

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Petitioner/Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents/Appellees.

Supreme Court No. 77345
District Court Case No. 96C19882-1
(Death Penalty Case)
Electronically Filed
Jun 14 2019 02:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**MOTION TO PERMIT APPELLANT
TO FILE A BRIEF EXCEEDING
37,000 WORDS**

Petitioner/Appellant, Marlo Thomas, by and through counsel,
hereby moves this Court for permission to file an opening brief that is
38,740 words in length, which exceeds the 37,000 word limit provided
for in NRAP 32(a)(7)(B)(ii) for capital cases. This motion is made and
based on the attached declaration of counsel. NRAP 32(a)(7)(D)(ii).

DATED this 14th day of June, 2019.

Respectfully submitted,

/s/ Joanne L. Diamond

JOANNE L. DIAMOND

Assistant Federal Public Defender

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DECLARATION OF JOANNE L. DIAMOND

I, Joanne L. Diamond, declare as follows:

1. I am an attorney at law, admitted to practice before this Court and employed by the Capital Habeas Unit of the Federal Public Defender, District of Nevada. I am assigned to represent Marlo Thomas in this matter.

2. NRAP 32(a)(7)(B)(ii) permits the filing of an opening brief in a capital case that is 37,000 words in length. Pursuant to 32(a)(7)(D), Thomas hereby moves this Court for permission to file an opening brief that is 38,740 words in length, exceeding the page limit by 1,740 words. Thomas submits that he can demonstrate sufficient good cause and diligence to file a brief exceeding the word limit.

3. Thomas's appeal involves a capital case with a complex procedural history. Thomas was convicted of two counts of first-degree murder and sentenced to death on June 18, 1997. That case proceeded through direct appeal and post-conviction proceedings. On February 10, 2004, on appeal from the denial of post-conviction relief, this Court affirmed Thomas's convictions but reversed his death sentences and

remanded for a new penalty trial. Thomas was again sentenced to death. This Court affirmed the sentences on December 28, 2006, and another round of post-conviction proceedings commenced. Thomas's opening brief therefore had to address the performance of two sets of trial counsel, two sets of direct appeal counsel, and two sets of post-conviction counsel. The opening brief also alleges multiple other constitutional violations appearing from a record that is twice the length of the record in a typical capital case.

4. I have attempted to reduce the length of the brief as much as possible. I have omitted at least two constitutional claims that were raised in the petition below. I do not believe I can make the brief shorter without jeopardizing Thomas's right to receive an adequate review of his claims of constitutional error. *Cf.* 28 U.S.C. §2254(b) (1, 3). I have attempted to comply with the Court's decisions requiring counsel both to shorten arguments presented, and to provide "cogent" supporting authority for each constitutional claim. *Compare Hernandez v. State*, 117 Nev. 463, 466-67, 24 P.3d 767, 769-70 (2001), *with*

Browning v. State, 120 Nev. 347, 361, 367, 91 P.3d 39, 50, 53-54 (2004), and *State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676, 684 (2003).

5. This request is not made for the purpose of delay, or for any other improper purpose, but only to ensure that this office provides competent representation to Thomas. Nev. R. Prof. Conduct 1.1.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 14, 2019, in Las Vegas Nevada.

/s/ Joanne L. Diamond

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of June, 2019, electronic service of the foregoing MOTION TO PERMIT APPELLANT TO FILE A BRIEF EXCEEDING 37,000 WORDS shall be made in accordance with the Master Service List as follows:

Steven Owens
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/s/ *Jeremy Kip*
An Employee of the
Federal Public Defender,
District of Nevada