

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

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

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

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

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

21 What other documents do you seek to  
22 admit?

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

25 MR. OWENS: We had marked as exhibit for

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

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

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

21 THE COURT: And on the same basis plus  
22 additional fact that these are certified copies  
23 your objection is overruled. 116 and 116A will be  
24 admitted.  
25 / / /

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

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

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

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

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

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

22 THE COURT: Are those certified copies?

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

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

3 MR. OWENS: Yes.

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

8 THE COURT: Your objection is overruled.

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

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

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

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

1 proceeding. I don't think we're calling the  
2 witness on this case. There was theft of a  
3 bicycle. There was -- this involved a battery  
4 that occurred. These are witnesses that we had  
5 available to us and we chose not to call, so we're  
6 going to offer that report in lieu of that  
7 testimony.  
8 THE COURT: All right.  
9 MR. SCHIECK: Basically the same  
10 objection to those, your Honor. They are  
11 out-of-court statements. PSI's we know are full  
12 of statements that the writing officer claims to  
13 have obtained from any variety of people, and  
14 clearly those denied the right to confrontation as  
15 well as hearsay.  
16 THE COURT: I understand your position.  
17 The legislature requires the Department of Parole  
18 and Probation to prepare presentence report. They  
19 refuse to allow a sentencing court to sentence  
20 until a presentence report has been written. It's  
21 written at the request of the legislature, and  
22 because it's written and mandated by the  
23 legislature, I'm going to -- and it's given to  
24 judges every day of the week to sentence people,  
25 and there's no reason why the jury who are doing

1 the sentencing in this case should not receive  
2 those prior presentence reports. So therefore 87  
3 and 102 will be admitted. If 102 talks about the  
4 incident and then they give a summary of the  
5 incident and the backup documents from which they  
6 get the summary is 108, the actual police report,  
7 then 108 will be admitted also.  
8 All right. Bring the panel in.  
9 Jonathan.  
10 (Thereupon, State's Exhibit 87, 102, 108  
11 were admitted into evidence.)  
12 (Whereupon, the jury entered  
13 the courtroom.)  
14 THE COURT: Good morning, ladies and  
15 gentlemen. Welcome back finally to the State of  
16 Nevada versus Mario Thomas. I apologize for the  
17 delay in getting started this morning, but now  
18 we're finally here and ready to go.  
19 The record will reflect the presence of  
20 the parties and counsel, all officers of the  
21 court, the full jury including alternate jurors.  
22 You have now decided -- the deliberating  
23 jurors have now decided what aggravating  
24 circumstances exist, what mitigating circumstances  
25 you found and done the weighing process and

1 determined that the mitigating circumstances do  
2 not outweigh the aggravating circumstances and  
3 therefore all four available statutory penalties  
4 for first degree murder remain available to you as  
5 the sentencing body. The law now indicates that  
6 additional information will be given to you by  
7 both the prosecution and the defense which may aid  
8 you in reaching an appropriate verdict later today  
9 or sometime tomorrow.  
10 Counsel for the State, are you ready to  
11 call witnesses?  
12 MR. SCHWARTZ: Yes, Your Honor.  
13 THE COURT: You may proceed.  
14 MR. OWENS: Our first witness will be  
15 Pat Smith, your Honor.  
16 Whereupon,  
17 PATRICIA SMITH,  
18 was administered the following oath by the court  
19 clerk.  
20 THE CLERK: You do solemnly swear that  
21 the testimony you give shall be the truth, the  
22 whole truth, and nothing but the truth so help you  
23 God.  
24 THE WITNESS: I do.  
25 THE CLERK: State your name and spell

1 your last name for the record.  
 2 THE WITNESS: My name is Patricia Ann  
 3 Smith. P-A-T-R-I-C-I-A A-N-N S-M-I-T-H.  
 4  
 5 DIRECT EXAMINATION  
 6 BY MR. OWENS:  
 7 Q. You're employed for the Department of  
 8 Parole and Probation for Juvenile Services?  
 9 A. Juvenile justice, yes.  
 10 Q. And what do you do for the juvenile  
 11 division?  
 12 A. Currently I'm the record supervisor.  
 13 Q. And in preparation for your testimony  
 14 today, did you have occasion to review some  
 15 records for an individual named Mario Demetrius  
 16 Thomas?  
 17 A. I did.  
 18 Q. And in particular that would be a  
 19 petition and a certification order?  
 20 A. Yes.  
 21 MR. OWENS: If I may approach, your  
 22 Honor.  
 23 THE COURT: You may.  
 24 BY MR. OWENS:  
 25 Q. You've got some documents you're looking

1 at there. Those are some documents you brought  
 2 with you?  
 3 A. Right.  
 4 Q. I'm going to show you what's been marked  
 5 State's Exhibits 85 and 86, and ask if you  
 6 recognize those documents.  
 7 A. Yes, I do.  
 8 Q. Are those true and accurate copies of  
 9 the documents that we're talking about and the  
 10 documents on file with the juvenile services?  
 11 A. Yes, sir.  
 12 Q. And let's take them one at a time.  
 13 Exhibit No. 85, you've got your copy right there  
 14 to refer to?  
 15 A. Yes, I do.  
 16 Q. No. 85, for the record this is a  
 17 document that's simply entitled petition. What is  
 18 that petition?  
 19 A. Well, when people are juveniles commit  
 20 crimes and the district attorney's office wants to  
 21 prosecute them, they file a petition.  
 22 Q. And this is a document that's used to  
 23 take a juvenile offender and put them up into  
 24 adult court under certain circumstances?  
 25 A. It could be.

1 Q. And in that petition it lists the  
 2 history, juvenile criminal history, of the  
 3 offender usually?  
 4 A. The history of that charge and that  
 5 charge only.  
 6 Q. And it contains other information to  
 7 assist the Court in its determination?  
 8 A. Right.  
 9 Q. And the number on this particular  
 10 petition was J299999?  
 11 A. That's the case number.  
 12 Q. And I'm going to show you now what's  
 13 marked as Exhibit No. 86. This is a certification  
 14 order?  
 15 A. Correct.  
 16 Q. This is the order that the Court would  
 17 give as a follow-up to the petition?  
 18 A. Correct. It's a recommendation.  
 19 Q. And this is for Mario Demetrius Thomas  
 20 also?  
 21 A. Correct.  
 22 Q. It's got the same case number?  
 23 A. Yes, it does.  
 24 Q. And this is the document that would  
 25 actually certify him as an adult to be treated as

1 an adult for purposes of the charge contained  
 2 therein?  
 3 A. There is an order that's written by the  
 4 probation officer with a recommendation for  
 5 certification, yes.  
 6 Q. Now, you had mentioned before court that  
 7 you don't like to read?  
 8 A. I don't like to read in front of a bunch  
 9 of people.  
 10 Q. I told you I'd keep it to a minimum. If  
 11 you would for one moment turn with me to page 4 of  
 12 that certification order.  
 13 A. Okay.  
 14 Q. There's -- I'm referring down to the  
 15 second paragraph from the bottom there where it  
 16 begins "Mrs. Thomas reports"?  
 17 A. Right.  
 18 Q. This would be some information that was  
 19 received from the mother as a part of the report?  
 20 A. I would imagine. I didn't write this  
 21 report, so I would imagine that the probation  
 22 officer who wrote this report had spoke to the  
 23 mother.  
 24 Q. Can you just go ahead and read those two  
 25 paragraphs there on the bottom of the page for us?

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

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

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

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

1 S-P-R-I-N-G-G-A-T-E.  
2  
3  
4 BY MR. OWENS: DIRECT EXAMINATION  
5 Q. Mr. Springgate, you're employed by the  
6 Department of Parole and Probation?  
7 A. Yes, sir.  
8 Q. What's your position there?  
9 A. Presently I'm a lieutenant.  
10 Q. And back in the 1990's toward the end of  
11 the 1990's, you had some responsibilities with  
12 regard to presentence investigation reports?  
13 A. That's correct.  
14 Q. And you currently do as well?  
15 A. I'm in supervision now.  
16 Q. What's a presentence investigation  
17 report?  
18 A. It's a report prepared for the Court.  
19 It delves into criminal history and social history  
20 of the person about to be sentenced, makes a  
21 recommendation for sentencing.  
22 Q. And these are sometimes referred to as  
23 PSI's?  
24 A. Yes, sir.  
25 Q. And so if somebody is charged with a

1 crime and is convicted, then your department  
2 prepares a report for the judge.  
3 A. That's correct.  
4 Q. And what's the purpose of that report?  
5 A. The report is to make the Court familiar  
6 with the person so that he can make -- he or she  
7 can make the best decision possible.  
8 Q. As far as sentencing?  
9 A. As far as sentencing, yes.  
10 Q. Can you give us an idea what sort of  
11 information goes into a report and how that  
12 information is obtained?  
13 A. Yes. The information is gained from  
14 files. We go to the NCIC, the FBI file, and that  
15 relates to criminal history. We also have access  
16 to CIJS and Scope reports and various other  
17 separate for that. We also ask for criminal  
18 history from the offender, and we get social  
19 history from him and from any other reports that  
20 are available.  
21 Q. Then you put that into that report form  
22 for the Court?  
23 A. Yes.  
24 Q. I want to show you a couple of documents  
25 which have been marked as State's Exhibits

1 Nos. 102 and 87 and ask you if you recognize those  
2 documents?  
3 A. Yes, I do.  
4 Q. Are those presentence investigation  
5 reports that were prepared by your department?  
6 A. Yes, they are.  
7 Q. And, in fact, one of them shows a review  
8 by yourself?  
9 A. No, sir.  
10 Q. Were you involved in the preparation of  
11 either of these reports back then?  
12 A. No, I was not. I was in a subsequent  
13 one.  
14 Q. A different report but one that we don't  
15 have here?  
16 A. Correct.  
17 Q. And these are reports that were prepared  
18 on the defendant, Mario Thomas, Mario Demetrius  
19 Thomas?  
20 A. Correct.  
21 Q. They're both prepared on the same  
22 individual?  
23 A. Yes, they are.  
24 Q. These are true and accurate copies of  
25 the original reports that resided with your state

1 agency?  
2 A. Yes, sir.  
3 Q. Now, if I may, I'd like you to look at  
4 the screen to your left there, and I'm going to go  
5 ahead and place Exhibit No. 87 on our camera. Can  
6 you see that there?  
7 A. Yes, I can.  
8 Q. This is a presentence report that was  
9 prepared. Can you see the date there?  
10 A. Yes.  
11 Q. Tell us about that.  
12 A. The date is November 20, 1990.  
13 Q. And from this can you tell information  
14 such as the charge that the report was prepared  
15 on?  
16 A. Yes. The charge was for attempt  
17 robbery. The penalty for that would be one to  
18 seven-and-a-half years in the Nevada Department of  
19 Prisons.  
20 Q. And then there's a lot of additional  
21 personal information that's contained on that  
22 first page?  
23 A. Correct.  
24 Q. And then going to page 2, we find a  
25 number of identifying statistics for that

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

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

1 PSI?  
 2 A. Yes, sir.  
 3 Q. And that contains the history of what  
 4 happened in that particular incident that began as  
 5 a robbery and then was reduced to a battery; is  
 6 that correct?  
 7 A. Yes, sir.  
 8 MR. OWENS: I think the Court was  
 9 awaiting ruling on the use of this document 108 at  
 10 this time. We'd ask to be able to publish that.  
 11 MR. SCHIECK: We'd objected previously,  
 12 your Honor, on the basis of hearsay and  
 13 confrontation clause and the declarant is not able  
 14 to be cross-examined.  
 15 THE COURT: Your objections are noted  
 16 and overruled. 108 will be admitted.  
 17 (Thereupon, State's Exhibit 108  
 18 was admitted into evidence.)  
 19 BY MR. OWENS:  
 20 Q. Then we go over to page 4 on that same  
 21 document that we're looking at, No. 87, that 1980  
 22 PSI. Once again, the criminal history of the  
 23 defendant continues, and then we have something  
 24 called a probation adjustment paragraph. Tell us  
 25 what that is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Whereupon,  
2 CATY FRAZIER,  
3 was administered the following oath by the court  
4 clerk.  
5 THE CLERK: You do solemnly swear that  
6 the testimony you give shall be the truth, the  
7 whole truth, and nothing but the truth so help you  
8 God.  
9 THE WITNESS: Yes.  
10 THE CLERK: State your name and spell  
11 your name for the record.  
12 THE WITNESS: Cathy Frazier, C-A-T-H-Y  
13 F-R-A-Z-I-E-R.  
14  
15 DIRECT EXAMINATION  
16 BY MR. SCHWARTZ:  
17 Q. Directing your attention to August the  
18 12th, 1988, where were you employed?  
19 A. At the Broadway at the Meadows Mall.  
20 Q. And was the Broadway a department store?  
21 A. Yes.  
22 Q. And do you recall where the Meadows Mall  
23 was located?  
24 A. Yes. On Meadows Lane.  
25 Q. That's here in Clark County?

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

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

1 BY MR. SCHWARTZ:  
 2 Q. After the defendant struck you in the  
 3 face, what happened next?  
 4 A. He struck another individual, a store  
 5 manager that was assisting me, knocked a couple of  
 6 his teeth out and then took off running across the  
 7 parking lot.  
 8 Q. Did there come a time a security car or  
 9 vehicle attempted to detain Mr. Thomas?  
 10 A. Mall security arrived in their vehicle  
 11 and they jumped out of the vehicle and tried to  
 12 help us pursue -- some of these individuals.  
 13 Somehow Marlo got into their vehicle and got away  
 14 in their vehicle, wrecking their vehicle and  
 15 disabling the vehicle.  
 16 Q. So he was not apprehended that day?  
 17 A. No, he wasn't.  
 18 Q. Did there come a time later on that you  
 19 had occasion to see the defendant again?  
 20 A. Yes. Approximately about two weeks  
 21 after that event, he showed up into the store  
 22 again where I worked and had some individuals with  
 23 him, and he was pointing me out to them and  
 24 following me around the store.  
 25 Q. What, if anything, did you do when you

1 recognized the defendant and saw him pointing you  
 2 out to these other individuals?  
 3 A. I contacted Metro and my store manager  
 4 and advised them of what's going on. Metro came  
 5 down and apprehended him.  
 6 MR. SCHWARTZ: Thank you, I have  
 7 nothing further, your Honor.  
 8 THE COURT: Cross-examination, Counsel.  
 9 MR. SCHIECK: Just a couple, your Honor.  
 10  
 11 CROSS-EXAMINATION  
 12 BY MR. SCHIECK:  
 13 Q. Mrs. Frazier, you indicated that there  
 14 were six individuals that you initially saw?  
 15 A. Right.  
 16 Q. And when you approached, five of them  
 17 ran away?  
 18 A. Approximately five -- there was another  
 19 one that kind of stayed behind but wasn't really  
 20 close to us.  
 21 Q. Five that ran away they took the items  
 22 with them?  
 23 A. Pardon me?  
 24 Q. Did they take the items with them when  
 25 they ran away?

1 A. I don't recall.  
 2 Q. But Marlo didn't run away; he stayed  
 3 there?  
 4 A. Yes, he stayed.  
 5 Q. Everything that happened after that was  
 6 after you approached him?  
 7 A. Yes.  
 8 Q. And attempted to have him apprehended or  
 9 something?  
 10 A. Yes.  
 11 MR. SCHIECK: No further questions, your  
 12 Honor.  
 13 MR. SCHWARTZ: No redirect, your Honor.  
 14 THE COURT: Ladies and gentlemen of the  
 15 jury, do you have any questions for Ms. Frazier?  
 16 I see there are none. Ms. Frazier, thank you for  
 17 your testimony. You may be excused. Please do  
 18 not discuss your testimony with anyone other than  
 19 the attorneys.  
 20 Counsel, you may call your next witness.  
 21 MR. SCHWARTZ: Paul Wheelock.  
 22 Whereupon,  
 23 PAUL WHELOCK,  
 24 was administered the following oath by the court  
 25 clerk.

1 THE CLERK: You do solemnly swear that  
 2 the testimony you give shall be the truth, the  
 3 whole truth, and nothing but the truth so help you  
 4 God.  
 5 THE WITNESS: I do.  
 6 THE CLERK: State your name and spell  
 7 your last name for the record.  
 8 THE WITNESS: Paul Wheelock,  
 9 W-H-E-E-L-O-C-K.  
 10  
 11 DIRECT EXAMINATION  
 12 BY MR. SCHWARTZ:  
 13 Q. Sir, by whom were you employed back in  
 14 August the 1st of 1996?  
 15 A. State of Nevada Department of Prisons.  
 16 Q. In what capacity, sir?  
 17 A. At that time correctional officer.  
 18 Q. And did you become acquainted with an  
 19 inmate by the name of Marlo Thomas?  
 20 A. Yes, sir, I did.  
 21 Q. And would you be able to recognize Marlo  
 22 Thomas if you saw him again; do you think?  
 23 A. Looks like him setting right there in  
 24 the blue shirt, sir.  
 25 MR. SCHWARTZ: Would the record reflect

1 the identification of the defendant, your Honor.  
 2 THE COURT: Record will reflect that  
 3 that's who he believes Mario Thomas is today.  
 4 MR. SCHWARTZ: Thank you, your Honor.  
 5 BY MR. SCHWARTZ:  
 6 Q. On August the 1st, 1996, did an incident  
 7 occur in the prison involving the defendant Mario  
 8 Thomas?  
 9 A. Yes, sir.  
 10 Q. Could you relate to the members of the  
 11 jury what occurred?  
 12 A. Yeah. I was on the yard labor crew. We  
 13 were picking up the trash, and when we pulled up  
 14 to Unit 7, C33, 2, one of the wings right by the  
 15 door, one of the cells. As it turned out --  
 16 anyhow he started hollering out the window,  
 17 cursing, just being a jerk. Actually I went into  
 18 the unit and -- we were coming to get the garbage  
 19 out of the unit. The whole yard was in a lock  
 20 down. So basically I went over, tried to shut him  
 21 up, wasn't going to shut up, wanted to act bad and  
 22 break bad and decided he was going to take a swing  
 23 at me. I wound up putting him up against the wall  
 24 and did paperwork.  
 25 Q. You say did paperwork, what do you mean?

1 A. There was a write-up done,  
 2 informational.  
 3 Q. You indicated there was a state of lock  
 4 down at the time?  
 5 A. Yeah, the prison was in a lock down  
 6 state.  
 7 Q. What does that mean, lock down?  
 8 A. Everybody is locked down, every cell in  
 9 the yard is locked down, all the inmates were  
 10 locked in their house.  
 11 MR. SCHWARTZ: Court's indulgence for a  
 12 moment.  
 13 THE COURT: Certainly.  
 14 BY MR. SCHWARTZ:  
 15 Q. During this incident on August the 1st,  
 16 1996, were any threats made to you by the  
 17 defendant?  
 18 A. Oh, yeah. That's what started it.  
 19 Q. What kind of threats were made?  
 20 A. He was going to whip my white et cetera.  
 21 He was a little upset because the trash crew at  
 22 the time was all white and he didn't like that,  
 23 thought it was bad and made some pretty good  
 24 remarks.  
 25 Q. Had you done anything or said anything

1 to him to provoke him?  
 2 A. Yeah. I drove up with two white guy on  
 3 a trash cart.  
 4 Q. And he was just trying to take trash out  
 5 of the area?  
 6 A. Yeah.  
 7 MR. SCHWARTZ: Thank you. Nothing  
 8 further, your Honor.  
 9 THE COURT: Cross-examination, Counsel.  
 10  
 11 BY MR. SCHIECK: CROSS-EXAMINATION  
 12 Q. You said the entire facility was on lock  
 13 down?  
 14 A. Yes, sir.  
 15 Q. That means everybody was locked into  
 16 their individual --  
 17 A. Everybody was supposed to be locked in  
 18 their individual cells.  
 19 Q. And Mr. Thomas was locked in his  
 20 individual cell?  
 21 A. Yes, sir.  
 22 Q. And your responsibility was to go in  
 23 there and collect the trash, take the trash out?  
 24 A. Yes, sir.  
 25 Q. And in order for this incident to

1 happen, you had to, I assume, open Mr. Thomas's  
 2 door?  
 3 A. I did, sir. Yes, sir, I did. I wanted  
 4 to find out what was going on.  
 5 Q. You could have just picked up the trash  
 6 and left and ignored the comments that were being  
 7 made, couldn't you?  
 8 A. I could have.  
 9 Q. And isn't it true that it's very common  
 10 in a prison setting that there's a lot of yapping  
 11 going on and yelling back and forth between  
 12 everybody?  
 13 A. To an extent.  
 14 Q. To an extent. But you felt it was  
 15 necessary to go in there and open Mr. Thomas's  
 16 cell door or his house door and ask him to come  
 17 out?  
 18 A. Yes, sir, I did. I wanted to find out  
 19 what the problem was and if we needed to go any  
 20 further, I was going to get the S and E officers  
 21 down there.  
 22 Q. He was just talking, right?  
 23 A. No, he wasn't just talking, sir. He was  
 24 making some pretty gross threats.  
 25 Q. He was behind a locked door. The prison

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

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

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

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

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

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

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

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

1 your assignment at that time?  
 2 A. In 1993 I was on the security squad  
 3 which they've renamed to the CERT Team, but at the  
 4 time it was referred to as the security squad. We  
 5 were the front line for handling incidents.  
 6 Q. What does that mean?  
 7 A. What it means is if there's a problem  
 8 we're like the team that they call to go over  
 9 respond to the problem and assess and deal with  
 10 the situation.  
 11 Q. And how are you different from a regular  
 12 officer?  
 13 A. We do a lot more paperwork training to  
 14 understand the training and a little more familiar  
 15 with a lot of policies on handling situations.  
 16 Q. Was there special equipment that you  
 17 use?  
 18 A. Some special equipment. We were trained  
 19 on Tazer. The Nova shield which is a curved  
 20 shield that has the strips on it. When you push  
 21 the button it works like a Tazer, and we were  
 22 chemical agents trained, and we did have some  
 23 formal training outside the institution that was a  
 24 part of the state, but we did have it.  
 25 Q. You were called the security squad?

1 A. Yes, sir.  
 2 Q. Nowadays they call it the CERT squad?  
 3 A. Yes, sir. It's Correctional Emergency  
 4 Response Team.  
 5 Q. S-E-R-T?  
 6 A. C-E-R-T. S-E-R-T down south.  
 7 Q. What facility were you in back on this  
 8 date in 1993?  
 9 A. Ely Maximum Security Prison.  
 10 Q. You've identified Marlo Thomas. Had he  
 11 been an inmate there for a period of time?  
 12 A. Yes, he had.  
 13 Q. How long had you been dealing with him  
 14 at the time that this incident occurred?  
 15 A. Probably just a couple of months I'd  
 16 been on day shift.  
 17 Q. And tell us what happened.  
 18 A. Well, it was on day shift. It was  
 19 during -- back then Ely was a lot more open than  
 20 it is now. The units had yard time in the  
 21 mornings and in the afternoon. And it was in  
 22 morning yard and a bunch of the inmates were  
 23 together, some of his friends and stuff. And I  
 24 was coming through, and I had just recently been  
 25 put on to the security squad. We wear black

1 uniform instead of regular uniform. And he began  
 2 telling me that, you know, I run this yard, you  
 3 don't run nothing, you know, and just basically  
 4 escalating the situation. Policy is --  
 5 Q. Let me pause you right there for a  
 6 second. The defendant just started talking to you  
 7 like that?  
 8 A. Yeah.  
 9 Q. Had you had conversations with him  
 10 before?  
 11 A. We had had conversations before. He  
 12 knew who I was, and I had worked in the units  
 13 before.  
 14 Q. And you started to tell us about your  
 15 policy.  
 16 A. The policy is on the open yard like that  
 17 when you had an inmate that would start getting  
 18 really loud and out of hand and inciting the  
 19 situation, to control the situation and deescalate  
 20 it, you take them and you remove them from the  
 21 yard and usually take them to the desk sergeant  
 22 for the day, and they get to decide whether the  
 23 situation is serious enough that, A, send them  
 24 back to their unit or take them up to visiting  
 25 holding which is the holding cells up by the

1 visiting room to where they can have a cooling-off  
 2 period and calm down before they return back to  
 3 their unit.  
 4 Q. What did Marlo Thomas's challenges to  
 5 you why was that a escalation of a situation?  
 6 A. Because he was trying to make himself  
 7 seem more important and more powerful on the yard.  
 8 It was a power play I perceived it as and  
 9 that's -- the more I talked to him and told him  
 10 that's not acceptable, the louder he got, and at  
 11 that point the best way to deal with it is to  
 12 separate them from their peer group and when you  
 13 separate them from their peer group they no longer  
 14 have to keep up appearances and usually they'll  
 15 calm right down, and from there it's up to the  
 16 shift sergeant what happens to them.  
 17 Q. So at first you try to talked to him  
 18 about it to calm him down?  
 19 A. Yeah.  
 20 Q. But that didn't work.  
 21 A. No.  
 22 Q. Why are you concerned about escalating  
 23 tensions among the inmates?  
 24 A. At the time we had two different units  
 25 that come out to the yard at the same time, so you

1 have a potential of 140 inmates out there, and a  
 2 little situation gets away, it could turn into a  
 3 big situation real fast. Anytime you have what  
 4 you perceive as a problem, you try to separate it  
 5 from the rest of the group so that everything --  
 6 takes the tension off the yard and everybody calms  
 7 back down.  
 8 Q. So is that what you tried to do at that  
 9 point?  
 10 A. That was my effort.  
 11 Q. What happened?  
 12 A. Well, the more I tried to talk to him  
 13 the more he got loud and abusive and started  
 14 telling me that I didn't run nothing, he runs this  
 15 yard. At that point I felt I needed to pull him  
 16 off the yard. So I had him turn around, cuffed  
 17 him up, took him to the shift sergeant. And as I  
 18 was escorting along with Officer Steve Leander who  
 19 was the other officer with him, he was making  
 20 threats, I'm going to beat you up, that kind of  
 21 thing. When we get the visiting hold, you've had  
 22 it.  
 23 Q. When you get to what?  
 24 A. Visiting holding you've had it.  
 25 Q. What's visiting holding?

1 A. It's the holding cells up by the  
 2 visiting room. It's like a little hallway that  
 3 has four different cells off of it on one side and  
 4 four cells on the other and they take inmates that  
 5 going into visiting room take them up there, and  
 6 they all have to be separated before -- you got  
 7 some behind glass booths and some that aren't, so  
 8 the ones that are going to be behind glass are in  
 9 the booths, and then the other ones will be kept  
 10 in the four holding cells until the visitors  
 11 arrive, and then they go into the visiting room  
 12 with them.  
 13 Q. How long did it take to get him up to  
 14 the holding area?  
 15 A. Just a few minutes. We took him up to  
 16 the sergeant's desk and the sergeant tried to talk  
 17 to him. He got disgusted with him. He said just  
 18 take him to visiting holding and let him cool off.  
 19 So we took him up to visiting holding.  
 20 Q. Was he continuing to threaten you during  
 21 that time?  
 22 A. Yes, he was.  
 23 Q. What happened when you got up there?  
 24 A. When we got up there, the normal  
 25 procedure you place him on the wall facing away

1 from you and two officers stand on either side of  
 2 him and you give them specific directions. I'm  
 3 going to uncuff your hands, when I take this hand  
 4 loose, put it on the wall. When I take this hand  
 5 loose, put it on the wall. You have to do what  
 6 they call an unclothed body search to make sure  
 7 that they don't have any weapons or any kind of  
 8 contraband or anything -- they're not allowed to  
 9 have anything up in visiting holding so you take  
 10 everything away from them including the majority  
 11 of their clothes, their shoes and everything.  
 12 Q. What happened?  
 13 A. When I uncuffed his hand, I told him to  
 14 put his hand on the wall, and as soon as we  
 15 uncuffed his hand he spun around to swing on us,  
 16 and me and the other guard grabbed him and slammed  
 17 him to the floor and put the handcuff back on him.  
 18 And Senior Drake I believe it was that checked out  
 19 a Tazer from the control which is the electronic  
 20 device with the wands and they stood there with  
 21 that and we stood him back up and went through the  
 22 procedure with no further incident, closed the  
 23 door.  
 24 Q. Did you need to use the Tazer that  
 25 Officer Drake had?

1 A. At that time we did not.  
 2 Q. You said that he tried to swing on you.  
 3 Can you show us what he did?  
 4 A. He was on the wall like this, had his  
 5 hands behind him. I told him to put his hand on  
 6 the wall and as soon as I uncuffed him and told  
 7 him to put his left hand on the wall, he went like  
 8 that and turned around to swing like that.  
 9 Q. Was he using a fist?  
 10 A. Yeah, he was. He still had the handcuff  
 11 on that hand.  
 12 Q. But he didn't strike you?  
 13 A. No. Because he was making his threats  
 14 and I'm familiar with him and I have dealt with  
 15 him before, and our training is you don't allow  
 16 them the opportunity, so if -- you have to be  
 17 prepared for it, and when it does happen you  
 18 generally won't get.  
 19 Q. Based upon your experience with  
 20 Mr. Thomas even in that two-month period that  
 21 you'd been there, you were expecting that he very  
 22 probably would do something like that?  
 23 A. Yes, because he was pretty high up --  
 24 had a lot of gang activity back then. I haven't  
 25 been on the yard in a few years, and we've been

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

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

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

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

1 document. The original document that I received  
2 back was a yellow copy which comes back with the  
3 copy of the disciplinary sanctions against him  
4 that they took, and then they send that back to  
5 the officer.  
6 Q. Now, you say disciplinary sanctions.  
7 What do you mean?  
8 A. What kind of penalty was applied as a  
9 disciplinary sanction. So it's like if --  
10 sometimes they'll use loss of electrical  
11 appliances for ten days or if they've been abusing  
12 the phone system they'll get a loss of personal  
13 phone calls for 30 days. Sanctions are based on  
14 the severity of the incident.  
15 Q. They have electrical appliances in their  
16 cells?  
17 A. Yes, they do. They earn those  
18 privileges, and they also have to be able to  
19 either have money on their -- placed in their  
20 account so that they can purchase those through  
21 the inmate canteen.  
22 Q. So they have radios?  
23 A. Yes.  
24 Q. Televisions?  
25 A. Yes, they do.

1 Q. They have cable for the TV?  
2 A. Yes, there's cable in all the cells.  
3 Q. And telephone privileges?  
4 A. Yeah, they have telephone that's brought  
5 around. Depending on their custody level, they're  
6 allowed -- like, general population inmate is  
7 allowed to use the phone anytime they want to and  
8 all the way down to like ag seg which is allowed  
9 one phone call a week, and then like disciplinary  
10 segregation where they're only allowed one phone  
11 call a month.  
12 Q. When there's a problem like this, they  
13 might lose their radio for 30 days?  
14 A. Right. Depending on the severity of the  
15 incident and the frequency of the incident, they  
16 will rely on previous disciplinaries to say, all  
17 right, we did this twice and it seems not to have  
18 the effect, then they'll do something different.  
19 Q. Do you happen to know what happened on  
20 this particular incident?  
21 A. I don't remember. It's been eight  
22 years.  
23 MR. OWENS: Thank you. That's all I  
24 have.  
25 THE COURT: Cross-examination, Counsel.

1  
2 CROSS-EXAMINATION  
3 BY MR. ALBREGTS:  
4 Q. Mr. Johnson, in 1993 Mario was about 20  
5 years old?  
6 A. Yes, I believe so. I'm not aware of the  
7 defendant's exact age. We don't get that kind of  
8 personal information on them.  
9 Q. Fair to say 20, 21?  
10 A. He was probably about ten years younger  
11 than me, and I was in my 30s back then, and he was  
12 taller than me, wider through the shoulders than  
13 me. He was a very big young man.  
14 Q. I didn't ask you about being a big young  
15 man.  
16 A. You asked me --  
17 Q. About his age.  
18 A. His age, yeah.  
19 Q. He was about 20, 21 years old?  
20 A. As far as I could tell he appeared to be  
21 in his mid 20s, yes.  
22 Q. And the Ely Institution at that time was  
23 a maximum institution?  
24 A. It's always been a maximum security, but  
25 they've had all levels of custody there. Back in

1 those days we had closed custody, medium custody  
2 on the other side.  
3 Q. So individuals with very severe criminal  
4 backgrounds generally are placed up in Ely,  
5 correct?  
6 A. Yes.  
7 Q. And that's where Mr. Thomas was at about  
8 20 or 21 year old when you had this encounter with  
9 him, correct?  
10 A. Yes.  
11 Q. Now, you said you had a policy that was  
12 designed to handle these incidents that occurred  
13 like you described in the yard, correct?  
14 A. That is correct.  
15 Q. And you have that policy developed  
16 because those incidents are fairly common or occur  
17 on a regular basis up there where you have to deal  
18 with these type of incidents, correct?  
19 A. Yes, they are.  
20 Q. Not just Mr. Thomas but any inmate  
21 that's up there in that facility, correct?  
22 A. Not the -- being pulled off the yard for  
23 getting loud and unruly, yes.  
24 Q. And when he got pulled off the yard, you  
25 said he was going to have an unclothed body

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3/15/02 C136862

SHEET 6 PAGE 18

A. What line?

Q. At the bottom of 49. Statement is, "This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers. It's a special kind of mentality, a special type of person who can plunge a knife into a human being 34 or 36 times."

Was there any evidence at the penalty hearing concerning whether or not people can be rehabilitated?

A. I had put on an institutional expert who testified as to his behavior in prison before the murders, and I don't recall.

Q. Let me be more specific. Was there any evidence presented by the State that shows that there is no program that can rehabilitate a killer?

A. I don't recall.

Q. If there was no such evidence, should you have objected to that argument?

A. Well, that's theoretical. I don't know. I would have had to have heard the evidence and then heard --

Q. As you sit here today, can you recall any strategic or reason not to object to that argument?

PAGE 19

A. No, I can't recall any strategic reason.

Q. And going on to page 50, and these are two separate statements but basically contain the same factual content, and that is that the vast majority of the people who are on death row in the state of Nevada, these worst of the worst, have killed one single human being, and the second argument again the prosecutor said, "The vast majority of those individuals, as I said earlier, who are on death row have killed only once, not twice such as this defendant."

Was there any evidence put on during the penalty hearing to show the composition of death row and how many people had been killed by the individuals that are on death row?

A. I don't recall.

Q. If there had been no such evidence, should you have objected to the prosecutor making that argument to the jury?

A. If there was no evidence in the record, yes.

Q. Do you even know whether or not the vast majority of people on death row have only killed once as opposed --

A. I have absolutely no idea.

PAGE 20

Q. Have you seen any studies done that would indicate that?

A. No.

Q. Next issue that we need to discuss the comments that were made by yourself during the penalty hearing during your arguments. And it's on page 51.

A. This was my closing argument?

Q. It's your opening statement. If you could --

A. Yes, I'm reviewing all the comments on page 52, lines --

Q. It starts on 51 actually.

A. It starts with "My client stands convicted of a terrible, awful, senseless and brutal crime?"

Q. Yes.

A. And concludes with the last comment, "This is a good juncture or point for me to address why I'm talking to you about this," starting on the bottom of page 52.

Q. The last two arguments on 52 were your closing argument, and the first six are your opening statement.

THE COURT: First six are what,

PAGE 21

Counsel?

MR. SCHIECK: From the opening statement at the penalty hearing.

A. I'll put these into the record. In the first comment I call it an unforgivable crime, and this was after he had been convicted by the jury and this was going into the penalty hearing.

The second one refers to the fact that I'm not going to tell you Marlow is a good guy because he certainly is not.

The third one is I've already alluded to severe emotional disabilities or disturbances that Mr. Thomas had. The next comment --

Q. On that last one, also you indicated that he's a young man totally out of control?

A. From early on. The next comment, you're not going to hear a lot of psychobabble. You're going to hear about a defective human being. His wiring is different from everybody else's.

The next comment is starts out, This is a horrible crime, a crime that Marlow does need to be severely punished for and needs to be removed from society permanently.

The next comment is when all is said and done here we're going to ask you to severely punish

Mary Beth Cook, CCR 268 RPR

8JDC04276

AA376

Docket 77345 Document 2019-25918

3/15/02 C136862

SHEET 7 PAGE 22

this defective human being.

That was my opening statement. And I did that clearly for strategic reason. First of all, the jury had heard about two brutal knife stabbings of a 18 and 19-year-old boys who were at work and they had convicted him of that. Mr. Thomas had absolutely no credibility with this jury. For all I knew they hated him. The only thing he had going for him were the two attorneys in the courtroom, primarily myself and Ms. McMahon, and since I had taken over the primary defense during this penalty hearing, I decided that I needed to let this jury hear that, yes, he was a bad guy; yes, as far as you're concerned he has committed these two murders; he does need to be severely punished, but he doesn't need to be put to death. All I was trying to do there was save his life. We knew he was going to go to prison. That was obvious.

Q. Did you believe that it was necessary to refer to him as a defective human being in order to --

A. Yes.

Q. And all the other things that you said?

A. Yes.

PAGE 23

Q. Had you discussed that with Ms. McMahon before you made the argument?

A. I'm sure that we reviewed the argument.

Q. Did you discuss it with anyone else outside the office?

A. No.

Q. Did you do any research or look into any other cases where attorneys had made such arguments in death penalty cases?

A. I believe in this particular situation I did read two or three transcripts from some prior trials that the office had done or other individuals had done. I don't recall who, but I do remember reading those final arguments from some attorneys that I respected. In fact, one of them I won't name.

Q. At your closing argument there's two arguments set forth. Can you review those?

A. The first one starts out on page 52, line 14. He can't control his behavior. It's very difficult for him. His wiring is different. He functions as a 14 year old emotionally. He's a dangerous man, make no mistake about that. As diagnosed by the doctor, he's antisocial personality. He's not a true sociopath. There is

PAGE 24

1 a glimmer, there is a glimmer of humanity.

2 The second statement is, "This is a good  
3 juncture or point for me to address why I'm talking  
4 to you about this. You say to me what does this  
5 have to do with this adult crime. Well, that's  
6 just it. It's unforgivable, and it's inexcusable,  
7 and I don't offer you this stuff in asking  
8 forgiveness to the point where you spare his life.  
9 I offer this to you not to justify these crimes  
10 because nothing can justify them. I want you to  
11 know what forces shaped Marlow's life as he grew  
12 up. What brought him to this point in his life  
13 where the State is now asking you to kill him."

14 Q. What was your reasoning to making those  
15 arguments to the jury?

16 A. Once again that I wanted to maintain the  
17 credibility with the jury. I didn't want them to  
18 think that I was trying to soft sell them or sell  
19 them that he wasn't a dangerous man or he was a  
20 misunderstood person; that he was dangerous, that  
21 he had done an inexcusable thing but I wanted  
22 them -- and there were just a variety of things  
23 that were brought out in trial through a  
24 psychologist that we had hired and I believe some  
25 other witnesses including his mom, his brother and

PAGE 25

1 his sister who all testified or his aunt I believe  
2 who testified and testified about events in his  
3 life. And that's what I had referred to that he  
4 didn't grow up like the rest of us. There were  
5 reasons for this, and I offered that in mitigation.

6 Q. With respect to your trial preparation,  
7 isn't it true Mr. Thomas had filed a motion to have  
8 you removed from the case --

9 A. I don't recall.

10 Q. If I were to represent to you that he  
11 had filed such a motion on September 4, 1996,  
12 before Judge Bonaventure, would you have any reason  
13 to dispute it?

14 A. No.

15 Q. He was housed out at Indian Springs for  
16 a period of time; is that correct?

17 A. I believe so.

18 Q. Did you go to visit him out there?

19 A. I don't recall.

20 Q. Do you recall the outcome of that motion  
21 that Mr. Thomas had filed asking that you be  
22 removed from the case?

23 A. I believe it was denied.

24 Q. In fact, you convinced Judge Bonaventure  
25 that you were going to be working on the case?

Mary Beth Cook, CCR 268 RPR

8JDC04277

AA377

3/15/02 C136862

SHEET 8 PAGE 26

A. I don't recall the conversations, no, because in our office this happened quite often. That's just one of the things you deal with as a public defender.

Q. If you can turn to page 55, there's a quotation from the argument in front of Judge Bonaventure. Do you recall that hearing?

A. Yes. This was where I was explaining to the Court that I had finish two death penalties back-to-back or I was about to and I had been in trial for over five weeks and I had just finished one and that's why I hadn't been around as much as my client needed me or wanted me to be around. Yes, and then I assured him that I would.

Q. That you were going to give it 100 percent attention?

A. 100 percent of the time I had available. I had a lot of other clients. Everyone wants 100 percent of my time.

Q. Would it be fair to say at that period of time that your caseload was as you described 10 to 15 cases?

A. Oh, yes, easily.

Q. So what you're saying you're giving it as much time as you could given the extremely heavy

PAGE 27

1 caseload?

A. That's true. You're preparing each murder case as if it's going to go to trial. You've got somewhere between 10 to 15 cases, they're all set for trial within nine months. You've got trial going sometimes two trials going you're preparing for every month. And these are murders; they're not drug cases. You know how much time they require.

Q. Visiting records from the jail indicate that you didn't see Mr. Thomas from February of 1997 until May of 1997 and the case was going to trial eventually in June of 1997. Do you have any reason to dispute that?

A. No, but as irregular as it sounds that oftentimes I was so well known over in the jail that oftentimes I'd just go up, they pull people and they pull out the card, and it never gets signed or nothing would ever be entered by me. That didn't happen that often, and I don't know if it happened in this case, but it could have.

Q. Do you recall on January 29, 1997, you filed a motion to reset the trial date and to move it up from a May trial date to an April trial date?

A. I don't recall that.

PAGE 28

1 Q. Do you recall Mr. Thomas coming to court  
2 and objecting to that?

3 THE COURT: Court would find that to be  
4 nothing. The trial didn't take place until June.  
5 It got continued. It didn't get moved forward.

6 MR. SCHIECK: It's because the defendant  
7 objected to moving it forward and Judge Bonaventure  
8 agreed and moved it back.

9 THE COURT: Well, who cares? The  
10 question is whether he was ready, and if they  
11 thought they could be ready in April then they  
12 certainly could be ready in June. You may  
13 continue, Mr. Schieck.

14 MR. SCHIECK:

15 Q. Did you have a scheduling conflict for  
16 the May trial date?

17 A. I must have. I don't recall what it  
18 was. I constantly had scheduling conflicts.

19 Q. Do you recall Ms. McMahon coming to  
20 court hearing the motion to move the trial date and  
21 saying the reason I'm asking for additional time  
22 is, one, so we can discuss Mr. Thomas's concerns  
23 with him and also I don't know Mr. Roger's  
24 schedule, I don't know Mr. LaPorta's. I do know we  
25 have approximately 15 murder cases scheduled

PAGE 29

1 between Mr. LaPorta and myself.

2 Would that be a fair statement to your  
3 recollection?

4 A. Yes, it would.

5 Q. Who made the decisions as to what  
6 witnesses would be called at the penalty hearing?

7 A. It was joint decision between Lee and I.

8 Q. And did you have reasons not to call  
9 more witnesses than you did call?

10 A. Well, I don't know. Who are you talking  
11 about?

12 Q. Do you recall who you did call?

13 A. No. I recall on the penalty phase some  
14 of the people I called.

15 Q. Do you recall who you called in the  
16 penalty phase? That's what I was asking.

17 A. At the penalty phase his mother, his  
18 brother, I believe his aunt or his sister. I think  
19 it was his aunt, an institutional expert who  
20 reviewed and testified as to his behavior and  
21 adjustment to prison. We had employed a  
22 psychologist who testified. I forget his name. I  
23 don't recall if we put anybody else on.

24 Q. The record indicates this you called the  
25 aunt, the mother, the brother, Dr. Kinsora, and the

Mary Beth Cook, CCR 268 RPR

8JDC04278

AA378

SHEET 9 PAGE 30

school psychologist.

A. Yes.

Q. Would that comport with your recollection?

A. Yes.

Q. Had Mr. Thomas given you a list of additional witnesses that he wanted to testify?

A. I don't recall.

Q. Do you recall the name David Hudson, his cousin?

A. No.

Q. Do you recall ever meeting with his --

A. No, I don't recall that individual. I do know that on two different occasions we went to his mother's house, and she had called a lot of family members over, and we had -- Lee McMahon and I and I believe one time the investigator was there, and he had -- we had interviewed whoever was there. And then we went back a second time, I believe, because we had missed some people, and it was based upon that that we made the decision who we called.

Q. Do you have any specific recollection as to why you decided not to call any of the witnesses that were there?

PAGE 31

A. Well, more than likely it was because his mother, his brother and his aunt were the most effective witnesses and would carry the message that I wanted to deliver to the jury.

Q. Did you believe that less was better than more?

A. Sometimes it is, and whether or not this was the situation I don't recall.

Q. Is it your recollection that both you and Ms. McMahon went to visit his mother?

A. Yes. I can recall this one time specifically because we had had a hard time finding the house, and I believe she was there on the second visit.

MR. SCHIECK: No further questions, Your Honor.

THE COURT: Mr. Roger.

CROSS-EXAMINATION

BY MR. ROGER:

Q. Mr. LaPorta, when were you first licensed to practice law?

A. 1989.

Q. 1989?

A. Mm-hmm.

PAGE 32

Q. Mr. Schieck asked you about your contact with the defendant in terms of trial preparation, and he referenced some jail records. I don't know if they've been admitted or not. Is it your recollection that there were many times or sometimes when you were admitted to the jail without having to sign cards?

A. On a few occasions it did happen when they were really rushed, but I don't know if it happened on this. You've got to understand that there was so much going on in our office that a lot of times we talked to the defendants on the telephone. We had a special phone arrangement. The public defender and the special public defender actually had a dedicated line or something like that that went right into the jail, and we could call certain units and then they would pull the defendants up for us especially with us since we were dealing with high-security risks at times and things like that, so a lot of our business was taken care of on the phone or at least I took care of a lot of business on the telephone.

Q. Did inmates also write letters to you outlining their issues?

A. Yeah.

PAGE 33

Q. So physically visiting a person at the jail isn't the only method of communicating?

A. Absolutely not. If it was the only way, you'd really be in trouble.

Q. Mr. Schieck talked to you about objections that you should have made or he believes you should have made during the closing argument. I want to talk to you about the mercy argument. First of all, what have you reviewed prior to today in preparation for your testimony?

A. Absolutely nothing.

Q. When was the last time you had a look at the file?

A. Back in '97 when Lee McMahon was doing or early '98 when Lee McMahon was doing the appeal and that was a very limited review.

Q. If a matter is placed in issue by the defense, do you feel that it is fair for the prosecution to comment about the particular issue?

A. Well, if defense has opened the door, yeah.

Q. Mr. Schieck asked you about the prosecution's argument concerning mercy, showing mercy to the defendant; do you recall that?

A. Yes.

3/15/02 C136862

SHEET 10 PAGE 34

Q. Isn't it true that family members during the penalty phase asked the jury to show the defendant mercy?

A. I don't recall the exact words that they used, but that's a typical plea that family members make on behalf of the defendant.

Q. In fact, the defendant's brother, older brother, was a minister?

A. Yes.

Q. And he came in to testify, and he talked about how the death penalty or how the issues of life and death should be left to the Lord generally; do you remember that argument?

A. I don't recall specifically what he said, but it's true he was a reverend, a minister, and I do recall that a lot of his testimony revolved around spiritual things.

Q. In fact, as a mitigator you had Judge Bonaventure instruct the jury that mercy could be a mitigator; do you recall that?

A. I do recall that. That was pretty standard for me.

Q. In fact, on page 1301, Volume 6 of the appellate record, Instruction No. 13 references mercy?

PAGE 36

1 paragraph if you can read it to yourself.

A. That's my pyramid theory.

Q. You spoke about which defendants you believe should be eligible for the death penalty, and you talked about Ted Bundy and a person -- a soldier who turned traitor on his country and killed over 160 people; is that right?

A. Yes.

Q. I take it that you were referencing Timothy McVeigh?

A. Yes.

Q. So the prosecution's argument in response to that was fair game, would you agree?

A. Under that factual situation, yes.

Q. I want to flesh out a little bit the issue about an attorney's credibility with the jury. When you analyze the evidence in the guilt phase -- and you have a fairly good recollection of the evidence as you sit here today?

A. Yes, I do.

Q. How did you at that time and how do you today characterize the prosecution's case in the guilt phase?

A. Solid.

Q. With respect to the penalty phase, would

PAGE 35

A. Yes.

Q. As a mitigating circumstance?

A. Yes. And I usually included that because oftentimes that's all the defendant had going for him.

Q. So the prosecution's argument concerning showing mercy to the defendant was certainly fair game; would you agree?

A. I would agree.

Q. Mr. Schieck talked to you about another argument that the prosecution made about matters outside of the record and determine which defendants should be eligible for the death penalty; do you remember generally that?

A. Yes. That's usually a topic in every death penalty.

Q. In fact, during your closing argument you brought in a chart with a triangle?

A. Yes, that was standard for me.

Q. So talking about who was the worst of the worst would be fair game for the prosecution to argue, would you agree?

A. If I had opened the door, yes, it would be.

Q. Indeed in Volume 7, page 1667 the top

PAGE 37

1 you agree that you had a very major challenge in making this defendant look sympathetic to the jury?

A. After reviewing his prison records and the things that had gone on while he had been in prison, we had a major uphill battle.

Q. What was your strategy in terms of trying to obtain a particular punishment for this defendant at the penalty phase?

A. Life without.

Q. Did you feel that you had a legitimate chance at getting life with the possibility of parole?

A. Well, that's how you enter into it and that's how you have to approach it, and I had decided that I was going to use his background as he grew up and then the psychological profile on him as information that I wanted to give to the jury to see if I could win them over and spare his life because I certainly wasn't going to do it with his behavior in prison or with the crime itself.

Q. Did you think that you had a chance at getting him life with the possibility of parole?

A. Well, there's always that possibility but, no. My professional estimation if I had got him life without that would have been a victory.

Mary Beth Cook, CCR 268 RPR

3/15/02 C136862

SHEET 11 PAGE 38

PAGE 40

1 Q. When you stand before a jury during your  
2 opening statements during a penalty phase, is it  
3 true that as a defense attorney you have to  
4 acknowledge the fact that the jury has found him  
5 guilty of murder in the first degree and just focus  
6 on your stronger points?

7 A. Yes.

8 Q. Would you agree that a defense attorney  
9 who is an obstructionist during closing arguments  
10 and entering many, many objections at times may  
11 turn off a jury?

12 A. Well, they consider you an absolute pain  
13 in the ass and they hate you, and you begin to lose  
14 your credibility with that jury.

15 Q. Mr. Schieck asked you about these  
16 penalty witnesses. Did you feel that based upon  
17 the defendant's family members, his mother, his  
18 brother who was a minister, the schoolteacher who  
19 talked about how the defendant was ridiculed by  
20 other students during his childhood, Dr. Thomas  
21 Kinsora, the psychologist, did you feel that you  
22 had as much evidence as you could possibly gather  
23 to present to a jury in mitigation?

24 A. Going into the trial -- or going into  
25 the penalty phase, I was comfortable with what we

1 A. Yes.

2 Q. They don't have the ability for you to  
3 call out there and talk to your client, do they?

4 A. You can make those necessary  
5 arrangements, but they don't have the same system  
6 as the public defender. I have talked to many of  
7 my clients out at Indian Springs, even up at Ely if  
8 you make the necessary arrangements with the  
9 warden. Whether or not I did this with Marlow, I  
10 don't recall.

11 Q. Mr. Roger asked you about getting  
12 letters from your clients. Do you recall receiving  
13 any correspondence from Mr. Thomas?

14 A. I don't recall. Whatever we got would  
15 be in the file.

16 Q. And when you made your pyramid argument  
17 during your closing argument, did you talk about  
18 the composition of Nevada's death row or did you  
19 just use the two references?

20 A. I just used those two references.

21 Q. So you didn't specifically compare  
22 Mr. Thomas to other people on Nevada's death row?

23 A. No.

24 MR. SCHIECK: No further questions, Your  
25 Honor.

PAGE 39

PAGE 41

1 were going to present. I felt that given the  
2 nature of the crime, his past that we had the best  
3 possible defense at the penalty hearing that we  
4 could muster.

5 Q. Did you feel that additional family  
6 members would have made the day -- made the case  
7 for him?

8 A. No. I selected those three because they  
9 were the most effective individuals.

10 MR. ROGER: Thank you. No further  
11 questions.

12 THE COURT: Redirect, Mr. Schieck.

13 MR. SCHIECK: Just a few, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. SCHIECK:

16 Q. Mr. LaPorta, you were asked about phone  
17 calls received. Do you have any specific  
18 recollection of talking with Mr. Thomas on the  
19 phone?

20 A. I don't have any specific recollection  
21 of talking to any defendant on the telephone during  
22 that time because there was so much of it.

23 Q. And Mr. Thomas was housed out at the  
24 prison for a substantial period of time?

1 THE COURT: Anything else, Mr. Roger?

2 MR. ROGER: No, Your Honor.

3 THE COURT: Thank you, Mr. LaPorta for  
4 your testimony. You may be excused.

5 Mr. Schieck, do you have any additional  
6 witnesses that you would like to call?

7 MR. SCHIECK: Not given the court's  
8 limiting us to these issues.

9 THE COURT: Mr. Roger, are there any  
10 witnesses that the State would like to call on the  
11 petition for postconviction relief?

12 MR. ROGER: None, Your Honor.

13 THE COURT: Given the matters that have  
14 been scheduled and we've gone past for today, what  
15 I would like to ask is I would like to ask you to  
16 do your closing argument in writing. Mr. Schieck,  
17 about how many pages would you think that you could  
18 concisely put your closing argument? 10 to 15  
19 pages?

20 MR. SCHIECK: Is that with authorities  
21 or without authorities?

22 THE COURT: If you want the authority,  
23 you can attach your authorities. That wouldn't be  
24 part of your 10 to 15 pages of closing argument.

25 MR. SCHIECK: I can do it in 10 to 15

Mary Beth Cook, CCR 268 RPR

8JDC04281

AA381

3/15/02 C136862

SHEET 12 PAGE 42

1 pages.

2 THE COURT: How much time do you want to  
3 do that two weeks, 30 days? How much time?4 MR. ROGER: May I suggest that perhaps  
5 we can get the transcript of Mr. LaPorta's  
6 testimony before we start briefing schedule?7 THE COURT: Yes. You'll have the  
8 transcript Monday.

9 MR. SCHIECK: Thirty days, Your Honor.

10 THE COURT: Mr. Schieck will file  
11 written closing argument on or before Monday.

12 THE CLERK: April 15th.

13 THE COURT: So, Mr. Schieck, if you get  
14 yours in by April 15th, and then, Mr. Roger, how  
15 much time would you like thereafter to file yours?

16 MR. ROGER: Thirty.

17 THE COURT: An additional 30 days which  
18 would be until --

19 THE CLERK: May 13th.

20 THE COURT: And then, Mr. Schieck, how  
21 much time would you like to reply?

22 MR. SCHIECK: Ten days, Your Honor.

23 THE COURT: So ten days thereafter would  
24 be about May 25th, and then the Court is going to  
25 rule without further argument, but I'm going to put

PAGE 43

43

1 it on calendar so I don't lose the case. If I  
2 don't put it on calendar, the case will get lost in  
3 the system, so let's put it on for decision by the  
4 Court on -- May 25th is a Saturday, Mr. Schieck, so  
5 let's make that May 24th. I was looking at the  
6 wrong month. And how about if we put it on for me  
7 to decide on June 5th. So it will be on calendar  
8 June 5th. If you'd like to come on June 5th, I  
9 will give you my decision and Mr. Thomas will not  
10 have to be here because Court's not going to allow  
11 any argument and will simply announce its  
12 decision. All right. Thank you. We are in  
13 recess.

-oOo-

14 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT.

15 *Mary Beth Cook*  
16 Mary Beth Cook, CCR No. 268, RPR  
17  
18  
19  
20  
21  
22  
23  
24  
25

MARY BETH COOK, CCR 268 (702)455-4288

Mary Beth Cook, CCR 268 RPR

8JDC04282

AA382

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

TRAN

CASE NO. C136862

DEPT. NO. XV

Oct 16 11 04 AM '02

CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

vs.

MARLO THOMAS,

Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT  
OF  
ARGUMENT AND DECISION

BEFORE THE HON. SALLY LOEHRER, DISTRICT COURT JUDGE  
WEDNESDAY, AUGUST 21, 2002  
8:30 A.M.

APPEARANCES:

For the Plaintiff: SANDRA K. DIGIACOMO, ESQ.  
Deputy District Attorney

For the Defendant: DAVID SCHIECK, ESQ.  
Attorney at Law

Reported by: LISA MAKOWSKI, CCR No. 345

LISA MAKOWSKI, CCR 345 455-4288

RECEIVED

OCT 16 2002

COUNTY CLERK

\$16

1 LAS VEGAS, CLARK COUNTY, NEVADA  
2 WEDNESDAY, AUGUST 21, 2002  
3 8:30 A.M.

4 \* \* \*

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

6 THE COURT: The State of Nevada versus  
7 Marlo Thomas. This is on today simply for decision.  
8 We have had evidentiary hearings over a period of time.  
9 The State was represented at those evidentiary hearings  
10 by Mr. O'Callaghan, was it not?

11 MR. SCHIECK: Mr. Rogers.

12 THE COURT: And Mr. Schieck wished an  
13 opportunity to do argument in brief form, brief format  
14 and the Court has read those arguments, and I have  
15 looked at these things because we had evidentiary  
16 hearing on, I think, three issues, which was issue  
17 No. 8 that trial counsel failed to object to  
18 prosecutorial misconduct. Issue No. 9, improper  
19 argument by trial counsel, and issue No. 10, trial  
20 counsel not prepared for trial.

21 I have reviewed my notes from the hearings  
22 and I reviewed the points and authorities submitted by  
23 the parties in way of argument and post hearing briefs,  
24 and I don't find that there was ineffective assistance  
25 of counsel on any of those issues.

So, Ms. DiGiacomo, will you have Mr. Roger

**LISA MAKOWSKI, CCR 345 455-4288**

MThomas-8JDC04369

1 or someone at his direction please prepare the order?

2 MS. DIGIACOMO: Yes, Your Honor.

3 MR. SCHIECK: Your Honor, could we note  
4 that we need to be served with the order once it is  
5 entered because his appeal time would start to run, and  
6 I would inquire whether the Court would be inclined to  
7 appoint me to do Mr. Thomas's appeal. It is a capital  
8 case.

9 THE COURT: To whom? It has been to  
10 direct appeal, has he not?

11 MR. SCHIECK: This would be appeal for the  
12 denial of his writ to the Nevada Supreme Court. He has  
13 to do that in order to exhaust his state remedies.

14 THE COURT: Yes, you may be and will be  
15 appointed to do his appeal to the Supreme Court from  
16 denial of his writ for post conviction relief.

17 MR. SCHIECK: Thank you, Your Honor.

18 THE COURT: Thank you.

19

20 ATTEST: Full, true and accurate transcript.

21

22



23

LISA MAKOWSKI, CCR #345

24

25

**LISA MAKOWSKI, CCR 345 455-4288**

AA386

MThomas SPD02698

1 LAS VEGAS, CLARK COUNTY, NEVADA  
2 MONDAY, MARCH 29, 2004  
3 8:30 A.M.

4 \* \* \*

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

6 \* \* \*

7 THE COURT: Marlo Thomas who's at the  
8 Nevada Department of Corrections. The Supreme  
9 Court remanded this case. And do you know what I  
10 really love, if I were keeping score it would  
11 bother me, but since I don't keep score it doesn't  
12 bother me a great deal. But when caseloads get  
13 transferred, the judge's name who's presently  
14 assigned to the case always shows up on the  
15 Supreme Court decisions, not the judge that tried  
16 the case, so that's just.

17 MR. SCHIECK: You heard the  
18 post-conviction.

19 THE COURT: That's just in passing.  
20 We're going to do a whole new penalty  
21 hearing?

22 MR. SCHIECK: That's what the order of  
23 remand provides for, your Honor, and I was  
24 appointed to do the appeal from his  
25 post-conviction.

THE COURT: Would you like to be

*Mary Beth Cook, CCR 268, RPR*

SPD02698

AA387

MThomas SPD02699

1 appointed to do the penalty?

2 MR. SCHIECK: That's fine, your Honor.  
3 I should probably tell the Court that I don't  
4 believe there's a conflict in appointing the  
5 Special Public Defender onto the case. Now,  
6 Mr. LaPorta was trial counsel. He's no longer  
7 with the Public Defender's Office. Lee McMahon  
8 was second chair for the trial, and so she's still  
9 with the Special Public Defender, but I don't see  
10 that the basis of the reversal was such that would  
11 create a conflict on reappointing them if the  
12 Court was inclined to do that.

13 THE COURT: Since I didn't read the  
14 remand order, is the remand order because of  
15 ineffective assistance of counsel?

16 MR. SCHIECK: The remand was based on  
17 the fact that a jury instruction was given to the  
18 penalty jury that incorrectly left them the belief  
19 that perhaps he could get a pardon from the  
20 pardons board, and based on that one instruction  
21 they reversed the conviction.

22 THE COURT: So Dave Schieck is  
23 representing the State.

24 MR. SCHWARTZ: Dave Schwartz.

25 THE COURT: Dave Schwartz.

**Mary Beth Cook, CCR 268, RPR**

SPD02699

AA388

1 MR. SCHWARTZ: He'll never represent the  
2 State.

3 THE COURT: Dave Schwartz is  
4 representing the State. Dave Schieck is  
5 representing Mr. Thomas.

6 So we've got to do a new penalty  
7 hearing. Now, what I would suggest is,  
8 Mr. Schieck, that you be lead counsel, and that  
9 the special public defender be second chair.  
10 Would that be appropriate, Mr. Schieck, from your  
11 understanding of the record in this case?

12 MR. SCHIECK: I don't see where there  
13 would be a conflict in doing that, your Honor. I  
14 don't know what the situation is with the Special  
15 Public Defender's Office right now understaffing.  
16 They're having some changes in personnel obviously  
17 with Phil leaving the office, so I don't know if  
18 they're even interested in doing that.

19 Ms. Jackson is here today but --

20 THE COURT: I can't see -- if there's no  
21 conflict with the public defender, the special  
22 public defender, I can't appoint two private  
23 counsel because that violates the statute.

24 So, Ms. Jackson, would it be less of a  
25 burden on a penalty hearing if Mr. Schieck would

*Mary Beth Cook, CCR 268, RPR*

MThomas SPD02701

1 be lead counsel because he's the one who did the  
2 post-conviction and got the thing reversed, and  
3 your office simply was second chair?

4 MR. SCHWARTZ: Your Honor, before she  
5 answers, it's my understanding, my recollection, I  
6 could be wrong, that Ms. McMahon, who's still with  
7 the office, was one of the two attorneys on the  
8 case. She has some familiarity with it.

9 THE COURT: I'm not saying Ms. Jackson  
10 would be second. I'm just saying the Special  
11 Public Defender.

12 MR. SCHWARTZ: The Special Public  
13 Defender seems to be a good fit.

14 THE COURT: I'm going to appoint the  
15 Special Public Defender and Mr. Schieck, but  
16 Mr. Schieck seems to me would be more familiar  
17 with the case since he did all the appellate work.

18 MR. SCHIECK: I can tell the Court  
19 Mr. Thomas was not particularly happy with  
20 Mr. LaPorta or Ms. McMahon when he went through  
21 the trial.

22 THE COURT: There's hardly any defendant  
23 who loses at trial who's happy with their  
24 attorney, is there?

25 MR. SCHIECK: Not very often, your

**Mary Beth Cook, CCR 268, RPR**

SPD02701

AA390

1 Honor.

2 THE COURT: Now, have you all thought  
3 about a date?

4 MR. SCHIECK: No, your Honor, because I  
5 wasn't aware whether I was going to be appointed  
6 to do or not do it. I will tell the Court there  
7 is going to be a mental health issue on whether or  
8 not he even qualifies for the death penalty given  
9 his IQ. There's going to have to be mental health  
10 testing done before we even know that we need to  
11 set a penalty hearing.

12 THE COURT: Submit an order to me that  
13 you're appointed and that the Special Public  
14 Defender is appointed. Let's put this out for 90  
15 days. You get him examined and do all the testing  
16 and all the psycho stuff, and then you can all  
17 check your schedules, and let's be back in here in  
18 90 days to set a penalty hearing.

19 Do you think 90 days would be sufficient  
20 to get all that done?

21 MR. SCHIECK: Yes, your Honor.

22 THE CLERK: Wednesday, June 30th,  
23 8:30 a.m.

24 THE COURT: At that time we'll schedule  
25 a penalty hearing. Thank you.

**Mary Beth Cook, CCR 268, RPR**

MThomas SPD02703

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-o0o-

ATTEST: Full, true and accurate transcript.

*MaryBethCook*-----  
MARY BETH COOK, CCR #268, RPR*Mary Beth Cook, CCR 268, RPR*

SPD02703

AA392

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

|                                                                                                                            |                            |                                    |
|----------------------------------------------------------------------------------------------------------------------------|----------------------------|------------------------------------|
| DISTRICT COURT                                                                                                             |                            | FILED <sup>1</sup>                 |
| CLARK COUNTY, NEVADA                                                                                                       |                            | 2006 JAN -3 P 1:38                 |
|                                                                                                                            |                            | <i>Shirley B. Pringle</i><br>CLERK |
| STATE OF NEVADA,                                                                                                           | )                          |                                    |
|                                                                                                                            | )                          |                                    |
| Plaintiff,                                                                                                                 | )                          | CASE NO. C136862                   |
|                                                                                                                            | )                          | DEPT. NO. XV                       |
| vs.                                                                                                                        | )                          |                                    |
|                                                                                                                            | )                          |                                    |
| MARLO THOMAS,                                                                                                              | )                          |                                    |
|                                                                                                                            | )                          |                                    |
| Defendant.                                                                                                                 | )                          |                                    |
| <hr/>                                                                                                                      |                            |                                    |
| REPORTER'S TRANSCRIPT<br>OF<br>ALL PENDING MOTIONS                                                                         |                            |                                    |
| BEFORE THE HONORABLE SALLY LOEHRER, DISTRICT COURT JUDGE<br>Taken on Wednesday, September 14, 2005<br>At 8:30 o'clock a.m. |                            |                                    |
| APPEARANCES:                                                                                                               |                            |                                    |
| For the State:                                                                                                             | CHRISTOPHER J. OWENS, ESQ. | Deputy District Attorney           |
| For the Defendant:                                                                                                         | DAVID M. SCHIECK, ESQ.     | DANIEL J. ALBREGTS, ESQ.           |
|                                                                                                                            | Attorneys at Law           |                                    |
| REPORTED BY: YVONNE M. VALENTIN, CCR 342                                                                                   |                            |                                    |

YVONNE M. VALENTIN, OFFICIAL COURT REPORTER

1 LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 14, 2005, 8:30 A.M.

2 -o0o-

3  
4 THE COURT: Page four, Marlo Thomas.

5 Mr. Thomas is --

6 MR. SCHIECK: He's present, your Honor.

7 THE COURT: -- present in custody with  
8 Mr. Schieck. The State's represented by Mr. Owens and Mr. --

9 MR. OWENS: Schwartz.

10 THE COURT: -- Schwartz.

11 This is on all pretrial motions.

12 Mr. Schieck, the order in which they are on  
13 calendar is the order in which they will be discussed.

14 The defendant's motion to allow a jury  
15 questionnaire is granted.

16 Have both sides agreed upon the questionnaire to  
17 be used?

18 MR. SCHIECK: I'll submit one to them for their  
19 approval, your Honor, and we'll work that out.

20 THE COURT: All right. For some reason my  
21 calendar doesn't show my trial date. When is this case set  
22 for trial?

23 MR. SCHIECK: Excuse me. October 19th, I  
24 believe, your Honor.

25 THE COURT: And calendar call is?

1 THE CLERK: This says October 10 for trial,  
2 October 5th. It's way at the bottom of the last motion, but  
3 let me check that for sure.

4 It's October 10; October 10 for calendar call,  
5 and October 5th --

6 MR. OWENS: You have the Garrett case the week  
7 before that.

8 THE COURT: October 19th, correct?

9 THE CLERK: No, October 10.

10 THE COURT: Trial is October 10th?

11 THE CLERK: Yes. Trial is October 10th.

12 Calendar call is October 5th.

13 THE COURT: What I need to do is, I need to give  
14 you a date, but you've got to get the form in to me so that  
15 they can get a count -- I think this is a penalty hearing;  
16 correct?

17 MR. SCHIECK: Right.

18 MR. OWENS: Correct.

19 THE COURT: And it's a death case?

20 MR. OWENS: Yes.

21 MR. SCHIECK: Correct.

22 THE COURT: How many do we usually call in? I  
23 think it's about 110 people. I think they summon 110 to come  
24 in, and most of that number fills out the paperwork. I  
25 haven't done a death penalty case in awhile.

1 Do you guys know?

2 MR. OWENS: No, I don't know.

3 THE COURT: How many do you usually call?

4 MR. SCHIECK: I think it's either 100 or 110.

5 I'm not sure, but the jury commission will know when it's a  
6 death penalty case.

7 THE COURT: So if the trial is on the 10th, and  
8 calendar call is on the 5th, it's easiest for them to bring  
9 that many in on a Friday. So if they bring them in on  
10 September 29th, you would get your questionnaires in on  
11 October 3rd.

12 Is that sufficient time for your purposes?

13 MR. SCHIECK: Yes, your Honor.

14 MR. OWENS: Yes.

15 THE COURT: So let's do the panel. Let's bring  
16 the panel in, and we'll tell the jury commission to bring the  
17 panel in on the 28th or the 29th. It doesn't make any  
18 difference -- oh, the 29th or 30th. The jury commissioner can  
19 bring them in the 29th or 30th of September.

20 Who prints up the questionnaire, State or  
21 defense?

22 MR. OWENS: Well, it's been the Court. Give them  
23 a copy of it.

24 MR. SCHIECK: The jury commissioner copies it.

25 THE COURT: Baloney. We never do that. Somebody

1 has to take them down there.

2 MR. OWENS: That's the way they've been doing it.  
3 We send them a copy.

4 THE COURT: So -- I don't know if they send those  
5 out to be -- we don't do them here. Somebody does not stand  
6 down there at a photocopy to do this.

7 So you need to give your -- and I need to sign  
8 it, so it has to be done -- it goes to the jury commissioner  
9 on September 26th. So you have to resolve and figure out what  
10 you're going to do.

11 Now, what I'd like you to do is up front on the  
12 first page of the thing, tell them a little bit about the  
13 case, and tell them how long the trial is going to be.

14 Now, this is just penalty; correct?

15 MR. SCHIECK: Correct.

16 THE COURT: So they need to be available for the  
17 entire week of October 10th. And if they can't be available,  
18 I like them to put right on the first page, someplace on the  
19 first page, because we review them all.

20 And those who are obviously unavailable we call  
21 and excuse. So they don't clutter up the courthouse and come  
22 in here, and we just have to excuse them anyway.

23 So don't bury it in the middle of the thing or  
24 the back end of it. Have it right up front. If there is any  
25 reason they can't be here from October 10th through

1 October 14th, I need to know about it ASAP.

2 Now, we're going to run into -- this is going to  
3 affect all the October trials, and I think we have a death  
4 case practically every week. Presently, we are scheduled to  
5 move -- this department is scheduled to move, and we are not  
6 to have any court on the 14th and the 17th.

7 I don't know how long the case is going to take.  
8 Would you approach, please?

9 (Whereupon, a bench conference ensued.)

10 THE COURT: Jury questionnaire will require that  
11 the jurors be available from the 10th through the 19th of  
12 October, due to the pending move from this building to the new  
13 building and at times that we may not be available, or we may  
14 not be able to actually hold court during that time period of  
15 the 10th through the 19th.

16 So the questionnaire is granted. I like to sign  
17 them, so get it to me not later than the 26th of September for  
18 signature and then photocopying.

19 The next motion is the defendant's motion to  
20 strike the aggravating circumstances that are overlapping and  
21 based on multiple use of the same fact.

22 The aggravators presently listed are burglary,  
23 robbery, and murder of more than one person. Did more than  
24 one person get killed?

25 MR. SCHIECK: Yes.

1 MR. OWENS: Yes, your Honor.

2 THE COURT: How many people got killed?

3 MR. SCHIECK: Two.

4 MR. OWENS: Two.

5 THE COURT: Two persons. But isn't murder of  
6 more than one person, isn't that a statutory aggravator?

7 MR. OWENS: It is, your Honor.

8 MR. SCHIECK: And so is burglary and robbery,  
9 your Honor. The thing of it is, it goes more towards the  
10 burglary and the robbery being the same set of facts  
11 duplicating the aggravators.

12 THE COURT: Well, I didn't try the case the first  
13 time around. Was it charged -- was either one of them charged  
14 as felony murder, Mr. Owens?

15 MR. OWENS: I think the robbery was, and we're  
16 not sure about the burglary. Collectively, we were talking  
17 about that, but I think the robbery was part of the felony  
18 murder. That's another issue.

19 THE COURT: If it's part of the felony murder, I  
20 know one of the questions is whether McConnell is retroactive  
21 or not, but I think when we're talking about something as  
22 significant as whether or not Nevada's death penalty statute  
23 significantly -- not significantly, but sufficiently narrows  
24 the facts of a person's eligibility for the death penalty, we  
25 should always err on the side of narrow not wide.

1           So for that reason, and what we will do is strike  
2 the robbery as an aggravating circumstance. The burglary will  
3 go forward as an aggravating circumstance. The fact that more  
4 than one person was killed at the event will go forward as one  
5 of the aggravators.

6           The next motion is to strike aggravator number  
7 four. Now, what's number four?

8           MR. SCHIECK: That's the robbery.

9           THE COURT: We granted that one.

10          The next is the defendant's motion to compel  
11 disclosure of existence and substance of expectations or  
12 actual receipt of benefits or preferential treatment for  
13 cooperation with prosecution.

14          Now, that is as it applies only to the penalty  
15 hearing, is that correct, Mr. Schieck?

16          MR. SCHIECK: Well, I think it applies to the  
17 guilt phase also, your Honor. That might be something that  
18 the jury would consider as a mitigating circumstance.

19          If one of the key witnesses was getting  
20 preferential treatment from the State, the jury might want to  
21 consider that as a mitigating circumstance as a reason not to  
22 impose the death penalty.

23          So I would ask that it apply to any witness that  
24 the State called either at the guilt phase at the first trial  
25 or anybody they're going to call at the penalty hearing.

1 THE COURT: So, Mr. Owens, what's your position  
2 on that?

3 MR. OWENS: Well, we provide Giglio information  
4 as we're aware of it.

5 THE COURT: Well, no, I guess the question is,  
6 did you try the case the first time around, or did both of  
7 you?

8 MR. SCHWARTZ: No. I tried the case with  
9 Dave Roger.

10 THE COURT: To your recollection, was there any  
11 agreements made --

12 MR. SCHWARTZ: There was an agreement made with a  
13 young fellow, a 16-year-old, I think, who testified and then  
14 clammed up. We used his prelim transcript at the trial,  
15 because he was unavailable at the trial time.

16 But I think we gave him a benefit in terms of  
17 whatever he was charged with.

18 MR. OWENS: They're aware of that.

19 MR. SCHWARTZ: The jury was aware of that.

20 THE COURT: Do you have possession of that?

21 MR. SCHIECK: We know what as of the time of the  
22 trial. We don't know if there has been anything since then  
23 that they've done for this fellow.

24 MR. OWENS: Nothing.

25 THE COURT: Have you seen found him since then?

1 MR. SCHIECK: No. He's in prison

2 MR. OWENS: He totally turned the State around.  
3 There's been nothing further with regard to his case.

4 THE COURT: So you got it, and the State's  
5 represented to you that there was no further benefit to him,  
6 other than the guy's sitting in prison. I don't know how that  
7 is going to be a benefit, but maybe he's in some better prison  
8 than the rest of the people, but I seriously doubt it.

9 Do you know?

10 MR. SCHWARTZ: No, your Honor.

11 THE COURT: Is he getting any benefits?

12 MR. SCHWARTZ: Nothing was done on his behalf  
13 after he turned us around.

14 THE COURT: Okay. To your knowledge, has anybody  
15 that's testifying in the penalty hearing received any type of  
16 benefits?

17 MR. SCHWARTZ: No, none at all.

18 THE COURT: So the motion is granted. And the  
19 record will reflect that Mr. Schieck already has the agreement  
20 that the State had with a young witness who testified at the  
21 trial and that the benefits which he was supposed to receive  
22 were canceled, because he refused to testify at the time of  
23 trial. So he actually received nothing.

24 The defendant's motion to dismiss the State's  
25 intent to seek the death penalty because the Nevada death

1 penalty is unconstitutional, that's a supreme court issue.

2 The supreme court has consistently said that  
3 Nevada's death penalty statutes aren't unconstitutional, and I  
4 think that we are seeing a trend of the supreme court to, in  
5 my opinion, establish that narrowing criteria for our  
6 constitutional death penalty statute. So that motion is  
7 denied.

8 Defendant's motion in limine to limit penalty  
9 hearing evidence to avoid violation of the 8th Amendment and  
10 due process right to a fundamentally fair penalty hearing.

11 Do you want to summarize that one for me in a  
12 minute or two, Mr. Schieck?

13 MR. SCHIECK: I won't even take that long, your  
14 Honor.

15 This is a motion we filed to make a record on  
16 this, in case at some point either the federal court or the  
17 Nevada Supreme Court decides they're going to limit the  
18 victim-impact testimony and other bad acts that can come in at  
19 the penalty hearing.

20 It's our position that the statute that allows  
21 them to introduce everything, including the kitchen sink, is  
22 unfair and a violation of the 8th Amendment. And at some  
23 point in time, we feel that an appellate court is going to  
24 agree with us on that issue.

25 So the Nevada Supreme Court has not ruled that

1 way, but we want to be sure we preserve the record.

2 THE COURT: Let's discuss how we're going to do  
3 the penalty hearing, because I'm not opposed to -- I'm not  
4 opposed to the jury deliberating twice. I know the supreme  
5 court hasn't mandated it, but I think it's the cleanest way to  
6 go.

7 We certainly have enough time, because we've got  
8 them here for the better part of two weeks. And let me  
9 suggest to you what I mean by that. The other bad acts, the  
10 garbage, the kitchen-sink information doesn't come in for a  
11 determination of whether a person is eligible for the death  
12 penalty or not.

13 MR. SCHIECK: Correct.

14 THE COURT: The determination on the aggravating  
15 circumstances should be made based on aggravating  
16 circumstances only. And I have no opposition to putting on  
17 the aggravating circumstances and the mitigating circumstances  
18 or just the aggravating circumstances to determine -- no, we  
19 have to put on aggravating and mitigating.

20 I have no objection to the State putting on all  
21 the aggravating circumstances, the defense putting on as many  
22 mitigating circumstances as they can come up with at one point  
23 in time, having the jury determine has one or more aggravating  
24 circumstances been established beyond a reasonable doubt by a  
25 unanimous jury, what the mitigating circumstances are found by

1 one or more jurors, and then doing the weighing, whether the  
2 aggravating circumstances outweigh the mitigating  
3 circumstances, and coming back with a verdict that we find  
4 this aggravating circumstance, we find these mitigating  
5 circumstances, and we find either that the aggravating  
6 circumstances outweigh or don't outweigh the mitigating  
7 circumstances, then returning them and then putting on the  
8 other bad-acts info.

9 And I don't know, because I didn't do the case  
10 before, I don't know what other bad acts there are.

11 MR. SCHIECK: At the first penalty hearing, there  
12 was a lot of other bad-act testimony that came out.

13 I summarized it in my motion, but it includes  
14 just a variety of things, including incidents at the prison  
15 and things of that nature that they add, I would guess, 15 to  
16 20 witnesses on other bad-act testimony.

17 THE COURT: Then I prefer to do it that way,  
18 especially where there is a lot of other bad acts, because it  
19 keeps it cleaner. It's absolutely crystal clear that the jury  
20 can't be weighing -- can't be doing their weighing decision  
21 with information that they're not supposed to be considering  
22 in their weighing of aggravating and mitigating circumstances.

23 Mr. Owens?

24 MR. OWENS: Your Honor, we've opposed these when  
25 they've made motions formally on them. I know that you've

1 done this or considered doing it. I know Judge Gates has.

2 Our problem right now, as the Court's alluded to  
3 with the supreme court, and that's mirrored somewhat in our  
4 local courts here, is that this whole area is in such a state  
5 of flux, we don't know really what the law is on the death  
6 penalty totally right now.

7 We've got things pending on appeal. And in  
8 walking from courtroom to courtroom and having our procedure  
9 changed is kind of a problem, too.

10 They went up, and they asked for special briefing  
11 on the issue of whether you have to put your aggravators  
12 through a preliminary hearing after a preindian arraignment, and  
13 after we argued that, they came up with an opinion saying they  
14 declined to address that issue.

15 This is another issue that hasn't really gone up  
16 to them, and they've tried to get that up to them. We're very  
17 hesitant about ad hoc expansions of what's already in the  
18 statute, the procedure there.

19 I can say that a bifurcated proceeding in a case  
20 where we've got four or five aggravators probably  
21 strategically works to our favor, because we can come back in  
22 that second proceeding and say, hey, you've already decided  
23 that the death penalty is viable. Hey, here's what you don't  
24 know, and we bring in this truckload of additional stuff.

25 And I think that's going to strategically look

1 pretty good for us. But as a big-picture approach to this  
2 thing, I just don't think that it's a good idea for us to be  
3 having different procedures employed in different departments  
4 here that haven't been sanctioned or adopted by the supreme  
5 court, at least uniformly by this district.

6 It's just -- unfortunately, it's maybe because we  
7 haven't had clear direction from the supreme court, but it  
8 gives us sort of an ad hoc process down here that the State  
9 finds very disagreeable.

10 We'd like to know what the procedure is and what  
11 the law is.

12 THE COURT: You never find that out until the  
13 supreme court tells us.

14 MR. OWENS: And that's the problem. There are a  
15 lot of other things. They look at this, and they'd like to  
16 bifurcate other parts.

17 The supreme court looked at this issue. They  
18 came out with evidence in Holloway. They came out with  
19 instructions for the jury to help explain to them how that  
20 process works so that we can do that in one proceeding.

21 That's the direction that they've given to us,  
22 and so that's the direction that we ask the courts to employ  
23 in these cases, rather than having a different procedure in  
24 every department.

25 I understand what the Court's saying. There are

1 arguments in favor of that. I think the Court can understand  
2 why we really need to have, in a time when there is so much  
3 flux anyway, we need to have a system of procedures that are  
4 in place so that we understand and at least go with the ones  
5 that are fixed, and this one is fixed in the law of this  
6 State.

7 THE COURT: I don't think it violates the statute  
8 to do it the way I suggested it be done.

9 MR. OWENS: Well, I think it does technically,  
10 because the statute calls for a single hearing. That's the  
11 way that it sets it up in there.

12 MR. SCHIECK: But the law is clear, your Honor,  
13 that the jury can't consider the other bad acts and other  
14 testimony, such as victim impact and all of that, in doing the  
15 weighing process. So why are we giving them all that  
16 information and telling them to disregard it?

17 It's something that is impossible for a jury to  
18 do. The direction that the supreme court is going, in my  
19 opinion, is going to be to say you have to do bifurcated  
20 hearings in these cases.

21 THE COURT: They haven't so decided.

22 MR. SCHIECK: There is a jury --

23 THE COURT: Some of us like to be on the cutting  
24 edge, Mr. Owens.

25 MR. OWENS: We've got so many cutting edges --

1 THE COURT: You're bleeding?

2 MR. OWENS: Yeah.

3 MR. SCHIECK: We'd like some clarity, too, your  
4 Honor, but we can't tell the supreme court to decide things.  
5 They do it as they see fit.

6 MR. OWENS: The supreme court has had an  
7 opportunity to address this and change the law in this area,  
8 and they haven't. They have not chosen to do that. They've  
9 mandated it be handled by instruction process.

10 THE COURT: I think, truthfully, if I were in the  
11 appellate court, which I have never had a desire to do that,  
12 but if I were in the appellate court, I would be real hesitant  
13 to change procedures and things, because everybody sitting on  
14 death row would want to be retried for penalty, because they  
15 would say that, you know, there is no way to tell whether the  
16 jurors minds were clouded.

17 So I think it's something that would be better  
18 done and a better procedure if it was done by the trial  
19 courts. And the supreme court -- certainly nobody is going to  
20 appeal the way we did it and say that that was wrong.

21 And the supreme court will never be in a position  
22 where they have to say well, this is the better procedure,  
23 unless they come out and say well, this is the better  
24 procedure, but we're certainly not invalidating the procedure  
25 that was used prior, because the law never required it.

1 MR. OWENS: But you can say the same thing about  
2 putting aggravators through a preliminary hearing threshold.

3 THE COURT: That's a bunch of baloney. That's  
4 just a terrible unnecessary waste.

5 MR. OWENS: Our position is that many of these  
6 things are in that same category of baloney, your Honor, but  
7 there is no end to the number of procedures that the defense  
8 bar would like to put in place on a death penalty hearing. We  
9 were arguing some the other day in here.

10 THE COURT: Mr. Owens, reasonable people can  
11 differ as to whether or not Nevada's statutory scheme truly  
12 narrows, and you've got some pretty reasonable people up there  
13 at the supreme court who have personal opinions and then have  
14 their written opinions to preserve, you know, case authority  
15 and preserve 78 people on death row.

16 And I think that those of us who are reasonable  
17 people down here who could disagree should do everything in  
18 our power to make sure that the cases that we're sending  
19 through are never going to be those that get reversed or  
20 somebody comes along 10 years from now and says, you know, now  
21 we're going to go back and do this.

22 If we have to decide we're going to go back and  
23 do this, this one won't ever have to be redone.

24 MR. OWENS: This case was reversed because the  
25 supreme court found a dereliction in what the attorney did.

1 But there are other things -- in the instructions. But there  
2 are other cases where the supreme court found that the defense  
3 should have prognosticated about what they were going to do  
4 two or three years later in their law and failed to do so.

5 There is just no way to do that reasonably.  
6 Things that were aggravators back then are no longer  
7 aggravators.

8 THE COURT: I don't see that there is any  
9 unnecessary work in doing it the way that I propose we might  
10 do it, because it's the same witnesses that have to testify.  
11 The jury just deliberates twice, and so the deliberation the  
12 second time is much shorter than the deliberation the first  
13 time.

14 The deliberation period -- the same decisions --  
15 the jury has to make the same decisions, and their only  
16 question is whether they're going to sit down and make those  
17 decisions at one time or whether they're going to make those  
18 decisions step one and step two.

19 MR. OWENS: And what the Court's saying, and I've  
20 heard from other departments now, every judge has certain pat  
21 categories that they'd like to see imposed on the death  
22 penalty process. Every one of them has different ways of  
23 proceeding, and we're looking for a clearinghouse direction  
24 from the supreme court, so we know what we're facing.

25 THE COURT: This is your opportunity here. I'm

1 going to order it be done that way, and you can run a writ,  
2 and then we'll have clear direction.

3 MR. OWENS: They'll give us all the direction  
4 that they gave us in McConnell, where we don't know about  
5 retroactivity currently, which is what we're arguing about  
6 right here.

7 THE COURT: We're making it retroactive, because  
8 you should always err on the side -- if you want your  
9 conviction upheld, you should always err on the side of  
10 safety.

11 So we're going to do it that way. Then you guys  
12 can run the writ, and that way you'll get a decision out of  
13 the supreme court.

14 Does that take care of all the motions?

15 MR. SCHIECK: Yes.

16 MR. OWENS: Yes.

17 MR. SCHIECK: Thank you, your Honor.

18 THE COURT: Thank you.

19 ATTEST: Full, true, and accurate transcript of  
20 proceedings.

21

22

23

YVONNE M. VALENTIN, CCR 342

24

25

YVONNE M. VALENTIN, OFFICIAL COURT REPORTER

SPD02732

AA412

320

10-31-05 C136862

1

|    |                                            |                          |                               |
|----|--------------------------------------------|--------------------------|-------------------------------|
| 1  | TRAN                                       |                          | FILED IN OPEN COURT           |
| 2  | CASE NO. C136862                           |                          | NOV - 2 2005 20               |
| 3  | DEPT. NO. XV                               |                          | SHIRLEY B. PARRAGUIRRE, CLERK |
| 4  |                                            |                          | BY <u>Theresa Lee</u>         |
| 5  |                                            |                          | <b>THERESA LEE</b> DEPUTY     |
| 6  |                                            | DISTRICT COURT           |                               |
| 7  |                                            | CLARK COUNTY, NEVADA     |                               |
| 8  | THE STATE OF NEVADA,                       | )                        | <b>ORIGINAL</b>               |
| 9  | Plaintiff,                                 | )                        |                               |
| 10 | vs.                                        | )                        | REPORTER'S TRANSCRIPT         |
| 11 |                                            | )                        | OF                            |
| 12 | MARLO THOMAS AKA MARLOW                    | )                        | PENALTY HEARING               |
| 13 | DEMITRIUS THOMAS,                          | )                        |                               |
| 14 | Defendant.                                 | )                        |                               |
| 15 | -----                                      |                          |                               |
| 16 | BEFORE THE HONORABLE SALLY LOEHRER         |                          |                               |
| 17 | DISTRICT COURT JUDGE                       |                          |                               |
| 18 | MONDAY, OCTOBER 31, 2005                   |                          |                               |
| 19 | 11:30 A.M.                                 |                          |                               |
| 20 | APPEARANCES:                               |                          |                               |
| 21 | For the Plaintiff:                         | CHRIS OWENS, ESQ.        |                               |
| 22 |                                            | DAVID SCHWARTZ, ESQ.     |                               |
| 23 |                                            | Deputy District Attorney |                               |
| 24 | For the Defendant:                         | DAVID SCHIECK, ESQ.      |                               |
| 25 |                                            | DANIEL ALBREGTS, ESQ.    |                               |
|    |                                            | Attorneys-at-Law         |                               |
|    | Reported by: Mary Beth Cook, CCR #268, RPR |                          | 89                            |

MARY BETH COOK (702) 455-4288

1 LAS VEGAS, CLARK COUNTY, NEVADA  
2 MONDAY, OCTOBER 31, 2005  
3 11:30 A.M.

4 P R O C E E D I N G S  
5 \* \* \*

6 THE COURT: This is the State of Nevada  
7 versus Marlo Thomas. The record will reflect the  
8 presence of the attorneys. Mr. Thomas is in the  
9 holding cell immediately adjacent to the  
10 courtroom.

11 And we got a call this morning from  
12 Department of Prisons saying that there isn't any  
13 order in place to keep Mr. Thomas here for the  
14 trial, and if there's no order in place, then  
15 Mr. Thomas would have to be transported on a daily  
16 basis from here to Indian Springs? Now, Officer,  
17 what's your name?

18 SERGEANT JACOBI: Sergeant Jacobi.

19 THE COURT: Sergeant Jacobi's here.  
20 Mr. Schieck was indicated that Mr. Tabish was  
21 transported from Indian Springs on a daily basis.

22 SERGEANT JACOBI: Yes, he was  
23 transported on a daily basis. However, prior to  
24 the trial starting, about four weeks prior to  
25 that, we had a meeting with the judge, and it was

1 specify that it would last more than -- or how  
2 long it would last because we really didn't know,  
3 and, in fact, the date got changed from the  
4 24th to the 31st. It would make it easier for us  
5 if he was kept at High Desert, and it would make  
6 him more easy to deal with, but if the Court does  
7 not want to order that he be transported every day  
8 because of concerns of the Department of Prisons  
9 on their staffing requirements, I guess we'll have  
10 to deal with that. It would be our preference  
11 that he be transported every day back and forth  
12 from High Desert, and it's where all his property  
13 is at, and if you book him in today all of his  
14 property is still out there at High Desert  
15 including his legal work; is that correct?

16 SERGEANT JACOBI: Yes, it is.

17 MR. SCHIECK: So he wouldn't have  
18 anything with him other than whatever he's  
19 wearing. If we could do it maybe just one day,  
20 give him notice that he's going to be booked in  
21 tomorrow so he can bring his property with him,  
22 that might alleviate some of the concerns.

23 THE COURT: Well, one of the biggest  
24 reasons that we order people in here to the county  
25 jail from whatever prison facility they're being

1 agreed at that point in time to transport Tabish  
2 back and forth. We had previous knowledge to get  
3 us time to prepare for it. I heard at 8:30 he's  
4 supposed to go back and forth every day, and it  
5 would be kind of difficult right now.

6 THE COURT: Why can't he stay here?  
7 It's almost 99.9 percent of the time people who  
8 are in the prison system for whatever the reason  
9 are housed at the county detention center which is  
10 just across the street from the courthouse for  
11 trial.

12 MR. SCHIECK: Mr. Thomas would certainly  
13 prefer not to be housed at the detention center.  
14 That's not the overriding thing.

15 THE COURT: I'd probably prefer to be at  
16 the Four Seasons Hotel as compared to the Best  
17 Western. You may proceed, Mr. Schieck.

18 MR. SCHIECK: The jail is not overly  
19 thrilled with the possibility of him being housed  
20 there.

21 THE COURT: They don't have anything to  
22 say about it either.

23 MR. SCHIECK: Correct. I think our  
24 order specified that he be transported for his  
25 penalty hearing starting this week and did not

1 held at is so that counsel can meet with them on a  
2 daily basis outside of the actual trial time to  
3 prepare for the next day's testimony and the next  
4 day's testimony, et cetera, et cetera, and  
5 certainly that would be defeated by sending him  
6 back to Indian Springs on a daily basis.

7 What all does he have at Indian Springs,  
8 if you know, Sergeant?

9 SERGEANT JACOBI: I really have no idea  
10 what he has as far as personal property, but I'm  
11 sure if he had legal work he would have brought it  
12 with him. He came down with nothing.

13 THE COURT: Why don't you ask him,  
14 Mr. Schieck, if he brought all the stuff with him.

15 MR. SCHIECK: I can ask. If he --

16 THE COURT: If he brought it all down  
17 with him then he can stay.

18 SERGEANT JACOBI: He didn't bring  
19 anything. I don't know what he's got back at the  
20 prison there.

21 THE COURT: He's not housed ordinarily  
22 at Indian Springs, is he?

23 MR. SCHIECK: He has been at High Deser  
24 for several months, and when he came down I had a  
25 discussion with Paul Martin about housing him at

1 the jail, and they had some concerns because of  
2 his custody status with housing him there. They  
3 weren't thrilled that Mr. Thomas would be housed  
4 there for a while. I'm sure Sergeant Jacobi will  
5 confirm that there are concerns with Mr. Thomas's  
6 housing.

7 SERGEANT JACOBI: Their concern is with  
8 all the inmates on death row and even with inmates  
9 who are not on death row.

10 THE COURT: So how much stuff does he  
11 have back there?

12 SERGEANT JACOBI: He has no legal work  
13 with him whatsoever.

14 MR. SCHIECK: Can I go talk to him, take  
15 a short break and see what's going on with him?

16 THE COURT: Certainly.

17 (Pause in proceedings.)

18 THE COURT: The State of Nevada versus  
19 Mario Thomas. The prosecution is represented by  
20 Dave Schwartz, the defense is represented by  
21 Mr. Schieck and Mr. Albregts, and the defendant is  
22 still in the anteroom preparing himself for trial.

23 MR. SCHIECK: Correct. There's a  
24 serious constitutional issue concerning having the  
25 defendant in visible chains in front of the jury,

1 and while I recognize this is the penalty hearing  
2 and not the guilt phase portion of the trial, we  
3 would ask that unless the Court makes a specific  
4 finding that he is a danger or has acted out that  
5 he not be restrained in front of the jury. They  
6 have a set of -- and when they come out you can  
7 talk to the guards about that, but he has chains  
8 on his hand, plus a belly chain, plus leg chains.

9 THE COURT: There's a screen of some  
10 sort in front of your table, and go sit in the box  
11 and see if you can see anybody's feet. Now sit  
12 down.

13 MR. SCHIECK: I can certainly see his  
14 expensive shoes.

15 THE COURT: How high up are the ankle  
16 chains?

17 SERGEANT JACOBI: Above the ankles.

18 THE COURT: If you were in the jury box,  
19 would you be able to see the ankle chains on the  
20 defendant?

21 SERGEANT JACOBI: I doubt it.

22 THE COURT: How about from where you  
23 are, Mr. Schieck?

24 MR. SCHIECK: When I stand up I may be  
25 able to see them.

1 MR. SCHWARTZ: You'll be blocking.

2 THE COURT: There will be another person  
3 sitting in front of him.

4 MR. SCHIECK: Obviously the arm  
5 restraints would be visible.

6 THE COURT: You can take the arm  
7 restraints off. He can't fly, but he might be  
8 able to run. And certainly a person who's already  
9 been convicted of two first degree murders with  
10 use of a deadly weapon has more reason to flee  
11 than someone who is either not yet convicted or  
12 someone who doesn't know what penalty they  
13 received the first time around. So leave the leg  
14 chains on. He can drop his pants down over them.

15 Keep him tucked in under the table when the jury  
16 comes in and goes out, and I don't think that the  
17 jury will be able to see the leg chains. Arm  
18 chains have to come off and the belly chain so he  
19 can assist counsel so he can write notes, so he  
20 can talk to people.

21 MR. SCHIECK: Can we have permission of  
22 the Court then when the Court leaves or when the  
23 jury comes in that we don't have to stand up?

24 THE COURT: No, don't stand up. We'll  
25 just come to order, and the prosecutor will sit

1 also. Anything else?

2 MR. SCHIECK: Nothing that I can think  
3 of right now.

4 THE COURT: Well, let me know as they  
5 come up.

6 (Pause in proceedings.)

7 THE COURT: Good morning, Mr. Thomas.

8 This is the time set for retrial of the penalty  
9 hearing in the State of Nevada versus Thomas,  
10 C136862. The record will now reflect the presence  
11 of the state through Dave Schwartz. The defendant  
12 is present in custody with Mr. Schieck and  
13 Mr. Albregts. Jonathan has --

14 MR. SCHIECK: The problem is the chain  
15 between his legs, but if you weren't really,  
16 really trying to see it.

17 THE COURT: I can't even see it. And  
18 you will stay seated while the jury panel comes  
19 in.

20 Jonathan, how many jurors do we have?

21 THE BAILIFF: Sixty.

22 (Discussion off the record.)

23 THE COURT: Are we ready to bring in the  
24 jury panel, Counsel?

25 MR. ALBREGTS: Yes, Your Honor.

1 THE COURT: Okay.  
 2 (Whereupon, the jury entered  
 3 the courtroom.)  
 4 THE COURT: Good morning, ladies and  
 5 gentlemen. Welcome to Department XV of the Eighth  
 6 Judicial District Court. You have previously come  
 7 in and filled out a jury questionnaire that gave  
 8 you a synopsis of this case and so you know that  
 9 our defendant today, Marlo Thomas who's sitting at  
 10 the middle table on the left has been convicted of  
 11 two counts of first degree murder with use of a  
 12 deadly weapon with respect to the stabbing deaths  
 13 of Matthew Gianakis and Carl Dixon at the Lone  
 14 Star Restaurant located at Cheyenne and Rainbow  
 15 here in Clark County in April of 1996.  
 16 The purpose of the penalty hearing is  
 17 for you to decide the appropriate punishment for  
 18 Mr. Thomas. Now, you might wonder if this event  
 19 occurred in 1996 why are we doing a penalty  
 20 hearing in 2005, and the reason for that is there  
 21 was an irregularity in the sentencing hearing  
 22 which occurred closer to the event at the time  
 23 that he was convicted of these murders, and the  
 24 Supreme Court has determined that it is  
 25 appropriate to redo the sentencing, and for that

1 ultimately going to be picked to be our jurors who  
 2 decide this case, once it goes to them we don't  
 3 really have any way of accurately predicting how  
 4 long the case might take them to decide. However,  
 5 we believe our best prognosis at the moment is is  
 6 that you should be completed with both of those  
 7 decisions by Friday. If you haven't, then we will  
 8 just stay and deliberate on Thursday night or  
 9 Friday night or whatever, and it may be necessary  
 10 if you're still not finished on Friday night to  
 11 come in on Saturday to complete deliberations. I  
 12 don't think that's going to take that long. I  
 13 don't think that's going to be necessary, but I  
 14 can't promise that because I don't know how long  
 15 it's going to take the jury to make any decisions  
 16 that the jury has to make in this case.  
 17 I'm going to have the attorneys  
 18 introduce themselves, and I'm going to have  
 19 them -- the defense attorneys introduce  
 20 Mr. Thomas. I will ask the State to give us a  
 21 list of possible witnesses or names that you may  
 22 hear of during the trial because we will all want  
 23 to know if you know any of the people who worked  
 24 at the Lone Star back in 1996, if you know any of  
 25 the people who may be mentioned as witnesses in

1 reason this is a sentencing hearing and penalty  
 2 hearing rather than the trial on the merits.  
 3 The selection of the jury is done under  
 4 oath, and at this time our clerk is going to issue  
 5 that oath to you.  
 6 (Juror oath administered.)  
 7 THE COURT: The attorneys have indicated  
 8 to me the number of witness that they have and how  
 9 long they think this proceeding might take, and to  
 10 qualify to serve on this jury you need to be  
 11 available for this week. Once we send an issue to  
 12 the jury to make a decision on, we don't have any  
 13 way of accurately predicting how long the jury may  
 14 take to make that decision, but in this case the  
 15 jury will be asked to make two decisions, so the  
 16 jury -- you're going to hear some evidence, you're  
 17 going to hear some testimony, you're going to get  
 18 some information given to you, and then you're  
 19 going to be asked to make a decision. Then after  
 20 you make that decision, you're going to come back  
 21 and hear some more information and then you'll go  
 22 out to make another decision. So once -- we know  
 23 how long approximately it's going to take for the  
 24 evidence to come in and the witnesses to testify,  
 25 but once it goes to the 12 jurors who are

1 this case or who may testify in the case. And so,  
 2 Mr. Schwartz, would you please start first.  
 3 MR. SCHWARTZ: Thank you, your Honor.  
 4 Good morning, ladies and gentlemen. My name is  
 5 David Schwartz, and I'm a Chief Deputy District  
 6 Attorney here in Clark County. I'll be  
 7 representing the State of Nevada at this penalty  
 8 hearing. Another gentleman who will also be at  
 9 this hearing is Chris Owens. He's also a chief  
 10 deputy district attorney, but he's giving a  
 11 summation or closing argument right now in another  
 12 trial so he'll join us in all probability first  
 13 thing tomorrow morning.  
 14 As Judge Loehrer has told you, this is a  
 15 penalty hearing. The defendant has been convicted  
 16 of two counts of first degree murder with use of a  
 17 deadly weapon, and you are going to be selected to  
 18 determine the appropriate punishment for those two  
 19 crimes. Now, some of the witnesses the State  
 20 might be calling at this penalty hearing include  
 21 Steve Hemmes, Vince Oddo, Sidney Sontag, Dave  
 22 Mesinar who's a detective with the Las Vegas  
 23 Metropolitan Police Department, David Bailey who's  
 24 with the Nevada Highway Patrol, Dr. Jordan who was  
 25 a coroner back in 1996 but has since retired. You

1 might hear from Hanifa Alkarem, Loletha Jackson,  
 2 Mike Compton who's from the Department of Parole  
 3 and Probation, Wendy Cecil, several individuals  
 4 who are currently employed in the Nevada State  
 5 Prison system, perhaps Officer Schrader, Paul  
 6 Whetlock, Dave Williams, Kathy Barfus, Gina Morris.  
 7 They're all employed in that system. Juvenile  
 8 probation officer by the name of Hill, Charles  
 9 Hanks and possibly a Jeff Carlson. Also you'll  
 10 hear from the families of the deceased, Mr. Fred  
 11 Dixon and Alexander Gianakis.  
 12 THE COURT: Mr. Schieck.  
 13 MR. SCHIECK: Thank you, your Honor.  
 14 Good morning. I guess it's still morning. I'm  
 15 David Schieck. I'm the Special Public Defender  
 16 for Clark County. I represent Marlo Thomas. This  
 17 is Marlo sitting here in the center. Assisting me  
 18 as co-counsel during the trial is Dan Albregts  
 19 who's in private practice here in Clark County,  
 20 has been for a number of years.  
 21 The witnesses that we may be calling,  
 22 and this is not all inclusive but would include  
 23 Sherman Nash, Shirley Nash, Charles Nash, Georgia  
 24 Thomas, Paul Thomas, Darryl Thomas and Liza  
 25 Bosley. And as in any case the witnesses we call

1 THE JUROR: No.  
 2 THE COURT: Social friends?  
 3 THE JUROR: Social.  
 4 THE COURT: The fact that he is counsel  
 5 for the defendant in this case, will that  
 6 automatically prejudice you for or against any  
 7 party to this action?  
 8 THE JUROR: No.  
 9 THE COURT: All right. Thank you.  
 10 Anybody else know any of the attorneys or  
 11 Mr. Thomas?  
 12 Does anybody know the families of  
 13 Matthew Gianakis or Carl Dixon who are employees  
 14 at the Lone Star Restaurant at Cheyenne and  
 15 Rainbow in 1996? Anybody know anybody who worked  
 16 at the Lone Star on Cheyenne and Rainbow in  
 17 April 1996? I see no hands up.  
 18 Did anybody recognize the names of any  
 19 of the potential witnesses given to you either by  
 20 Mr. Schwartz or Mr. Schieck? Yes, there's a hand.  
 21 Your badge number, ma'am, last three digits,  
 22 please?  
 23 THE JUROR: 808.  
 24 THE COURT: Ms. Connery. Which name o  
 25 names did you recognize?

1 depends on what -- whether we need to rebut  
 2 something they call. There may be additional  
 3 witnesses that we call, but that's pretty much the  
 4 inclusive list of who we anticipate. Thank you.  
 5 THE COURT: Thank you, Counsel. The  
 6 first thing I need to know is does anybody here  
 7 know the attorneys or Mr. Thomas? I see there are  
 8 no hands up. Does anybody know --  
 9 MR. ALBREGTS: Judge, there is a hand.  
 10 THE COURT: What is your badge number,  
 11 sir?  
 12 THE JUROR: 030832.  
 13 THE COURT: We're going to call you 832.  
 14 We don't need all those big numbers. Edward  
 15 Harris?  
 16 THE JUROR: Yes.  
 17 THE COURT: Sir, which of the attorneys  
 18 or the defendant do you know?  
 19 THE JUROR: This gentleman here in the  
 20 dark coat.  
 21 THE COURT: Mr. Albregts?  
 22 THE JUROR: Yes. I don't know him  
 23 personally, but kind of an acquaintance.  
 24 THE COURT: Has he ever represented you  
 25 or?

1 THE JUROR: I recognized the name Dave  
 2 Mesinar as somebody who used to work with me at  
 3 the post office, but I don't know if it's the same  
 4 gentleman.  
 5 THE COURT: And how long ago did you  
 6 work with a Dave Mesinar at the post office?  
 7 THE JUROR: It was 12 to 15 years ago,  
 8 and I didn't work closely with him.  
 9 THE COURT: So if it turns out to be the  
 10 same person that you worked with at the post  
 11 office some time ago, would that automatically  
 12 prejudice you for or against any party to this  
 13 lawsuit?  
 14 THE JUROR: No, I don't think so.  
 15 THE COURT: Anybody else recognize any  
 16 of the names of the people who may be involved in  
 17 this trial? All right. Thank you.  
 18 Now what I'm going to do is ask if there  
 19 is any reason any of you could not serve your  
 20 community as jurors this week in determining the  
 21 appropriate penalty for Mr. Thomas for his -- two  
 22 first degree murder with use of a deadly weapon  
 23 convictions. We're going to do over here first.  
 24 Your badge number, sir?  
 25 THE JUROR: 490.

1 THE COURT: Mr. Kieffer, what would be  
2 your conflict which would preclude you from  
3 serving your community this week as a juror?  
4 THE JUROR: Your Honor, I have business  
5 clients to visit. I have appointments set up for  
6 meeting tomorrow afternoon and all day Wednesday  
7 in Los Angeles.  
8 THE COURT: And there's no one else at  
9 your business who could do those for you?  
10 THE JUROR: There's only two of us.  
11 One's on the East Coast, and I'm on the West  
12 Coast.  
13 THE COURT: Counsel, do you wish to  
14 inquire of Mr. Kieffer?  
15 MR. SCHWARTZ: No, your Honor.  
16 THE COURT: Mr. Schieck, No. 490.  
17 MR. SCHIECK: No, your Honor.  
18 THE COURT: Mr. Kieffer, you may be  
19 excused due to your out-of-state travel. Please  
20 go back to the jury commission office, tell them  
21 you've been excused all week.  
22 THE JUROR: Thank you, your Honor.  
23 THE COURT: Anybody else up here could  
24 not serve your community?  
25 THE JUROR: 544.

1 THE COURT: Ms. Kaczmarek, what is your  
2 conflict?  
3 THE JUROR: My conflict is my son got  
4 suspended from school. In order for me to be able  
5 to get him back into school, I have to be able to  
6 meet with them, and they don't obviously get back  
7 to school until tomorrow, and if I don't then  
8 he'll be out of school even longer.  
9 THE COURT: How old is your boy?  
10 THE JUROR: He's 16.  
11 THE COURT: And what time of day are you  
12 supposed to meet with school officials?  
13 THE JUROR: As soon as I can get the  
14 appointment. He was suspended last week, and I  
15 called them on Wednesday. They were supposed to  
16 return my phone call on Thursday so this could  
17 have been resolved prior to and they haven't done  
18 so.  
19 THE COURT: You're still waiting for  
20 them to call you?  
21 THE JUROR: Yes, ma'am.  
22 THE COURT: Did you call them again this  
23 morning?  
24 THE JUROR: Yes, ma'am, I did.  
25 THE COURT: Did they say when they might

1 call you back?  
2 THE JUROR: They didn't answer the  
3 phone.  
4 THE CLERK: They're on staff development  
5 today.  
6 THE COURT: So if you called them on  
7 Wednesday, who did you leave the message with on  
8 Wednesday?  
9 THE JUROR: I actually spoke to a young  
10 lady there, and I told her my predicament. I told  
11 her that I have been called to serve and --  
12 THE COURT: So did she say when they  
13 were going to call you back?  
14 THE JUROR: The young lady indicated  
15 because I gave her two numbers, my work number and  
16 my home number, you can call me before seven here  
17 or after 8:00 here. Okay, well, they'll call you  
18 tomorrow meaning Thursday, and I did not receive a  
19 call. I got an automated phone call later in the  
20 evening at seven indicating my son was absent from  
21 school.  
22 THE COURT: Counsel, do you wish to  
23 inquire of Ms. Kaczmarek?  
24 MR. SCHWARTZ: No, your Honor.  
25 MR. SCHIECK: What is our schedule like

1 tomorrow, do we know? She may be able to schedule  
2 around.  
3 THE COURT: With the school district  
4 that won't even return her phone calls? What's  
5 the chance of that happening?  
6 THE JUROR: I could show up at their  
7 door tomorrow morning. They open at six, but I  
8 don't know if I could see anyone.  
9 THE COURT: Do you know what the  
10 procedure is for getting your son back in school?  
11 THE JUROR: They said that he couldn't  
12 be out more than three days but that he needed to  
13 be present during the course of my counseling with  
14 him.  
15 THE COURT: What is the ordinary time  
16 that he goes to school?  
17 THE JUROR: School usually starts at  
18 7:05.  
19 THE COURT: Then what time is he off in  
20 the afternoon?  
21 THE JUROR: At 2:30 -- 1:30.  
22 THE COURT: We would not start tomorrow  
23 until 10:00 in the morning. Do you think there's  
24 a possibility that you could --  
25 THE JUROR: I'm working on it.

1 THE COURT: -- get it done at seven in  
 2 the morning because if you don't go in tomorrow  
 3 then he's kicked out for the whole year, right?  
 4 THE JUROR: I'm sorry?  
 5 THE COURT: If you don't see them  
 6 tomorrow and get him back in, then he's missed  
 7 three days, correct?  
 8 THE JUROR: At least.  
 9 THE COURT: Because they kicked him out  
 10 Wednesday.  
 11 THE JUROR: Tuesday.  
 12 THE COURT: He's already missed  
 13 Wednesday and Thursday and tomorrow is the third  
 14 day.  
 15 THE JUROR: Yes, ma'am.  
 16 THE COURT: So tomorrow if you're not in  
 17 there and if they don't take him back tomorrow,  
 18 then he's gone for the whole semester right?  
 19 THE JUROR: I don't know what their  
 20 normal procedure would be.  
 21 THE COURT: I'm going to leave you here  
 22 because it is very important that you get it taken  
 23 care of, but I think you best be there at 6:30 in  
 24 the morning with him and sit on the front steps  
 25 until somebody sees you.

1 Anybody else up here? Blue shirt.  
 2 THE JUROR: 494.  
 3 THE COURT: Mr. Quenzer, what is your  
 4 conflict, sir?  
 5 THE JUROR: I'm able to serve this week,  
 6 but my concern is I am an employee of Lone Star  
 7 restaurants and have been for five-and-a-half  
 8 years.  
 9 THE COURT: And which one do you work  
 10 at?  
 11 THE JUROR: I actually work in the  
 12 Delfrisco Steak House which is owned by Lone Star.  
 13 THE COURT: Delfrisco is a little higher  
 14 class than Lone Star, isn't it?  
 15 THE JUROR: Absolutely. Same company.  
 16 THE COURT: Do you know any of the  
 17 people that ever worked at that location?  
 18 THE JUROR: I haven't recognized any of  
 19 the names.  
 20 THE COURT: But Lone Star is the parent  
 21 company, correct?  
 22 THE JUROR: Yes.  
 23 THE COURT: Anybody else over here? In  
 24 the red, badge number?  
 25 THE JUROR: 501.

1 THE COURT: Ms. Gonzales?  
 2 THE JUROR: I'm an executive assistant  
 3 at Harrah's Entertainment, and my boss is a vice  
 4 president of IT and he has various meetings this  
 5 week which I have to prepare for and luncheons for  
 6 the vice presidents coming into town.  
 7 THE COURT: I know it's going to be a  
 8 real inconvenience for your boss if you get picked  
 9 for the jury, but I cannot excuse you for that  
 10 reason. I simply can't excuse you for that.  
 11 Anybody else over here?  
 12 THE JUROR: 502.  
 13 THE COURT: Mr. Crooks, what is your  
 14 conflict?  
 15 THE JUROR: I had to take my  
 16 two-year-old son to the emergency room last night  
 17 with 105 fever.  
 18 THE COURT: Where is he now?  
 19 THE JUROR: At home. He cannot return  
 20 to day care.  
 21 THE COURT: Who's taking care of him  
 22 today?  
 23 THE JUROR: My wife. We have today off  
 24 together.  
 25 THE COURT: And you both work?

1 THE JUROR: We both work.  
 2 THE COURT: So is the baby -- what's his  
 3 temperature down to now?  
 4 THE JUROR: It's 102 today.  
 5 THE COURT: And is he on medication?  
 6 THE JUROR: He's just taking Tylenol.  
 7 They said it was a viral infection, just have to  
 8 wait it out.  
 9 THE COURT: Who would stay home tomorrow  
 10 if he's still sick tomorrow?  
 11 THE JUROR: I would.  
 12 THE COURT: And his mother would go to  
 13 work?  
 14 THE JUROR: His mother if she calls into  
 15 work one more time she's probably going to lose  
 16 her job. It's a point system. She works at  
 17 Harrah's Las Vegas.  
 18 THE COURT: And the day care won't take  
 19 him until he's down to 98?  
 20 THE JUROR: He has to have no fever so  
 21 98, 99.  
 22 THE COURT: Well, I am going to excuse  
 23 you. We can't predict when he will recover normal  
 24 temperature, and I don't want you being serving  
 25 here as a juror and your wife being fired and the

1 family being on the street.  
 2 THE JUROR: That would be bad, yeah.  
 3 THE COURT: You may be excused. Please  
 4 go to the jury commission office, tell them you've  
 5 been excused for the entire week.  
 6 MR. ALBREGTS: That was Mr. Crooks,  
 7 right?  
 8 THE COURT: Yes. Your badge number,  
 9 ma'am?  
 10 THE JUROR: 491.  
 11 THE COURT: Mrs. Guffey, what is your  
 12 conflict?  
 13 THE JUROR: It's just very hard for me  
 14 to get up here because I have to walk so far just  
 15 to get here. It took me 45 minutes just to walk  
 16 down the street.  
 17 THE COURT: Where do they have you  
 18 jurors park?  
 19 THE JUROR: To tell you the truth, they  
 20 told us to park over on Fremont, but I couldn't do  
 21 that so I parked over there in that metro parking  
 22 in the handicap and put as many quarters in and  
 23 decided just to get a ticket.  
 24 THE COURT: Well, if you do get a ticket  
 25 and you bring your ticket back to the court

1 MR. SCHIECK: No further questions.  
 2 THE COURT: Ms. Guffey, thank you for  
 3 being here today. You may be excused. Please go  
 4 to the third floor jury commission office, tell  
 5 them you've been excused for the entire week.  
 6 Anybody else up here? Your badge  
 7 number, ma'am?  
 8 THE JUROR: 504.  
 9 THE COURT: Ms. Martinez, what is your  
 10 conflict?  
 11 THE JUROR: I'm a single mother with two  
 12 children, and I really can't afford to miss any  
 13 more work. I've already missed two days, today  
 14 and I was here October 5th also.  
 15 THE COURT: How old are the children?  
 16 THE JUROR: Eight and six.  
 17 THE COURT: Who takes care of them when  
 18 you work?  
 19 THE JUROR: Actually right now my mother  
 20 is. She's had to miss work also so that I could  
 21 be here.  
 22 THE COURT: Where do you work?  
 23 THE JUROR: I work at Mandalay Bay.  
 24 THE COURT: What shift do you work?  
 25 THE JUROR: I work in the mornings.

1 administration it will be taken care of because  
 2 there's an agreement between the court system and  
 3 the city that handles that.  
 4 Counsel for the State, do you wish to  
 5 inquire of Ms. Guffey?  
 6 MR. SCHWARTZ: No, your Honor.  
 7 THE COURT: Mr. Schieck.  
 8 BY MR. SCHIECK:  
 9 Q. Does walking that distance does that  
 10 cause you any physical problems?  
 11 A. Yes. I have a very bad hip and a bad  
 12 ankle, and it literally takes me forever to walk  
 13 from there just to get into the courthouse.  
 14 Q. Would that inhibit your ability to  
 15 listen to the testimony from witnesses because you  
 16 were in pain from having to walk that far?  
 17 A. No. Besides I'd be in pain, no.  
 18 Q. Do you take something for the pain?  
 19 A. Yes, I do.  
 20 Q. Would that inhibit your ability to  
 21 listen to witnesses?  
 22 A. I don't know.  
 23 Q. It doesn't make you drowsy or anything  
 24 like that?  
 25 A. No, sir.

1 THE COURT: What time to what time?  
 2 THE JUROR: Six in the morning until two  
 3 in the afternoon.  
 4 THE COURT: Who gets the kids off to  
 5 school?  
 6 THE JUROR: My mom does.  
 7 THE COURT: Now, you said she has to --  
 8 she had to take two days off. What is her  
 9 schedule?  
 10 THE JUROR: She works in the mornings  
 11 also.  
 12 THE COURT: Well, when the both of you  
 13 work, who gets the kids off to school?  
 14 THE JUROR: One day of the week my  
 15 ex-husband does because the kids are with him and  
 16 then the other two days I either have a friend  
 17 that does it or my mom will do it. I really can't  
 18 miss work.  
 19 THE COURT: What time does your mother  
 20 go to work?  
 21 THE JUROR: She works from seven to  
 22 three.  
 23 THE COURT: Do the kids walk to school,  
 24 do they take the bus?  
 25 THE JUROR: They take the bus.

1 THE COURT: And what do you do at  
2 Mandalay Bay.  
3 THE JUROR: I'm a fountain worker.  
4 THE COURT: And did you check with Human  
5 Resources to see if they pay your wages while  
6 you're on jury service?  
7 THE JUROR: They said they would, but  
8 they only pay a percentage. They don't pay the  
9 full amount.  
10 THE COURT: How much do they pay?  
11 THE JUROR: Like \$40 a day.  
12 THE COURT: That's what you get paid as  
13 a juror.  
14 THE JUROR: I make over a hundred a day  
15 if I was at work between my wages and tips.  
16 THE COURT: Mandalay Bay pays you 40 and  
17 we pay you 40, that's 80. You probably ought to  
18 be able to slide by on that.  
19 THE JUROR: Well, yeah.  
20 THE COURT: Thank you for sharing this  
21 information with us. I can't excuse you for that  
22 purpose.  
23 Anybody else over here? Now, let us go  
24 over here. Front row first. Striped shirt, your  
25 badge number?

1 you got out of here by five or ten after five,  
2 could you make it to class on time?  
3 THE JUROR: I can, but my day job I work  
4 as an agent during the day to service my clients.  
5 THE COURT: We don't start until ten or  
6 10:30 in the morning. We always take an hour,  
7 hour and a half for lunch, and if you could make  
8 phone calls during all that time period, would  
9 that be satisfactory?  
10 THE JUROR: It's going to be tough  
11 because I'm the only one in the office, your  
12 Honor.  
13 THE COURT: Can you put a sign on the  
14 door that says you've got to call me on my cell  
15 phone?  
16 THE JUROR: I could lose clients if I  
17 don't return calls if I'm not there.  
18 THE COURT: What kind of insurance do  
19 you sell?  
20 THE JUROR: Auto, home, life.  
21 THE COURT: Are you an independent  
22 agent?  
23 THE JUROR: Independent.  
24 THE COURT: Where's your office located?  
25 THE JUROR: Sahara and Rainbow.

1 THE JUROR: 773, your Honor.  
2 THE COURT: Mr. Elpidio, what is your  
3 conflict, sir?  
4 THE JUROR: I'm sole business owner and  
5 I work day job and a night job.  
6 THE COURT: What type of business are  
7 you in?  
8 THE JUROR: I'm insurance during the day  
9 and I teach at night.  
10 THE COURT: Where do you teach at night?  
11 THE JUROR: At the University of  
12 Phoenix. I teach this week three nights a week  
13 and next week four nights a week.  
14 THE COURT: What time are those classes?  
15 THE JUROR: Six to ten.  
16 THE COURT: Where is the campus for the  
17 University of Phoenix?  
18 THE JUROR: They're all over. Rancho.  
19 THE COURT: Where's the one you have to  
20 teach at this week?  
21 THE JUROR: This week the three sites,  
22 Henderson, Rancho and southwest.  
23 THE COURT: Generally we stop the trial  
24 around 5:00 in the evening. Sometimes it's a  
25 little before, sometimes a little after, and if

1 THE COURT: What are your regular  
2 business hours?  
3 THE JUROR: Eight to six.  
4 THE COURT: It can't be eight to six  
5 because you've got to beat the campuses at 6:00 at  
6 night.  
7 THE JUROR: Normally if I'm not teaching  
8 it would be eight to six, but I leave at five,  
9 5:30, so eight to five.  
10 THE COURT: Do you have anybody that  
11 answers the phone, sir?  
12 THE JUROR: Not right now. Just me.  
13 THE COURT: So you're the only one  
14 that's in the office? Is there a recording on the  
15 phone today that says you're not available, call  
16 tomorrow? What's your recording say?  
17 THE JUROR: I can change the recording  
18 but right now.  
19 THE COURT: What's your number?  
20 Jonathan, take Mr. Elpidio, call his office and  
21 see what the recording says. Go with the bailiff.  
22 Anybody else in the first row? Yes,  
23 ma'am, your badge number?  
24 THE JUROR: 751.  
25 THE COURT: Ms. Kelemen, what is your

1 conflict?  
 2 THE JUROR: I'm a stay-at-home mom, and  
 3 I don't have anyone to take care of my children.  
 4 They're in preschool. They get out at noon. I  
 5 made arrangements to take extended care. They're  
 6 in school Monday, Wednesday and Friday.  
 7 THE COURT: Preschool is morning only?  
 8 THE JUROR: Yeah, eight to noon.  
 9 THE COURT: Counsel, do you wish to  
 10 inquire of Ms. Kelemen?  
 11 MR. SCHWARTZ: No, your Honor.  
 12 THE COURT: Mr. Albregts, Mr. Schieck?  
 13 MR. SCHIECK: Court's indulgence. No  
 14 questions, your Honor.  
 15 THE COURT: Ms. Kelemen, thank you for  
 16 being here. You may be excused. Please go back  
 17 to the jury commission office and tell them you've  
 18 been excused all week.  
 19 Second row. Lady in the white, what's  
 20 your badge number?  
 21 THE JUROR: 808.  
 22 THE COURT: Ms. Connery, what is your  
 23 conflict?  
 24 THE JUROR: I have a medical excuse.  
 25 THE COURT: Hold on for a second and the

1 early in the morning. Work isn't a problem. I  
 2 can take the bus down here. It's not a problem.  
 3 I just can't promise to be on time.  
 4 THE COURT: All right. We are very  
 5 close to the bus center and that will be  
 6 satisfactory.  
 7 Now let's go back to Mr. Elpidio. You  
 8 must have a miracle in your office today because a  
 9 real live person answered your phone.  
 10 THE JUROR: I asked one of the ladies in  
 11 there.  
 12 THE COURT: And it's a Farmers Insurance  
 13 Company, and there's all kinds of people in there  
 14 so you are not excused, and the Court is not  
 15 appreciative of you telling me that you are the  
 16 only one who works there and that nobody is there  
 17 to answer the telephone.  
 18 THE JUROR: I'm an independent, your  
 19 Honor.  
 20 THE COURT: You're not excused.  
 21 Ms. Connery, you are excused. Counsel,  
 22 she has a medical excuse. You may go to the third  
 23 floor of the jury office, tell them you've been  
 24 excused all week, Ms. Connery, so you may be  
 25 excused.

1 bailiff will bring that forward.  
 2 Anybody else in the second row? In the  
 3 green, your badge number?  
 4 THE JUROR: 780.  
 5 THE COURT: Ms. Shaverdian, what is your  
 6 conflict?  
 7 THE JUROR: I don't have a car right  
 8 now. I got a ride today, but I don't know if I  
 9 can get one this whole week. I might have to take  
 10 the bus, and I don't know if I can make it on time  
 11 or if anything happens, your Honor.  
 12 THE COURT: If your husband rides the  
 13 bust to work, you must be close to a bus line?  
 14 THE JUROR: I'm not married.  
 15 THE COURT: Who took the bus today?  
 16 THE JUROR: My boyfriend gave me a ride  
 17 over here because I don't have a car right now,  
 18 and I might have to take the bus this week because  
 19 I don't have anybody to take me all week long.  
 20 THE COURT: So do you have a job?  
 21 THE JUROR: Yeah.  
 22 THE COURT: How do you get to work.  
 23 THE JUROR: They have me on a schedule  
 24 because my mom goes to work six to two so I work  
 25 the same shift. She drops me off a little bit

1 Anybody else in the second row? How  
 2 about the back row? Your badge number?  
 3 THE JUROR: 810.  
 4 THE COURT: Ms. Forsyth, what is your  
 5 conflict?  
 6 THE JUROR: I don't really understand  
 7 English that well.  
 8 THE COURT: How long have you lived in  
 9 the US?  
 10 THE JUROR: About 20-some years.  
 11 THE COURT: And have you worked outside  
 12 of the home?  
 13 THE JUROR: Yes, ma'am.  
 14 THE COURT: Where have you worked?  
 15 THE JUROR: At the Venetian.  
 16 THE COURT: What do you do for the  
 17 Venetian?  
 18 THE JUROR: Dealer.  
 19 THE COURT: Of 21 or craps?  
 20 THE JUROR: Blackjack.  
 21 THE COURT: I appreciate the fact that  
 22 English isn't your first language, but I think you  
 23 have a significant grasp of the language which  
 24 will enable you to serve as a juror.  
 25 Anybody else in the last row? In the

1 blue shirt, your badge number?  
 2 THE JUROR: 811.  
 3 THE COURT: Mr. Connelly, what is your  
 4 conflict?  
 5 THE JUROR: I have a medical appointment  
 6 scheduled on Thursday.  
 7 THE COURT: What time?  
 8 THE JUROR: 11:00 a.m.  
 9 THE COURT: And can that be rescheduled?  
 10 THE JUROR: Probably.  
 11 THE COURT: You don't have any medical  
 12 condition at the moment that would preclude you  
 13 from serving?  
 14 THE JUROR: No. It's more of an  
 15 examination, but it would require anesthesia.  
 16 THE COURT: Well, if you get picked on  
 17 the jury you're probably going to have to  
 18 reschedule that procedure.  
 19 THE JUROR: Okay.  
 20 THE COURT: Anybody else in the back  
 21 row?  
 22 THE JUROR: 830.  
 23 THE COURT: Ms. Storck, what is your  
 24 conflict?  
 25 THE JUROR: I have -- I work a kiosk

1 not, so she is working the sixth day for me until  
 2 my second guy gets in there at one.  
 3 THE COURT: Counsel, do you wish to  
 4 inquire of Ms. Storck?  
 5 MR. SCHWARTZ: No, your Honor.  
 6 MR. SCHIECK: No, your Honor.  
 7 THE COURT: Ms. Storck, thank you for  
 8 being here today, for coming in the other day.  
 9 You may be excused all week. Please go to the  
 10 jury commission office and tell them you've been  
 11 excused all week.  
 12 Anybody else in the back row? Your  
 13 badge number, sir. 832, Edward Harris, what is  
 14 your conflict?  
 15 THE JUROR: I'm self-employed, and I  
 16 have probably 30, 40, 50 clients on my books. I'd  
 17 have to get on the phone, reschedule them. A lot  
 18 of financial debt.  
 19 THE COURT: What do you do for a living,  
 20 sir?  
 21 THE JUROR: I'm a hairdresser.  
 22 THE COURT: Do you have your own shop?  
 23 you work some place?  
 24 THE JUROR: I'm an independent  
 25 contractor.

1 inside of Sam's Club, and we have a mandatory  
 2 meeting on Wednesday starting at two, plus we're  
 3 only -- three-person crew for a seven days work  
 4 week, so if I'm not there they would have to work  
 5 from, like, 9:30 in the morning until 8:30 at  
 6 night.  
 7 THE COURT: And you know the people that  
 8 you work with so you could go and you could be a  
 9 juror here from ten in the morning until five or  
 10 so and you could pick up the 5:30 to 8:30 shift so  
 11 you could spell the people there all day?  
 12 THE JUROR: I guess I could do that.  
 13 THE COURT: Now, the mandatory meeting  
 14 at Sam's --  
 15 THE JUROR: It's a district meeting for  
 16 the store managers. I'm a store kiosk manager and  
 17 my boss is flying in on Wednesday and we have a  
 18 meeting from two until nine at night.  
 19 THE COURT: Who's going to run those  
 20 kiosks from 2:00 p.m. until 8:30 if everybody has  
 21 to meet with the store manager?  
 22 THE JUROR: That is my day off. My  
 23 scheduled day off is Wednesday -- Tuesday and  
 24 Wednesday, and I had my girl come in because I  
 25 didn't know if it was going to be continued or

1 THE COURT: What shop do you work at?  
 2 THE JUROR: Euphoria Salon on Green  
 3 Valley Parkway.  
 4 THE COURT: What hours do you ordinarily  
 5 work?  
 6 THE JUROR: Nine to six.  
 7 THE COURT: What day are you off?  
 8 THE JUROR: I'm off Sunday, Monday.  
 9 THE COURT: And you've got -- if you  
 10 were chosen as a juror, you'd have to  
 11 reschedule --  
 12 THE JUROR: I'd have to get on the  
 13 phone.  
 14 THE COURT: -- heads for the entire  
 15 week. Now, if you missed working at the salon all  
 16 week and got \$40 a day being a juror, would you be  
 17 able to pay your car payment and your house  
 18 payment and your child support and all that stuff?  
 19 THE JUROR: No. That wouldn't even pay  
 20 my lease space at the salon.  
 21 THE COURT: All right. You may be  
 22 excused. Please report downstairs to the jury  
 23 commission office on the third floor. Tell them  
 24 you've been excused all week.  
 25 All right, over here this group first

1 row, yes, ma'am.  
2 THE JUROR: I'm just concerned --  
3 THE COURT: I have to have your number,  
4 please.  
5 THE JUROR: 570.  
6 THE COURT: Rosa Belch?  
7 THE JUROR: Yes, ma'am.  
8 THE COURT: What is your conflict?  
9 THE JUROR: My only conflict is if this  
10 runs past this week. I'm scheduled to go to  
11 Europe on the 9th.  
12 THE COURT: It won't. Your badge  
13 number, ma'am?  
14 THE JUROR: 578.  
15 THE COURT: Ms. Cookson?  
16 THE JUROR: I have stressed out since I  
17 filled out the questionnaire. I cannot be a fair  
18 and impartial juror because I don't believe in an  
19 eye for an eye so I would not be able to come to a  
20 sentence on this case.  
21 THE COURT: Well, we're going to get  
22 into that, what the four possible punishments are,  
23 and I'll tell you what they are now. Maybe your  
24 jury questionnaire already told you. Did it?  
25 MR. ALBREGTS: Yes, ma'am.

1 belief.  
2 THE COURT: Counsel, you may inquire of  
3 Ms. Cookson.  
4 BY MR. SCHWARTZ:  
5 Q. So, ma'am, if you were selected as a  
6 juror in this particular case and it got to the  
7 point where the death penalty was a possible  
8 option, one of four, would you be able to consider  
9 the death penalty?  
10 A. No.  
11 Q. So you automatically push it aside and  
12 just consider the other three the remaining  
13 possible punishments?  
14 A. Right.  
15 Q. Under no circumstances could you  
16 consider the death penalty?  
17 A. No.  
18 MR. SCHWARTZ: Your Honor, I would  
19 challenge for cause.  
20 THE COURT: Mr. Schieck and  
21 Mr. Albregts, do you wish to inquire of  
22 Ms. Cookson?  
23 MR. SCHIECK: No, your Honor.  
24 THE COURT: Ms. Cookson, thank you for  
25 being with us. You may be excused. Please go

1 THE COURT: Then you know because you  
2 filled out the questionnaire, but you probably  
3 filled it out some time ago. There's four  
4 possible punishments for first degree murder:  
5 Life in the Department of Prisons with the  
6 possibility of parole beginning at the end of 20  
7 years plus an equal and consecutive life with  
8 parole beginning at the end of 20 years for the  
9 deadly weapon enhancement; life without the  
10 possibility of parole which simply means that the  
11 defendant would remain for the rest of his natural  
12 life in the prison system; a term of 50 years with  
13 parole eligibility beginning at the end of 20  
14 years plus an equal and consecutive 20 years for  
15 the deadly weapon enhancement, and the death  
16 penalty. Those are the four choices. You say  
17 you're stressed out. Tell me what you mean by  
18 you're stressed out.  
19 THE JUROR: Basically I've thought about  
20 it since I had to call back because I believe --  
21 I'm sure that everybody believes that some cases  
22 do deserve that, but it's not something that I can  
23 personally make a decision on because I have to  
24 live with that in my heart for the rest of my  
25 life, and I won't do it, and that's just my

1 down to the third floor, tell them you can be sent  
2 out on another panel. So if they need you on  
3 another case, they'll send you out today on  
4 another case.  
5 Anybody else in the first row? Your  
6 badge number, sir?  
7 THE JUROR: 585.  
8 THE COURT: And Mr. Adona, what is your  
9 conflict?  
10 THE JUROR: I attend classes on Monday  
11 and Tuesday.  
12 THE COURT: Where do you go to school?  
13 THE JUROR: Community College of  
14 Southern Nevada.  
15 THE COURT: What hours are your classes?  
16 THE JUROR: Six to nine at night.  
17 THE COURT: You go Monday and Tuesday  
18 and it's six to 9 o'clock?  
19 THE DEFENDANT: Yes.  
20 THE COURT: You'll be fine. You'll be  
21 absolutely fine.  
22 Anybody else in the first row? Your  
23 badge number?  
24 THE JUROR: My badge number is 586.  
25 Actually, your Honor, I just need to use the rest

1 room.  
 2 THE COURT: All right. Jonathan,  
 3 Mr. Kimberlin is going to go to the rest room. Go  
 4 out the door, turn left where the walkway goes  
 5 like two buildings and when you get to the next  
 6 building it's on the left-hand side and come back  
 7 when you're finished.  
 8 Yes, your badge number, ma'am?  
 9 THE JUROR: 592.  
 10 THE COURT: Ms. Larry, what is your  
 11 conflict?  
 12 THE JUROR: I'm an ex-felon.  
 13 THE COURT: Well, you know that no  
 14 longer necessarily precludes you from serving as a  
 15 juror. Depending on when you got paroled or  
 16 probation or were released from Parole and  
 17 Probation if you had your civil rights restored to  
 18 you, you now qualify to be a juror. Did you look  
 19 at the paperwork you got when you either were  
 20 released from parole or probation?  
 21 THE JUROR: No.  
 22 THE COURT: How long ago has it been  
 23 that you were released?  
 24 THE JUROR: About a year.  
 25 THE COURT: Jonathan, would you take

1 the dead. There's a famous person with your name  
 2 or infamous. And, Mr. Schieck.  
 3 MR. SCHIECK: No questions, your Honor.  
 4 THE COURT: Mr. Cusimano, thank you,  
 5 sir, for being here. You may be excused. Please  
 6 report downstairs to the third floor, tell them  
 7 you've been excused all week.  
 8 Another hand in the second row. Your  
 9 badge number, ma'am?  
 10 THE JUROR: 640.  
 11 THE COURT: Ms. Williams, what is your  
 12 conflict?  
 13 THE JUROR: It's I teach high school  
 14 English. There's state proficiency exams on  
 15 Wednesday that I am proctoring for.  
 16 THE COURT: Does that mean that on  
 17 Wednesday everybody that's a certain age is going  
 18 to be taking a standardized test in every school  
 19 in the county?  
 20 THE JUROR: No. High school it's either  
 21 juniors -- mainly juniors they're doing the  
 22 writing proficiency exam. That's what I'm  
 23 proctoring.  
 24 THE COURT: Who would teach your regula  
 25 English class if you're going to be proctoring?

1 Ms. Larry back to the office, have her -- were you  
 2 convicted here or some place?  
 3 THE JUROR: Yes, here.  
 4 THE COURT: Explain to Diane that she's  
 5 an ex-felon and we need to know if she was  
 6 released with all of her civil rights restored  
 7 because if you were you qualify to be a juror and  
 8 we don't want to exclude you and not have you in  
 9 here as a potential juror if, in fact, you  
 10 qualify. So please go with the bailiff and he  
 11 will find out. Thank you.  
 12 Anybody else in the first row? Second  
 13 row, yellow shirt, badge number, sir?  
 14 THE JUROR: 635.  
 15 THE COURT: Mr. Cusimano, what is your  
 16 conflict, sir?  
 17 THE JUROR: For health reasons. I have  
 18 spinal stenosis and I have difficulty walking from  
 19 the parking lot to here, and I'm scheduled for the  
 20 surgeon to review it on Tuesday, the 7th, to see  
 21 if I need back surgery.  
 22 THE COURT: Counsel, do you wish to  
 23 inquire of Mr. Joseph Cusimano?  
 24 MR. SCHWARTZ: No, your Honor.  
 25 THE COURT: Who has returned to us from

1 THE JUROR: They reschedule us all  
 2 around.  
 3 THE COURT: Somebody is taking your  
 4 class?  
 5 THE JUROR: I haven't seen the schedule.  
 6 She wants me proctoring for the exams so I assume  
 7 it's during my prep time.  
 8 THE COURT: When are your report cards  
 9 due for this quarter?  
 10 THE JUROR: I've already entered grades  
 11 last Thursday. Tomorrow we have to verify with  
 12 all the kids and make sure they're in accurately.  
 13 THE COURT: All right. You may be  
 14 excused. I don't find that a substitute teacher  
 15 would be sufficient or could do what's necessary  
 16 for you to do in the next couple of days. Please  
 17 go downstairs, tell them in the jury commission  
 18 office you've been excused all week.  
 19 Last row, one hand. Your badge number?  
 20 THE JUROR: 700.  
 21 THE COURT: Ms. Houghton, what is your  
 22 conflict?  
 23 THE JUROR: I do payroll for food and  
 24 beverage for 300 employees, and I have to turn  
 25 payroll in tomorrow.

1 THE COURT: What hotel or restaurant do  
 2 you work for?  
 3 THE JUROR: Tuscany Casino.  
 4 THE COURT: And if you were in a car  
 5 accident and you were in the hospital today and  
 6 tomorrow, who would do payroll?  
 7 THE JUROR: I have no idea. Everybody  
 8 has their own department, and I do food and  
 9 beverage so I'm the only one who does food and  
 10 beverage.  
 11 THE COURT: So somebody who does payroll  
 12 for a different department would have to work a  
 13 second shift and get your people paid, correct?  
 14 THE JUROR: Probably.  
 15 THE COURT: I know it's going to put --  
 16 if you're chosen it's going to put your casino and  
 17 especially the F and B people at a disadvantage,  
 18 but I can't excuse you for that purpose.  
 19 THE JUROR: Also I have a sitter for my  
 20 daughter. My sister usually watches her, but  
 21 she's in Arizona.  
 22 THE COURT: What's your work hours?  
 23 THE DEFENDANT: Nine to five, eight to  
 24 four.  
 25 THE COURT: What days do you work?

1 THE JUROR: Monday through Friday.  
 2 THE COURT: You've got to do payroll,  
 3 but you can't do payroll because of your child has  
 4 to be taken care of?  
 5 THE JUROR: Not only do I do payroll,  
 6 but the other thing is I don't have a baby-sitter  
 7 for my daughter. Today my mother watched her but  
 8 she's --  
 9 THE COURT: So usually you take your  
 10 child to work with you?  
 11 THE JUROR: No, she goes to school.  
 12 THE COURT: And how old is your  
 13 daughter?  
 14 THE JUROR: She's five.  
 15 THE COURT: So what are her school  
 16 hours?  
 17 THE JUROR: She goes from 9:00 until  
 18 3:00.  
 19 THE COURT: So who usually picks her up  
 20 at 3:20?  
 21 THE JUROR: My sister.  
 22 THE COURT: And your sister's in Arizona  
 23 this week?  
 24 THE JUROR: Yes.  
 25 THE COURT: Who's going to pick her up

1 every day this week?  
 2 THE JUROR: I will.  
 3 THE COURT: You're going to take her to  
 4 work with you?  
 5 THE JUROR: No, I'll have to go in  
 6 early.  
 7 THE COURT: Do they have Safekey at the  
 8 school that your child attends?  
 9 THE JUROR: They do.  
 10 THE COURT: So your child could stay at  
 11 Safekey for this week until six?  
 12 THE JUROR: I really can't afford it.  
 13 THE COURT: How much does it cost for  
 14 Safekey, \$15 a week?  
 15 THE JUROR: Seven dollars a day, so 35  
 16 bucks a week.  
 17 THE COURT: Counsel, do you wish to  
 18 inquire of Ms. Houghton?  
 19 MR. SCHWARTZ: No, your Honor.  
 20 THE COURT: Mr. Schieck.  
 21 MR. SCHIECK: No, your Honor.  
 22 THE COURT: Ms. Houghton, you may be  
 23 excused. Please report downstairs to the third  
 24 floor, tell them you've been excused all week due  
 25 to your day care situation.

1 What I would like to do is fill the box  
 2 in here and make sure we've got you in more or  
 3 less order. So Rashad Keenan, are you back there?  
 4 THE JUROR: No.  
 5 THE COURT: Is 482, Rashad Keenan here  
 6 There was too many people who didn't show up so we  
 7 don't know until I call them by know whether they  
 8 showed up or didn't show up. So is juror 482,  
 9 Rashad Keenan, are you here? I guess that would  
 10 be a big no.  
 11 MR. SCHIECK: Can we cross that off on  
 12 the list permanently?  
 13 THE COURT: Yes, he'll be crossed off  
 14 permanently. Are you Keith Nicholson?  
 15 THE JUROR: Yes, Your Honor.  
 16 THE COURT: You're exactly where you're  
 17 supposed to be. And Keith Nicholson would be  
 18 No. 1. Now, Nancy Norander, if you slide over I'd  
 19 appreciate it. You'll be No. 2. Steven Quenzer,  
 20 you slide over, you're No. 3. Jack Greenberg.  
 21 Obviously you're not Jack Greenberg. Is Jack  
 22 Greenberg here, 495, any place?  
 23 MR. ALBREGTS: That's one that was on  
 24 the list that you previously.  
 25 THE COURT: So cross Greenberg off.

1 496, Janet Cunningham?  
 2 THE JUROR: Yes.  
 3 THE COURT: Please slide over and you're  
 4 No. 4. 500, Linda Amadio. That's No. 5. 501,  
 5 Maria Gonzales, you're No. 6. 504, Shannon  
 6 Martinez, if you'd please go to the top row,  
 7 you're No. 7. 510, Robert Hoving. Is 510 here?  
 8 So cross off 510. 512, Janet Jones, please go to  
 9 the top row. 530, Lourdes Oliva; 532, Don  
 10 McIntosh; 544, Connie Kaczmarek; 545, Elena  
 11 Villanueva; 555, Leroy Thompson. Now, 559, Jimmy  
 12 Ross, are you here? Cross him off. 570, Rosa we  
 13 know you're here. You get the next seat. 573,  
 14 Desiree Payne. 573, Desiree Payne cross her off.  
 15 575, Maria Arzate, cross her off. 580, Laurie  
 16 Rocchio, if you'd please come forward and take the  
 17 next empty seat up there. That would be No. 15.  
 18 No. 584, Carol Fisk; Philip Adona, you are next.  
 19 You get to go up and take the next empty seat.  
 20 Ms. Larry, here's the story because  
 21 you've got to know this. This is really involved.  
 22 You were honorably discharged and you are restored  
 23 your civil rights to vote, so you can vote and you  
 24 can serve in a civil action as a juror, but you've  
 25 got to wait until April of 2010, six years, to

1 persons to be with us as our jurors and alternate  
 2 jurors, to comply with our rules of choosing a  
 3 jury we have to qualify 32 people. So I've got 16  
 4 up here, and we'll pick another 16 after we ask  
 5 these 16 questions. You're back at a quarter to  
 6 two. The rest of you are back at 3:00.  
 7 THE JUROR: Your Honor, we report to the  
 8 courtroom?  
 9 THE COURT: Yes, right here.  
 10 (Whereupon, the jury retired  
 11 from the courtroom.)  
 12 THE COURT: The record will reflect that  
 13 the jury venire has left the courtroom.  
 14 MR. SCHIECK: I am sure your Honor read  
 15 the newspaper over the weekend.  
 16 THE COURT: I was gone. I didn't.  
 17 MR. SCHIECK: Underrepresentation of  
 18 minorities on our jury panels. By my count there  
 19 were two African-American persons in the entire  
 20 panel, one of which turned out to be an ex-felon  
 21 and is not eligible and one gentleman that  
 22 remains.  
 23 THE COURT: By my count there was three,  
 24 and if you want to know who they are I'll tell you  
 25 who they are. Philip Adona who's No. 16 just came

1 serve as a juror in a criminal action. So in 2010  
 2 you're clear for criminal trials and you're okay  
 3 as a civil juror, so you need to go to the jury  
 4 commission office on the third floor, tell them  
 5 that you have to be out on a civil panel only not  
 6 a criminal panel and they'll tell you if they have  
 7 a civil trial or not. You can take them this.  
 8 Give this to the lady or gentleman down in the  
 9 jury office and if they have a civil panel they  
 10 can send you out on.  
 11 MR. ALBREGTS: She's No. 592; is that  
 12 right?  
 13 THE COURT: Yes. Okay. Now, it's past  
 14 lunch and we've got kind of a late start so what  
 15 we're going to do now is those of you who we do  
 16 not have seated here we're going to let you be at  
 17 lunch until -- we're going to be back at those of  
 18 you who are up here you need to remember where  
 19 you're sitting. It's 20 minutes to one. We're  
 20 going to be back at quarter to two, so you're  
 21 excused until a quarter to two, and those of you  
 22 who are out here why don't you come back at three.  
 23 All of you out here at three. The reason I have  
 24 to have you come back is we have to qualify 32  
 25 jurors. Even though we're only going to choose 14

1 up here.  
 2 MR. SCHIECK: I thought he was Hispanic.  
 3 MR. ALBREGTS: He's Hispanic, Judge.  
 4 THE COURT: Well, you know, when you  
 5 guys can tell me by eyeball without some kind of  
 6 genetic test what the genetic makeup of our jury  
 7 panel is, then I think you should give up your day  
 8 jobs and take that job to make those  
 9 determinations.  
 10 MR. ALBREGTS: Can we inquire him what  
 11 we think his race is?  
 12 THE COURT: You certainly may. There's  
 13 another one here who sits over here, and I can't  
 14 remember what his name is, but I thought I marked  
 15 him. We didn't get to him yet. Plus this is only  
 16 half the panel. There's another 60 of them --  
 17 there's another 40 of them in jury commission  
 18 office. We can only seat so many in here so.  
 19 MR. SCHIECK: As I indicated, your  
 20 Honor, I'm making a record for future purposes  
 21 that if at some point some court, usually the  
 22 Ninth Circuit, decides that the selection process  
 23 in Clark County is discriminatory and is not a  
 24 cross-section of society, that I preserved this  
 25 for Mr. Thomas. I didn't expect you to rule in my

1 favor on this, but I want to make a record.

2 THE COURT: I would like the record to  
3 be accurate. Sixty people came in here. By my  
4 count, three of them are either obviously or  
5 potentially black. Our community is, what,  
6 9 percent black, which 9 percent of six would be  
7 five people. However, that is not a random  
8 selection. Random means that you have all of your  
9 9 percent of black people in the community that  
10 are in the jury base. A random jury could pick  
11 100 percent black people, or a random jury could  
12 pick 100 percent white people. Randomness has  
13 nothing to do with -- random is not equal and it's  
14 my understanding that the law requires that jurors  
15 be chosen randomly from the community, not equally  
16 from the community. Now, if the statute changes  
17 and says that we will have equal representation of  
18 all ethnic groups in the community, then the jury  
19 selection process will have to be changed. But I  
20 also questioned -- yes, I did read that article.  
21 I also questioned that the 24 percent of our  
22 community who are Hispanic qualify to be jurors.  
23 I would suggest that a large percentage of our  
24 Hispanic population does not qualify to be a juror  
25 because they are not citizens.

1 MR. SCHIECK: That very well could be,  
2 your Honor.

3 THE COURT: So when we have newspapers  
4 that write dangerous articles using dangerous  
5 figures, we could end up with dangerous decisions  
6 made by appellate courts who do not have the  
7 information that is necessary to make an  
8 appropriate decision.

9 Thank you. We are in recess until  
10 quarter to two.

11 (Whereupon, a recess was taken.)

12 THE COURT: Welcome back to continuation  
13 of trial in the State of Nevada versus Marlo  
14 Thomas. The record will reflect the presence of  
15 the attorneys and counsel, all officers of the  
16 court and the 16 members of the jury venire.

17 Counsel for the State, you may begin  
18 your questioning.

19 BY MR. SCHWARTZ:

20 Q. Good afternoon, ladies and gentlemen.  
21 I'll go by my questionnaire, and I'll question you  
22 individually if that's okay with the Court.

23 THE COURT: If you have a question  
24 written on your questionnaire for one of those  
25 jurors you can. If there's no questions written

1 on the front of your questionnaire, I expect you  
2 not to ask them any questions.

3 MR. SCHWARTZ: Thank you, your Honor.

4 BY MR. SCHWARTZ:

5 Q. Mr. Nicholson, how are you?

6 A. Pretty good.

7 Q. Sir, if you are selected as a juror at  
8 this penalty phase and you deliberated during the  
9 first phase and at that time you're going to be  
10 asked whether or not the death penalty is even  
11 applicable, whether you can consider it. And  
12 let's say the jury says you can consider it, and  
13 we come back and there's a second phase, fairly  
14 short. Maybe some witnesses will testify.  
15 Perhaps you'd be instructed on the law and counsel  
16 can make arguments, closing arguments to you. So  
17 if you're at that second phase and all four  
18 punishments are available to you, term of years,  
19 life in prison with the possibility of parole,  
20 life in prison without the possibility of parole  
21 and the imposition of the death penalty, if you  
22 felt in this particular case the death penalty was  
23 appropriate, could you vote for the death penalty  
24 realizing you'll be sentencing this gentleman to  
25 death?

1 A. Yes, sir.

2 Q. Have you ever thought about the death  
3 penalty prior to filling out the questionnaire?

4 A. In certain cases like, for instance, the  
5 Oklahoma City bombing.

6 Q. And if you were a legislator, do you  
7 feel -- in the state of Nevada do you feel that  
8 you would vote to at least have the death penalty  
9 as a possible option?

10 A. Yes, sir.

11 Q. Thank you very much. Ms. Cunningham,  
12 hi, how are you. Trying to see if I have  
13 everybody down here in the right order.

14 On the questionnaire -- and I apologize  
15 if any of these questions appear to be personal.  
16 It's certainly not my intention, but we can't  
17 question you once you're selected. It's over. We  
18 can't ask you any questions, so we have to ask  
19 whatever questions we have right now.

20 You indicated that in one of the areas  
21 on the questionnaire it talks about whether you or  
22 any members of your family had any negative  
23 contacts with law enforcement, perhaps an arrest  
24 or citation; do you recall that?

25 A. Yeah, I remember the question.

1 Q. Do you remember saying to the effect  
2 that a stepson having been convicted of something?  
3 A. I've got a stepson who is serving time  
4 in Lovelock, and I've got his brother who's a cop.  
5 Q. With regard to the stepson who's serving  
6 time, were you familiar with the facts and  
7 circumstances of that particular case?  
8 A. Yes, I was.  
9 Q. Do you feel he was treated fairly by the  
10 system as we call it?  
11 A. He is serving time for what he did, yes.  
12 Q. Was he prosecuted by the Clark County  
13 District Attorney's office, if you know?  
14 A. Yes.  
15 Q. Is there anything about that situation  
16 that would make it difficult for you to be  
17 anything but fair and impartial to both sides?  
18 A. No.  
19 Q. Thank you.  
20 Ms. Amadio, on your questionnaire you  
21 indicate is it you who worked for a law firm or  
22 someone you know?  
23 A. No, I do.  
24 Q. What law firm is that?  
25 A. Greenburg Taurig.

1 indicate yes but you didn't elaborate.  
2 A. There was a situation where it was an  
3 emergency situation. My husband was rushing an  
4 animal to the hospital and a police officer who  
5 was in an unmarked car and not in uniform tried to  
6 force him over because he was going fast. He was  
7 trying to get the pet to the hospital to live and  
8 that ended up going to court. He was exonerated  
9 totally, but just the whole process of that was  
10 abhorrent.  
11 Q. Were you with him at the time this  
12 happened?  
13 A. No, I was not.  
14 Q. Based upon that experience, do you have  
15 any negative feelings toward law enforcement?  
16 A. Oh, not at all. That situation was.  
17 Q. That incident wouldn't affect your  
18 judgment in this particular case?  
19 A. No.  
20 Q. And if you were selected as a juror and  
21 you reach that second stage where four possible  
22 punishments were available to you, one being the  
23 death penalty, and you felt in this particular  
24 case the imposition of the death penalty was  
25 warranted, could you vote for the death penalty?

1 Q. Do they do any criminal law?  
2 A. No.  
3 Q. Do you ever discuss criminal matters  
4 with them?  
5 A. No.  
6 Q. So is there anything about your  
7 connection with that particular law firm that  
8 would make it difficult for you to be anything but  
9 fair and impartial to both sides?  
10 A. No.  
11 Q. You indicated that the criminal justice  
12 system needs some tweaking; is that correct?  
13 A. Yes.  
14 Q. What do you mean by tweaking?  
15 A. I feel that laws could be legislated to  
16 be a little more fair in judgments and also to  
17 expedite the system. I don't see why people need  
18 to sit in jail for years and years and years.  
19 Q. If you're on the Nevada legislature,  
20 would you vote in favor of having the death  
21 penalty as a possible punishment?  
22 A. Yes.  
23 Q. You indicated on question No. 25 which  
24 talks about any negative contacts friends or  
25 family may have had with law enforcement, you

1 A. Yes.  
2 Q. Thank you. Ms. Martinez, hi. What are  
3 your feelings toward the death penalty?  
4 A. I feel that it's necessary in some  
5 circumstances and some others no.  
6 Q. On Question 25 which deals with negative  
7 contacts with law enforcement, a family -- friends  
8 or a close friend or family member or close  
9 friends of having been charged with a crime, you  
10 say yes but you didn't elaborate. Who was  
11 charged?  
12 A. My brother.  
13 Q. And what crime was that?  
14 A. It was a sexual offense.  
15 Q. Was that here in Clark County?  
16 A. Yes.  
17 Q. Did your brother go to trial?  
18 A. No, he didn't go to trial. He served in  
19 Lovelock.  
20 Q. So he ultimately entered a plea?  
21 A. Mm-hmm.  
22 Q. Anything about that experience that  
23 would make it difficult for you to participate in  
24 this particular sentencing phase?  
25 A. No.

1 Q. So the fact that he was prosecuted  
2 perhaps by my office you wouldn't hold that  
3 against me?  
4 A. No.  
5 Q. If you were selected as a juror and you  
6 were given four options, one being the death  
7 penalty, if you felt it appropriate, could you  
8 sentence the defendant to death?  
9 A. Yes.  
10 Q. Could you also consider the other three  
11 possible forms of sentence?  
12 A. Yes.  
13 Q. Would you consider all four forms before  
14 making at least in your own mind a decision?  
15 A. Yes.  
16 Q. Do you feel it would be important if you  
17 were selected as a juror to discuss with other  
18 members of the jury what took place during this  
19 penalty phase?  
20 A. Yes.  
21 Q. So you'd have an open mind?  
22 A. Yes.  
23 Q. Thank you. Ms. Jones, hi.  
24 A. Hi.  
25 Q. Regarding the question on the death

1 County?  
2 A. Yes, sir.  
3 Q. Is there anything about those two  
4 incidents that would make it difficult for you to  
5 participate as a juror?  
6 A. No.  
7 Q. If you're selected as a juror in this  
8 particular case, would you be fair and impartial  
9 to both the State and the defense?  
10 A. Yes.  
11 Q. Do you believe people should be held  
12 accountable for their actions?  
13 A. Absolutely.  
14 Q. Ms. Oliva.  
15 A. Good evening.  
16 Q. How are you. Is there anything about  
17 the facts and circumstances of this particular  
18 case that would make it difficult for you to serve  
19 as a fair and impartial juror?  
20 A. It's very difficult for me to give my  
21 opinion.  
22 Q. Why is that?  
23 A. Because it's my conscience and this  
24 people is a convict person and if I decide for him  
25 to kill it's -- I don't want to be involved.

1 penalty, I believe -- and correct me if I'm  
2 wrong -- but I believe you indicated that you felt  
3 it was appropriate for serial killers or child  
4 killers?  
5 A. Yes, that's what came to mind. I would  
6 have to feel this person was not someone who  
7 would -- someone that committed a murder  
8 intentionally and that there was not sufficient  
9 remorse or chance of rehabilitation.  
10 Q. So in other words, you're kind of  
11 open-minded as to who could ultimately be  
12 sentenced or who deserves to be sentenced to the  
13 death penalty? You're not limiting to just these  
14 two categories?  
15 A. No, but those are examples of people.  
16 Q. On Question No. 25 which deals with  
17 negative contacts that you or members of your  
18 family or friends may have had with law  
19 enforcement, you indicate also yes, but there's no  
20 explanation. Could I ask who was involved?  
21 A. Both my brother and my stepson. My  
22 brother was convicted in 1979 for multiple counts  
23 of sexual assault, and my stepson was put on  
24 probation for sexual offense as well.  
25 Q. Were both of those occur here in Clark

1 Q. I don't understand. Can you repeat  
2 that? You don't want?  
3 A. I'm not --  
4 THE COURT: Mr. Schwartz, we have to  
5 hear, and the court reporter has got to make a  
6 record, and if you stand in front of her we can't  
7 see.  
8 MR. SCHWARTZ: I can't hear.  
9 THE COURT: I know. So, Ms. Oliva,  
10 please tell us your last couple of answers because  
11 we didn't catch them.  
12 BY MR. SCHWARTZ:  
13 Q. Speak out loud so the court reporter can  
14 hear you.  
15 A. Can you repeat the question?  
16 Q. Sure. You have said that you were  
17 uncomfortable about sitting here?  
18 A. Mm-hmm.  
19 Q. Why?  
20 A. Well, because I feel like nervous and I  
21 want to say something, but it's hard for me to  
22 say, but I don't believe in killing person. It's  
23 my belief.  
24 Q. So your religious beliefs tell you that  
25 you do not believe in the death penalty?

1 A. Yeah.  
 2 Q. Is that correct?  
 3 A. Yes.  
 4 Q. If you were selected as a juror in this  
 5 case, could you consider sentencing this defendant  
 6 to death? Would you at least consider it along  
 7 with the other possible punishments?  
 8 A. I would not consider the death, but I  
 9 will give -- the other option.  
 10 Q. You'll give the -- one of the other  
 11 three options but not the death penalty?  
 12 A. Yes.  
 13 MR. SCHWARTZ: Your Honor, I would  
 14 challenge for cause.  
 15 THE COURT: Counsel, do you wish to  
 16 inquire of Ms. Oliva?  
 17 MR. ALBREGTS: Yeah. Can we do it  
 18 during the course of voir dire or do you want it  
 19 done now?  
 20 THE COURT: Do it now. There's been a  
 21 challenge for cause and I need to rule on that and  
 22 I won't do that until after you've questioned her.  
 23 MR. ALBREGTS: Okay. We just don't have  
 24 anybody else to bring up is the other issue.  
 25 THE COURT: That doesn't make any

1 difference.  
 2 BY MR. ALBREGTS:  
 3 Q. Ms. Oliva, at the end of the case and at  
 4 the end of both sections, because we've heard  
 5 about two different sections, but the judge is  
 6 going to give you the law of the state of Nevada,  
 7 and as a juror you're going to be sworn to uphold  
 8 the law of the state of Nevada, and the State that  
 9 we live in allows for a jury to consider the death  
 10 penalty in a case like this, and so the judge will  
 11 tell you that that's the law. Are you willing to  
 12 follow the law if you're selected as a juror or  
 13 are your religious convictions just so strong?  
 14 A. I don't believe in the death penalty  
 15 so -- I cannot be part of it. I don't want to be  
 16 part of it.  
 17 MR. ALBREGTS: I don't see any need to  
 18 inquire further. We'll leave it to the Court.  
 19 THE COURT: Thank you, Ms. Oliva. You  
 20 may be excused. Please report down to the third  
 21 floor and tell them that you've been excused in  
 22 Department XV. If they need you in another case,  
 23 they'll send you out in another case.  
 24 You may continue, Mr. Schwartz.  
 25 MR. SCHWARTZ: Thank you.

1 BY MR. SCHWARTZ:  
 2 Q. Mr. McIntosh, sir, if you're selected as  
 3 a juror in this particular case and you reach that  
 4 second stage where you and your fellow jurors  
 5 agreed or determined that the death penalty was  
 6 appropriate, if you felt in this particular case  
 7 that it was warranted, could you yourself sentence  
 8 this defendant to death?  
 9 A. Yes.  
 10 Q. You feel people should be accountable  
 11 for their actions, sir?  
 12 A. Yes, I do.  
 13 Q. Is there anything about the questions  
 14 that I've asked, what the judge asked earlier this  
 15 morning, that you feel we need to know about you  
 16 regarding your ability to be a fair and impartial  
 17 juror?  
 18 A. No. I think I can be a fair juror.  
 19 Q. Thank you.  
 20 Ms. Kaczmarek, regarding the  
 21 questionnaire that you filled out, I made notes on  
 22 the top so if I'm misstating anything, please  
 23 correct me, but I got the feeling from reading the  
 24 questionnaire that you kind of think there's a  
 25 need for the death penalty, but you don't like the

1 death penalty; is that fair?  
 2 A. Yeah, that's fair.  
 3 Q. It's one thing for us to intellectually  
 4 talk about the death penalty and capital  
 5 punishment and how some people deserve it, some  
 6 people don't, but it's quite another thing when  
 7 you're actually sitting in the position where  
 8 you're going to make that determination.  
 9 A. Right.  
 10 Q. Do you feel if you were selected as a  
 11 juror and you felt that in this particular case  
 12 the death penalty was appropriate, could you as a  
 13 member of that jury sentence this defendant to  
 14 death?  
 15 A. I don't know.  
 16 Q. That's fair.  
 17 A. I don't know.  
 18 Q. You understand that there could be  
 19 either three or four different possible forms of  
 20 punishment depending on what the jury does in  
 21 their first deliberations. Would you consider all  
 22 four possible punishments, or are you going to  
 23 automatically throw out the death penalty because  
 24 it's too hard to deal with?  
 25 A. No. You have to get the bigger picture.

1 Q. Do you believe people should be  
2 accountable for their actions?  
3 A. Most definitely.  
4 Q. Is there anything about this particular  
5 situation that would make it difficult for you to  
6 be anything but fair and impartial to both sides?  
7 A. Having to choose whether or not this  
8 person is put to death would be very difficult.  
9 Q. It should never be easy. It should be  
10 difficult for everybody.  
11 A. Mm-hmm.  
12 Q. But do you feel that you have the  
13 ability to do that should you think it's  
14 warranted, or do you know sitting here right now  
15 that there's no way in the world that I can do it?  
16 A. It's making me uncomfortable to  
17 contemplate it, but I think possibly yes.  
18 Q. Thank you.  
19 A. You're welcome.  
20 Q. Ms. Belch, you indicated on Question 25  
21 having -- knowing somebody, either family member  
22 or friends, who has either been arrested or  
23 charged with a crime; is that correct?  
24 A. Yes.  
25 Q. What are the facts or circumstances of

1 Q. Could you say that you won't do it no  
2 matter what?  
3 A. Probably I wouldn't do it, probably  
4 wouldn't.  
5 Q. Is that based on your own just personal  
6 feelings or religious background?  
7 A. A little bit of that. Also just knowing  
8 that I was part of his sentence.  
9 Q. Being sentenced to death?  
10 A. Yes.  
11 Q. So if you're selected as a juror and at  
12 the end of the penalty phase the Court instructed  
13 you that there are four possible forms of  
14 punishment, life in prison with parole, life in  
15 prison without parole, a term of years with parole  
16 eligibility somewhere down the road or the death  
17 penalty, you would not at all consider the death  
18 penalty?  
19 A. No, I would have a problem.  
20 Q. We'd all have problems.  
21 A. I know, but I can honestly say that I  
22 would not consider it.  
23 MR. SCHWARTZ: I challenge for cause,  
24 your Honor.  
25 THE COURT: Counsel, do you wish to

1 that particular situation?  
2 A. My son. I have a son that has problems  
3 most of his life. He was in the juvenile system  
4 and he spent a year in Indian Springs when he was  
5 18, and he's 29 now and he's in Clark County  
6 Detention waiting for sentencing on drug charge.  
7 Q. Being in the Clark County Detention  
8 Center in all probability he's being prosecuted by  
9 my office?  
10 A. Yes, he is.  
11 Q. Is there anything about that situation  
12 that would make it difficult for you to be  
13 anything but fair to both parties?  
14 A. No.  
15 Q. Do you feel in the appropriate case if  
16 you felt the evidence justified it you could  
17 return with a sentence of death?  
18 A. If it was appropriate, yes.  
19 Q. Ms. Rocchio, is there anything about  
20 this particular situation being a prospective  
21 juror on a penalty phase of a trial that makes it  
22 difficult for you to serve?  
23 A. Well, having come this far, I can't say  
24 I could actually sentence this person to death. I  
25 can't honestly say I could do it.

1 inquire of Ms. Rocchio?  
2 MR. ALBREGTS: Yeah, just real briefly.  
3 THE COURT: You may.  
4 BY MR. ALBREGTS:  
5 Q. Ms. Rocchio, do you remember vaguely at  
6 least the questionnaire that you filled out?  
7 A. Yes.  
8 Q. And on it I think you put in there when  
9 we asked about your opinion on the death penalty  
10 that you would consider it in certain  
11 circumstances?  
12 A. Mm-hmm.  
13 Q. We need a yes for the lady in purple  
14 writing all this down.  
15 A. Yes.  
16 Q. What has changed since then?  
17 A. It's just like anything else. It's easy  
18 to put something down and then when you're  
19 actually called on it, you feel a little different  
20 when you see the person. You just kind of change  
21 the way. I guess it's easy to say yes, but then  
22 when you're called on it then.  
23 Q. And you're sitting in the box?  
24 A. Yeah.  
25 Q. And you see a man?

1 A. That's just me. That's just my  
2 personality. I have two children. I'm a  
3 compassionate person. I guess I can say that I  
4 wouldn't want to be one of the people that  
5 sentences him if it came to that.  
6 Q. Is there anything you think here that  
7 would happen or we could talk about that might  
8 change that opinion so that we can get a  
9 cross-section of the community to sit here and  
10 consider this?  
11 A. No.  
12 Q. Thanks.  
13 MR. ALBREGTS: Leave it to the Court,  
14 Judge.  
15 THE COURT: All right. Ms. Rocchio, if  
16 you are convinced that there's no way that you  
17 would consider the death penalty, then, of course,  
18 I will excuse you. And I do appreciate the fact  
19 that when you're talking in the abstract it's much  
20 easier to say yes, I believe in capital  
21 punishment, yes, I think it's appropriate, but  
22 when it gets right down to the nitty gritty you're  
23 looking at somebody and you're having to decide,  
24 then sometimes the abstract goes out the window  
25 because it's now personal. So the real question

1 degree murder, two separate individuals have been  
2 killed. On page -- Question 24 the question asked  
3 what are your opinions or feelings about the  
4 criminal justice system and how it works and you  
5 wrote no comment. I don't have any quarrel with  
6 that. I'm just curious is there a reason you  
7 didn't feel you needed to say anything or afraid  
8 we'd be offended by what you had to say?  
9 A. Yes. This whole thing sentencing  
10 sometimes I feel that I shouldn't put the  
11 person -- I mean sentence that person -- it just  
12 depends on the evidence but.  
13 Q. Go ahead.  
14 A. I'm just nervous right now.  
15 Q. That's fine. Everybody is nervous.  
16 That's good. You'll get over it and you'll be  
17 fine. If you were selected and you felt in this  
18 particular case a sentence of death was the right  
19 thing or the appropriate thing to do, could you do  
20 that?  
21 A. I'd consider it, with the evidence.  
22 Q. Certainly the State of Nevada is not  
23 going to be asking you to do anything without  
24 supplying you with evidence. Remember that.  
25 You're going to have several days of testimony.

1 is is could you consider it? The law never ever  
2 requires any jury to sentence anybody to death,  
3 but to serve on a panel like this one you have to  
4 be able to consider it, and in the appropriate  
5 case you felt it was the appropriate case you do  
6 have to be able to go ahead and vote that way.  
7 THE DEFENDANT: Right.  
8 THE COURT: So can you or can't you?  
9 THE DEFENDANT: No.  
10 THE COURT: Then you may be excused.  
11 Please go down to the jury commission office on  
12 the third floor. Tell them you've been excused up  
13 here in XV and you're available to go out on any  
14 other type of case.  
15 THE JUROR: Thank you.  
16 BY MR. SCHWARTZ:  
17 Q. Ms. Villanueva, you've sat on a prior  
18 criminal jury; is that correct?  
19 A. Yes.  
20 Q. As the judge mentioned earlier, this is  
21 a little bit different. Your responsibility as  
22 jurors is not to determine the guilt or innocence  
23 of an individual. That's been determined by  
24 another jury, okay? So you have to determine the  
25 appropriate punishment for two counts of first

1 You're going to have to make a decision based  
2 solely upon the evidence, not what I say or what  
3 other counsel say. If you were on the legislature  
4 in the state of Nevada, do you feel that you would  
5 want to have the death penalty?  
6 A. I'd consider it.  
7 Q. You feel that people should be held  
8 accountable for their actions?  
9 A. Yes.  
10 Q. Ms. Norander, is there anything about  
11 the facts and circumstances of this particular  
12 case what you've heard so far, the questionnaire,  
13 what the judge has said, what any of us have said  
14 in court, your fellow jurors, that would make it  
15 difficult for you to participate as a juror in  
16 this particular case?  
17 A. No, sir.  
18 Q. Do you feel that people should be held  
19 accountable for their actions?  
20 A. Absolutely.  
21 Q. And do I have your assurance that you  
22 won't make a decision with regard to the  
23 appropriate punishment until you've heard all the  
24 evidence?  
25 A. Absolutely.

1 Q. Ms. Gonzales, is there anything about  
2 the facts, circumstances as you know them right  
3 now of this particular case that would make it  
4 difficult for you to serve? I understand you have  
5 your work situation, but other than that is there  
6 anything that would keep you from being fair and  
7 impartial to both sides?  
8 A. Well, our peers have already convicted  
9 him of two counts so I've already formed an  
10 opinion as to where I'm going to go with this.  
11 Q. You're going to -- it's kind of unusual  
12 but it happens where the jury sentencing is not  
13 the jury that actually convicts, but as the judge  
14 told you, several years went by and then our  
15 Supreme Court found some type of irregularity in  
16 the sentencing so they asked that a new sentencing  
17 be done. We can't try and find the jurors who  
18 convicted the defendant six, seven, eight years  
19 ago, so under our statutes we impanel a new jury  
20 and that's what we're doing today. You'll get  
21 some evidence about the guilt phase even though  
22 that's been established so you have something to  
23 work with and then you'll get other evidence based  
24 upon certain rulings that the Court makes and both  
25 sides hope that you get a complete picture of what

1 a first degree murder, doesn't even necessarily  
2 mean they're eligible for the death penalty.  
3 That's a separate finding that the jury is going  
4 to have to make. So all murderers are not  
5 eligible for the death penalty in our state. My  
6 read on what you're saying is -- are you saying  
7 you'd just consider death or just life without and  
8 nothing else? You wouldn't even consider life  
9 with the possibility of parole?  
10 A. I couldn't consider that.  
11 Q. Mr. Thompson, how are you, sir?  
12 A. I'm fine.  
13 Q. Is there anything about the facts and  
14 circumstances of this case that would make it  
15 difficult for you to participate as a juror at the  
16 sentencing phase?  
17 A. No.  
18 Q. Do you feel that people should be held  
19 accountable for their actions?  
20 A. Yes.  
21 Q. Mr. Adona, how are you, sir?  
22 A. All right. How are you?  
23 Q. Good. Kind of hard keeping all these  
24 things together. If you were a legislator up in  
25 Carson City and you were asked for your input on

1 happened on that particular date and about this  
2 particular defendant, be it good or bad, and make  
3 an informed decision. Is there any problem with  
4 what I've told you so far? Do you have a quarrel  
5 with it?  
6 A. No, just that again unless I hear some  
7 evidence I've already formed an opinion of how I'm  
8 going to go.  
9 Q. Well, let's go to that. I'm not sure I  
10 understand where you're going with that. But  
11 let's say that you are on this jury and you're  
12 given four forms of verdicts for punishment.  
13 Could you consider each four before reaching a  
14 verdict, just carry on a dialogue with your fellow  
15 jurors, some may think this, some may think that.  
16 Have a dialogue and make an informed decision  
17 after considering all forms of punishment?  
18 A. Probably not.  
19 Q. You say you've made up your mind, but  
20 you don't know anything about the case really  
21 other than the defendant has been convicted of  
22 two --  
23 A. Two counts of first degree murder.  
24 Q. And do you understand that in the state  
25 of Nevada, the fact that someone commits a murder,

1 whether or not the state of Nevada should have a  
2 death penalty as an option, how do you think you'd  
3 vote or react to that?  
4 A. I'd probably vote for it. Depends on  
5 the crime.  
6 Q. Under certain circumstances you think  
7 the death penalty is appropriate?  
8 A. Yeah.  
9 Q. If you were selected as a juror in this  
10 case, would you follow all the instructions given  
11 to you by Judge Loehrer even though you might  
12 disagree with the instruction? In other words,  
13 the judge is the judge of the law, and we ask the  
14 jury to follow the instructions given to them by  
15 the judge. Would you have any problem doing that?  
16 A. No.  
17 Q. If you felt in this particular case that  
18 the death penalty was the only appropriate  
19 punishment, could you sentence this defendant to  
20 death?  
21 A. Yeah, I could.  
22 Q. Do you think people should be held  
23 accountable for their crime, sir?  
24 A. Yes.  
25 MR. SCHWARTZ: Your Honor, that

1 concludes my examination.

2 THE COURT: Do you pass this panel for  
3 cause?

4 MR. SCHWARTZ: Yes, Your Honor. Thank  
5 you.

6 THE COURT: Counsel for the defense, you  
7 may inquire of the panel.

8 BY MR. ALBREGTS:

9 Q. Good afternoon everyone. My name is Dan  
10 Albregts. I represent Marlo along with Dave  
11 Schieck. Dave will be doing some of this later  
12 with some other folks.

13 A couple of things before we get  
14 started. I'm nervous. I've done this 18 years.  
15 Never goes away. Some of you may be nervous, some  
16 of you may have gotten a little comfort zone and  
17 that's good too. There's no wrong answers, and I  
18 know we've already touched on some folks on some  
19 personal things, and we may do that again as I  
20 talk to you all. If it's really personal and you  
21 really feel uncomfortable, we can go outside the  
22 presence of other people, but it's not something I  
23 prefer to do. I don't know about the Court, and  
24 so I hope that we can try to get through it  
25 understanding that that's part of what we're doing

1 here is we're trying to get a little bit personal  
2 with each of you to decide what I think you might  
3 agree is about the most important thing you can  
4 ever decide in a criminal case, and important to  
5 everybody involved. And so with those words if  
6 you think that maybe I'm out of line with the  
7 question or you don't feel comfortable answering,  
8 just let me know, but I'm simply going to try to  
9 get at some of the issues that I think cause us  
10 concern about folks' ability to be the right juror  
11 for this case. Doesn't mean you're not the right  
12 juror for other cases, but there may be something  
13 about this case that is such that it might be  
14 better off for folks to go down and serve on  
15 another jury. That's what we're going to try to  
16 do. Let's see if I have any success whatsoever.

17 Ms. Gonzales, probably surprised I'm  
18 going to ask you some questions. Your  
19 questionnaire seemed pretty consistent with what  
20 you've voiced a little bit here today about your  
21 opinion, and I think -- at least I took it that  
22 you felt if somebody took somebody else's life  
23 then the punishment should be that person's life.

24 A. Yes.

25 Q. I presume by your brief comments to

1 Mr. Schwartz here that nothing here, like the lady  
2 here earlier had changed a bit on her opinion,  
3 nothing has occurred today sitting here through  
4 the process to change that opinion: is that fair?

5 A. I've had these opinions before, you  
6 know, the questionnaire.

7 Q. How long have you had them?

8 A. Well, you know, when you watch the news  
9 people take people's lives and people have to be  
10 accountable and here it's two lives, first degree  
11 murder, and I don't know what I could consider.

12 Q. So life in prison without the  
13 possibility for parole in your mind -- and, again,  
14 there's no right or wrong opinions, that's why  
15 they're opinions, that wouldn't be sufficient  
16 punishment or sufficient responsibility for the  
17 crime?

18 A. Two lives are gone.

19 Q. Is it fair to say that nothing we tell  
20 you about Marlo during the course of this about  
21 his upbringing, about his family life, about any  
22 of that is going to change? And, again,  
23 your opinion's fair. Nothing we tell you is going  
24 to change the fact that two lives are gone and  
25 he's been convicted of taking those two lives: is

1 that fair to say that nothing will change your  
2 opinion?

3 A. It's possible.

4 Q. Well, that's what we call a chink in the  
5 iron. You need to tell us. Your opinion is just  
6 as valid as this lady's or this lady's who said I  
7 don't care what he did, I'm not going to be the  
8 one to make that decision.

9 A. Well, yeah, when I was filling out the  
10 questionnaire I was already angry at filling it  
11 out. Two lives gone and not even knowing the  
12 circumstances I've already formed an opinion.

13 Q. And, again, I will not take offense at  
14 the fact that my lawyering abilities can't change  
15 that opinion, but is it fair to say that there's  
16 really nothing we can do to change that during the  
17 course of the trial? And if so maybe this isn't  
18 the right case for you.

19 A. Yeah, I think so because there might be  
20 this brick wall that's just.

21 Q. That's all we're worried about, and I'm  
22 sure you can understand that's my job to worry  
23 about that. And so I guess the last question  
24 again is do you think that those feelings are so  
25 strong that no matter what happens in the course

1 of the next few days you're still going to have  
2 that opinion that two lives are gone, he should  
3 pay with his life?

4 A. Absolutely.

5 MR. ALBREGTS: Your Honor, I challenge  
6 for cause.

7 THE COURT: Ms. Gonzales, thank you for  
8 being willing to serve your community. You may be  
9 excused. Please go down to the third floor and  
10 tell them that you ever been excused in Department  
11 XV. You can go on anything other than a death  
12 case.

13 BY MR. ALBREGTS:

14 Q. Let me continue this way and I think  
15 it's probably time maybe get this stuff out as  
16 well. Let me tell you a little bit about what  
17 you're going to hear and then use that --

18 THE COURT: You're here to ask  
19 questions, Mr. Albregts, not give a summary of the  
20 case.

21 MR. ALBREGTS: I understand, Judge.

22 THE COURT: In any way, shape, or form,  
23 The jurors have been given a synopsis of the case  
24 which was approved by both parties, so please  
25 don't get too much in the case here.

1 MR. ALBREGTS: Don't intend to. What  
2 I'm going to tell you is a little bit what you  
3 already know is that Mr. Thomas has been convicted  
4 of two murders. You're going to hear that the two  
5 murders were committed and he was convicted during  
6 the course of a robbery. You're going to hear  
7 that he has two prior convictions and that he  
8 spent time in prison for those convictions. It's  
9 not going to change. It's the case that we have.  
10 And my question to you is can anybody think of any  
11 reason given those facts that are unchangeable as  
12 to why Mr. Thomas should receive anything but the  
13 death penalty?

14 Mr. Adona, studying criminal justice in  
15 college I read.

16 A. Yes, sir.

17 Q. What about that? That's not a very  
18 request set of facts I would assume you'd agree?

19 A. Well, I just started so I'm not sure  
20 which way I'm going to go.

21 Q. I'm not picking on you because you're a  
22 criminal justice major. Can you think of any  
23 reasons why Mr. Thomas shouldn't get the death  
24 penalty given the set of facts? Why should we  
25 consider those other three choices? Can you think

1 of anything?

2 A. I don't know.

3 Q. What about his background and  
4 upbringing? You heard me talk briefly to this

5 other woman about that. Anything about that you  
6 might consider? Anything about Mr. Thomas that  
7 would make you think, you know what, there is a  
8 reason that the State shouldn't execute him?

9 A. Yeah, there probably would be a reason,  
10 maybe how he was brought up and stuff like that.  
11 I might consider it.

12 Q. Ms. Jones, how about you?

13 A. Same question?

14 Q. Yeah.

15 A. I don't think that a person's background  
16 or upbringing is an excuse for committing crimes,  
17 but I don't necessarily think -- I at this point  
18 have not decided that Mr. Thomas has earned the  
19 death penalty. I would need to know the  
20 circumstances surrounding.

21 Q. What sort of things -- when you say need  
22 to know the circumstances, what sort of things are  
23 you going to consider if you're chosen for this  
24 jury?

25 A. His personal state of mind at the time

1 would be a consideration. Exactly what happened,  
2 what took place. You said it happened during a  
3 robbery, but I would expect that we'll have more  
4 details.

5 Q. About the circumstances?

6 A. About the circumstances. Did he go into  
7 this intending to kill someone. Just what  
8 happened, what was the intent, I guess.

9 Q. Ms. Belch, same question, what do you  
10 think of this discussion we have going on here?

11 A. I don't know any of the details of what  
12 happened because I don't remember when this  
13 happened so I would hate to sit here and form an  
14 opinion without being told.

15 Q. Or at least told from the witness stand?

16 A. Right.

17 Q. Are there things you can think of that  
18 you would like to consider?

19 A. I would like to consider what's happened  
20 to this gentleman since that time to now.

21 Q. Okay. Excellent. That's something else  
22 nobody else brought up. What sort of things?

23 A. Well, what's his behavior been, what has  
24 he done his time in prison.

25 Q. Ms. Amadio.

1 A. The evidence would have to be somewhat

2 debatable I guess you could say.

3 Q. What evidence?

4 A. Whatever evidence you're going to share

5 with us. In other words, was he yes, in fact, the

6 person that did that. If that is the evidence and

7 it was just circumstantial, or was it actually

8 proven by DNA, that kind of thing.

9 Q. I tell you and I think you'll be

10 instructed that a jury has found him guilty of two

11 counts, so there isn't any what-ifs or DNA.

12 A. Well, I wasn't there. I don't know

13 that. I don't know what the evidence was in that

14 particular case. I really don't, and if I'm going

15 to accept somebody else's judgment of a person, I

16 want to make sure that, yeah, that was, in fact, a

17 valid reason.

18 Q. What about some of the other suggestions

19 that were made by fellow jurors?

20 A. Frankly I don't believe anybody's

21 upbringing should make a difference.

22 Q. Why not?

23 A. Because I know very good people that

24 came from horrible, horrible circumstances. It's

25 a decision a person makes. I believe in a person

1 basically the overview I gave you is what it is,

2 you wouldn't then consider the other three

3 punishments?

4 A. Of course I would. Again, if there was

5 any kind of possibility that this crime happened

6 for anything other than for what was determined or

7 if he's going to serve some form of a purpose in

8 serving out or serving out a lifetime sentence at

9 least in some productive way whether he's helping

10 others or whatever.

11 Q. Because you're at least willing to

12 consider while in prison he might be able to help

13 others. You may or may not hear evidence of that.

14 A. Exactly.

15 Q. Mr. Thompson.

16 A. I don't believe anybody's upbringing is

17 an excuse to take two lives, and going to prison,

18 I mean, these people have lost their lives. They

19 don't get that chance, so it's hard to say. Just

20 have to wait and see.

21 Q. I don't think Mr. Schieck nor I are

22 saying excuse his actions because of his

23 upbringing. We're simply trying to determine what

24 sort of factors folks will consider in what's

25 called mitigation, meaning that might otherwise

1 being responsible for their actions. Whether you

2 choose to take drugs and flip out and kill

3 somebody, you're still responsible for that.

4 Q. Do you think that by if you serve the

5 rest of your life in prison do you think that's

6 taking responsibility and paying for your crime?

7 A. That could be a good argument, but

8 unless they are going to be productive members of

9 society, no. If they can be productive in prison,

10 maybe you have an argument there, but I don't see

11 that.

12 Q. So do you feel then that if rather than

13 just going to spend the rest of their life in

14 prison we may as well have the State kill them?

15 A. Yes.

16 Q. Why?

17 A. If they did that kind of a crime and

18 they're going to serve no good to anybody and

19 they're just -- I hate to put it this way but

20 taking up air and space for no good reason, I

21 don't understand. Who would want to even do that?

22 Q. So if you're instructed or you're told

23 the jury convicted him and those basically --

24 again, I'm not going to get into the facts

25 extensively, that's not appropriate for now. But

1 lead you to believe that he shouldn't be executed.

2 There should be some other sort of sentence. Are

3 you willing to consider some of those?

4 A. Sure.

5 Q. What sort of things would you consider?

6 A. Life without probably for both counts of

7 murder. That's about it.

8 Q. So the other two sentencing

9 possibilities, a definite term or life with the

10 possibility, are not on your plate?

11 A. No.

12 Q. Mr. Quenzer, I think you were one of

13 many on the questionnaires who talk about an eye

14 for an eye. We had this conversation going on now

15 a few minutes. What's your thought on that? Are

16 you of the belief that he's been convicted of two

17 murders, end of story?

18 A. Well, I think everyone, especially being

19 on this panel, we've seen that he has been

20 convicted and we're very quick to judge on your

21 initial impression. He's been convicted. Okay,

22 he deserves to die. Is that the case every time?

23 No. I think you have to look at everything, and

24 my personal opinion is you take somebody's life,

25 there's no reason that your life shouldn't be

1 taken as well, but there are circumstances that  
2 have developed in the situation of what was going  
3 on at the time, things that we've already talked  
4 about, his upbringing, any number of things could  
5 have affected that situation that happened that  
6 day that lead to the loss of these two lives.

7 Q. And so are you saying then that maybe  
8 not always an eye for an eye?

9 A. Not always an eye for an eye.

10 Q. And I guess logically it would seem to  
11 follow that you're willing, given that, to  
12 consider other forms of punishment besides the  
13 execution of Mr. Thomas?

14 A. I would consider all forms.

15 Q. Is there anything else that you could  
16 think of that you would consider that we haven't  
17 talked about here?

18 A. I mean, me personally the only thing  
19 that brings up to me and I have no idea of this, I  
20 actually work for Lone Star Corporation. Now, I  
21 knew none of the defendants. I knew nothing --  
22 none of these people or any of their personal  
23 lives, but you think about people that you work  
24 with every day and people that sometimes you see  
25 people that you work with more than you see your

1 things. I actually -- I mean, about ten years ago  
2 I worked for another restaurant and actually had  
3 an old manager that was killed in a robbery, and  
4 it's something that you think about every now and  
5 then. You can't put everything behind you.

6 There's going to be that a little bit of human  
7 nature element, the past, I think, is going to  
8 affect somewhat of what your judgment. Now,  
9 obviously we're held to be making decisions within  
10 the law, and I think that comes first obviously.

11 You have to consider yourself as impartial as you  
12 can and look at the facts that are presented in  
13 the case and then go from there, but there's  
14 always going to be that little bit that maybe is  
15 going to sway your opinion.

16 Q. You're well-educated, you're  
17 well-spoken. What do you think? Mr. Thomas is  
18 sitting here. Do you feel comfortable enough with  
19 what you know about yourself and all the other  
20 partly the human frailties, partly your  
21 understanding of having to follow the law and  
22 knowing that, what do you think? Do you think you  
23 can put that aside and make a decision based upon  
24 the law and the facts that you hear without  
25 considering the things -- it's odd but

1 own family and you think about, you know, a  
2 company being a family and that two lives were  
3 lost in this kind of family, and it's something I  
4 haven't thought about at all.

5 Q. What are you thinking now that you're  
6 thinking about it?

7 A. Honestly I don't know what to think  
8 because I couldn't even imagine that it would come  
9 to something like this, that it would have been  
10 somewhat close to home. Is it personal to me? I  
11 wouldn't call it personal, but it's something that  
12 I've never thought about.

13 Q. Let me ask you this, and I'm going to  
14 try to make you think about it if I can. If  
15 you're picked for the jury, when you go back there  
16 with 11 other folks and start talking about these  
17 issues, do you think at some stage you're talking  
18 about it you're going to have those folks in the  
19 back of your mind. I work in the restaurant.  
20 This happened in a restaurant. Not only did it  
21 happen in a restaurant, it happened in a  
22 restaurant that's an affiliate of my restaurant.  
23 Sometimes things are just a little too close to  
24 home.

25 A. Certainly going to think about those

1 occasionally we have fact pattern in a case that  
2 really strikes close to home.

3 A. I would have to say a small percentage I  
4 would have to consider that.

5 Q. Do you think it's going to impair your  
6 ability to be fair and impartial, follow the law  
7 in this case such that maybe you ought to go to  
8 another case?

9 A. That I don't know. I don't know. It's  
10 something I haven't thought about.

11 Q. Give you a few minutes to think about  
12 and we'll come back.

13 Ms. Belch, did I notice in your  
14 questionnaire that your mother was a victim of a  
15 murder?

16 A. Yes, she was.

17 Q. That gets back to the close to home  
18 stuff. Obviously I have a concern about that as  
19 it relates to this case outside of other concerns  
20 obviously. What do you think? Do you think  
21 that's something that's too close to home in this  
22 case?

23 A. My mother was killed a long time ago.  
24 Her murderer was never caught and if he had have  
25 been caught I would have hoped that all would have

1 been dealt with appropriately, but I've dealt with  
 2 it within myself.  
 3 Q. Let me ask you this and again I don't  
 4 mean to pry or be insensitive or anything. At  
 5 some stage the officer here isn't going to be  
 6 there and witnesses are going to be there and I  
 7 suspect at some stage you're going to hear from  
 8 the two young men who were killed in this case  
 9 from their family. My obvious concern obviously  
 10 is that when they get there that might be too  
 11 close to home as well. Do I have a concern or not  
 12 or have you even thought about it?  
 13 A. I hadn't really thought about it. It's  
 14 going to be hard on all of us I would think to  
 15 hear from families of the victim.  
 16 Q. Absolutely.  
 17 A. Whether it's going to be particularly  
 18 hard on me I don't know. My mother was killed  
 19 over 40 years ago. I've dealt with it.  
 20 Q. Mr. McIntosh, no one escapes the  
 21 questions.  
 22 A. I didn't think so.  
 23 Q. Or at least if I'm doing my job right  
 24 they don't. What do you think of these  
 25 discussions?

1 A. Well, I think good points have been  
 2 brought up. I think that I could consider all  
 3 forms of punishment. I would for the  
 4 considerations I think the upbringing doesn't have  
 5 anything to do with what you do in your adult  
 6 life. However I would be interested in how he  
 7 served his other prison term. I could bring that  
 8 into -- I could consider that.  
 9 Q. Why don't you think the upbringing  
 10 shapes at all who you become later in life?  
 11 A. Because there are good people that come  
 12 from bad background and there are bad people that  
 13 come from good background.  
 14 Q. Absolutely. Everybody is shaking their  
 15 head. Probably that's the only thing all of us  
 16 will agree on, including the prosecution and  
 17 defense. You don't think it's a consideration at  
 18 all, the environment, what you see, what you go  
 19 through doesn't affect what we become later on?  
 20 A. Everyone has to make choices in their  
 21 lives. Everyone has made bad choices and good  
 22 choices. I think that you can see people doing  
 23 things wrong in your background and you can choose  
 24 to go with those people or you can choose to stay  
 25 away from those people, and that is a private

1 choice by the individual and input from parents or  
 2 friends or clergy, sometimes that doesn't make any  
 3 difference at all.  
 4 Q. Mr. Nicholson.  
 5 A. Yes, sir.  
 6 Q. What do you think of those discussions  
 7 about upbringing and family and those things?  
 8 A. I agree with some of them. I was  
 9 talking to my family that our parents who we live  
 10 with or who we are around bring us up and bring us  
 11 like in a little pool in our house, and they bring  
 12 us up into what we are made of today. Yes, we all  
 13 have choices. Yes, we all have certain things  
 14 that we can say, oh, he made a bad choice, I don't  
 15 want to follow in those footsteps. But when you  
 16 see like your brother doing it, when you see your  
 17 mom doing it, when you see you're going to think  
 18 it's right. I personally think my brother, for  
 19 instance, he was raised like it's only him. He's  
 20 like a baby. He's a brat, and he was brought up  
 21 that way, and we didn't put it out in the world,  
 22 but he can't change that. He can't change the way  
 23 he's brought up with my mom and my dad that he was  
 24 a spoiled brat. He can't change that in later  
 25 life. So, yes, you do weigh their backgrounds,

1 you do weigh how they were brought up, how they  
 2 served in prison or how they changed their life  
 3 around and want to become better. We all make  
 4 mistakes, we all do. I'm not saying that he  
 5 killed two people -- he was convicted of killing  
 6 two people and that he shouldn't be put to death.  
 7 I'm not saying that. I'll weigh all four  
 8 possibilities because -- what I'm saying we all  
 9 make mistakes, and like I'm saying any one of  
 10 these people right here if say -- he's not family,  
 11 he's not nothing, he's a person. We all make  
 12 mistakes, so that's what I'm trying to say.  
 13 Q. Ms. Norander?  
 14 A. That's one mighty big mistake.  
 15 Q. It's two mighty big mistakes.  
 16 A. Yes, two. I think I feel right along  
 17 the lines of this gentleman over here.  
 18 Q. Mr. Adona?  
 19 A. You should have no possibility for  
 20 parole, so right now in my mind I have two  
 21 choices, life without the possibility or the death  
 22 penalty. I've never been in a situation like this  
 23 before just like everyone else sitting here with  
 24 me so I can't give you a decision or let you know  
 25 which way I'm swaying right now because it's an

1 awful lot to consider. Plus like you said, we're  
2 all really nervous to begin with. The way you're  
3 brought up and he could have been brought up in a  
4 convent for all I know. He's a grown man. He  
5 made decisions of his own. Whether it was drug  
6 induced or not, he made that decision, he followed  
7 through on it not once, but twice. I think you  
8 should be accountable for what he has done, but I  
9 can't turn around like that other woman and saying  
10 he's on death row and that's it. But I could  
11 never see the possibility of parole.

12 Q. And you've bought up a point. I want to  
13 make it clear again. I'm not looking for  
14 decisions what you're going to do one way or the  
15 other. We're simply doing -- I'm trying to do  
16 what we're doing and that's getting your opinions  
17 on it, and so if I've made it sound like I want  
18 you to sort of prejudy verdict decision from you  
19 all, that's not it at all. But, again, this is  
20 what we're doing is getting these opinions.  
21 Ms. Kaczmarek.

22 A. Yes.

23 Q. You've been nodding. I know you've been  
24 listening.

25 A. Yes.

1 Q. What do you think? Tell me.

2 A. I think it's a sad day.

3 Q. It is truly a difficult day.

4 A. Like the woman behind me here, none of  
5 us have ever experienced anything like this ever.  
6 I have a 16-year-old son. I would kick his behind  
7 if I felt that the direction he was going in was  
8 wrong. I don't know if this gentleman had that  
9 same. Maybe he had too much. Maybe he had way  
10 too much. I don't know. I don't know him.

11 Q. But is it fair to say those are all  
12 things that you're willing to consider in the  
13 context of this case?

14 A. I would take it as a piece of, but I  
15 wouldn't necessarily put a lot of emphasis on it  
16 only because when you become 18 regardless of what  
17 happened to you you become an adult at that time  
18 and you can't here change your circumstance. If  
19 you choose not to do that, if you want to blame  
20 and continue to do so for the rest of your life, I  
21 consider that would cause a problem.

22 Q. Let me ask everybody this because we've  
23 kind of touched on this now. I fully expect  
24 Mr. Schieck and I on behalf of Mr. Thomas to bring  
25 in family members to tell you about his

1 upbringing, to give you some insight to Marlo  
2 Thomas, the man. Not just Marlo Thomas the  
3 two-time convicted murderer.

4 Does anybody think that you're going to  
5 sense that Mr. Schieck and I are going to try to  
6 excuse actions or be so offended by that that  
7 we're trying to give you an excuse for what he  
8 did? Or will everybody be able to understand that  
9 we're just trying to present, I think as you said,  
10 the whole picture for you to whether this man  
11 ought to be executed? Does anybody as you sit  
12 there think, you know what, these are two defense  
13 attorneys trying to get -- I don't know if it's  
14 you folks but some of the questionnaires talks  
15 about defense attorneys and attorneys, and that's  
16 fair. You're not the first folks that have talked  
17 to me about that, but does anybody think that in  
18 doing that it might be offensive to you that we're  
19 trying to somehow cover up for his actions or give  
20 an excuse for something that's inexcusable?

21 A. No, you pretty much put it out there  
22 already. You haven't covered up anything that he  
23 has done. I think what the attempt is at this  
24 point is to fully with some compassion minimize  
25 the outcome for this gentleman ones and for all if

1 you can. Whether you are successful or not is yet  
2 to be seen, but if you can.

3 Q. Ms. Villanueva, did I butcher the name?

4 A. It's close.

5 Q. Close enough for a defendant's attorney.  
6 Well, what do you think of all this? I know you  
7 talked about considering the evidence and some of  
8 these things.

9 A. I consider all the sentences. It's  
10 either -- I would choose life without parole or  
11 death penalty because of the actions he's done,  
12 but if I do choose those things, especially the  
13 death penalty, it's more of a personal thing to me  
14 that I would be thinking of that person -- I put  
15 him in that position. You see what I'm saying?

16 Q. No.

17 A. I would feel bad.

18 Q. Right.

19 A. I would be thinking of him dying.

20 Q. But I assume as you've indicated that's  
21 not enough to overcome if you're picked as a juror  
22 your duty as a juror to make the decision based  
23 upon -- let me ask you this. What if you're  
24 picked for the jury and 12 of you go back there,  
25 I don't know how you do this. You all do it

1 yourself, but for the purposes of this example  
2 let's say you all take a vote initially and  
3 everybody wants death, but you want life. After  
4 everything you've heard, all the evidence that's  
5 put on and all the arguments, in your heart of  
6 hearts you say to yourself, you know what, I can  
7 consider death -- I would have considered death,  
8 but I want life, but all other 11 want the death  
9 penalty. How are you going to feel? What are you  
10 going to do?

11 A. It's a hard decision, but listening to  
12 what you've said and what he's done I would  
13 consider death.

14 Q. Do you think that you'd be swayed enough  
15 by the other 11?

16 A. Yeah, because I'm sometimes gullible.  
17 It's just the actions he's done.

18 Q. Mr. Adona, same question to you. Twelve  
19 of you go back there. Your heart of hearts when  
20 you go back there you think to yourself, you know  
21 what, I can't give this man the death penalty.  
22 How are you going to handle it if the other 11?

23 A. I don't know, to tell you the truth. I  
24 don't know how I'd feel.

25 Q. Is it something you think you'd say you

1 work to do. Let me touch on another issue. I  
2 appreciate everybody's willingness to be open and  
3 discuss these. The judge, I suspect, is going to  
4 instruct you that the whole idea of the trial  
5 being quite a bit earlier and us being here later  
6 and just the penalty phase maybe is issues that  
7 shouldn't be considered. Those are issues that  
8 didn't concern you all. Really the issue is the  
9 four potential penalties and your decision on the  
10 facts. Is everybody going to be able to put that  
11 out of their minds and not worry themselves with  
12 what went on before us and only with what happened  
13 here?

14 Another issue, Marlo is black. There's  
15 something that I told you that you already knew.  
16 You all are not black although there's certainly  
17 other races here and out in the audience. The two  
18 individuals who were killed were white. Let's get  
19 it out on the table. Does anybody think that  
20 that's going to cause them a concern? That  
21 there's something in their background that might  
22 make it more difficult for them to make a decision  
23 because of the race issue?

24 Mr. Quenzer, have you thought some more?

25 A. I have and the more I think of it the

1 know what, it's Thursday afternoon. The other 11  
2 think it's death, that's good enough for me?

3 A. No.

4 Q. Why not?

5 A. It's not that easy just say okay. It's  
6 not that easy. I don't know how I'd feel.

7 Q. Ms. Jones.

8 A. I wouldn't in my heart go along with the  
9 others. That's a monumental decision whether a  
10 person lives or dies. You can't just decide it's  
11 4:00 in the afternoon and I want to go home. He  
12 did kill somebody.

13 Q. Ms. Martinez, how do you think you'd  
14 handle that sort of situation? Do you think  
15 you'd?

16 A. It's hard to say. I'd consider both the  
17 death or possibility without parole because of  
18 like you said the actions that he did, but I'd  
19 want to also know his prior convictions and what  
20 they were for and what he's done since that day.

21 Q. So the mere fact that 11 other people  
22 disagree with you isn't going to be the swaying  
23 factor for you? It isn't going to be your own  
24 judgment.

25 It's getting late and we have a lot more

1 more it eats me up inside.

2 Q. I don't mean to do that to you.

3 A. I think about what I do every day and  
4 working in a restaurant, working around handle a  
5 lot of money and I close the restaurant at night  
6 and things like that, and this situation is going  
7 to bring up a lot of personal experiences just  
8 from friends that I've known. Like I told you I  
9 had a friend that was a manager that was murdered  
10 ten years ago in a robbery attempt and --

11 Q. I suspect you're going to hear about  
12 what these young men were doing before he came in  
13 and about how the restaurant operated, some of  
14 that stuff. My concern and my concern is because  
15 of your honesty. I appreciate that. But my  
16 concern is you're going -- you're a thoughtful  
17 guy. You're going to continue to think about that  
18 and tomorrow or Wednesday or at the time to figure  
19 that out and so you tell me.

20 A. I'm just concerned because I don't think  
21 that in the end if I'm chosen as a juror and it  
22 comes down to the panel, I'm going to have too  
23 many things, personal things, that are going to  
24 sway me to one side versus somebody else who has  
25 not worked in the restaurant business or had some

1 experiences around what this case is about.

2 Q. Fair to say you think maybe another jury  
3 might be better off?

4 A. I think someone other than I would be  
5 more impartial than myself.

6 Q. I appreciate your honesty.

7 MR. ALBREGTS: I would pass everyone for  
8 cause but Mr. Quenzer.

9 THE COURT: Mr. Quenzer, you are the  
10 only one who can answer those questions. You  
11 didn't work for Lone Star at the time this  
12 occurred. You've only been with them for five  
13 years; is that correct?

14 THE JUROR: Yes, five years.

15 THE COURT: You work for Delfrisco who  
16 is earned by the parent company of Lone Star. I  
17 guess in today's business world if you work for  
18 the Olive Garden you're owned by General Foods or  
19 something like that that makes Pillsbury and  
20 Duncan Hines and Betty Crocker and, and, and, in  
21 the big corporate world of things, but you are the  
22 only one who can tell us if the fact that you work  
23 in a restaurant and you do close up and you do  
24 recall an incident in your personal life within  
25 the last ten years of your restaurant manager

1 being robbed, whether that would unduly prejudice  
2 you in favor of or against one of the parties to  
3 this lawsuit. And that's the real question is  
4 whether you would be prejudiced for or against  
5 either party based on your own background.

6 THE JUROR: I think I would.

7 THE COURT: All right. We appreciate  
8 that because we do like the jury panel to be fair  
9 and impartial.

10 MR. ALBREGTS: I'm sorry. I also  
11 neglected co-counsel reminded me there's one other  
12 individual I need to speak to briefly about a  
13 cause issue that I missed. I am sorry.

14 THE COURT: Mr. Quenzer, thank you, sir,  
15 you may be excused. Please report down to the  
16 jury commission office on the third floor and they  
17 can send you out on any other jury other than this  
18 one.

19 THE JUROR: Thank you.

20 MR. ALBREGTS: May I ask Mr. Thompson  
21 just a couple important questions?

22 THE COURT: You may.

23 BY MR. ALBREGTS:

24 Q. Mr. Thompson, did you indicate that you  
25 wouldn't be willing to consider any other

1 punishments but the death penalty?

2 A. No, I did not say that. I said life for  
3 both counts without parole.

4 Q. I apologize. I don't want to put you on  
5 the spot. You wouldn't consider the initial two,  
6 life with the possibility or the definitive term,  
7 but you would consider the other two, life without  
8 possibility or the death penalty, depending on the  
9 facts?

10 A. That's true.

11 MR. ALBREGTS: Thank you, Judge.

12 THE COURT: The 12 of you who are left  
13 qualify to be jurors in this case. We're going to  
14 pick another 16 plus four -- we'll pick another 20  
15 people and ask them the same questions. Why don't  
16 you come back at 4:00. So you're good to go on  
17 this case. You're all qualified to be jurors on  
18 this case. Come back at four.

19 I'm going to call our next jurors  
20 forward, and when I call your name and read your  
21 number, please come forward and be seated as the  
22 bailiff indicates. No. 586, Benjamin Kimberlin.  
23 Counsel, he'll go in as 17.

24 MR. SCHIECK: On the sheet we're just  
25 going to be in order and not fill these positions?

1 THE COURT: Yeah.

2 MR. SCHIECK: This will be that 12 and  
3 that will be 13.

4 THE COURT: Yes, you're right. He'll be  
5 13. They'll all move up a spot.

6 MR. SCHIECK: We're not filling the  
7 empty spots.

8 THE COURT: No. 615, Donald Erickson;  
9 624, Nancy Demelas; 638, Nipapon Angsumalee.

10 MR. SCHIECK: I think he was excused  
11 also.

12 THE COURT: All right. 642, Cynthia  
13 Dacks. Ms. Dacks is present. 647, Lilibeth  
14 Rafanan. She doesn't appear to be here. 660  
15 Adele Basye. Ms. Basye is present. 665, Johanna  
16 Salvador; 675, Jill McGrath; 676, Nicole  
17 Hostetter.

18 MR. SCHIECK: I think she was excused,  
19 your Honor.

20 THE COURT: 677, Marisa NMuniz; 681,  
21 Alice Chorlton. Alice is not here. Loretta  
22 Gillis, No. 686. She's here. 688, Jennifer Mowen  
23 is also here. 690, Tanya Brown-Merafuentes, not  
24 here. 692, Patricia Brown. Patricia Brown is  
25 present. Let's put Ms. Brown in the front row.

1 Jonathan. No. 701, Paul Schutts, not present.  
 2 704, Mary Heacock, she's here; 705, Xiera Desamero  
 3 row, not present. 712, Jacqueline Wohlt; 713,  
 4 Lauren Kratz, not present.

5 MR. SCHIECK: She was excused.

6 THE COURT: 735, Patricia Freitas, not  
 7 present. 737, Frank Krasn. He's here. 740,  
 8 Edmund Redfield, present; 744, Chi W Wan, present;  
 9 750, Brian Mason. Mr. Mason is present. 752,  
 10 Raul Chavez, present; 758, Herbert Rice. Mr. rice  
 11 is here. 767, Debbie Atienza, she is here.

12 Counsel for the state, you may inquire  
 13 of this panel.

14 MR. SCHWARTZ: Thank you, your Honor.

15 BY MR. SCHWARTZ:

16 Q. Mr. Kimberlin, how are you, sir?

17 A. I'm fine, thank you.

18 Q. Is there anything about the nature of  
 19 this particular proceeding that would make it  
 20 difficult for you to participate as a juror at the  
 21 penalty phase?

22 A. I don't think so.

23 Q. If you're selected as a juror and you  
 24 made a determination, you and your fellow jurors,  
 25 that the death penalty is an option in this

1 without parole and the imposition of the death

2 penalty. Can you consider each of those four

3 forms of punishment and then make a decision

4 regarding the one you feel most appropriate, or do

5 you have a view that you automatically are going

6 to get rid of one or two of those? Can you weigh

7 all four of them and then make a decision?

8 A. I was just thinking back to the question

9 here. I believe there was the bottom two, 50

10 years with the possibility of parole and the other

11 one was possibility of parole. With the amount of

12 information that I have right now, I would say

13 that those two are probably not something I would

14 consider.

15 Q. I'm not asking you to vote today.

16 A. I understand.

17 Q. I'm just asking -- you're going to hear

18 a lot of evidence, okay, and hopefully at the

19 conclusion you'll be more informed. All I want to

20 know is right at the start can you consider all

21 four and then based upon what you hear pick the

22 one you feel is most appropriate?

23 A. Sure.

24 Q. Do you believe that people should be

25 held accountable for their actions, Mr. Erickson?

1 particular case, do you feel if you felt it  
 2 appropriate you could return with a verdict  
 3 sentencing this defendant to death?

4 A. I can't say that I'm entirely

5 comfortable with that, but I do feel that in some

6 cases the death penalty is necessary and I feel

7 that if I find and my fellow jurors find it would

8 be necessary in this case then I think I could

9 return with a verdict.

10 Q. Donald Erickson, what are your views

11 regarding the death penalty sir?

12 A. I think in some cases it is necessary to

13 use the death penalty. However, I do not

14 100 percent in favor for it. Really it depends on

15 the circumstances.

16 Q. And I realize these questions are kind

17 of unfair because you have some idea of what

18 occurred, but you didn't sit on the trial. You'll

19 hear evidence concerning what happened that caused

20 us all to be here today, but be that as it may,

21 for our purposes now as best you can I'm going to

22 ask you a couple more questions. You heard I

23 believe earlier from the judge that you might be

24 considering four forms of punishment, a term of

25 years, life in prison with parole, life in prison

1 A. Yes, I do.

2 Q. Ms. Demelas, on Question 25 you were

3 asked have any family members or close friends

4 been arrested or charged with a crime, and you

5 indicated you weren't sure, sometimes we don't get

6 all the details. Do you know if anybody, a friend

7 or member of your family, has been arrested or

8 charged with a crime?

9 A. Yes, they have.

10 Q. Who would that have been?

11 A. Who would that have been?

12 Q. Who do you know who's been arrested and

13 charged with a crime?

14 A. I guess I'm not understanding that.

15 Q. This is a question on your questionnaire

16 that you filled out. Have you or any member or

17 family member or close friend ever been arrested

18 and charged with a crime, and you answered yes.

19 So my question now is who was --

20 A. I can't think of anybody right now.

21 Q. Is there anything about that situation

22 that would make it difficult for you to be fair

23 and impartial to both sides?

24 A. No.

25 Q. Do you feel you could return with a

1 verdict of death if you felt it was appropriate?

2 A. I'd have to, you know, think it all  
3 through.

4 Q. Well, assuming you have all the  
5 evidence, you thought it all through and you feel  
6 that death is appropriate, could you come in and  
7 vote death?

8 A. I'm not sure about that.

9 Q. Do you believe that people should be  
10 held accountable for their actions?

11 A. Yes.

12 Q. Are there things you might consider  
13 that -- strike that. What would you consider in  
14 determining what the appropriate punishment should  
15 be? What kind of factors would be important to  
16 you?

17 A. What kind of factors? Maybe the way he  
18 was raised. I don't know.

19 Q. Thank you. Ms. Dacks, if you are a  
20 member of our legislature, do you feel that you  
21 would vote in support of having a death penalty in  
22 the state of Nevada?

23 A. Yes.

24 Q. Do you think it's appropriate for  
25 certain cases?

1 Q. But you'd have an open mind going into  
2 your deliberation?

3 A. I think so.

4 Q. And you'd be willing to express your  
5 opinions to your fellow jurors?

6 A. Mm-hmm.

7 Q. Is that a yes?

8 A. Yes.

9 Q. Thank you.

10 Ms. Basye, do you believe that people  
11 should be held accountable for their actions?

12 A. Yes, sir, I do.

13 Q. And what would be important to you, what  
14 factors would be important to you that you would  
15 consider before you made a decision on the  
16 appropriate punishment for a man convicted of two  
17 murders?

18 A. Testimony from the witnesses, evidence,  
19 possibly history, life history.

20 Q. Who's history?

21 A. His history.

22 Q. The defendant's history?

23 A. Yes.

24 Q. Would his childhood be important to you,  
25 how he was raised?

1 A. Mm-hmm.

2 Q. And if you were selected as a juror in  
3 this particular proceeding, could you consider all  
4 four possible punishments and then return with the  
5 one you feel most appropriate based upon what you  
6 hear later on?

7 A. Yes.

8 Q. What do you think would be important for  
9 you to consider in determining the appropriate  
10 punishment?

11 A. I think probably the most important  
12 thing would maybe be how the whole situation  
13 happened.

14 Q. The circumstances surrounding the two  
15 killings?

16 A. Mm-hmm.

17 Q. Do you believe people should be held  
18 accountable for their actions?

19 A. Yes.

20 Q. And if you were selected as a juror,  
21 would you participate with other jurors in  
22 discussing the case before making an informed  
23 decision?

24 A. I would make sure that I was very  
25 comfortable with my decision, yes.

1 A. I believe so.

2 Q. Ms. Salvador, is there anything about  
3 what you've heard so far today that you feel ought  
4 to be brought to our attention before we consider  
5 whether or not you should participate as a juror  
6 in proceeding?

7 A. Not at this moment.

8 Q. Do you feel comfortable as you sit here?  
9 I know it's a little nerve-racking. It might be  
10 nervous.

11 A. Yeah, just a little.

12 Q. You're going to be asked to make a very  
13 important decision if you're selected as a juror.

14 You understand that of course. If you felt it  
15 appropriate, could you come into this courtroom  
16 and sentence this defendant to death?

17 A. It all depends.

18 Q. What does it depend upon?

19 A. Everything, the trial, everything.

20 Q. Ms. McGrath, you feel people should be  
21 held accountable for their actions?

22 A. Yes, I do.

23 Q. If you're selected as a juror, what

24 would be important to you before you made a  
25 decision at least in your own mind what you felt

1 the appropriate punishment should be?

2 A. I think the circumstances that  
3 everything involved, the evidence, the motives,  
4 the witnesses.

5 Q. What are your feelings toward the death  
6 penalty?

7 A. Kind of in the middle. It all depends  
8 on the circumstance. I'm not against it, but I'm  
9 not all for it. It just really depends on the  
10 circumstance.

11 Q. If you are selected as a juror at this  
12 particular proceeding and you had four forms of  
13 punishment to consider, could you consider the  
14 death penalty?

15 A. Depending on after.

16 Q. If you felt it appropriate?

17 A. Yes.

18 Q. And then the next step could you come  
19 into this courtroom and actually vote for the  
20 death penalty?

21 A. If I felt I needed to, yes.

22 Q. Ms. Muniz.

23 A. Yes.

24 Q. What are your feelings toward the death  
25 penalty?

1 A. No. I don't feel that I am qualified to  
2 judge a person.

3 Q. That's fine. As counsel said, there's  
4 no right or wrong answers. We just need to get as  
5 much information as we can before we make our  
6 informed decisions as who we want on this  
7 particular jury?

8 MR. SCHWARTZ: I would respectfully  
9 challenge for cause, your Honor.

10 THE COURT: Do you wish to inquire of  
11 Juror 667, Marisa Muniz?

12 MR. SCHIECK: Yes, Your Honor, just  
13 briefly.

14 BY MR. SCHIECK:

15 Q. Ms. Muniz, perhaps I'm just confused.

16 You said you can consider it, but you couldn't

17 vote for it. What's the difference between

18 considering it?

19 A. Well, it's easy to consider anything but  
20 to actually vote for it, no, I couldn't.

21 Q. Under no circumstances?

22 A. No.

23 Q. You can't think of any set of  
24 circumstances where you would even consider voting  
25 for the death penalty even though you believe that

1 A. I'm really not for it. It's usually  
2 just in an extreme case if necessary.

3 Q. So if you were selected as a juror at  
4 this particular proceeding, could you consider all  
5 forms of punishment including the death penalty?

6 A. I could consider it, but I couldn't  
7 guarantee that I could vote for it if needed to  
8 be.

9 Q. Well, I'm not asking you -- it would be  
10 nice to get guarantees, but we very seldom do, but  
11 you wouldn't automatically rule it out?

12 A. No.

13 Q. So if you felt it the appropriate case,  
14 could you return a verdict of death?

15 A. I don't believe I could. That's a big  
16 responsibility that I don't think I could handle.

17 Q. You said you weren't going to rule it  
18 out, but now you're saying you couldn't do it.

19 A. I wouldn't necessarily rule it out, but  
20 for me to actually put a vote in for it, no, I  
21 couldn't do it.

22 Q. So no matter what I say or my co-counsel  
23 says to you, there's no way that you would ever  
24 return a death verdict in this particular case  
25 against the defendant?

1 it's appropriate in some cases?

2 A. My belief is who am I to judge, and  
3 that's a big responsibility, and I don't think I  
4 could live with that kind of responsibility.

5 Q. We all understand it's a very hard  
6 decision to make in any case, but some decisions  
7 have to be made and they have to be made by juries  
8 and we need cross-section of the community to make  
9 those decisions. And your point of view is just  
10 as important as everybody else's; do you  
11 understand that?

12 A. (Witness nods head affirmatively.)

13 Q. And so the fact that it's very difficult  
14 for you to talk about it or to consider imposing  
15 it is okay. But the question is could you under  
16 any circumstance go ahead and vote?

17 A. I honestly -- I don't know.

18 Q. So we're back now that you could  
19 consider it but you don't know if you could vote  
20 for it.

21 A. I don't think I could vote for it. I  
22 honestly don't.

23 Q. You probably never been asked?

24 A. This is my first time for jury duty.  
25 This is kind of wow.

1 MR. SCHIECK: Thank you. We'd submit

2 it, your Honor.

3 THE COURT: Ms. Muniz, thank you for  
4 your answers to the attorney's questions. And it  
5 is a very challenging task, and I don't suppose  
6 any of us unless we've served on a capital murder  
7 panel before, jury panel, have ever had to make  
8 that decision. The challenge for cause is  
9 granted. You are excused. Please go back down to  
10 the jury commission office and tell them you can  
11 go out on any other panel other than a murder  
12 case. Let us call now Cesar Elpidio to take a  
13 spot vacated by Ms. Muniz. Now, since we have a  
14 panel here he will go in as 24. I know I'm  
15 confusing you.

16 You may continue with voir dire,  
17 Counsel.

18 MR. SCHWARTZ: Thank you, your Honor.

19 BY MR. SCHWARTZ:

20 Q. Ms. Gillis, how are you, ma'am?

21 A. Fine, thank you.

22 Q. What are your views regarding the death  
23 penalty, ma'am?

24 A. I think I could consider it.

25 Q. So if you were instructed on four

1 depend on what was laid out before me.

2 Q. Assuming everything is laid out in front  
3 of you and you felt it appropriate, its' one thing  
4 to feel you could do it. Do you think?

5 A. If I felt it appropriate, yes.

6 Q. Do you feel people should be held  
7 accountable for their actions?

8 A. Yes.

9 Q. What would you want to know before you  
10 made a decision regarding the appropriate  
11 sentence?

12 A. The circumstances surrounding what  
13 happened.

14 Q. And would you want to know anything  
15 else?

16 A. Not really.

17 Q. Do you feel the defendant's background,  
18 his upbringing, would be important to you?

19 A. I don't think so.

20 Q. Ms. Heacock, what are your feelings  
21 towards capital punishment, ma'am, or the death  
22 penalty?

23 A. I believe in it.

24 Q. So you feel in the appropriate situation  
25 it could be appropriate? The appropriate case the

1 possible forms of punishment, you could consider

2 all four forms of punishment?

3 A. Yes, sir.

4 Q. And then choose or select one you feel  
5 is most appropriate for this particular case?

6 A. Yes, sir.

7 Q. Do you feel that people should be held  
8 accountable for their actions?

9 A. Yes, sir.

10 Q. Before you were to make a decision  
11 regarding a possible sentence, what things would  
12 be important to you? What would you want to know?

13 A. Circumstances, the evidence.

14 Q. What about the background of the  
15 defendant? Would that be important?

16 A. Probably.

17 Q. Ms. Brown, how are you, ma'am?

18 A. I'm fine, thank you.

19 Q. What are your feelings toward the death  
20 penalty, ma'am?

21 A. In some cases I think it's the proper  
22 and necessary.

23 Q. So in the particular case you feel you  
24 could vote for the death penalty?

25 A. I imagine it would be hard, but it would

1 death penalty could be appropriate?

2 A. Absolutely.

3 Q. Could you vote for it if you're selected  
4 as a juror?

5 A. Yes.

6 Q. Question 25 indicates that you know  
7 somebody who's been arrested or had contacts with  
8 law enforcement?

9 A. Yes.

10 Q. Who was that?

11 A. My nephew.

12 Q. Was it more than one contact?

13 A. Yes. Nephews.

14 Q. Was that here in Las Vegas?

15 A. No.

16 Q. Is there anything about their situations  
17 that would make it difficult for you to be a fair  
18 and impartial juror to both sides?

19 A. I don't think -- well, one of them was  
20 for murder.

21 Q. Do you think the system treated him  
22 fairly?

23 A. Oh, more than fairly. Absolutely.

24 Q. Ms. Wohlt, do you have a criminal  
25 justice degree?

1 A. I do. I had my undergrad in criminal  
2 justice.  
3 Q. Where did you obtain that?  
4 A. University of Wisconsin Oshkosh.  
5 Q. Is there anything about these  
6 proceedings that would make it difficult for you  
7 to participate?  
8 A. I think I might be a little biased  
9 towards the State because I do have my background  
10 from criminal justice and also my dad was a police  
11 officer.  
12 Q. Now, was he a police officer in the  
13 state of Wisconsin?  
14 A. Yes, sir.  
15 Q. Now, both sides are looking for fair and  
16 impartial jurors, fair to the State and fair to  
17 the defense. Is there anything about the fact  
18 that your dad was a police officer that would make  
19 you prejudiced in this particular case, slanted  
20 you towards the State versus the defendant?  
21 A. I don't think so.  
22 Q. You can be fair and impartial to both  
23 sides and return just a fair honest verdict?  
24 A. Honestly I don't know because I do have  
25 the criminal justice background. I think I would

1 the judge threw it out because you don't go to  
2 court without an attorney.  
3 Q. Was that here in Las Vegas?  
4 A. No, that was in the state of California.  
5 Q. If you were selected as a juror in this  
6 particular case, could you be fair and impartial  
7 to both sides regardless of your view about the  
8 criminal justice system?  
9 A. Absolutely.  
10 Q. What are your feelings towards the death  
11 penalty?  
12 A. I really have no problems of voting for  
13 it if it was appropriate for that matter or any of  
14 the other ones. I would have to look at evidence.  
15 I would like to know for the defendant his psycho  
16 profile which expert witness I would hope would be  
17 present to give, and based upon that I know I  
18 would come to a decision that would fit most  
19 correctly towards such a crime.  
20 Q. If that decision was the death penalty,  
21 you could come into this courtroom and announce  
22 that decision?  
23 A. Yes, I could.  
24 Q. Thank you, sir. Mr. Redfield, how are  
25 you, sir?

1 be a little more biased towards the State.  
2 Q. What are your feelings toward the death  
3 penalty?  
4 A. In favor of it.  
5 Q. Do you feel that if you're selected as a  
6 juror in this case and you felt the death penalty  
7 was appropriate you could return it? Actually  
8 come into that courtroom and announce that verdict  
9 in front of the defendant?  
10 A. Yes, sir.  
11 Q. The fact that you have a criminal  
12 justice degree, did you hear anything about this  
13 case prior to filling out the questionnaire?  
14 A. No. Maybe just a little bit but not  
15 that I can remember.  
16 Q. Mr. Krasn, how are you, sir?  
17 A. Good.  
18 Q. You don't care too much for the criminal  
19 justice system?  
20 A. No.  
21 Q. Is that personal? Has it been bad to  
22 you?  
23 A. For me it has been. I've never been  
24 arrested. I filed a lawsuit with a lawyer, and of  
25 course my lawyer didn't show up and luckily for me

1 A. I'm good.  
2 Q. What are your feelings toward capital  
3 punishment?  
4 A. I'm not opposed to capital punishment,  
5 but I'm not a big fan of it. I think it should be  
6 used as an exception.  
7 Q. Do you feel in the appropriate case you  
8 yourself could vote for the imposition of a death  
9 penalty against an individual?  
10 A. In an appropriate case.  
11 Q. Has there ever been an appropriate case  
12 as far as you're concerned?  
13 A. I think Jeffrey Dahmer would be a good  
14 candidate.  
15 Q. As you sit here today a little bit about  
16 the case that involves the murder of two  
17 individuals, does that already tell you something  
18 that you're going to exclude the possibility of  
19 death penalty or you're willing to consider it?  
20 A. I'm willing to consider it, but I find  
21 it unlikely that I would find that to be an  
22 exception to the case.  
23 Q. But you can't say that you will not come  
24 back with --  
25 A. I don't know about the case now so.

1 Q. Thank you, sir. Mr. Wan how are you,  
2 sir?  
3 A. Very good.  
4 Q. Do you remember filling out this  
5 questionnaire, sir?  
6 A. I filled out a couple. I don't  
7 understand the law.  
8 Q. You filled out a couple of questions?  
9 A. That's right.  
10 Q. What was the difficulty? Understanding  
11 what the questions were?  
12 A. Because I don't read English good.  
13 MR. SCHWARTZ: Can counsel approach,  
14 your Honor?  
15 THE COURT: You may.  
16 (off-the-record bench conference.)  
17 THE COURT: Mr. Wan, you have every  
18 right to be on this jury panel as a citizen of  
19 this country. However, if you don't want to be on  
20 the panel because of your language difficulty, we  
21 will excuse you, so which would you prefer? You  
22 would prefer to go or stay?  
23 THE JUROR: I prefer to go.  
24 THE COURT: Then you may be excused.  
25 Please go down to the jury commission office on

1 the third floor, tell them you've been excused all  
2 week.  
3 THE JUROR: Thank you very much.  
4 THE COURT: You're welcome. Our next  
5 juror is 780, Christina Shaverdian. Christina,  
6 please come up and take the empty seat in the jury  
7 box. Counsel, she'll go in as Juror 32.  
8 BY MR. SCHWARTZ:  
9 Q. Ms. Shaverdian, good afternoon. Is  
10 there anything about these proceedings that would  
11 make it difficult for you?  
12 A. I'm a little biased toward the victim's  
13 family only because I had a friend that was  
14 murdered recently and you have no idea how it  
15 hurts the family's perspective on life when you  
16 lose somebody very close to you. That's the only  
17 thing that makes me a little biased.  
18 Q. Do you think you'd be able to put that  
19 bias aside and be fair and impartial to both sides  
20 and not make any decision until you heard all of  
21 the evidence?  
22 A. That would depend on the defendant's  
23 witnesses. Possibly.  
24 Q. What are your feelings toward on the  
25 death penalty, ma'am.

1 A. It's a 50/50. It depends on the  
2 defendant either for it or against it.  
3 Q. So the appropriate case you feel you  
4 could come into this courtroom and announce a  
5 verdict sentencing someone to death?  
6 A. Yes.  
7 Q. Ms. Chiangi, what are your feelings  
8 toward capital punishment?  
9 A. I don't believe in it.  
10 Q. So if you're selected on this case for  
11 this penalty phase and the Court instructed you  
12 that there were four forms of punishment, one  
13 being the death penalty, could you consider the  
14 death penalty?  
15 A. No.  
16 MR. SCHWARTZ: I challenge for cause,  
17 your Honor.  
18 THE COURT: Counsel, do you wish to  
19 inquire of Juror 767, Debbie Atienza?  
20 MR. SCHIECK: Just briefly, your Honor.  
21 BY MR. SCHIECK:  
22 Q. Under no circumstances would you even  
23 consider the death penalty as a punishment?  
24 A. No.  
25 Q. Is that a religious belief?

1 A. Yes, it is.  
2 Q. Moral belief?  
3 A. No, it's a religious belief.  
4 MR. SCHIECK: No further questions.  
5 THE COURT: Thank you for being here and  
6 willing to serve your community this week. You  
7 may be excused. Please go downstairs, tell them  
8 you can go out on any other panel other than a  
9 murder case.  
10 Our next juror in line is No. 782,  
11 Tamara Chiangi. She will go in as Juror No. 36.  
12 BY MR. SCHWARTZ:  
13 Q. Good afternoon. You indicated on your  
14 questionnaire that you could consider the death  
15 penalty in certain circumstances, is that correct?  
16 A. Yes.  
17 Q. Has that changed since you filled that  
18 out coming here now?  
19 A. No.  
20 Q. So in other words, if you were selected  
21 as a juror in this particular case, if you felt it  
22 appropriate you could return with a verdict of  
23 death?  
24 A. Yes.  
25 Q. Thank you. What would you want to know

1 before you made up your mind concerning the  
2 appropriate punishment?

3 A. The circumstances, hearing the evidence,  
4 what brought him to that point.

5 Q. Would you be interested in learning  
6 about the defendant, his background, how he was  
7 raised?

8 A. Everything would be considered.

9 Q. Thank you.

10 MR. SCHWARTZ: I have no further  
11 questions, your Honor. I'll pass for cause.

12 THE COURT: Thank you, Counsel.

13 MR. SCHIECK: Thank you, your Honor.

14 BY MR. SCHIECK:

15 Q. I know we've all been here for a long  
16 time today and I'll try not to be too long on  
17 this, but I'm sure you understand we have to ask  
18 these questions of the panel in order to get an  
19 understanding of the proper cross-section of the  
20 community. We are not here to argue that Mario is  
21 not guilty of two counts of first degree murder.  
22 That's already been determined so you have to  
23 accept that as a fact in this case. The only  
24 reason we are here is to decide what is a fair and  
25 appropriate punishment, and you have to focus on

1 crime. While you're not entirely comfortable with  
2 execution, you do believe it's something that's  
3 necessary. Can you expound on that a little bit  
4 for me?

5 A. Absolutely. I don't like the idea of  
6 death because it is so final. It is, you know,  
7 with a prison sentence someone can quite possibly  
8 be reformed, can quite possibly become a  
9 productive member of society once again. But then  
10 there are certain circumstances, there are certain  
11 people who cannot be rehabilitated or who have  
12 done such horrendous things that death is the  
13 necessary punishment; that to remove them from  
14 society is the only way.

15 Q. Do you think that life in prison with no  
16 chance to ever get out is a severe punishment?

17 A. I think that's a very severe punishment.  
18 In some ways I think that's much worse than death.  
19 I think that life in imprisonment aside from  
20 being — putting aside that it is just a severe  
21 punishment, there is always the chance that he  
22 could escape, slim it may be. You can't escape  
23 the death, but I also know that in today's  
24 bureaucratic world that someone who is sentenced  
25 for death sits on death row for years and years

1 that. We're not going to try to soft sell the  
2 case to you or the circumstances. You'll hear  
3 some testimony concerning the homicides but not a  
4 real lot. It will be summarized for you. And  
5 then you'll hear evidence what's known as  
6 aggravators and mitigators and things of that  
7 nature that our legislature says is appropriate in  
8 death penalty decision making by a jury, and so  
9 you're going to hear that Mario had been in prison  
10 before. He'd been convicted of two crimes before  
11 and gone to prison, and so we're not trying to  
12 hide any of that information from you. Up front  
13 we're telling you this information to make sure  
14 that it's not going to so infect your thinking  
15 that you can't consider the forms of punishment  
16 that are available in this type of a case. And so  
17 if you have any questions about that, they'll be  
18 answered during the course of the penalty hearing,  
19 but we want you to know everything going in in  
20 order to make an informed decision. And that's  
21 the bad thing about getting old is that you lose  
22 your reading glasses.

23 Mr. Kimberlin, I see that in looking at  
24 your questionnaire you talk about your religious  
25 background and the punishment should fit the

1 and years and has a lot more motivation to escape

2 Q. You're not going to hear any evidence on  
3 escapes and things like that. I know it factors  
4 into everybody's thinking this possibility, that  
5 possibility, but it's really not a factor in this  
6 case. You indicated in your questionnaire that  
7 you would consider mitigating circumstances?

8 A. Absolutely.

9 Q. You'd want to hear about that?

10 A. Absolutely. I want to — I would like  
11 to hear the circumstances surrounding the case,  
12 what happened. Because I myself I have a temper  
13 I fly off the handle, and so I understand that  
14 that happens and I understand that you do stupid  
15 things when that happens. I also understand that  
16 a person's background has a lot to do with how  
17 they react in various situations. Example is that  
18 I had a stepfather who was a complete tyrant in my  
19 household, and for that any step parent I'm  
20 suspicious of, and so I understand that  
21 experiences in life have a huge effect on how we  
22 react to any given situation in life.

23 Q. Mr. Erickson, in looking at your  
24 questionnaire I notice that in one question,  
25 No. 24, in some cases one must be firmer in

1 sentencing; the crime should fit the punishment.  
 2 Do you have cases in mind where you're  
 3 thinking that someone didn't get a firm enough  
 4 sentence or harsh enough sentence?  
 5 A. No.  
 6 Q. It's just a general view of the criminal  
 7 justice system that you have?  
 8 A. Yes.  
 9 Q. How do you feel about the death penalty?  
 10 A. It is something that needs to stay  
 11 around, and if the crime is severe enough it  
 12 should be implemented.  
 13 Q. On your questionnaire you say an eye for  
 14 an eye is never a good solution. You believe  
 15 that?  
 16 A. You have to hear all of the facts. I  
 17 would never want somebody to -- just because they  
 18 did something they should get the same benefit,  
 19 but on top of that the crime should fit.  
 20 Q. You also say that you wouldn't be open  
 21 to considering all forms of punishment. You  
 22 indicated no. Two counts of first degree murder  
 23 tells me he's not learned his lesson; therefore 50  
 24 years is not a proper punishment.  
 25 A. I agree.

1 Q. You wouldn't consider anything other  
 2 than the death penalty or life without parole --  
 3 A. Correct.  
 4 Q. -- if you sit on the jury? You can't  
 5 consider all forms of punishment in the case?  
 6 A. I wouldn't be able to do that.  
 7 Q. Even if the judge were to instruct you  
 8 that this is the law in Nevada and you must  
 9 consider all four forms of punishment?  
 10 A. I tend to do what I'm told, so if I was  
 11 instructed to I guess -- it would be very  
 12 difficult for me to do that.  
 13 Q. None of the choices are easy choices in  
 14 this case. We just want to be sure that if the  
 15 judge tells you there's four forms you have to  
 16 consider which one is appropriate doesn't mean  
 17 she's telling you which one you have to pick. We  
 18 can't change your mind-set. We have to be aware  
 19 and know that you're going to consider all forms  
 20 of punishment.  
 21 A. I know that they're there. I'm aware  
 22 that they're there.  
 23 Q. Under the right circumstances you could  
 24 envision yourself saying, you know what, maybe I'm  
 25 going to go and give him life with parole because

1 you don't know anything about the case except what  
 2 we've told you.  
 3 A. Correct.  
 4 Q. You might actually vote for it. It's  
 5 not likely as you sit there.  
 6 A. It's not impossible; you are correct.  
 7 Q. That's all we want is to know that you  
 8 can consider the forms of punishment. We're not  
 9 trying to get anybody on the jury to prejudge the  
 10 case and tell us how you're going to vote. We  
 11 just want to make sure you're going to consider  
 12 how you're going to vote and take everything into  
 13 consideration before you make your decision.  
 14 Now, I'm going to mispronounce your  
 15 name. Nancy Demelas, how do you feel about having  
 16 to sit on a case and consider whether or not to  
 17 vote to execute someone?  
 18 A. It's uncomfortable.  
 19 Q. Is it something you can do? You can  
 20 make that decision?  
 21 A. I guess if I have to.  
 22 Q. And before you made that decision, you'd  
 23 want to know as much as possible about not only  
 24 the facts of the case but about Mr. Thomas?  
 25 A. Yep.

1 Q. You would consider all of that in making  
 2 your decision?  
 3 A. Yes, I would.  
 4 Q. I've got a note on the front,  
 5 Mrs. Dacks, of your questionnaire that you're  
 6 pretty much in favor the death penalty?  
 7 A. Yes.  
 8 Q. Is it something you feel is deserved in  
 9 every murder case?  
 10 A. No, not in every murder case.  
 11 Q. And then question about the mitigation  
 12 evidence, you put you would somewhat consider  
 13 those factors and then put not sure and crossed  
 14 that off.  
 15 A. It just seems like there's a lot -- it  
 16 just seems like they let a lot of excuses get in  
 17 anymore going back on somebody on how they were  
 18 raised and everything. It seems like that's used  
 19 more than ever before.  
 20 Q. You need to understand, as everyone on  
 21 the jury needs to understand, mitigation is not an  
 22 excuse, it's not justification. It's not a  
 23 defense. It's just factors in deciding on what  
 24 the appropriate punishment is in the case. We're  
 25 not going to stand here and try to make excuses.

1 We're not going to stand here and try to justify  
 2 what he's been convicted of. We're here to give  
 3 you as much information as you can so you can  
 4 consider whether or not to go for the death  
 5 penalty. So no excuses, okay? Just information  
 6 for you to make an informed decision. Do you have  
 7 any problem with that?  
 8 A. No.  
 9 Q. And you would consider that?  
 10 A. Mm-hmm.  
 11 Q. You say somewhat. We like it a lot more  
 12 when you would very much consider it as to  
 13 somewhat consider, but you're going to consider  
 14 it?  
 15 A. Right, I will.  
 16 Q. If you were the only juror -- let's say  
 17 you went back and you were voting, and 11 other  
 18 jurors said we vote for the death penalty and you  
 19 said, you know, I don't think I can o that, I  
 20 don't think that's the appropriate punishment.  
 21 How would you handle that situation?  
 22 A. If I came back and said I didn't think?  
 23 I would have to be pretty darn sure of myself, the  
 24 evidence that I would have a very good argument  
 25 against their all voting against me.

1 Q. The laws in Nevada do not require the  
 2 death penalty in any case. When you get right  
 3 down to it, the jury can do whatever the jury  
 4 wants to do, and there's not a Category A, a  
 5 Category B, a Category C, therefore we go to D and  
 6 give them the death penalty. You can get to A, B,  
 7 C and just think I don't think he deserves to die  
 8 or he can spend the rest of his life in prison.  
 9 It's a hard decision for any jury to make. You  
 10 think you'd be able to stand up to 11 other  
 11 jurors?  
 12 A. If I felt that strongly that I perceived  
 13 something, that I got something out of the trial  
 14 that they did.  
 15 Q. Or you just saw something different than  
 16 they saw, interpreted it different?  
 17 A. Mm-hmm.  
 18 Q. You'd stick to your guns?  
 19 A. Mm-hmm.  
 20 Q. And likewise you would expect all the  
 21 other jurors to have the same attitude as you  
 22 would have even if you were on the side of the 11  
 23 and there was one holding out, you would  
 24 understand that?  
 25 A. Right.

1 Q. Ms. Basye, tell me about the classes  
 2 that you took for medical law and ethics.  
 3 A. It all had to do with medical.  
 4 Q. Nothing to do with criminal?  
 5 A. No.  
 6 Q. But you've had courses in psychology and  
 7 sociology?  
 8 A. That ran also.  
 9 Q. It had nothing to do with criminal  
 10 psychology, criminal sociology, nothing like that?  
 11 A. No.  
 12 Q. When you talk about the death penalty,  
 13 you indicate I believe it to be fair to the  
 14 defendant but also fairness to the victims' family  
 15 and the victims even if they die. We're going to  
 16 hear testimony from members of the family of the  
 17 two young men that were killed. Are you going to  
 18 be able to fairly judge that?  
 19 A. Yes, sir.  
 20 Q. It's not going to be so emotional for  
 21 you that -- you would still listen to all the  
 22 evidence that both sides presented?  
 23 A. I would listen to all of it, yes, sir.  
 24 Q. We're trying to get through this as  
 25 quickly as we can. I'm sure you all know that we

1 have to ask these questions.  
 2 Ms. Salvador, I've already told you that  
 3 Marlo is convicted of two murders, he's guilty of  
 4 the crime. In your questionnaire you make it  
 5 sound like the question of guilt or innocence is  
 6 what's going to make you decide whether or not to  
 7 impose the death penalty, and that's not a  
 8 question. He's guilty. We have to accept that  
 9 for purposes of these proceedings. Do you still  
 10 want to hear other evidence in the case before you  
 11 make up your mind?  
 12 A. Probably not, if he's convicted.  
 13 Q. You pretty much decided if you're guilty  
 14 of committing two murders you're going to get the  
 15 death penalty, and there's not much we can do to  
 16 change that frame of mind?  
 17 A. No.  
 18 Q. That's not to say that -- nobody is  
 19 criticizing your opinion, but if that's your  
 20 opinion we need to know it.  
 21 A. That is my opinion.  
 22 Q. You're really not going to consider any  
 23 of the other forms of punishment, are you?  
 24 A. No.  
 25 MR. SCHIECK: We'd challenge for cause,

1 your Honor.

2 THE COURT: Counsel, do you wish to  
3 inquire of Ms. Salvador.

4 MR. SCHWARTZ: No, your Honor.

5 THE COURT: Ms. Salvador, I'm somewhat  
6 confused by the question that Mr. Schieck asked  
7 you. Surely all of you would want to know what  
8 the facts of the case are because every murder is  
9 distinctly different from any other murder, and if  
10 that's what you meant in your questionnaire, that  
11 you'd want to know what the facts of the case are  
12 and that in and of itself would give you  
13 information as to what might be the appropriate  
14 penalty because otherwise I don't know what other  
15 information you get to decide which is the  
16 appropriate case for life with parole, which is  
17 the appropriate case for life without the  
18 possibility of parole, which is the appropriate  
19 case for a term of years and which is the  
20 appropriate case for the death penalty. So I'm  
21 confused in what information that you wanted to  
22 help you make up your mind what the penalty should  
23 be.

24 THE JUROR: Well, I see it as he took  
25 two people's lives.

1 THE COURT: So in your mind it doesn't  
2 make any difference what the facts are or the  
3 circumstances. If you're guilty of killing two  
4 people, then the only appropriate penalty is the  
5 death penalty?

6 THE JUROR: Well, no, not necessarily,  
7 not the death penalty.

8 THE COURT: Well, that's where we're at  
9 right now because. That's the impression that  
10 you've left Mr. Schieck is is that once you're  
11 convinced that Mr. Thomas killed two people  
12 there's only one appropriate penalty and that's  
13 the death penalty. That's kind of where we're at,  
14 so I think we've misunderstood you a little bit.  
15 So after you learn about all the facts in the case  
16 and what happened and how it was that these two  
17 people got killed, you are not going to be asked  
18 to decide whether he did it or not because another  
19 jury has already determined that. You're going to  
20 be asked to determine what the appropriate  
21 punishment is, and when you're asked what the  
22 appropriate punishment is would you be able to  
23 consider all of the available punishments which  
24 are those four?

25 THE JUROR: I guess I would.

1 THE COURT: You guess you would? Well,  
2 you can't guess because we've got to be sure  
3 that -- we don't want you to tell us which one  
4 because we would hope for heaven's sake you  
5 haven't made up your mind which one because you  
6 haven't heard anything about the case yet, so the  
7 only question is is whether you could consider --  
8 if you had an appropriate case, could you consider  
9 giving a person life imprisonment with the  
10 possibility of parole which in this instance would  
11 be after 40 years. In the appropriate instance  
12 could you consider giving somebody life without  
13 the possibility of parole which means they're  
14 simply going to stay in jail until the day they  
15 die. Could you consider giving somebody a term of  
16 50 years plus an equal and consecutive 50 years  
17 which makes it a hundred years with the  
18 possibility of parole beginning after 40 years if  
19 you felt that that was the appropriate punishment?  
20 Could you consider it and could you consider the  
21 death penalty?

22 THE JUROR: Yes, I could, all of the  
23 above.

24 THE COURT: So you could consider all of  
25 them in an appropriate case?

1 THE JUROR: Correct.

2 THE COURT: And you've not made up your  
3 mind about what the punishment in this case should  
4 be?

5 THE JUROR: No, I guess I'm being  
6 close-minded. I'm confused.

7 THE COURT: Mr. Schieck, you may inquire  
8 because right now.

9 MR. SCHIECK: I'm confused too.

10 THE COURT: I was confused about her  
11 answer.

12 MR. SCHIECK: Just so we're clear, your  
13 Honor, there's two counts of murder, and so the  
14 Court would decide whatever the sentence was,  
15 whether it was consecutive or concurrent.

16 THE COURT: I'm talking about deadly  
17 weapon enhancement.

18 MR. SCHIECK: There's two homicides.  
19 There could be four life sentences imposed  
20 potentially.

21 THE COURT: I understand.

22 BY MR. SCHIECK:

23 Q. Do you have any questions for me? I  
24 didn't mean to confuse you.

25 A. That's okay. No questions.

1 Q. You probably prefer not to be here.  
 2 A. Yeah.  
 3 Q. Well, you had your chance.  
 4 THE COURT: Your challenge for cause is  
 5 overruled, Mr. Schieck, unless she clarifies where  
 6 she's at.  
 7 BY MR. SCHIECK:  
 8 Q. Ms. McGrath, how are you this afternoon?  
 9 A. I'm all right.  
 10 Q. When Mr. Schwartz was talking to you, I  
 11 made a little note to myself that -- about the  
 12 death penalty. You're kind of on the fence?  
 13 A. I really think that it depends on the  
 14 circumstance. I would definitely want to hear  
 15 everything. I'm not for or against it. I will  
 16 want to know more than -- before I can make a  
 17 judgment and say I'm always for it or I'm always  
 18 against it.  
 19 Q. But it's a decision that you definitely  
 20 feel that you could make if you went back to  
 21 deliberate?  
 22 A. Yeah.  
 23 Q. Just so we're clear, you're not going to  
 24 get back there and say, you know what, I've been  
 25 thinking about this and there's no way I'm going

1 A. Religious grounds I'm not supposed to,  
 2 but if as part of our legal system I'm willing to  
 3 consider it.  
 4 Q. Because this question you said yes, you  
 5 would automatically vote for it. I'm getting the  
 6 feeling that's not the way you really feel about  
 7 the death penalty. You want to hear all the  
 8 evidence in the case and make up your own mind?  
 9 A. Sure.  
 10 Q. And the fact that there's two homicides  
 11 is not going to make you just automatically say  
 12 let's give him the death penalty?  
 13 A. Right.  
 14 Q. And when we ask about mitigating  
 15 circumstances, the question is would you consider  
 16 these mitigating circumstances and we listed a  
 17 couple of them out, and you said not sure. Would  
 18 it be fair to say that you would consider those  
 19 factors?  
 20 A. I think I would consider.  
 21 Q. You'd consider everything in the case?  
 22 A. Yes.  
 23 Q. Ms. Gillis, you have a lot of police  
 24 officers in your family?  
 25 A. Yes, sir.

1 to vote for the death penalty under any  
 2 circumstance.  
 3 A. If I felt it was deserved.  
 4 Q. But you'd want to hear all the evidence  
 5 that you could, and that includes mitigating  
 6 evidence?  
 7 A. Everything that I could hear, yeah.  
 8 Q. You think you could be fair and  
 9 impartial to both sides in the case?  
 10 A. Yes.  
 11 Q. Is it Elpidio. You were a late-minute  
 12 substitution here, so on the death penalty you  
 13 sort of circled I was in favor of it and then you  
 14 circled you would consider it. Are you kind of  
 15 leaning both ways on it also?  
 16 A. I think after I hear enough information.  
 17 Q. And to be fair to everybody that filled  
 18 out these questionnaires, lawyers wrote these  
 19 things up and sometimes they're confusing. One of  
 20 the questions was, Are your beliefs about the  
 21 death penalty such that you would automatically  
 22 vote for the death penalty regardless of the facts  
 23 or circumstances of the case, and you checked yes.  
 24 Did we confuse you on that? You're not  
 25 automatically voting for the death penalty?

1 Q. I'm just looking down the list. Your  
 2 children you've got one's a SWAT police officer?  
 3 A. Yes.  
 4 Q. Where's that at?  
 5 A. Henderson.  
 6 Q. He's here locally?  
 7 A. Yes.  
 8 Q. And you've got another son that's a  
 9 police detective?  
 10 A. Yes, sir.  
 11 Q. Is that here?  
 12 A. Yes, sir.  
 13 Q. And what kind of detective is he?  
 14 A. Robbery homicide.  
 15 Q. Do you ever talk to him about cases --  
 16 A. Occasionally.  
 17 Q. -- that he investigates? There are  
 18 going to be police officers that come in and  
 19 testify in this case. Are you going to give more  
 20 weight to the testimony of police officers because  
 21 you've got kids that are police officers?  
 22 A. I believe I can be fair.  
 23 Q. Do you think that police officer always  
 24 is correct in his testimony or that he's like  
 25 everyone else and can make a mistake?

1 A. I believe he's just like everybody else.  
 2 Q. The facts of the case really aren't at  
 3 issue here so that's not a big issue in this case,  
 4 but we expect a homicide detective to come in here  
 5 and testify concerning the facts of the case. Are  
 6 you going to view his testimony the same as every  
 7 other?  
 8 A. Yes, sir.  
 9 Q. His name is Dave Mesinar? Did your son  
 10 work with Dave Mesinar?  
 11 A. I don't know.  
 12 Q. He was the homicide detective on this  
 13 case back in 1996, so he'll be coming in to  
 14 testify. Are you going to feel that you have to  
 15 accept everything that he says as the gospel or  
 16 are you willing to take it for what it is?  
 17 A. I believe I can take it for what it is.  
 18 Q. Did you have someone else in law  
 19 enforcement? You have a brother-in-law that's a  
 20 judge.  
 21 A. Yes, sir.  
 22 Q. Is that here too?  
 23 A. It's in Riverside.  
 24 Q. Does he do criminal law at all, do you  
 25 know? Does he hear homicide cases?

1 forms of punishment?  
 2 A. No.  
 3 Q. Is it Ms. or Mrs. Mowen?  
 4 A. Ms.  
 5 Q. I notice the prosecutor didn't ask you  
 6 any questions, but from reading your questionnaire  
 7 it sounds like you believe the guy is guilty of  
 8 murder the death penalty is deserved?  
 9 A. No.  
 10 Q. You're willing to consider all forms of  
 11 punishment?  
 12 A. Yes.  
 13 Q. However, you indicate that you're not  
 14 going to consider anything in mitigation on your  
 15 questionnaire?  
 16 A. I would consider it. It wouldn't weigh  
 17 very much on my decision though.  
 18 Q. Why is that?  
 19 A. I don't believe that the way that you  
 20 were raised and how you were raised, where you  
 21 were raised had as much to do with your actions  
 22 that night.  
 23 Q. But it's something that you would want  
 24 to hear before you took a man away to execute  
 25 someone?

1 A. I believe he does.  
 2 Q. Do you talk to him much about that?  
 3 A. Occasionally. I have not spoken to him  
 4 about this case.  
 5 Q. He probably wouldn't have heard about  
 6 this case. And your son-in-law is in law  
 7 enforcement also?  
 8 A. Yes.  
 9 Q. Is that here in Metro also?  
 10 A. It's in Henderson.  
 11 Q. The detective's son, is that Metro?  
 12 A. Yes, sir.  
 13 Q. So you've got two in Henderson and one  
 14 in Metro?  
 15 A. Yes, sir.  
 16 Q. Anyone else in your family?  
 17 A. A nephew, but he's in California,  
 18 Riverside, California.  
 19 Q. Have you ever been in law enforcement?  
 20 A. No, sir.  
 21 Q. How do you feel about the death penalty?  
 22 A. I can consider it as one of the options.  
 23 Q. The fact that we tell you that Mario is  
 24 guilty of two homicides is not going to change the  
 25 fact that you're going to consider all of the

1 A. Yes.  
 2 Q. And it's something you could consider?  
 3 A. Yes.  
 4 Q. It's something you're not going to give  
 5 a whole lot of weight to?  
 6 A. Exactly.  
 7 Q. So when you said not at all, you  
 8 probably should have said "somewhat" as opposed to  
 9 "not at all"?  
 10 A. Yes.  
 11 Q. It's always good to answer somewhat  
 12 because you've got wiggle room around. Has  
 13 anyone -- Question No. 24 you say that defendants  
 14 have too much leniency at their side rather than  
 15 the victims. What causes you to say that? Do you  
 16 have a case in mind or circumstance has happened  
 17 in your life, someone you knew?  
 18 A. Yes.  
 19 Q. What is that?  
 20 A. I am a victim of -- my brother was  
 21 murdered.  
 22 Q. Here in Las Vegas?  
 23 A. Yes.  
 24 Q. And was that a case involving more than  
 25 one death?

1 A. Yes.  
 2 Q. And was the defendant Dante Johnson?  
 3 A. Yes.  
 4 Q. Do you know that my office defended  
 5 Dante Johnson in the case?  
 6 A. Yes.  
 7 Q. Given that fact -- did you attend the  
 8 trial?  
 9 A. I've been to every single day of  
 10 Dante's.  
 11 Q. So you were here at his criminal hearing  
 12 not too long ago? You attended that?  
 13 A. Yes.  
 14 Q. The attorneys from my office were there?  
 15 A. Mm-hmm.  
 16 Q. Is there anything about that that causes  
 17 you some angst toward me or toward the office or  
 18 toward the system?  
 19 A. No, not at all.  
 20 Q. Given the fact that your brother was  
 21 killed, was murdered, do you think you can be fair  
 22 and sit on a case of this nature?  
 23 A. I've sat up all night thinking about it,  
 24 and I think that I can be fair. I would consider  
 25 everything.

1 Q. You know that the victims' family is  
 2 going to come in and testify.  
 3 A. Yes.  
 4 Q. Did you testify or --  
 5 A. Yes, I did.  
 6 Q. You testified with victim impact  
 7 information?  
 8 A. I did.  
 9 Q. So you learned a lot of information  
 10 about Mr. Johnson?  
 11 A. Yes.  
 12 Q. The entire criminal justice system?  
 13 A. Yes.  
 14 Q. About prison, about Ely State Prison?  
 15 A. Yes.  
 16 Q. Mr. Johnson was on death row?  
 17 A. Yes.  
 18 Q. Given all of that. You can understand  
 19 my concern?  
 20 A. Oh, yeah. I'm surprised I'm still here.  
 21 THE COURT: That doesn't disqualify you  
 22 from being a juror.  
 23 THE JUROR: I know. I'm just surprised  
 24 that I've not been kicked off sooner.  
 25 / / /

1 BY MR. SCHIECK:

2 Q. There's two different things. There's  
 3 challenges for cause which means you can't be fair  
 4 and impartial or because of your unfortunate  
 5 situation with your brother is going to affect  
 6 your ability to fairly judge the defendant's  
 7 witnesses as opposed to the victim's witnesses  
 8 which obviously you're going to empathize with  
 9 victims' family when they come in here and testify  
 10 because you've been through it, and you know what  
 11 it's like and you're probably not going to be too  
 12 sympathetic for Mr. Thomas's case; is that fair?  
 13 A. No, that's not true. In a sense they  
 14 still lost part of their family too. I'm still  
 15 going to listen to their impact, listen to what  
 16 they have to say. In all honesty what happened to  
 17 me has nothing to do with this trial, and as a  
 18 potential juror I have to put that aside, and I  
 19 have to take my emotions and put them aside.  
 20 Q. And you think you can do that?  
 21 A. Yeah.  
 22 Q. You indicated in your questionnaire that  
 23 you wouldn't consider anything in mitigation.  
 24 A. I would what?  
 25 Q. That you would not consider mitigation

1 of any type in this case.  
 2 A. Yes.  
 3 Q. So you wouldn't even consider mitigation  
 4 on behalf of Mr. Thomas?  
 5 A. At that time when I was reading it I  
 6 don't believe that I would. I've thought about  
 7 it, and I would consider it. And like I said  
 8 earlier, it's not going to weigh too much on me.  
 9 Q. You said you stayed up all night  
 10 thinking about this. It weighed on your mind that  
 11 heavily?  
 12 A. (Witness nods head affirmatively.)  
 13 Q. You read the questionnaire sometime ago  
 14 and filled it out. Had you thought about it  
 15 during that intervening period also?  
 16 A. Somewhat.  
 17 Q. What had you thought?  
 18 A. It's a tough decision, but I've seen --  
 19 I've gone through three different murder trials  
 20 with three different cases, and one was death  
 21 which I completely feel was necessary.  
 22 Q. We don't need to talk about specific  
 23 verdicts in different cases.  
 24 A. Some people deserve death. Some people  
 25 deserve life. I'm not going to go for one certain

1 thing just because of.

2 Q. You're willing to consider all the forms  
3 of punishment?

4 A. Yes.

5 Q. Thank you very much. I'm sorry to have  
6 to bring that up.

7 Mrs. Brown, you pretty much indicate in  
8 your questionnaire that someone is found guilty of  
9 two first degree murders that the death penalty is  
10 probably the way you're going to vote?

11 A. No. I put down it seems like C and D  
12 would be what would be appropriate.

13 Q. C would consider it.

14 A. That's life I think.

15 Q. Why don't you tell me what you meant by  
16 that?

17 A. I believe -- I don't remember the  
18 numbers, but I know the question you're referring  
19 to. I believe I said I thought that since they'd  
20 already been convicted of two that it would  
21 probably be my opinion to say life imprisonment  
22 without parole or the death.

23 Q. And you're open to considering both of  
24 those options? You haven't made up your mind in  
25 this case?

1 A. No, because all I have is just a little  
2 thing given, a brief summary of what it was. It  
3 wasn't like what actually happened or any  
4 background.

5 Q. You indicated that you wouldn't consider  
6 mitigation. You checked not at all.

7 A. I'm not really sure what mitigation  
8 means, to be honest with you.

9 Q. The question was you will be asked to  
10 consider mitigating circumstances such as the  
11 defendant's background, health, mental status,  
12 age, childhood experiences, education, et cetera.

13 A. Not particularly. I don't think that  
14 weighs that heavy because I've raised three  
15 children. Every one of them is different. Every  
16 one of them with a different personality. So a  
17 lot of that background stuff is the person  
18 themselves, not the way they were raised.

19 Q. But you'd want to know as much as you  
20 could know before you made a decision as hard as  
21 this one is going to be?

22 A. It's going to be very hard.

23 Q. Have you thought about this since you  
24 filled out the questionnaire?

25 A. Yes, I have.

1 Q. What have you thought? Have you gone  
2 over it in your mind could I or can't I, should I,  
3 would I?

4 A. Yeah, I certainly have.

5 Q. And you decided that?

6 A. Because just like other people have  
7 said, the weight of judging someone, well, it's  
8 not judging. He's already been judged, but any of  
9 it is like on your shoulders, you know, and that's  
10 pretty weighty.

11 Q. I understand.

12 Mrs. Heacock, you also pretty much  
13 indicated that you weren't going to consider  
14 mitigation. You said somewhat. Having heard me  
15 talk with everyone about mitigation, the  
16 difference between somewhat and not at all, you're  
17 going to want to hear that evidence and consider  
18 it before you make the decision?

19 A. Yes.

20 Q. And you say if you kill someone I  
21 believe you have to answer to, number one, God  
22 and, number two, laws of the land and that you  
23 favor the death penalty. But you're not saying  
24 death penalty in every case?

25 A. Oh, no.

1 Q. Is it Mrs. Wohlt? Your dad's a police  
2 officer?

3 A. Yes.

4 Q. Where?

5 A. Wisconsin.

6 Q. That's right. And is he a homicide  
7 police officer?

8 A. No, just patrol.

9 Q. You said in No. 37, Question 37 on the  
10 questionnaire, whether or not you were open to  
11 considering all forms of punishment depending on  
12 the evidence and you said not for two counts of  
13 murder. So you're not -- tell me what you think.  
14 I don't want to confuse any more people.

15 A. He's already been convicted. I think  
16 the mitigating circumstances don't really do much  
17 for me. I think death penalty is the only option.

18 Q. Is the only option?

19 A. Mm-hmm.

20 Q. And nothing I say is going to sway you  
21 from that?

22 A. No.

23 Q. Again, I'm not saying -- I'm not  
24 criticizing your opinion because there's a lot of  
25 people with different opinions.

1 MR. SCHIECK: We would challenge for  
2 cause, your Honor.

3 THE COURT: Mr. Schwartz, do you wish to  
4 inquire of Ms. Wohlt again?

5 BY MR. SCHWARTZ:

6 Q. Under no circumstances would you  
7 consider life with the possibility of parole or a  
8 term of years not knowing anything about the case  
9 other than?

10 A. Other than conviction, no, I don't think  
11 I could.

12 Q. It doesn't matter to you what his  
13 background was or what other people might come  
14 here and testify?

15 A. I could probably consider it, but I  
16 would already be more leaning towards death.

17 Q. The question is can you consider all  
18 four forms. We're not locking you into one  
19 punishment. Would you consider all four?

20 A. I don't think fairly I can.

21 THE COURT: Thank you, Ms. Wohlt, for  
22 being willing to serve your community. You may be  
23 excused. Please report down to the jury  
24 commission office on the third floor tell them you  
25 can go out on anything other than a murder case.

1 involved, yes.

2 Q. What type of stuff did you do?

3 A. Well, I was in the Coast Guard, Smokeys  
4 of the sea. Everything from drunks to people  
5 stealing boats, drug running, all that sort of  
6 stuff.

7 Q. Did you ever get involved with anybody  
8 that had committed a homicide that you  
9 investigated?

10 A. No.

11 Q. I assume that occasionally you had to go  
12 to court to testify?

13 A. Yes.

14 Q. And your next-door neighbor works for  
15 the North Las Vegas Police Department?

16 A. Right.

17 Q. Do you ever talk to him about his work  
18 or what's going on?

19 A. Not specifics but a lot of general a  
20 little, yes.

21 Q. Thank you very much. Is it Krasn?

22 A. Yes.

23 Q. And Mr. Schwartz had touched on this.  
24 You said you don't like the criminal justice  
25 system, and I just wondered if you could change

1 Our next juror in line is No. 784,

2 Joseph Delia. Sir, would you come forward and  
3 take the seat vacated by Ms. Wohlt and, Counsel,  
4 Mr. Delia will go in as Juror No. 29.

5 BY MR. SCHIECK:

6 Q. Good afternoon. You've been sitting  
7 here listening to us talk for a while. Any  
8 questions you have or anything you think you could  
9 tell us based on the questions I've asked the  
10 other jurors?

11 A. Not that I can think of.

12 Q. And you would consider mitigation as  
13 we've explained?

14 A. I would consider it, yeah.

15 Q. You haven't made up your mind in this  
16 case based on anything that's been said?

17 A. No. I don't know anything about it. I  
18 haven't made up my mind about anything.

19 Q. Are you generally in favor of the death  
20 penalty?

21 A. Under certain circumstances, yeah. It's  
22 not that I'm for or against either way.

23 Q. You were in the military in law  
24 enforcement?

25 A. There was a lot of law enforcement

1 the criminal justice system how would you change  
2 it?

3 A. I would hold legal counsel when they  
4 walk out on a client I would like to see someone  
5 where a judge would hold them more accountable  
6 rather than throw out a case all together like  
7 they did to me.

8 Q. Was that a civil case?

9 A. Yes, it was a civil case. It was a  
10 derivative lawsuit which I brought against a  
11 corporation to dissolve.

12 Q. There's a lot of people that don't like  
13 attorneys. We all know that. Are you going to  
14 hold anything against Mr. Albrechts or I do  
15 something are you going to say that's not very  
16 tactful?

17 A. Not at all.

18 Q. You certainly wouldn't hold it against  
19 Mr. Thomas?

20 A. Absolutely not.

21 Q. In fact, you probably would feel sorry  
22 that he's got such lousy attorneys representing  
23 him.

24 A. I wouldn't go that far. I just look at  
25 my own personal experience, you know, which is

1 very bad. It really is. And I say in my case  
 2 justice was not served. Justice was ill that day.  
 3 Q. You're not talking about anything of a  
 4 criminal nature?  
 5 A. Absolutely not.  
 6 Q. Thank you very much.  
 7 THE COURT: Mr. Schieck and  
 8 Mr. Schwartz, would you approach for just a  
 9 minute.  
 10 (off-the-record bench conference.)  
 11 BY MR. SCHIECK:  
 12 Q. Mr. Redfield, the note I made is you're  
 13 not a big fan. I don't know what that means. Did  
 14 you say you weren't a big fan of the criminal  
 15 justice system?  
 16 A. No.  
 17 Q. You're not a big fan of the death  
 18 penalty?  
 19 A. I'm not a big fan of the death penalty.  
 20 Q. But in the right case you could consider  
 21 it?  
 22 A. Yes.  
 23 Q. You say, over all the death penalty lets  
 24 people off too easily without offering much  
 25 deterrent to us and to me and society at large.

1 sentenced.  
 2 Q. Did you attend the trial?  
 3 A. No, I didn't because I was too emotional  
 4 at the time.  
 5 Q. I don't want to get into too much detail  
 6 with you because I know it's an emotional thing.  
 7 Was she murdered by someone she knew, or was it a  
 8 drive-by?  
 9 A. It was a drunk driver. She got picked  
 10 up because her car broke down and then the drunk  
 11 driver killed her as she was crossing the street.  
 12 Q. So it was a automobile collision?  
 13 A. Yeah, but she was walking.  
 14 Q. Anything about that?  
 15 A. Just makes me biased more towards the  
 16 families that have to go through after the victims  
 17 die or suffer. It just makes me more biased  
 18 towards the families have gone through the loss.  
 19 Q. We're going to have some members of the  
 20 victims' family who will testify here. Do you  
 21 feel that you can judge their testimony fairly  
 22 with whatever testimony we put on?  
 23 A. I can do that. I can consider both  
 24 sides.  
 25 Q. Mr. Mason, looks to me like you're

1 Do you base that on any readings you're done or  
 2 studies that you've looked at?  
 3 A. You mean about the deterrent value of  
 4 it?  
 5 Q. Yes.  
 6 A. I wouldn't say I have any data for it.  
 7 It's more of an impression. My feeling about  
 8 letting people off easy it just seems to me, they  
 9 execute, then they're dead, that's it. But having  
 10 to live with being locked up for a long time.  
 11 Q. So you actually agree with one of the  
 12 other jurors who thought that perhaps life in  
 13 prison without parole is a worst punishment than  
 14 the death penalty?  
 15 A. Oh, I would think so.  
 16 Q. Thank you very much. Christina  
 17 Shaverdian, you had a friend that was murdered  
 18 recently?  
 19 A. Two years ago. We just celebrated her  
 20 anniversary a couple weeks ago, her death.  
 21 Q. Was that here in Clark County?  
 22 A. No, it was California.  
 23 Q. You said no one was ever caught for  
 24 that.  
 25 A. They were caught and they were

1 pretty much in favor of the death penalty?  
 2 A. Yes.  
 3 Q. I can't read exactly what you wrote, but  
 4 on the explanation you said I believe it is the  
 5 vigilant thing to do?  
 6 A. I couldn't tell you.  
 7 MR. SCHIECK: Can I show him his  
 8 questionnaire so he can read it?  
 9 THE COURT: Sure.  
 10 THE JUROR: It is the right thing to do.  
 11 BY MR. SCHIECK:  
 12 Q. I thought that was a V.  
 13 A. It's an R.  
 14 Q. Can you consider all the forms of  
 15 punishment or are you pretty much of the mind-set  
 16 that if someone commits two murders they deserve  
 17 the death penalty and nothing we say is going to  
 18 sway you?  
 19 A. It depends on the circumstances.  
 20 Q. What type of circumstances?  
 21 Circumstances of the crime?  
 22 A. The circumstances of the crime.  
 23 Q. What about the mitigation on behalf of  
 24 the defendant? Is that something you would  
 25 consider?

1 A. I don't think it would have a lot of  
2 weight with me.  
3 Q. But it's something that you would at  
4 least consider?  
5 A. I'll listen to it.  
6 Q. There's a difference between listening  
7 to it and considering.  
8 A. I don't feel it would have a lot of  
9 impact on me but, you know, I'm not ruling it out.  
10 Q. Mr. Chavez, we're wrapping it up real  
11 quick here. You indicate that you wouldn't  
12 consider mitigation at all. You said not at all  
13 would I consider mitigation in a penalty hearing.  
14 After hearing me talk for an hour-and-a-half or  
15 two hours it seems like that I've been up here, is  
16 mitigation something that you would consider or  
17 that you wouldn't consider?  
18 A. I believe in the death penalty. I would  
19 have to have more information based on if I hear  
20 more facts about the case just to apply the death  
21 penalty even more.  
22 Q. You indicated if someone takes a life or  
23 hurts a child they deserve the death penalty if  
24 they get convicted beyond a reasonable doubt.  
25 We've already told you that he's convicted of two

1 it's a deliberate murder is the way I put it as  
2 opposed to self-defense or circumstances where a  
3 person was defending himself or their family or  
4 whatever, that's a different circumstance to me.  
5 MR. SCHIECK: That's all the questions I  
6 have, your Honor.  
7 THE COURT: Mr. Schwartz, would you like  
8 to question those who have come up given  
9 challenges that you've not questioned?  
10 MR. SCHWARTZ: Just one question for  
11 Mr. Delia.  
12 BY MR. SCHWARTZ:  
13 Q. Mr. Schiack, I think, talked to you  
14 about briefly, but I didn't quite understand your  
15 response. What is your position with regard to  
16 the death penalty?  
17 A. I'm neither for nor against.  
18 Q. But if you were selected as a juror on  
19 this particular case and you were given four  
20 options and you felt the only appropriate sentence  
21 in this particular case was the imposition of the  
22 death penalty, could you come into this courtroom  
23 and sentence that defendant to death?  
24 A. If I felt it was appropriate?  
25 Q. Yes.

1 counts of murder. You don't even have to worry  
2 about making that decision. Given that fact, can  
3 you consider anything other than the death penalty  
4 in this case?  
5 A. Probably the only one I would consider  
6 is the life in prison without parole, but I'm  
7 leaning more towards the death penalty.  
8 Q. Without having heard anything other than  
9 there was two homicides?  
10 A. Like I said, I would like to be given  
11 more confirmation for my basis of what I believe.  
12 Q. You do want to hear all that  
13 information?  
14 A. Well, if it's going to be a lot of more  
15 confirmation of what I believe, then if I hear  
16 that then I'm going to rest my case on how I  
17 believe the death penalty would be applied.  
18 Q. Thank you. Mr. Rice, you indicate that  
19 you're in favor of the death penalty for  
20 premeditated and deliberate murders?  
21 A. Yes.  
22 Q. Are you of such a mind-set that you  
23 couldn't consider other possibilities?  
24 A. Depending on circumstances,  
25 circumstances of how he got to that point. If

1 A. Yes.  
2 MR. SCHWARTZ: Thank you very much.  
3 Thank you, Counsel.  
4 THE COURT: Counsel, you pass the juror  
5 panel for cause?  
6 MR. SCHIECK: Yes, Your Honor.  
7 THE COURT: And you pass the panel for  
8 cause?  
9 MR. SCHWARTZ: Yes, Your Honor.  
10 THE COURT: The 12 of you qualify and  
11 the 20 of you qualify to be jurors. Those who  
12 we've not talked to, thank you for being here all  
13 day. We're not going to need you in this panel.  
14 The other 32 of you all of whom are qualified if  
15 you will -- how long is it going to take you,  
16 Counsel, ten minutes?  
17 MR. SCHWARTZ: I'm alone.  
18 THE COURT: The attorneys have -- each  
19 side has the right to peremptorily challenge nine  
20 people, so if you start with 32 of you all of whom  
21 qualify to be jurors in this case and 32 minus  
22 nine and nine is 18 that leaves 14. That's what  
23 they're going to do now. We call it jury  
24 selection, but it's actually jury deselection  
25 because they can't say I want this one and the

1 other one says I want this one. It's not like  
 2 pick the ball team when we were kids and the  
 3 captains would each choose people to be on the  
 4 ball team. It's the opposite of that. It's  
 5 here's 32 people and then they each get to  
 6 peremptorily challenge nine, and those who are  
 7 left are on the ball team, and the ball team being  
 8 the jury panel. So you don't necessarily have to  
 9 sit through this because they just go back and  
 10 forth, so why don't you be back at five minutes to  
 11 five and we'll be able to tell you which of you  
 12 will go forward with us as our jurors and  
 13 alternate jurors in this case.  
 14 (Pause in proceedings.)  
 15 THE COURT: We're back in session on  
 16 jury selection on the State of Nevada versus Marlo  
 17 Thomas. The record will reflect the absence of  
 18 the jury. The attorneys have now exercised their  
 19 peremptory challenges, and before the Court brings  
 20 the panel back in and announces who will be with  
 21 us as our jury panel, does either party wish to  
 22 exercise Batson or JEB versus Alabama challenge by  
 23 the other party.  
 24 THE JUROR: For the record, there was no  
 25 African-Americans who made it in the panel. Other

1 than the previous objections stated, no objection.  
 2 THE COURT: Mr. Schwartz.  
 3 MR. SCHWARTZ: Just for the record, your  
 4 Honor, one African-American I believe was on her  
 5 way until she discovered she was an ex-felon.  
 6 THE COURT: And the other one was the  
 7 very next one to come into the box if there had  
 8 been another challenge for cause. He was next in  
 9 line, the fellow that sat right behind you.  
 10 Jonathan, would you bring the panel in,  
 11 please.  
 12 Good evening, ladies and gentlemen. You  
 13 are the 32 who have been chosen, and at this time  
 14 I'm going to tell you which 14 of you will be  
 15 going forward as our jury and alternate juror.  
 16 Our alternate jurors will not know that they're  
 17 the alternates until the end of the trial when  
 18 only 12 go in and deliberate to reach a decision.  
 19 No. 496, Janet Cunningham; 512, Janet Jones; 532,  
 20 Don McIntosh; 544, Connie Kaczmarek; 570, Rosa  
 21 Belch; 585, Philip Adona; 660, Adele Bayse; 675,  
 22 Jill McGrath; 773, Ceasar Elpidio; 684, Loretta  
 23 Giltis; 784, Joseph Della; 780, Christina  
 24 Shaverdian; 758, Herbert Rice; and 782, Tamara  
 25 Chiangi. If we called your name and read your

1 number, please come forward and take a seat in the  
 2 14 seats in the jury box.  
 3 Ladies and gentlemen, you are the chosen  
 4 14. Please don't feel slighted or hurt back there  
 5 that you didn't get chosen. You all qualified to  
 6 be jurors on this case. You're not going to be  
 7 needed for the trial. Thank you for being with us  
 8 and filling out the questionnaire some weeks ago  
 9 and being here all day for jury selection. You  
 10 are now excused and you may leave. Those of you  
 11 out there are excused with the Court's thanks, and  
 12 the clerk is going to issue the juror oath to the  
 13 14 of you.

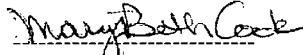
14 (Juror oath administered.)  
 15 THE COURT: Ladies and gentlemen, we're  
 16 going to be in recess now for the evening recess.  
 17 We'll be back in session at 10:00 tomorrow  
 18 morning. The only thing you have to do downstairs  
 19 on the third floor in the jury room is sometime  
 20 during the day validate your parking ticket. And  
 21 I'm not familiar with the new procedures here  
 22 because we just moved in. This is our third week  
 23 in this building, but I think some place there  
 24 there's a ticket validator. That's the only thing  
 25 you have to do there. You will come directly to

1 Department XV. We are in 12C. It's the  
 2 12th floor, Courtroom C. Be here at  
 3 10:00 tomorrow morning.  
 4 You are admonished not to converse  
 5 amongst yourselves or with anyone else on any  
 6 subject related to or read, watch or listen to any  
 7 report of or commentary on the trial or any person  
 8 connected with the trial by any medium of  
 9 information including, but not limited to,  
 10 television, radio, or newspapers, or form or  
 11 express any opinion on any subject connected with  
 12 the trial until the case is finally submitted to  
 13 you.  
 14 Those of you who are employed you need  
 15 to call the boss. You need to tell them you're  
 16 chosen as a juror in the Marlo Thomas case. You  
 17 can't tell them anything else about the case until  
 18 you are finished. You can't tell your family,  
 19 your friends anything else about the case other  
 20 than that you've been chosen as a criminal juror  
 21 and that your service will probably last this  
 22 week. You're excused. We'll see you back at  
 23 10:00 tomorrow morning. Thank you.  
 24 THE JUROR: Will we be here from 10 to  
 25 five each day?

1 THE COURT: Starting times differ, but  
2 generally it's ten to five daily. And the bailiff  
3 can answer any other questions that you might  
4 have.

5 -o0o-

6 ATTEST: Full, true and accurate transcript.

7   
8  
9 MARY BETH COOK, CCR #268, RPR

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

FILED IN OPEN COURT  
NOV - 4 2005 20  
SHIRLEY B. PARRAGUIRRE, CLERK  
BY *Theresa Lee*  
THERESA LEE DEPUTY

4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

6 \* \* \*

7 ORIGINAL

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

15 BEFORE THE HONORABLE SALLY LOEHRER  
16 DISTRICT COURT JUDGE

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

19 APPEARANCES:

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

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

MARY BETH COOK (702) 455-4288

**INDEX OF EXHIBITS**

| Exhibit         | Description                | Admitted |
|-----------------|----------------------------|----------|
| State's 11A     | Disciplinary Appeal Report | 17       |
| State's 85      | Juvenile Records           | 19       |
| State's 86      | Juvenile Records           | 19       |
| State's 87      | PSI                        | 22       |
| State's 89-100  | NSP Records                | 16       |
| State's 102     | PSI                        | 22       |
| State's 104-107 | NSP Records                | 16       |
| State's 108     | NLV Incident Report        | 22       |
| State's 108     | NLV Incident Report        | 38       |
| State's 116     | Disciplinary Reports       | 17       |

**I N D E X**

| Witness                             | Page |
|-------------------------------------|------|
| PATRICIA ANN SMITH                  |      |
| Direct Exam by Mr. Owens            | 24   |
| Cross-Examination by Mr. Schieck    | 30   |
| JOHN SPRINGGATE                     |      |
| Direct Exam by Mr. Owens            | 32   |
| Cross-Examination by Mr. Schieck    | 42   |
| Redirect Exam by Mr. Owens          | 46   |
| ALKAREEM HANIFA'S TRANSCRIPT        |      |
| CATHY FRAZIER                       |      |
| Direct Exam by Mr. Schwartz         | 57   |
| Cross-Examination by Mr. Schieck    | 61   |
| PAUL WHEELOCK                       |      |
| Direct Exam by Mr. Schwartz         | 63   |
| Cross-Examination by Mr. Schieck    | 66   |
| Redirect Exam by Mr. Schwartz       | 69   |
| Recross-Examination by Mr. Schieck  | 71   |
| RICHARD JOHNSON                     |      |
| Direct Exam by Mr. Owens            | 74   |
| Cross-Examination by Mr. Albregts   | 90   |
| Redirect Exam by Mr. Owens          | 93   |
| Recross-Examination by Mr. Albregts | 94   |
| WENDY GRAY                          |      |
| Direct Exam by Mr. Schwartz         | 95   |
| Cross-Examination by Mr. Schieck    | 101  |
| Redirect Exam by Mr. Schwartz       | 104  |
| GINA HAIN                           |      |
| Direct Exam by Mr. Schwartz         | 106  |
| Cross-Examination by Mr. Schieck    | 110  |
| Redirect Exam by Mr. Schwartz       | 111  |
| MARTY NAEGLE TRANSCRIPT             | 114  |
| MARGARET WOOD TRANSCRIPT            | 134  |

**MARY BETH COOK (702) 455-4288**

|    |                                    |     |
|----|------------------------------------|-----|
| 1  | ROBERT SEDLACEK                    |     |
|    | Direct Exam by Mr. Schwartz        | 146 |
| 2  | Cross-Examination by Mr. Schieck   | 152 |
|    | Redirect Exam by Mr. Schwartz      | 160 |
| 3  | Recross-Examination by Mr. Schieck | 162 |
|    | ROGER EDWARDS TRANSCRIPT           | 163 |
| 4  | GREGORY FREEMAN                    |     |
|    | Direct Exam by Mr. Owens           | 202 |
| 5  | Cross-Examination by Mr. Schieck   | 209 |
|    | DAVID WILLIAMS                     |     |
| 6  | Direct Exam by Mr. Owens           | 210 |
|    | Redirect Exam by Mr. Owens         | 217 |
| 7  | Recross-Examination by Mr. Schieck | 217 |
|    | Further Recross-Exam by Mr. Owens  | 219 |
| 8  | VANESSA HEIDT                      |     |
|    | Direct Exam by Mr. Owens           | 220 |
| 9  | Cross-Examination by Mr. Schieck   | 225 |
|    | Redirect Exam by Mr. Owens         | 228 |
| 10 | Recross-Examination by Mr. Schieck | 229 |
|    | FRED DIXON                         |     |
| 11 | Direct Exam by Mr. Schwartz        | 231 |
|    | ALEXANDER GIANAKIS                 |     |
| 12 | Direct Exam by Mr. Owens           | 241 |

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MARY BETH COOK (702) 455-4288

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

PROCEEDINGS

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

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

THE COURT: What a surprise.

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

THE COURT: Okay.

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

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

MR. OWENS: Yeah, before the last trial.

THE COURT: Now you have new ones since then?

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

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

MR. SCHIECK: We've seen the reports.

THE COURT: Have you seen the new ones?

MR. SCHIECK: Yes.

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

a summary document of all the reports.

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

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

THE COURT: Which is in English.

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

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

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

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

MR. OWENS: Yeah, I think so.

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

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

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

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

THE COURT: You've got to do that.

MR. SCHIECK: Just so you're aware.

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

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

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

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

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

1 MR. OWENS: We have documents that were  
2 admitted in the prior calendar proceeding. I  
3 organized them into groups according to subject.  
4 First of all, we have the prison records showing  
5 disciplinary incidents before the penalty hearing.  
6 100 is the summary, and Exhibits 89, 90, 91, 92,  
7 93, 94, 95, 96, 97, 98, 99, 104 through 107.  
8 THE COURT: Those are disciplinary  
9 records from the prison system prior to these  
10 murders; is that correct?  
11 MR. OWENS: That's correct, your Honor.  
12 THE COURT: Mr. Schleck, the State is  
13 moving to admit Exhibits 100, which is the  
14 summary, and 89 through 107 with a few numbers  
15 out. Have you had a chance to review the  
16 disciplinary records of your client from his prior  
17 time at the Nevada Department of Prisons prior to  
18 this murder?  
19 MR. SCHIECK: Yes, I have, your Honor.  
20 THE COURT: Are you objecting to the  
21 introduction of these documents?  
22 MR. SCHIECK: Yes, I am, your Honor.  
23 We're objecting under NRS 52.235 and NRS 52.245  
24 under the rules of evidence because the declarant  
25 is not present and these are not the originals.

1 THE COURT: You're talking about.  
2 MR. SCHIECK: It's the best evidence  
3 rule. The original's required on any writing that  
4 the State intends to introduce, and in the 52.245  
5 is the admissibility of duplicates, and it says  
6 they should not be admitted as an original in  
7 circumstances that would be unfair to admit the  
8 duplicate in lieu of the original.  
9 We're objecting on that basis as well as  
10 on the basis that these are hearsay documents  
11 under both Nevada hearsay law and under the  
12 confrontation clause. The declarant of each of  
13 these statements should be available to be  
14 cross-examined before they're admitted.  
15 THE COURT: All right. Under the  
16 hearsay definition on the prohibition against  
17 hearsay, the statute specifically allows hearsay  
18 in the penalty proceeding, so your objection under  
19 52.235 is denied. Let me take a look at your  
20 other objection under 52.245.  
21 MR. SCHIECK: And 52.235, both of those  
22 statutes.  
23 THE COURT: Let's look at the definition  
24 of the original as defined by the legislature. An  
25 original of a writing or a recording is the

1 writing or recording itself or any counterpart  
2 intended to have the same effect by a person  
3 executing or issuing it. An original of a  
4 photograph includes the negatives or any print  
5 therefrom. If data are stored in a computer or  
6 similar device, any printout or output readable by  
7 sight, shown accurately to reflect the data, is an  
8 original.  
9 And it indicates under Chapter 52, To  
10 prove the content of a writing, recording, or  
11 photograph, the original is required except as  
12 otherwise provided in this title. 52.245 says, in  
13 addition to the situation governed by subsection  
14 2, a duplicate is admissible to the same extent as  
15 an original unless a genuine question is raised as  
16 to the authenticity of the original; or in the  
17 circumstances it would be unfair to admit the  
18 duplicate in lieu of the original. And except as  
19 otherwise provided in 247, a duplicate is  
20 admissible to the same extent as an original if  
21 the person or office having custody of the  
22 original was authorized to destroy the original  
23 after preparing the duplicate, and, in fact, did  
24 do so.  
25 And 52.247, subsection 2, any

1 rerecorded, copied or reproduced record specified  
2 in subsection 1 is admissible to the same extent  
3 as the original, regardless of whether the  
4 original is available for inspection or has been  
5 lost or destroyed, if the rerecorded copies or  
6 reproduced record is sufficiently authenticated.  
7 An enlargement or facsimile of a  
8 rerecorded copy or reproduced record is admissible  
9 to the same extent as the original.  
10 Subsection 4 says, if the governmental  
11 agency destroys any of its records and causes  
12 those records to be recorded, copied or reproduced  
13 pursuant to subsection 1 recorded, copied or  
14 reproduced record shall be deemed a public record,  
15 and the governmental agency shall render such  
16 assistance as is necessary to allow any member of  
17 the public access to the recorded, copied, or  
18 reproduced record unless it is declared by law to  
19 be confidential.  
20 So I find no requirement that the prison  
21 incident sheets -- do we have the originals or  
22 photocopies?  
23 MR. OWENS: These are photocopies.  
24 THE COURT: I find no reason to question  
25 the authenticity of the originals, and therefore

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \* \* \*

MARLO THOMAS,

Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents.

Electronically Filed  
Jun 14 2019 02:43 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

No. 77345

District Court Case No.  
96C136862-1

(Death Penalty Case)

APPELLANT'S APPENDIX

Volume 2 of 35

Appeal from Order Dismissing Petition for Writ of Habeas  
Corpus (Post-Conviction)  
Eighth Judicial District Court, Clark County  
The Honorable Stefany Miley, District Judge

RENE L. VALLADARES  
Federal Public Defender

JOANNE L. DIAMOND  
Assistant Federal Public Defender  
Nevada Bar No. 14139C  
Joanne\_Diamond@fd.org

411 E. Bonneville, Suite 250  
Las Vegas, Nevada 89101  
(702) 388-6577

Attorneys for Appellant

## INDEX

| <u>VOLUME</u>   | <u>DOCUMENT</u>                                                                                                                                                        | <u>PAGE</u> |
|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 35              | Case Appeal Statement, <i>Thomas v. Gittere</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (October 30, 2018) .....                                   | 8617-8619   |
| 35              | Decision and Order, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (September 27, 2018) .....                                          | 8590-8599   |
| 34              | Exhibits in Support of Motion for Evidentiary Hearing (List), <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (June 8, 2018) ..... | 8417-8419   |
| <b>EXHIBITS</b> |                                                                                                                                                                        |             |
| 34              | 1. Order for Evidentiary Hearing, <i>McConnell v. State of Nevada</i> , Second Judicial District Court Case No. CR02P1938 (August 30, 2013) .....                      | 8420-8424   |
| 34              | 2. Order of Reversal and Remand, <i>Gutierrez v. State of Nevada</i> , Nevada Supreme Court Case No. 53506, (September 19, 2012) .....                                 | 8425-8439   |
| 34              | 3. Order, <i>Vanisi v. McDaniel, et al.</i> , Second Judicial District Court Case No. CR98P0516 (March 21, 2012) .....                                                 | 8440-8443   |
| 34              | 4. Order Setting Evidentiary Hearing, <i>Rhyne v. McDaniel, et al.</i> , Fourth Judicial District Court Case No. CV-HC-08-673 (August 27, 2009) .....                  | 8444-8447   |
| 34-35           | 5. Reporter's Transcript of Argument/Decision, <i>State of Nevada v. Greene</i> , Eighth Judicial District Court Case No. C124806 (June 5, 2009) .....                 | 8448-8504   |

| <u>VOLUME</u>   | <u>DOCUMENT</u>                                                                                                                                                                                                                                                                                             | <u>PAGE</u> |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 35              | 6. Recorder's Transcript of Hearing re: Defendant's Petition for Writ of Habeas Corpus, <i>State of Nevada v. Floyd</i> , Eighth Judicial District Court Case No. C159897 (December 13, 2007) .....                                                                                                         | 8505-8511   |
| 35              | 7. Order, <i>Casillas-Gutierrez v. LeGrand, et al.</i> , Second Judicial District Court Case No. CR08-0985 (August 26, 2014) .....                                                                                                                                                                          | 8512-8515   |
| 35              | 8. Transcript of Hearing Defendant's Pro Se Petition for Writ of Habeas Corpus (Post-Conviction), State's Response and Countermotion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), <i>State of Nevada v. Reberger</i> , Eighth Judicial District Court Case No. C098213..... | 8516-8533   |
| 35              | 9. Minutes, <i>State of Nevada v. Homick</i> , Eighth Judicial District Court Case No. 86-C-074385-C (June 5, 2009) .....                                                                                                                                                                                   | 8534-8537   |
| 32              | Exhibits in Support of Motion and Notice of Motion for Leave to Conduct Discovery (List), <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (June 8, 2018) .....                                                                                                          | 7952-7956   |
| <b>EXHIBITS</b> |                                                                                                                                                                                                                                                                                                             |             |
| 32              | A. Proposed Subpoena Duces Tecum to the Clark County District Attorney .....                                                                                                                                                                                                                                | 7957-7967   |
| 32              | B. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Homicide .....                                                                                                                                                                                                            | 7968-7976   |
| 32              | C. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Criminalistics Bureau.....                                                                                                                                                                                                | 7977-7984   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                   | <u>PAGE</u> |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 32            | D. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Patrol<br>.....                                                                                 | 7985-7992   |
| 32-33         | E. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Technical Services Division.....                                                                | 7993-8001   |
| 33            | F. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Confidential Informant .....                                                                    | 8002-8009   |
| 33            | G. Las Vegas Metropolitan Police Department, Technical Services Division, Proposed Subpoena Duces Tecum to the Fingerprint Bureau.....                                            | 8010-8017   |
| 33            | H. Proposed Subpoena Duces Tecum to the Clark County Detention Center-Business Accounts .....                                                                                     | 8018-8025   |
| 33            | I. Proposed Subpoena Duces Tecum to the Clark County Detention Center-Classification .....                                                                                        | 8026-8033   |
| 33            | J. Deposition of Former Clark County District Attorney Gary Guymon, <i>Witter v. E.K. McDaniel</i> , United States District Court Case No. CV-S-01-1034 (February 11, 2005) ..... | 8034-8115   |
| 33            | K. Proposed Subpoena Duces Tecum to the Federal Bureau of Investigation, Record Information/Dissemination Section.....                                                            | 8116-8123   |
| 33            | L. Proposed Subpoena Duces Tecum to the Nevada Department of Corrections regarding Bobby L. Lewis (deceased) .....                                                                | 8124-8133   |
| 33            | M. Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Criminal History .....                                                                          | 8134-8141   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                             | <u>PAGE</u> |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 33            | N. Proposed Subpoena Duces Tecum to the Clark County Coroner-Medical Examiner .....                                                                         | 8142-8149   |
| 33            | O. Proposed Subpoena Duces Tecum to Jury Commissioner, Eighth Judicial District Court .....                                                                 | 8150-8157   |
| 33            | P. Proposed Subpoena Duces Tecum to the Nevada Board of Continuing Legal Education .....                                                                    | 8158-8165   |
| 33            | Q. Declaration of Katrina Davidson (June 7, 2018) .....                                                                                                     | 8166-8169   |
| 33            | R. Proposed Subpoena Duces Tecum to the Clark County Comptroller .....                                                                                      | 8170-8177   |
| 33            | S. Order Regarding Remaining Discovery Issues, <i>Doyle v. McDaniel</i> , U.S.D.C., Case No. CV-N-00-0101-HDM(RAM) (September 24, 2002).....                | 8178-8194   |
| 33            | T. <i>Homick v. McDaniel</i> , U.S. District Court Case No. CV-N-99-0299, Order regarding Remaining Discovery Issues (September 1, 2004) .....              | 8195-8240   |
| 33-34         | U. <i>State v. Jimenez</i> , Case No. C77955, Eighth Judicial District Court, Recorder's Transcript re: Evidentiary Hearing (excerpt) (April 19, 1993)..... | 8241-8297   |
| 34            | V. <i>State v. Bailey</i> , Case No. C129217, Eighth Judicial District Court, Reporter's Transcript of Proceedings (July 30, 1996) .....                    | 8298-8333   |
| 34            | W. <i>State v. Rippo</i> , Case No. C106784, Eighth Judicial District Court, Reporter's Transcript of Proceedings (February 8, 1996).....                   | 8334-8339   |
| 34            | X. Order Regarding Discovery, <i>Paine v. McDaniel</i> , No. CV-S-00-1082-KJD(PAL) (September 27, 2002).....                                                | 8340-8360   |

| <u>VOLUME</u>  | <u>DOCUMENT</u>                                                                                                                                                                                                                                            | <u>PAGE</u> |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 34             | Y. Order Regarding Discovery, <i>Riley v. McDaniel</i> , No. CV-N-01-0096-DWH(VPC)<br>(September 30, 2002) .....                                                                                                                                           | 8361-8375   |
| 34             | Z. Order Regarding Discovery, <i>McNelson v. McDaniel</i> ,<br>No. CV-S-00-284-LRH(LRL)<br>(September 30, 2002) .....                                                                                                                                      | 8376-8398   |
| 34             | AA. Washoe County, excerpt of discovery provided in<br><i>Williams v. McDaniel</i> , Case No. CV-S-98-56PMP (LRL)<br>.....                                                                                                                                 | 8399        |
| 34             | 1. Declaration of Becky L. Hansen dated August 19,<br>2002) .....                                                                                                                                                                                          | 8400-8401   |
| 34             | 2. Jury selection, discovery obtained from the Office of<br>the Washoe County District Attorney in response to<br>Federal Subpoena Duces Tecum on April 23, 1999<br>in <i>Williams v. McDaniel</i> , Case No. CV-S-98-<br>56PMP(LRL), Bates No. 1619 ..... | 8402-8403   |
| 34             | 3. Letter from Garry H. Hatlestad, Chief Appellate<br>Deputy, Office of the Washoe County District<br>Attorney to Assistant Federal Public Defender<br>Rebecca Blaskey, dated May 13, 1999.....                                                            | 8404-8406   |
| 4              | Exhibits In Support of Petition for Writ of<br>Habeas Corpus (list) <i>Thomas v. Filson</i> , District Court, Clark<br>County, Nevada Case No. C96C136862-1,<br>(October 20, 2017) .....                                                                   | 886-889     |
| <b>EXHIBIT</b> |                                                                                                                                                                                                                                                            |             |
| 4              | 1. Judgment of Conviction, <i>State v. Thomas</i> , Case No.<br>C136862, District Court, Clark County<br>(August 27, 1997) .....                                                                                                                           | 890-894     |
| 4              | 2. Amended Judgment of Conviction, <i>State v. Thomas</i> ,<br>Case No. C136862, District Court, Clark County<br>(September 16, 1997) .....                                                                                                                | 895-898     |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                              | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 4             | 3. Opening Brief, <i>Thomas v. State</i> , Case No. 31019, In the Supreme Court of the State of Nevada (February 4, 1998) .....                                                              | 899-959     |
| 4             | 4. Appellant's Reply Brief, <i>Thomas v. State</i> , Case No. 31019, In the Supreme Court of the State of Nevada (October 7, 1998) .....                                                     | 960-990     |
| 4-5           | 5. Opinion, <i>Thomas v. State</i> , Case No. 31019, In the Supreme Court of the State of Nevada (November 25, 1998 .....                                                                    | 991-1019    |
| 5             | 6. Appellant Marlo Thomas' Petition for Rehearing, <i>Thomas v. State</i> , Case No. 31019, In the Supreme Court of the State of Nevada (December 11, 1998) .....                            | 1020-1029   |
| 5             | 7. Order Denying Rehearing, <i>Thomas v. State</i> , Case No. 31019, In the Supreme Court of the State of Nevada (February 4, 1999) .....                                                    | 1030-1031   |
| 5             | 8. Petition for Writ of Certiorari, <i>Thomas v. State</i> , Case No. 98-9250, In the Supreme Court of the United States (May 4, 1999).....                                                  | 1032-1054   |
| 5             | 9. Opinion, <i>Thomas v. State</i> , Case No. 98-9250, In the Supreme Court of the United States (October 4, 1999) .....                                                                     | 1055-1056   |
| 5             | 10. Petition for Writ of Habeas Corpus, <i>Thomas v. State</i> , Case No. C136862, District Court, Clark County (January 6, 2000) .....                                                      | 1057-1064   |
| 5             | 11. Supplemental Petition for Writ of Habeas Corpus (Post Conviction) and Points and Authorities in Support Thereof, <i>Thomas v. State</i> , Case No. C136862, District Court, Clark County |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                  | <u>PAGE</u> |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | (July 16, 2001).....                                                                                                                                             | 1065-1142   |
| 5             | 12. Findings of Fact Conclusions of Law and Order, <i>State v. Thomas</i> , Case No. C136862, District Court, Clark County (September 6, 2002) .....             | 1143-1158   |
| 5             | 13. Opening Brief, <i>Thomas v. State</i> , Case No. 40248, In the Supreme Court of the State of Nevada (April 3, 2003) .....                                    | 1159-1244   |
| 5-6           | 14. Reply Brief, <i>Thomas v. State</i> , Case No. 40248, In the Supreme Court of the State of Nevada (September 10, 2003) .....                                 | 1245-1266   |
| 6             | 15. Opinion, <i>Thomas v. State</i> , Case No. 40248, In the Supreme Court of the State of Nevada (February 10, 2004).....                                       | 1267-1284   |
| 6             | 16. Judgment of Conviction, <i>State v. Thomas</i> , Case No. C136862, District Court, Clark County (November 28, 2005) .....                                    | 1285-1288   |
| 6             | 17. Appellant's Opening Brief, <i>Thomas v. State</i> , Case No. 46509, In the Supreme Court in the State of Nevada (June 1, 2006) .....                         | 1289-1347   |
| 6             | 18. Appellant's Reply Brief, <i>Thomas v. State</i> , Case No. 46509, In the Supreme Court of the State of Nevada (October 24, 2006) .....                       | 1348-1377   |
| 6             | 19. Opinion, <i>Thomas v. State</i> , Case No. 46509, In the Supreme Court of the State of Nevada (December 28, 2006) .....                                      | 1378-1398   |
| 6             | 20. Petition for Rehearing and Motion to Recuse the Clerk Clark County District Attorney's Office from Further Involvement in the Case, <i>Thomas v. State</i> , |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                | <u>PAGE</u> |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | Case No. 46509, In the Supreme Court of the State of Nevada (March 27, 2007).....                                                                                                              | 1399-1415   |
| 6             | 21. Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel, <i>Thomas v. Warden</i> , Case No. C136862, District Court, Clark County (March 6, 2008) ..... | 1416-1428   |
| 6             | 22. Petition for Writ of Habeas Corpus (Post-Conviction), <i>Thomas v. Warden</i> , Case No. C136862, District Court, Clark County (July 12, 2010).....                                        | 1429-1448   |
| 6             | 23. Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), <i>Thomas v. Warden</i> , Case No. C136862, District Court, Clark County (March 31, 2014) .....                         | 1449-1498   |
| 6-7           | 24. Findings of Fact, Conclusions of Law and Order, <i>State v. Thomas</i> , Case No. C136862 District Court, Clark County (May 30, 2014) .....                                                | 1499-1509   |
| 7             | 25. Appellant’s Opening Brief, <i>State v. Thomas</i> , Case No. 65916, In the Supreme Court of the State of Nevada (November 4, 2014).....                                                    | 1510-1531   |
| 7             | 26. Order of Affirmation, <i>Thomas v. State</i> , Case No. 65916, In the Supreme Court of the State of Nevada (July 22, 2016).....                                                            | 1532-1539   |
| 7             | 27. Petition for Rehearing, <i>Thomas v. State</i> , Case No. 65916, In the Supreme Court of the State of Nevada (August 9, 2016) .....                                                        | 1540-1550   |
| 7             | 28. Order Denying Rehearing, <i>Thomas v. State</i> , Case No. 65916, In the Supreme Court of the State of Nevada (September 22, 2016) .....                                                   | 1551-1552   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                                        | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 7             | 29. Defendant's Motion to Strike State's Notice of Intent to Seek Death Penalty Because the Procedure in this Case is Unconstitutional, <i>State v. Chappell</i> , Case No. C131341, District Court, Clark County (July 23, 1996)..... | 1553-1567   |
| 7             | 30. Verdict Forms, <i>State v. Powell</i> , Case No. C148936, District Court, Clark County (November 15, 2000) .....                                                                                                                   | 1568-1588   |
| 7             | 31. Minutes, <i>State v. Strohmeyer</i> , Case No. C144577, District Court, Clark County (September 8, 1998) .....                                                                                                                     | 1589-1591   |
| 7             | 32. Verdict Forms, <i>State v. Rodriguez</i> , Case No. C130763, District Court, Clark County (May 7, 1996).....                                                                                                                       | 1592-1594   |
| 7             | 33. Verdict Forms, <i>State v. Daniels</i> , Case No. C126201, District Court, Clark County (November 1, 1995).....                                                                                                                    | 1595-1605   |
| 7             | 34. Declaration of Andrew Williams (May 25, 2017).....                                                                                                                                                                                 | 1606-1610   |
| 7             | 35. Declaration of Antionette Thomas (June 2, 2017).....                                                                                                                                                                               | 1611-1613   |
| 7             | 36. Declaration of Charles Nash (June 19, 2017).....                                                                                                                                                                                   | 1614-1617   |
| 7             | 37. Declaration of Darrell Thomas (July 19, 2017).....                                                                                                                                                                                 | 1618-1625   |
| 7             | 38. Declaration of David Hudson (May 24, 2017).....                                                                                                                                                                                    | 1626-1630   |
| 7             | 39. Declaration of James A. Treanor                                                                                                                                                                                                    |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                          | <u>PAGE</u> |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | (May 22, 2017).....                                                                                                                                                      | 1631-1633   |
| 7             | 40. Declaration of Kareem Hunt<br>(June 19, 2017).....                                                                                                                   | 1634-1636   |
| 7             | 41. Declaration of Linda McGilbra<br>(May 24, 2017).....                                                                                                                 | 1637-1639   |
| 7             | 42. Declaration of Paul Hardwick, Sr.<br>(May 24, 2017).....                                                                                                             | 1640-1643   |
| 7             | 43. Declaration of Peter LaPorta<br>(July 2011).....                                                                                                                     | 1644-1651   |
| 7             | 44. Declaration of Shirley Nash<br>(May 24, 2017).....                                                                                                                   | 1652-1656   |
| 7             | 45. Declaration of Ty'yivri Glover<br>(June 18, 2017).....                                                                                                               | 1657-1659   |
| 7             | 46. Declaration of Virgie Robinson<br>(May 25, 2017).....                                                                                                                | 1660-1663   |
| 7             | 47. Certification Hearing Report, <i>In the Matter of<br/>Thomas, Marlo Demetrius</i> , District Court, Juvenile<br>Division Case No. J29999<br>(February 8, 1990) ..... | 1664-1686   |
| 7-8           | 48. Marlo Thomas Various Juvenile Records<br>.....                                                                                                                       | 1687-1938   |
| 8             | 49. Marlo Thomas Various School Records<br>.....                                                                                                                         | 1939-1990   |
| 8             | 50. Operation School Bell, Dressing Children in Need (K-<br>8) in Clark County Schools .....                                                                             | 1991-1998   |
| 8             | 51. Photograph of Georgia Thomas and Sisters                                                                                                                             |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                           | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------|-------------|
|               | .....                                                                                                                     | 1999-2000   |
| 9             | 52. Photograph of TJ and JT Thomas .....                                                                                  | 2001-2002   |
| 9             | 53. Draft Memo: Georgia Thomas Interview conducted by James Green (January 21, 2010).....                                 | 2003-2006   |
| 9             | 54. Investigative Memorandum, Interview of Witness Georgia Ann Thomas conducted by Tena S. Francis (October 5, 2011)..... | 2007-2011   |
| 9             | 55. Criminal File, <i>State v. Bobby Lewis</i> , District Court, Clark County, Nevada Case No. C65500 .....               | 2012-2191   |
| 9-10          | 56. Criminal File, <i>State v. Darrell Bernard Thomas</i> , District Court, Clark County, Nevada Case No. C147517 .....   | 2192-2390   |
| 10            | 57. Bobby Lewis Police Records.....                                                                                       | 2391-2409   |
| 10            | 58. Declaration of Annie Outland (June 27, 2017).....                                                                     | 2410-2414   |
| 10            | 59. Declaration of Bobby Gronauer (June 27, 2017).....                                                                    | 2415-2417   |
| 10-12         | 60. Larry Thomas Criminal File .....                                                                                      | 2418-2859   |
| 12            | 61. Georgia Ann Thomas School Records.....                                                                                | 2860-2862   |
| 12            | 62. Declaration of Johnny Hudson (June 29, 2017).....                                                                     | 2863-2868   |
| 12            | 63. Declaration of Matthew Young (July 3, 2017).....                                                                      | 2869-2876   |
| 12            | 64. Photography of TJ Thomas (younger) .....                                                                              | 2877-2878   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                 | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 12            | 65. Marlo Thomas Excerpted Prison Records<br>.....                                                                                                                              | 2879-2916   |
| 12-13         | 66. American Bar Association Guidelines for the<br>Appointment and Performance of Defense Counsel in<br>a Death Penalty Cases (1989).....                                       | 2917-3049   |
| 13            | 67. American Bar Association Guidelines for the<br>Appointed and Performance of Defense Counsel in<br>Death Penalty Cases (Revised Edition February<br>2003).....               | 3050-3228   |
| 13            | 68. Supplementary Guidelines for the Mitigation<br>Function of Defense Teams in Death Penalty Cases<br>(June 15, 2008).....                                                     | 3229-3245   |
| 13            | 69. Department of Health and Human Services,<br>Certificate of Death, Georgia Ann Thomas<br>(December 22, 2015) .....                                                           | 3246-3247   |
| 13-14         | 70. State of Nevada Department of Health, Welfare, and<br>Rehabilitation, Certificate of Live Birth, Marlo<br>Demetrius Thomas<br>(November 6, 1972) .....                      | 3248-3253   |
| 14            | 71. Instructions to the Jury (Guilt Phase), <i>State of<br/>Nevada v. Marlo Thomas</i> , District Court, Clark<br>County, Nevada Case No. C136862<br>(June 18, 1997).....       | 3254-3302   |
| 14            | 72. Instructions to the Jury (Penalty Phase), <i>State of<br/>Nevada v. Marlo Thomas</i> , District Court, Clark<br>County, Nevada Case No. C136862<br>(November 2, 2005) ..... | 3303-3320   |
| 14            | 73. Correspondence to Gary Taylor and Daniel Wong<br>dated June 13, 2008, enclosing redacted copy of                                                                            |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                                        | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | Confidential Execution Manual (Revised: October 2007).....                                                                                                                                                                             | 3321-3340   |
| 14            | 74. Declaration of Mark J.S. Heath, M.D., including Attachments A-F.....                                                                                                                                                               | 3341-3467   |
| 14            | 75. The American Board and Anesthesiology, Inc. Anesthesiologists and Capital Punishment (4/2/10); American Medical Association Policy E-2.06 Capital Punishment.....                                                                  | 3468-3472   |
| 14-15         | 76. Order, <i>In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases</i> , In the Supreme Court of the State of Nevada ADKT No. 411 (October 16, 2008)..... | 3473-3534   |
| 15            | 77. “Justice by the people”, Jury Improvement Commission, Report of the Supreme Court of Nevada (October 2002).....                                                                                                                    | 3535-3628   |
| 15-16         | 78. 1977 Nevada Log., 59 <sup>th</sup> Sess., Senate Judiciary Committee, Minutes of Meeting (October 2002).....                                                                                                                       | 3629-3731   |
| 16            | 79. Darrell Thomas Clark County School District Records .....                                                                                                                                                                          | 3732-3740   |
| 16            | 80. Information, <i>State of Nevada v. Angela Colleen Love</i> , District Court, Clark County, Nevada Case No. C121962 (August 8, 1994).....                                                                                           | 3741-3743   |
| 16            | 81. Judgment of Conviction, <i>State of Nevada v. Angela Colleen Love</i> , District Court, Clark County, Nevada Case No. C121962X (March 25, 1998) .....                                                                              | 3744-3746   |
| 16            | 82. U.S. Census Bureau, Profile of General Demographic Characteristics: 200 .....                                                                                                                                                      | 3747-3751   |

| <u>VOLUME</u>         | <u>DOCUMENT</u>                                                                                                                      | <u>PAGE</u> |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 16                    | 83. 2010 Census Interactive Population Search: NV-Clark County.....                                                                  | 3752-3756   |
| 16                    | 84. <u>Editorial: Jury Pools are Shallow</u> , The Las Vegas Sun (November 1, 2005).....                                             | 3757-3758   |
| 16                    | 85. <u>The Jury's Still Out</u> , The Las Vegas Sun, by Matt Pordum (October 30, 2005).....                                          | 3759-3765   |
| 16                    | 86. <u>Editorial: Question of Fairness Lingers</u> , The Las Vegas Sun (November 8, 2005).....                                       | 3766-3767   |
| 16                    | 87. Declaration of Adele Basye (June 29, 2017).....                                                                                  | 3768-3772   |
| <b>Seated Jurors:</b> |                                                                                                                                      |             |
| 16                    | 88. Jury Questionnaire (Janet Cunningham), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862..... | 3773-3782   |
| 16                    | 89. Jury Questionnaire (Janet Jones), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....      | 3783-3792   |
| 16                    | 90. Jury Questionnaire (Don McIntosh), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....     | 3793-3802   |
| 16                    | 91. Jury Questionnaire (Connie Kaczmarek), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862..... | 3803-3812   |
| 16                    | 92. Jury Questionnaire (Rosa Belch), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....       | 3813-3822   |

| <u>VOLUME</u>           | <u>DOCUMENT</u>                                                                                                                          | <u>PAGE</u> |
|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 16                      | 93. Jury Questionnaire (Philip Adona), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....         | 3823-3832   |
| 16                      | 94. Jury Questionnaire (Adele Basye), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....          | 3833-3842   |
| 16                      | 95. Jury Questionnaire (Jill McGrath), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....         | 3843-3852   |
| 16                      | 96. Jury Questionnaire (Ceasar Elpidio), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....       | 3853-3862   |
| 16                      | 97. Jury Questionnaire (Loretta Gillis), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....       | 3863-3872   |
| 16                      | 98. Jury Questionnaire (Joseph Delia), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....         | 3873-3882   |
| 16                      | 99. Jury Questionnaire (Christina Shaverdian), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862..... | 3883-3892   |
| <b>Jury Alternates:</b> |                                                                                                                                          |             |
| 16                      | 100. Jury Questionnaire (Herbert Rice), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....        | 3893-3902   |
| 16                      | 101. Jury Questionnaire (Tamara Chiangi), <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....      | 3903-3912   |

| <u>VOLUME</u>             | <u>DOCUMENT</u>                                                                                                                                                            | <u>PAGE</u> |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <b>Non-Seated Jurors:</b> |                                                                                                                                                                            |             |
| 16-20                     | 102. Jury Questionnaires of the remaining un-seated jurors, <i>State v. Marlo Thomas</i> , District Court, Clark County, Nevada Case No. C136862.....                      | 3916-4781   |
| 20                        | 103. Investigative Memorandum, Interview of Witness Rebecca Thomas conducted by Tena S. Francis (October 25, 2011) .....                                                   | 4782-4784   |
| 20                        | 104. Itemized Statement of Earnings, Social Security Administration Earnings Record Information, Marlo Thomas.....                                                         | 4785-4788   |
| 20                        | 105. Home Going Celebration for Bobby Lewis (January 23, 2012) .....                                                                                                       | 4789-4797   |
| 20                        | 106. Division of Child & Family Services, Caliente Youth Center Program Information.....                                                                                   | 4798-4801   |
| 20                        | 107. Declaration of Jerome Dyer (July 14, 2011) .....                                                                                                                      | 4802-4804   |
| 20                        | 108. Investigation of Nevada Youth Training Center, Department of Justice, Signed by Ralph F. Boyd, Jr., Assistant Attorney General (Conducted February 11-13, 2002) ..... | 4805-4811   |
| 20                        | 109. Photograph of Darrell and Georgia Thomas .....                                                                                                                        | 4812-4813   |
| 20                        | 110. Photograph of Georgia Thomas' Casket .....                                                                                                                            | 4814-4815   |
| 20                        | 111. Photograph of Larry Thomas.....                                                                                                                                       | 4816-4817   |
| 20                        | 112. Photograph of Marlo Thomas as an adolescent .....                                                                                                                     | 4818-4819   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                       | <u>PAGE</u> |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 20            | 113. Photograph of Marlo Thomas as a child<br>.....                                                                                                                                                   | 4820-4821   |
| 20            | 114. Matthew G. Young Criminal File.....                                                                                                                                                              | 4826-4962   |
| 20            | 115. Sentencing Agreement, <i>State v. Evans</i> , District<br>Court, Clark County, Nevada Case No. C116071<br>(February 4, 2004) .....                                                               | 4963-4968   |
| 20            | 116. Photograph of Georgia Thomas .....                                                                                                                                                               | 4969-4970   |
| 20            | 117. Photograph of TJ Thomas.....                                                                                                                                                                     | 4971-4972   |
| 20            | 118. Photograph of Darrell Thomas .....                                                                                                                                                               | 4973-4974   |
| 20            | 119. The Greater Philadelphia Church of God in Christ,<br>Annual Report, Darrell Thomas, Domestic Non-Profit<br>Corporation, File No. E0389782012-8<br>(July 24, 2012) .....                          | 4975-4976   |
| 20            | 120. Special Verdict, <i>State v. Ducksworth, Jr.</i> , District<br>Court, Clark County, Nevada Case No. C108501<br>(October 28, 1993) .....                                                          | 4977-4988   |
| 20            | 121. Correspondence from David Schieck to Daniel<br>Albregts with Mitigating Factors Preliminary<br>Checklist (June 2, 2005) .....                                                                    | 4989-4995   |
| 20-21         | 122. Getting it Right: Life History Investigations as the<br>Foundation for a Reliable Mental Health Assessment,<br>authored by Richard G. Dudley, Jr., Pamela Blume<br>Leonard (June 15, 2008) ..... | 4996-5022   |
| 21            | 123. Criminal Complaint, <i>State v. Thomas</i> , Justice Court,<br>Las Vegas Township, Clark County, Nevada Case No.<br>96F07190A-B (April 22, 1996) .....                                           | 5023-5028   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                            | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 21            | 124. Appearances-Hearing, <i>State v. Thomas</i> , Justice Court, Las Vegas Township, Clark County, Nevada Case No. 96F07190A.....                                         | 5029-5030   |
| 21            | 125. Reporter's Transcript of Preliminary Hearing, <i>State v. Thomas</i> , Justice Court, Las Vegas Township, Clark County Nevada Case No. 96F07190A (June 27, 1996)..... | 5031-5180   |
| 21            | 126. Information, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (July 2, 1996).....                                                       | 5181-5188   |
| 21            | 127. Notice of Intent to Seek Death Penalty, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (July 3, 1996) .....                           | 5189-5192   |
| 21            | 128. Reporter's Transcript of Proceedings, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (July 10, 1996).....                             | 5193-5197   |
| 21-22         | 129. Jury Trial-Day 1, Volume I, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 16, 1997).....                                       | 5198-5472   |
| 22            | 130. Jury Trial-Day 1, Volume II, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 16, 1997) .....                                     | 5473-5490   |
| 22-23         | 131. Jury Trial-Day 3, Volume IV, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 18, 1997) .....                                     | 5491-5573   |
| 23-24         | 132. Jury Trial-Penalty Phase Day 1, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 23, 1997) .....                                  | 5574-5812   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                        | <u>PAGE</u> |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 24            | 133. Jury Trial-Penalty Phase Day 2, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 25, 1997) .....              | 5813-5959   |
| 24            | 134. Verdicts (Guilt), <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 18, 1997).....                             | 5964-5970   |
| 24            | 135. Verdicts (Penalty), <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 25, 1997).....                           | 5971-5972   |
| 24            | 136. Special Verdicts (Penalty), <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (June 25, 1997).....                   | 5973-5981   |
| 24            | 137. Remittitur, <i>Thomas v. State</i> , In the Supreme Court of the State of Nevada Case No. 31019 (November 4, 1999) .....                          | 5982-5983   |
| 24            | 138. Remittitur, <i>Thomas v. State</i> , In the Supreme Court of the State of Nevada Case No. 40248 (March 11, 2004) .....                            | 5984-5985   |
| 24-25         | 139. Reporter's Transcript of Penalty Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (November 1, 2005) ..... | 5986-6046   |
| 25-26         | 140. Reporter's Transcript of Penalty Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (November 2, 2005) ..... | 6047-6256   |
| 26            | 141. Special Verdict, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (November 2, 2005) .....                          | 6257-6267   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                      | <u>PAGE</u> |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 26            | 142. Order Denying Motion, <i>Thomas v. State</i> , In the Supreme Court of the State of Nevada, Case No. 46509 (June 29, 2007) .....                                                | 6268-6271   |
| 26            | 143. Correspondence Regarding Order Denying Petition for Writ of Certiorari, <i>Thomas v. Nevada</i> , Supreme Court of the United States Case No. 06-10347 (January 14, 2008) ..... | 6272-6273   |
| 26            | 144. Remittitur, <i>Thomas v. State</i> , In the Supreme of the State of Nevada, Case No. 65916 (October 27, 2016) .....                                                             | 6274-6276   |
| 26            | 145. National Sex Offender Registry for Larry James Thomas (June 6, 2017).....                                                                                                       | 6277-6279   |
| 26            | 146. W-4 Employee's Withholding Allowance Certificate, Marlo Thomas (February 1996).....                                                                                             | 6280-6281   |
| 26            | 147. Nevada Department of Public Safety, Nevada Sex Offender Registry for Bobby Lewis .....                                                                                          | 6282-6283   |
| 26            | 148. Correspondence from Thomas F. Kinsora, Ph.D. to Peter La Porta (June 30, 1997).....                                                                                             | 6284-6285   |
| 26            | 149. Correspondence from Lee Elizabeth McMahon to Marlo Thomas (May 15, 1997).....                                                                                                   | 6286-6287   |
| 26            | 150. Correspondence from Lee Elizabeth McMahon to Marlo Thomas (May 27, 1997).....                                                                                                   | 6288-6291   |
| 26            | 151. Statements related to Precilian Beltran .....                                                                                                                                   | 6292-6308   |
| 26            | 152. Declaration of Julia Ann Williams (July 28, 2017).....                                                                                                                          | 6309-6312   |
| 26            | 153. Declaration of Tony Thomas, Jr.                                                                                                                                                 |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                  | <u>PAGE</u> |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | (July 25, 2017) .....                                                                                                                                                                                            | 6313-6320   |
| 26            | 154. Declaration of Rebecca Thomas<br>(July 21, 2017).....                                                                                                                                                       | 6321-6323   |
| 26            | 155. Declaration of Paul Hardwick, Jr.<br>(July 17, 2017).....                                                                                                                                                   | 6324-6327   |
| 26            | 156. Photograph Paul Hardwick, Jr.....                                                                                                                                                                           | 6328-6329   |
| 26            | 157. Declaration of Walter Mackie<br>(July 13, 2017).....                                                                                                                                                        | 6330-6334   |
| 26            | 158. Declaration of Katrina Davidson<br>(July 18, 2017).....                                                                                                                                                     | 6335-6336   |
| 26            | 159. State's Trial Exhibit 86, Certification Order, <i>In the<br/>Matter of Marlo Demetrius Thomas</i> , District Court,<br>Juvenile Division, Clark County Nevada Case No.<br>J29999 (September 17, 1990) ..... | 6337-6358   |
| 26            | 160. State's Trial Exhibit 85, Juvenile Petitions, <i>In the<br/>Matter of Marlo Demetrius Thomas</i> , District Court,<br>Juvenile Division, Clark County, Nevada Case No.<br>J29999 .....                      | 6359-6386   |
| 26            | 161. State's Trial Exhibit 87, Pre-Sentence Report, Marlo<br>Demetrius Thomas, Department of Parole and<br>Probation (November 20, 1990) .....                                                                   | 6387-6397   |
| 26            | 162. State's Trial Exhibit 102, Pre-Sentence Report, Marlo<br>Demetrius Thomas, Department of Motor Vehicles<br>and Public Safety, Division of Parole and Probation<br>(May 20, 1996).....                       | 6398-6407   |
| 26            | 163. State's Exhibit 108, Incident Report, North Las Vegas<br>Police Department Event No. 84-5789<br>(July 6, 1984).....                                                                                         | 6408-6411   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 26            | 164. Declaration of Daniel J. Albregts<br>(July 18, 2017).....                                                                                                 | 6411-6414   |
| 26            | 165. Declaration of Janet Diane Cunningham<br>(July 18, 2017).....                                                                                             | 6415-6418   |
| 26            | 166. Declaration of Philip Adona<br>(July 18, 2017).....                                                                                                       | 6419-6421   |
| 26            | 167. Declaration of Maribel Yanez<br>(July 19, 2017).....                                                                                                      | 6422-6426   |
| 26            | 168. Certificate of Death, Elizabeth McMahon<br>(August 12, 2008).....                                                                                         | 6427-6428   |
| 26            | 169. Certificate of Death, Peter R La Porta<br>(July 5, 2014).....                                                                                             | 6429-6430   |
| 26            | 170. “Temporary Judge Faces State Sanctions”, Las Vegas<br>Sun (March 15, 2004).....                                                                           | 6431-6432   |
| 26            | 171. “State Defender’s Office in Turmoil as LaPorta<br>Ousted”, by Bill Gang, Las Vegas Sun<br>(October 2, 1996).....                                          | 6433-6435   |
| 26            | 172. Criminal Court Minutes, <i>State v. Thomas</i> , Case No.<br>96-C-136862-C .....                                                                          | 6436-6474   |
| 26            | 173. Research re: Alcohol Effects on a Fetus .....                                                                                                             | 6475-6486   |
| 26            | 174. Declaration of Cassondrus Ragsdale<br>(July 21, 2017).....                                                                                                | 6487-6490   |
| 26-27         | 175. Jury Composition Preliminary Sturdy, Eighth<br>Judicial District Court, Clark County, Nevada,<br>Prepared by John S. DeWitt, Ph.D.<br>(August 1992) ..... | 6491-6549   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                 | <u>PAGE</u> |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 27            | 176. Correspondence from Jordan Savage to Marlo Thomas (September 23, 1996) .....                                                                                                                               | 6550-6551   |
| 27            | 177. Opposition to Renewed Motion for Leave to Conduct Discovery, <i>Sherman v. Baker</i> , In the United States District Court for the District of Nevada, Case No. 2:02-cv-1349-LRH-LRL (January 26, 212) ... | 6552-6573   |
| 27            | 178. Recorder's Transcript of Proceedings re: Calendar Call, <i>State v. Williams</i> , District Court, Clark County, Nevada Case No. C124422 (May 8, 2013) ....                                                | 6574-6580   |
| 27            | 179. Handwritten Notes, Gregory Leonard Case (October 12, 1995) .....                                                                                                                                           | 6581-6582   |
| 27            | 180. Neuropsychological Assessment of Marlo Thomas, by Thomas F. Kinsora, Ph.D. (June 9, 1997) ....                                                                                                             | 6583-6595   |
| 27            | 181. Declaration of Amy B. Nguyen (July 23, 2017) .....                                                                                                                                                         | 6596-6633   |
| 27            | 182. Declaration of David Schieck, Gregory Neal Leonard Case (July 16, 2007) .....                                                                                                                              | 6634-6647   |
| 27            | 183. Declaration of Richard G. Dudley, Jr., M.D. (July 24, 2017) (CV attached as Exhibit A) .....                                                                                                               | 6648-6687   |
| 27            | 184. Declaration of Nancy Lemcke, Patrick McKenna Case (July 8, 2011) .....                                                                                                                                     | 6688-6696   |
| 27            | 185. Declaration of Nancy Lemcke, Donald Sherman Case (October 26, 2005) .....                                                                                                                                  | 6697-6707   |
| 27-28         | 186. Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels, by Kathleen Wayland and Sean D. O'Brien .....                               | 6708-6778   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                              | <u>PAGE</u> |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 28            | 187. Declaration of Don McIntosh<br>(July 22, 2017) .....                                                                                                                                    | 6779-6785   |
| 28            | 188. Interoffice Memorandum from Jerry to Pete and Lee<br>re: Emma Nash (June 2, 1997) .....                                                                                                 | 6786-6788   |
| 28            | 189. Interoffice Memorandum from Jerry to Pete and Lee<br>re: Charles Nash (June 5, 1997) .....                                                                                              | 6789-6790   |
| 28            | 190. Interoffice Memorandum from Jerry to Pete and Lee<br>re: Mary Resendez (June 13, 1997) .....                                                                                            | 6791-6792   |
| 28            | 191. Interoffice Memorandum from Jerry to Pete and Lee<br>re: Linda Overby (June 14, 1997) .....                                                                                             | 6793-6796   |
| 28            | 192. Interoffice Memorandum from Jerry to Pete and Lee<br>re: Thomas Jackson (July 8, 1997) .....                                                                                            | 6797-6799   |
| 28            | 193. Motion to Dismiss Counsel and/or Appointment of Co-<br>Counsel (Pro-Se), <i>State v. Thomas</i> , District Court,<br>Clark County, Nevada Case No. C136862<br>(September 4, 1996) ..... | 6800-6809   |
| 28            | 194. Correspondence from David M. Schieck to Marlo<br>Thomas (April 12, 2004) .....                                                                                                          | 6810-6811   |
| 28            | 195. Declaration of Connie Kaxmarek<br>(July 22, 2017) .....                                                                                                                                 | 6812-6817   |
| 28            | 196. Declaration of Roy Shupe<br>(June 21, 2017) .....                                                                                                                                       | 6818-6821   |
| 28            | 197. “Judge out of order, ethics claims say”, by Sam<br>Skolnik, Las Vegas Sun<br>(April 27, 2007) .....                                                                                     | 6822-6825   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                           | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 28            | 198. “Mabey takes heat for attending his patients instead of inauguration”, by John L. Smith, Las Vegas Review Journal (January 5, 2007).....                             | 6826-6829   |
| 28            | 199. Declaration of Everlyn Brown Grace (July 25, 2017) .....                                                                                                             | 6890-6835   |
| 28            | 200. Declaration of Ceasar Elpidio (July 26, 2017) .....                                                                                                                  | 6836-6838   |
| 28            | 201. Criminal File, <i>State v. John Thomas, Jr.</i> , In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, Case No. C61187 ..... | 6844-6880   |
| 28            | 202. Bobby Lewis Police Photo .....                                                                                                                                       | 6881-6882   |
| 28            | 203. Photograph of Bobby Lewis .....                                                                                                                                      | 6883-6884   |
| 28            | 204. Photograph of Georgia Thomas .....                                                                                                                                   | 6885-6886   |
| 28            | 205. Declaration of Thomas F. Kinsora, Ph.D. (July 26, 2014)(CV attached as Exhibit A) .....                                                                              | 6887-6897   |
| 28            | 206. Neuropsychological Evaluation of Marlo Thomas, by Joan W. Mayfield, PhD. (July 27, 2017)(CV attached as Exhibit A) .....                                             | 6898-6949   |
| 28            | 207. “Mayor shakes up housing board”, Las Vegas Sun (June 17, 2003).....                                                                                                  | 6944-6946   |
| 28            | 208. Declaration of Roseann Pecora (June, 2017) .....                                                                                                                     | 6947-6950   |
| 28            | 209. Declaration of Annie Stringer (July 28, 2017).....                                                                                                                   | 6951-6956   |
| 28            | 210. Declaration of David M. Schieck                                                                                                                                      |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                 | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | (July 28, 2017) .....                                                                                                                                                           | 6957-6958   |
| 28            | 211. Correspondence from David M. Schieck to Dr. Thomas Kinsora (April 5, 2004) .....                                                                                           | 6959-6961   |
| 28            | 212. Order Approving Issuance of Public Remand, <i>In re: Discipline of Peter LaPorta</i> , In the Supreme Court of the State of Nevada, Case No. 29452 (August 29, 1997) ..... | 6962-6965   |
| 28            | 213. Notice of Evidence in Support of Aggravating Circumstances, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (September 23, 2005) .....      | 6966-6968   |
| 28            | 214. Ancestry.com results.....                                                                                                                                                  | 6969-6975   |
| 28            | 215. Correspondence from Steven S. Owens to Randolph Fiedler (November 3, 2016) .....                                                                                           | 6976-6986   |
| 28            | 216. Correspondence from Heidi Parry Stern to Katrina Davidson (December 29, 2016) .....                                                                                        | 6987-6989   |
| 28            | 217. Correspondence from Charlotte Bible to Katrina Davidson (November 10, 2016).....                                                                                           | 6990-6991   |
| 28            | 218. Declaration of Katrina Davidson (July 31, 2017) .....                                                                                                                      | 6992-6994   |
| 28            | 219. Jury, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (October 31, 2005) .....                                                              | 6995-6996   |
| 28            | 220. Declaration of Tammy R. Smith (October 20, 2016) .....                                                                                                                     | 6997-7000   |
| 29            | 221. Marlo Thomas Residential Chronology .....                                                                                                                                  | 7001-7003   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                     | <u>PAGE</u> |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 29            | 222. Agreement to Testify, <i>State v. Hall</i> , Justice Court, Las Vegas Township, Clark County, Nevada Case No. 96F01790B (June 27, 1996) .....  | 7004-7007   |
| 29            | 223. “A Blighted Las Vegas Community is Transformed into a Model Neighborhood”, U.S. Department of Housing and Urban Living (August 27, 2002) ..... | 7008-7009   |
| 29            | 224. Social History and Narrative (July 2, 2017).....                                                                                               | 7010-7062   |
| 29            | 225. Fountain Praise Ministry Annual Report, Larry J. Thomas, Sr., Domestic Non-Profit Corporation, File No. C5-221-1994 (April 6, 1994) .....      | 7063-7064   |
| 29            | 226. Declaration of Cynthia Thomas (August 1, 2017) .....                                                                                           | 7065-7068   |
| 29            | 227. Declaration of Denise Hall (August 28, 2017) .....                                                                                             | 7069-7072   |
| 29            | 228. Declaration of Jordan Savage (August 23, 2017) .....                                                                                           | 7073-7077   |
| 29            | 229. Declaration of Shirley Beatrice Thomas (August 10, 2017) .....                                                                                 | 7078-7080   |
| 29            | 230. Billing Records for Daniel Albregts, Esq., <i>State v. Thomas</i> , District Court Case No. C136862 (June 6, 2005).....                        | 7081-7091   |
| 29            | 231. Billing Records for David M. Schieck, Esq., <i>State v. Thomas</i> , District Court, Case No. C136862 (July 8, 2004).....                      | 7092-7104   |
| 29            | 232. Itemized Statement of Earnings, Social Security Administration, Georgia A. Thomas                                                              |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                                                                                                         | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | (September 8, 2017) .....                                                                                                                                                                                                                                                                               | 7105-7111   |
| 29            | 233. Louisiana School Census, Family Field Record Sheet,<br>Bobby Lewis .....                                                                                                                                                                                                                           | 7112-7115   |
| 29            | 234. Criminal Records for Bobby Lewis, Sixth Judicial<br>District Court, Parish of Madison, Case No. 11969<br>.....                                                                                                                                                                                     | 7116-7134   |
| 29            | 235. Criminal Records for Bobby Lewis, Sixth Judicial<br>District Court, Parish of Madison, Case No. 11965<br>.....                                                                                                                                                                                     | 7135-7139   |
| 29            | 236. Declaration of Christopher Milian<br>(October 10, 2017) .....                                                                                                                                                                                                                                      | 7140-7145   |
| 29            | 237. Declaration of Jonathan H. Mack, Psy.D.<br>(October 12, 2017) .....                                                                                                                                                                                                                                | 7146-7148   |
| 29            | 238. Declaration of Joseph Hannigan<br>(September 13, 2017) .....                                                                                                                                                                                                                                       | 7149-7153   |
| 29            | 239. Declaration of Claytee White<br>(October 13, 2017) .....                                                                                                                                                                                                                                           | 7154-7158   |
| 29            | 240. “Woman in salon-related shooting to be paroled”, Las<br>Vegas Sun (February 25, 1997) .....                                                                                                                                                                                                        | 7159-7161   |
| 29            | 241. Order Regarding Sanctions, Denying Motion to<br>Dismiss, and Imposing Additional Sanction, <i>Brett O.<br/>Whipple v. Second Judicial District Court and K.<br/>Beth Luna (Real Parties in Interest)</i> , In the Supreme<br>Court of the State of Nevada, Case No. 68668<br>(June 23, 2016) ..... | 7162-7165   |
| 29            | 242. Order Approving Conditional Guilty Plea Agreement,<br><i>In the Matter of Discipline of Brett O. Whipple, Bar</i>                                                                                                                                                                                  |             |

| <u>VOLUME</u>   | <u>DOCUMENT</u>                                                                                                                                                                               | <u>PAGE</u> |
|-----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|                 | <i>No. 6168</i> , In the Supreme Court of the State of Nevada, Case No. 70951<br>(December 21, 2016).....                                                                                     | 7166-7170   |
| 29-30           | 243. Angela Thomas Southern Nevada Mental Health Services Records .....                                                                                                                       | 7171-7435   |
| 30              | 244. Declaration of Brett O. Whipple<br>(October 16, 2017) .....                                                                                                                              | 7436-7438   |
| 30              | 245. Declaration of Angela Colleen Thomas<br>(October 17, 2017) .....                                                                                                                         | 7439-7448   |
| 30              | 246. Declaration of Kenya Hall<br>(October 19, 2017) .....                                                                                                                                    | 7449-7452   |
| 30              | 247. Declaration of Sharyn Brown<br>(October 19, 2017) .....                                                                                                                                  | 7453-7455   |
| 31              | Exhibits in Support of Reply to Response (List); Opposition to Motion to Dismiss, <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1<br>(June 4, 2018) ..... | 7631-7633   |
| <b>EXHIBITS</b> |                                                                                                                                                                                               |             |
| 31              | 248. Request for Funds for Investigative Assistance, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862C (November 9, 2009).....                                  | 7634-7708   |
| 31              | 249. Recorder's Transcript Re: Filing of Brief, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (November 9, 2009) .....                                       | 7709-7714   |
| 31-32           | 250. Response to Request for Funds for Investigative Assistance, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862<br>(December 8, 2009).....                    | 7715-7766   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                                 | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 32            | 251. Recorder's Transcript re: Status Check: Defendant's Request for Investigative Assistance-State's Brief/Opposition, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (January 19, 2010) ..... | 7767-7775   |
| 32            | 252. Reply to the Response to the Request for Funds for Investigative Assistance, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (December 28, 2009).....                                       | 7776-7782   |
| 32            | 253. Jury Composition Preliminary Study, Eighth Judicial District Court, Clark County Nevada, Prepared for Nevada Appellate and Post-Conviction Project by John S. DeWitt, Ph.D.....                                            | 7783-7839   |
| 32            | 254. Jury Improvement Commission Report of the Supreme Court of Nevada, (October 2002) .....                                                                                                                                    | 7840-7933   |
| 32            | 255. Register of Actions, Minutes, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862 (January 7, 2009) .....                                                                                       | 7934-7936   |
| 1-2           | Jury Trial-Day 2, Volume III, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (June 17, 1997) .....                                                                                             | 22-348      |
| 34            | Motion and Notice of Motion for Evidentiary Hearing, <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1(June 8, 2018) .....                                                                    | 8407-8416   |
| 32            | Motion and Notice of Motion for Leave to Conduct Discovery, <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (June 8, 2018) .....                                                            | 7937-7951   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                          | <u>PAGE</u> |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 2             | Minutes, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (September 26, 2001) .....                                                      | 349-350     |
| 3             | Minutes, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (March 7, 2011) .....                                                           | 628         |
| 3             | Minutes, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (March 11, 2011) .....                                                          | 629         |
| 35            | Notice of Appeal, <i>Thomas v. Gittere</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (October 30, 2018) .....                                          | 8611-8616   |
| 35            | Notice of Entry of Order, <i>Thomas v. State</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (October 1, 2018) .....                                     | 8600-8610   |
| 30            | Notice Resetting Date and Time of Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96-C136862-1 (December 1, 2017) .....                  | 7456        |
| 35            | Notice Resetting Date and Time of Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96-C136862-1 (July 24, 2018) .....                     | 8573        |
| 35            | Opposition to Motions for Discovery and for Evidentiary Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (July 9, 2018) ..... | 8538-8543   |
| 3-4           | Petition for Writ of Habeas Corpus (Post-Conviction), <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. C96C136862-1 (October 20, 2017) .....      | 630-885     |
| 30            | Recorder's Transcript of Hearing: Defendant's Pro Per Petition for Writ of Habeas Corpus (Post-Conviction), State                                                        |             |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                                                                                                                                   | <u>PAGE</u> |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
|               | <i>v. Thomas</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (January 22, 2018) .....                                                                                                                                                                                                             | 7457-7459   |
| 1             | Recorder's Transcript Re: Calendar Call, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (June 13, 1997) .....                                                                                                                                                                    | 19-21       |
| 1             | Recorder's Transcript Re: Defendant's Motion to Reset Trial Date, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (January 29, 1997).....                                                                                                                                         | 8-15        |
| 35            | Recorder's Transcript of Hearing: Defendant's Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) Defendant's Motion for Leave to Conduct Discovery Defendant's Motion for Evidentiary Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (August 8, 2018)..... | 8574-8589   |
| 1             | Recorder's Transcript Re: Status Check: Re: Re-Set Trial Date, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (February 7, 1997) .....                                                                                                                                           | 16-18       |
| 35            | Reply to Opposition to Motion to Dismiss, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96C136862-1 C196420 (July 9, 2018) .....                                                                                                                                                         | 8544-8562   |
| 35            | Reply to Opposition to Motions for Discovery and For Evidentiary Hearing, <i>Thomas v. Gittere</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (July 16, 2018) .....                                                                                                                              | 8563-8572   |
| 31            | Reply to Response; Opposition to Motion to Dismiss, <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (June 4, 2018).....                                                                                                                                                       | 7532-7630   |
| 2             | Reporter's Transcript of All Pending Motions, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (September 14, 2005) .....                                                                                                                                                          | 393-412     |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                                                                               | <u>PAGE</u> |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 2             | Reporter's Transcript of Appointment of Counsel, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (March 29, 2004) .....                                                       | 386-392     |
| 2             | Reporter's Transcript of Argument and Decision, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (August 21, 2002) .....                                                       | 383-385     |
| 2             | Reporter's Transcript of Evidentiary Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (January 22, 2002) .....                                                        | 351-370     |
| 2             | Reporter's Transcript of Evidentiary Hearing, Volume II, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (March 15, 2002).....                                                | 371-382     |
| 2             | Reporter's Transcript of Penalty Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (October 31, 2005) .....                                                            | 413-461     |
| 2-3           | Reporter's Transcript of Penalty Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (November 3, 2005) .....                                                            | 462-551     |
| 3             | Reporter's Transcript of Penalty Hearing, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (November 4, 2005) .....                                                            | 552-627     |
| 1             | Reporter's Transcript of Proceedings Taken Before the Honorable Joseph T. Bonaventure District Judge, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. C136862, (October 2, 1996) ..... | 1-7         |
| 30-31         | State's Response to Third Amended Petition for Writ of Habeas Corpus and Motion to Dismiss, <i>State v. Thomas</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (March 26, 2018) .....         | 7460-7528   |

| <u>VOLUME</u> | <u>DOCUMENT</u>                                                                                                                                             | <u>PAGE</u> |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 31            | Stipulation and Order to Modify Briefing Schedule, <i>Thomas v. Filson</i> , District Court, Clark County, Nevada Case No. 96C136862-1 (May 23, 2018) ..... | 7529-7531   |

## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 14, 2019. Electronic Service of the foregoing APPELLANT'S APPENDIX shall be made in accordance with the Master Service List as follows:

Steven S. Owens  
Chief Deputy District Attorney

/s/ *Jeremy Kip*

An Employee of the  
Federal Public Defender,  
District of Nevada

COOK - DIRECT

1           A     Except identical twins.

2           MR. SCHWARTZ: Your Honor, I'd ask that Mr. Cook be  
3 deemed an expert in the field of DNA. And I have a few more  
4 questions to ask him.

5           MR. LaPORTA: Yes, Your Honor, I -- I have no  
6 objection to that. Your Honor -- well --

7           MR. SCHWARTZ: They'll be brief.

8           MR. LaPORTA: All right, let him proceed, I don't --

9           THE COURT: All right, so he'll be qualified now  
10 too.

11          MR. SCHWARTZ: Thank you, Your Honor.

12 BY MR. SCHWARTZ:

13          Q     Mr. Cook, you testified earlier that back when this  
14 crime occurred, the Las Vegas Metropolitan Police Department's  
15 crime lab did not have in place a facility to do DNA testing,  
16 is that correct?

17          A     We weren't accepting case work, but we could do it  
18 at the time. There were some technical and administrative  
19 hurdles that had to be dealt with.

20          Q     And in this particular case that we're concerned  
21 with today, you sent the -- you made a request of Cellmark to  
22 do DNA testing --

23          A     That's correct.

24          Q     -- on certain items?

25          A     Yes, sir.

III-230

COOK - DIRECT

1 Q Okay. And did you receive a report from Cellmark as  
2 a result of the tests that were performed?

3 A I did not, but our laboratory did.

4 Q Okay. Have you --

5 MR. LaPORTA: Judge --

6 BY MR. SCHWARTZ:

7 Q -- have you seen a report from Cellmark?

8 MR. LaPORTA: Judge, can I conduct some voir dire,  
9 just briefly, on this?

10 THE COURT: Yes.

11 VOIR DIRE EXAMINATION

12 BY MR. LaPORTA:

13 Q Mr. Cook, you -- your participation in this DNA  
14 testing and all that was merely taking the samples from the  
15 various pieces of admitted evidence and forwarding them to  
16 Cellmark --

17 A That's correct.

18 Q -- is that correct? Did you conduct any of the  
19 testing yourself?

20 A No, sir, I did not.

21 Q Did you have an opportunity to review the person who  
22 tested the work, while they were doing it?

23 A No, sir, I did not.

24 Q And so you're not personally involved in the testing  
25 whatsoever?

III-231

COOK - DIRECT

1 A No, sir, I'm not.

2 Q All right, so anything that you may have to say  
3 would come directly off of, you know, a third party's report,  
4 is that not correct?

5 A That's correct, sir.

6 MR. LaPORTA: Your Honor, I would object to any  
7 further testimony at this point in time. He's not personally  
8 involved in the testing and he was not a -- personally review  
9 the person who analyzed this work.

10 MR. SCHWARTZ: Your Honor, Mr. LaPorta stipulated to  
11 his expertise in the field, and an expert can refer to  
12 hearsay, or can refer to another expert's work and give an  
13 opinion that is either consistent or inconsistent with that  
14 other expert.

15 MR. LaPORTA: Judge, this is scientific technical  
16 evidence right here; this just goes beyond anything of that  
17 nature where he can just review another person's work and then  
18 give his expert testimony. I mean, it's scientific technical  
19 evidence --

20 MR. SCHWARTZ: And that's what an expert is.

21 THE COURT: Could you review somebody else's work?  
22 I guess -- who did this work, Cellmark?

23 MR. SCHWARTZ: Cellmark. Two -- there's a scientist  
24 and a Ph.D. from Cellmark, who Mr. Cook's familiar with, he's  
25 familiar with their credentials and their work product.

III-232

COOK - DIRECT

1 THE COURT: Well, you -- you reviewed these people  
2 -- the people's work and you're able to come to a conclusion?

3 THE WITNESS: Well, actually, sir, in this case --

4 THE COURT: Or are you just really reading from  
5 their report and telling us what they did, and that's it?

6 THE WITNESS: The latter would actually display  
7 [sic] me, just reading from their --

8 THE COURT: I'm going to sustain the objection.

9 MR. SCHWARTZ: Your Honor --

10 THE COURT: I don't think he, at this point, he  
11 could -- he could be allowed to go into -- he's just really  
12 explaining what they did, and it's a third-party thing, and  
13 I'm uncomfortable with it, Mr. Schwartz. So --

14 MR. SCHWARTZ: Your Honor, he also --

15 THE COURT: -- at this point --

16 MR. SCHWARTZ: I'm sorry. He also testified with  
17 regard to what he did, and their report, the only question I  
18 want to ask him is, is their report consistent or inconsistent  
19 with what he's testified to here today.

20 MR. LaPORTA: Your Honor, I'm going to object.

21 MR. SCHWARTZ: That's all.

22 MR. LaPORTA: That's just another way of getting in  
23 their testimony, their expertise, Cellmark's expertise in this  
24 area.

25 THE COURT: The objection is sustained.

III-233

HANSELL - DIRECT

1 MR. SCHWARTZ: I have no further questions then,  
2 Your Honor.

3 THE COURT: Thank you very much.

4 Do you have anything, Mr. LaPorta?

5 MR. LaPORTA: No, Your Honor, we don't have any  
6 questions.

7 THE COURT: Thank you very much. It was very  
8 enlightening, we appreciate it. You're free to go.

9 Next witness.

10 MR. ROGER: Richard Hansell.

11 THE COURT: Richard Hansell.

12 Please remain standing up over there, sir, raise  
13 your right hand and be sworn.

14 RICHARD HANSELL, PLAINTIFF'S WITNESS, IS SWORN

15 THE CLERK: Thank you. Please be seated.

16 THE COURT: Please state your name and spell your  
17 last name for the record.

18 THE WITNESS: Richard Hansell, H-A-N-S-E-L-L,  
19 P-number 5054.

20 THE COURT: All right, Mr. Roger.

21 DIRECT EXAMINATION

22 BY MR. ROGER:

23 Q What's a P-number?

24 A Personnel number for Metro. It's like a badge  
25 number, only I'm a civilian.

III-234

HANSELL - DIRECT

1 Q Right. Mr. Hansell, what is your business or  
2 occupation?

3 A I'm currently employed by Metropolitan Police  
4 Department as a latent fingerprint examiner.

5 Q What is a latent print examiner?

6 A A latent fingerprint examiner is a person that  
7 examines the fingerprints that are recovered from crime  
8 scenes, and I process items recovered from crime scenes to see  
9 if there are latent fingerprints on those items, and then I  
10 testify in court as to my examination and results.

11 Q Mr. Hansell, will you please tell us about your  
12 education, training and experience in the area of latent  
13 fingerprint examination and comparison?

14 A Prior to this I worked for the Philadelphia Police  
15 Department for twenty-five years as a fingerprint examiner. I  
16 have an associate's degree in applied sciences. I've attended  
17 the FBI school for advanced latent fingerprints. I attended  
18 school on ridgology, which is another way of saying latent  
19 fingerprints, back in April of '95, and -- I'm sorry, April  
20 '96. And I try and keep current with the latest publications  
21 and so forth.

22 Q And how many years have you been a latent print  
23 examiner with the Las Vegas Metropolitan Police Department?

24 A For a year and a half. Prior to that I have five  
25 years with the Philadelphia PD, and twenty -- twenty-five

III-235

HANSELL - DIRECT

1 years in total in fingerprints.

2 Q Over all of those years, have you testified as an  
3 expert in the area of latent fingerprint examination and  
4 comparison?

5 A Yes, sir, I've been certified both here in Nevada  
6 and in Pennsylvania at the state and local level.

7 Q Can you estimate for us on how many times you've  
8 testified as an expert in that area?

9 A Over a hundred times.

10 Q Mr. Hansell, during the course of the investigation  
11 into the killing of Carl Dixon and Matthew Gianakis, were you  
12 requested by homicide detectives, David Mesinar and Mike  
13 Bryant to examine latent fingerprints which were recovered  
14 from the crime scene located at the Lone Star Steakhouse at  
15 3131 North Rainbow Boulevard?

16 A Yes, sir, on April 23rd, '96 Detective Mesinar  
17 submitted a request for fingerprint comparison of those latent  
18 fingerprints.

19 Q Did he provide you a list of individuals that he  
20 wanted those prints compared to?

21 A Yes, sir, the two individuals that were deceased,  
22 Carl Dixon and Matt Gankis [sic], and three individuals, Marlo  
23 Thomas, Kenya Hall and Vincent Oddo.

24 Q You had those latent fingerprints which were  
25 recovered by Yolanda Peterson and crime scene --

III-236

HANSELL - DIRECT

1 MR. SCHWARTZ: McClary.

2 BY MR. ROGER:

3 Q -- Yolanda McClary, as well as crime scene analyst  
4 Dave Ruffino?

5 A Yes, sir, I have 'em with me.

6 Q Did you compare those latents to the individuals  
7 that you've just listed?

8 A Yes, sir, and I found Carl Dixon was identified to  
9 the southwest table on the prep room and on the south metal  
10 partition between the urinals in the men's room. The other  
11 subjects were compared, with negative results.

12 Q With respect to the latent print which was recovered  
13 from the urinal partition in the men's room, was that a  
14 fingerprint in blood?

15 A Yes, sir, it's noted a fingerprint in blood, "latent  
16 in blood on south metal partition between urinals in men's  
17 bathroom" by CSA Ruffino.

18 Q Thank you.

19 MR. ROGER: That concludes direct examination.

20 THE COURT: Anything?

21 MR. LaPORTA: Nothing, Your Honor.

22 THE COURT: Thank you very much. You're free to go,  
23 sir.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Next witness?

III-237

1 MR. ROGER: Can we approach the bench, Judge?  
2 THE COURT: Yes.  
3 (Off-record bench conference)  
4 THE COURT: Don't converse among yourselves or  
5 anyone else on any subject connected with the trial, read,  
6 watch or listen to any report of or commentary on the trial or  
7 any person connected with the trial by any medium of  
8 information, including without limitation newspapers,  
9 television and radio; and don't form or express any opinion on  
10 any subject connected with the trial until the cause is  
11 finally submitted to you.  
12 I have about a five-minute legal argument, take your  
13 ten-minute recess, we'll see you back in fifteen minutes.  
14 We'll be at ease until the jury leaves.  
15 (The Jury recessed)  
16 THE COURT: All right, this is outside the presence  
17 of the jury.  
18 The next witness is who now, as far as the State is  
19 concerned?  
20 MR. ROGER: We'll be reading into the record, if the  
21 Court allows us, Kenya Hall's testimony.  
22 THE COURT: So a synopsis of what happened and what  
23 transpired, Mr. Roger, basically -- I mean, just very briefly  
24 indicate to the Court what happened.  
25 MR. ROGER: Judge --

III-238

1 THE COURT: For the record.

2 MR. ROGER: -- Kenya Hall gave a statement to  
3 Trooper David Bailey in Hawthorne, Nevada on April 15th, 1996.  
4 He was charged with the murder along with the defendant, Marlo  
5 Thomas.

6 Mr. Harmon from our office entered into a plea  
7 agreement with Mr. Hall, his attorney Mr. Stefan. The  
8 agreement provided that Mr. Hall would plead guilty to robbery  
9 with use of a deadly weapon, sentencing would be continued, he  
10 would testify at both the preliminary hearing as well as the  
11 trial, and at that time the Court would sentence him on the  
12 robbery with use of a deadly weapon.

13 To that end, an agreement to testify was signed and  
14 filed with the Justice Court on June 27th, 1996. A  
15 preliminary hearing was held, I believe on that same date,  
16 June 27th, 1996 before the Honorable Doug Smith. Mr. LaPorta  
17 was the attorney. Mr. Thomas -- Mr. Hall, rather, testified  
18 at preliminary hearing; he was subject to cross-examination.  
19 The transcription of his statement to the Highway Patrol  
20 trooper was given to the defense. I believe that they alluded  
21 to it during cross-examination, but I know at a minimum Mr.  
22 Harmon alluded to it in redirect. They were given the plea  
23 agreement, as well as the agreement to testify. Mr. LaPorta  
24 cross-examined Kenya Hall about the agreement to testify, and  
25 any benefits which were given to him.

III-239

1           Subsequent to that, unfortunately due to the  
2 continuances in this case, Mr. Hall, who has been an inmate at  
3 the Clark County Detention Center, has decided not to testify.  
4 It is not of my doing that he has declined to testify, and  
5 although it is an inference, and an inference only, I would  
6 suggest that it is the "jailhouse lawyers," loosely referred  
7 to as other inmates, who have perhaps counseled him not to  
8 testify.

9           He has been before the Court, the Court has  
10 indicated that he must testify; he has indicated personally,  
11 as well as through his attorneys, that he is not going to  
12 testify, that he would invoke his Fifth Amendment right.

13           The fact of the matter is is that under our statute,  
14 which allows for the use of reported testimony from a  
15 preliminary hearing, if a witness has testified at a  
16 preliminary hearing, the defendant -- the defense -- or the  
17 witness has been available for cross-examination, and he is  
18 then unavailable at time of trial, and the statute  
19 specifically refers to a refusal to testify, the Court may  
20 allow the transcript to be read to the jury.

21           Mr. LaPorta had full opportunity to cross-examine  
22 this witness. It is not my fault that this witness has  
23 declined to testify; in fact, I have urged him to testify. He  
24 has been counseled by his attorneys; the ramifications of his  
25 refusal to testify are severe.

1           And so I'm asking the Court, under the statute, to  
2 allow us to read in the testimony. The case law, as well as  
3 the statute, requires us to provide the jury with the  
4 witness's agreement to testify. Our case law has required  
5 that we redact certain portions; I have done so on a -- an  
6 exhibit that I'll be offering to the Court if the Court allows  
7 us to present his testimony.

8           The Court has previously ruled that we are allowed  
9 to bring in this testimony, yet Mr. LaPorta has requested  
10 leave to ask the Court to reconsider.

11           And so that is our position at this time.

12           THE COURT: Mr. LaPorta.

13           MS. McMAHON: Thank you, Your Honor.

14           We had asked the Court's reconsideration of its  
15 prior ruling, specifically based on our Nevada statute, the  
16 statute that Mr. Roger has referred to. And it's quite clear  
17 that under NRS 51.055 that the Court can allow the  
18 introduction of testimony such as prior recorded testimony,  
19 providing certain factual conditions are met. And it's our  
20 position the State has failed to meet those.

21           Specifically, the transcript from the preliminary  
22 hearing could be introduced if in fact Kenya Hall had been  
23 given immunity or privilege so that he could testify without  
24 self-harm; that has not happened.

25           Now as the Court is aware, Kenya Hall is fifteen

1 years old. He entered into a plea negotiation with --  
2 represented by an attorney who is not currently in this  
3 jurisdiction. Subsequent thereto, Mr. Hall has filed motions  
4 with this Court, which are pending, seeking to withdraw the  
5 guilty plea. As I understand it, among the allegations that  
6 he's made, was despite the lack of constitutionality, he was  
7 threatened with the death penalty. Now we know that our  
8 United States Supreme Court says that can't be given to  
9 someone under sixteen, which again goes to the validity of the  
10 statements.

11 But the bottom line is, unavailability of a witness  
12 has been defined by our legislature and upheld by our courts.  
13 Kenya Hall simply does not meet the unavailability  
14 requirement. Because the State has not met the requirements  
15 to declare him unavailable under the stat [sic], it's  
16 inappropriate for the State to be allowed to introduce the  
17 transcript of his testimony at the preliminary hearing.

18 And we'd request the Court to reconsider its prior  
19 order, again based on the fact that as we understand the  
20 statute, Kenya Hall does not qualify as an unavailable  
21 witness; unavailability is not determined by refusal, but by  
22 the meeting of certain criteria which have not been met in  
23 this case.

24 THE COURT: And what is that criteria again?

25 MS. McMAHON: One, he would have to be given

1 privilege or immunity, which clearly is not the case. That  
2 young man was not offered that.

3 Secondly, that the Court must order --

4 THE COURT: I did order him last time, I said,  
5 you're going to testify, you should testify.

6 MS. McMAHON: That --

7 THE COURT: He said, Your Honor, I'm not testifying  
8 for the State, I'm not testifying for the defense, I invoke my  
9 Fifth Amendment right, and the Constitution says, no person  
10 shall be compelled at any criminal case to be a witness  
11 against himself. And he's invoking his constitutional right,  
12 as far as I'm concerned I -- it's unavailable; he won't do it.

13 MS. McMAHON: Well, Your Honor, I don't -- and  
14 perhaps I misunderstood. But given the fact that that young  
15 man has filed motions in your Court requesting to withdraw his  
16 plea and the consequences thereof, and the fact that you've  
17 continued that matter until August, I believe, to hear, how  
18 could the Court in fact order someone to testify against their  
19 own interest.

20 I didn't perceive your inquiry to Mr. Hall as being  
21 an order, young man, I'm ordering you to testify; but rather,  
22 young man, aren't you going to do this, aren't you going to go  
23 forward with the agreement, aren't you going to testify. I  
24 did not perceive that as an order by this Court, Your Honor.

25 THE COURT: We had another hearing Friday that you

1 weren't present I believe, you or Mr. LaPorta. It was just --  
2 it was a motion to Kenya Hall's attorney to exclude this,  
3 and --

4 MS. McMAHON: To withdraw.

5 THE COURT: No, not to withdraw, it was just to  
6 prevent -- and I could -- I had inquiry, it's a matter of  
7 record, and I continued it for further proceedings on Monday.  
8 Well, does the State want to say anything.

9 MR. ROGER: Judge, with due respect to Ms. McMahon,  
10 some of her allegations are spurious. When she talks about  
11 the State threatening this minor with the death penalty,  
12 that's not true; I don't know where she comes up with this  
13 factual basis, but it is not true. Mr. Harmon certainly knows  
14 that the death penalty is unavailable to a person under  
15 sixteen years of age. Never in any of my conversations with  
16 Kenya Hall, which have been very limited, have I ever  
17 threatened him. And so there have been no threats. Perhaps  
18 that's an allegation that he is telling someone in the jail,  
19 but that's not an allegation that is supported by the record.

20 When Ms. McMahon talks about the State being  
21 required to offer immunity to a witness, I haven't heard a  
22 single case which has been cited by the defense which requires  
23 that. All our statute requires is that the Court order this  
24 witness to testify.

25 The Court inquired of the defendant, Defendant Hall;

1 he said he would not testify. Defendant Hall provided an  
2 affidavit which Ms. McMahon and Mr. LaPorta have, which  
3 indicate that he is not going to testify. So the factual  
4 foundation has been laid, and the Court should stand by its  
5 earlier ruling.

6 THE COURT: Well, the motion to reconsider my ruling  
7 to allow the preliminary hearing transcript is denied. I  
8 think -- I think the man is unavailable, he won't testify; he  
9 indicated that very strongly, that he's not going to testify.  
10 And I don't think immunity has to be given to him. He's  
11 unavailable, we have a preliminary hearing transcript wherein  
12 he was under oath, he was allowed to be cross-examined by  
13 defense counsel, and I see nothing wrong with it.

14 MR. LaPORTA: Judge, as you -- the Court's order is  
15 to allow the State to publish Mr. Hall's preliminary hearing  
16 testimony. We have one additional motion, and that motion  
17 deals with some information contained within that testimony,  
18 and that is both the referral to the plea bargain and the  
19 agreement to testify. Clearly, any conversations between  
20 defense counsel and the prosecution as to the plea bargains,  
21 which there were none in this case that relate to the  
22 defendant, are not -- the State is not able to introduce  
23 during the trial.

24 If --

25 THE COURT: What are you talking about?

1 MR. LaPORTA: Well --  
2 THE COURT: I'm just going to allow them to do the  
3 transcript, is this something it --  
4 MR. LaPORTA: Within the transcript there are  
5 referrals, if my memory serves me correct, to the plea bargain  
6 and also to his agreement to testify.  
7 THE COURT: But for --  
8 MR. LaPORTA: All right --  
9 THE COURT: -- for Kenya Hall.  
10 MR. LaPORTA: Kenya Hall.  
11 THE COURT: All right.  
12 MR. LaPORTA: And our -- and we want -- our request  
13 is, to have that redacted out, not read to the jury, any  
14 referrals to any plea bargains or the agreement to testify on  
15 behalf of Kenya Hall, in that we believe that that reflects  
16 poorly on the defendant, the jury could very easily draw the  
17 inference that the codefendant has agreed to testify and to  
18 also enter into a plea bargain, he's guilty, therefore Mr.  
19 Thomas is guilty. Mr. Thomas has entered a not guilty verdict  
20 [sic], and that would be an unfair inference that would be  
21 pointed in his direction.  
22 THE COURT: You want to respond to that?  
23 MR. ROGER: I'm not sure that I can; I don't  
24 understand it, Judge. During cross --  
25 THE COURT: There's something in the preliminary

III-246

1 hearing transcript wherein you referred to the deal that Kenya  
2 Hall made with the State and you don't want me to read that.  
3 I don't -- I would think that would be beneficial to the  
4 defense, saying, the only reason he testified is because he  
5 was offered a deal and -- I mean, I would think that would be  
6 beneficial to you. But I'm missing some point here, too.

7 MR. LaPORTA: Well, Judge, the point you may be  
8 missing is, he now wants to back out of that, saying that the  
9 State has coerced him into making that negotiation, into  
10 making that deal, into giving that testimony. The jury is not  
11 going to hear that; they're not going to hear the other half.  
12 They're just going to hear the testimony, the fact he made a  
13 plea bargain, an agreement to testify, but they'll never hear  
14 the fact that now he's made allegations that the State and his  
15 attorney coerced him into giving this testimony at that  
16 preliminary hearing. And that's our problem, Judge.

17 MR. ROGER: Judge, I'm not sure that entirely object  
18 to what Mr. LaPorta is saying. I'm not sure that his point is  
19 well taken though. The testimony that he's referring to was  
20 brought out in cross-examination. In fact I can cite the  
21 Court to --

22 THE COURT: Well, can you scratch it out then? If  
23 it's so important to Mr. LaPorta, can you just redact that and  
24 let's get on with this case?

25 MR. ROGER: That's fine. But to --

1           THE COURT: All right. Take a look at it during the  
2 recess and scratch out what you want, show Mr. LaPorta and  
3 just redact that. All right?

4           MR. ROGER: Here's a problem though, Judge.  
5 NRS175.282, provides that if a prosecuting attorney enters  
6 into an agreement with a defendant in which the defendant  
7 agrees not to testify against another defendant -- agrees to  
8 testify against another defendant, in exchange for a plea of  
9 guilty or nolo contendere of the law, the Court shall, after  
10 excising any portion it deems relevant -- irrelevant or  
11 prejudicial, permit the jury to inspect the agreement. If the  
12 defendant is who -- who is testifying has not entered his plea  
13 or has been sentenced pursuant to agreement, instruct the jury  
14 regarding possible related pressures, et cetera. Sessions  
15 versus State, I only have the advanced opinion, 111 Advance  
16 Opinion, 19, a 1995 case, Sessions versus State indicates that  
17 the Court shall present this. And so if Mr. LaPorta is  
18 willing to waive that statutory requirement after consulting  
19 with his client as a part of a tactful decision, then I have  
20 no problem with not offering the agreement to testify and  
21 deleting any reference to his plea agreement.

22           THE COURT: All right. Do you want to waive that?

23           MR. LaPORTA: Judge, if we can -- if I can review  
24 the case.

25           THE COURT: All right. Why don't you review it.

1 We'll take are recess --

2 MR. LaPORTA: I think we can probably resolve this  
3 fairly --

4 THE COURT: Resolve it, please, and then I'll come  
5 in before the jury. Let's put it on the record and let's go  
6 with it. All right?

7 (Court recessed and reconvened)

8 (Jury is present)

9 THE COURT: Counsel stipulate to the presence of the  
10 jury?

11 MR. ROGER: Yes, Judge.

12 MR. LaPORTA: Yes, Judge.

13 THE COURT: All right. We resolved our legal  
14 argument, ladies and gentlemen and we're ready to proceed.  
15 The State will call their next witness.

16 MR. ROGER: Kathy Henkel.

17 THE COURT: Kathy Henkel here?

18 MR. ROGER: Judge, for the record, Ms. Henkel is not  
19 a witness. She'll be assisting in reading a transcript of the  
20 testimony which took place on June 26, 1996 at the preliminary  
21 hearing held before the Honorable Douglas Smith. Mel Harmon  
22 was the prosecutor, Mr. LaPorta was the defense attorney.

23 THE COURT: All right. So basically to inform the  
24 jury, she works in your office, I guess, and she's just going  
25 to read -- you're going to -- explain again, she's going to

1 read -- you're going to read a --  
2 MR. ROGER: I will read --  
3 THE COURT: -- a transcript of a preliminary  
4 hearing, everybody was under oath, and you're going to be who,  
5 the prosecutor?  
6 MR. ROGER: I'm going to play the prosecutor, the  
7 Court and Mr. LaPorta has asked that I read his portions as  
8 well.  
9 THE COURT: All right. And the witness is going to  
10 read which part?  
11 MR. ROGER: Kenya Hall's testimony.  
12 THE COURT: Kenya -- this is testimony of Kenya Hall  
13 who was under oath at a preliminary hearing that was held here  
14 in Justice Court, is that correct? I think we'll just swear  
15 you in to make sure you read it correctly. All right. Just  
16 raise your -- stand up, raise your right hand and be sworn.  
17 KATHY HENKEL, READER, SWORN  
18 THE COURT: And state your name and spell your last  
19 name.  
20 MS. HENKEL: My name is Kathy Henkel, H-E-N-K-E-L.  
21 THE COURT: And you're going to read the part of  
22 Kenya Hall from this preliminary hearing transcript?  
23 MS. HENKEL: Yes.  
24 THE COURT: What date was that?  
25 MS. HENKEL: I don't know.

III-250

1 MR. ROGER: It was June 26, 1996, Judge.  
2 THE COURT: June 26, 1996. This was a preliminary  
3 hearing transcript of Kenya Hall, is that correct?  
4 MR. ROGER: Correct, Judge.  
5 THE COURT: Why don't you proceed then.  
6 MR. ROGER: Thank you.  
7 Ms. Henkel, I direct your attention to page 83, at  
8 lines 22. The clerk stated:  
9 KENYA HALL, PRELIMINARY HEARING TESTIMONY  
10 "THE CLERK: Stand up please. Do you solemnly swear  
11 the testimony which you're about to give shall be the truth,  
12 the whole truth and nothing but the truth, so help you God.  
13 "THE WITNESS: Yes.  
14 "THE CLERK: Please state your full name and spell  
15 your full name for the record?  
16 "Kenya Hall, having first duly sworn and testified  
17 as follows:  
18 "THE WITNESS: Where is my lawyer. First I want to  
19 see my lawyer.  
20 "THE COURT: Who are you looking for?  
21 "THE WITNESS: My lawyer.  
22 "THE COURT: If you want to come up here and sit, he  
23 would feel more comfortable if you were up here by him.  
24 "Is there any objection to that?  
25 "MR. LaPORTA: Judge, I'm going to object to him

1 standing next to him, Your Honor. I want this witness's  
2 testimony, I don't want the attorney coaching him.  
3 "THE COURT: Objection overruled. Don't coach him.  
4 What we'll do is this. He's representing this guy Mr.  
5 LaPorta, not the State."  
6 MR. ROGER: Mr. Stefan, who is Mr. Hall's attorney.  
7 "MR. STEFAN: Could we meet? Can we have a sidebar?  
8 Thanks."  
9 MR. ROGER: At the bench, discussion off the record  
10 and then:  
11 "THE COURT: Would you take this young man outside  
12 in the hall and be with him, and his attorney wants to talk to  
13 him for just a second. Go out here.  
14 "DEFENDANT THOMAS: I wish to speak."  
15 MR. ROGER: And then there's a male speaker.  
16 "MALE SPEAKER: Your Honor, he would like to talk to  
17 his mother.  
18 "THE COURT: Yes, get his mom. Is Mr. Hall's mother  
19 here? Come up. This witness wants to talk. Is there any  
20 objection? He wants to talk to his mother.  
21 "DEFENDANT THOMAS: Yeah, she can talk.  
22 "THE COURT: Gee, thanks. Come up -- would you come  
23 up, your son is out here -- out there.  
24 "MR. HARMON: May I leave the courtroom, Your Honor?  
25 "THE COURT: Absolutely, we're in a pause in the

1 proceedings."

2 "THE COURT: This is a resumption of 96F7190A, State  
3 of Nevada versus Marlo Thomas. Let's get started. Mr. Hall's  
4 been sworn in. Go ahead.

5 "MR. HARMON: State your name please.

6 "THE WITNESS: Kenya Hall.

7 "MR. HARMON: Perhaps, Your Honor, we could have the  
8 microphone turned just a little bit.

9 //

10 "BY MR. HARMON:

11 "Q Can you spell your first name for the record?

12 "A K-E-N-Y-A H-A-double-L.

13 "Q Now, Mr. Hall, how old are you?

14 "A Fifteen.

15 "Q What is your date of birth?

16 "A 2/19/81.

17 "Q Other than your temporary residence in the Clark  
18 County Detention Center, where do you live, sir?

19 "A Hawthorne, Nevada.

20 "Q How long have you lived at Hawthorne, Nevada?

21 "A Eight years.

22 "Q Do you know the defendant in this action, a Marlo  
23 Thomas?

24 "A Yes.

25 "Q Do you see him in the courtroom?

III-253

1 "A Yes.  
2 "Q Will you point to him and describe something that  
3 he's wearing in court.  
4 "THE COURT: Just describe it if you will.  
5 "THE WITNESS: Blue shirt, blue pants.  
6 "THE COURT: Is he the person sitting next to the  
7 lawyer with the tie right there in front of you?  
8 "THE WITNESS: Yes.  
9 "THE COURT: The record will reflect that he  
10 identified the defendant.  
11 "MR. HARMON: Thank you, Your Honor.  
12 "BY MR. HARMON:  
13 "Q How is it that you know Marlo Thomas?  
14 "A He's my sister's husband.  
15 "Q What's your sister's name?  
16 "A Angela Thomas.  
17 "Q Mr. Hall, I want to direct your attention to April  
18 14th, of 1996, a Sunday. On that day did you travel from  
19 Hawthorne, Nevada to Las Vegas, Nevada with your sister,  
20 Angela Thomas?  
21 "A Yes.  
22 "Q And with the defendant, Marlo Thomas?  
23 "A Yes.  
24 "Q Did you use an automobile?  
25 "A Yes.

III-254

1 "Q Describe the car, please.  
2 "A 1991 Mitsubishi Mirage.  
3 "Q Whose car was it?  
4 "A My mother's.  
5 "Q Was it your mother's name -- what is your mother's  
6 name?  
7 "A Denise Hall.  
8 "Q You said Denise Hall?  
9 "A Yes.  
10 "Q Will you spell your mother's first name?  
11 "A D-E-N-I-S-E.  
12 "Q Who drove the car from Tonopah -- excuse me, from  
13 Hawthorne to Las Vegas?  
14 "A Angela Thomas.  
15 "Q Angela Thomas, your sister?  
16 "A Yes.  
17 "Q Was anyone else in the car? Did anyone else make  
18 the trip with you besides the defendant, Mr. Thomas, and your  
19 sister?  
20 "A No.  
21 "Q Did you get to Las Vegas that evening?  
22 "A Yes.  
23 "Q Sunday, April the 14th?  
24 "A Yes.  
25 "Q Where did you stay that night?

III-255

1 "A At his aunt's.  
2 "Q You say 'at his aunt's.' Whose?  
3 "A Marlo.  
4 "Q At Marlo Thomas's aunt's place?  
5 "A Yes.  
6 "Q Did you know his aunt prior to that evening?  
7 "A No.  
8 "Q Do you remember about what time you got up the next  
9 morning?  
10 "A About 6:00 o'clock.  
11 "Q After you had been up for awhile, did you go  
12 somewhere?  
13 "A Yes.  
14 "Q Who did you leave with?  
15 "A Angela Thomas and Marlo Thomas.  
16 "Q Did you ride in a car?  
17 "A Yes.  
18 "Q Which car?  
19 "A A 1991 Mitsubishi Mirage.  
20 "Q Your mother, Denise Hall's car?  
21 "A Yes.  
22 "Q The same car that you had traveled from Hawthorne to  
23 Las Vegas?  
24 "A Yes.  
25 "Q Now who drove the car that Monday morning, April

III-256

1 15th, 1996?

2 "A Angela Thomas.

3 "Q Where did you go Mr. Hall?

4 "A Huh?

5 "Q Where did you go?

6 "A To a gas station.

7 "Q Was gas put into the car?

8 "A Yes.

9 "Q After the gas station, did you go to the location of

10 a Lone Star Steakhouse?

11 "A Yes.

12 "Q Now would you estimate about what time you arrived

13 there?

14 "A 7:30, I don't know.

15 "Q Perhaps 7:30 in the morning?

16 "A Yes.

17 "Q Is that simply an estimate by you?

18 "A Yes.

19 "Q Do you know why you had gone to the Lone Star

20 Steakhouse?

21 "A Sort of.

22 "Q What does sort of mean?

23 "A The reason I was told we was going there wasn't the

24 reason that we was there.

25 "MR. LaPORTA: Your Honor, I'm sorry, but I'm having

1 trouble understanding a lot of what he says. Could you ask  
2 him to move closer to the mike.  
3 "THE COURT: Speak up a little bit.  
4 "THE WITNESS: Because the reason we went there  
5 wasn't the reason that I was told we was there.  
6 "BY MR. HARMON:  
7 "Q Let's start with what you were told. Were you given  
8 a reason for going to the steakhouse?  
9 "A Yes.  
10 "Q Who gave you a reason for going there originally?  
11 "A Marlo Thomas.  
12 "Q The defendant, Marlo Thomas?  
13 "A Yes.  
14 "Q What did he tell you at first was the reason for  
15 going there?  
16 "A To get his job back.  
17 "Q To get his job back?  
18 "A Yes.  
19 "Q When you got to the location of the Lone Star  
20 Steakhouse, is that still what you were thinking?  
21 "A Yeah.  
22 "Q What was the answer?  
23 "A Yes.  
24 "Q What happened after you got to the area where the  
25 restaurant was located?

1 "A What do you mean what happened?  
2 "Q Was your sister, Angela Thomas, still driving?  
3 "A Yes.  
4 "Q Did she pull into a shopping area?  
5 "A Yes.  
6 "Q Did she at some point stop the car?  
7 "A Yes.  
8 "Q Tell us what happened there?  
9 "A After that?  
10 "Q Yes.  
11 "A Sat there for awhile and we was just watching.  
12 "Q You were just watching you said?  
13 "A Looking at the Lone Star and then my sister was told  
14 to drive over to the store.  
15 "Q Now who told her to drive over to a store?  
16 "A Marlo Thomas.  
17 "Q Had there been any conversation while the three of  
18 you sat in the car just watching the restaurant?  
19 "A Yes.  
20 "Q What was the conversation that you remember?  
21 "A It was conversation about a white van that was  
22 driving around the parking lot and went to the Lone Star. And  
23 about money and stuff, about the white van making a pick up.  
24 "Q What did Mr. Thomas say about the white van and  
25 money?

1           "A    They do a pick up every day of the week and they do  
2 a pick up every Monday morning for the weekend and stuff.  
3           "Q    Are you saying that there actually was a white van  
4 in the area of the restaurant?  
5           "A    Yes.  
6           "Q    Were you able to see where the white van stopped, if  
7 it stopped at all?  
8           "A    Yes.  
9           "Q    Where did it stop?  
10          "A    At the Lone Star parking lot.  
11          "Q    Did you see people get out?  
12          "A    Yes.  
13          "Q    Where did they go?  
14          "A    Into the Lone Star.  
15          "Q    Was there any comment at that time by Marlo Thomas?  
16          "A    Not that I remember?  
17          "Q    Was there any further conversation?  
18          "A    No.  
19          "Q    Did you see people come out of the restaurant?  
20          "A    Yes.  
21          "Q    The same people who had gone in from the white van?  
22          "A    I believe so.  
23          "Q    You said that at some point Marlo Thomas told your  
24 sister to go over to the store?  
25          "A    Yes.

III-260

1 "Q Did they drive the car to the store or did they  
2 simply get out and walk to the store?  
3 "A She drove the car over to the store.  
4 "Q What happened when you got to the store?  
5 "A She got on the phone.  
6 "Q She got on the telephone?  
7 "A Yes.  
8 "Q Where was the telephone located in relation to the  
9 store?  
10 "A On the side of the store.  
11 "Q Was she using the pay phone?  
12 "A Yes.  
13 "Q What happened while your sister was on the  
14 telephone?  
15 "A Me and Marlo got out.  
16 "Q Why did you get out?  
17 "A Huh?  
18 "Q Why did you get out of the car?  
19 "A Go in the Lone Star.  
20 "Q Whose idea was it to go into the Lone Star?  
21 "A Marlo's.  
22 "Q Did you have any interest in going into the Lone  
23 Star Restaurant that morning?  
24 "A Not for a reason.  
25 "Q Was it your idea to go along with the defendant and

III-261

1 your sister to the Lone Star Restaurant?

2 "A Yes.

3 "Q You wanted to go with them?

4 "A Yes.

5 "Q Did you want to go into the restaurant?

6 "A Yes.

7 "Q Why?

8 "A I didn't want to sit in the car. There was nothing

9 else to do.

10 "Q So did you and Mr. Thomas proceed to go inside of

11 the restaurant?

12 "A I didn't hear you. I didn't understand.

13 "Q Well, you said that the two of you got out and that

14 was for the purpose of going inside the Lone Star?

15 "A Yes.

16 "Q Did you go inside?

17 "A Yes.

18 "Q Was a weapon of any kind taken into the restaurant?

19 "A Not when we first got out. Well, into it, yes.

20 "Q You say, not when you first got out?

21 "A Yes.

22 "Q What happened after you got out and before you had

23 actually entered the restaurant?

24 "A Yes. Before. We got out of the car and we started

25 walking around the front of the Lone Star and there was a

1 delivery truck and Marlo said something, turn around. We went  
2 to the car and he got in the car and he started loading the  
3 gun and --  
4 "Q Now you saw him get into the car and start to load a  
5 gun?  
6 "A Yes.  
7 "Q Did you know that he had the gun that morning?  
8 "A I knew it was in the car.  
9 "Q Where in the car was it?  
10 "A The glove compartment.  
11 "Q Whose gun was it?  
12 "A Marlo's.  
13 "Q Who?  
14 "A Marlo's.  
15 "Q Marlo's, the defendant?  
16 "A Yes.  
17 "Q What kind of gun was it?  
18 "A A .32.  
19 "Q Did you have a gun?  
20 "A No.  
21 "Q You say that you actually saw Marlo Thomas loading  
22 the .32 gun?  
23 "A Yes.  
24 "Q Where was he when he was loading it?  
25 "A In the car.

III-263

1 "Q Did he get completely back into the car?  
2 "A No.  
3 "Q Was he sitting on the seat?  
4 "A He was sitting on the seat, but his leg was outside  
5 the door.  
6 "Q With the door open?  
7 "A Yes.  
8 "Q You mentioned that a delivery truck had pulled up  
9 and Marlo said something?  
10 "A Yes.  
11 "Q That was as the two of you were walking toward the  
12 Lone Star?  
13 "A Yes.  
14 "Q What did he say to you when the delivery truck  
15 pulled up?  
16 "A He didn't say it to me.  
17 "Q Excuse me?  
18 "A He didn't say nothing to me. He said it to himself.  
19 "Q He said what?  
20 "A He said it to himself.  
21 "Q Did you -- could you tell what he said to himself?  
22 "A Yes.  
23 "Q What did he say to himself?  
24 "A Shit.  
25 "Q Did you see what the delivery truck did when it

III-264

1 pulled up?  
2 "A No. I just seen it there.  
3 "Q But it was after it pulled up that he went back and  
4 you say got the gun out of the glove box?  
5 "A Yes.  
6 "Q Loaded the gun?  
7 "A Huh?  
8 "Q Loaded the gun?  
9 "A Yes.  
10 "Q With bullets?  
11 "A Yes.  
12 "Q What happened then?  
13 "A He said 'come on,' we went back to the Lone Star.  
14 "Q Did you then go to a door of the Lone Star  
15 Restaurant?  
16 "A Yes.  
17 "Q Do you remember what door you went to?  
18 "A Yes.  
19 "Q Which door?  
20 "A The back door.  
21 "Q Did Mr. Thomas still have the gun?  
22 "A Yes.  
23 "Q .32 caliber gun that he had loaded?  
24 "A Yes.  
25 "Q Did you have a weapon of any kind?

III-265

1 "A No.  
2 "Q Did you have a knife?  
3 "A No.  
4 "Q Did Mr. Thomas have a knife as far as you knew?  
5 "A No.  
6 "Q At the point that you arrived at the back door, did  
7 anyone knock or ring a doorbell or say anything?  
8 "A No, we just sat there for awhile.  
9 "Q You just sat there for awhile?  
10 "A Yes.  
11 "Q Now, up to that point had Mr. Thomas said anything  
12 about his purpose for going to the Lone Star that was  
13 different than trying to get his job back?  
14 "A Not that day.  
15 "Q Did you know at the time you waited outside the door  
16 that there was going to be a robbery?  
17 "A Pretty much.  
18 "Q Why did you pretty much know that there was going to  
19 be a robbery?  
20 "A Because he had the gun.  
21 "Q Is that the only reason that you concluded that?  
22 "A Not really, no.  
23 "Q Had Mr. Thomas said anything to you that made you  
24 pretty sure that there was going to be a robbery?  
25 "A No.

III-266

1 "Q So you say that you waited at the back door?  
2 "A Yes.  
3 "Q Did someone come out?  
4 "A Yes.  
5 "Q Tell us what happened.  
6 "A While we was sitting there a guy walked out and  
7 Marlo and him started talking.  
8 "Q Do you know how long they talked?  
9 "A No.  
10 "Q Did you learn why this person had come out of the  
11 restaurant?  
12 "A Yes.  
13 "Q Why?  
14 "A He had slippers on. He didn't have work shoes on.  
15 "Q So he had gone -- he had to go change shoes?  
16 "A Yes.  
17 "Q Did the man say that he was coming back?  
18 "A Yes.  
19 "Q Did he say how long he was going to be?  
20 "A About twenty minutes.  
21 "Q Did this man then leave?  
22 "A Yes.  
23 "Q What did you and Marlo Thomas do?  
24 "A Just waited there and I think the guy left. We went  
25 inside the Lone Star.

III-267

1 "Q How did you get inside?  
2 "A Marlo knocked on the door and a guy opened it for  
3 us.  
4 "Q Someone opened it who was inside the Lone Star?  
5 "A Yes.  
6 "Q Did the guy let you and Marlo come inside?  
7 "A Yes.  
8 "Q What happened after you got inside?  
9 "A We walked past two guys cutting up meat and went  
10 back to the manager's office.  
11 "Q What happened when you got back to the manager's  
12 office?  
13 "A Marlo looked around the dining area and then came  
14 back, knocked on the manager's office door and the manager let  
15 us in.  
16 "Q Did you know the manager?  
17 "A No.  
18 "Q Had you ever seen him before?  
19 "A No.  
20 "Q What happened after the manager let you and Marlo  
21 come into the office?  
22 "A Marlo took the phone from him, hung it up and pulled  
23 out a gun.  
24 "Q He pulled out which gun?  
25 "A The .32.

III-268

1 "Q What did he do with the gun when he pulled it out?  
2 "A He just -- he kept it in his hand.  
3 "Q Did he point the barrel of the gun in any particular  
4 direction?  
5 "A He just pulled it out, like -- just like he was  
6 careless with it, I mean.  
7 "Q Now did Marlo Thomas say anything to the manager?  
8 "A He told him to open the safe.  
9 "Q Did he have the gun out when he said that?  
10 "A Yes.  
11 "Q What did the manager do?  
12 "A Open the safe.  
13 "Q You saw him do that?  
14 "A Yes.  
15 "Q After the manager began to open the safe what  
16 happened?  
17 "A Marlo gave me the gun, said I'll be back.  
18 "Q Did you take the gun?  
19 "A Yes.  
20 "Q Is this still the .32 caliber handgun?  
21 "A Yes.  
22 "Q Did Marlo Thomas tell you what to do with the gun?  
23 "A No, not that I remember.  
24 "Q He didn't give you any instructions?  
25 "A He told me to get the money.

1 "Q Did you get the money?  
2 "A Yes.  
3 "Q Who did you get the money from?  
4 "A The manager.  
5 "Q Were you holding the gun at the time you got the  
6 money?  
7 "A Yes.  
8 "Q Was the gun placed into any type of containers?  
9 What was the money -- I'm sorry --  
10 "A What was the money in?  
11 "Q Was the money placed by the manager into any type of  
12 containers?  
13 "A Bank of America bags.  
14 "Q How many bags?  
15 "A Three.  
16 "Q Did you know how much money it was?  
17 "A No.  
18 "Q Are we talking about coins or bills or both?  
19 "A Bills.  
20 "Q Did you see the bills were being taken by the  
21 manager from a safe and placed into the bags?  
22 "A Yes.  
23 "Q What happened after he had put all the money into  
24 the three bank bags?  
25 "A Told him to sit in the chair.

III-270

1 "Q You told him to sit -- sit in the chair?  
2 "A Yes.  
3 "Q What was the color of the bank bags?  
4 "A The bank bags?  
5 "Q Yes.  
6 "A Three -- I mean blue.  
7 "Q Blue?  
8 "A Yes.  
9 "Q When you told the manager to sit in the chair, did  
10 he?  
11 "A I don't know.  
12 "Q Why don't you know?  
13 "A Because I left.  
14 "Q When you left, you mean you left the office?  
15 "A Yes.  
16 "Q Did you have three bank bags and the money with you  
17 at the time?  
18 "A Yes.  
19 "Q Did you still have the gun?  
20 "A Yes.  
21 "Q Did you pay attention to what the manager did after  
22 you left?  
23 "A No.  
24 "Q Did you try to harm the manager in any way?  
25 "A No.

III-271

1 "Q You knew the gun was loaded, is that correct?  
2 "A Yes.  
3 "Q You had seen Marlo Thomas load the gun out of the  
4 car?  
5 "A Yes.  
6 "Q Did you try to use the gun?  
7 "A No.  
8 "Q And besides holding it, did you attempt to pull the  
9 trigger and shoot anyone inside the Lone Star?  
10 "A No.  
11 "Q So when you left the office where did you go?  
12 "A I walked out the door and I went towards the back  
13 door.  
14 "Q Towards the same door that you had come in?  
15 "A Yes.  
16 "Q As you walked in that direction, did you see or hear  
17 anyone?  
18 "A Seen Marlo.  
19 "Q Where was Marlo?  
20 "A He was fighting with a guy.  
21 "Q You said fighting with a guy?  
22 "A Yes.  
23 "Q Describe what you saw Marlo doing?  
24 "A Punching him.  
25 "Q He what?

III-272

1 "A He was punching him.  
2 "Q Where was the guy who was being punched by Marlo?  
3 "A On the floor.  
4 "Q On his stomach or on his back?  
5 "A On his back.  
6 "Q And when you saw -- when you say punching him, will  
7 you demonstrate what you saw Marlo doing?  
8 "A Swinging at him.  
9 "Q Demonstrate to the Court what you saw him do.  
10 "THE COURT: I think that his hands are handcuffed,  
11 Mr. Harmon.  
12 "MR. HARMON: That's a good point, Your Honor. I'm  
13 sorry.  
14 "BY MR. HARMON:  
15 "Q That was an unreasonable request. I won't ask you  
16 to demonstrate. Did he raise his arms in air?  
17 "A No, he was just swinging at him, that's --  
18 "Q Was he lying on top of this person or just over him?  
19 "A They was fighting, I mean.  
20 "Q Could you see the other person who was on his back  
21 on the floor struggling, too?  
22 "A Yes.  
23 "Q Could you tell if Marlo Thomas had anything in his  
24 hand?  
25 "A No.

III-273

1 "Q How close were you?  
2 "A I don't know.  
3 "Q What did you do when you saw this happening?  
4 "A Called Marlo.  
5 "Q What do you mean you called Marlo?  
6 "A Called him. Said his name.  
7 "Q You called out his name?  
8 "A Yes.  
9 "Q When you did that, did he seem to hear you?  
10 "A Huh?  
11 "Q When you called out his name did he seem to hear  
12 you?  
13 "A Yes.  
14 "Q What did he do?  
15 "A He got up. The guy let him go. He got up.  
16 "Q He got off the guy?  
17 "A He wasn't really on him.  
18 "Q What do you mean that he got up? Where was he?  
19 "A On the ground with the guy.  
20 "Q So he got up. Did he come to where you were?  
21 "A Yes.  
22 "Q Did you notice what the guy who was on the floor  
23 did?  
24 "A He kicked him and got up.  
25 "Q Who kicked who?

III-274

1 "A The guy kicked Marlo.  
2 "Q And then he got up?  
3 "A Yes.  
4 "Q Where did the guy go?  
5 "A He ran through a hall.  
6 "Q After he ran through the hall, did you see where he  
7 went?  
8 "A No.  
9 "Q Could you tell if he was injured?  
10 "A No.  
11 "Q Did Marlo then walk over to where you were?  
12 "A Yes.  
13 "Q Did you have a conversation with him?  
14 "A Sort of.  
15 "Q What was this sort of conversation you had?  
16 "A It was -- he asked me where was the manager at.  
17 "Q What did you say?  
18 "A I don't know.  
19 "Q Was that the truth?  
20 "A Yes.  
21 "Q Did you still have three bank bags and the gun?  
22 "A Yes.  
23 "Q What did you do with the money and the gun?  
24 "A I took the money out to the car and I handed the gun  
25 to Marlo.

III-275

1 "Q When Marlo asked you where the manager was, and you  
2 said, I don't know. What did he say or do?  
3 "A He stuttered -- I mean like he didn't know which way  
4 to go.  
5 "Q So what way did he go?  
6 "A Towards the front.  
7 "Q He walked towards the front?  
8 "A Yes.  
9 "Q Did you go on out?  
10 "A Yes.  
11 "Q Did you know at what -- at that point that any  
12 persons had been seriously hurt?  
13 "A No.  
14 "Q Had you hurt anyone while you're inside the Lone  
15 Star Restaurant?  
16 "A No.  
17 "Q You say that you still had the three bank bags?  
18 "A Yes.  
19 "Q You carried them out to the car?  
20 "A Yes.  
21 "Q Did you leave by the same or different door than you  
22 came in?  
23 "A Excuse me?  
24 "Q Did you leave by the same door or a different door  
25 than when you went in?

III-276

1 "A Same door that I came in.  
2 "Q Did you go to the car?  
3 "A Yes.  
4 "Q Was your sister still over at the telephone or was  
5 she in the car?  
6 "A She was in the car.  
7 "Q What happened when you got out to the car?  
8 "A Marlo came out -- had came out already and he was --  
9 he was kind of mad. He was mad at himself, and my sister was  
10 yelling what happened and everything and Marlo told her.  
11 "Q Your sister wanted to know what had happened?  
12 "A Yes.  
13 "Q What did Marlo tell her?  
14 "A He said -- he said he killed a guy.  
15 "Q He said that he killed a guy?  
16 "A Yes. And I let -- I let the manager get away.  
17 "Q Who said that you let the manager get away?  
18 "A Marlo.  
19 "Q You explained what he meant by that?  
20 "A That -- I don't really know. He just said I let him  
21 get away.  
22 "Q Was Marlo Thomas angry at that time?  
23 "A Not at me.  
24 "Q And had he ever told you what he expected you to do  
25 to the manager?

III-277

1           "A   He just -- he thought -- he thought I was going to  
2 do something.  
3           "Q   You said that he thought that you were going to do  
4 -- to what?  
5           "A   Shoot the manager.  
6           "Q   Did you have a chance to see the clothing of Marlo  
7 Thomas when he came out to the car?  
8           "A   Excuse me?  
9           "Q   Did you see the clothing of Marlo Thomas when he  
10 came out to the car?  
11          "A   I wasn't paying attention.  
12          "Q   You didn't notice any blood?  
13          "A   When we got back to his aunt's.  
14          "Q   Did you notice blood then?  
15          "A   Yes.  
16          "Q   What did you notice?  
17          "A   There was blood on his clothes.  
18          "Q   Where on his clothes?  
19          "A   On his shorts.  
20          "Q   You said that he told your sister he killed a guy?  
21          "A   Yes.  
22          "Q   Did he say that he got in a fight with a second guy?  
23          "A   Yes.  
24          "Q   Did he tell you what he used to kill the guy and in  
25 the fight with the other guy?

III-278

1 "A Yes.  
2 "Q What did he say that he used?  
3 "A A knife.  
4 "Q Did he tell you, you and your sister, where he got  
5 the knife?  
6 "A No.  
7 "Q Did he describe the knife?  
8 "A No.  
9 "Q Did you ever see the knife?  
10 "A Yes.  
11 "Q Where were you when you saw the knife?  
12 "A In the car.  
13 "Q In the car going back to his aunt's house --  
14 "A Yes.  
15 "Q -- place?  
16 "A Yes.  
17 "Q Who had the knife when you saw it?  
18 "A Marlo.  
19 "Q Was there blood on the knife?  
20 "A Yes.  
21 "Q On what part of the knife?  
22 "A The blade.  
23 "Q Describe the knife.  
24 "A I only seen the blade.  
25 "Q About how long was the blade?

1 "A I can't remember.  
2 "Q Were you given a knife?  
3 "A Yes.  
4 "Q When?  
5 "A At his aunt's.  
6 "Q After you got back there?  
7 "A Yes.  
8 "Q Were you told what to do with the knife?  
9 "A Yes.  
10 "Q By whom?  
11 "A Marlo.  
12 "Q What did Marlo tell you to do with the knife?  
13 "A To throw it as far as I can out in the desert.  
14 "Q Did you do that?  
15 "A Yes.  
16 "Q Do you know what happened to Marlo's clothes, the  
17 shorts that had blood on them?  
18 "A I didn't then.  
19 "Q You say that you didn't then?  
20 "A Yes.  
21 "Q Did he ever tell you what happened to them?  
22 "A Yes.  
23 "Q What did he tell you?  
24 "A They were thrown out in the desert.  
25 "Q You testified that while you were still inside the

1 Lone Star you gave the gun back to Marlo?  
2 "A Yes.  
3 "Q Do you know what happened to the gun?  
4 "A Yes.  
5 "Q What did happen to the gun?  
6 "A It was thrown out in the desert with the rest of the  
7 stuff.  
8 "Q You said that you carried --  
9 "A Wait, it was given to his aunt.  
10 "Q Do you know what she did with it?  
11 "A No.  
12 "Q You said that you carried the three bank bags out to  
13 the car?  
14 "A Yes.  
15 "Q What happened to the bags and the money?  
16 "A I don't what happened to the bags. The money was  
17 put in a pillowcase.  
18 "Q Who put the money in a pillowcase?  
19 "A I don't know.  
20 "Q How do you know that the money was placed in the  
21 pillowcase?  
22 "A Because I seen it in the pillowcase in the living  
23 room.  
24 "Q In whose living room?  
25 "A His aunt's. Marlo's aunt.

1           "Q   Did there come a time when you and your sister and  
2 Marlo left Las Vegas?  
3           "A   Yes.  
4           "Q   About when was that?  
5           "A   I don't know.  
6           "Q   How long after you had been to the Lone Star was it?  
7           "A   I don't know. Probably about 9:00 o'clock.  
8           "Q   Probably about 9:00 o'clock, you say?  
9           "A   Yes.  
10          "Q   Was there any conversation as you left Las Vegas  
11 about the police or being spotted by someone?  
12          "A   Excuse me?  
13          "Q   Was there any conversation about the police as you  
14 left Las Vegas.  
15          "A   Said if -- not about the police, we would probably  
16 be caught like within a week or something.  
17          "Q   Did anyone attempt to drop down out of sight as the  
18 car was leaving town?  
19          "A   Yes.  
20          "Q   Who?  
21          "A   Me.  
22          "Q   Who was driving the car?  
23          "A   Angela Thomas.  
24          "Q   Do you know where the money was at at that time?  
25          "A   Yes.

III-282

1 "Q Where?  
2 "A In the trunk.  
3 "Q Still in the pillowcase?  
4 "A I believe so.  
5 "Q Who put the money in the trunk?  
6 "A Angela.  
7 "Q Did Marlo ever explain why he killed someone?  
8 "A Excuse me?  
9 "Q You told us earlier that Marlo said that he killed a  
10 guy and he got in a fight with a second guy. Did he explain  
11 why that happened?  
12 "A Why it happened?  
13 "Q Yes.  
14 "A I don't know why it happened.  
15 "Q Did he explain to you why it happened?  
16 "A Why he killed the two guys?  
17 "Q Yes.  
18 "A No, he didn't.  
19 "Q Did he ever say anything about being concerned that  
20 there wouldn't be any witnesses?  
21 "A Yes.  
22 "Q When did he say that?  
23 "A In the car, he said if you commit a crime you're not  
24 suppose to leave no witnesses.  
25 "MR. HARMON: Thank you. I'll pass the witness,

1 Your Honor.

2 "THE COURT: Cross?

3 "MR. LaPORTA: Thank you, Your Honor.

4 "CROSS-EXAMINATION

5 "BY MR. LaPORTA:

6 "Q Kenya, when you were with Marlo from the time that

7 you drove from Hawthorne to the next morning, just outside the

8 Lone Star, is that not correct, were you with him the whole

9 time pretty much?

10 "A Yes.

11 "Q During that time there was no discussion about

12 robbing any place or any one, was there?

13 "A No.

14 "Q Let me take you to the moments when you were just

15 outside the Lone Star that morning. There's no conversation

16 about robbing the place or anyone inside, was there?

17 "A No.

18 "Q As you were just about to walk into the Lone Star,

19 there's no conversation that you're going to go in and rob the

20 place or anyone in there, was there?

21 "A No.

22 "Q After you had approached the manager's office, who

23 knocked on the door?

24 "A Marlo.

25 "Q The manager opens the door?

III-284

1 "A Yes.

2 "Q And you characterized the weapon, the production of

3 the weapon as, you used the words, I believe I'm quoting you

4 correctly, it fell out?

5 "A What fell out?

6 "Q The gun. That's what I heard you say. Am I right

7 or am I wrong?

8 "A The gun fell out?

9 "Q The gun sort of fell out?

10 "A I didn't see him. I didn't see the gun come out at

11 all. I just seen it when it was outside.

12 "Q So you didn't see who had the gun?

13 "A Marlo.

14 "Q And you never saw him pull the gun out?

15 "A No.

16 "Q You just -- at some point it was in the -- in his

17 hands?

18 "A Yes.

19 "Q How long were you in there before he handed you the

20 weapon?

21 "A I don't know.

22 "Q Can you estimate? Was it a few seconds, a few

23 minutes?

24 "A Two, three minutes.

25 "Q Okay. He did tell you though, if I heard you

1 correctly, that he wanted to go there that morning to get his  
2 job back, is that not right?  
3 "A Yes.  
4 "Q As far as you know that's why he went in there?  
5 "A Yes.  
6 "Q Now you testified that you saw Marlo fighting with  
7 one of the two victims on the floor. Do you remember what the  
8 victim looked like?  
9 "A No.  
10 "Q Is it not your testimony also that while you were  
11 fighting you didn't see any weapon, specifically a knife?  
12 "A No.  
13 "Q That victim, when Marlo pulled away, got up?  
14 "A Yes.  
15 "Q And what did he do?  
16 "A He ran through a hall.  
17 "Q And disappeared from your sight?  
18 "A Yes.  
19 "Q Did you ever see him again?  
20 "A No.  
21 "Q About how much time between when Marlo left the  
22 manager's office and gave you the money until you next saw  
23 Marlo?  
24 "A A couple of seconds, thirty seconds.  
25 "Q About thirty seconds?

1 "A Yes.

2 "Q So it's your testimony that about thirty seconds

3 went by from the time Marlo handed you the gun, told you to

4 get the money and when you next saw him, which was when he was

5 fighting on the floor?

6 "A Yes.

7 "Q That's correct? That's correct?

8 "A Yes.

9 "Q Excuse me?

10 "A Excuse me. I didn't mean that was thirty seconds.

11 I don't know long that was.

12 "Q You don't know how long that was?

13 "A Between when he left the office and I came out of

14 the office. I don't know how long that was.

15 "Q Well, could you -- was it a minute, was it five

16 minutes?

17 "A I don't remember at all.

18 "Q Well, let's talk about what happened during the time

19 you had the gun.

20 "A Yes.

21 "Q You held the gun on the manager, you pointed the gun

22 at the manager, correct?

23 "A I don't remember.

24 "Q You had the gun, correct?

25 "A Yes, I had the gun.

III-287

1 "Q What was the manager doing while you had the gun on  
2 you?  
3 "A Getting the money.  
4 "Q Was the safe already open when Marlo left?  
5 "A No.  
6 "Q Had the manager started to open the safe before  
7 Marlo left?  
8 "A Yes.  
9 "Q What kind of safe was it? Was it a key, a  
10 combination?  
11 "A Combination.  
12 "Q When Marlo left, what was the manager doing right at  
13 that moment, do you recall?  
14 "A Getting the money right when we -- when he left.  
15 "Q Right when he left?  
16 "A He was still twisting the thing.  
17 "Q Okay. Now, it took him about how long after Marlo  
18 left to take the top off the safe?  
19 "A The top?  
20 "Q The lid to open the safe?  
21 "A I don't know.  
22 "Q A few seconds?  
23 "A Yes.  
24 "Q Couple minutes?  
25 "A Few seconds.

III-288

1 "Q Few seconds. And once the manager opened it up,  
2 what did he do?  
3 "A Started putting the money in bank bags.  
4 "Q About how long did it take him to put all the money  
5 in the bank bags.  
6 "A About a minute, two minutes.  
7 "Q The money was all -- the money was located in the  
8 safe?  
9 "A Yes.  
10 "Q Did he have to go anywhere else? Did he go  
11 searching anywhere else for any money?  
12 "A No.  
13 "Q So his concentration was on the money in the safe?  
14 "A Yes.  
15 "Q He never opened any drawers to any desk, or looked  
16 anywhere else for money?  
17 "A No.  
18 "Q So now he's put all the money in the safe in the  
19 bank bag, is that correct?  
20 "A Yes.  
21 "Q Does he hand it to you?  
22 "A Yes.  
23 "Q After he hands it to you, what happens?  
24 "A Well, I told him to sit in the chair.  
25 "Q What did you do?

1           "A    Leave.

2           "Q    So it doesn't sound like there was a whole lot of  
3 wasted effort here, a whole lot of time searching for things.  
4 He pretty much got into the safe, got the money out, put it in  
5 the bank bags, handed it to you and out the door he went?

6           "A    Yes.

7           "Q    Did he have to search inside the safe for the money  
8 or was it right there?

9           "A    It was right there.

10          "Q    How much time do you think it took --

11          "MR. STEFAN:  Objection, Your Honor, that's been  
12 asked and answered.

13          "THE COURT:  Sustained.

14          "BY MR. LaPORTA:

15          "Q    You went outside through the door that you  
16 originally entered through, is that not correct?

17          "A    That's correct.

18          "Q    Was Marlo outside waiting for you when you walked  
19 out there?

20          "A    No.

21          "Q    When did you next see Marlo after you exited that  
22 door?

23          "A    When I turned around.

24          "Q    Turned around?

25          "A    Yes.

III-290

1 "Q After exiting the door?  
2 "A Yes.  
3 "Q How many feet -- approximately how far did you go  
4 from the door to outside before you turned around?  
5 "A Twenty, thirty feet maybe.  
6 "Q And you turned around?  
7 "A Yes.  
8 "Q And there was Marlo when you turned around?  
9 "A Walking out the door.  
10 "MR. LaPORTA: Court's indulgence."  
11 MR. ROGER: Continued questioning.  
12 "BY MR. LaPORTA:  
13 "Q Did Marlo go straight to the car after you saw him  
14 walking out the back door?  
15 "A Yes.  
16 "Q Did you go straight to the car?  
17 "A Yes.  
18 "Q Did you get into the car?  
19 "A Yes.  
20 "Q The front, back?  
21 "A Back.  
22 "Q Where did Marlo go? Did he get in the car?  
23 "A Front.  
24 "Q Who's driving the car again?  
25 "A Angela Thomas.

III-291

1 "Q The individual that you saw fighting on the floor  
2 with Marlo, had you seen him before that morning?  
3 "A No.  
4 "MR. LaPORTA: Your Honor, I have no further  
5 questions.  
6 "THE COURT: Mr. Harmon.  
7 "MR. HARMON: Thank you, Your Honor.  
8 "BY MR. HARMON:  
9 "Q Mr. Hall, when you were inside the restaurant were  
10 you ever told by Marlo Thomas to shoot the manager of the  
11 restaurant?  
12 "A Not that I remember.  
13 "Q Do you remember what it was that you told the police  
14 when you talked to them?  
15 "A Yes.  
16 "Q Did you give a recorded statement to the police?  
17 "A Yes.  
18 "MR. HARMON: May I approach the witness, Your  
19 Honor?  
20 "THE COURT: Yes.  
21 "BY MR. HARMON:  
22 "Q I'm showing you quite a lengthy statement, Mr. Hall.  
23 Have you had a chance to read this before?  
24 "A Not all of it.  
25 "Q Does it appear to be a copy of a statement you gave

1 to Highway Patrolman named David Bailey?  
2 "A Yes.  
3 "Q Were you interviewed by Trooper Bailey in Hawthorne,  
4 Nevada?  
5 "A Yes.  
6 "Q Was this after your arrest?  
7 "A Yes.  
8 "Q I want to direct your attention to an answer at the  
9 bottom of the page.  
10 "THE COURT: What page are you on?  
11 "MR. HARMON: Unfortunately, they are not -- they  
12 are not numbered. It looks like, counsel and Your Honor, the  
13 fifth page.  
14 "BY MR. HARMON:  
15 "Q Would you read that, Mr. Hall, to yourself, over to  
16 the top of what is probably the sixth page.  
17 "A Start right here?  
18 "Q To yourself.  
19 "A To myself.  
20 "Q Yes. Just as quickly as you can. Is that an answer  
21 that you gave to Trooper David Bailey?  
22 "A Yes.  
23 "Q When he interviewed you?  
24 "A Yes.  
25 "Q Was it a truthful answer?

1 "A Truthful, yes. Could be.  
2 "Q You say, yes, it could be?  
3 "A Yes. I don't remember right now.  
4 "Q Was this the answer -- and let's go right up to the  
5 previous page, previous answer. We walked over to the  
6 restaurant, I guess. Is that what you said?  
7 "A Yes.  
8 "Q Question by Trooper Bailey 'And did what?' And did  
9 you answer, 'We went -- at first he knocked on the back door.  
10 Well, and this guy came out, right, and he was all talking to  
11 him and stuff and he told the guy that he's supposed to be  
12 talking to some guy about his job. And then the guy left and  
13 he said he was coming back and Marlo went in there -- and  
14 cause the guy said let him in, he went in there. He asked  
15 where some guy was at. He went back there into an office and  
16 he knocked on the door and the guy let him in and Marlo  
17 started shoving him up against the desk and I thought he was  
18 like choking him with the phone, but I think that the guy was  
19 on the phone and he was hanging it up. And then he told the  
20 guy to open the safe. He put the gun in my hand. He told me  
21 to get the money and shoot he guy in the back of the head when  
22 I leave like that.'  
23 "A Yes.  
24 "Q Is that what you said?  
25 "A It might have been. But I meant for him when I said

1 that. That's what he was telling me what I was supposed to do  
2 in the car. He didn't tell me to do that when I was in the  
3 office.

4 "Q So you're saying that when Marlo Thomas told you  
5 that you were supposed to shoot the guy in the back of the  
6 head but that wasn't inside the restaurant?

7 "A It was in the car.

8 "Q That happened out in the car after it happened?

9 "A Yes.

10 "Q And that's what he told you that you're supposed to  
11 have shot the guy in the back of the head?

12 "A Yes.

13 "Q Now previously you were asked if there was any  
14 conversation on the way to Hawthorne from Las Vegas. Did Mr.  
15 Thomas ever tell you what you were to say or how you were to  
16 act if you were arrested?

17 "A No, he just said the cops were going to interrogate  
18 me.

19 "Q Did he ever suggest in any way that you ought to  
20 take the blame for what had happened?

21 "A No. He just said if I did, then I would probably  
22 get out in twenty years.

23 "Q Because why? Because you are younger?

24 "A Yes, I'm a juvenile.

25 "Q Did Mr. Thomas in the car, after this happened, ever

1 say how it incurred that one of the victims was in the  
2 restroom?  
3 "A In the restroom?  
4 "Q Yes.  
5 "A He said he told him he had to talk to him.  
6 "Q When did he tell you that?  
7 "A In the car.  
8 "Q And so after it happened he explained how one of the  
9 persons got back into the restroom, men's restroom?  
10 "A Excuse me?  
11 "Q After this happened in the car, is that when Mr.  
12 Thomas explained to you and your sister how one of the victims  
13 got back into the men's restroom?  
14 "A Yes.  
15 "Q What did he say that he did to get the person to  
16 come back to the restroom?  
17 "A He told him that he had to talk to him.  
18 "Q Is that what you told Trooper Bailey?  
19 "A I believe so.  
20 "Q Did you -- do you see the answer --  
21 "MR. HARMON: And I'm really sorry counsel the pages  
22 aren't numbered.  
23 "MR. LaPORTA: Well, Your Honor, just for some  
24 housekeeping purposes I have many things from Mineral County  
25 and law enforcement agencies in the area, but I do not have a

1 copy of this. If I could review this for a moment before I  
2 recross and then if the DA's office will provide me with a  
3 copy.

4 "MR. HARMON: We certainly will, Your Honor. I  
5 thought that he had it.

6 "MR. LaPORTA: I've gone through everything and I  
7 have everything else. But I just don't have this.

8 "THE COURT: That's fine.

9 //

10 "BY MR. HARMON:

11 "Q Do you see the answer right here, Mr. Hall, near the  
12 bottom of this page which has been paper clipped? Does that  
13 appear to be an answer that you gave to the highway patrolman?

14 "A Yes.

15 "Q Now you mention up above that, about how long Marlo  
16 was gone when he gave you the gun and he left?

17 "A Yes.

18 "Q Do you see this answer -- question, 'How long was  
19 Marlo gone?' And did you answer, 'For about -- about two to  
20 five minutes. I don't know. I don't know for exact. I don't  
21 know'?

22 "A Yes.

23 "Q And now do you say that after you got in the car  
24 there was a conversation?

25 "A Sort of. Not between me and Marlo.

III-297

1           "Q   Was there this question by Patrolman Bailey, 'Where  
2 did he say that he had went'? And did you give this answer,  
3 'He said he went in the back -- he told -- he told one of the  
4 guys to come in the bathroom. He got to talk to him. He said  
5 he started stabbing him and then he started stabbing that guy.  
6 And he said the guy dropped. And then he tried to call the  
7 other guy back there and the guy said that -- said the guy  
8 didn't come back there. The guy came around the corner and  
9 Marlo said he stabbed him in his heart and that was it. And  
10 when I walked out he was hitting him.' Is that what you said?  
11           "A   Yes.  
12           "Q   Was that the truth?  
13           "A   I believe so. Yes.  
14           "Q   Is there anything that you have told us this  
15 afternoon in court -- is everything that you have told us this  
16 afternoon in court the truth to the best of your recollection?  
17           "A   Yes.  
18           "Q   You understand the importance of this hearing.  
19           "A   Yes.  
20           "Q   You understand it's important to you, to family  
21 members, to the State and to the defendant, Mr. Thomas?  
22           "A   Yes.  
23           "MR. HARMON: Thank you. That's all, Your Honor.  
24 Do you want --  
25           "MR. LaPORTA: Just a couple minutes just to review

1 this. It won't take long.

2 "THE COURT: And before you leave Mr. Harmon, if  
3 it's all right, we'll have a copy of that made.

4 "MR. HARMON: That particular copy is marked, but I  
5 may even have additional copies here.

6 "THE COURT: That's fine, okay.

7 "MR. LaPORTA: May I use this?

8 "MR. HARMON: Sure.

9 "MR. LaPORTA: Thank you.

10 "RE CROSS EXAMINATION

11 "BY MR. LaPORTA:

12 "Q Now, Kenya, you made this statement to a Trooper  
13 Bailey for the Nevada Highway Patrol, is that not correct?

14 "A Which statement?

15 "Q The statement that Mr. Harmon just went through  
16 with you?

17 "A Yes.

18 "Q Okay. Do you remember who was there at the time?

19 "A No.

20 "Q Was there just Trooper Bailey?

21 "A No, there was -- I remember some of the people, but  
22 I don't remember all of them.

23 "Q Okay. Well, about how many people were there?

24 "A Ten.

25 "Q About ten people?

III-299

1 "A Yes.

2 "Q A little scary, wasn't it?

3 "A At first.

4 "Q Did they have badges?

5 "A Yes.

6 "Q Guns?

7 "A I can't remember.

8 "Q During this interview, Kenya, did anybody suggest to

9 you that any of these answers that you gave, in particular

10 about the shooting -- about shooting the manager in the back

11 of the head?

12 "A Did anyone suggest that I give them to them, no.

13 They said --

14 "Q Anybody force you to give these answers?

15 "A No, just back in Hawthorne, if I said that and if I

16 had said different the guys would think that I would be lying,

17 so.

18 "Q Why do you say that?

19 "A Huh?

20 "Q Why -- why did you say it?

21 "A Back in Hawthorne. Because I was trying to tell

22 them what was said in Hawthorne, I was getting mixed up.

23 "Q Was it the truth?

24 "A That's what was said in the car. It wasn't said in

25 the office.

III-300

1 "Q You didn't get mixed up?  
2 "A What?  
3 "Q You didn't get mixed up while they were asking you  
4 all these questions?  
5 "A Maybe.  
6 "Q Do you feel like they confused you a little bit?  
7 "A Sometimes.  
8 "Q Did you feel like there was certain answers that  
9 they wanted you to give so you gave them to them?  
10 "A I don't know. Never thought of it.  
11 "Q Well, I'm asking you now in your mind do you think  
12 at the time that they were looking for certain answers and  
13 pushing you to give them and you just gave them to them at the  
14 time?  
15 "MR. HARMON: I object to the form of the question.  
16 Now it's irrelevant.  
17 "THE COURT: Sustained.  
18 "MR. HARMON: He said that he never thought of it up  
19 until now.  
20 "THE COURT: Sustained.  
21 "MR. LaPORTA: No further questions, Your Honor.  
22 "MR. HARMON: Nothing further."  
23 MR. ROGER: And that's the conclusion of the  
24 testimony.  
25 THE COURT: All right. Thank you very much.

III-301

MESINAR - DIRECT

1 Next witness.

2 MR. ROGER: David Mesinar.

3 THE COURT: Please remain standing. Raise your  
4 right hand and be sworn.

5 DAVID MESINAR, PLAINTIFF'S WITNESS, IS SWORN

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

8 THE WITNESS: David Mesinar, M-E-S-I-N-A-R.

9 DIRECT EXAMINATION

10 BY MR. ROGER:

11 Q Detective Mesinar, what is your business or  
12 occupation?

13 A I'm a police officer with Metropolitan Police  
14 Department.

15 Q How long have you been a police officer with the Las  
16 Vegas Metropolitan Police Department?

17 A Twenty-five years.

18 Q What is your current assignment?

19 A I'm assigned to the homicide section.

20 Q How long have you been a homicide detective?

21 A Four years.

22 Q During your four years approximately how many  
23 homicides have you investigated?

24 A Between eighty and a hundred.

25 Q Detective Mesinar, I'd like to direct your attention

III-302

MESINAR - DIRECT

1 to Monday, April 15th, 1996. Were you asked to respond to the  
2 Lone Star Steakhouse located at 3131 North Rainbow, Las Vegas,  
3 Clark County, Nevada?

4 A I was, but I was to detour first to University  
5 Medical Center Trauma Unit.

6 Q Did you go to UMC at that point?

7 A Yes, I did.

8 Q Did you observe the body of Matt Gianakis at UMC?

9 A Yes, I did.

10 Q Did you learn that he had been pronounced dead?

11 A Yes.

12 Q Do you know what time he was pronounced dead?

13 A Not exactly. Sometime in the morning.

14 Q Thereafter, did you respond to the Lone Star  
15 Steakhouse?

16 A Yes.

17 Q Were police officers, criminalists, as well as  
18 Detective Mike Bryant and perhaps a Sergeant Kevin Manning  
19 present?

20 A Yes, they were.

21 Q Were they conducting their crime scene investigation  
22 at both the Steakhouse and the Rebel station, which is located  
23 just north of the Steakhouse?

24 A Yes, they were.

25 Q Did you converse with Detective Bryant concerning

III-303

MESINAR - DIRECT

1 what he had discovered by interviewing witnesses and  
2 conducting the crime scene investigation?

3 A Yes, we discussed the incident, yes.

4 Q Did you learn that a Carl Dixon was found stabbed to  
5 death in the men's room of the restaurant?

6 A Yes, I did.

7 Q So this was the scene of a double homicide?

8 A Yes.

9 Q As a result of Detective Bryant's interviews did you  
10 develop a suspect?

11 A I did.

12 Q Who was that?

13 A Marlo Thomas.

14 Q Did you learn that -- subsequently did you receive a  
15 request or information that Emma Nash and Barbara Smith might  
16 have information concerning Marlo Thomas?

17 A Yes.

18 Q Did both you and Detective Bryant interview both  
19 Mrs. Nash and Ms. Smith?

20 A Yes.

21 Q Where did you contact these two ladies?

22 A First contact with Emma Nash was on a street called  
23 Raymond in North Las Vegas and Ms. Smith was contacted at her  
24 residence at 2505 West Cartier.

25 Q Did you learn that they had very important

III-304

MESINAR - DIRECT

1 information and that they had contact with the defendant after  
2 the killing at the Lone Star Restaurant?

3 A Yes, I did.

4 Q Did you ask them to give you a tape-recorded  
5 interview?

6 A Yes.

7 Q Did they comply?

8 A They did.

9 Q How would you describe their cooperation with you  
10 that morning?

11 A Fully cooperative with the police.

12 Q Did you take a tape-recorded statement from them?

13 A Yes.

14 Q Did they answer their -- your questions or Detective  
15 Bryant's questions to the best of their ability?

16 A Yes.

17 Q Was there any suggestion that you were able to  
18 determine that they were hiding anything from you?

19 A None whatsoever.

20 Q Were you able to obtain physical evidence from Emma  
21 Nash?

22 A Yes.

23 Q What did you recover from Mrs. Nash?

24 A It was an RG pistol.

25 Q Do you recall the caliber of the handgun?

III-305

MESINAR - DIRECT

1           A     I want to say .38, but I'd have to look at the  
2 reports.

3           Q     Think it was a small handgun?

4           A     Yes.

5           Q     A revolver?

6           A     Yes.

7           Q     Thereafter was your attention directed to the desert  
8 area just to the rear of 2505 Cartier?

9           A     Yes.

10          Q     This is based upon some information that you had  
11 received from Emma Nash or Barbara Smith?

12          A     Yes.

13          Q     Did you go out into the desert yourself looking for  
14 certain items?

15          A     Yes.

16          Q     What were you looking for?

17          A     We were looking for clothing that was possibly worn  
18 by the suspect.

19          Q     Did you participate in the search in this desert  
20 area?

21          A     Yes.

22          Q     Did you find anything?

23          A     Yes. Found a pair of sneakers and some shorts and  
24 we found a knife.

25          Q     Will you describe the shorts to us or what caught

III-306

MESINAR - DIRECT

1 your attention?

2 A The shorts were just dropped haphazardly out in the  
3 desert and they appeared to be bloodstained.

4 Q What about the shoes?

5 A The shoes were also thrown out in the desert and  
6 contained what appeared to be blood.

7 Q You say that you recovered a knife?

8 A Yes.

9 Q Was this in the general area of the clothes and --  
10 or the pants and the shoes?

11 A No, it was -- it was quite a distance further south  
12 from the clothing. It was inside a small desert plant, bush.

13 Q Will you describe the condition of the knife?

14 A The knife appeared to be bloodstained.

15 Q Did you request that crime scene analyst Monte Spoor  
16 respond to your location --

17 A Yes.

18 Q -- in order to process and impound those items?

19 A Yes.

20 Q Did you do a thorough search of the desert area?

21 A Yes, we did.

22 Q Did you find any other firearms in that desert area?

23 A No.

24 Q Subsequently did either yourself, or Detective  
25 Bryant request that other law enforcement agencies assist you

III-307

MESINAR - DIRECT

1 in locating a vehicle?

2 A A vehicle?

3 Q Yes.

4 A Yes.

5 Q Had you learned that the defendant, Angela Thomas,  
6 and Kenya Hall had traveled to Las Vegas in a green or a  
7 bluish Mitsubishi?

8 A Yes.

9 Q Did you request agencies to try to locate that  
10 vehicle and the suspects?

11 A Yes, a state-wide broadcast was put out attempting  
12 to locate that vehicle and three people.

13 Q Did you have some indication as to where that  
14 vehicle might be traveling?

15 A Yes, all indications were pointing towards  
16 Hawthorne, Nevada.

17 Q Later that day, somewhere around 2:00 o'clock, did  
18 you receive information that the vehicle had been stopped by  
19 Mineral County Sheriffs, Highway Patrol Troopers and that  
20 Angela Thomas, Kenya Hall, and Marlo Thomas had been arrested?

21 A Yes, I did.

22 Q Did you make arrangements to travel to Hawthorne,  
23 Nevada?

24 A I did.

25 Q Did you in fact go to Hawthorne, Nevada?

III-308

MESINAR - DIRECT

1           A     Yes, the next morning myself, Detective Bryant, and  
2 two crime scene analysts went to Hawthorne.

3           Q     When you went to Hawthorne, Nevada did you request a  
4 crime scene analyst process the vehicle?

5           A     Yes.

6           Q     Were you present when they processed the vehicle?

7           A     No, myself and Detective Bryant were at the Mineral  
8 County Sheriff's office interviewing the -- Mr. Thomas and his  
9 wife, Angela.

10          Q     Prior to interviewing Marlo Thomas, did you read him  
11 certain constitutional rights?

12          A     Yes, I did.

13          Q     What rights were those?

14          A     He was informed that he had the right to remain  
15 silent and that anything he said can and will be used against  
16 him in a court of law. He had the right to have an attorney  
17 present before any questioning, and if he could not afford an  
18 attorney one would be appointed to him before questioning.  
19 And if he decided to answer questions he may stop at any time  
20 and ask to speak with an attorney and at that time all  
21 questioning would stop.

22          Q     Were -- are those rights memorialized on a rights of  
23 person card?

24          A     Yes.

25          Q     Detective Mesinar, I'm showing you State's Proposed

MESINAR - DIRECT

1 Exhibit Number 81. Is that a rights of person's arrested  
2 card?

3 A Yes.

4 Q That's the card that you used to advise Marlo Thomas  
5 of his rights?

6 A Yes, it is.

7 Q In conversing with Marlo Thomas did he indicate that  
8 he understood those rights?

9 A Yes.

10 Q Do you see Mr. Thomas in court today?

11 A I do.

12 Q Please point to him and describe an article of  
13 clothing that he's wearing today.

14 A He's the gentleman wearing the white shirt and the  
15 multicolored yellow and blue tie.

16 MR. ROGER: May the record reflect the  
17 identification of the defendant, Marlo Demetrius Thomas?

18 THE COURT: The record will so reflect.

19 BY MR. ROGER:

20 Q Did you ask Mr. Thomas to sign that card?

21 A I did.

22 Q Did you witness him signing it?

23 A Yes.

24 Q Is his signature on there dated April 17th, 1996 at  
25 6:27 p.m.?

III-310

MESINAR - DIRECT

1 A Yes.

2 Q His signature is there?

3 A Yes, it is.

4 Q Is your signature on there as well?

5 A My printed name is on there. I printed that myself.

6 Q Are there any other either printed names or  
7 signatures?

8 A Yes, Detective Bryant's name is on there.

9 Q He was also present during the admonishment of those  
10 rights?

11 A Yes.

12 Q You have a number which appears to be a ten-digit  
13 number?

14 A Yes, this is what we call a DR number or file  
15 number. It's particular to a certain case.

16 Q And so that number was assigned to the Lone Star  
17 killings?

18 A Yes.

19 MR. ROGER: I'd move for the admission of State's  
20 Proposed Exhibit Number 81?

21 THE COURT: Any objection?

22 MS. McMAHON: No objection, Your Honor.

23 THE COURT: 81 will be admitted into evidence.

24 (Plaintiff's Exhibit No. 81 admitted)

25 BY MR. ROGER:

III-311

MESINAR - DIRECT

1 Q Did the defendant elect to speak with you at that  
2 time?

3 A At 6:00 p.m., is that what you're talking about?

4 Q Right.

5 A Yes.

6 Q Were you able to take a statement from him at that  
7 point?

8 A Yes, his statement was videotaped.

9 Q Okay. I'm -- obviously made a mistake. On April  
10 17th, 1996 at 10:00 a.m., that was the first time that you had  
11 contacted the defendant, is that right?

12 A In Hawthorne, Nevada, yes.

13 Q Subsequently you transported the defendant back to  
14 Las Vegas and he chose to make a statement?

15 A Yes.

16 Q Was this statement videotaped?

17 A Yes, the one when we got back to Las Vegas was.

18 Q Did you readvise him of his rights at that point?

19 A Yes.

20 MR. ROGER: Judge, State's Proposed Exhibit Number  
21 82 is a videotape of Marlo Thomas's statement to Detective  
22 Mesinar. I believe that we have a stipulation that this is an  
23 authentic copy of the videotape.

24 MR. LaPORTA: It's so stipulated, Your Honor.

25 THE COURT: All right, and we'll admit that? Or

MESINAR - DIRECT

1 you --

2 MR. ROGER: So moved.

3 THE COURT: Okay, any objection to it being  
4 admitted?

5 MS. McMAHON: No, Your Honor.

6 THE COURT: All right, 82 will be admitted into  
7 evidence.

8 (Plaintiff's Exhibit No. 82 admitted)

9 MR. ROGER: May I play this to the jury, Judge?

10 THE COURT: Yes. You'd like to play it to the jury,  
11 that's fine.

12 MR. SCHWARTZ: Judge, this is a rather long tape, we  
13 need to grab some chairs and take them over there.

14 (Off-record colloquy)

15 THE COURT: How long is the tape? I'm just curious.

16 MR. ROGER: Twenty-five minutes.

17 (Exhibit No. 82, videotape, is played for the jury)

18 THE COURT: All right. Anything else?

19 MR. ROGER: Couple more questions, Judge.

20 THE COURT: Pardon?

21 MR. ROGER: Couple more questions?

22 BY MR. ROGER:

23 Q Detective Mesinar, from the time that you first met  
24 the defendant on April 17th, 1996 in Hawthorne, Nevada to the  
25 time that you returned here to Clark County where charges were

MESINAR - CROSS

1 filed against the defendant, did you ever observe any injuries  
2 which was suggested by the defendant in his videotaped  
3 confession?

4 A None whatsoever.

5 Q None to his neck or his face?

6 A No.

7 Q No scratch marks?

8 A No.

9 Q In fact did you ask Crime Scene Analyst Dave Ruffino  
10 to go photograph the defendant?

11 A Yes.

12 Q At any time did the defendant complain about any  
13 injuries on the trip from Hawthorne to Las Vegas?

14 A No.

15 MR. ROGER: That concludes direct examination.

16 THE COURT: Do you have anything?

17 MR. LaPORTA: Your Honor, I do have a few questions.  
18 They won't be long.

19 CROSS-EXAMINATION

20 BY MR. LaPORTA:

21 Q Good afternoon, Detective.

22 A Good afternoon.

23 Q There's been some testimony about one thousand  
24 dollars (\$1,000), part of the proceeds of the robbery that  
25 supposedly Mr. Thomas gave to Barbara Smith, I believe is her

MESINAR - CROSS

1 name, who has previously testified. Do you recall anything  
2 about that?

3 A I recall the comment about it. The money was  
4 allegedly giving -- given to Mr. Thomas's mother but we could  
5 not confirm that by talking with his mother.

6 Q All right. You included that in your report, I take  
7 it?

8 A Yes.

9 Q All right. And then also, you had talked with I  
10 believe it was Mrs. Nash about her conversation with the  
11 defendant Darrel [sic] Thomas?

12 A Marlo Thomas?

13 Q Yes.

14 A Yes.

15 Q All right. I mean Marlo -- Marlo Thomas. All  
16 right. And is it not true that she told you that during her  
17 conversation with Marlo Thomas that she observed him to be  
18 crying while she was at the -- while he was at the home  
19 subsequent to the robbery and killings?

20 A Yes, I believe she told me that.

21 Q All right, she did tell you that in fact?

22 A Yes.

23 Q Did you have any reason not to believe her at that  
24 point?

25 A No, like I -- like I said on direct examination that

III-315

MESINAR - CROSS

1 I totally believed everybody we talked to that was a part of  
2 Mr. Thomas's family.

3 Q Okay. All right.

4 MR. LaPORTA: No further questions.

5 THE COURT: Anything else?

6 MR. ROGER: No, Your Honor.

7 THE COURT: All right, thank you very much.

8 Appreciate it, you're free to go.

9 What's the State's pleasure now, any other  
10 witnesses?

11 MR. ROGER: No, Judge. I'd like to confer with the  
12 clerk to see --

13 THE COURT: Yes.

14 MR. ROGER: -- what the exhibit list is.

15 (Off-record colloquy between Mr. Roger and the Clerk)

16 MR. ROGER: Judge, with respect to State's Proposed  
17 Exhibit Number 35, that was the autopsy photograph of Carl  
18 Dixon of the face.

19 THE COURT: That's 35, are you sure?

20 MR. ROGER: 39?

21 THE COURT: 39, right.

22 MR. ROGER: The face.

23 THE COURT: That was ID'd by the doctor. You move  
24 to admit that?

25 MR. ROGER: So move.

III-316

1 THE COURT: Any objection?  
2 MR. LaPORTA: No, Your Honor.  
3 THE COURT: 39 will be admitted into evidence.  
4 (Plaintiff's Exhibit No. 39 admitted)  
5 MR. ROGER: 52 which is an autopsy photograph of  
6 Matthew Gianakis's face. I believe that was identified by  
7 the --  
8 THE COURT: That was. Any objection to that being  
9 admitted, 52?  
10 MR. LaPORTA: No objection to that one, Your Honor.  
11 THE COURT: 52 will be admitted into evidence.  
12 (Plaintiff's Exhibit No. 52 admitted)  
13 MR. ROGER: 69 is an evidence package with blood I  
14 believe from the -- from the knife. Does the Court's record  
15 reflect whether or not that was offered?  
16 THE COURT: It's -- no, nobody moved to admit that.  
17 Any objection?  
18 MR. LaPORTA: No objection, Your Honor.  
19 THE COURT: All right 69 will be admitted.  
20 (Plaintiff's Exhibit No. 69 admitted)  
21 MR. ROGER: 70, which is an evidence package -- no,  
22 that was admitted, I'm sorry.  
23 It appears that all of the State's exhibits have  
24 been admitted. So, with that, Judge, State will rest.  
25 THE COURT: All right, ladies and gentlemen, it's

III-317

1 been a long day but we've accomplished a lot. The State has  
2 now rested their case in this particular case. I'm very  
3 confident that we'll be able to have instructions of law to  
4 you tomorrow and the closing arguments, and you'll be able to  
5 deliberate this case tomorrow.

6 MR. ROGER: Judge, may we approach?

7 THE COURT: Yes.

8 (Off-record bench conference)

9 THE COURT: So that being the case, ladies and  
10 gentlemen, we'll start at 9:30 tomorrow, might be a little  
11 later, but, you know, be here about 9:30 tomorrow. We will  
12 resume and then I'm sure we'll be able to -- openings made and  
13 we'll get this case to you tomorrow. All right.

14 Don't converse among yourselves or with anyone else  
15 on any subject connected with the trial, read, watch, or  
16 listen to any report of or commentary on the trial, or any  
17 person connected with the trial by any medium of information,  
18 including, without limitation, newspapers, television and  
19 radio and don't form or express any opinion on any subject  
20 connected with the trial until the cause is finally submitted  
21 to you.

22 We'll be in recess 'til about 9:30 tomorrow. We'll  
23 be at ease until the jury leaves.

24 (Jury recessed)

25 THE COURT: Before the defendant takes or refuses to

1 take the stand, I think this should be read to the defendant  
2 outside the presence of the jury, and I should advise counsel  
3 to confer with his client with the view of having the  
4 defendant voluntarily make a knowing and understanding waiver  
5 of his right against self incrimination by testifying if he so  
6 desires, or he may refuse to waive his constitutional right  
7 and not take the stand.

8 "NRS 175.171. No special instruction to be given  
9 relating exclusively to the defendant's testimony. In the  
10 trial of all indictments, complaints, and other proceedings  
11 against persons charged with the commission of crimes or  
12 offenses, the person so charged shall, at his own request, but  
13 not otherwise, be deemed a competent witness, the credit to be  
14 given his testimony being left solely to the jury under the  
15 instructions of the Court, but no special instructions shall  
16 be given relating exclusively to the testimony of the  
17 defendant."

18 "NRS 175.181. Instruction not to be given relative  
19 to failure of defendant to testify.

20 "One, no instruction shall be given relative to the  
21 failure of the person charged with the commission of crime or  
22 offense to testify, except upon the request of the person so  
23 charged the court shall instruct the jury that in accordance  
24 with a right guaranteed by the Constitution no person can be  
25 compelled in a criminal action to be a witness against

1 himself, and, two, nothing herein contained shall be construed  
2 as compelling any such person to testify."

3           Mr. LaPorta, have you advised your client of his  
4 constitutional rights? You know, of course, the Constitution  
5 says, any person is not to be compelled to testify and he  
6 could waive that right though. What --

7           MR. LaPORTA: Your Honor, Ms. McMahon has -- is in  
8 discussions right now with Mr. Thomas about that very matter.  
9 We'd ask that this be put over until tomorrow morning so we  
10 can have further discussions with him.

11           THE COURT: All right, and in addition, there's a  
12 few clean-up things. I notice you wanted to put something on  
13 the record about 38, it was the 84 enlargement, the  
14 enlargement of the -- if you want to say something I'll give  
15 you a chance now.

16           MR. LaPORTA: Judge, essentially, what we felt was  
17 that was repetitive, cumulative evidence that the State had  
18 already introduced through some rather -- through some  
19 enlarged autopsy photographs. We felt that that was nothing  
20 more than just to appeal to the jury and infuriate them, at  
21 this point --

22           THE COURT: Well, again, I --

23           MR. LaPORTA: -- and so we objected to the  
24 introduction of those blown-up anatomical drawings.

25           THE COURT: All right and I overruled your

1 objection. I think that was proper, wasn't inflammatory. It  
2 was just to show exactly how all the wounds was on the body,  
3 so that exhibit will be admitted.

4 And in addition, before we left you wanted to take a  
5 look at the preliminary hearing transcript of Kenya Hall and  
6 you wanted to delete any reference to a guilty plea agreement.  
7 I just want it for the record that there was a stipulation or  
8 something, an agreement reached on that is that correct?

9 MR. ROGER: That's correct. Mr. LaPorta indicated  
10 that he wanted certain portions deleted from the transcript.  
11 Those portions were not read in accordance with what he had  
12 requested.

13 In addition, pursuant to NRS 175.282 and the case of  
14 Sessions versus State I had a redacted copy of the agreement  
15 to testify signed by Kenya Hall, but because Mr. LaPorta did  
16 not want reference in the preliminary hearing transcript, he  
17 also did not want that redacted agreement to testify, to be  
18 published to the jury, so we did not.

19 THE COURT: Is that correct?

20 MR. LaPORTA: That's correct, Your Honor. We did  
21 arrive at an agreement.

22 THE COURT: Fine, then that'll be a matter of record  
23 that that was -- that agreement, at least regarding the  
24 negotiations or guilty plea negotiations was entered into.  
25 All right?

III-321

1           Is there anything else to come before the state?  
2 Clean-up things or anything that --

3           MR. ROGER: Yes, Judge. Finally the videotape of  
4 the defendant's testimony. There were certain references in  
5 the original concerning him going to see his probation  
6 officer. These items were eliminated by turning off the  
7 audio.

8           On a revised tape Mr. LaPorta had an opportunity to  
9 review the tape in my office last week and I think that the  
10 stipulation is that that is an accurate copy as to our  
11 agreement.

12          MR. LaPORTA: That's the stipulation, Your Honor.

13          THE COURT: All right, so that'll be a matter of  
14 record.

15          Anything else from the state that you can think of?

16          MR. ROGER: Not by the state, Judge.

17          THE COURT: If you think of anything tomorrow, let  
18 me know. But as far as the defense now, I expect -- what I  
19 expected to do then was have you come in my chambers around  
20 9:15 with the instructions and we'll settle instructions and  
21 come out, settle instructions and read the instructions to the  
22 jury and argue tomorrow morning. That's what I expect to do,  
23 but you let me know --

24          MR. LaPORTA: Judge, there is a possibility of a  
25 witness or two, so --

1           THE COURT: Well, you have the witness here at 9:15  
2 if you have one, I mean, this is something I wasn't aware of,  
3 Mr. LaPorta, so -- but that's what I expect to do then.  
4 Number one, either way, be at 9:15 here to apprise me what's  
5 happening and have the instructions here. Do you want any --  
6 if this goes any lesser included, like second degree, make  
7 sure Mr. Roger knows that so we could have the stock  
8 instructions on those -- and the verdicts, all right?  
9           MR. LaPORTA: Yes, Your Honor.  
10          THE COURT: You'll let Mr. Roger know on that?  
11          MR. LaPORTA: Yes, Your Honor. We will -- we will  
12 discuss that. In fact we'll try to discuss it this evening.  
13          THE COURT: And also if you needed instruction about  
14 his -- if he doesn't testify, that he doesn't want to testify,  
15 you have to request that instruction and Mr. Roger will have  
16 that available to put in the packet.  
17          MR. LaPORTA: We will.  
18          THE COURT: So take care all of that.  
19          MR. LaPORTA: We'll address all those issues.  
20          THE COURT: So we will see you either way at 9:15  
21 and we'll settle instructions. if we need to put on one or  
22 two witnesses for the defense, we will and then we'll submit  
23 it to the jury. It's up to you what you want to do, but I'll  
24 see everybody back at 9:15 with the instructions and the forms  
25 of verdict and we'll give this to the jury tomorrow either

1 way. All right?  
2 Anything else to come before the Court?  
3 MR. LaPORTA: Judge, we'd just like to talk to the  
4 defendant for just a couple of minutes.  
5 THE COURT: Is it all right if he stays here five  
6 minutes or so?  
7 MR. LaPORTA: Just a couple of minutes.  
8 THE COURT: I appreciate it. It'll save time.  
9 All right, then. Thank you very much, I appreciate  
10 it.

11 (Court adjourned at 5:45 p.m. until 9:30 a.m.  
12 the following day, June 18, 1997)

13 \* \* \* \* \*

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

III-324

WITNESS INDEX

| <u>NAME</u>                           | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|---------------------------------------|---------------|--------------|-----------------|----------------|
| <u>PLAINTIFF'S WITNESSES</u>          |               |              |                 |                |
| Stephen Hemmes                        | 4             | 15           | 20              | --             |
| Vince Oddo                            | 21            | 60           | --              | --             |
| Sidney Sontag                         | 66            | --           | --              | --             |
| Edgar Stubbs                          | 70            | --           | --              | --             |
| David Ruffino                         | 79            | 106          | --              | --             |
| Emma Nash                             | 109           | 127          | --              | --             |
| Barbara Smith                         | 132           | 140          | --              | --             |
| Monte Spoor                           | 141           | 149          | --              | --             |
| Dr. Robert Jordan                     | 154           | --           | --              | --             |
| Daniel Peterson                       | 178           | --           | --              | --             |
| David Lee Bailey                      | 184           | --           | --              | --             |
| Yolanda McClary                       | 194           | --           | --              | --             |
| Michael Bryant                        | 203           | --           | --              | --             |
| Terry Cook                            | 211           | VD 231       | --              | --             |
| Richard Hansell                       | 234           | --           | --              | --             |
| Kenya Hall<br>(Preliminary Testimony) | 250           | 284          | 299             | --             |
| David Mesinar                         | 302           | 314          | --              | --             |

# EXHIBIT LIST

| <u>PLAINTIFF'S</u><br><u>EXHIBIT NO.</u> | <u>DESCRIPTION</u>                             | <u>ADMITTED</u> |
|------------------------------------------|------------------------------------------------|-----------------|
| 1                                        | Aerial photograph, back of Lone Star           | 41              |
| 2                                        | Aerial photograph, front of Lone Star          | 41              |
| 3                                        | Diagram of interior of Lone Star               | 41              |
| 4-22                                     | Photographs of Lone Star Steakhouse            | 98              |
| 24-25                                    | Photographs of Lone Star Steakhouse            | 98              |
| 26                                       | Evidence impound report                        | 87              |
| 27                                       | Envelope with blood samples                    | 89              |
| 28-31                                    | Photographs behind 2505 Cartier                | 142             |
| 32                                       | Evidence impound report                        | 143             |
| 33A                                      | Shorts                                         | 149             |
| 34A-B                                    | Tennis shoes                                   | 147             |
| 36, 36A                                  | Bag and knife                                  | 53              |
| 37, 37A                                  | Bag and revolver                               | 51              |
| 38                                       | Enlargement of diagram (Exhibit 84)            | 169             |
| 39                                       | Autopsy photo of Carl Dixon's face             | 317             |
| 41-49                                    | Autopsy photos of Carl Dixon                   | 164             |
| 51                                       | Blowup of autopsy diagram                      | 176             |
| 52                                       | Autopsy photo of Matthew Gianakis' face        | 317             |
| 54-55                                    | Autopsy photos of Matthew Gianakis             | 175             |
| 56                                       | Peterson evidence impound report               | 181             |
| 57                                       | Serology standards kit, Gianakis               | 182             |
| 58                                       | Serology standards kit, Dixon                  | 183             |
| 61-65                                    |                                                | 189             |
| 66                                       |                                                | 198             |
| 67-68                                    |                                                | 200             |
| 69                                       | Evidence packet with blood from knife          | 317             |
| 70                                       |                                                | 202             |
| 73                                       |                                                | 209             |
| 74                                       |                                                | 210             |
| 75                                       |                                                | 222             |
| 77                                       | Photo of Carl Dixon                            | 25              |
| 78                                       | Photo of Matt Gianakis                         | 25              |
| 79 & 80                                  | Photo of Kenya Hall and Marlo Thomas           | 102             |
| 81                                       | Rights of person arrested card                 | 311             |
| 82                                       | Videotape of Marlo Thomas statement to Mesinar | 313             |
| 83                                       | Evidence bag of blood samples                  | 145             |
| 84                                       | Autopsy diagram of Carl Dixon                  | 168             |

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE  
ABOVE-ENTITLED MATTER.

NORTHWEST TRANSCRIPTS, INC.  
LAS VEGAS DIVISION  
P.O. BOX 35257  
LAS VEGAS, NEVADA 89133-5257  
(702) 658-9626

GAYLE MARTIN-LUTZ  
FEDERALLY CERTIFIED OWNER

*Gayle M. Lutz*  
MANAGER

*Gayle M. Lutz*  
SIGNATURE OF TRANSCRIBER

6/18/97  
DATE

ORIGINAL



passions and denigrating mitigators. Arguments by counsel. The Court feels it is fair comment for the prosecutor and defense counsel to ask the jury to make a decision. Fourth issue, the trial court erred in admitting the premeditation and deliberation felony murder, equal and exact justice, anti-sympathy, reasonable doubt and unanimous instructions. Arguments by counsel. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel to predict what the Supreme Court would do in the future. Fifth issue, trial counsel failed to object to a witness comment Deft. was "back in jail". Arguments by counsel. Court stated counsel did object. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel on that issue. Sixth issue, trial counsel failed to object to overlapping aggravating circumstances and appellate counsel failed to raise the issue. Arguments by counsel. COURT ORDERED, Supreme Court states the State can come up with three aggravators on the same act. Counsel can preserve that if they go to the Federal Court on that issue. Seventh issue, trial counsel failed to object to inflammatory opening statements and appellate counsel failed to raise the issue on direct appeal. Arguments by counsel. Although, the Court feels defense counsel should have objected to it, COURT ORDERED, the Court DOES NOT FIND it is of such magnitude to require a new trial. EIGHTH ISSUE, trial counsel failed to object to prosecutorial misconduct at the penalty phase. Arguments by counsel. COURT ORDERED, the Court will address this issue at the EVIDENTIARY HEARING. The Court will ask trial counsel about this matter. NINTH ISSUE, trial counsel made improper arguments. Arguments by counsel. COURT ORDERED, this issue will be heard at the EVIDENTIARY HEARING and ask trial counsel about this matter. TENTH ISSUE, trial counsel was not prepared. Arguments by counsel. Court inquired of counsel if Deft. confessed to the crimes. Counsel concurred. COURT ORDERED, the Court will reserve this issue for EVIDENTIARY HEARING. The Court will ask counsel re their trial preparation. Eleventh issue, trial counsel failed to offer a jury instruction on theory of mitigation. Arguments by counsel. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel on this issue. Twelfth issue, trial counsel failed to object to the jury being instructed on commutation of sentence. Arguments by counsel. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel. Thirteenth issue, trial counsel failed to request an instruction properly defining character evidence. Arguments by counsel. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel. Fourteenth issue, Appellate counsel failed to raise error in the malice instruction. Arguments by counsel. COURT ORDERED, Deft.'s argument is overruled and FINDS no merit to this issue. Fifteenth issue, Appellate counsel failed to object to the jury being instructed on commutation. Arguments by counsel. COURT ORDERED, the Court FINDS this issue is without merit. Sixteenth issue, Nevada Supreme Court did not conduct fair and adequate appellate review under NRS 177.055(2). COURT ORDERED, request to return to Supreme Court for review is DENIED. Seventeenth issue, fair trial based on race. Arguments by counsel. COURT ORDERED, the Court DOES NOT FIND any systematic exclusion of anyone. Jury selection is random selection through several methods by the Jury Commissioner. COURT ORDERED, the Court DOES NOT FIND ineffective assistance of counsel because it was raised by counsel at time of trial. Court directed both counsel to contact Ms. McMahon and Mr. LaPorta and coordinate their schedules. COURT ORDERED, Mr. Schieck to serve Ms. McMahon and Mr. LaPorta with subpoenas. Upon Court's inquiry, Mr. Schieck stated Deft. will probably want to be present, however, he will check with him. NDC 10/12/01 1:30 P.M. EVIDENTIARY HEARING

[Parties Present](#)[Return to Register of Actions](#)

9

FILED

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

JAN 25 4 55 PM '02

*Shirley E. Pangione*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

9 THE STATE OF NEVADA, )  
10 )  
11 Plaintiff, )  
12 vs. )  
13 )  
14 MARLO THOMAS, )  
15 Defendant. )

ORIGINAL

REPORTER'S TRANSCRIPT  
OF  
EVIDENTIARY HEARING

BEFORE THE HON. SALLY LOEHRER, DISTRICT COURT JUDGE  
TUESDAY, JANUARY 22, 2002  
10:30 A.M.

APPEARANCES:

For the Plaintiff: DAVID J.J. ROGER, ESQ.  
Deputy District Attorney  
  
For the Defendant: DAVID SCHIECK, ESQ.  
Attorney at Law

Reported by: LISA MAKOWSKI, CCR No. 345

CE05

LISA MAKOWSKI, CCR 345 455-4288

5  
215

RECEIVED

JAN 25 2002

COUNTY CLERK

1 TRAN  
2 CASE NO. C136862  
3 DEPT. NO. XV  
4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA  
7 \* \* \*  
8  
9 THE STATE OF NEVADA, )  
10 )  
11 Plaintiff, )  
12 vs. ) REPORTER'S TRANSCRIPT  
13 ) OF  
14 MARLO THOMAS, ) EVIDENTIARY HEARING  
15 )  
16 ) Defendant. )  
17  
18 BEFORE THE HON. SALLY LOEHRER, DISTRICT COURT JUDGE  
19 TUESDAY, JANUARY 22, 2002  
20 10:30 A.M.  
21  
22 APPEARANCES:  
23 For the Plaintiff: DAVID J.J. ROGER, ESO.  
24 Deputy District Attorney  
25 For the Defendant: DAVID SCHIECK, ESO.  
Attorney at Law  
Reported by: LISA MAKOWSKI, CCR No. 345

1 LAS VEGAS, CLARK COUNTY, NEVADA  
2 TUESDAY, JANUARY 22, 2002  
3 10:30 A.M.  
4 \* \* \*  
5 PROCEEDINGS  
6 THE COURT: We lost David Roger. Did  
7 anybody see where he went?  
8 MR. SHIECK: He said he was going to watch  
9 Department VI. It was more entertaining than you were.  
10 THE COURT: All right. This is the time  
11 set for State of Nevada versus Marlo Thomas Case  
12 C13686. For the State we have David Roger for the  
13 defendant, David Shieck. Defendant Marlo Thomas is  
14 present in custody.  
15 As I recall from the writ of habeas corpus  
16 postconviction, you were going to go forward with  
17 defense issues No. 8 and No. 9 and have an evidentiary  
18 hearing on that  
19 No. 8 was trial counsel failed to object  
20 to prosecutorial misconduct at the penalty phase,  
21 specifically pointing out arguments that defendant  
22 should receive the same mercy as the victim had, that  
23 the jury was to send a message to the community, that  
24 the State argued some type of facts that were not in  
25 evidence, specifically not in the rehabilitation  
hearing, and arguing that returning of the death

1 sentence is society's self-defense; and issue No. 9,  
2 that the defendant's trial counsel made improper  
3 argument, although I guess statements would be better  
4 and that in the opening statement of the penalty  
5 hearing trial counsel said "My client stands convicted  
6 of terrible, awful, senseless and brutal crimes. We  
7 are not asking for forgiveness" And in closing  
8 statement trial counsel said, "He can't control his  
9 behavior. I offer you this not to justify his crimes"  
10 MR. SHIECK: Also, Your Honor, my copy of  
11 the minutes that I printed out shows you also reserved  
12 on issue No. 10, the trial counsel was not prepared  
13 and it indicated that the Court will reserve this issue  
14 for evidentiary hearing  
15 THE COURT: Then 10 will go forward to  
16 evidentiary hearing also  
17 MR. ROGER: Judge, with one clarification.  
18 My recollection was that the investigation or the  
19 preparations dealt with the penalty phase and why the  
20 other defense witnesses or character witnesses weren't  
21 called at the penalty phase. I don't think that the  
22 Court decided that you were going to revisit the guilt  
23 phase of the trial.  
24 THE COURT: So No. 10 was not during the  
25 trial. Ten was simply for the penalty hearing.

1 MR. SHIECK: Your Honor, the issue as it  
2 was raised and pled had to do with both phases of the  
3 trial. And my recollection is based solely on what the  
4 minutes said, and the Court did limit it to just the  
5 penalty hearing.  
6 THE COURT: I would not base my decision  
7 on what the minutes say, so let us proceed with the  
8 evidentiary hearing  
9 And I believe trial counsel is here, and  
10 you can ask trial counsel if trial counsel ever  
11 indicated that trial counsel was not prepared. I  
12 didn't try the case. I didn't preside over the trial,  
13 I don't believe, but certainly we can look back here at  
14 the date of the calendar call to see if people  
15 announced ready or not ready. I presume if a party  
16 announces ready for trial at calendar call that  
17 exactly the truth of the matter is they are ready for  
18 trial. So let me see if I can go back to calendar  
19 call.  
20 Initial arraignment was July 8th of 1996  
21 in front of Judge Pavokowski. Arraignment was to  
22 continued until July 10th. He entered a plea of not  
23 guilty, waived his right to a speedy trial. We have  
24 defendant's pro per motion to dismiss counsel and  
25 appointment of co-counsel in September of 96 in front

1 of Judge Bonaventure.  
 2 In October of 1996 we have defendant's pro  
 3 per motion/appointment of co-counsel, and Mr. Savage  
 4 indicated Mr. La Porta would be first chair and  
 5 Mr. Savage would be second chair.  
 6 In October the request was that the  
 7 defendant be housed in Clark County so he could get  
 8 ready for trial. On October 21st, evidently there was  
 9 some kind of motion, I guess, for a new trial, and the  
 10 Court denied that motion. November '96 State's motion  
 11 to endorse names on the information. There was no  
 12 objection by defense counsel at that time.  
 13 On December 18th it was State's request to  
 14 reset the trial date. Mr. Roger stated that due to the  
 15 holidays it is difficult to schedule witnesses.  
 16 Ms. McMahon stated there was no opposition to  
 17 re-scheduling the matter. Mr. La Porta joins in.  
 18 Trial date is vacated and reset for May of '97.  
 19 Well, I guess it isn't -- wait a minute.  
 20 Defendant scheduled in April. Counsel agreed that  
 21 would be a good date. Defendant Thomas stated he did  
 22 not want that date and requested trial be moved to a  
 23 later date. Court ordered defense counsel to confer  
 24 with defendant and order the matter set for status  
 25 check, vacated trial date and jury trial date and

1 trial was then set, instead of April, in June.  
 2 In May defendant's motion to allow a jury  
 3 questionnaire was granted. June 13 it was calendar  
 4 call and defendant's motion to prevent co-defendant  
 5 Kenya Hall, from being called to appear and testify, to  
 6 allow counsel for Kenya Hall to invoke the Fifth  
 7 Amendment privilege against self-incrimination an order  
 8 shortening time, State's motion to endorse.  
 9 Counsel advised ready to go to trial as to  
 10 Mario Thomas. Jury questionnaire has been reviewed.  
 11 Trial set to commence June 16th 8:45. Additional  
 12 discussion, additional motion to endorse. Motion to  
 13 use recorded testimony of Kenya Hall. The State would  
 14 review the motion on trial date of June 16 of 1997.  
 15 On June 16, 1997 Court ordered motion to  
 16 endorse names granted, motion to amend, granted. Court  
 17 ordered it will not order Defendant Hall to testify as  
 18 she's invoked the Fifth Amendment. State's motion to  
 19 use testimony is granted. Then there was a trial.  
 20 So I do not believe that there is going to  
 21 be any issue or dispute, and this Court would not  
 22 countenance an issue or dispute regarding whether trial  
 23 counsel was ready for trial because the case was  
 24 continued for six months from the original date.  
 25 Counsel announced ready for trial. There was no motion

1 to continue, so let us do --  
 2 MR. SHIECK: Your Honor, as to issue  
 3 No. 10, as to the penalty proceeding if I can add a  
 4 couple statements to the record in that regard.  
 5 Mr. Thomas when he was present in court, I have  
 6 included statements he made in my supplemental  
 7 petition, was complaining at all of those court  
 8 appearances that he was not seeing his attorney. They  
 9 were not working on his case.  
 10 That six-month continuance, Your Honor,  
 11 talked about we have obtained the visiting card, and  
 12 it shows between December of 1996 and the end of  
 13 May 1997 there was only two visits to Mr. Thomas, and  
 14 that was by Miss McMahon, no visit at all by  
 15 Mr. La Porta during that period of time that six  
 16 months leading up to when they were getting ready to go  
 17 to trial.  
 18 The April trial date that was discussed  
 19 was because trial counsel filed a motion to reset the  
 20 trial date and move it from May until April when  
 21 Mr. Thomas went in front of Judge Bonaventure. On that  
 22 occasion he complained and told the Court how can you  
 23 move the trial date up when the attorney has not been  
 24 seeing me or doing anything on the case. He stated,  
 25 "You know, I don't think May was fine. I ain't even

1 sit and discuss my strategies with my attorneys.  
 2 neither one of them. You know, I told you the first  
 3 time we had a conflict. I am saying they ain't talked  
 4 to me enough."  
 5 He was complaining when counsel was trying  
 6 to move it up. I think there is an issue in the  
 7 record. And, Your Honor, just because counsel in any  
 8 case comes to court and says at calendar call, declares  
 9 ready for trial doesn't mean they have actually done  
 10 what they need to do to be ready to go to trial.  
 11 THE COURT: You can call Mr. Thomas. He  
 12 can tell us what things he wanted done that didn't get  
 13 done in preparation for trial. Mr. Shieck, you may  
 14 call your first witness.  
 15 MR. SHIECK: First witness is  
 16 Miss McMahon, Your Honor.  
 17 THE COURT: Miss McMahon, please take the  
 18 witness stand and be sworn.  
 19 THE CLERK: Do you solemnly swear the  
 20 testimony you are about to give will be the truth, the  
 21 whole truth, and nothing but the truth, so help you  
 22 God?  
 23 THE WITNESS: Lee Elizabeth M-C-M-A-H-O-N.  
 24 LEE ELIZABETH MCMAHON,  
 25 having been first duly sworn, did testify as follows:

1 DIRECT EXAMINATION  
2 BY MR. SHIECK:  
3 Q. Miss McMahon, how are you employed?  
4 A. I am employed in the office of Special  
5 Public Defender. I am a deputy defender.  
6 Q. And you're licensed to practice here in  
7 the State of Nevada?  
8 A. Yes, that's correct.  
9 Q. How long have you been licensed?  
10 A. I was first licensed in Illinois in 1977,  
11 was licensed here in Nevada in 1980 I think or -- 80.  
12 Q. How long have you been with the Special  
13 Public Defender's office?  
14 A. I went to work initially for the office of  
15 the Special Public Defender in November of '86, and I  
16 believe it was July 1st of '97 I was switched over to  
17 be under the jurisdiction and budget of the county,  
18 since -- I have been in that office since November of  
19 '96.  
20 Q. And at that time, it was the state Public  
21 Defender's office?  
22 A. Yes, that's correct.  
23 Q. And then it switched over to be the  
24 Special Public Defender's office on July 1st of '97?  
25 A. Yes.

1 Q. Do you recall when you first were assigned  
2 to work on Mr. Thomas's case?  
3 A. I can't give you an exact date. Probably  
4 shortly thereafter. I don't recall.  
5 Q. Was that one of the first cases you were  
6 assigned to work on?  
7 A. No, I had a number of other cases also.  
8 Q. Can you estimate how many other cases you  
9 had at that period of time?  
10 A. I had some cases pending in the Nevada  
11 Supreme Court from my private practice, and I think I  
12 acquired, and again this is a guess, probably four  
13 or five other cases. When I went into that office  
14 other attorneys were leaving.  
15 Q. What type of cases were assigned to you?  
16 A. At that time the office was -- special  
17 defenders was taking cases other than murder cases a  
18 case where the Court would appoint the office if there  
19 was a conflict for an indigent defendant with the  
20 office of the Public Defender. So we had some murder,  
21 some burglary, I believe there was some child  
22 molestation cases.  
23 Q. How would you characterize the case load  
24 of the State Public Defender's office during the period  
25 of time between November of '96 and July of '97 when

1 you worked there?  
2 A. How would I characterize the case load? I  
3 don't think they were large.  
4 Q. And who was heading the office at that  
5 period of time?  
6 A. Peter LaPorta.  
7 Q. Do you know how many cases he was handling  
8 at that period of time?  
9 A. No, I don't.  
10 Q. Are you familiar at all with what his case  
11 load was, whether it was heavy or light?  
12 A. I'm really not.  
13 Q. When you were assigned to -- who assigned  
14 you to Mr. Thomas's case?  
15 A. Mr. LaPorta.  
16 Q. When he assigned you to the case, were you  
17 given any specific designation on the case?  
18 A. If I recall, and I might not be correct I  
19 believe I was going to be focusing on mitigation given  
20 the position the case was in terms of the videotape.  
21 THE COURT: What do you mean by videotape?  
22 THE WITNESS: There was a videotape taken  
23 by the Las Vegas Metropolitan Police Department where  
24 Mr. Thomas gave a statement regarding the events that  
25 occurred resulting in the death of the two young men.

1 THE COURT: So did he confess on  
2 videotape?  
3 THE WITNESS: Yes.  
4 THE COURT: All right. And you didn't  
5 represent him at the time he was interviewed by Metro  
6 and confessed on videotape?  
7 THE WITNESS: I was not in the office  
8 of the Special Public Defender at that time.  
9 THE COURT: Was that tape ultimately shown  
10 to the jury, or was it suppressed?  
11 THE WITNESS: It was not suppressed.  
12 THE COURT: Was it shown to the jury?  
13 THE WITNESS: I am sorry, I don't  
14 remember.  
15 THE COURT: Mr. Roger, do you remember?  
16 MR. ROGER: Yes, Judge, it was shown to  
17 the jury.  
18 THE COURT: Now, Mr. Shieck, how do you  
19 prepare to defend a case where your client gives a  
20 nonsuppressible videotaped confession to the offense  
21 to the police department?  
22 MR. SHIECK: Well, Your Honor --  
23 THE COURT: What kind of rabbits are there  
24 in hats to pull out to counter that type of State's  
25 evidence?

1 MR. SHIECK: Your Honor, it has not been  
2 established whether or not the tape was suppressible or  
3 not suppressible. I don't believe the motion was filed  
4 to suppress the tape.

5 Additionally, just because the defendant  
6 confesses doesn't mean the jury necessarily accepts  
7 what he says on tape as being an accurate  
8 representation of what happened. And my recollection  
9 is the statements of Mr. Thomas in this case were not  
10 confessing to first degree murder, rather that he in  
11 fact acted in a self-defense capacity at the time of  
12 the commission of the acts.

13 THE COURT: You may proceed with your  
14 examination.

15 BY MR. SHIECK:

16 Q. How would you describe the comments on  
17 tape, as a confession or as a defense?

18 A. I think that Mario genuinely believed that  
19 what he did was self-defense, not understanding the  
20 legal concept of felony murder or that kidnapping under  
21 Clem.

22 Q. Was any evidence made to suppress the  
23 videotape?

24 A. I don't know. The case was in the office  
25 at the time that I began working there so I can't

1 answer that. I don't recall.

2 Q. You indicated that your recollection was  
3 you were assigned to work on mitigation aspects of the  
4 case.

5 A. And again, we are talking about a period  
6 of time of almost five years. I think our general  
7 feeling was that given the videotape that it was not  
8 unreasonable to try to have the goal of avoiding the  
9 death penalty, of getting Mr. Thomas something less  
10 than death.

11 Q. Did you do any work on the guilt portion  
12 of the preparations for trial?

13 THE COURT: You mean the evidentiary  
14 trial, Mr. Shieck?

15 MR. SHIECK: Yes, Your Honor.

16 THE COURT: See, the defense always  
17 objects to the trial being called the guilt phase, but  
18 yet they will not stop referring to as such.

19 MR. SHIECK: I don't file those motions.

20 THE COURT: It is an idiosyncrasy because  
21 the Court has never called the trial the guilt phase.  
22 It is the trial.

23 THE WITNESS: We had at that time one  
24 investigator in the office, Jerry Dyer, who was a  
25 retired FBI special agent and also at one time had been

1 a licensed attorney. He and I and Mr. LaPorta worked  
2 together. So I am sure I did some things in  
3 preparation for the guilt stage but I don't know.

4 BY MR. SHIECK:

5 Q. How much work did Mr. Dyer do on the case?

6 A. I think quite a bit. I know that he went  
7 with me to Hawthorne, Nevada as part of the  
8 investigation.

9 Q. What investigation was done in Hawthorne?

10 A. In Hawthorne was where Mr. Thomas's wife  
11 was incarcerated and where the family the  
12 mother-in-law and the brother-in-law, where Mr. Hall  
13 had been living and where there were other kinds of  
14 records that we wanted to look at.

15 Q. To your recollection, did Mr. Dyer ever  
16 once go to the jail to see Mr. Thomas?

17 A. I don't know.

18 Q. Would you be surprised if I told you that  
19 visiting cards don't reflect Mr. Dyer went once to see  
20 Mr. Thomas?

21 A. I don't know if I'm surprised.

22 Q. Was he the only investigator working in  
23 the office during that period of time?

24 A. Yes.

25 Q. And how many murder cases was the office

1 handling during that period of time between roughly  
2 November '96 and July '97?

3 A. I don't know, you would have to ask  
4 Mr. LaPorta that.

5 Q. So Mr. Dyer was the only investigator on  
6 how many ever cases the office was handling at that  
7 point in time?

8 A. Yes.

9 Q. How would you characterize his case load?

10 A. Same thing. I didn't keep the statistics  
11 or do any of the administrative work in the office. I  
12 can't answer that question. I just don't know.

13 Q. Were there ever instances with respect to  
14 Mr. Thomas's case where you asked Mr. Dyer to do an  
15 investigation but then it was not done?

16 A. Not that I recall.

17 Q. Did you do investigative work on the case?

18 A. I am not sure all of what that  
19 encompasses. I obtained the inmate file from the  
20 prison. We obtained the school records. I personally  
21 met with family members, prepared Dr. Consora, and the  
22 psychologist who worked with Mr. Thomas when he was a  
23 child for trial testimony. If that falls within  
24 investigative, those are the things I recall doing.

25 Q. Did Mr. Dyer go with you when you

1 interviewed the witnesses for the penalty hearing?  
 2 A. For the most part, no, especially with  
 3 Mr. Thomas's family. Because of working schedules I  
 4 would frequently meet with them on weekends not during  
 5 Monday through Friday.  
 6 Q. What I asked you about how many cases you  
 7 were handling, had you ever made representations to the  
 8 Court on how many murder cases you and Mr. LaPorta were  
 9 handling during that period of time?  
 10 A. I don't recall.  
 11 Q. Would it refresh your recollection to show  
 12 you a portion of the statements you made to the Court  
 13 on January 29th, 1997?  
 14 A. That would be fine.  
 15 MR. SHIECK: And this is contained in the  
 16 supplement we filed. Your Honor. I will give  
 17 Miss McMahon a copy so that she can have it available  
 18 BY MR. SHIECK:  
 19 Q. I am referring to, probably want to start  
 20 on page 56 and then on to page 57  
 21 A. I have reviewed it.  
 22 Q. Did you recall telling the Court that  
 23 between you and Mr. LaPorta "We have approximately 15  
 24 murder cases scheduled between Mr. LaPorta and myself?  
 25 A. I don't recall. I assume if it is there I

1 said it. If I said it, it must be true.  
 2 THE COURT: What was the number?  
 3 MR. SHIECK: Fifteen, Your Honor.  
 4 THE COURT: Does it refresh your  
 5 recollection at all that your case load was quite heavy  
 6 at that period of time?  
 7 THE WITNESS: No, I'm sorry.  
 8 BY MR. SHIECK:  
 9 Q. Again, if there were 15 murder cases  
 10 scheduled between Mr. LaPorta and yourself Mr. Dyer  
 11 would have been the sole investigator on all 15 of  
 12 those murder cases?  
 13 A. Yes.  
 14 Q. You had indicated that you had interviewed  
 15 a number of witnesses to be used at the mitigation at  
 16 the penalty portion of the trial; is that correct?  
 17 A. Yes, that's correct.  
 18 Q. Did you recall who it was you interviewed?  
 19 A. I know that I talked with his wife, his  
 20 mother, the brother that's a pastor, spent a great deal  
 21 of time with Dr. Consors, I don't remember the lady's  
 22 name but a psychologist who worked with Marlo when he  
 23 was in grammar school.  
 24 Q. And just so the record is clear do you  
 25 recall the names of the wife mother and brother that

1 you interviewed?  
 2 A. The wife's name was Angela Love. The  
 3 mothers' name was Georgia, I believe, and the brother  
 4 that was a minister, I don't recall his name.  
 5 Q. Would Darrell Thomas perhaps refresh your  
 6 recollection?  
 7 A. Probably.  
 8 Q. The record reflects it was Darrell Thomas.  
 9 You would have no reason to argue with that?  
 10 A. No.  
 11 Q. And the school psychologist Linda Overby,  
 12 O-V-E-R-B-Y. Did you interview any other witnesses for  
 13 use at the penalty hearing?  
 14 A. I don't recall.  
 15 Q. Do you recall interviewing Ann Thomas?  
 16 A. Was that the aunt?  
 17 Q. Cousin.  
 18 A. No, I don't.  
 19 Q. How about Mr. Thomas' younger brother  
 20 Paul?  
 21 A. I've spoke with him when I was at the  
 22 home.  
 23 Q. And when it was that you went to the home?  
 24 A. I went a number of Saturdays.  
 25 Q. During what period of time?

1 A. I don't know. I think maybe April, but I  
 2 am not sure.  
 3 Q. And whose home was that you went to?  
 4 A. Marlo's mother's.  
 5 Q. What about his cousin Vincent Diggs, did  
 6 you interview that individual?  
 7 A. I don't recall.  
 8 Q. What about D.D. Thomas, Mr. Thomas's 14  
 9 year old cousin?  
 10 A. I don't believe so.  
 11 Q. What about Johnny Thomas?  
 12 A. That name. I am not recalling that either.  
 13 Q. It was an aunt of Mr. Thomas  
 14 A. You don't recall that name. No, I'm  
 15 sorry, I don't.  
 16 Q. Sherman Nash, a cousin Sherman Nash,  
 17 cousin?  
 18 A. I don't think -- I don't know whether I  
 19 talked to Sherman Nash or not. I think I spoke to his  
 20 mother.  
 21 Q. And Mr. Thomas's father, Bobby Lewis?  
 22 A. Did I speak with him, no  
 23 Q. Is there a reason you didn't speak with  
 24 Mr. Thomas's father?  
 25 A. As I understand, and I may not be correct

1 in my recall, that Mr. Thomas — his father had been in  
2 prison, I believe, for murder at the time Mr. Thomas  
3 was born.  
4 Q. He was in custody?  
5 A. Yeah. No, I did not interview him.  
6 Q. Is there a reason why you didn't?  
7 A. I don't recall, although I don't know that  
8 I would want to put him on the stand as a witness.  
9 Q. Did you believe it was important to put on  
10 Mr. Thomas's background and upbringing before the jury  
11 so they could understand him?  
12 A. I'm sorry. Would you repeat that?  
13 Q. Did you consider putting Mr. Thomas's  
14 background and upbringing before the jury at the  
15 penalty hearing?  
16 A. Yes, and I think we did.  
17 Q. You didn't think it was important to talk  
18 to his father and what role his father did or didn't  
19 play in his upbringing?  
20 A. As I understand from Mario's mother,  
21 during the time that she was pregnant and carrying  
22 Mario, he was incarcerated in prison, that he was not  
23 obviously around.  
24 Q. So you don't know what information  
25 Mr. Lewis could have provided or not provided? You

1 didn't talk with him?  
2 A. That's correct.  
3 Q. How many capital cases have you handled  
4 that went to trial?  
5 A. At that time?  
6 Q. As of right now.  
7 A. I think maybe that three of them went to  
8 trial.  
9 Q. That is as of now?  
10 A. Uh-huh, yes.  
11 Q. And as of Mr. Thomas's trial, how many had  
12 you handled?  
13 A. That was the first capital trial I had  
14 done, not first murder trial but first capital case.  
15 Q. It was the first case you had prepared  
16 for, a capital penalty hearing, implying that there may  
17 have cases you may have been prepared for cases and  
18 pled out? You did preparations for the penalty hearing  
19 and never actually got to trial, or was this the first  
20 capital penalty hearing case you had worked on and  
21 prepared for trial?  
22 A. That would be the first capital penalty  
23 phase that I worked on.  
24 Q. And in any of the other capital cases that  
25 you worked on, have you made an effort to interview

1 both the father and the mother of the defendant if they  
2 are available?  
3 A. If they are available, yes.  
4 Q. So this would be the only case you had not  
5 talked to both the mother and father if they were  
6 available?  
7 A. In other cases, we had parents that were  
8 deceased.  
9 Q. That were available.  
10 A. Available, yeah.  
11 Q. Do you recall going out to the Thomases'  
12 house on the weekend the verdict in the trial phase and  
13 penalty hearing began?  
14 A. I don't recall, but I may have down if  
15 Mr. LaPorta went out at that time. I know Mr. LaPorta  
16 went with me out there on occasions but I don't know  
17 if it was — if that was one of them or not.  
18 Q. Do you recall Mr. Thomas giving you a list  
19 of witnesses that he wanted to be called at the penalty  
20 hearing?  
21 A. No.  
22 Q. Do you recall Mr. Thomas's mother making  
23 arrangements for all of witnesses to be available to be  
24 interviewed?  
25 A. I think she had people come to her home on

1 a number of times when I was out there to make them  
2 available for us.  
3 Q. How many people were there?  
4 A. I'm not sure I can give you a number.  
5 Q. You have told us that you called — or let  
6 me back up. Do you recall what witnesses lay  
7 witnesses, were called at the penalty hearing on behalf  
8 of Mr. Thomas?  
9 A. I think his mother, his brother, an aunt.  
10 Q. Were there other individuals other than  
11 those three from Mr. Thomas's family that were  
12 interviewed by either yourself or, to your knowledge  
13 Mr. LaPorta?  
14 A. I believe we talked to several others, but  
15 I truly don't recall who they were.  
16 Q. Do you recall any reason why those others  
17 weren't called?  
18 A. No, I don't.  
19 Q. When you do a capital penalty hearing, do  
20 you believe that more are better than less when it  
21 comes to character witnesses or family members of the  
22 defendant?  
23 A. Do I believe more is better than less?  
24 Q. Yes.  
25 A. That would depend on the individual and

1 the assessment of individual family members and how a  
2 jury would react to them. I don't know if that answers  
3 the question.  
4 Q. Would you not call -- why would you not  
5 call members of a defendant's family to come in and  
6 testify?  
7 A. Why would I not call?  
8 Q. Yes.  
9 A. I think if we made an assessment that the  
10 reaction to a potential witness would be negative, we  
11 might not chance it.  
12 Q. You don't recall any other of these  
13 individuals that you talked with and didn't call at the  
14 penalty hearing?  
15 A. I know that I talked with other people. I  
16 don't recall who they were.  
17 Q. After the conclusion of this case, did you  
18 prepare a Rule 250 memorandum regarding witnesses that  
19 had been interviewed?  
20 A. Yes, we did.  
21 Q. What did you do with that?  
22 A. And I don't know. The reason I say that I  
23 don't know is this was right about the time that the  
24 office was switching over the support staff for people  
25 in the last office for the State left, and the

1 employees for the county came in July 1st so it was a  
2 lot of paperwork stuff going on.  
3 Q. This was going on during the trial?  
4 A. I think that one of the -- there were only  
5 two other than the investigator. I think one of them  
6 left about the time we were in trial and one of them  
7 left right at that point in time.  
8 Q. And Mr. LaPorta was still the head of the  
9 office during this period of time?  
10 A. Yes.  
11 Q. So he had a lot of responsibilities in the  
12 office that he had to handle concerning the switchover  
13 from state to county?  
14 A. I don't think -- I can't answer that  
15 question. I am sorry. I don't know.  
16 Q. So at this point in time, you can't  
17 articulate any strategic or tactical reason for not  
18 calling any of the witnesses that I read the names to  
19 you of?  
20 A. That's correct.  
21 Q. Did you do the direct appeal for  
22 Mr. Thomas?  
23 A. I think Mr. Bailus did the direct appeal  
24 I could be wrong but I think he did. And I did the  
25 petition for certiorari.

1 Q. Did you discuss with Mr. Bailus the issues  
2 to be raised in direct appeal?  
3 A. I'm sure I did.  
4 Q. Could you give us a brief synopsis of your  
5 appellate experience?  
6 A. I've been writing criminal appeals since  
7 1976. Obviously, I have done appeals in Illinois and  
8 appeals here. I can't tell you how many, but I  
9 certainly would imagine a very large number.  
10 Q. And you are familiar with the procedural  
11 bar that can be placed on appellate issues if there is  
12 not a contemporaneous objection at trial?  
13 A. That's not quite correct. It can be  
14 barred. The Court can also review it depending on the  
15 standard of error and depending on whether there is a  
16 constitutional issue involved.  
17 Q. During the course of the trial phase of  
18 this case and during the penalty phase, did you and  
19 Mr. LaPorta divide up who would make objections to  
20 things that transpired?  
21 A. I am sure we probably did but I don't  
22 recall.  
23 Q. Do you have any recollection over  
24 discussing who should object during closing arguments  
25 by the prosecutor?

1 A. No, I don't.  
2 Q. Do you recall making any objections during  
3 those closing arguments?  
4 A. I don't even recall the closing argument.  
5 Q. Let me retract that. If you are trying a  
6 case with someone else, that you are co-counsel, and  
7 during closing argument you hear something that you  
8 deem to be inappropriate or improper argument would  
9 you normally object whether it was your responsibility  
10 or the other guy's responsibility?  
11 A. I am thinking I have not done that many  
12 trials with another attorney. I don't know.  
13 Q. Would you ever think of a situation where  
14 you heard something that was improper in closing  
15 argument and you wouldn't object?  
16 A. That's the reverse of the other question.  
17 Again, I don't know. I can't --  
18 Q. Would you ever have a tactical reason for  
19 not objecting to closing argument?  
20 A. Sometimes there are tactical reasons. It  
21 is comparable in some regard to objections to improper  
22 questions by a prosecutor during direct  
23 cross-examination. You may not want to call attention  
24 to it.  
25 It becomes a different matter in the

1 penalty phase because of the nature of the herring but  
2 sometimes I can see where there would be.  
3 Q. You have done a number of appeals before  
4 the Nevada Supreme Court  
5 A. Yes, that's correct. I think I have  
6 gotten 8 or 9 reversals from them.  
7 Q. Have any of them been based on  
8 prosecutorial misconduct or improper closing argument?  
9 A. The last case that we got a reversal on  
10 Runion versus State, prosecutorial misconduct was an  
11 issue and included in the reversal opinion.  
12 Q. That was during the penalty phase or the  
13 trial phase?  
14 A. The penalty phase in that case went to  
15 court, so that was the trial.  
16 Q. To your knowledge, has the Supreme Court  
17 reversed a number of capital cases based on improper  
18 closing argument by prosecutors?  
19 A. You mean the Nevada Supreme Court?  
20 Q. Yes.  
21 A. I know that recently they overturned the  
22 Evans case on prosecutorial misconduct by Mr. Harmon in  
23 argument. Usually— I know one of the first cases  
24 death penalty appeals I did Flenagan, we got a reversal  
25 after remand from the United States Supreme Court. And

1 there was prosecutorial misconduct by Mr. Seaton in  
2 this case, and it was also an issue in the Lord case  
3 which I did an appeal on.  
4 Q. In your opinion, is it important in the  
5 penalty hearing closing argument to object to those  
6 improper types of arguments in order to preserve the  
7 issue to the Nevada Supreme Court?  
8 A. I don't think it is mandatory. The reason  
9 I say that is, going back to the last decision of the  
10 Nevada Supreme Court, which would be the Evans case,  
11 there was no objection, as I understood the opinion  
12 for the improper statements of the prosecutor and they  
13 still reversed it.  
14 Q. Is it better a practice to go ahead and  
15 object than rely on them agreeing to hear the issue?  
16 A. I would say for the most part, yes.  
17 Q. Now, we set forth in supplemental points  
18 and authorities, you have in front of me a number of  
19 closing arguments that there weren't objections to, and  
20 what I'd like to do is go over some of those with you.  
21 And the basic question I will be asking you is did you  
22 have a tactical or strategic reason not to object to  
23 the arguments.  
24 And we will start on page 44. And the  
25 argument was that the defendant is deserving of the

1 same sympathy and compassion and mercy that he extended  
2 to Carl Dickson and Mat Gianakis.  
3 Do you recall that argument being made  
4 during closing argument?  
5 A. No, I don't.  
6 Q. Can you think of any tactical or strategic  
7 reason for not objecting to that?  
8 A. Not at this reason, no.  
9 Q. If you were doing a capital case today and  
10 this argument was made by a prosecutor, would you  
11 object?  
12 A. Just a moment. It would seem to me it is  
13 objectionable, yes.  
14 Q. And you are aware in a capital case there  
15 are two levels of a habeas review, state and federal?  
16 A. Yes.  
17 Q. And that oftentimes you're objecting in  
18 order to preserve issues for federal review would that  
19 be correct?  
20 A. Yes, that's correct.  
21 Q. You are not always objecting on what the  
22 Nevada Supreme Court believes is proper. Sometimes you  
23 are objecting on what the Ninth Circuit believes is  
24 proper?  
25 A. Would you repeat that please.

1 Q. In making objections, you are not always  
2 objecting based on what the Nevada Supreme Court says  
3 is proper argument you are objecting based on what the  
4 federal courts consider proper arguments?  
5 A. I don't know that really comes into it a  
6 great deal, Mr. Shieck.  
7 Q. You are not concerned with what the Ninth  
8 Circuit thinks about improper arguments when you are  
9 deciding whether or not to object?  
10 A. I don't think that is what I was saying.  
11 Q. The next argument is, starts on the bottom  
12 of page 47, and this is the send a message to the  
13 community argument. If you can just review the first  
14 quoted argument that goes on to page 47.  
15 Do you recall that argument being made?  
16 A. No, I don't recall it. I am reading it  
17 here now, and it is certainly objectionable. I  
18 certainly don't recall it.  
19 Q. Can you think of any strategic or tactical  
20 reason you would have had at trial not to object to  
21 that argument?  
22 A. I don't know that I can answer your  
23 question. I simply don't know.  
24 Q. If you were trying a case, a capital case  
25 at a penalty hearing today and you heard this argument

1 would you object?

2 A. Yes, I think I would.

3 Q. The next argument which starts out "The

4 defendant took the lives of two innocent men," do you

5 recall that argument?

6 A. No, I am sorry, I don't. I was looking --

7 I'm sorry. I was thinking about it in terms of future

8 dangerousness issues. I don't recall it.

9 Q. Did you have any tactical or strategic

10 reason not to object to that argument?

11 A. I don't know, Mr. Shieck.

12 Q. Do you recall whether or not that argument

13 was raised on direct appeal as being improper?

14 A. I don't recall what was raised on direct

15 appeal.

16 Q. If I were to show you a copy of the

17 opening brief, would that refresh your recollection

18 that argument was raised?

19 A. I am sure it would.

20 Q. I'm showing you what appears to be a file

21 stamped copy of the opening brief. And on page 34,

22 does that appear to be the argument we are talking

23 about?

24 A. Yes, it is.

25 Q. So it appears that Mr. Bailus raised that

1 issue on direct appeal even in the absence of a

2 contemporaneous objection?

3 A. It would appear so.

4 Q. Are you aware that the Nevada Supreme

5 Court declined to review that issue because it had not

6 been subject to a contemporaneous objection?

7 A. It has been a very long time since I read

8 the Nevada Supreme Court opinion on Thomas. I don't

9 know.

10 Q. You would not argue with me if I

11 represented to you that is what their decision was?

12 A. I would have no reason to, no.

13 Q. Knowing now that the Nevada Supreme Court

14 declined to review that issue, on the direct appeal as

15 raised by Mr. Bailus, do you think it would have been

16 prudent to object to it at the time of the penalty

17 hearing?

18 A. I would assume so, yes.

19 Q. If we go down to the next argument,

20 "People believe that an organized society..."

21 A. Yes, I see that.

22 Q. Still under the send a message category of

23 improper argument, did you have any tactical or

24 strategic reason for not objecting to that argument?

25 A. I don't recall. I simply don't know.

1 Q. If you were trying a case today, would you

2 object to that argument?

3 A. Yes, I believe I would.

4 Q. And again, if you can read the next

5 argument, "Those who are against the death penalty" do

6 you recall that argument?

7 A. No, I'm sorry, I don't recall it.

8 Q. Perhaps we can move on to the next one,

9 and I will ask questions of both of them. Do you

10 recall the last argument there?

11 A. No, I'm sorry, I don't recall that either.

12 Q. And your answer would be the same

13 concerning whether or not there was a strategic or

14 tactical reason not to object?

15 A. I simply don't recall, Mr. Shieck.

16 Q. If you can turn to page 49 this is under

17 the heading of "Arguing facts not in evidence at the

18 penalty hearing" if you can read that argument that is

19 at the bottom continuing onto the next page.

20 A. You want me to read from the bottom of 48?

21 Q. Bottom of 49 and on to 50. There are

22 three arguments there.

23 A. Yes, I have read it.

24 Q. Do you recall during Mr. Thomas' penalty

25 hearing whether or not there was any evidence put

1 forward concerning programs to rehabilitate people that

2 have killed?

3 A. I don't recall.

4 Q. So there was no evidence of that presented

5 at the penalty hearing?

6 A. I don't recall. I don't know if there was

7 or not.

8 Q. Do you recall any evidence coming in at

9 the penalty hearing as to the statement during closing

10 argument that the vast majority of people who are on

11 death row in the State of Nevada have killed more than

12 one human being?

13 A. Do I recall, no.

14 Q. And again, do you recall any evidence

15 presented at the penalty hearing again that the vast

16 majority of the individuals as I said earlier, who are

17 on death row have killed only once, not twice? Do you

18 recall any evidence of that?

19 A. No, I do not.

20 Q. Would you have any tactical or strategic

21 reason not to object to an argument that discussed

22 things that were not put into evidence?

23 A. I don't recall.

24 Q. Would it be fair to say with respect to

25 all of the questions I have asked about the closing

1 argument and failure to object you just simply don't  
2 recall any strategic or tactical reasons?  
3 A. I don't recall the statements I have  
4 reviewed.  
5 Q. When was it you first met with  
6 Dr. Consora, do you recall?  
7 A. No, I am sorry. I don't recall.  
8 Q. Did he come on early or late in the case?  
9 A. I don't know, because if I recall, and I  
10 may not be correct, that he was known to Mr. LaPorta  
11 rather than to myself, and I believe Mr. LaPorta made  
12 the arrangements to work with us. That might be faulty  
13 recall too.  
14 Q. During the time leading up to going to  
15 trial, do you recall whether or not Mr. Thomas was  
16 housed for a period of time out at the Nevada State  
17 Prison out at Indian Springs?  
18 A. Do I recall whether he was or not?  
19 Q. Yes.  
20 A. No, I don't recall.  
21 Q. Do you remember ever going to see  
22 Mr. Thomas, not at the detention center but seeing him  
23 while he was in prison?  
24 A. I don't recall.  
25 Q. Do you recall how often you saw Mr. Thomas

1 while he was in the detention center?  
2 A. No.  
3 Q. Do you recall whether you saw him more or  
4 less often than Mr. LaPorta did?  
5 A. No, I have no idea.  
6 MR. SHIECK: I have no further questions  
7 on the issues you allowed the evidentiary hearing on  
8 Your Honor.  
9  
10 CROSS-EXAMINATION  
10 BY MR. ROGER:  
11 Q. Miss McMahon, since 1977 when you were  
12 first licensed to practice law, how many criminal  
13 defendants have you represented?  
14 A. I started out as a public defender in  
15 Chicago, very, very large case loads there. I would  
16 say clearly in the hundreds over a period of 25 years.  
17 Q. You have practiced both as a trial  
18 attorney as well as an appellate attorney?  
19 A. Yes, that's correct.  
20 Q. So you are very familiar for the most part  
21 with the Nevada Supreme Court's decision on criminal  
22 law?  
23 A. Oh, yes.  
24 Q. Mr. Shieck asked you a number of questions  
25 concerning your contact with the defendant and he

1 referenced some jail records.  
2 Is that the only contact you typically  
3 have with a defendant is face-to-face contact?  
4 A. No, we -- the jail has phones available  
5 for inmates. We can call them from our office from  
6 our lines, or they can place collect calls to us. So  
7 usually there are a number of telephone calls  
8 conferences, information requests, other sorts of  
9 things. There are also hand-delivered letters and  
10 stuff.  
11 Q. You receive letters from the inmates at  
12 the jail?  
13 A. Frankly, we do, yes.  
14 Q. You also had pretty close contact with  
15 defendant's common-law wife as well as his family  
16 members?  
17 A. I went to Hawthorne, Nevada to meet her  
18 and to meet with her and talk with her about her --  
19 Mario, about the original co-defendant, her brother  
20 Mr. Hall.  
21 Q. You referenced Angela Thomas, the  
22 defendant's common-law wife.  
23 A. It was my understanding they were legally  
24 married.  
25 Q. You recall that Angela Thomas was a

1 potential witness inasmuch as she was driving the  
2 vehicle to and from the crime scene?  
3 A. Yes.  
4 Q. She may have also been privy to certain  
5 incriminating statements the defendant may have made?  
6 A. Yes. She also, when I spoke with her, I  
7 think was strongly influenced by her mother and was  
8 blaming Mario for the difficulties her brother was in.  
9 Q. And the brother was a 15 year old young  
10 boy who was a participant in this robbery murder?  
11 A. Yes, that's correct.  
12 Q. You also had contact with the defendant's  
13 mother?  
14 A. Yes.  
15 Q. Georgia Thomas?  
16 A. Yes.  
17 Q. Did you have access to his aunts?  
18 A. Mrs. Nash?  
19 Q. Yes.  
20 A. Yes.  
21 Q. So the times that you visited the  
22 defendant at jail were not the only times you had  
23 contact with either him or his representatives about  
24 his case?  
25 A. That's correct.

1 Q. Can the same be said about Mr. LaPorta and  
2 Mr. Dyer about their contact with the defendant?  
3 A. I would assume so. I can't say.  
4 Q. I want to talk to you a little bit about  
5 the guilt phase of this case. When you first took this  
6 case on, did you analyze the state of prosecution  
7 evidence in the guilt phase?  
8 A. You have to realize the case was in the  
9 office a period of six months or so before I went  
10 there, but when I first went to the office and when  
11 Peter told me I was going to be working on it I sat  
12 down, read all of the discovery. I watched the  
13 videotape a number of times. I reviewed all of the  
14 prison files, the inmate records and the materials we  
15 had regarding prior convictions. I think I knew the  
16 case very well at that time.  
17 Q. Is a trial attorney's credibility with the  
18 jury an important aspect in properly representing a  
19 client who is facing the death penalty?  
20 A. I think it is important in any case where  
21 you are representing a criminal defendant. There seems  
22 to be a kind of thing among attorneys who do death  
23 penalty defense that if the state has an overwhelming  
24 case for guilt, juries don't understand that you don't  
25 have any choice. They are not giving your client an

1 offer. You have to go to trial.  
2 They frequently will divide it up; one  
3 attorney will handle the majority of the guilt phase,  
4 and the other attorney will put on the witness in the  
5 penalty phase, because the thinking is that maybe  
6 having to go up there and argue to the jury that the  
7 client should be found not guilty in the face of  
8 overwhelming evidence sort of destroys credibility.  
9 Q. Recognizing that this case, this trial  
10 took place a number of years ago, do you recall whether  
11 you had an opinion as to the strength of the State's  
12 case in the guilt phase?  
13 A. I was very upset about the case. I felt  
14 that the State's case for guilt was overwhelming. As I  
15 mentioned earlier, the videotape, and I had concerns  
16 I was certainly familiar with the  
17 statistical work done by the NAACP legal defense fund  
18 that talked about factors like race. Mr. Thomas is an  
19 Afro-American. The victims were not. That makes a  
20 high probability of a death verdict much more likely  
21 and other factors. So, yeah, I think maybe the case  
22 was overwhelming.  
23 Q. I will run a few facts by you and you tell  
24 me if you recall this. And we are dealing with the  
25 guilt phase.

1 There was a young man-- well, first of  
2 all, the defendant had previously been employed at that  
3 Lone Star restaurant and had been fired is that right?  
4 A. It was unclear whether he had been fired.  
5 He had worked there, and I think there might have been  
6 an issue of no call, no show and that he was going  
7 there to pick up a paycheck I think was part of the  
8 underlying facts.  
9 Q. There was an eyewitness, a young man by  
10 the name of Steven Hems?  
11 A. Is he the one who went home over shoes?  
12 Q. He is the individual who was employed at  
13 the restaurant and was sent home the morning of the  
14 murder in order to change his shoes.  
15 A. Yes, that's correct.  
16 Q. As he left the back of the Lone Star  
17 restaurant, he came in contact with the defendant and  
18 Kenya Hall?  
19 A. Yes, that's correct.  
20 Q. And this person was familiar with the  
21 defendant? He knew the defendant?  
22 A. Yes. They had worked together.  
23 Q. So you had an eyewitness placing the  
24 defendant at the scene of crime?  
25 A. That was one of them, yes.

1 Q. There was a manager on duty Vince Oddo?  
2 A. Yes.  
3 Q. Who also knew the defendant; is that  
4 right?  
5 A. Yes, that's correct.  
6 Q. The defendant was the one who confronted  
7 Vince Oddo and demanded money from him?  
8 A. Yes.  
9 Q. And Mr. Oddo said that as he was taken  
10 back to the safe, both the defendant and young Kenya  
11 Hall took him back into that back office?  
12 A. Yes.  
13 Q. Mr. Oddo or the defendant told Kenya Hall  
14 to watch him while he went -- while the defendant went  
15 to other parts of the restaurant?  
16 A. Yes, that's correct.  
17 Q. The two victims, Matthew Gianakis and Carl  
18 Dickson were both stabbed to death?  
19 A. Yes, that's correct.  
20 Q. Mr. Gianakis had close to 34 stab wounds  
21 to his body?  
22 A. Yes, I believe it was in that range.  
23 Q. And Mr. Dickson was stabbed two or three  
24 times?  
25 A. Yes, I believe so. Might have been the

1 other way around  
 2 Q. In addition, there were family members who  
 3 testified against the defendant; is that right?  
 4 A. Yes, that's correct.  
 5 Q. Emma Nash was a relative?  
 6 A. His aunt.  
 7 Q. The defendant went over to her house and  
 8 gave her money, a thousand dollars, and told her to  
 9 give it to the defendant's mother?  
 10 A. Yes, that's correct.  
 11 Q. He gave Emma Nash a revolver which was  
 12 wrapped up in a blue towel and asked her to give it to  
 13 her son Matthew?  
 14 A. I don't remember whether he gave it to  
 15 Emma or gave to a cousin Barbara. I know that it  
 16 transpired and ended up in the area.  
 17 Q. Emma Nash stated that the defendant's  
 18 clothes were bloody, and he dumped them out in the  
 19 desert?  
 20 A. Yes.  
 21 Q. That desert was behind her house?  
 22 A. Yes.  
 23 Q. Barbara Smith was another relative who was  
 24 present at that time?  
 25 A. Yes. Cousin, I believe.

1 Q. The defendant told her that he killed two  
 2 people because his mom needed money?  
 3 A. Yes.  
 4 Q. Police eventually responded to Mrs. Nash's  
 5 home where they recovered bloody clothes?  
 6 A. Yes.  
 7 Q. Do you recall that at least some of these  
 8 items had blood which was analyzed for DNA?  
 9 A. Yes.  
 10 Q. And the blood or DNA on the clothes came  
 11 back to one of the victims?  
 12 A. Yes.  
 13 Q. These were clothes the defendant was  
 14 wearing just after the murder and robbery?  
 15 A. Yes.  
 16 Q. At the time of the preliminary hearing,  
 17 the State had negotiated with the defendant's  
 18 15-year-old accomplice?  
 19 A. Right.  
 20 Q. Kenya Hall had testified at the  
 21 preliminary hearing?  
 22 A. Yes, that's correct.  
 23 Q. His testimony was preserved, and he talked  
 24 about the robbery and murder that occurred at the Lone  
 25 Star restaurant?

1 A. Yes.  
 2 Q. There was also flight involved where the  
 3 defendant arguably drove north to Hawthorne immediately  
 4 after the murder; is that right?  
 5 A. Yes, that was correct.  
 6 Q. So all of that evidence that we have just  
 7 discussed did not include the defendant's videotaped  
 8 statement to police; is that right?  
 9 A. Yes, that's correct.  
 10 Q. In his statement he acknowledged being  
 11 present at the Lone Star restaurant, his participation  
 12 in the robbery, but he attempted to mitigate his  
 13 participation by saying that he stabbed these two young  
 14 men in self-defense?  
 15 A. I think that he truly believed that.  
 16 That's how he looked at the situation that it truly  
 17 was self-defense. He didn't have the sophistication to  
 18 understand the law that was involved and that was how  
 19 he perceived it.  
 20 Q. Did you feel that was going to fly with  
 21 the jury?  
 22 A. No.  
 23 Q. I want to talk to you a little bit about  
 24 the penalty phase. You did quite a bit of work on the  
 25 penalty phase?

1 A. Yes, that's correct.  
 2 Q. You had the good fortune of having a  
 3 school psychologist from CPS who remembered the  
 4 defendant?  
 5 A. Yes.  
 6 Q. This was Linda Overby?  
 7 A. Yes.  
 8 Q. Mrs. Linda Overby recalled the problems  
 9 that the defendant had when he was a youth?  
 10 A. When he was child, even before he was a  
 11 youth, yes.  
 12 Q. Did you feel that was important  
 13 information to relay to both Dr. Consora as well as the  
 14 jury so the jury would understand the defendant's  
 15 childhood?  
 16 A. Absolutely.  
 17 Q. Mr. Shieck asked you whether you spoke  
 18 with the defendant's father, who was incarcerated in  
 19 the Nevada Department of Prisons for a murder  
 20 conviction. Did you feel he could add very much to  
 21 your mitigation inasmuch as he was in prison at the  
 22 time when the defendant was born?  
 23 A. No, I didn't.  
 24 Q. Did you want to present to the jury the  
 25 fact that his father was a convicted killer just as the

1 defendant was at the time of the penalty phase?  
 2 A. No. What I had hoped that the jury would  
 3 come away with was a realization of what a godawful  
 4 life Marlo had, what his circumstances were, his  
 5 mother's alcoholism, his father's incarceration, his  
 6 difficulties as a child, not as an excuse but as an  
 7 explanation and as a basis for mercy.  
 8 Q. Were you — do you feel that you made your  
 9 best efforts to present that type of scenario to the  
 10 jury?  
 11 A. Oh, yes.  
 12 Q. You had the defendant's aunt who talked  
 13 about his upbringing and how he was somewhat of a role  
 14 model to his cousin inasmuch as he told his cousin to  
 15 go back to school as opposed to hanging around with the  
 16 defendant out on the streets; is that right?  
 17 A. Yes, that's correct.  
 18 Q. Did you feel that would be important in  
 19 order to persuade the jury to give the defendant  
 20 something less than death?  
 21 A. I think anything that showed Marlo as a  
 22 human being who cared, who had feelings, who had been  
 23 experientially deprived would be helpful.  
 24 Q. You had Dr. Consora, who is a clinical  
 25 psychologist, I believe; is that right?

1 A. Yes, that's correct.  
 2 Q. Did you present him with as much  
 3 information as you had and you thought you could  
 4 gather?  
 5 A. Yes, all of it. And that is the typical  
 6 way of proceeding: give them all the data, you give  
 7 them discovery, you give them reports, school records,  
 8 prison records.  
 9 Q. Some of the things that Dr. Consora talked  
 10 about was the defendant's poor childhood?  
 11 A. Yes.  
 12 Q. The fact that he may have been suffering  
 13 from fetal alcohol syndrome?  
 14 A. Yes.  
 15 Q. The fact that he had, the defendant had a  
 16 low IQ and suffered from dyslexia?  
 17 A. Yes.  
 18 Q. What was your impression of Dr. Consora's  
 19 demeanor and testimony?  
 20 A. Dr. Consora, in my opinion, is an expert  
 21 who presents well to a jury. He is a physically  
 22 attractive man. He has a kind of charm. He is  
 23 articulate. He does not talk down or engage in the  
 24 nomenclature of behavioral science.  
 25 He had an extensive exhibit chart that he

1 used to explain and to contrast and compare Marlo's  
 2 development and circumstances with those of a similar  
 3 age group.  
 4 Q. Darrell Thomas, the defendant's brother,  
 5 was a minister; is that right?  
 6 A. Yes, that's correct.  
 7 Q. Did you feel he was a presentable witness?  
 8 A. We went back and forth there. Was some  
 9 difficulties that he was experiencing but, yes, he  
 10 genuinely cared about Marlo and he genuinely believed  
 11 in the concept of redemption from his church. I  
 12 thought he would be an excellent witness given those  
 13 factors.  
 14 Q. In fact, this witness's message to the  
 15 jury was do not kill the defendant because if there is  
 16 punishment to be given, that God would be the ultimate  
 17 person to give punishment.  
 18 A. Yes.  
 19 Q. Do you recall that testimony?  
 20 A. Yes.  
 21 Q. And then you had the defendant's mother,  
 22 Georgia Thomas, beg for her son's life?  
 23 A. Yes, she begged. She literally pleaded  
 24 and begged.  
 25 Q. Do you feel as a trial attorney and

1 attorney that handles capital cases that there is a  
 2 point in presenting character witnesses where there is  
 3 a saturation point and that you lose some of the  
 4 emotional impact with the jury when you put too many  
 5 family members on?  
 6 A. I think that's true in penalty hearings  
 7 both for capital and non capital cases.  
 8 Q. Based upon the witnesses that you  
 9 presented, the defendant's mother, his aunt, a brother  
 10 who was a minister and then two psychological types of  
 11 witnesses, did you feel that you presented a pretty  
 12 fair case to this jury which would allow you to argue  
 13 for something less than death?  
 14 A. Yes. I thought that was exactly what we  
 15 were doing.  
 16 Q. The defendant did have a bad criminal  
 17 background; would you agree?  
 18 A. Yes, that's correct.  
 19 Q. It started back when he was 11 years old  
 20 when he was charged with beating a teacher?  
 21 A. Yes.  
 22 Q. Continued on where he engaged a mail  
 23 security officer after a theft and knocked two of this  
 24 lady's teeth out?  
 25 A. Yes.

1 Q. He was also charged with a robbery/battery  
2 with use of a deadly weapon where he used of all  
3 things, a knife during the commission of this crime?  
4 A. Yes.  
5 Q. These are things that the jury heard  
6 during the penalty phase?  
7 A. They also heard testimony from various  
8 staff members of the prison.  
9 Q. A lady who was a juvenile probation  
10 officer testified about how the defendant was certified  
11 as an adult after he went through all of the different  
12 programs that juvenile had to give to youthful  
13 offenders?  
14 A. Yes.  
15 Q. You talked a little bit about correctional  
16 officers who testified. These are correctional  
17 officers from Ely State Prison that had contact with  
18 the defendant?  
19 A. Yes.  
20 Q. On one occasion, the defendant while he  
21 was being fed by a female correctional officer, called  
22 her a, quote, "slut and whore," unquote?  
23 A. I don't specifically recall that.  
24 Q. And then the defendant said, "Suck my"  
25 blank and then placed his penis on the food slot train.

1 Do you remember that?  
2 A. Yes, I remember that.  
3 Q. On another occasion the defendant threw  
4 what appeared to be urine on a female correctional  
5 officer?  
6 A. Yes.  
7 Q. On yet another occasion a correctional  
8 officer testified about threats to correctional  
9 officers and that the defendant was in possession of a  
10 homemade blackjack?  
11 A. You know, that one I don't particularly  
12 recall.  
13 Q. Do you recall the testimony of another  
14 correctional officer who believed that the defendant  
15 was trying to incite a riot in the prison by trying to  
16 get other inmates to, quote, kick the officer's ass?  
17 A. Yes.  
18 Q. So the defendant's time in prison was  
19 arguably filled with misconduct?  
20 A. Yes. And it was our hope that when  
21 Dr. Consora talked about the level of functioning and  
22 impulse control, that would kind of reduce the impact  
23 of that, which obviously it didn't.  
24 Q. Let's talk about victim impact testimony.  
25 The prosecution presented the family members of the two

1 young boys who had been murdered. Did you feel that  
2 testimony had much of an impact on the jury?  
3 A. Oh, yes.  
4 Q. These two young men, from what we see from  
5 the record, did not have very much trouble with the  
6 law. They were just working.  
7 A. No, and the family had the photographs.  
8 They were attractive young men they were Caucasian,  
9 and they were at their place of employment.  
10 Q. And preparing to argue to the jury in the  
11 penalty phase, did you and Mr. LaPorta feel that there  
12 was much likelihood based upon the evidence which was  
13 presented to the jury that an argument for life without  
14 possibility of parole for a determined period of time  
15 would be a viable option to this jury?  
16 A. I think the reality is in some capital  
17 cases that you can hope that they won't impose death.  
18 If you have more than one victim, you have great  
19 difficulty having a jury consider life with the  
20 possibility of parole. It is not often that happens.  
21 Q. Did you feel that the defense team's  
22 credibility would be best served by acknowledging that  
23 the record was bad that the defendant had problems in  
24 his past and to ask for life without the possibility of  
25 parole as opposed to a lesser punishment?

1 A. Yes.  
2 Q. Is that what you did?  
3 A. Basically.  
4 Q. In closing arguments, do you recall that  
5 Mr. LaPorta pulled out a chart which had a triangle on  
6 it where Mr. LaPorta tried to distinguish Mario Thomas  
7 from other prolific killers to argue to the jury that  
8 the defendant was entitled to something less than  
9 death?  
10 A. Actually, I don't.  
11 Q. You recall some defense attorneys doing  
12 that back at the time, kind of like Tony Sgro with the  
13 triangle?  
14 A. Mr. Sgro's triangle, oh, yes.  
15 Q. I'm sorry, to save time, Miss McMahon, I  
16 will read a few sections.  
17 THE COURT: Is this the trial transcript  
18 counsel?  
19 MR. ROGER: Yes, Your Honor. The record  
20 on appeal is page 1667 Volume 7.  
21 BY MR. ROGER:  
22 Q. Mr. LaPorta, this is Mr. LaPorta's  
23 argument now here in this penalty hearing "Because  
24 the punishment must be individualized the State of  
25 Nevada through the legislature, through our statutes

1 has determined that there are three forms of punishment  
2 when you've found someone guilty of first degree  
3 murder. So obviously the legislature, with all they've  
4 studied, thought, have determined in some cases that  
5 people convicted of first degree murder need not be  
6 executed.

7 "To put it into context, to frame this for  
8 you, I will use this board one time, so bear with me.  
9 The triangle represents every victim of first degree  
10 murder. These are the people at the top of the pyramid  
11 who need to be executed that deserve the death  
12 penalty. Does Marlo fit in there? Let me suggest this  
13 to you, and once again to put it into— frame it, put  
14 it in proper context is he a Ted Bundy?"

15 Do you recall any testimony during the  
16 penalty phase about Ted Bundy?

17 A. No.

18 Q. So that was something outside of the  
19 record?

20 A. Yes, that's correct.

21 Q. He goes on, "Is he a man who went to law  
22 school and then chose to roam through four states  
23 raping and viciously killing women over a period of  
24 many years?"

25 Once again, it is apparent that

1 Mr. La Porta is referring to Ted Bundy?

2 A. Yes.

3 Q. And then the next, "is the soldier who  
4 turned traitor on his country and killed over a hundred  
5 and sixty people." Presumably we are talking about  
6 Timothy McVey; is that right?

7 A. Yes, that's correct. I'm sorry.

8 Q. "I ask you to consider that when putting  
9 it into reference."

10 So Mr. LaPorta was trying to distance  
11 Marlo Thomas from the other prolific killers who  
12 according to some, deserve the death penalty?

13 A. Yes, that's correct.

14 Q. When Mr. Schwartz responded in rebuttal  
15 argument and talked about other killers arguably that  
16 was an invited response by addressing some of the  
17 matters that Mr. LaPorta discussed that were outside of  
18 the record. Would you agree with that?

19 A. Well, arguably I suppose it would be  
20 invited response, could be considered misconduct

21 Q. In this case, when the jury was  
22 instructed, the defense asked that specific mitigating  
23 circumstances relating to the defendant be presented to  
24 the jury; is that right?

25 A. Yes, that's correct.

1 Q. So, for example, the defendant had a  
2 problem with incontinence when he was young. That was  
3 listed as a mitigating circumstance?

4 A. Yes, that's correct, by us.

5 Q. There was testimony that kids used to call  
6 him "Stinky" when he was young

7 A. Yes. And he was socially ostracized and  
8 picked on by other children because of the problem

9 Q. And in addition, as a specific mitigation  
10 circumstance, the defense asked the court to reference  
11 mercy as a mitigating circumstance, right?

12 A. I believe so.

13 Q. So that was a mitigating circumstance  
14 listed by the court. And of course your character  
15 witnesses, either express or implied, were asking for  
16 mercy for the defendant?

17 A. Yes.

18 Q. Would you agree that the topic of mercy  
19 was fair game for argument by all parties based upon  
20 that record?

21 A. You mean on prosecutorial rebuttal?

22 Q. At any point since mercy was brought up by  
23 defense, both in mitigating circumstance as well as  
24 testimony by the defense witnesses

25 A. Yes.

1 Q. Mr. Shieck asked you if there are tactical  
2 reasons why a defense attorney might not object to  
3 arguments that were arguably objectionable

4 Is it true that as a defense attorney you  
5 want to save appropriate objections for the record  
6 inasmuch as you don't want to appear to be an  
7 obstructionist with a jury that will be determining  
8 whether your client lives or dies?

9 A. In some regards, that is true, yes

10 Q. Mr. Shieck asked you whether it is  
11 important to preserve every issue for both direct  
12 appeal as well as federal habeas review. Do you recall  
13 that question?

14 A. No, but...

15 Q. What is your feeling on that?

16 A. Well, the law tells us that is not a  
17 requirement. It seems to me in practicality that it  
18 should be. Our United States Supreme Court has been  
19 very clear about how arguments are raised on appeal and  
20 whether things are preserved et cetera.

21 When you are dealing with capital cases  
22 clearly you want to have whatever record you can have

23 Q. Are you familiar with the Nevada Supreme  
24 Court's decision in Hernandez versus State which was  
25 handed down in July of 2001 where Janell Thomas had

1 petitioned the court to file--  
 2 A. A hundred and eighty page brief, I think  
 3 it was, or 120 page.  
 4 Q. Did you read that opinion?  
 5 A. Yes, I did. I read every opinion that  
 6 comes down.  
 7 Q. Do you recall that the Nevada Supreme  
 8 Court wrote without reference to any specific  
 9 provisions, "Counsel cites the federal antiterrorism  
 10 effective death penalty act 1996, and this Court's  
 11 Supreme Court Rule 250 for her belief that she is  
 12 obligated to raise counsel's" -- or, I'm sorry, to  
 13 raise every issue of arguable merit," unquote.  
 14 And the Supreme Court response was "Most  
 15 assuredly. However, it is not counsel's obligation to  
 16 present every non frivolous claim." And they went on  
 17 to cite a U.S. Supreme Court decision as well as their  
 18 own feelings it is counsel's duty to the client and to  
 19 the Court to raise the important issues or non  
 20 frivolous issues?  
 21 A. Yes, that's correct. The only time I  
 22 think that the frivolous issues are raised is if they  
 23 are so multiple that you can use the argument of  
 24 cumulative error under big pond.  
 25 Q. On direct appeal the Nevada Supreme Court

1 wrote that certain arguments including some alleged  
 2 prosecutorial misconduct were not raised on direct  
 3 appeal or that they were not contemporaneous objection  
 4 is that right?  
 5 A. Yes, that's correct.  
 6 Q. Didn't the Nevada Supreme Court also say  
 7 that there was, quote, "no plain or patently  
 8 prejudicial error"?  
 9 A. Yes.  
 10 Q. So in truth, they did at least do a  
 11 cursory review of the allegations of prosecutorial  
 12 misconduct?  
 13 A. I assume that, yes.  
 14 Q. You referenced in your direct testimony  
 15 that there are times when the Nevada Supreme Court  
 16 reviews misconduct even though it was neither objected  
 17 to or raised on direct appeal?  
 18 A. Yes, that's correct.  
 19 Q. Some of the arguments that Mr. Shieck  
 20 referenced during your direct examination dealt with  
 21 community standards, theories of penology, right?  
 22 A. Yes, that's correct.  
 23 Q. You are familiar with the Supreme Court  
 24 decision in Witter versus State?  
 25 A. Yes. I particularly dislike that one,

1 yes.  
 2 Q. That was a case which was defended by the  
 3 State Public Defender's office, right?  
 4 A. I think it was Phil Kohn from the Clark  
 5 County Public Defender's office that had Witter, wasn't  
 6 it, I think at that point?  
 7 Q. Okay. It was in 1996.  
 8 A. Yeah.  
 9 Q. And in the Witter case, the prosecutor in  
 10 part argued, "What message does this punishment send to  
 11 whether we tell would-be murderers, whether we tell the  
 12 community that you can kill a man, thrust a knife into  
 13 his skull, one time through his skull," et cetera, and  
 14 then he says, "What message does it send to say the man  
 15 that perpetrates those crimes can live his life in  
 16 prison," and he goes on.  
 17 The Nevada Supreme Court said that that  
 18 message to the community was an appropriate argument  
 19 and distinguished it from Collier versus State, right?  
 20 A. Yes, that's correct.  
 21 Q. Would you say that the arguments made by  
 22 the prosecution in this case certainly came very close  
 23 to the argument made in Witter?  
 24 A. It would seem to me in some parts it does  
 25 and in some parts it doesn't.

1 Q. Which parts does it not?  
 2 A. You want me go back and read through these  
 3 things?  
 4 Q. Fair enough. We will leave that for the  
 5 record.  
 6 The Nevada Supreme Court as early as  
 7 Pelegrini versus State and on through Witter said that  
 8 theories of penology, reasons why we seek punishment  
 9 are fair arguments for a prosecutor or even a defense  
 10 attorney to make; is that correct?  
 11 A. Yes, that's correct.  
 12 Q. Some of the arguments in this case  
 13 arguably were theories of penology when we talk about  
 14 deterrence and that kind of stuff?  
 15 A. Some arguably were.  
 16 Q. So when Mr. Shieck tells us that you  
 17 didn't object to these arguments, can you tell us that  
 18 they were clear-cut, objectionable arguments that must  
 19 have been raised and as a result of those arguments,  
 20 he didn't get a fair trial?  
 21 A. No, I couldn't tell you that.  
 22 MR. ROGER: Thank you. That concludes  
 23 examination.  
 24 THE COURT: Thank you, Mr. Roger.  
 25 Mr. Shieck, you may follow up.

1 MR. SHIECK: Just follow up a couple of  
2 areas, Your Honor.  
3 THE COURT: All right. You may continue.  
4  
5 REDIRECT EXAMINATION  
6 BY MR. SHIECK:  
7 Q. During your cross-examination, you  
8 indicated that it is important to save credibility with  
9 the jury in a case where guilt may be afgone  
10 conclusion. Do you recall who did the closing argument  
11 at the trial portion of the case?  
12 A. No.  
13 Q. Do you recall who argued at the penalty  
14 hearing?  
15 A. I think Pete did, but I am really not  
16 sure.  
17 Q. If I were to represent that you argued at  
18 the trial phase and Pete argued at the penalty hearing  
19 would you have any argument with that?  
20 A. I would have no reason to  
21 Q. You told us that your recollection is you  
22 were the one handling the preparation for the penalty  
23 hearing investigating the mitigation  
24 A. That was my recall, yes.  
25 Q. Why was it that Mr. LaPorta argued at the

1 penalty hearing when that was your area of, so to  
2 speak, assignment in the case?  
3 A. I don't know. You would have to ask  
4 Mr. LaPorta.  
5 Q. Did Mr. LaPorta make that decision?  
6 A. He was lead counsel. He was also my boss.  
7 Q. Was it your decision, to your  
8 recollection, that you discussed or that was told to  
9 you?  
10 A. I am sorry. I really don't recall.  
11 Q. Now, the record shows — or do you recall  
12 that there was no opening statement made by either you  
13 or Mr. LaPorta at the trial phase?  
14 A. There was no opening statement do I  
15 recall that, no.  
16 Q. So you don't recall whether there was any  
17 tactical or strategic reason for that?  
18 A. I'm sorry, Mr. Shieck, I don't recall that  
19 much of the trial.  
20 Q. Do you recall that defense called no  
21 witnesses at trial?  
22 A. For the first part of the trial?  
23 Q. The trial portion, yes.  
24 A. I think that's probably correct.  
25 Certainly we were not going to put Mr. Thomas on

1 Q. Who made the decision what witnesses would  
2 be called at the penalty hearing?  
3 A. I think in all probability that we  
4 discussed it and it was a joint decision but I can't  
5 be definite. I can't say that definitely.  
6 Q. Mr. Roger asked about a number of prior  
7 criminal acts committed by Mr. Thomas that were  
8 presented at the penalty hearing. Did you investigate  
9 any of those prior criminal acts?  
10 A. I believe we did.  
11 Q. Which ones?  
12 A. I'm sorry, Mr. Shieck, I don't recall, but  
13 I am sure we did.  
14 Q. Did you do that or did Mr. Dyer do that?  
15 A. I'm sorry. I don't know.  
16 Q. You made reference to the fact that the  
17 victims in this case were Caucasian?  
18 A. Yes. It was an important factor.  
19 Q. Do you recall the composition of the jury?  
20 A. No.  
21 Q. Do you recall discussing with Mr. Bailus  
22 raising any issues on the direct appeal specifically  
23 having to do with the composition of the jury?  
24 A. That have to do with the one young black  
25 man?

1 Q. Do you recall?  
2 A. I'm sorry. I don't.  
3 Q. Do you recall making any objections at  
4 trial to the composition of the jury or to peremts  
5 exercised by the State?  
6 A. I don't recall.  
7 Q. You had been asked some questions  
8 concerning the victim impact testimony that came in  
9 during the trial. Do you recall that members of the  
10 victim's family were present during the court  
11 proceedings?  
12 A. Yes, I believe they were.  
13 Q. Do you recall them crying or being  
14 emotional in front of the jury during the presentation  
15 of evidence?  
16 A. What I recall, I believe, were jurors  
17 looking teary-eyed.  
18 Q. During the trial proceedings was it the  
19 responsibility of one or anyone in particular of the  
20 two attorneys to talk with Mr. Thomas if he had  
21 questions or comments during the testimony?  
22 A. I don't recall. I don't know.  
23 Q. Do you recall Mr. Thomas complaining about  
24 the emotional displays from the victims family during  
25 the trial?

1 A. No.  
2 MR. SHIECK: That's all I have, Your  
3 Honor.  
4 THE COURT: Thank you. Do you have  
5 additional witnesses?  
6 MR. SHIECK: Mr. LaPorta was to have been  
7 here at 11, Your Honor. He was sitting in municipal  
8 court this morning. He said as soon as he got off the  
9 bench he would come straight here. May I look in the  
10 hallway?  
11 THE COURT: You may.  
12 MR. SHIECK: Your Honor, Mr. LaPorta is  
13 not present. I talked with him as soon as I got back  
14 to the office when we were here when Mr. Thomas wasn't  
15 transported. And because he was in California that  
16 day, I called him that afternoon, talked with him on  
17 his cell phone and told him this date.  
18 And he recognized he had to sit as an  
19 alternate judge, said he would be here not right at  
20 10 o'clock because he would be on the bench but  
21 expected a short calendar and he would be here.  
22 THE COURT: Why don't you call that court  
23 Go back and use Diane's phone, call the court and see  
24 if he is en route or where he is. The Court can't  
25 reschedule you. We are picking a jury in 60 minutes.

1 THE WITNESS: May I be excused?  
2 THE COURT: You may be excused.  
3 Miss McMahon. Thank you.  
4 (Recess)  
5 THE COURT: What is the status on  
6 Mr. LaPorta?  
7 MR. SHIECK: I had Diane call Henderson  
8 Municipal. At the same time I called my office to get  
9 the cell number so I could call and he had them call  
10 the number and put me on hold. The cell phone is on  
11 answer, but they said he had-- Sandy, who I think is  
12 his secretary or someone that works out in Henderson. I  
13 guess, called at 11:15, called my office and left just  
14 a message that he can't make it today. He is a sitting  
15 judge pro tem, which is different from what he told me.  
16 Diane called out to Henderson Municipal  
17 Court and talked to the department where he is sitting  
18 and they said he has gone to lunch. So his cell phone  
19 is off, he is not in Henderson Municipal Court and I  
20 can't reach him, Your Honor.  
21 THE COURT: He may have to go back this  
22 afternoon.  
23 MR. SHIECK: He has to be back at  
24 1 o'clock, back on the bench.  
25 THE COURT: All right. Then we are going

1 to have to continue this proceeding to another  
2 convenient date. Whenever you find such a date between  
3 my office and Mr. LaPorta's very busy schedules and  
4 Mr. Roger's busy schedule, you let us know. We will be  
5 happy to have the clerk put it down.  
6 MR. SHIECK: I think Mr. LaPorta's  
7 testimony will be much shorter than Miss McMahon's.  
8 THE COURT: You are asking questions,  
9 counsel.  
10 MR. SHIECK: Well, so you're starting a  
11 murder trial today.  
12 THE COURT: Less than hour from now. And  
13 I have the jury out on the murder trial that needs a  
14 read back.  
15 (Thereupon, a brief off-the-record discussion  
16 was held.)  
17  
18 THE COURT: We will continue this matter.  
19 This case is going to take-- this case I am starting  
20 today, Mr. Coumou, our best estimate is we can get to  
21 the jury Friday afternoon, maybe? Otherwise, not until  
22 Monday on this case?  
23  
24 MR. COUMOU: I believe so, Judge.  
25 THE COURT: We are not finished with this

1 We have to get LaPorta back here. We don't know what  
2 day he is-- call LaPorta. Find out what day he is not  
3 sitting. Call Diane. Officers leave him here in High  
4 Desert. Don't take him to Ely. We will get a date for  
5 you today or tomorrow we will give you a date.  
6 Hopefully it will be-- might be next Monday morning  
7 I don't know.  
8 MR. SHIECK: We are trying for Monday at  
9 10. Is that?  
10 THE COURT: No. I have a pretrial. I  
11 have calendar call Monday at 10. Maybe one o'clock,  
12 maybe one o'clock Monday.  
13 MR. SHIECK: I will check with  
14 Mr. LaPorta. The problem is I have a calendar call on  
15 Thursday. I may be starting a murder trial on Monday.  
16 Probably not because we are trailing. We will work it  
17 out, judge.  
18 THE COURT: We can't give you a date right  
19 now. Officers, we will call you. Mr. Roger will do  
20 another transport order. We will try to do it Monday,  
21 next week sometime.  
22 MR. SHIECK: Can I get an order to get a  
23 copy of McMahon's testimony prepared, because with all  
24 the trials you have got if you don't order, I will  
25 probably not get one for about six years. The rule

1 doesn't specify. I would say in the spirit of rule it  
2 should be prepared contemporaneously.

3 THE COURT: I think this week.

4 ATTEST: Full, true and accurate transcript.

5 Lisa Makowski  
6

7 LISA MAKOWSKI, CCR #345  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MTThomas-8JDC04268

8JDC04271

3/15/02 C136862

SHEET 1 PAGE 1

FILED  
MAR 18 12 37 PM '02  
Sally C. Pangione  
CLERK

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

ORIGINAL

4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA  
7 -ooo-

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

15  
16 BEFORE THE HON. SALLY LOEHRER, DISTRICT COURT JUDGE  
17 FRIDAY, MARCH 15, 2002  
18 9:00 A.M.

19 APPEARANCES:

20 For the State: DAVID ROGER, ESQ.  
Deputy District Attorney  
21 For the Defendant: DAVID SCHIECK, ESQ.

22  
23  
24 Reported by: Mary Beth Cook  
25 CCR No. 268, RPR

RECEIVED

MAR 18 2002

MARY BETH COOK, CCR 268 (702)455-4288

Mary Beth Cook, CCR 268 RPR

COUNTY CLERK

8JDC04271  
AA371

3/15/02 C136862

SHEET 2 PAGE 2

2

## I N D E X

## WITNESSES FOR THE DEFENSE:

PAGE

PETER LaPORTA

Direct Examination by Mr. Schieck

4

Cross-Examination by Mr. Roger

31

Redirect Examination by Mr. Schieck

39

-000-

MARY BETH COOK, CCR 268 (702)455-4288

PAGE 3

3

1 LAS VEGAS, CLARK COUNTY, NEVADA, FRI., MARCH 15, 2002

2 9:00 A.M.

3 -000-

## 4 P R O C E E D I N G S

5  
6 THE COURT: This is the time set for the  
7 conclusion of postconviction relief hearing on the  
8 State of Nevada versus Marlow Thomas. It is 3 1/2  
9 minutes of nine. The Department of Prisons called  
10 several times this morning indicating they were  
11 having difficulties getting Mr. Thomas here, but  
12 they have now arrived and we are ready to proceed.

13 The record will reflect the presence of  
14 the State through Chief Deputy District Attorney  
15 David Roger, the defendant Marlow Thomas is present  
16 in custody with David Schieck, and our witness is  
17 present also.

18 MR. SCHIECK: Mr. LaPorta wandered off.

19 THE COURT: Mr. LaPorta, will you please  
20 take the witness stand and be sworn.  
21 Whereupon,

22 PETER LaPORTA,  
23 having been first duly sworn to testify to the  
24 truth, the whole truth and nothing but the truth,  
25 was examined and testified as follows:

MARY BETH COOK, CCR 268 (702)455-4288

PAGE 4

1 THE CLERK: Would you please state your  
2 name and spell your last name for the record.

3 THE WITNESS: Peter Richard LaPorta.  
4 Capital L-a capital P-o-r-t-a.

5 THE COURT: Mr. Schieck, do you wish to  
6 inquire?

7 MR. SCHIECK: Yes, Your Honor.

8 THE COURT: You may proceed.

## 9 DIRECT EXAMINATION

10 BY MR. SCHIECK:

11 Q. Mr. LaPorta, how are you currently  
12 employed?

13 A. I'm self-employed.

14 Q. Are you licensed as an attorney?

15 A. Yes, I am.

16 Q. And when did you first become licensed?

17 A. 1989.

18 Q. That was here in Nevada?

19 A. Yes.

20 Q. And you've been continuously licensed  
21 since then?

22 A. Yes.

23 Q. Did there come a period of time when you  
24 went to work for the state public defender's  
25

PAGE 5

1 office?

2 A. Yes, I did. July 1st of '95.

3 Q. And what was your position?

4 A. I was a deputy.

5 Q. At some point did you become the head of  
6 the office?

7 A. Yes. About a year and a half later, I  
8 became the acting head of the office.

9 Q. And how long did you continue with the  
10 office?

11 A. I was -- state public defender closed up  
12 June 30th of '97 and the next day Clark County  
13 Special Public Defender's Unit opened up in the  
14 same space.

15 Q. What was your position?

16 A. I was a deputy with that new office.

17 Q. Do you recall representing an individual  
18 by the name of Marlow Thomas?

19 A. Yes, I do.

20 Q. Do you recall when you first met  
21 Mr. Thomas?

22 A. No, I do not. It was probably around  
23 '96, early '97.

24 Q. Do you recall when the case went to  
25 trial?

Mary Beth Cook, CCR 268 RPR

8JDC04272

AA372

3/15/02 C136862

SHEET 3 PAGE 6

PAGE 8

1 A. I think it went to trial in summer of  
2 '97.  
3 Q. If I were to represent that Mr. Thomas  
4 was charged on April 23, 1996, would that refresh  
5 your recollection as to when you started working on  
6 the case?  
7 A. Yes. I do remember the incident, and I  
8 went to work on the case sometime shortly after  
9 that.  
10 Q. What was your caseload like when you  
11 were first assigned this case?  
12 A. Extensive.  
13 Q. Do you recall how many cases you would  
14 have been handling?  
15 A. I think on an average I handled  
16 somewhere between 10 to 15 murders at any one time.  
17 Q. And would that have been true during the  
18 entire time you were representing Mr. Thomas?  
19 A. For the most part, yes.  
20 Q. And how many of those cases would go to  
21 trial typically?  
22 A. Well, all the death penalties went to  
23 trial. This was one. This was one of the death  
24 penalties. I would say probably about 20,  
25 25 percent.

1 out of town or something like that she would step  
2 in.  
3 Q. What type of assignments did you give  
4 Mr. Dyer with respect to the case?  
5 A. Find witnesses, check out factual  
6 situations that the defendant would give us, go out  
7 and look at locations, which I believe we did a  
8 couple of times out to the Lone Star Steakhouse.  
9 Q. How many times did you go see Mr. Thomas  
10 in the jail?  
11 A. I have absolutely no idea.  
12 Q. Any recollection at all?  
13 A. No.  
14 Q. If I were to represent to you that the  
15 visiting record show three visits during the entire  
16 time, would that surprise you?  
17 A. Yes.  
18 Q. If I were to tell you that the visiting  
19 records show that Mr. Dyer never saw Mr. Thomas,  
20 would that surprise you?  
21 A. Yes.  
22 Q. Did anyone assist you in working on the  
23 case?  
24 A. Lee McMahon.  
25 Q. When did Ms. McMahon come on the case?

PAGE 7

PAGE 9

1 Q. During this period of time, how many  
2 total cases was your office handling?  
3 A. If I recall correctly, I think at one  
4 point we were handling somewhere between over 50  
5 murder cases.  
6 Q. Divided between how many?  
7 A. Four or five deputies.  
8 Q. So everybody's caseload was about the  
9 same as yours?  
10 A. Mine was the heaviest because I was the  
11 most experienced in the office.  
12 Q. How many investigators did you have in  
13 the office?  
14 A. Two.  
15 Q. Two investigators for 50 murder cases?  
16 A. Yes. I'm sort of guesstimating on how  
17 many because I only took care of my own cases. I  
18 really didn't pay that much attention to cases that  
19 weren't assigned to me or the caseload. That was  
20 somebody else's job after July 1, '97.  
21 Q. Who was the investigator assigned to  
22 Mr. Thomas's case?  
23 A. Well, I believe Jerry Dyer was the  
24 primary investigator, but another gal in the office  
25 pitched in at times when he went on vacation or was

1 A. Quite some time before we went to  
2 trial. I don't recall just when.  
3 Q. Did the two of you divide up your job  
4 responsibilities?  
5 A. Yes.  
6 Q. How were they divided?  
7 A. Nothing specific, just we would take  
8 turns either visiting him. We'd go out and see  
9 witnesses, primarily his family. That was about  
10 it.  
11 Q. With respect to the guilt phase and the  
12 penalty phase, was there a division as to who would  
13 be primarily responsible for those phases?  
14 A. Yes. I believe that -- if I'm recalling  
15 correctly, I believe Lee argued the guilt phase so  
16 I'd save my credibility with the jury for the  
17 penalty phase, and I believe that I argued the  
18 penalty phase.  
19 Q. What about with respect to objections  
20 during the trial? Did you have any understanding  
21 or a plan as to who would object to various things?  
22 A. No plan. I was the lead attorney on  
23 that so I would assume that Lee looked to me to  
24 make the objections when necessary.  
25 Q. After the case was over, did you have

Mary Beth Cook, CCR 268 RPR

3/15/02 C136862

SHEET 4 PAGE 10

1 any involvement in the direct appeal?  
2 A. No.  
3 Q. Ms. McMahon did that?  
4 A. Yes.  
5 Q. Did you have any input into the decision  
6 making as to which issues would be raised and which  
7 wouldn't be raised?  
8 A. I remember Lee and I had, along with a  
9 few other people, sat down at least two or three  
10 times to discuss the case and potential appeal  
11 issues.  
12 Q. Who made the decisions as to what issues  
13 would be in there? Was it Ms. McMahon?  
14 A. Lee McMahon.  
15 Q. Had the two of you come to any strategic  
16 or tactical decision concerning not objecting to  
17 things during the closing arguments of the trial?  
18 A. Well, I don't remember having a  
19 discussion with her, but this was a particularly  
20 nasty case, and the defendant's prison record and  
21 his behavioral record while he was in prison prior  
22 to these two murders was particularly bad, and it  
23 all came out during the penalty hearing, and so I  
24 needed to maintain my credibility with this jury  
25 so, yes, from a strategic standpoint, legal

PAGE 11

1 strategy to maintain my credibility with this jury  
2 I was very careful about what I objected to and  
3 didn't object to as far as comments that the  
4 prosecutor was making.  
5 Q. Would you not object to objectionable  
6 statements by the prosecutor?  
7 MR. ROGER: Objection, vague question.  
8 THE COURT: Objection is sustained.  
9 Please be more specific.  
10 A. I'm not following the question.  
11 MR. SCHIECK:  
12 Q. If you heard the prosecutor make an  
13 argument that you felt was objectionable, would you  
14 then not object?  
15 A. No. If it was truly outrageous, such as  
16 future dangerousness or something like that, I  
17 would always object, but if they made comment like  
18 they called him a bad guy or something like that  
19 which is objectionable, I wouldn't. I would back  
20 off on something like that.  
21 Q. So your tactical decision was based on  
22 whether or not you thought the comment was  
23 outrageous?  
24 A. No, no. If they were characterizing him  
25 as a bad guy, okay, typically prosecutors do in a

PAGE 12

1 murder trial, all right, what essentially happened  
2 was I needed to maintain my credibility with this  
3 jury. That's all there was to it, and so I was  
4 very careful about what I objected to and what I  
5 didn't. That's about all I can tell you.  
6 Q. Do you have the supplemental petition up  
7 there?  
8 A. I have it. It was handed to me.  
9 Q. If you could turn to page 42, I'm going  
10 to ask you about some specific comments that were  
11 made. And starting on line 20, there's a  
12 statement, this is during the opening statement of  
13 the prosecutor at the trial phase. They indicated  
14 that Mr. Marlow Thomas was an evil person.  
15 A. I don't recall this, but apparently I  
16 missed this comment when they made it.  
17 Q. Now, looking back, do you think you  
18 should have objected to it?  
19 A. Evil crosses the line, yes.  
20 Q. So you had no strategic or tactical  
21 reason --  
22 A. Not to leave something like this out,  
23 no.  
24 Q. If we can turn to page 44. This is at  
25 the penalty hearing. Prosecutor is urging the jury

PAGE 13

1 to show Mr. Thomas the same sympathy, compassion,  
2 and mercy that he extended to the two victims. Did  
3 you have a strategic reason not to object to that?  
4 A. No, that was objectionable, and I must  
5 have missed that.  
6 Q. Turn to page 47. There's a whole series  
7 on 47 and on to 48. We'll take them one at a time.  
8 First, prosecutor urging the jury to send a message  
9 to the community and give Mr. Thomas the death  
10 penalty. Did you have any strategic reason --  
11 A. No.  
12 Q. Next one wherein the prosecutor is  
13 urging the jury to return the death penalty so the  
14 community will not find out what will happen with a  
15 shorter sentence. Any reason --  
16 A. No.  
17 Q. Next one.  
18 A. Which page is that? Is that the bottom  
19 of 47 or 48?  
20 Q. On to 48.  
21 A. No.  
22 Q. That's no strategic reason?  
23 A. No strategic.  
24 THE COURT: What was the comment?  
25 MR. SCHIECK: It begins "people believe

Mary Beth Cook, CCR 268 RPR

8JDC04274

AA374

3/15/02 C136862

SHEET 5 PAGE 14

PAGE 16

that an organized society is unwilling or unable to impose on criminal offenders punishment." Basically it's send-a-message argument, Your Honor.

THE COURT: Well, can you put the whole comment on the record, Mr. Schieck, so that in clear light of five years after the fact somebody can know what you're talking about?

MR. SCHIECK: It's set forth verbatim in the supplement, Your Honor. Would you like me to read it into the record?

THE COURT: I'd like you to read it into the record for today; that's correct.

MR. SCHIECK: "People believe that an organized society is unwilling or unable to impose on criminal offenders punishment that they truly deserve for the most horrible crimes. Law and order deteriorates, becomes demoralized, and society becomes defeated. A free society requires of its jurors vigilance and courage and strength to resolve and resolve in making the decisions that you have to make here today."

Q. You had already answered yes?

A. Yes, I already answered that.

THE COURT: You're saying, Mr. LaPorta, that you think that that's objectionable?

context of each other, Your Honor. It's an entire send a message to society.

THE COURT: Well, Mr. Schieck, I guess what it comes down to is the people on the defense side do they think that the prosecutor can get up and say anything more than you've heard the evidence, please return the appropriate verdict. I mean, is that the limit to what the State can argue, because every single thing it seems to me that the State has argued the defense says is objectionable, so what theories do you think the State is allowed to argue?

MR. SCHIECK: They're allowed to argue aggravators and mitigators and the weighing of aggravators and mitigators and the character of the defendant and that's it. We're not deciding societal issues. We're deciding the proper punishment for a particular individual, and that's what we assert the U.S. Supreme Court wants in these death penalty cases, Your Honor. I acknowledge Nevada Supreme Court occasionally says these arguments are proper, but I also recognize that occasionally, or quite often actually, they change their mind and decide, you know what, that argument really isn't okay anymore, and that's why

PAGE 15

PAGE 17

THE WITNESS: Yes, Your Honor, I believe it is.

THE COURT: Mr. Roger, what's your opinion on that according to the most recent pronouncements by the Nevada Supreme Court? That in and of itself that paragraph that Mr. Schieck just read is that objectionable and the Court ought to sustain an objection to that type of closing argument?

MR. ROGER: No, Your Honor. I referenced Witter versus State last time we were here with Ms. McMahon, and Witter versus State talks about arguments like this. Attorneys are allowed to argue theories of penology. That would certainly fall within that parameter. Message to the community, that is something that was argued in Witter, and the Nevada Supreme Court held that that was proper argument.

THE COURT: You may continue, Mr. Schieck, because certainly I don't sit on the Supreme Court, but I don't find anything wrong with that last paragraph that you just read into the record. So you may proceed with your questioning of this witness.

MR. SCHIECK: These are actually all in

we have to preserve these things, Your Honor.

THE COURT: Well, telling jurors that they have to be vigilant and it takes courage and strength to serve on a death penalty case is absolutely correct. There's nothing wrong about that. It's nothing inflammatory. It's nothing this or that, so go on with your next question. In my opinion anyway.

MR. SCHIECK: Thank you, Your Honor.

Q. We can go to the last one on page 48, and that is the return of the death sentence is society's way or act of self-defense, a return of the death verdict is the enforcement of society's right to be free from murder.

A. It's objectionable from the standpoint that you represent society and impose society's when you're representing the community. From that standpoint I believe it's objectionable.

Q. Did you have strategic reason not to object?

A. No.

Q. If we can go to page 49. This deals with prosecutor arguing the facts not in evidence during the closing argument of the penalty hearing.

Mary Beth Cook, CCR 268 RPR