is that your state of mind now?

13 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

14 MR. WALL: Okay. Taking that other situation that you
15 talked about where your wife's nephew...

16 PROSPECTIVE ALTERNATE JUROR NO. 2: Uh-huh.

17 MR. WALL: ...as I understand, it killed your wife's
18 niece.

19 PROSPECTIVE ALTERNATE JUROR NO. 2: That's correct.

20 MR. WALL: How long ago was that?

21 PROSPECTIVE ALTERNATE JUROR NO. 2: That was in 1982,
22 '83.

23 MR. WALL: Okay. How old was the nephew?

24 PROSPECTIVE ALTERNATE JUROR NO. 2: He was 16.

25 MR. WALL: How old was the niece?

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1 PROSPECTIVE ALTERNATE JUROR NO. 2: Fourteen.

2 MR. WALL: You wrote a little something on the
3 questionnaire about that, that your wife's niece was disturbed.
4 "I think the sister was a runaway." Can you give a little run
5 down on the factual situation that surrounded that?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

7 THE COURT: Is that Question 39?

8 MR. WALL: Actually it's on the -- yes, your Honor, and
9 it's continued on the back page, your Honor.

10 PROSPECTIVE ALTERNATE JUROR NO. 2: The family
11 situation was not a good one. The parents had split. They had
12 both remarried. The mother of the children was less than
13 desirable, according to my standards. The children lived with
14 her for a period of time.

15 When she had friends in, the children would have to camp out
16 in the back yard. The daughter took the habits of the mother and
17 began to run away at the age of 13/14. The nephew felt very
18 responsible for trying to contain the behavior and habits of his
19 sister. He was unable to do so, and frustrated; his sister had
20 just returned -- been returned from a runaway trip to Alabama
21 with trucker from California, and they allegedly had formed a
22 pact that they would go together.

23 MR. WALL: The nephew and the niece?

24 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes. My nephew --
25 my wife's nephew took his sister's life and supposedly was going

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1 to then take his own life, and he didn't. And he admitted guilt.

2 MR. WALL: Was that here in Nevada?

3 PROSPECTIVE ALTERNATE JUROR NO. 2: That was in
4 California.

5 MR. WALL: Okay. Were there court proceedings?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir, there
7 were.

8 MR. WALL: The prosecution of your wife's nephew?

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

10 MR. WALL: And what was the outcome of that?

11 PROSPECTIVE ALTERNATE JUROR NO. 2: The outcome, he was
12 tried as a youth, as a juvenile. He spent approximately nine
13 years in the California penal system. Several years in a Win Too
14 program in Sacramento. And then he was transferred to Ventura,
15 California, and he was released in 1993.

16 MR. WALL: He's about 27/28 years old now? 29 maybe?

17 PROSPECTIVE ALTERNATE JUROR NO. 2: Twenty-nine.

18 MR. WALL: Would the fact that the Defendants in this
19 case are about that same age make it difficult for you at all, or
20 is there anything about that situation other than what you've
21 told the Court already that would make it -- that wouldn't make
22 you a fair juror in this case?

23 PROSPECTIVE ALTERNATE JUROR NO. 2: There's nothing
24 about my association with my nephew and these gentlemen that
25 would not make it a fair case for me. I must say that I would

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1 like more information about what the State's policies are in
2 regard to life with parole. Unlike my situation prior to coming
3 in here not knowing what the requirements were or the ability to
4 induce the
5 -- or call for the death penalty, I have no idea what the State's
6 requirements are with life with the opportunity for parole.

7 My original prejudices were that I felt that I came into
8 here with not being able to consider life with parole were based
9 upon my nephew's situation; and not knowing these gentlemen's
10 particular circumstances, I think the proceedings would bring out
11 what has happened to these gentlemen since they've been
12 incarcerated.

13 I feel in the instance of my nephew, he spent too much time
14 in the system. He was getting good assistance when he was in a
15 Win Too program. When he was transferred to Ventura, that's when
16 learned or it was imposed upon him what can occur in the penal
17 situation. That's where had learned as a white in a largely non-
18 white facility, he was faced with gangs, he was -- just things
19 that were introduced to him that he wasn't exposed to before.
20 And that's when he really became more hardened.

21 MR. WALL: Given that this case is a little bit unique
22 in that a significant amount of time has passed since the
23 original conviction, would you then take into consideration, if
24 you were to end up sitting as a member of the jury, the behavior
25 of the Defendants since that time?

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1 PROSPECTIVE ALTERNATE JUROR NO. 2: That's the only
2 way.

3 MR. WALL: Thank you.

4 I'll pass for cause, your Honor.

5 THE COURT: Mr. Schieck?

6 MR. SCHIECK: Thank you, your Honor--just a few.

7 Mr. Marten, I note that Question 48 that you read John
8 Grisham.

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

10 MR. SCHIECK: Have you read The Chamber?

11 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

12 MR. SCHIECK: What did you think of it?

13 PROSPECTIVE ALTERNATE JUROR NO. 2: It was interesting
14 reading.

15 MR. SCHIECK: Do you think it would in any way impact
16 your decision making process in this case?

17 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir, it was
18 recreational reading.

19 MR. SCHIECK: How's your nephew doing?

20 PROSPECTIVE ALTERNATE JUROR NO. 2: This moment? He's
21 comatose in a hospital in Northridge, California.

22 MR. SCHIECK: Can you tell us -- I mean, was it -- we
23 know he got out in 1993. Did he behave himself and conform to
24 society's standards when he got out?

25 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, he did. He

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1 married an individual that he met in the institution. They had a
2 child together. He was successful in his employment. The
3 marriage started to go sour, and two weeks ago he attempted to
4 take his life.

5 MR. SCHIECK: Attempted suicide?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

7 MR. SCHIECK: Do you know whether he was receiving any
8 counseling after he had been released?

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Unfortunately, no.

10 MR. SCHIECK: Thank you very much.

11 PROSPECTIVE ALTERNATE JUROR NO. 2: Uh-huh.

12 MR. SCHIECK: We'd pass for cause, your Honor.

13 THE COURT: Mr. Seaton?

14 MR. SEATON: Pass for cause.

15 THE COURT: Mr. Kramar?

16 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes, sir.

17 THE COURT: Sir, how long have you lived in Clark
18 County, Nevada?

19 PROSPECTIVE ALTERNATE JUROR NO. 3: Been in Clark
20 County 16 years.

21 THE COURT: Where were you born and raised?

22 PROSPECTIVE ALTERNATE JUROR NO. 3: Born in Los
23 Angeles, raised in Los Angeles, moved up here 16 years ago.

24 THE COURT: What is your educational background?

25 PROSPECTIVE ALTERNATE JUROR NO. 3: High school

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8JD04811

1 graduate, two years of college.

2 THE COURT: What college did you attend?

3 PROSPECTIVE ALTERNATE JUROR NO. 3: Citrus College in
4 Azusa, California.

5 THE COURT: And what was your field of endeavor?

6 PROSPECTIVE ALTERNATE JUROR NO. 3: Engineering.

7 THE COURT: What has been your employment for the last
8 ten years?

9 PROSPECTIVE ALTERNATE JUROR NO. 3: I work for American
10 Airlines. I'm a crew chief in maintenance, and also in charge of
11 environmental.

12 THE COURT: And what is your religious preference?

13 PROSPECTIVE ALTERNATE JUROR NO. 3: Non-denominational.

14 THE COURT: Do you attend church regularly?

15 PROSPECTIVE ALTERNATE JUROR NO. 3: No, sir.

16 THE COURT: How old are you, sir?

17 PROSPECTIVE ALTERNATE JUROR NO. 3: Forty-one.

18 THE COURT: Are you married or single?

19 PROSPECTIVE ALTERNATE JUROR NO. 3: Married.

20 THE COURT: Is your wife employed?

21 PROSPECTIVE ALTERNATE JUROR NO. 3: Housewife.

22 THE COURT: Do you have any children?

23 PROSPECTIVE ALTERNATE JUROR NO. 3: I have a daughter,
24 twelve, and a son, nine.

25 THE COURT: Are you acquainted with either of the

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8JD04812

1 Defendants or their attorneys?

2 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I'm not.

3 THE COURT: Did you recognize any of the persons whose
4 names were given to you as possible prosecution witnesses?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I don't.

6 THE COURT: Do you know anyone in the District
7 Attorney's Office?

8 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes, Eric
9 Jorgansen, which is a chief deputy attorney.

10 THE COURT: And how do you happen to know him?

11 PROSPECTIVE ALTERNATE JUROR NO. 3: Went to high school
12 with him, and then he moved up here and became a district
13 attorney.

14 THE COURT: And since high school have you kept any
15 relationship with him?

16 PROSPECTIVE ALTERNATE JUROR NO. 3: We visited last
17 summer a little bit, for a day.

18 THE COURT: Did he discuss his business with you?

19 PROSPECTIVE ALTERNATE JUROR NO. 3: No, he didn't.

20 THE COURT: As a result of this relationship, do you
21 have any biases for or against either side in this case?

22 PROSPECTIVE ALTERNATE JUROR NO. 3: No. I also know
23 Karen, which is also in the District Attorney's Office. She's a
24 district attorney. I don't recall her last name.

25 THE COURT: Okay. As a result of...

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8JD04813

1 PROSPECTIVE ALTERNATE JUROR NO. 3: Uh...

2 THE COURT: Please continue.

3 PROSPECTIVE ALTERNATE JUROR NO. 3: We've got together
4 on different social functions and talked about different -- just
5 in general what goes on in Clark County.

6 THE COURT: As a result of those relationships, do you
7 have any biases for or against either side in this case?

8 PROSPECTIVE ALTERNATE JUROR NO. 3: Not in this case,
9 no.

10 THE COURT: In the State of Nevada, there are three
11 possible forms of punishment that the jury may consider and then
12 select the one they feel is the most appropriate under the law
13 and facts of this case. Those three possible forms of punishment
14 are: (a) the imposition of the death penalty; (b) life
15 imprisonment without the possibility of parole; and (c) life
16 imprisonment with the possibility of parole. Do you understand,
17 sir?

18 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes.

19 THE COURT: In your present state of mind, can you, if
20 you are selected as a juror in this case, consider equally all
21 three possible forms of punishment and then select the one that
22 you feel is most appropriate?

23 PROSPECTIVE ALTERNATE JUROR NO. 3: At this point I
24 don't think so.

25 THE COURT: Please explain, sir.

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8JD04814

1 PROSPECTIVE ALTERNATE JUROR NO. 3: I would tend to
2 lean towards the death penalty for these guys.

3 THE COURT: You cannot consider any of the other
4 possibilities at all?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: At this point, no.
6 I had a -- a friend of mine that you can -- I'll answer in a
7 little bit.

8 THE COURT: Mister...

9 PROSPECTIVE ALTERNATE JUROR NO. 3: But he's a
10 lieutenant in El Monte, California for the police department, and
11 last weekend we discussed a murder that happened three weeks
12 ago...

13 THE COURT: Well...

14 PROSPECTIVE ALTERNATE JUROR NO. 3: ...where they
15 haven't got anybody on it. And it was a family of seven, and two
16 guys came in, killed everybody but two kids that were -- they
17 shot, I guess, the mom, the dad and a couple of children.

18 THE COURT: Sir, that happened in California. Mr. Wall
19 or Ms. Mounts, any challenge?

20 MS. MOUNTS: Court's indulgence a moment, your Honor.

21 (Pause).

22 MS. MOUNTS: Your Honor, we would challenge for cause.

23 THE COURT: Okay. Mr. Schieck?

24 MR. SCHIECK: We would join, your Honor.

25 THE COURT: Any traverse, sir?

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8JD04815

1 MR. SEATON: No.

2 THE COURT: Thank you, sir, you are excused. Report
3 back to the jury commissioner and tell them that you have been
4 excused.

5 THE CLERK: Juanito R. Delosreyes, Badge No. 532,
6 D-E-L-O-S-R-E-Y-E-S.

7 THE COURT: Mr. Reyes, sir, how long have you lived in
8 Clark County, Nevada?

9 PROSPECTIVE ALTERNATE JUROR NO. 3: About 30 years,
10 Judge.

11 THE COURT: Where were you born and raised?

12 PROSPECTIVE ALTERNATE JUROR NO. 3: I was born in the
13 Philippine Islands.

14 THE COURT: And what is your educational background?

15 PROSPECTIVE ALTERNATE JUROR NO. 3: I'm a third-grader.

16 THE COURT: What has been your employment for the last
17 ten years?

18 PROSPECTIVE ALTERNATE JUROR NO. 3: I've been in the
19 casino business. I'm employed with the Mirage Hotel right now.

20 THE COURT: And what do you do there, sir?

21 PROSPECTIVE ALTERNATE JUROR NO. 3: I'm a floor
22 supervisor.

23 THE COURT: All right. And what is your religious
24 preference?

25 PROSPECTIVE ALTERNATE JUROR NO. 3: Catholic.

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8JD04816

1 THE COURT: Do you attend mass regularly?
2 PROSPECTIVE ALTERNATE JUROR NO. 3: No, sir.
3 THE COURT: How old are you, sir?
4 PROSPECTIVE ALTERNATE JUROR NO. 3: I'm 55.
5 THE COURT: Are you married or single?
6 PROSPECTIVE ALTERNATE JUROR NO. 3: Twice divorced.
7 THE COURT: Do you have any children?
8 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes, I do.
9 THE COURT: May we have their ages and sex, please,
10 sir?
11 PROSPECTIVE ALTERNATE JUROR NO. 3: Female, 27, and
12 female, 24.
13 THE COURT: Do you know either of the Defendants or
14 their attorneys?
15 PROSPECTIVE ALTERNATE JUROR NO. 3: No, sir.
16 THE COURT: Do you know anyone in the District
17 Attorney's Office?
18 PROSPECTIVE ALTERNATE JUROR NO. 3: No, sir.
19 THE COURT: Did you recognize any of the persons whose
20 names were given to you as possible prosecution witnesses?
21 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I do not.
22 THE COURT: In the State of Nevada, there are three
23 possible forms of punishment that the jury may consider and then
24 select the one that they feel is the most appropriate under the
25 facts and law of this case. Those three possible forms of

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8JD04817

1 punishment are: (a) life imprisonment with the possibility of
2 parole; (b) life imprisonment without the possibility of parole;
3 and (c) the imposition of the death penalty. Do you understand,
4 sir?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes, sir, I do.

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

10 PROSPECTIVE ALTERNATE JUROR NO. 3: I believe in two.
11 I believe in death penalty, and I believe in without parole.

12 THE COURT: Does that mean you cannot consider...

13 PROSPECTIVE ALTERNATE JUROR NO. 3: I don't think so,
14 Judge.

15 THE COURT: ...the life in prison with the possibility
16 of parole?

17 PROSPECTIVE ALTERNATE JUROR NO. 3: I don't believe in
18 that. Not in this case.

19 MR. WALL: Your Honor, we'd challenge for cause at this
20 time.

21 THE COURT: Mr. Schieck?

22 MR. SCHIECK: We would join.

23 MR. SEATON: No traverse.

24 THE COURT: Thank you, sir, you are excused.

25 PROSPECTIVE ALTERNATE JUROR NO. 3: Thank you.

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8JD04818

1 THE CLERK: Rodney P. Foster, Badge No. 533,
2 F-O-S-T-E-R.

3 THE COURT: Mr. Foster, sir, how long have you lived in
4 Clark County, Nevada?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: Six years.

6 THE COURT: Where did you come from?

7 PROSPECTIVE ALTERNATE JUROR NO. 3: Salt Lake City.

8 THE COURT: How long did you live in Salt Lake City?

9 PROSPECTIVE ALTERNATE JUROR NO. 3: Thirteen years.

10 THE COURT: Where were you born and raised?

11 PROSPECTIVE ALTERNATE JUROR NO. 3: San Antonio, Texas.

12 My father was in the military, was raised all over the world.

13 THE COURT: What is your educational background?

14 PROSPECTIVE ALTERNATE JUROR NO. 3: I have a B.A. in
15 English.

16 THE COURT: What college did you attend, sir?

17 PROSPECTIVE ALTERNATE JUROR NO. 3: BYU.

18 THE COURT: Did you take up any law courses?

19 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

20 THE COURT: What has been your employment for the last
21 ten years?

22 PROSPECTIVE ALTERNATE JUROR NO. 3: The last three
23 years I've worked in my brother's law office here in Las Vegas.
24 Prior to that I worked for the LDS Church in Salt Lake City and
25 here.

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8JD04819

1 THE COURT: What is your religious preference?
2 PROSPECTIVE ALTERNATE JUROR NO. 3: LDS.
3 THE COURT: Do you attend church regularly?
4 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes.
5 THE COURT: How old are you, sir?
6 PROSPECTIVE ALTERNATE JUROR NO. 3: Forty-four.
7 THE COURT: Does your brother practice criminal law or
8 civil law, primarily?
9 PROSPECTIVE ALTERNATE JUROR NO. 3: Civil.
10 THE COURT: Are you married or single?
11 PROSPECTIVE ALTERNATE JUROR NO. 3: Divorced.
12 THE COURT: Do you have any children?
13 PROSPECTIVE ALTERNATE JUROR NO. 3: I have four.
14 THE COURT: May we have their ages and sex, sir?
15 PROSPECTIVE ALTERNATE JUROR NO. 3: Daughter, 19; son,
16 17; daughter, 13; daughter, 11.
17 THE COURT: Are you acquainted with either of the
18 Defendants or their attorney?
19 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I am not.
20 THE COURT: Do you work -- do you know anyone in the
21 District Attorney's Office?
22 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I do not.
23 THE COURT: Did you recognize any of the persons whose
24 names were given to you as possible witnesses in this case?
25 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I do not.

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8JD04820

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

9 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes, I do.

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

14 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes.

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

17 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

18 THE COURT: Are you now involved in or have you ever
19 been involved in any law enforcement work?

20 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

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

23 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

24 THE COURT: Have you ever appeared as a witness in any
25 criminal prosecution?

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8JD04821

1 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

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

3 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I have not.

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

5 PROSPECTIVE ALTERNATE JUROR NO. 3: No.

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

8 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes. My parents
9 had their car burglarized and things stolen out of it.

10 THE COURT: As a result of that experience do you have
11 any biases for or against either side in this case?

12 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I do not.

13 THE COURT: If you were either of the Defendants would
14 you want twelve people in your present state of mind to sit and
15 judge your case?

16 PROSPECTIVE ALTERNATE JUROR NO. 3: Yes.

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

20 PROSPECTIVE ALTERNATE JUROR NO. 3: No, I do not.

21 THE COURT: MR. WALL?

22 MR. WALL: Thank you, your Honor. Mr. Foster, you have
23 two brothers who are attorneys?

24 PROSPECTIVE ALTERNATE JUROR NO. 3: That's correct.

25 MR. WALL: What kind of law do they practice?

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8JD04822

8JD04823

1 PROSPECTIVE ALTERNATE JUROR NO. 3: They both practice
2 estate planning.

3 MR. WALL: Are they both in the same firm?

4 PROSPECTIVE ALTERNATE JUROR NO. 3: No, one is in
5 Michigan and one is here in Clark County.

6 MR. WALL: Okay. What do you do for the brother who
7 lives here?

8 PROSPECTIVE ALTERNATE JUROR NO. 3: I'm basically the
9 administrator. Do his paralegal work as well.

10 MR. WALL: In an estate practice, does that involve
11 legal research or much court appearances, or is it more of a form
12 type business?

13 PROSPECTIVE ALTERNATE JUROR NO. 3: Very little court
14 appearance. There's some probate work, but it's pretty much
15 perfunctory.

16 MR. WALL: Do you ever talk with either of your
17 brothers about cases that may be in the media, criminal cases?

18 PROSPECTIVE ALTERNATE JUROR NO. 3: Occasionally.

19 MR. WALL: Their prospective as a lawyer?

20 PROSPECTIVE ALTERNATE JUROR NO. 3: Occasionally.

21 MR. WALL: What kind of training have you had? Any
22 kind of paralegal courses?

23 PROSPECTIVE ALTERNATE JUROR NO. 3: Mostly on-the-job
24 training.

25 MR. WALL: Have you -- when you talk to your brothers

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1 about high-profile cases, do they talk about the death penalty?

2 PROSPECTIVE ALTERNATE JUROR NO. 3: I think it has come
3 up before.

4 MR. WALL: Okay. What are your views on the
5 appropriateness of the death penalty?

6 PROSPECTIVE ALTERNATE JUROR NO. 3: I think there is a
7 place for it. I think it should be used with discretion.

8 MR. WALL: How do you mean?

9 PROSPECTIVE ALTERNATE JUROR NO. 3: I think in
10 listening to all the other questions that have been asked at this
11 point, if I was posed the question, "Was it used too much, too
12 frequently, or just about right," I would say it's probably used
13 too much.

14 MR. WALL: Okay. Knowing what you know about the facts
15 of this case already, do you feel that all three of the possible
16 sentences could be appropriate ones given whatever additional
17 information you might receive later if you were selected to be a
18 juror?

19 PROSPECTIVE ALTERNATE JUROR NO. 3: It could be, yes.

20 MR. WALL: Okay. In Question 38 on the questionnaire,
21 opinions and feelings about how the criminal justice system
22 works, you wrote, "I don't always feel justice is done, but it is
23 the most workable system we have." When don't you think justice
24 is done?

25 PROSPECTIVE ALTERNATE JUROR NO. 3: There's certain

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8JD04824

1 social issues that really don't reflect on life and death, but I
2 think have not been handled appropriately in the legal system.

3 MR. WALL: Any examples in your mind of those kinds of
4 issues?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: Don't ask/don't
6 tell policy. Things like that.

7 MR. WALL: Okay. What did you do when you were
8 employed by the President of the LDS Church?

9 PROSPECTIVE ALTERNATE JUROR NO. 3: I worked at church
10 headquarters in the First Presidency's office in Salt Lake City.
11 And also in the Temple Program, which was basically an office
12 position where we train people to do computer work, that type of
13 thing, the Temple Program.

14 MR. WALL: Okay. Thank you. We pass for cause, your
15 Honor.

16 THE COURT: Mr. Schieck?

17 MR. SCHIECK: No.

18 THE COURT: Mr. Wolfbrandt?

19 MR. WOLFBRANDT: Mr. Foster, you've worked with your
20 brother here now for a couple of years?

21 PROSPECTIVE ALTERNATE JUROR NO. 3: That is correct.

22 MR. WOLFBRANDT: Almost three?

23 PROSPECTIVE ALTERNATE JUROR NO. 3: Uh-huh.

24 MR. WOLFBRANDT: Do you have any plans of going to law
25 school yourself?

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8JD04825

1 PROSPECTIVE ALTERNATE JUROR NO. 3: If Nevada had one I
2 might consider it. I've thought about it.

3 MR. WOLFBRANDT: Okay. But is it financial reasons,
4 and the fact that it's out of state that is...

5 PROSPECTIVE ALTERNATE JUROR NO. 3: Basically. And
6 my age.

7 MR. WOLFBRANDT: When you and your brother have had
8 some of the conversations about some of the higher profile cases
9 -- I take it that's about the only kind of criminal cases you
10 guys have discussed?

11 PROSPECTIVE ALTERNATE JUROR NO. 3: That's correct.

12 MR. WOLFBRANDT: And when you've had those
13 conversations, have you taken one side of an issue and he's taken
14 the other?

15 PROSPECTIVE ALTERNATE JUROR NO. 3: Basically if a --
16 with a death penalty case he's usually for and I usually argue
17 against just theoretically. And I can't think of a specific
18 instances but I'm generally the champion for the underdog, and
19 play the Devil's advocate with him.

20 MR. WOLFBRANDT: Okay. So there might be one where he
21 was disappointed that a death penalty wasn't imposed and you felt
22 that was the appropriate result?

23 PROSPECTIVE ALTERNATE JUROR NO. 3: That could be
24 correct, yes.

25 MR. WOLFBRANDT: How big is your brother's firm? I

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8JD04826

1 mean, is he the only...

2 PROSPECTIVE ALTERNATE JUROR NO. 3: He's a sole
3 practitioner.

4 MR. WOLFBRANDT: Is he a sole practitioner?

5 PROSPECTIVE ALTERNATE JUROR NO. 3: Uh-huh.

6 MR. WOLFBRANDT: Okay. Now, you're in the Alternate 3
7 position, so the likelihood of you actually getting into the jury
8 box, or into the deliberation itself may be slim, although
9 they've gone through a number of them over in California in any
10 given day, so there is still that likelihood, and there's still
11 that chance.

12 Are you going to be able to sit and listen carefully to all
13 the evidence and then be prepared, if called upon, to jump into
14 the deliberations?

15 PROSPECTIVE ALTERNATE JUROR NO. 3: Sure.

16 MR. WOLFBRANDT: Thank you. We would pass for cause.

17 THE COURT: Mr. Seaton?

18 MR. SEATON: Pass for cause.

19 THE COURT: Ms. McKennery, how long have you lived in
20 Clark County, Nevada?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: Almost 19 years.

22 THE COURT: And where were you born and raised?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Johnsville,
24 Louisiana.

25 THE COURT: What is your educational background?

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8JD04827

1 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm a high school
2 graduate. I have one semester of college, and I've completed
3 several banking courses.

4 THE COURT: And which college did you attend?

5 PROSPECTIVE ALTERNATE JUROR NO. 4: Clark County
6 Community College here in Las Vegas.

7 THE COURT: Did you take any courses in college
8 involving the law?

9 PROSPECTIVE ALTERNATE JUROR NO. 4: I took a political
10 science class, but that was almost 20 years ago, so I really
11 don't recall anything about it.

12 THE COURT: What has been your employment for the last
13 ten years?

14 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm employed by
15 American Federal Savings Bank. I'm a Branch Manager there.

16 THE COURT: And what is your religious preference?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: Baptist.

18 THE COURT: Do you attend church regularly?

19 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not.

20 THE COURT: How old are you?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: Thirty-six.

22 THE COURT: Are you married?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I am.

24 THE COURT: Is your husband employed?

25 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, he is.

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8JD04828

1 THE COURT: Where does he work and what are his duties?

2 PROSPECTIVE ALTERNATE JUROR NO. 4: He's employed by
3 Nevada Power Company. He's an instrument technician there.

4 THE COURT: And do you have any children?

5 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I do.

6 THE COURT: May we have their ages and sex, please?

7 PROSPECTIVE ALTERNATE JUROR NO. 4: My son is
8 seventeen, and my daughter's twelve.

9 THE COURT: Are you acquainted with either of the
10 Defendants or their attorneys?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I am not.

12 THE COURT: And do you know anyone in the District
13 Attorney's Office?

14 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not.

15 THE COURT: Did you recognize the names of any of the
16 persons given to you as possible prosecution witnesses?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

18 THE COURT: In the State of Nevada, there are three
19 possible forms of punishment that a jury may consider and then
20 select the one they believe is most appropriate under the law and
21 facts of this case. Those three possible forms of punishment
22 are: (a) the imposition of the death penalty; (b) life
23 imprisonment without the possibility of parole; and (c) life
24 imprisonment with the possibility of parole. Do you understand,
25 ma'am?

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8JD04829

1 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

2 THE COURT: In your present state of mind, can you, if
3 you are selected as a juror in this case, consider equally all
4 three possible forms of punishment and then select the one that
5 you feel is most appropriate?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

7 THE COURT: And do you have any conscientious, moral or
8 religious objections to the imposition of the death penalty?

9 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

10 THE COURT: Are you now involved in or have you ever
11 been involved in any law enforcement work?

12 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

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

15 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

16 THE COURT: Have you ever been a witness in any
17 criminal prosecution?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

19 THE COURT: Have you ever served on a jury?

20 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

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

22 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

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

25 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

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8JD04830

1 THE COURT: Please tell us about it. When and where?

2 PROSPECTIVE ALTERNATE JUROR NO. 4: In 1979, working as
3 a teller I was robbed. In approximately 1990, I was robbed at
4 another bank I worked at.

5 THE COURT: Is there anything about those two
6 experiences that would cause you to have any biases for or
7 against either side in this case?

8 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

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

11 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

12 THE COURT: If you were either of the Defendants, would
13 you want twelve people in your present state of mind to sit and
14 judge your case?

15 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

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

19 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

20 THE COURT: Mr. Wall? Ms. Mounts?

21 MS. MOUNTS: Thank you, your Honor.

22 Ma'am, good morning.

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Good morning.

24 MS. MOUNTS: You just indicated that you would want
25 twelve people like yourself on your own jury. Can you tell us

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8JD04831

8JD04832

1 why that is?

2 PROSPECTIVE ALTERNATE JUROR NO. 4: I consider myself
3 to be a very fair person, very even with everyone.

4 MS. MOUNTS: As a bank manager, do you have to settle
5 disputes from customers from time to time?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: All day long.

7 MS. MOUNTS: All day long. Do you have to also be
8 involved in disputes among coworkers and so forth?

9 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I do.

10 MS. MOUNTS: Okay. And in that capacity do you
11 have to listen to both sides of the story and then make
12 your determination?

13 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

14 MS. MOUNTS: Do you feel that you could do that in this
15 case if you were called upon to sit as a juror?

16 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I do.

17 MS. MOUNTS: Now, you indicated in the questionnaire
18 that you had reservations about...

19 THE COURT: A number, please?

20 MS. MOUNTS: Thank you, your Honor. It is No. 58C.
21 You indicated that you would not want to sit on a murder case.
22 Can you tell us why that is?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: In reading that, my
24 first thoughts were I would not want to sit in a courtroom and
25 look at graphic pictures of autopsies, things of that nature.

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8JD04832

1 MS. MOUNTS: Do you feel as you sit here now that you
2 still wouldn't want to be involved in the case?

3 PROSPECTIVE ALTERNATE JUROR NO. 4: I would, in all
4 honesty, have problems viewing pictures like that, yes.

5 MS. MOUNTS: Okay. Do you think that that might affect
6 your judgment in the case at all?

7 PROSPECTIVE ALTERNATE JUROR NO. 4: I don't believe
8 that would affect my judgment. I could still listen and still
9 be fair.

10 MS. MOUNTS: You do feel though, nonetheless, that
11 being called upon to look about photographs or perhaps hear
12 graphic testimony might be difficult for you?

13 PROSPECTIVE ALTERNATE JUROR NO. 4: Somewhat, yes.

14 MS. MOUNTS: Do you feel that it would -- with due
15 appreciation that it would be tough for everyone, do you feel
16 that it would stand in the way of your being fair to
17 these two men?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

19 MS. MOUNTS: Now, you have been a juror previously on a
20 couple of drug cases. Is that right?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: That's correct.

22 MS. MOUNTS: Were you the foreperson of either of those
23 juries?

24 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I was not.

25 MS. MOUNTS: How did you feel about your jury service

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1 in those cases?

2 PROSPECTIVE ALTERNATE JUROR NO. 4: It was a learning
3 experience. It gave me a greater insight on how the jury system
4 works. It was fine.

5 MS. MOUNTS: Did you view it as a positive or a
6 negative experience?

7 PROSPECTIVE ALTERNATE JUROR NO. 4: It was a positive.

8 MS. MOUNTS: Obviously in those cases you were not
9 called upon to impose punishment upon the accused?

10 PROSPECTIVE ALTERNATE JUROR NO. 4: No, we were not.

11 MS. MOUNTS: And in this case, if you were to be a
12 member of the twelve-person jury panel, you would have to do
13 that. Would you have any problem with that?

14 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

15 MS. MOUNTS: How, in general, would you feel about
16 having to decide the fate of these two men?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: As long as I knew
18 that I was sitting there listening to everything and being
19 completely open-minded and completely fair, I would not have
20 a problem.

21 MS. MOUNTS: How do you feel, in general, about the
22 death penalty?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Prior to coming
24 here I never really thought about it a lot.

25 MS. MOUNTS: Well, since you've had a week or -- and

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1 now more than a week, I guess, since you filled out the
2 questionnaire to think about it, have you given it much thought
3 since that time?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: My thoughts are
5 just that it's a part of our system. It's an option that we have
6 to choose from, not necessarily the one we have to choose, but it
7 is a given option.

8 MS. MOUNTS: Do you feel that you could consider all
9 three of the options--life with the possibility of parole
10 someday, life without parole, and the death penalty...

11 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

12 MS. MOUNTS: ...equally?

13 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I do.

14 MS. MOUNTS: Do you feel that you could impose any of
15 the three of them if the facts supported your decision?

16 PROSPECTIVE ALTERNATE JUROR NO. 4: After listening to
17 the facts, yes.

18 MS. MOUNTS: Thank you. Your Honor, we would pass for
19 cause.

20 THE COURT: Mr. Wolfbrandt?

21 MR. WOLFBRANDT: Yes, thank you, your Honor. Ma'am,
22 you understand that in this case, even as an alternate, you're
23 going to see all of the evidence that was presented in the guilt
24 phase, as well as whatever may be presented here?

25 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

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1 MR. WOLFBRANDT: And there's going to be some graphic
2 photographs. How are you going to react to that?

3 PROSPECTIVE ALTERNATE JUROR NO. 4: I'll do the very
4 best I can to look at them and to listen to everything.

5 MR. WOLFBRANDT: I mean, there's no pretty murder case.

6 PROSPECTIVE ALTERNATE JUROR NO. 4: Uh-huh.

7 MR. WOLFBRANDT: And so, any murder case is going to
8 have pictures that are going to be disturbing. And every
9 individual's going to have one set of pictures that's going to be
10 disturbing to one person where it wouldn't necessarily be to
11 another.

12 PROSPECTIVE ALTERNATE JUROR NO. 4: Right.

13 MR. WOLFBRANDT: Okay. I just want to make sure that
14 you understand that, or that we understand what your personal
15 feeling would be and what your reaction would be. Are you going
16 to be okay with that?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: I think so.

18 MR. WOLFBRANDT: In response to question 59C, you
19 indicated that with your views and state of mind, that, yes, you
20 would be substantially impaired in performing your duty in
21 accordance with the Court's instructions. I trust that perhaps
22 maybe you read that question differently?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: I read that
24 question wrong.

25 MR. WOLFBRANDT: Okay. So the answer really should be

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1 is that despite your personal views you will follow the Court's
2 instructions?

3 PROSPECTIVE ALTERNATE JUROR NO. 4: Right.

4 MR. WOLFBRANDT: Thank you, Judge. We would pass for
5 cause.

6 THE COURT: Mr. Seaton?

7 MR. SEATON: Pass for cause.

8 THE COURT: The State may exercise its first peremptory
9 challenge?

10 MR. SEATON: The State will waive it.

11 MR. WALL: May we have the Court's indul...

12 THE COURT: Defense may exercise their first peremptory
13 challenge?

14 MR. WALL: May we have the Court's indulgence one
15 moment, please?

16 THE COURT: Sure. Would Counsel like some time to -- a
17 brief few minutes to confer?

18 MR. WALL: If we could, your Honor, that would be
19 helpful.

20 THE COURT: All right. It's 10:20 by the clock on the
21 wall. Please be back in your seats at 10:25 -- 10:35.

22 In the meantime, it is your duty not to talk among
23 yourselves or with anyone else on any matter pertaining to this
24 trial; read, watch or listen to any report of or commentary on
25 the trial by any person or by any medium of information,

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1 including without limitation newspapers, radio or television;
2 form or express any opinion on any matter pertaining to this
3 trial until it is finally submitted to you. See you back in your
4 seats in 15 minutes.

5 THE BAILIFF: All rise.

6 (Recess taken and jury out at 10:20 a.m.)

7 (Proceedings reconvened and jury in)

8 THE BAILIFF: Department XI is again in session.

9 THE COURT: Please be seated. Continuation of State
10 vs. Flanagan & Moore. Let the record reflect the presence of
11 Defendants with counsel, District Attorney, other officers of the
12 court.

13 The Clerk will please call roll call of the jury.

14 (Clerk calls roll of prospective jurors; all present)

15 THE COURT: Will counsel stipulate to the presence of
16 the jury?

17 MR. SEATON: Yes, Judge.

18 MR. WALL: Yes, your Honor.

19 MR. WOLFBRANDT: Yes, your Honor.

20 THE COURT: Defense may exercise their first peremptory
21 challenge.

22 MR. WALL: Thank you, your Honor. The Defense would
23 thank and excuse Juror No. 529, Mr. Donato.

24 THE COURT: Mr. Donato, you're excused, sir. Thank you
25 for coming down.

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1 THE CLERK: Stephen Jerome Hayden, Badge No. 534,
2 H-A-Y-D-E-N.

3 THE COURT: Would you hand Mr. Hayden the microphone,
4 please? Thank you.

5 Mr. Hayden, how long have you lived in Clark County, Nevada?

6 PROSPECTIVE ALTERNATE JUROR NO. 1: Three years.

7 THE COURT: Where did you come from?

8 PROSPECTIVE ALTERNATE JUROR NO. 1: Albuquerque, New
9 Mexico.

10 THE COURT: How long did you live in Albuquerque?

11 PROSPECTIVE ALTERNATE JUROR NO. 1: Fifteen years.

12 THE COURT: Where were you born and raised?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: Grand Island,
14 Nebraska.

15 THE COURT: What is your educational background?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: I have a Bachelor's
17 Degree in Business Administration.

18 THE COURT: And what college did you attend, sir?

19 PROSPECTIVE ALTERNATE JUROR NO. 1: The College of
20 Santa Fe.

21 THE COURT: And where is that located?

22 PROSPECTIVE ALTERNATE JUROR NO. 1: There was a branch
23 in Albuquerque, New Mexico.

24 THE COURT: Did you take any law courses in college?

25 PROSPECTIVE ALTERNATE JUROR NO. 1: There were two

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1 business law classes in the degree plan.

2 THE COURT: What has been your employment for the past
3 ten years?

4 PROSPECTIVE ALTERNATE JUROR NO. 1: I've worked for
5 EG&G Energy Measurements.

6 THE COURT: And what did you do there, sir?

7 PROSPECTIVE ALTERNATE JUROR NO. 1: I'm an accountant.

8 THE COURT: What is your religious preference?

9 PROSPECTIVE ALTERNATE JUROR NO. 1: Catholic.

10 THE COURT: Do you attend mass regularly?

11 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

12 THE COURT: How old are you, sir?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: I'm 31.

14 THE COURT: Are you married or single?

15 PROSPECTIVE ALTERNATE JUROR NO. 1: I'm single.

16 THE COURT: Do you have any children?

17 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

18 THE COURT: Are you acquainted with either of the
19 Defendants or their attorneys?

20 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

21 THE COURT: Do you know anyone in the District
22 Attorney's Office?

23 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

24 THE COURT: Did you recognize any of the names of the
25 persons given to you as possible prosecution witnesses?

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8JD04840

1 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

2 THE COURT: In the State of Nevada, there are three
3 possible forms of punishment that a jury may consider and then
4 select the one that they believe is the most appropriate under
5 the facts and law of this case. Those three possible forms of
6 punishment are: (a) the imposition of the death penalty;
7 (b) life imprisonment without the possibility of parole; and
8 (c) life imprisonment with the possibility of parole. Do you
9 understand, sir?

10 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

11 THE COURT: In your present state of mind, can you, if
12 you are selected as a juror, consider equally all three possible
13 forms of punishment and then select the one that you feel is most
14 appropriate under the laws and facts of this case?

15 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

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

18 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

19 THE COURT: Are you now involved in or have you ever
20 been involved in any law enforcement work?

21 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

24 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

25 THE COURT: Have you ever appeared as a witness in any

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8JD04842
1 criminal prosecution?

2 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

4 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

6 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

9 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

12 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

13 THE COURT: If you were either of the Defendants, would
14 you want twelve people with your present state of mind to sit and
15 judge your case?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

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

20 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

21 THE COURT: Mr. Wall?

22 MR. WALL: Thank you, your Honor.

23 THE COURT: You're welcome, sir.

24 MR. WALL: Mr. Hayden, your questionnaire at page 15
25 indicates you've taken some general psychology courses. Was

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8JD04842

1 there more than one, or did you get into it in depth?

2 PROSPECTIVE ALTERNATE JUROR NO. 1: Just an intro
3 class.

4 MR. WALL: Okay. The questionnaire also states that,
5 at question 20, you have a sister who's a student. Is she a law
6 student? What kind of student is she?

7 PROSPECTIVE ALTERNATE JUROR NO. 1: She's studying
8 physical therapy.

9 MR. WALL: Is that a graduate program, or is that here?

10 PROSPECTIVE ALTERNATE JUROR NO. 1: No, it is in
11 Albuquerque, New Mexico, and it's an undergraduate at this time.

12 MR. WALL: Undergraduate. You've heard us over the
13 last several days ask people their views on the death penalty,
14 and you've heard it asked a hundred different ways. Tell me how
15 you feel about the issue of the death penalty or life in prison?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: To address the
17 death penalty, I do think that it does serve a purpose in our --
18 it does serve a purpose of a form of punishment. And depending
19 on the actual case, on an individual basis it has to be looked
20 at.

21 MR. WALL: Knowing what you know about the facts of
22 this case, that Mr. Flanagan and Mr. Moore have already been
23 convicted of the first-degree murder of Mr. Flanagan's
24 grandparents, do you feel that one of the three right now is more
25 appropriate than the others?

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8JD04843

1 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

2 MR. WALL: You'll listen to the evidence that's
3 presented before making any kind of decision?

4 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

5 MR. WALL: And the Judge asked you about whether if you
6 were seated here you'd want someone in your frame of mind.

7 Understanding that you're, I suppose, a little bit like the vice-
8 president, in that in this case if you were selected, you're one
9 step away as an alternate from really having a tremendous amount
10 of power--the power to return a verdict of life or death. And,
11 of course, with all power there comes great responsibility. Why
12 do you think that you're the type of person that could take on
13 that kind of responsibility?

14 PROSPECTIVE ALTERNATE JUROR NO. 1: I'm a very fair and
15 impartial person.

16 MR. WALL: Are there any experiences in your background
17 which come to mind immediately that have been triggered listening
18 to people answer questions?

19 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

20 MR. WALL: Okay. Thank you. We'll pass for cause.

21 THE COURT: Mr. Schieck or Mr. Wolfbrandt?

22 MR. WOLFBRANDT: Thank you, your Honor. Mr. Hayden,
23 you indicate in question 38 that you feel the criminal justice
24 system is effective in the way it works. What do you base that
25 on?

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: Could you read the
2 question again?

3 MR. WOLFBRANDT: Yes. Question 38 asks for, in
4 general, your opinions and feelings about how the criminal
5 justice system works, and you said "effective." And I was asking
6 you what you base that opinion?

7 PROSPECTIVE ALTERNATE JUROR NO. 1: I base it on the
8 cases that I read in the newspaper, and I do believe that the
9 justice system is fair the way it is set up through the jury
10 system and the ability to appeal.

11 MR. WOLFBRANDT: You've never had any personal dealings
12 with the system, have you?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

14 MR. WOLFBRANDT: Whether as a juror or witness,
15 defendant, any dealings?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

17 MR. WOLFBRANDT: You've heard all the questions we've
18 been asking since Tuesday now. Is there any one question that
19 you heard while you were sitting there that you thought that
20 maybe we should ask you that you haven't answered that we
21 probably want to hear?

22 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

23 MR. WOLFBRANDT: Thank you. We'd pass for cause, your
24 Honor.

25 THE COURT: Mr. Seaton?

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1 MR. SEATON: Pass for cause.

2 THE COURT: The State may exercise its second
3 peremptory challenge.

4 MR. SEATON: The State will waive it.

5 THE COURT: Defense may exercise their second
6 peremptory challenge.

7 MR. WOLFBRANDT: The Court's indulgence?

8 (Pause)

9 MR. SCHIECK: Your Honor, we would thank and excuse,
10 yeah, Alternate No. 4, Ms. Johnson McKennery.

11 THE COURT: Thank you, ma'am, you are excused.

12 PROSPECTIVE ALTERNATE JUROR NO. 4: Thank you.

13 THE COURT: Thank you for coming down.

14 THE CLERK: David Ross Phillips, Badge No. 536,
15 P-H-I-L-L-I-P-S.

16 THE COURT: Mr. Phillips, sir, how long have you lived
17 in Clark County, Nevada?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: Approximately six
19 years.

20 THE COURT: Where did you come from?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: I was in Tucson,
22 Arizona for two years.

23 THE COURT: Where were you born and raised?

24 PROSPECTIVE ALTERNATE JUROR NO. 4: Galveston, Texas.

25 THE COURT: What is your educational background?

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1 PROSPECTIVE ALTERNATE JUROR NO. 4: I have a Bachelor's
2 Degree in Environmental Design.

3 THE COURT: And what college did you attend, sir?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: Texas A&M
5 University.

6 THE COURT: What has been your employment for the last
7 ten years?

8 PROSPECTIVE ALTERNATE JUROR NO. 4: For the past six
9 years I've been -- I worked for a design developer here in Las
10 Vegas. And previous to that I worked for a developer for two
11 years in Tucson, Arizona. And beyond that I worked for
12 architects in Houston, Texas.

13 THE COURT: What's the developer's name here in Las
14 Vegas?

15 PROSPECTIVE ALTERNATE JUROR NO. 4: James C. Saxton.

16 THE COURT: What is your religious preference?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: Catholic.

18 THE COURT: Do you attend mass regularly?

19 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

20 THE COURT: How old are you, sir?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: Forty-two.

22 THE COURT: Are you married or single?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm married.

24 THE COURT: Is your wife employed?

25 PROSPECTIVE ALTERNATE JUROR NO. 4: Housewife.

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1 THE COURT: And do you have any children?

2 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I do.

3 THE COURT: May we have their ages and sex, sir?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: I have a son six
5 years old, and I have a daughter two years old.

6 THE COURT: Are you acquainted with either of the
7 Defendants or their attorneys?

8 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I'm not.

9 THE COURT: Do you know anyone in the District
10 Attorney's Office?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

12 THE COURT: Did you recognize any persons whose names
13 were given to you as possible witnesses in this case?

14 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

15 THE COURT: In the State of Nevada, there are three
16 possible forms of punishment that the jury may consider and then
17 select the one they feel is most appropriate under the law and
18 facts of this case. Those three possible forms of punishment
19 are: (a) the imposition of the death penalty; (b) life
20 imprisonment without the possibility of parole; and (c) life
21 imprisonment with the possibility of parole. Do you understand,
22 sir?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, sir.

24 THE COURT: In your present state of mind, can you, if
25 you are selected as a juror, consider equally all three possible

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1 forms of punishment and then select the one that you feel is most
2 appropriate?

3 PROSPECTIVE ALTERNATE JUROR NO. 4: After being here
4 for a week and listening to this situation, no, I could not.

5 THE COURT: Would you mind explaining, sir?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: I could not give
7 these individuals life imprisonment with the possibility of
8 parole.

9 THE COURT: Mr. Wall, any challenges?

10 MR. WALL: We challenge for cause at this time.

11 THE COURT: Do you want to challenge, Mr. Schieck?

12 MR. SCHIECK: Yes, your Honor.

13 MR. SEATON: No traverse.

14 THE COURT: Any traverse?

15 MR. SEATON: No traverse.

16 THE COURT: Thank you, sir, you are excused.

17 PROSPECTIVE ALTERNATE JUROR NO. 4: Thank you.

18 THE CLERK: Charles Delplair Ychon, Badge No. 537,
19 Y-C-H-O-N.

20 THE COURT: Mr. Ychon?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

22 THE COURT: Sir, how long have you lived in Clark
23 County, Nevada?

24 PROSPECTIVE ALTERNATE JUROR NO. 4: About ten years.

25 THE COURT: Where were you born and raised?

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1 PROSPECTIVE ALTERNATE JUROR NO. 4: Dayton, Ohio.
2 THE COURT: What is your educational background?
3 PROSPECTIVE ALTERNATE JUROR NO. 4: A Bachelor's in
4 Accounting.
5 THE COURT: What college did you attend?
6 PROSPECTIVE ALTERNATE JUROR NO. 4: Wright State
7 University in Dayton.
8 THE COURT: I'm sorry?
9 PROSPECTIVE ALTERNATE JUROR NO. 4: Wright State
10 University.
11 THE COURT: And where is that located?
12 PROSPECTIVE ALTERNATE JUROR NO. 4: Dayton, Ohio,
13 THE COURT: Did you take any courses in law there?
14 PROSPECTIVE ALTERNATE JUROR NO. 4: Just the required.
15 THE COURT: Which ones were required?
16 PROSPECTIVE ALTERNATE JUROR NO. 4: I know business. I
17 don't know if criminal was; I can't remember that.
18 THE COURT: What has been your employment for the past
19 ten years?
20 PROSPECTIVE ALTERNATE JUROR NO. 4: Production Manager
21 for a print shop.
22 THE COURT: Which one, sir?
23 PROSPECTIVE ALTERNATE JUROR NO. 4: Century Graphics.
24 THE COURT: And what is your religious preference?
25 PROSPECTIVE ALTERNATE JUROR NO. 4: Catholic.

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1 THE COURT: Do you attend mass regularly?
2 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.
3 THE COURT: How old are you?
4 PROSPECTIVE ALTERNATE JUROR NO. 4: Forty-two.
5 THE COURT: Are you married or single?
6 PROSPECTIVE ALTERNATE JUROR NO. 4: Single.
7 THE COURT: Do you have any children?
8 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.
9 THE COURT: Are you acquainted with either of the
10 Defendants or their attorneys?
11 PROSPECTIVE ALTERNATE JUROR NO. 4: No.
12 THE COURT: Do you know anyone in the District
13 Attorney's Office?
14 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not.
15 THE COURT: Did you recognize the names of any persons
16 who were given to you as possible prosecution witnesses?
17 PROSPECTIVE ALTERNATE JUROR NO. 4: No.
18 THE COURT: In the State of Nevada, there are three
19 possible forms of punishment that the jury may consider and then
20 select the one they feel is most appropriate under the law and
21 facts of this case. Those three possible forms of punishment are
22 as follows: (a) life imprisonment with the possibility of
23 parole; (b) life imprisonment without the possibility of parole;
24 and (c) the imposition of the death penalty. Do you understand,
25 sir?

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8JD04851

1 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, sir.

2 THE COURT: In your present state of mind, can you, if
3 you are selected as a juror in this case, consider equally all
4 three possible forms of punishment and then select the one that
5 you feel is most appropriate?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: I would have a
7 problem with the, with parole.

8 THE COURT: Please explain, sir?

9 PROSPECTIVE ALTERNATE JUROR NO. 4: Well, knowing that
10 there's a conviction already I would, that would tend to weigh no
11 parole.

12 THE COURT: Mr. Wall?

13 MR. WALL: Your Honor, we'd make a challenge for cause
14 at this time.

15 THE COURT: Do you join, Mr. Schieck?

16 MR. SCHIECK: Yes, your Honor.

17 THE COURT: Mr. Seaton?

18 MR. SEATON: No traverse.

19 THE COURT: Thank you, sir, you are excused.

20 THE CLERK: Marilyn Ellen Prall, Badge No. 538,
21 P-R-A-L-L.

22 THE COURT: Ms. Prall, is that correct?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, sir.

24 THE COURT: How long have you lived in Clark County,
25 Nevada?

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1 PROSPECTIVE ALTERNATE JUROR NO. 4: Approximately 16
2 years.

3 THE COURT: Where were you born and raised?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: Deerborn, Michigan.

5 THE COURT: And what is your educational background?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: Twelfth grade; some
7 college, some community college.

8 THE COURT: What colleges have you attended?

9 PROSPECTIVE ALTERNATE JUROR NO. 4: Clark County.

10 THE COURT: What was your field of endeavor?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: Presently taking
12 classes for medical records.

13 THE COURT: What has been your employment for the last
14 ten years?

15 PROSPECTIVE ALTERNATE JUROR NO. 4: The past four years
16 I'm a unit clerk for a care center. And four years before that I
17 was a certified nurse's aide. And two years prior to that I was
18 housewife.

19 THE COURT: And which care center are you working for
20 now?

21 PROSPECTIVE ALTERNATE JUROR NO. 4: Torrey Pines.

22 THE COURT: What is your religious preference?

23 PROSPECTIVE ALTERNATE JUROR NO. 4: I was born and
24 raised Catholic...

25 THE COURT: Do you attend...

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8JD04853

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1 PROSPECTIVE ALTERNATE JUROR NO. 4: ...but I belong to
2 a Lutheran Christ.

3 THE COURT: Do you attend church regularly?

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

5 THE COURT: How old are you now?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm 54.

7 THE COURT: Are you married or single?

8 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm divorced.

9 THE COURT: Do you have any children?

10 PROSPECTIVE ALTERNATE JUROR NO. 4: I have two boys;
11 one 23, the other one's going to be 18 next month.

12 THE COURT: Are you acquainted with either of the
13 Defendants or their attorneys?

14 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I'm not.

15 THE COURT: Do you know any member of the District
16 Attorney's Office?

17 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not.

18 THE COURT: Did you recognize any of the persons whose
19 names were given to you as possible prosecution witnesses?

20 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

21 THE COURT: In the State of Nevada, there are three
22 possible forms of punishment that the jury may consider and then
23 select the one they believe is most appropriate under the law and
24 facts of this case. Those three possible forms of punishment
25 are: (a) the imposition of the death penalty; (b) life

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8JD04854

1 imprisonment without the possibility of parole; and (c) life
2 imprisonment with the possibility of parole. Do you understand,
3 ma'am?

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

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

9 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I can.

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

12 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I don't.

13 THE COURT: Are you now involved in or have you ever
14 been involved in any law enforcement work?

15 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

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

18 PROSPECTIVE ALTERNATE JUROR NO. 4: Not to my
19 knowledge.

20 THE COURT: Have you ever appeared as a witness in any
21 criminal prosecution?

22 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

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

24 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

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

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1 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

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

4 PROSPECTIVE ALTERNATE JUROR NO. 4: Uh-huh. I had my
5 house robbed.

6 THE COURT: When was this?

7 PROSPECTIVE ALTERNATE JUROR NO. 4: Oh, back in '86.

8 THE COURT: Is there anything about that experience
9 that would cause you to have any biases for or against either
10 side?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: No, sir.

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

14 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, I can.

15 THE COURT: If you either of the Defendants, would you
16 want twelve people in your present state of mind to sit and judge
17 your case?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes, sir.

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

22 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

23 THE COURT: Mr. Wall?

24 MR. WALL: Thank you, your Honor. Ms. Prall, let me
25 ask you first, in the questionnaire at question 34 you had some

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1 concerns about work commitments...

2 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

3 MR. WALL: ...if you were called upon to serve. I know
4 we've already kept you here four or five days, but can you tell
5 me whether or not you still have those concerns?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: I'm the only unit
7 clerk at the care center, and I suppose they could get along
8 without me, but they're looking forward to me coming back.

9 MR. WALL: And you also had some personal concerns
10 about lost work hours and things like that?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: I've already lost
12 them.

13 MR. WALL: Okay. Knowing that this case will take us
14 into probably Monday or Tuesday, and then it's, if you were moved
15 into a position -- first, if you were selected here and then
16 moved into a position where you'd be a member of the jury, you
17 know, we've heard other prospective jurors talk about prior jury
18 service where it took a day or even more for a jury to
19 deliberate.

20 PROSPECTIVE ALTERNATE JUROR NO. 4: Uh-huh.

21 MR. WALL: Would that cause you any problem or pressure
22 if we went into, if you were called upon to serve well into next
23 week?

24 PROSPECTIVE ALTERNATE JUROR NO. 4: No. The overtime
25 that I had I've already lost.

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1 MR. WALL: Okay.

2 PROSPECTIVE ALTERNATE JUROR NO. 4: So it wouldn't be
3 any different at this point.

4 MR. WALL: Okay. Would you feel a need to complete any
5 work duties after court on any day that we were here?

6 PROSPECTIVE ALTERNATE JUROR NO. 4: Would I feel any
7 need to complete any work duties? It'll be there.

8 MR. WALL: Yeah, but I mean would you feel any need to
9 go into work say at 4:00 p.m. or 5:00 p.m. when we'd finish at
10 the end of the day?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: No. No.

12 MR. WALL: Working at the care center I would venture
13 to say that you've had the opportunity to meet with and probably
14 give some comfort to people who were either, where death was
15 imminent for that person or for a relative or loved one?

16 PROSPECTIVE ALTERNATE JUROR NO. 4: Definitely.

17 MR. WALL: Having done that for a number of years, do
18 you think that's changed you at all, and if so, how?

19 PROSPECTIVE ALTERNATE JUROR NO. 4: I don't think it's
20 changed me any more than the way I've always thought.

21 MR. WALL: Okay. Knowing that there's two grandparents
22 in this case who were murdered...

23 PROSPECTIVE ALTERNATE JUROR NO. 4: Uh-huh.

24 MR. WALL: ...would your experiences working at the
25 care center -- well, I should -- how would your experiences

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1 working at the care center affect you as a juror listening to a
2 case where you will hear and see some photographs of two elderly
3 people who were murdered?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: It would be
5 difficult.

6 MR. WALL: Would you be able to put some of your prior
7 experiences aside and still judge what the proper sentence might
8 be for these two individuals if you were in fact placed as a
9 member of the actual jury?

10 PROSPECTIVE ALTERNATE JUROR NO. 4: I think I could.

11 MR. WALL: Okay. How do you feel about the death
12 penalty?

13 PROSPECTIVE ALTERNATE JUROR NO. 4: I believe -- I'm
14 for it. I believe it's necessary.

15 MR. WALL: Okay. And knowing what you know about the
16 facts of this case could all three possible punishments be
17 appropriate in your mind?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: Yes.

19 MR. WALL: Okay. Of all the questions that you've
20 heard asked of others, are there any that I ought to ask of you
21 that, you know, something that you think we ought to know?

22 PROSPECTIVE ALTERNATE JUROR NO. 4: No.

23 MR. WALL: Okay. Thank you, your Honor. We'll pass
24 for cause.

25 THE COURT: Mr. Schleck?

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8JD04859

1 MR. SCHIECK: Ma'am, excuse me, at question No. 54 you
2 indicated false, that you never disagree with the law. Are there
3 times where you do disagree with some of the laws?

4 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not
5 disagree with the law.

6 MR. SCHIECK: If you have a personal opinion about
7 something that differs from what the Court's instructions might
8 be, should you get in that position, would you be able to set
9 aside your own personal opinion to then follow the Court's
10 instructions?

11 PROSPECTIVE ALTERNATE JUROR NO. 4: I think so.

12 MR. SCHIECK: You also indicated at No. 62 that you do
13 not believe in the adage of "an eye for an eye."

14 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I don't.

15 MR. SCHIECK: Okay. So I take it then you would not
16 necessarily feel that a pound of flesh exacts another pound of
17 flesh?

18 PROSPECTIVE ALTERNATE JUROR NO. 4: No, I do not.

19 MR. SCHIECK: All right. Thank you. We would pass for
20 cause.

21 THE COURT: Mr. Seaton?

22 MR. SEATON: Pass for cause, Judge.

23 THE COURT: Swear in the alternates.

24 THE CLERK: Would you please rise and raise your right
25 hand, the four of you?

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8JD04860

8JD04861

1 (Clerk swears alternate jurors)

2 THE CLERK: Thank you, you may be seated.

3 THE COURT: Ladies and gentlemen of the jury, this case
4 will proceed in the following order:

5 The State will make an opening statement outlining its case.
6 The Defense may also make an opening statement outlining his
7 case, or their cases immediately after State's statement, unless,
8 with permission of the Court, Defense has reserved their opening
9 statements until the conclusion of the State's case. The Defense
10 is not required to make an opening statement.

11 The State will first introduce evidence. At the conclusion
12 of the State's evidence Defense may present evidence. The burden
13 is always on the State to prove every element of the offense
14 charged beyond a reasonable doubt. The law never imposes upon
15 the Defense in a criminal case the burden of calling any
16 witnesses or introducing any evidence.

17 At the conclusion of the evidence each party has the
18 opportunity to present closing argument in support of their case.
19 What is said in closing argument is not evidence, just as what is
20 said in the opening statement is not evidence. The arguments are
21 designed to present to you the contention of the parties as to
22 what the evidence has shown and what inferences may be drawn from
23 the evidence. The State has the right to open and close the
24 arguments.

25 Either before or after argument I will instruct you on the

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8JD04861

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1 applicable law. You will then retire, select a foreperson,
2 deliberate, and arrive at a verdict, which must be unanimous.
3 Unfaithful performance by you of your duties is a violation of
4 the administration of justice. The law applicable to this suit
5 is given to you in these instructions and in other instructions
6 that you will receive at the close of all the evidence in the
7 case, and it is your duty to follow all such instructions.

8 It is your duty to determine the facts and to determine them
9 from the evidence and the reasonable inferences arriving from
10 such evidence. And in doing so you must not indulge in guesswork
11 or speculation. It is especially important that you perform your
12 duty of determining the facts diligently and conscientiously, for
13 ordinarily there are no means of correcting an erroneous
14 determination of the facts by a jury. On the other hand, and
15 with equal emphasis, I instruct you that the law as given by the
16 Court constitutes the only law for your guidance, and it is your
17 duty to accept it and to follow it.

18 It is your duty to follow the law as I give it to you even
19 though you may differ with the law. The parties may sometimes
20 present objections to some of the testimony or other evidence.
21 It is the duty of a lawyer to object to evidence which he or she
22 believes may not properly be offered, and you should not be
23 prejudice in any way against a lawyer who makes objections on
24 behalf of the party he or she represents.

25 At times I may sustain objections or direct that you

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8JD04862

8JD04863

1 disregard certain testimony or exhibits. You must not consider
2 any evidence to which an objection has been sustained or which
3 I've instructed you to disregard. You must not be influenced in
4 any degree by any personal feeling or sympathy for or prejudice
5 against any party of this suit. But each party is entitled to
6 the same fair and impartial consideration.

7 In considering the weight and value of the testimony of any
8 witness you may take into consideration the appearance, attitude
9 and behavior of the witness; the interest of the witness to any
10 party in the suit; the inclination of the witness to speak
11 truthfully or not; and the probability or improbability of the
12 witness' statements and all other facts and circumstances in
13 evidence. Thus, you may give the testimony of any witness just
14 such weight and value as you believe the testimony of that
15 witness is entitled to receive.

16 And this I wish to emphasize most strongly. There are no
17 statements, ruling, remark, comment or gesture that I may make
18 during the course of this trial that's intended to indicate my
19 opinion as to how you should decide the case or to influence you
20 in anyway in your determination of the facts. At times I may
21 even ask questions of the witnesses. If I do so, it is for the
22 purpose of bringing out matters which I feel should be brought
23 out and not in anyway to indicate my opinion about the facts or
24 to indicate the weight I feel you should give to the testimony of
25 that witness.

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8JD04863

1 I may also find it necessary to admonish the lawyers. If I
2 do so, you should not show prejudice toward a lawyer or his or
3 her client because I have found it necessary to admonish him or
4 her.

5 No person should declare to any fellow juror any fact
6 relative to this case as of his own knowledge. If any person
7 discovers during the trial or after the jury has retired that he
8 or she or any other juror has personal knowledge of any fact and
9 controversy in this case, they should disclose such situation to
10 the Court in the absence of the other jurors.

11 If the attorneys or the Defendants should see you, should
12 pass you in the halls or on the street, and do not say hello or
13 good-bye, good morning, please do not feel insulted as they're
14 not supposed to talk to you during the course of the trial. And
15 again I'll remind you, don't go asking them any questions.

16 You are informed that you may, if you wish, take notes
17 during the trial; however, do not rely upon your individual notes
18 if there's a conflict between them, because the court recorder
19 has the complete and authentic record of the case.

20 If at anytime I should appear to be inattentive, please do
21 not consider the evidence being offered to be unimportant. It
22 may be that I have heard the evidence during pretrial motions.
23 This week I was very fortunate; one of the other judges handled
24 my morning calendar. But every Monday, Tuesday, Wednesday and
25 Thursday I have morning calendars that start at 9:00 a.m.

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8JD04864

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 4 OF 5

Electronically Filed
Jun 11 2015 12:30 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S SUPPLEMENTAL APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)

Second Judicial District Court, Washoe County

RENE L. VALLADARES
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Attorneys for Appellant

1 presented, and they interpret it different. And then whereas one
2 person may be able to relate to the other individual better, then
3 maybe the District Attorney or yourself, and you might be able to
4 find out things that you didn't know, that you didn't understand
5 from, say, another juror that you didn't understand when he came
6 from, the Defense or the Prosecution.

7 MR. WALL: Having been in that situation, did you leave
8 that with greater confidence in the jury system or less
9 confidence?

10 PROSPECTIVE JUROR NO. 8: With greater confidence in
11 the jury system.

12 MR. WALL: Let me ask you about the situation involving
13 your cousin. At the time, or even now, did you feel like the
14 individual who was responsible should have gotten the death
15 penalty?

16 PROSPECTIVE JUROR NO. 8: Not necessarily the death
17 penalty, but I felt they should have got quite a bit of time for
18 it. And possibly the death penalty, yes.

19 MR. WALL: So in some situations at least, you believe
20 that the death penalty is appropriate for a first-degree murder
21 case?

22 PROSPECTIVE JUROR NO. 8: Yes.

23 MR. WALL: And the Judge asked you to consider all
24 three possible punishments, and you indicated that you could. If
25 called upon to do so, could you consider the death penalty in

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8JD04738

1 this case?

2 PROSPECTIVE JUROR NO. 8: Yes.

3 MR. WALL: And you understand, in this case there are
4 just those three choices? There's no possibility that you could
5 come back with a sentence that involved probation, so that Mr.
6 Flanagan, say, could just go home and live happily ever after
7 like the situation you described.

8 PROSPECTIVE JUROR NO. 8: Right, yes.

9 MR. WALL: That's not an option here. Do you have
10 grandchildren?

11 PROSPECTIVE JUROR NO. 8: Yes, I have five.

12 MR. WALL: Would the fact that you have either children
13 the same age as Mr. Flanagan was at the time that this offense
14 took place, or the fact that you're a grandpa--even that--could
15 you still be fair and impartial to both sides and consider all
16 three possible penalties?

17 PROSPECTIVE JUROR NO. 8: Yes.

18 MR. WALL: Thank you very much. Your Honor, we'll pass
19 for cause.

20 MR. SEATON: Thank you, Judge. Okay. Mr. Hooks, where
21 did we meet?

22 PROSPECTIVE JUROR NO. 8: Other than the case -- other
23 than that one particular case, that was it.

24 MR. SEATON: Is that the case in 1992 that you served
25 on as a juror? Is that the one you're speaking of?

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1 PROSPECTIVE JUROR NO. 8: Probably. I don't recall the
2 year, but it was four or five years ago, I'm sure.

3 MR. SEATON: Okay. And was it a drug case?

4 PROSPECTIVE JUROR NO. 8: Yes, it was.

5 MR. SEATON: I don't want to contradict you, but over
6 the years I've not done drug cases. I've done murder cases with
7 drugs affiliated with them, but never -- not in the recent past
8 have I done any drug cases. And as recently as 1992, in that
9 particular year I wasn't doing trials. I just want to make sure
10 that we -- did the person -- was the prosecutor a good
11 prosecutor? (laughter) I might admit to it.

12 PROSPECTIVE JUROR NO. 8: Well, I was basing it -- it
13 wasn't by name or anything. It was just by looks that I seem to
14 remember you from that trial. As I sit here, as the days go by I
15 seem to remember. It's possibility that five years ago, I can be
16 wrong.

17 MR. SEATON: Well, and it's possible that you could be
18 right. This is the important question: Was there anything about
19 that trial that would put you on my side or against me?

20 PROSPECTIVE JUROR NO. 8: No.

21 MR. SEATON: Oh, that's really all that matters. I'd
22 like to go back to the situation briefly, if we could, where your
23 first cousin was murdered and the individual got probation. And
24 someone from our office handled that. And that was back in '75
25 did you say?

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8JD04740

1 PROSPECTIVE JUROR NO. 8: I think '75, somewhere --
2 about that, yes.

3 MR. SEATON: I was with the office at that time. Did I
4 have anything to do with that case that you know of?

5 PROSPECTIVE JUROR NO. 8: I wasn't familiar -- I didn't
6 know anyone that handled any of the plea bargaining or anything.
7 I was just aware of the initial hearing, I think what they called
8 the preliminary hearing. And the person's -- the case drug on
9 for maybe ten months, and then the next thing that I heard that
10 the person had -- that the case had been plea bargained down, and
11 the individual was out on probation.

12 MR. SEATON: And you were dissatisfied with that
13 obviously?

14 PROSPECTIVE JUROR NO. 8: Yes, I was.

15 MR. SEATON: And I gathered from your answers before
16 that notwithstanding I'm still with the office that's
17 representing the State now and that also represented your dead
18 first cousin in that particular case, you don't hold any hard
19 feelings?

20 PROSPECTIVE JUROR NO. 8: No.

21 MR. SEATON: So we shouldn't expect any repercussions
22 in this case from that case?

23 PROSPECTIVE JUROR NO. 8: Well, as I stated earlier, I
24 think I said that as I sit here now, I don't think that case
25 would have any bearing on my decision here. But as the case goes

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8JD04741

1 on, I'm saying I'm hoping, but there is a possibility that
2 something might occur that will trigger me one way or the other,
3 you know, to cause me to just lock in on one side or the other.
4 That's what I'm saying.

5 MR. SEATON: Let's say that that might happen, and I
6 assume now that you don't have anything particular in mind.

7 PROSPECTIVE JUROR NO. 8: No.

8 MR. SEATON: You just don't know what's going to go on
9 here for the next few days.

10 PROSPECTIVE JUROR NO. 8: right.

11 MR. SEATON: Let's say that something happens and you
12 go, "Oh, boy, that's meaningful to me." Can you promise us at
13 least that you would do your darnedest to put that out of your
14 mind?

15 PROSPECTIVE JUROR NO. 8: Yes, I would.

16 MR. SEATON: Okay. And not utilize it to judge this
17 particular case?

18 PROSPECTIVE JUROR NO. 8: Yes, I would.

19 MR. SEATON: There will be certain things that go on
20 within the confines of this courtroom: witnesses, evidence,
21 instructions, argument. Can you tell us that you would just
22 consider those things and try to put all the outside influences
23 outside this courtroom?

24 PROSPECTIVE JUROR NO. 8: Yes.

25 MR. SEATON: Now, I'm not saying that when you go back

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1 as a juror and you deliberate, you're not to use your own past
2 experiences, your common sense, everything you've learned over
3 the course of your life, but we don't want those things to unduly
4 prejudice this case one way or the other.

5 PROSPECTIVE JUROR NO. 8: Right.

6 MR. SEATON: You feel comfortable with that?

7 PROSPECTIVE JUROR NO. 8: Yes.

8 MR. SEATON: All right. Great. The other thing that
9 may have more of a bearing on this case as I listen to you speak
10 with the other lawyers is some of the attitudes that you have
11 developed as a result of the -- I think it was an abortion of a
12 girlfriend?

13 PROSPECTIVE JUROR NO. 8: Yes.

14 MR. SEATON: How long ago was that?

15 PROSPECTIVE JUROR NO. 8: Thirty years.

16 MR. SEATON: All right. That still has some very
17 pervasive memories for you, as I understand it?

18 PROSPECTIVE JUROR NO. 8: Yes.

19 MR. SEATON: And you remember it quite well and are
20 affected by it today?

21 PROSPECTIVE JUROR NO. 8: Yes.

22 MR. SEATON: How do you think it affects you in terms
23 of whether or not you can look at the death penalty in a fashion
24 that we've been asking all the other jurors to?

25 PROSPECTIVE JUROR NO. 8: Well, over the past few days

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1 I have thought about it and asked myself that if -- once you're
2 presented all of the evidence and it clearly stated or showed
3 that these gentlemen should receive the death penalty, and could
4 I say yes even though the evidence indicated/showed that that's
5 the way it should go, could I say yes. And I've wrestled with
6 that question for the last three or four days, and to tell you
7 the truth, I haven't came up with an answer.

8 MR. SEATON: To tell you the truth, I need an answer.

9 PROSPECTIVE JUROR NO. 8: I figured you did. I figured
10 you did. But it would be a tough yes for me.

11 MR. SEATON: Let me make some inquiries here. Is this
12 subject something that bothers you talking about in front of
13 other people?

14 PROSPECTIVE JUROR NO. 8: No, I doesn't bother me.

15 MR. SEATON: I don't mean to embarrass you.

16 PROSPECTIVE JUROR NO. 8: No, no, it doesn't bother me.

17 MR. SEATON: You can tell you've gotten to the very
18 heart of my problem.

19 PROSPECTIVE JUROR NO. 8: Right.

20 MR. SEATON: In terms of where the State is coming
21 from. Were the feelings that you had after the abortion was
22 done, did they cause you to hold a greater respect for life?

23 PROSPECTIVE JUROR NO. 8: Yes, it did.

24 MR. SEATON: You have a feeling, I take it, that you
25 don't want to be responsible for the taking of a life?

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1 PROSPECTIVE JUROR NO. 8: Right.

2 MR. SEATON: Did you feel that you were somewhat
3 responsible for the decision that was made to get the abortion?

4 PROSPECTIVE JUROR NO. 8: Yes.

5 MR. SEATON: She turned to you for advice?

6 PROSPECTIVE JUROR NO. 8: Yes. It was a joint
7 decision.

8 MR. SEATON: All right. But you had a great deal to do
9 with it?

10 PROSPECTIVE JUROR NO. 8: Yes.

11 MR. SEATON: And is it that those feelings that give
12 you difficulty now in wondering whether or not when it comes
13 right down to the decision-making time, if your head tells you
14 that the evidence says that the death penalty is appropriate and
15 your heart or your stomach might tell you that, "I just don't
16 want to do this"?

17 PROSPECTIVE JUROR NO. 8: More of my heart probably.

18 MR. SEATON: Is that your concern?

19 PROSPECTIVE JUROR NO. 8: Yes.

20 MR. SEATON: Remember the question everybody's asked?
21 If you would sit in those chairs...

22 PROSPECTIVE JUROR NO. 8: Yes.

23 MR. SEATON: ...would you want twelve people like you
24 --- remember I asked the one woman...

25 PROSPECTIVE JUROR NO. 8: Right.

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8JD04745

1 MR. SEATON: ...if she was sitting in my chair, would
2 she want twelve people of her mind-set -- and I'll ask that
3 question of you. Do I want you as a juror?--is the question.

4 PROSPECTIVE JUROR NO. 8: Do you or do they want me?

5 MR. SEATON: Do I.

6 PROSPECTIVE JUROR NO. 8: I would think so, because I
7 think my experience would probably make me be more careful in the
8 decision and in looking at the evidence, knowing that the
9 decision that I might have to make. And then again, I come to
10 the right point again, when it comes down to the point that I
11 have to make that decision, if you ask me right now, could I, I
12 will still have to say I'm not sure.

13 MR. SEATON: If you're picked as a juror, are you going
14 to try to do that?

15 PROSPECTIVE JUROR NO. 8: Yes, I would.

16 MR. SEATON: Do you recognize that there is potentially
17 a fairly large difference between those two decisions?

18 PROSPECTIVE JUROR NO. 8: Yes.

19 MR. SEATON: The abortion was something of choice to
20 try to assist the woman, I suppose, either physically or mentally
21 or economically or whatever the reasons were behind it, and I
22 don't really want to get into those. Am I on the right track?

23 PROSPECTIVE JUROR NO. 8: Yes, yes.

24 MR. SEATON: And here, this is to fall in step with the
25 criminal justice system.

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1 PROSPECTIVE JUROR NO. 8: Yes.
2 MR. SEATON: A wrong has been committed, and we have to
3 figure out what the punishment is.
4 PROSPECTIVE JUROR NO. 8: Right.
5 MR. SEATON: Am I correct?
6 PROSPECTIVE JUROR NO. 8: Right.
7 MR. SEATON: And one of those punishments include the
8 death penalty, right?
9 PROSPECTIVE JUROR NO. 8: Right.
10 MR. SEATON: And you believe in the death penalty?
11 PROSPECTIVE JUROR NO. 8: Yes.
12 MR. SEATON: All right. So I guess I'm going to go
13 back to one of the last questions I asked you then and that is
14 that you would try so very hard to utilize the death penalty if
15 you truly believe that it was the appropriate penalty in this
16 particular case?
17 PROSPECTIVE JUROR NO. 8: Yes.
18 MR. SEATON: All right. Thank you. I'd pass for
19 cause, Judge.
20 THE COURT: The State will exercise its seventh
21 peremptory challenge.
22 MR. SEATON: The State will waive.
23 THE COURT: Defense will exercise its seventh
24 peremptory challenge.
25 MR. SCHIECK: May we have the Court's indulgence for

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8JD04747

1 one moment, please, your Honor?

2 THE COURT: Yes, you may.

3 (Pause)

4 MR. SCHIECK: Thank you, your Honor. The Defense would
5 thank and excuse Juror No. 510, Ms. Credille in the No. 7
6 position.

7 THE COURT: Ms. Credille, you are excused. Thank you
8 for coming down. Tell the jury commissioner I have excused you
9 from further jury duty.

10 THE CLERK: Lynn Fluckiger Stirling, Badge No. 525,
11 S-T-I-R-L-I-N-G.

12 THE COURT: Mr. Sterling, sir, how long have you lived
13 in Clark County?

14 PROSPECTIVE JUROR NO. 7: Forty-one years.

15 THE COURT: Thank you. Where were you born and raised?

16 PROSPECTIVE JUROR NO. 7: I was born in St. George,
17 Utah, raised here.

18 THE COURT: What is your educational background?

19 PROSPECTIVE JUROR NO. 7: Four years of college. I
20 have no degree.

21 THE COURT: And what was your field of endeavor?

22 PROSPECTIVE JUROR NO. 7: I'm pre-med.

23 THE COURT: And what college?

24 PROSPECTIVE JUROR NO. 7: I went to UNLV and UNR.

25 THE COURT: What has been your employment for the last

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1 ten years?

2 PROSPECTIVE JUROR NO. 7: I've been employed at Sunrise
3 Hospital as a raspatory therapy technician for the last 15 years.

4 THE COURT: And what is your religious preference?

5 PROSPECTIVE JUROR NO. 7: Church of Jesus Christ of
6 Latter-day Saints.

7 THE COURT: Do you attend church regularly?

8 PROSPECTIVE JUROR NO. 7: I do.

9 THE COURT: How old are you, sir?

10 PROSPECTIVE JUROR NO. 7: I'm 46 years old.

11 THE COURT: Are you married or single?

12 PROSPECTIVE JUROR NO. 7: I'm married.

13 THE COURT: Is your wife employed?

14 PROSPECTIVE JUROR NO. 7: She's not.

15 THE COURT: Do you have any children?

16 PROSPECTIVE JUROR NO. 7: Have six children.

17 THE COURT: May we have their ages and sex?

18 PROSPECTIVE JUROR NO. 7: A daughter, age 20; a
19 daughter, age 18; a daughter, age 15; a daughter, age 13; a son,
20 age 10; a daughter, age 6.

21 THE COURT: Don't you tell anybody that your wife is
22 not employed anymore.

23 PROSPECTIVE JUROR NO. 7: I said she wasn't employed.
24 I didn't say she doesn't work hard.

25 THE COURT: Are you acquainted with either of the

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1 Defendants or their attorneys?

2 PROSPECTIVE JUROR NO. 7: No, sir.

3 THE COURT: Do you know anyone in the District

4 Attorney's Office?

5 PROSPECTIVE JUROR NO. 7: Yes, I do. I'm acquainted
6 with an attorney named Shannon Flake, who I believe works with
7 the D.A.'s Office.

8 THE COURT: And how do you know Shannon?

9 PROSPECTIVE JUROR NO. 7: I go to church with him.

10 THE COURT: Does he discuss his work with you?

11 PROSPECTIVE JUROR NO. 7: No.

12 THE COURT: Is there anything about that relationship
13 that would cause you to have any biases for or against either
14 side?

15 PROSPECTIVE JUROR NO. 7: No, sir.

16 THE COURT: Did you recognize any of the persons
17 whose names were given to you as possible prosecution
18 witnesses?

19 PROSPECTIVE JUROR NO. 7: No, sir.

20 THE COURT: In the State of Nevada, there are three
21 possible forms of punishment that the jury may consider and then
22 select the one that they believe is the most appropriate under
23 the laws and facts of this case. Those three possible forms of
24 punishment are: (a) life imprisonment without the possibility of
25 parole; (b) the imposition of the death penalty, and (c) life

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8JD04750

1 imprisonment with the possibility of parole. Do you understand,
2 sir?

3 PROSPECTIVE JUROR NO. 7: Yes, sir.

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

8 PROSPECTIVE JUROR NO. 7: Yes, I can.

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

11 PROSPECTIVE JUROR NO. 7: No, sir.

12 THE COURT: Are you now involved in or have you ever
13 been involved in any law enforcement work?

14 PROSPECTIVE JUROR NO. 7: No, sir.

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

17 PROSPECTIVE JUROR NO. 7: No, sir.

18 THE COURT: Have you been a witness in any criminal
19 prosecution?

20 PROSPECTIVE JUROR NO. 7: No, sir.

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

22 PROSPECTIVE JUROR NO. 7: Twice.

23 THE COURT: When was this?

24 PROSPECTIVE JUROR NO. 7: Once about two or three years
25 ago, once about nine years ago.

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8JD04751

1 THE COURT: And what type of cases were they?
2 PROSPECTIVE JUROR NO. 7: The first one I served on was
3 a drug case; the second one was a murder case.
4 THE COURT: Without disclosing your verdicts, were your
5 juries able to arrive at verdicts?
6 PROSPECTIVE JUROR NO. 7: Yes, sir.
7 THE COURT: Were you the foreman on any of them?
8 PROSPECTIVE JUROR NO. 7: No, sir.
9 THE COURT: Have you ever served in military service?
10 PROSPECTIVE JUROR NO. 7: Yes, I did.
11 THE COURT: Which service?
12 PROSPECTIVE JUROR NO. 7: United States Army.
13 THE COURT: Which branch?
14 PROSPECTIVE JUROR NO. 7: Army Security Agency.
15 THE COURT: That's involved in background
16 investigations, isn't it, sir?
17 PROSPECTIVE JUROR NO. 7: No. I was a Russian
18 interpreter/translator.
19 THE COURT: All right. Have you ever been or anyone
20 close to you -- strike that.
21 What was your rank?
22 PROSPECTIVE JUROR NO. 7: Specialist--Spec 5.
23 THE COURT: Did you ever sit on any court-martials or
24 boards?
25 PROSPECTIVE JUROR NO. 7: No, sir.

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8JD04752

1 THE COURT: Counsel?

2 MS. MOUNTS: Apologize, your Honor.

3 THE COURT: Both sides now. If you have to talk, get
4 some pencil and paper.

5 MS. MOUNTS: I apologize to the Court, your Honor.

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

8 PROSPECTIVE JUROR NO. 7: We've had a couple of
9 bicycles stolen in the last year. Other than that, nothing.

10 THE COURT: Is there anything about that experience
11 that would cause you to have any biases for or against either
12 side?

13 PROSPECTIVE JUROR NO. 7: 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 them?

16 PROSPECTIVE JUROR NO. 7: Yes, I will.

17 THE COURT: If you were either the State -- strike
18 that.

19 If you were either one of the Defendants, would you care to
20 have twelve people in your present state of mind to sit and judge
21 your case?

22 PROSPECTIVE JUROR NO. 7: I believe so.

23 THE COURT: And do you know of any reason whatsoever,
24 whether I've asked you or not, why you cannot sit as a fair and
25 impartial juror in this case?

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8JD04753

1 PROSPECTIVE JUROR NO. 7: No, sir.

2 THE COURT: Mr. Wolfbrandt?

3 MR. WOLFBRANDT: Yes, thank you. Good afternoon, Mr.
4 Stirling. With regard to Question 31, I'll just start there.
5 That was the prior jury experience that you had?

6 PROSPECTIVE JUROR NO. 7: Yes.

7 MR. WOLFBRANDT: With regard to the murder case a few
8 years ago, was that a capital case? In other words, do you
9 recall whether or not the State was seeking the death penalty?

10 PROSPECTIVE JUROR NO. 7: I don't recall.

11 MR. WOLFBRANDT: Do you recall whether or not the jury
12 had to be involved in a penalty phase?

13 PROSPECTIVE JUROR NO. 7: We were not involved in a
14 penalty phase.

15 MR. WOLFBRANDT: In a response -- well, you found that
16 that was a positive experience?

17 PROSPECTIVE JUROR NO. 7: Yes, I did.

18 MR. WOLFBRANDT: And I guess it would be both of your
19 experiences as a juror?

20 PROSPECTIVE JUROR NO. 7: Yes, uh-huh.

21 MR. WOLFBRANDT: And your response/answer to 33, you
22 mention that you spoke with, if I understand this correctly, the
23 prosecutor only?

24 PROSPECTIVE JUROR NO. 7: That's correct. After the
25 murder case.

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8JD04754

1 MR. WOLFBRANDT: Okay. Was there a reason why you did
2 not talk to the Defense?

3 PROSPECTIVE JUROR NO. 7: We came out of the -- you
4 know, after the trial was over, we came out, and the prosecutor
6 approached us and talked to us. The Defense attorney did not.

8 MR. WOLFBRANDT: Okay. So it wasn't that you avoided a
7 defense attorney on it.

8 PROSPECTIVE JUROR NO. 7: No.

9 MR. WOLFBRANDT: It was just that they weren't
10 available?

11 PROSPECTIVE JUROR NO. 7: Apparently not.

12 MR. WOLFBRANDT: How was it you got to be a Russian
13 interpreter or translator in the Army?

14 PROSPECTIVE JUROR NO. 7: I was drafted into the Army,
15 and they wanted me to be a meat cutter, and I didn't want that,
16 so I reenlisted for Russian language.

17 MR. WOLFBRANDT: Had that been the second language to
18 you?

19 PROSPECTIVE JUROR NO. 7: No.

20 MR. WOLFBRANDT: It was the only one that you had
21 learned in school?

22 PROSPECTIVE JUROR NO. 7: No, I'd never had any
23 experience in Russian. I had some Spanish training. So
24 linguistics did interest me.

25 MR. WOLFBRANDT: Generally what part of the Las Vegas

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8JD04755

1 Valley did you live in about ten-eleven years ago?

2 PROSPECTIVE JUROR NO. 7: Desert Inn/Eastern area.

3 MR. WOLFBRANDT: Are you familiar at all where Washburn
4 Road is?

5 PROSPECTIVE JUROR NO. 7: Not really.

6 MR. WOLFBRANDT: Your response answer to Question 58B,
7 you said you may have heard about it at the time but don't
8 remember any of the details.

9 PROSPECTIVE JUROR NO. 7: I remember very vaguely
10 hearing about it, but I don't remember any details at all.

11 MR. WOLFBRANDT: Okay. Now, since you've been in here
12 for the last several days, has that triggered any additional
13 recollection?

14 PROSPECTIVE JUROR NO. 7: No, sir.

15 MR. WOLFBRANDT: As you see both Dale and Randy sitting
16 here, is there anything about their appearance that triggers any
17 opinions in your mind in any direction?

18 PROSPECTIVE JUROR NO. 7: No, sir.

19 MR. WOLFBRANDT: Anything about the facts of the case
20 itself? I mean, you come from a large family and you have what
21 some would consider a large family. Anything about the facts
22 that this is somewhat or is family-oriented that causes you any
23 problems or concerns as possibly sitting as a juror?

24 PROSPECTIVE JUROR NO. 7: I don't think so.

25 MR. WOLFBRANDT: Have you ever had discussions with

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1 people about the death penalty?

2 PROSPECTIVE JUROR NO. 7: Yes, I have.

3 MR. WOLFBRANDT: Under what sort of context was that?

4 PROSPECTIVE JUROR NO. 7: Mostly just conversations
5 with friends. It comes up. Family members, that sort of thing.

6 MR. WOLFBRANDT: Was it somewhat of discussing
7 particular cases you've read about in the paper or seen on TV?

8 PROSPECTIVE JUROR NO. 7: I really don't recall. But I
9 know it's come up in the past.

10 MR. WOLFBRANDT: Have you come across cases through the
11 television and newspaper where you had felt that the death
12 penalty should have been applied and was not for whatever reason?

13 PROSPECTIVE JUROR NO. 7: I can't think of any specific
14 cases right now.

15 MR. WOLFBRANDT: Generally do you -- is it your opinion
16 that you advocate -- you think the death penalty is an
17 appropriate option?

18 PROSPECTIVE JUROR NO. 7: I do.

19 MR. WOLFBRANDT: Do you feel that it's used enough?

20 PROSPECTIVE JUROR NO. 7: Probably not.

21 MR. WOLFBRANDT: Do you feel the death penalty as an
22 option acts as a deterrent against violent crimes?

23 PROSPECTIVE JUROR NO. 7: No, I don't.

24 MR. WOLFBRANDT: Would you feel inclined to help send a
25 message to society that the death penalty should be used more by

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8JD04757

1 taking an opportunity in this case to impose it?

2 PROSPECTIVE JUROR NO. 7: No, I wouldn't.

3 MR. WOLFBRANDT: Would you be able to weigh all of the
4 evidence both presented by the State and the Defense...

5 PROSPECTIVE JUROR NO. 7: Absolutely.

6 MR. WOLFBRANDT: ...in making your determination?

7 PROSPECTIVE JUROR NO. 7: Yes.

8 MR. WOLFBRANDT: All right. Thank you. We would pass
9 for cause.

10 THE COURT: Ms. Mounts?

11 MS. MOUNTS: Thank you. Mr. Stirling, good afternoon.
12 I want to ask you also a couple of questions about your views on
13 the death penalty. You stated a moment ago that you do not feel
14 that it had a deterrent effect. Is that correct?

15 PROSPECTIVE JUROR NO. 7: That's correct.

16 MS. MOUNTS: Can you tell us then in your view what
17 purpose it would serve if you do not feel it had a deterrent
18 factor?

19 PROSPECTIVE JUROR NO. 7: The only purpose that I can
20 see that it does serve it to eliminate from society individuals
21 who prey on society, cause people bodily harm, that sort of
22 thing...

23 MS. MOUNTS: Would you...

24 PROSPECTIVE JUROR NO. 7: ...who are not able to be
25 rehabilitated.

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8JD04758

1 MS. MOUNTS: I'm sorry, I didn't mean to interrupt you.
2 PROSPECTIVE JUROR NO. 7: That's all right.
3 MS. MOUNTS: Would you agree that a sentence of life
4 imprisonment with no chance for parole also remove that person
5 from society?
6 PROSPECTIVE JUROR NO. 7: Yes, it would.
7 MS. MOUNTS: Would you tend to favor one as opposed to
8 the other?
9 PROSPECTIVE JUROR NO. 7: Not necessarily.
10 MS. MOUNTS: Would you look at all of the facts before
11 you made that determination?
12 PROSPECTIVE JUROR NO. 7: Yes, I would.
13 MS. MOUNTS: Can you picture in your mind a set of
14 circumstances under which you might feel that life imprisonment
15 with the possibility of parole might be inappropriate punishment?
16 PROSPECTIVE JUROR NO. 7: Yes, I think that is
17 appropriate in some cases.
18 MS. MOUNTS: Do you have in your mind a particular kind
19 of case that you think that might be appropriate for?
20 PROSPECTIVE JUROR NO. 7: Nothing really specific,
21 no.
22 MS. MOUNTS: Again, you'd want to hear all the
23 evidence?
24 PROSPECTIVE JUROR NO. 7: Absolutely.
25 MS. MOUNTS: If you felt that that would be appropriate

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8JD04759

1 punishment, would you have any qualms about imposing it?

2 PROSPECTIVE JUROR NO. 7: You're talking about life
3 with the possibility of parole?

4 MS. MOUNTS: Life with the possibility that someone may
5 be released someday.

6 PROSPECTIVE JUROR NO. 7: I would have no problem
7 coming back with that.

8 MS. MOUNTS: Now, Mr. Seaton has asked several jurors
9 if they would have any problem should they elect to vote for the
10 death penalty, coming into the courtroom, looking Mr. Moore and
11 Mr. Flanagan in the eye and pronouncing that as their verdict.
12 Did you hear those questions that he asked?

13 PROSPECTIVE JUROR NO. 7: Yes, I did.

14 MS. MOUNTS: I would ask you, Mr. Stirling, if you felt
15 that life imprisonment with the possibility of parole were the
16 appropriate verdict, would you have any trouble coming into court
17 and looking Mr. Seaton in the eye and pronouncing that as your
18 verdict?

19 PROSPECTIVE JUROR NO. 7: No, I wouldn't.

20 MS. MOUNTS: Now, you indicated that on your prior
21 juror service on the 1989 murder case, you did not have the duty,
22 if you will, of deliberating about punishment.

23 PROSPECTIVE JUROR NO. 7: That's correct.

24 MS. MOUNTS: Tell me in general, please, how you feel
25 about having that responsibility in this case.

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8JD04760

1 PROSPECTIVE JUROR NO. 7: Of deliberating on a
2 sentence?

3 MS. MOUNTS: Exactly.

4 PROSPECTIVE JUROR NO. 7: I really don't see any
5 difference between that and what we did. After reviewing the
6 facts, I think that our job is to come back with an equitable
7 verdict, and I don't have any problem with that.

8 MS. MOUNTS: You acknowledge the enormity of the
9 responsibility.

10 PROSPECTIVE JUROR NO. 7: Oh, yes, absolutely.

11 MS. MOUNTS: But it's one that you'd willingly take on.
12 Is that fair to say?

13 PROSPECTIVE JUROR NO. 7: I could do that, yes.

14 MS. MOUNTS: Now, you mentioned, sir, that you were
15 acquainted with someone in the District Attorney's Office named
16 Shannon Flake?

17 PROSPECTIVE JUROR NO. 7: Yes.

18 MS. MOUNTS: Do you happen to know, sir, is Mr. Flake
19 in the criminal division or the civil division?

20 PROSPECTIVE JUROR NO. 7: I really don't know. I've
21 never really discussed his work with him. I just know that he
22 works in the D.A.'s Office.

23 MS. MOUNTS: You just have that general knowledge? Is
24 that right?

25 PROSPECTIVE JUROR NO. 7: Yes.

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1 MS. MOUNTS: Thank you, sir. Thank you, your Honor.
2 We'd pass for cause.

3 THE COURT: Mr. Seaton?

4 MR. SEATON: Pass for cause.

5 THE COURT: The State may exercise its eighth
6 peremptory challenge.

7 MR. SEATON: It's my turn, Judge?

8 THE COURT: Your turn, sir.

9 MR. SEATON: I'll waive it.

10 THE COURT: Defense may exercise their eighth
11 peremptory challenge.

12 MR. SCHIECK: Court's indulgence for a second, your
13 Honor.

14 THE COURT: Sure.

15 (Long pause)

16 THE COURT: May I see counsel, please?

17 (Bench conference)

18 THE COURT: It's 4:20; it's been a long day. Let's
19 call it quits.

20 We will, in all probability, have a jury tomorrow morning
21 sometime. And further probability, we'll start this case
22 sometime tomorrow. I don't know whether it'll be in the morning
23 or the afternoon, but we will commence sometime tomorrow.

24 In the meantime, it is your duty not to talk among
25 yourselves or with anyone else on any matter pertaining to this

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1 trial; read, watch or listen to any report of or commentary on
2 the trial by any person or by any medium of information,
3 including without limitations newspapers, radio or television;
4 form or express any opinion on any matter pertaining to this
5 trial until it is finally submitted to you.

6 Tomorrow morning at 9:00. Do have a good night.

7 (Pause)

8 THE COURT: Just a minute, sir.

9 (Prospective jurors out at 4:22)

10 THE COURT: Will counsel stipulate to the absence of
11 the jury?

12 MR. SEATON: Yes, your Honor.

13 MR. WALL: Yes, your Honor.

14 MR. SCHIECK: Yes, Judge.

15 THE COURT: Mr. Schieck, there's something you wanted
16 to tell me, and now's the time to do it.

17 MR. SCHIECK: Okay. I'm sorry, Judge, for trying to
18 tell you all this information while we were up at the bench.

19 The situation is this...

20 THE COURT: And before then somebody kept sending
21 messages to me.

22 MR. SCHIECK: We just finished with Mr. Sterling, No.
23 525. We've, in reviewing the questionnaires, noted that Lottie
24 Wilson Chase, who is Juror No. 526, is a member of a group that
25 advocates the abolition of the death penalty. And there is a

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1 very, very, very good chance that Mr. Seaton will exercise a
2 challenge against that juror if indeed we exercise our next
3 peremptory challenge and she reaches the box.

4 THE COURT: In either case, if he doesn't, she'll be
5 picked as an alternate anyway.

6 MR. SCHIECK: Pardon me, Judge?

7 THE COURT: We you don't, he'll be picked as an
8 alternate anyway. Whether you exercise your peremptory challenge
9 or not, he'll be your first alternate.

10 MR. SCHIECK: That's correct. Mr. Gardner is going to
11 become an issue whether or not...

12 THE COURT: You're concerned with Juror No. 527. Is
13 that correct?

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

15 THE COURT: The one who spoke to his daddy?

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

17 THE COURT: And daddy said he had sat on the original
18 jury?

19 MR. SCHIECK: That's correct.

20 THE COURT: Let's go to that then.

21 MR. SCHIECK: He also asked his father a question,
22 "Were they guilty," to which his father responded, "Yes, they
23 were." He claimed that there was no other conversations between
24 he and his father other than that limited conversation.

25 The appearance of impropriety perhaps with respect to Mr.

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1 Gardner being a member of this jury is more than was elicited
2 when we questioned him. But to have the son of a member of the
3 original jury on this case who heard a great deal of evidence
4 that was improper, that heard prosecutorial misconduct that has
5 been condemned by the Supreme Court, and who...

6 THE COURT: Oh, he didn't hear it; his dad heard it.

7 MR. SCHIECK: His dad heard it; that's correct, your
8 Honor. And who has already once violated the admonition of this
9 Court I think is asking for error in this case.

10 It is just ripe for litigation for years to come on this
11 case, and I would ask the Court to reconsider and just excuse Mr.
12 Gardner and thank him for his time. We have plenty of other
13 jurors, and it sure cleans things up if we can do that. And it
14 makes our decision easier on what we're going to do with our next
15 perempt.

16 THE COURT: Let me ask you a question. Assume for the
17 sake of argument that Juror 527 had not conversed with his
18 father. The fact is it would still be the same that his father
19 served on the jury that found these two guilty. That would not
20 change at all, would it?

21 MR. SCHIECK: If he hadn't conversed with his father,
22 he wouldn't know that his father had sat on that jury. The fact
23 of the matter is that he did, and I think that we have to
24 confront that fact and not "what if" he had followed the
25 admonition of the Court. Well, then, he wouldn't even have known

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1 this was the same case, because he didn't know until he talked to
2 his father.

3 I think we can "what if" the challenge a lot, but my
4 perception--and in discussion it with Mr. Flanagan's counsel--is
5 that when Mr. Gardner was sort of rebuked by the Court that he
6 wasn't supposed to talk to his father to begin with, so what was
7 he doing talking to him, that he clammed up quite a bit on us.
8 And for us to believe that there was only one question and one
9 answer given is a little bit hard for me to believe.

10 And like I said, I think that Mr. Gardner on this jury,
11 because if we exercise our next perempt, which we're prone to do
12 now, Mr. Gardner's going to slide right into the top twelve, and
13 there's no perempts left, and he will be a member of this jury.
14 And courts for the next how many ever years are going to be
15 looking at whether or not Mr. Gardner should be sitting here.

16 And I would ask the Court to reconsider and excuse him from
17 the jury.

18 THE COURT: Mr. Wall or Ms. Mounts, either one of you?

19 MR. WALL: Your Honor, we would just join in Mr.
20 Schieck's remarks.

21 THE COURT: Any further comment?

22 MR. WALL: No, I think that's...

23 THE COURT: Mr. Seaton?

24 MR. SEATON: It's the Court's prerogative, obviously.

25 But I am going to join in terms of a stipulation. Let's make it

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1 easier. Let's eliminate...

2 THE COURT: Well, just in case you folks might wonder,
3 I got the message this afternoon; I considered it very strongly.
4 One of the things that I considered was this: I'm quite sure
5 that in Juror 527's household, this case was discussed after the
6 penalty was in. He was 15 years of age.

7 I'm pretty well sure in my mind that he knew that the
8 Defendants received the death penalty, for whatever reason it may
9 be that he knew that and knows that now. And I don't have any
10 problem with your motion.

11 MR. SCHIECK: Thank you, your Honor.

12 THE COURT: As for this other, let's wait awhile to get
13 this other matter.

14 Anything else?

15 MR. SEATON: Perhaps...

16 THE COURT: Give Mr. Seaton a chance to stand, I think.

17 MR. SEATON: Perhaps as a quid pro quo we could excuse
18 the juror ahead of him. It does appear that she's adamantly
19 against the death penalty. As a matter of fact, advocates
20 against it. It would just save us some time in the morning.

21 MR. SCHIECK: Well, she has to come back anyway, Judge.

22 THE COURT: They both do.

23 MR. SCHIECK: It would take one question. We already
24 had one guy who said he thought that the death penalty...

25 THE COURT: Counsel?

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1 MR. SCHIECK: ...should be given...

2 THE COURT: Counsel? Your response can be done in a
3 simple one of two words, yes or no.

4 MR. SCHIECK: Well, Judge, that's contrary to typical
5 lawyer training, isn't it?

6 THE COURT: That only happens, Counsel, when lawyers
7 become so enhanced with the melodious tones of their own voice.

8 MR. SCHIECK: Well, I am somewhat enamored with it,
9 Judge.

10 No, Judge, I'm not going to stipulate to excuse her. I want
11 to be sure she hasn't changed.

12 THE COURT: All right. Anything else?

13 MR. SCHIECK: Just a procedural matter, your Honor.

14 THE COURT: Yes, I didn't get my instructions this
15 morning.

16 MR. SCHIECK: Judge, you said not to submit them to you
17 until we've gone through them and paper-clipped them. Ours are
18 prepared and are ready for Mr. Seaton.

19 THE COURT: And have them ready for me this morning.

20 MR. SCHIECK: Ours are prepared and ready to hand to
21 Mr. Seaton, your Honor.

22 THE COURT: You two are going to have to get together--
23 you five, I guess. Poor Mr. Seaton's outnumbered here.

24 And get together and let me have my instructions tomorrow
25 morning, because we're going to go to jury, and I'm going to

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1 presume that Mr. Schieck is correct when he shows a day and half.
2 Therefore I expect this case to go to the jury by 5:00 Monday.

3 I don't know. On Monday I have my own calendar again, so I
4 have no idea anymore.

5 MR. SCHIECK: At this point, Judge, I'd like to revise
6 my estimate to indicate I think that we -- assuming we get an
7 early enough start tomorrow after finishing jury selection, the
8 State will pretty much finish tomorrow. The Defense...

9 THE COURT: Mr. Schieck, that's okay. We have Monday,
10 Tuesday, and Wednesday.

11 MR. SCHIECK: The Defense finishes...

12 THE COURT: We have plenty of time.

13 MR. SCHIECK: I would...

14 THE COURT: When I get -- I have such little time to
15 tease you folks, so when I have the advantage I take it.

16 We'll be seeing you tomorrow morning, 9:00.

17 (Proceedings concluded)

18 * * * * *

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CERTIFICATION

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10

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

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Donna R. Hughes
Signature of Transcriber

15

16

17

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Linda Kay Sporn
Signature of Transcriber/Verifier
Federally Approved

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June 15, 1995
Date

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DISTRICT CLERK
FILED IN OPEN COURT
JUN 19 1995
CLARK COUNTY, NEVADA
LORETTA BOWMAN, CLERK
Deputy

THE STATE OF NEVADA,

Plaintiff,

vs.

DALE EDWARD FLANAGAN &
RANDOLPH MOORE,

Defendants.

By

Case No. C069269

Dept. No. XI

Docket "S"

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

JURY TRIAL -- PENALTY PHASE
(DAY 4, VOLUME IV)

FRIDAY; JUNE 16, 1995

APPEARANCES:

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1 Also appearing:
 2 (for Rusty Havens,
 3 witness)

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6 Proceedings recorded by electronic sound recording;
 7 transcript by electronic sound transcriber.

8 * * * * *

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8JD04774

1 FRIDAY, JUNE 16, 1995, 9:00 A.M.

2
3 (Prospective jurors absent)

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

6 THE COURT: Good morning, please be seated.

7 What's happening today? We are meeting outside the presence
8 of the jury?

9 MR. SCHIECK: Your Honor, the reason for being outside
10 the presence is to inquire how many alternates that the Court
11 wanted to impanel in this case.

12 THE COURT: You told me a day and a half, two.

13 MR. SCHIECK: And how many perempts the Court would
14 allow the Defense. It would be our request...

15 THE COURT: One and one.

16 MR. SCHIECK: It would be our request that the Court
17 allow one preempt for each Defendant.

18 THE COURT: The statute doesn't provide that. It says
19 you folks must join, doesn't it?

20 MR. SCHIECK: It indicates that, your Honor. However,
21 we have not really joined...

22 THE COURT: If I were going to have four, I would
23 divide it with one. But only when I have two? No.

24 MR. SCHIECK: So two perempts and one and one?

25 THE COURT: Hold it. Case No. C069269, State of Nevada

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1 v. Flanagan & Moore. Let the record reflect the presence of
2 Defendants with counsel, District Attorney, other officers of the
3 court.

4 Will counsel stipulate as to the absence of the jury?

5 MR. WALL: Yes, your Honor.

6 MR. SEATON: Yes.

7 MR. SCHIECK: Yes, your Honor.

8 THE COURT: Now let's put it on the record, Mr.
9 Schieck, for your protection.

10 MR. SCHIECK: Thank you, Judge.

11 The reason for meeting outside the presence is to inquire
12 how many alternates the Court wishes to impanel and request that
13 the Court allow one perempt per Defendant on the alternates.
14 It's very difficult. We've had difficulty sharing the perempts
15 during the eight that were available. In fact, we each exercised
16 four, or will have exercised four, and we'd ask that we each be
17 allowed one perempt on the alternates.

18 MR. WALL: On behalf of Mr. Flanagan, we'd join in the
19 request, your Honor, in case we disagree whether to perempt the
20 use the perempt, on how to use it.

21 MR. SEATON: Judge, the statute provides for one
22 peremptory. Even a case like this, it's to be shared by the
23 Defense. The State has one, the Defense should have one. We're
24 only having two alternate jurors.

25 THE COURT: If I were going to have more than two and

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1 it was going to be a longer trial than two or three days than I'm
2 planning on, I would be happy to acquiesce in your request. And
3 I'd also have to give the same amount to the State.

4 But it's going to be a very short trial, according to you
5 folk, and we should finish by Tuesday, go to the jury by Tuesday.
6 I'm only going to have two alternates. Your motion will be
7 denied.

8 Anything else? On Juror 527, I'll leave him stay until he's
9 called, because he's next one down. When he's called, we'll
10 inform him that because of his previous testimony on voir dire,
11 we are going to excuse him.

12 MR. SEATON: This has to do with -- oh, wait.

13 MR. SCHIECK: Just one additional procedural matter
14 from our standpoint, your Honor, is we would be requesting that
15 the Court, after we've impaneled the jury and before opening and
16 getting into any of the witnesses, that we take our recess at
17 that time.

18 The evidence isn't down here yet. We need to get that
19 evidence down here. The State needs to organize for their first
20 witness.

21 THE COURT: In either case, folks, at 1:00 we'll be
22 quitting today, and I intend to go through the lunch hour to
23 1:00.

24 MR. SCHIECK: I understand that, your Honor. If we can
25 have a break before we start the evidence after we've impaneled

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1 the jury so that we can organize all of the evidence.

2 THE COURT: Bring in my jury.

3 MR. SEATON: Judge, before you do, I have one other
4 thing that's off the record outside the presence.

5 THE COURT: Hold my jury.

6 MR. SEATON: I received this morning from Mr. Wall a
7 report from Dr. Louis M. Epcoch, a Ph.D., Nevada-licensed
8 psychologist. I have read not quite two paragraphs of it so far;
9 I haven't the slightest idea what it says. I'm not going to
10 complain or whine about it, but I want the Court to be aware in
11 case I need to make certain kinds of objections.

12 I note in this that the interview took place as late as last
13 Friday, very late in the proceedings in my estimation for
14 something that's so important. Mr. Wall has been kind enough to
15 tell me that it's been going on, but only this morning has he
16 given me the results, and obviously I'm not even going to be able
17 to read them until sometime this afternoon.

18 I'm a little bit concerned about it. I simply want the
19 Court to be aware. I may need to do something in response to
20 this with another medical person.

21 THE COURT: Do you think that you will need to have Mr.
22 Flanagan examined by a psychiatrist from the State standpoint?

23 MR. SEATON: I don't know that, Judge. That is one of
24 the alternatives that I will contemplate as I go through this.
25 My desire would be simply to cross-examine the psychologist and

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1 let it go at that. But obviously I have to read this and
2 determine to what degree he is going to hurt the State's
3 position. And if I can recover to some degree by calling other
4 witnesses, which, yes, of course would have to interview Mr.
5 Flanagan.

6 So I just don't know the position I'm going to be in. I
7 will let the Court know first thing Monday morning.

8 THE COURT: Well, that won't do me much today, because
9 if you're planning on getting a psychiatrist if necessary to talk
10 to Mr. Flanagan, you're going to obviously delay the trial for
11 two or three days. And that affects an amount of jurors that I
12 was going to have, all the jurors.

13 MR. SEATON: Well, Judge, it affects me as well.

14 THE COURT: I understand that.

15 MR. SEATON: I've got plane tickets out of the
16 jurisdiction for ten days starting next Friday. I've got to get
17 this case over with myself.

18 THE COURT: Maybe.

19 MR. SEATON: Mr. Dawson, I think it was.

20 So I'll work around the problem. I'll do my best. I just
21 wanted the Court to be aware at this time.

22 THE COURT: Okay. Based upon what I've just heard,
23 we'll have four alternate jurors. I'll give you a chance each to
24 knock off two.

25 MR. SEATON: Judge, the State's preference would be

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1 two. I think...

2 THE COURT: I think we're talking about -- I don't know
3 what's going to happen now with this late matter here. If you
4 find it necessary to contact your psychiatrist, that's going to
5 be -- going have to call somebody up and ask them quickly to
6 check out. That may take one, two, or three days, and I have no
7 idea.

8 Maybe those plane tickets won't be any good. But I'd be
9 happy to give you a letter.

10 Bring in my jury.

11 Are you offering an objection at this time, Mr. Seaton?
12 Hold it, now. May I see counsel, please?

13 (Bench conference)

14 (Prospective jurors in at 9:16 a.m.)

15 THE COURT: I kind of feel like a TV Judge with this.
16 I use it about once every four or five years.

17 Continuation of case No. C069269, State of Nevada v. Dale
18 Flanagan & Randolph Moore. Let the record reflect the presence
19 of Defendants with counsel, District Attorney, other officers of
20 the court.

21 Will counsel stipulate to the presence of the jury? Strike
22 that.

23 May I have roll call of the jury panel?

24 (Clerk calls roll of prospective jurors; all present)

25 THE COURT: Will counsel stipulate to the presence of

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8JD04780

1 the jury panel?

2 MR. SCHIECK: Yes, Judge.

3 MR. WALL: Yes, your Honor.

4 MR. SCHIECK: Yes, your Honor.

5 THE COURT: Good morning, jury -- jury panel. Some
6 good news and some bad news, depending upon which way you want to
7 look at it. We're going to go through the lunch hour today, but
8 we're going to adjourn at 1:00.

9 The Defense may exercise its eighth peremptory challenge.

10 MR. SCHIECK: Your Honor, the Defense would waive their
11 eighth challenge.

12 THE COURT: Swear in the jury.

13 THE CLERK: Could you all please stand and raise your
14 right hand?

15 (Jury sworn)

16 THE CLERK: Thank you; you may be seated.

17 THE COURT: The Clerk will now draw two extra names.

18 THE CLERK: Lottie Wilson Chase, Badge No. 526,

19 C-H-A-S-E; Shawn Patrick Gardner, Badge No. 527, G-A-R-D-N-E-R.

20 THE COURT: Mr. Gardner, we have previously had some
21 conversations with you, and counsel have agreed and stipulated
22 that you may be excused. Is that correct?

23 MR. WALL: Yes, your Honor.

24 MR. SEATON: Yes, Judge.

25 MR. SCHIECK: Yes, your Honor.

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1 THE COURT: So you are excused, sir.
2 THE CLERK: Bruce Wayne Marten, Badge No. 528,
3 M-A-R-T-E-N.
4 THE COURT: Ms. Chase, how long have you lived in Clark
5 County, Nevada?
6 PROSPECTIVE ALTERNATE JUROR NO. 1: Thirty-eight years,
7 sir.
8 THE COURT: Where were you born and raised?
9 PROSPECTIVE ALTERNATE JUROR NO. 1: Yuma, Arizona.
10 THE COURT: What is your educational background?
11 PROSPECTIVE ALTERNATE JUROR NO. 1: Tenth grade.
12 THE COURT: In what?
13 PROSPECTIVE ALTERNATE JUROR NO. 1: Just...
14 THE COURT: Did you get a degree?
15 PROSPECTIVE ALTERNATE JUROR NO. 1: No, I didn't.
16 Tenth grade of high school.
17 THE COURT: Oh, all right. What has been your
18 employment for the last ten years?
19 PROSPECTIVE ALTERNATE JUROR NO. 1: Maid.
20 THE COURT: And for whom?
21 PROSPECTIVE ALTERNATE JUROR NO. 1: At the Hacienda
22 Hotel.
23 THE COURT: And what is your religious preference?
24 PROSPECTIVE ALTERNATE JUROR NO. 1: Apostolic Faith.
25 THE COURT: Do you attend church regularly?

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.
2 THE COURT: How old are you?
3 PROSPECTIVE ALTERNATE JUROR NO. 1: Fifty.
4 THE COURT: Are you married or single?
5 PROSPECTIVE ALTERNATE JUROR NO. 1: Married.
6 THE COURT: Is your husband employed?
7 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.
8 THE COURT: Where does he work and what are his duties?
9 PROSPECTIVE ALTERNATE JUROR NO. 1: The Car Store, a
10 car detailer.
11 THE COURT: Do you have any children?
12 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.
13 THE COURT: May we have their ages and sex, please?
14 PROSPECTIVE ALTERNATE JUROR NO. 1: 32, male; 30,
15 female; 24, female.
16 THE COURT: Are you acquainted with any of the
17 Defendants or their attorneys?
18 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.
19 THE COURT: Do you know anyone in the District
20 Attorney's Office?
21 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.
22 THE COURT: Did you recognize any of the persons whose
23 names were given to you as possible prosecution witnesses?
24 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.
25 THE COURT: In the State of Nevada, there are three

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

8 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

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

13 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

14 THE COURT: Can you consider the death penalty under
15 any circumstances?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: I don't think so,
17 sir.

18 THE COURT: Do you have a conscientious, moral or
19 religious objections to the death penalty?

20 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

21 THE COURT: Mr. Seaton?

22 MR. SEATON: I would challenge for cause, Judge.

23 THE COURT: Traverse?

24 MR. SCHIECK: No, your Honor.

25 MR. WALL: No, your Honor.

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1 THE COURT: Thank you, ma'am, you are excused.

2 PROSPECTIVE ALTERNATE JUROR NO. 1: Thank you.

3 THE COURT: Report back to the jury commissioner for
4 further instructions. Tell them I've excused you from further
5 jury duty.

6 PROSPECTIVE ALTERNATE JUROR NO. 1: Okay. Thank you,
7 sir.

8 THE COURT: Thank you.

9 THE CLERK: Harry James Donato, Badge No. 529,
10 D-O-N-A-T-O.

11 THE COURT: Mr. Donato, sir, how long have you lived in
12 Clark County, Nevada?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: Thirty-two years.

14 THE COURT: Where were you born and raised?

15 PROSPECTIVE ALTERNATE JUROR NO. 1: I was born and
16 raised in Victoria, Texas.

17 THE COURT: Texas?

18 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

19 THE COURT: What is your educational background?

20 PROSPECTIVE ALTERNATE JUROR NO. 1: Four years, UNLV.

21 THE COURT: What was your major field of endeavor
22 there?

23 PROSPECTIVE ALTERNATE JUROR NO. 1: Physical Ed.

24 THE COURT: Did you take up any law courses there?

25 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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1 THE COURT: What has been your employment for the last
2 ten years?

3 PROSPECTIVE ALTERNATE JUROR NO. 1: Pepsi Cola, sales
4 rep.

5 THE COURT: What is your religious preference?

6 PROSPECTIVE ALTERNATE JUROR NO. 1: I was born, raised
7 and baptized Catholic, sir.

8 THE COURT: Do you attend mass regularly?

9 PROSPECTIVE ALTERNATE JUROR NO. 1: Every Sunday.

10 THE COURT: How old are you, sir?

11 PROSPECTIVE ALTERNATE JUROR NO. 1: Fifty-two.

12 THE COURT: Are you married or single?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: Married.

14 THE COURT: Is your wife employed?

15 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

16 THE COURT: Where does she work and what are her
17 duties?

18 PROSPECTIVE ALTERNATE JUROR NO. 1: She works for a
19 school district--supervisor, lunch.

20 THE COURT: And do you have any children?

21 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

22 THE COURT: May we have their ages and sex, please?

23 PROSPECTIVE ALTERNATE JUROR NO. 1: Female, 28; female,
24 26; male, 24.

25 THE COURT: Are you acquainted with either of the

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1 Defendants or their attorneys?

2 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

3 THE COURT: Do you know anyone in the District

4 Attorney's Office?

5 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

8 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

9 THE COURT: In the State of Nevada, there are three
10 possible forms of punishment that the jury may consider and then
11 select the one that they believe is the most appropriate under
12 the law and facts of this case. Those three possible forms of
13 punishment are: (a) the imposition of the death penalty;
14 (b) life imprisonment without the possibility of parole; and
15 (c) life imprisonment with the possibility of parole. Do you
16 understand, sir?

17 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

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

22 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

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

25 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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8JD04788

1 THE COURT: Are you now involved in or have you ever
2 been involved in any law enforcement work?

3 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

6 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

7 THE COURT: Have you ever appeared as a witness in any
8 criminal prosecution?

9 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

10 THE COURT: Have you ever served on any kind of a jury
11 before?

12 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

14 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

15 THE COURT: When was this, sir, and what branch, what
16 service?

17 PROSPECTIVE ALTERNATE JUROR NO. 1: Air Force, '62 to
18 '66.

19 THE COURT: What was your rank?

20 PROSPECTIVE ALTERNATE JUROR NO. 1: Airman second.

21 THE COURT: Did you serve on any boards or court-
22 martials?

23 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

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

4 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, sir.

5 THE COURT: If you were either the State or the --
6 strike that.

7 Do you know of any reason whatsoever, whether I've asked you
8 or not, why you cannot sit as a fair and impartial juror in this
9 case?

10 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

11 THE COURT: Mr. Wall or Ms. Mounts?

12 MS. MOUNTS: Thank you, your Honor.

13 THE COURT: You're welcome.

14 MS. MOUNTS: Mr. Donato, good morning.

15 PROSPECTIVE ALTERNATE JUROR NO. 1: Good morning.

16 MS. MOUNTS: You've lived in the Las Vegas area for
17 over 30 years. Is that correct?

18 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

19 MS. MOUNTS: Do you recall, sir, seeing or hearing
20 anything about this case...

21 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

22 MS. MOUNTS: ...prior to last week?

23 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

24 MS. MOUNTS: I notice, sir, that you have two
25 grandchildren.

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.
2 MS. MOUNTS: Do they live here in the Las Vegas area?
3 PROSPECTIVE ALTERNATE JUROR NO. 1: Born and raised,
4 ma'am, yes.
5 MS. MOUNTS: You're aware, I'm sure by now, the
6 circumstances of this case.
7 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.
8 MS. MOUNTS: Is there anything about the particular
9 facts of this case that you think would make it hard for you to
10 sit in judgement of these two men?
11 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.
12 MS. MOUNTS: Is there any doubt that you could be
13 completely fair to them.
14 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.
15 MS. MOUNTS: Yes, there's a doubt?
16 PROSPECTIVE ALTERNATE JUROR NO. 1: Oh, I'm sorry.
17 Yeah.
18 MS. MOUNTS: Maybe I didn't phrase it very well.
19 PROSPECTIVE ALTERNATE JUROR NO. 1: You're right.
20 MS. MOUNTS: Could you be completely fair to them?
21 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes.
22 MS. MOUNTS: I see that you served in the Air Force
23 during the Vietnam War.
24 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.
25 MS. MOUNTS: So matters involving life and death are

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8JD04790

1 familiar to you. Isn't that correct?

2 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

3 MS. MOUNTS: How do you feel about serving as a juror
4 in this case?

5 PROSPECTIVE ALTERNATE JUROR NO. 1: It doesn't bother
6 me, serving.

7 MS. MOUNTS: Any other feelings one way or the other?

8 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

9 MS. MOUNTS: I'd like to ask you, sir, a couple of
10 questions regarding your specific answers in the questionnaire.
11 You indicated at No. 54 that you never disagree with the law. Is
12 that a correct statement?

13 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

14 MS. MOUNTS: As you've sat here and listened to the
15 questions of the other jurors, have you had some time maybe to
16 reconsider that answer?

17 PROSPECTIVE ALTERNATE JUROR NO. 1: I go along with the
18 law no matter what, yeah.

19 MS. MOUNTS: Okay. And again, I'm not trying to change
20 your mind.

21 PROSPECTIVE ALTERNATE JUROR NO. 1: Right.

22 MS. MOUNTS: I'm just trying to understand what you
23 meant.

24 Have there been circumstances in the past where you've heard
25 something about a particular law and said, well, that doesn't

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8JD04791

1 seem fair or maybe that's too harsh or maybe that's too lenient?

2 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

3 MS. MOUNTS: So pretty much you believe that whatever
4 the law is is what you would follow?

5 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

6 MS. MOUNTS: Are you willing to listen to the Judge's
7 instructions on the law...

8 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

9 MS. MOUNTS: ...before making your determination?

10 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

11 MS. MOUNTS: You stated at Question 62 that you do not
12 believe in the adage "an eye for an eye." Can you tell us a
13 little bit about your views on that?

14 PROSPECTIVE ALTERNATE JUROR NO. 1: Do I believe in the
15 "eye for an eye"?

16 MS. MOUNTS: Yes. The question was, "Do you believe in
17 the adage, 'an eye for an eye?'" and you checked no.

18 PROSPECTIVE ALTERNATE JUROR NO. 1: I don't believe in
19 it, no. I hear both sides, and then I make my own judgement.

20 MS. MOUNTS: So you don't believe necessarily that
21 someone who takes the life of another should have his life taken?

22 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

23 MS. MOUNTS: Okay. You'd be willing to listen to all
24 the evidence and weigh all of the factors before making your
25 determination?

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am. I
2 believe in the scales of justice.

3 MS. MOUNTS: I had one question, and it may be because
4 the question is very obtuse. But at No. 59A you indicated that
5 you may not be of a mind that you could consider all punishments
6 equally.

7 PROSPECTIVE ALTERNATE JUROR NO. 1: I didn't understand
8 that question.

9 MS. MOUNTS: Okay. So we screwed up on that one,
10 didn't we? Okay. Do you think that you could consider all of
11 the punishments that the Judge has outlined for you equally?

12 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

13 MS. MOUNTS: You understand that a decision involving
14 the death penalty is one that you may or may not reach, depending
15 on what's presented to you?

16 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

17 MS. MOUNTS: Let me ask you a little bit in general
18 about your feelings on the death penalty and get you to expand on
19 those a little, if you would.

20 PROSPECTIVE ALTERNATE JUROR NO. 1: Well, not much,
21 because I really haven't think about the death penalty much. You
22 know, I don't really think about it.

23 MS. MOUNTS: So using Mr. Wall's example from
24 yesterday, you might be one of those people just beginning to get
25 in their car in San Francisco?

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1 PROSPECTIVE ALTERNATE JUROR NO. 1: Probably.

2 MS. MOUNTS: Okay. You haven't had occasion before
3 today to give it too much thought one way or the other?

4 PROSPECTIVE ALTERNATE JUROR NO. 1: No, ma'am.

5 MS. MOUNTS: Have you ever debated it with your friends
6 or coworkers?

7 PROSPECTIVE ALTERNATE JUROR NO. 1: We don't talk about
8 it. No, ma'am.

9 MS. MOUNTS: In general do you think it's an important
10 part of our justice system, or do you think it's maybe not of so
11 much use?

12 PROSPECTIVE ALTERNATE JUROR NO. 1: It's part of our
13 system, and there's nothing we can do about it.

14 MS. MOUNTS: Do you believe that you could consider
15 equally the possibility that someone may deserve a punishment of
16 life in prison with the possibility that someday they may be
17 eligible for parole?

18 PROSPECTIVE ALTERNATE JUROR NO. 1: Yes, ma'am.

19 MS. MOUNTS: Is there any hesitancy in your mind at all
20 that you could be fair to both sides?

21 PROSPECTIVE ALTERNATE JUROR NO. 1: Fair to both sides?
22 Yes, ma'am.

23 MS. MOUNTS: Thank you, your Honor. Thank you, sir.
24 We'd pass for cause.

25 THE COURT: Mr. Seaton?

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8JD04794

1 MR. SEATON: Pass for cause, Judge.

2 THE COURT: I'm sorry. Mr. Schieck?

3 MR. SCHIECK: Just a couple questions, Mr. Donato.

4 First off, have you ever followed any cases in the news, on
5 TV or in the newspaper?

6 PROSPECTIVE ALTERNATE JUROR NO. 1: No, sir.

7 MR. SCHIECK: Okay. You're kind of in an unenviable
8 seat, I suppose, in that you've got to listen to everything and
9 hear all the evidence, but you may not get to make a decision in
10 this case. You may not get to deliberate because you're in the
11 alternate spot. Are you still able to pay attention and listen
12 to everything, knowing that at some point you might be called to
13 jump right in and start deliberating?

14 PROSPECTIVE ALTERNATE JUROR NO. 1: Oh, yes, sir.

15 MR. SCHIECK: Okay. And you'll be able to take that
16 responsibility on with no problems?

17 PROSPECTIVE ALTERNATE JUROR NO. 1: Oh, yes, sir.

18 MR. SCHIECK: Thank you.

19 We would pass for cause.

20 THE COURT: May I see counsel a second, please?

21 (Bench conference)

22 THE COURT: Will the Clerk draw two more names for
23 alternates?

24 THE CLERK: David Nordell Kramar, Badge No. 530,
25 K-R-A-M-E-R.

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1 THE COURT: Top seat, sir.

2 THE CLERK: Shirley Johnson McKennery, Badge No. 531,
3 M-C-K-E-N-N-E-R-Y.

4 THE COURT: Mr. Marten, sir, how long have you lived in
5 Clark County, Nevada?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: Eight years, your
7 Honor.

8 THE COURT: Three years?

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Eight.

10 THE COURT: Where did you come from?

11 PROSPECTIVE ALTERNATE JUROR NO. 2: Denver, Colorado.

12 THE COURT: And where were you born and raised?

13 PROSPECTIVE ALTERNATE JUROR NO. 2: Chicago, Illinois.

14 THE COURT: What is your educational background?

15 PROSPECTIVE ALTERNATE JUROR NO. 2: I have a college
16 degree.

17 THE COURT: What college did you attend, and what was
18 your field of endeavor?

19 PROSPECTIVE ALTERNATE JUROR NO. 2: I attended Indiana
20 University, Valparaiso University and Elmers College. I have a
21 four-year degree, B.S. in recreation management.

22 THE COURT: What has been your employment for the last
23 ten years?

24 PROSPECTIVE ALTERNATE JUROR NO. 2: For the last two
25 years I'm semi-retired. Prior to that I owned a sales and

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1 marketing company for new homes sales for builders and
2 developers. I was a partner in a mortgage company. I sold those
3 two years ago. I had those companies for five years.

4 Prior to that I was involved as a VP of sales and marketing
5 for a national builder.

6 THE COURT: May I have the names of your companies as
7 well as the national builder.

8 PROSPECTIVE ALTERNATE JUROR NO. 2: The national
9 builder, the company I worked with? Richmond American Homes.

10 THE COURT: And I believe you said you had your own
11 business?

12 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

13 THE COURT: What was the name of your company?

14 PROSPECTIVE ALTERNATE JUROR NO. 2: Pennington, Marten,
15 and Associates, and Builder's Mortgage.

16 THE COURT: Thank you.

17 THE COURT: What is your religious preference?

18 PROSPECTIVE ALTERNATE JUROR NO. 2: I was raised
19 Lutheran.

20 THE COURT: Do you attend church regularly?

21 PROSPECTIVE ALTERNATE JUROR NO. 2: I do but not
22 necessarily the Lutheran church.

23 THE COURT: How old are you, sir?

24 PROSPECTIVE ALTERNATE JUROR NO. 2: Fifty.

25 THE COURT: Are you married or single?

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1 PROSPECTIVE ALTERNATE JUROR NO. 2: I'm married.

2 THE COURT: Is your wife employed?

3 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

4 THE COURT: Where does she work and what are her
5 duties?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: She works for
7 Christopher Homes. She is the manager of their interior design
8 center.

9 THE COURT: And do you have any children?

10 PROSPECTIVE ALTERNATE JUROR NO. 2: I do have. I have
11 a daughter, 26, and a son, 21.

12 THE COURT: Okay,

13 Why don't you change it now, Ed? Why don't you change it
14 now.

15 (Pause, colloquy not on the record)

16 THE COURT: We do need a new courthouse.

17 Are you acquainted with either of the Defendants or their
18 attorneys?

19 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

20 THE COURT: Do you know anyone in the District
21 Attorney's Office?

22 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

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

25 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

IV-24

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

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

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

14 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

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

17 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

18 THE COURT: Are you now involved in or have you ever
19 been involved in any law enforcement work?

20 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

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

23 PROSPECTIVE ALTERNATE JUROR NO. 2: My next-door
24 neighbor's son-in-law works for Nevada Highway Patrol.

25 THE COURT: And what's his name, sir?

IV-25

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1 PROSPECTIVE ALTERNATE JUROR NO. 2: Vince Danglese
2 [phonetic].

3 THE COURT: Does he discuss his cases with you?

4 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

5 THE COURT: Is there anything about that relationship
6 that would cause you to have any biases for or against either
7 side?

8 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

9 THE COURT: Would you tend to give a police officer's
10 testimony any greater or any lesser weight...

11 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

12 THE COURT: ...than anyone else who testifies merely
13 because they happen to be police officers?

14 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

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

16 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

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

18 PROSPECTIVE ALTERNATE JUROR NO. 2: No, sir.

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

21 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

22 THE COURT: Please explain, sir, and tell us when and
23 where.

24 PROSPECTIVE ALTERNATE JUROR NO. 2: My wife's nephew
25 killed his sister, my wife's niece, approximately 1982.

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1 THE COURT: What state?

2 PROSPECTIVE ALTERNATE JUROR NO. 2: In California.

3 THE COURT: Is there anything about that experience and
4 relationship that would cause you to have biases for or against
5 either side in this case?

6 PROSPECTIVE ALTERNATE JUROR NO. 2: Not at this time,
7 your Honor.

8 THE COURT: Would you mind explaining that?

9 PROSPECTIVE ALTERNATE JUROR NO. 2: Initially when we
10 started the proceedings earlier this week, I think I was biased
11 to the concept of life imprisonment with the opportunity of
12 parole. I was not close to the trial associated with my nephew,
13 and from hearing the proceedings this week I believe that I can
14 base my decisions on the facts given here rather than any
15 preprejudice I may have had.

16 THE COURT: You telling me that you can now equally
17 consider all three possible forms of punishment...

18 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

19 THE COURT: ...and then select the one that you feel is
20 most appropriate?

21 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

22 THE COURT: All right. If you were either of the
23 Defendants, would you want twelve people in your present state of
24 mind to sit and judge your case?

25 PROSPECTIVE ALTERNATE JUROR NO. 2: Yes, sir.

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