presided at a trial prosecuted by the United States Attorney for the District of Columbia, a division of the United States Department of Justice, while the judge was negotiating for employment with the Executive Office for United States Attorneys in the Department of Justice. The defendant, appellant Monroe W. Scott, Jr., learned of the judge's negotiations after he had been sentenced and he had noted an appeal from his conviction. Applying the special harmless error test of Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988), we hold that Scott is entitled to a new trial.

Given the present interpretation, a judge's "recusal is required when, at the very time * * * [of] trial before a judge, he is in negotiation * * * with a lawyer or law firm or party in the case over his future employment." (Pepsico, Inc. v. McMillen, (7th Cir. 1985) 764 F.2d 458, 461.) Bender v. Board of Fire & Police Comm'rs, 254 Ill. App. 3d 488, 491 (Ill. App. Ct. 1993).

THOMAS has an ethical obligation to bring the instant motion for a new panel and a rehearing of the arguments based upon the information that has been made available through the media, as well as the inferences that may be drawn therefrom. The acquisition of specific information regarding the dates and times of the negotiations is unknown, and unknowable to THOMAS or the public. Nor can the information be obtained by defense counsel. So, while there appear to be sufficient facts to raise the appearance of impropriety, JOHNSON and his attorneys lack the investigative tools to prove the violation except circumstantially. The Defense obligation is clear, and all avenues must be explored. Fortunately, the Court can ascertain with some specificity when the negotiations were commenced. Justices, familiar with the financial procedures of Clark County, would be aware of the possible locations of the information that would confirm the dates of the negotiations as

including, but not limited to:

1. Telephone records verifying calls to the District Attorney's office and the Justice.
2. Emails
3. Correspondence
4. Internal records within the possession of the District Attorneys' office as to the date of the "new position".
5. Records through the County Human Resources Department containing the application form.
6. Internal authorization through the County Managers' office verifying the request and justification for hiring a new employee at the highest pay rate.

Additionally, the Court would be in the best position to obtain the above.

Had the information been available, or had the District Attorney or then Justice Becker been forthcoming to the Defendant and his counsel while ongoing negotiations for employment were being had while the matter was pending , the Defendant could have made a strategic decision to either invoke or waive his right under NRS 1.225.

> "1.225. Grounds and procedure for disqualifying supreme court justices. 1. A justice of the supreme court shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action. 2. A justice of the supreme court shall not act as such in an action or proceeding when implied bias exists in any of the following respects: (a) When he is a party to or interested in the action or proceeding. (b) When he is related to either party by consanguinity or affinity within the third degree. (c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court. (d) When he is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. 3. A justice of the supreme court, upon his own motion, may disqualify himself from acting in any matter upon the ground of actual or implied bias. 4. Any party to an action or proceeding seeking to disqualify a justice of the supreme court for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the other justices of the supreme court. 5. Upon the disqualification of a justice of the supreme court pursuant to this section, a district judge shall be designated to sit in his place as provided in section 4 of

article 6 of the constitution of the State of Nevada. 6. No person shall be punished for contempt for making, filing or presenting a charge for disqualification pursuant to subsection 4."

This motion for disqualification, at that time would not necessarily had to rise to the level of a statutory "charge," which automatically calls for a formal hearing before unchallenged justices. Whitehead v. Nevada Comm'n on Judicial Discipline, 110 Nev. 380, 873 P.2d 946, 1994 Nev. LEXIS 48 (1994), *cert. denied*, In re Whitehead, 519 U.S. 1107, 117 S. Ct. 1021, 136 L. Ed. 2d 896, 1997 U.S. LEXIS 1214 (1997). Indeed, once the matter had been brought "pre-signature" by the Justice, the Court would have had the option of simply having Justice Becker withdraw from consideration of the matter and had a District Court fill the vacant position, participating via a review of the record. See NRS 1.225(5). "Upon the disqualification of a justice of the supreme court pursuant to this section, a district judge shall be designated to sit in his place as provided in section 4 of article 6 of the constitution of the State of Nevada."

A review of the facts in the present matter clearly indicate that if a motion was brought pre-signature against Justice Becker, it would have been granted. As the standard for assessing judicial bias is "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge's] impartiality." PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 438, 894 P.2d 337, 341 (1995); see also Richard E. Flamm, Judicial Disqualification § 5.5 (1996). Whether a judge's "impartiality can reasonably be questioned under an objective standard, however, is a question of law and this court will exercise its independent judgment of the undisputed facts." Berosini, 111 Nev. at 437, 894 P.2d at 341 (*citing* Flier v. Superior

Court (Perkins), 23 Cal. App. 4th 165, 28 Cal. Rptr. 2d 383, 386 (Ct. App. 1994); State v. Rochelt, 165 Wis. 2d 373, 477 N.W.2d 659, 661 (Wis. Ct. App. 1991) In re Varain, 114 Nev. 1271, 1278 (Nev. 1998).

The Defendant's counsel, being denied information that was available to the State, as well as Justice Becker, was denied his due process right to make a motion to recuse Justice Becker, and, now that the above information has been provided, given the espoused position of Justice Becker by her signature on the Decision affirming the Defendant's sentence of death, Defense has an obligation to bring the instant motion. NRS 1.223(6) 6. No person shall be punished for contempt for making, filing or presenting a charge for disqualification pursuant to subsection 4.

II.

DEFENDANT HAS A DUE PROCESS
RIGHT TO HAVE THE MATTER HEARD

The due process clause clearly applies in the instant case as the claimant has been deprived (or is in jeopardy of being deprived) of his most sacred liberty interest. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Thus, if a liberty interest is not at stake, the claimant cannot assert the protections of due process. Id. If, however, the government is attempting to infringe on a protected liberty interest, then it (the government) may do so only if it follows the procedures mandated by the due process clause. Id. Kelch v. Sumner, 107 Nev. 827, 829 (Nev. 1991).

In addition to the duty of the Court to have advised the parties, it can be reasonably argued from the mild nature and lack of redress that were made concerning the defendant's claims of prosecutorial misconduct made in the cases, that there were concessions possibly made.

Wherefore, based upon the above, counsel for JOHNSON

respectfully moves for an Order allowing for a rehearing of the matter before the Court, en banc, with it's present members. In the alternative, the Defendant would request that this Honorable Court initiate a review of the Court's records to either establish the violation of the above Canon of Judicial Ethics or exonerate the former Justice of the allegations.

Attendant with the above request, based upon the current employment by former Justice Becker, the Clark County District Attorney's Office must be recused, as the non-disclosure by the State further concealed the offending action. Appellant is well aware that the current Attorney General was previously the Assistant county manager that would have approved the financial matters concerning the hiring of Justice Becker at the highest salary, however, her Honor Ms. Mastos followed the ethical high road by resigning from her County position well before these matters became at issue. The State must now assume the lead in this matter.

DATED: 3/23/07

SUBMITTED BY:

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

RANDALL H. PIKE
Deputy Special Public Defender
Nevada Bar No. 1940
330 S. Third St., Ste. 800
Las Vegas NV 89155
702-455-6265
Attorneys for THOMAS

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

RANDALL H. PIKE, being first duly sworn, deposes and says:

Affiant is an attorney duly licensed to practice law in the State of Nevada and the Assistant Special Public Defender. That Affiant submits this Affidavit in support of Appellant THOMAS' Petition for Rehearing.

That based upon the information provided, Affiant has an ethical obligation to raise this issue for resolution at the first available opportunity.

Wherefore, based upon the above points and authorities, and upon good faith a belief, affiant believes that failure to rehear the above matter by this Honorable Court would constitute a violation of Defendant's due process rights under the Nevada and United State's Constitutions.

This Motion is made in good faith and not for the purpose of delay.

Further Affiant sayeth naught.

RANDALL H. PIKE

SUBSCRIBED and SWORN to before me
this 23 day of March, 2007.

NOTARY PUBLIC

KATHLEEN FITZGERALD
NOTARY PUBLIC
STATE OF NEVADA
APPT. No. 92-1567-1
MY APPT. EXPIRES DEC. 24, 2010

CERTIFICATE OF MAILING

The undersigned employee of The Special Public Defender's Office, does hereby certify that on the 23 day of March, 2007, I did deposit in the United States Post Office at Las Vegas, Nevada, a copy of the above and foregoing Petition for Rehearing, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following: Clark County District Attorney, 200 Lewis Ave., 3rd Floor, Las Vegas NV 89155; and Nevada Attorney General, 100 N. Carson St., Carson City NV 89701-4717.

KATHLEEN FITZGERALD
an employee of
The Special Public Defender

EXHS

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(702) 388-5819 (Fax)

Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General of the State of Nevada,

Respondents.

Case No. 96C136862-1
Dept No. XXIII

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

(EXHIBITS 21-50)

(Death Penalty Habeas Corpus Case)

21. Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel, Thomas v. Warden, Case No. C136862, District Court, Clark County (March 6, 2008)

22. Petition for Writ of Habeas Corpus (Post-Conviction), Thomas v. Warden, Case No. C136862, District Court, Clark County (July 12, 2010)

23. Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), Thomas v. Warden, Case No. C136862, District Court, Clark County (March 31, 2014)

24. Findings of Fact, Conclusions of Law and Order, State v. Thomas, Case No. C136862, District Court, Clark County (May 30, 2014)

25. Appellant's Opening Brief, Thomas v. State, Case No. 65916, In the Supreme Court of the State of Nevada (November 4, 2014)

26. Order of Affirmance, Thomas v. State, Case No. 65916, In the Supreme Court of the State of Nevada (July 22, 2016)

27. Petition for Rehearing, Thomas v. State, Case No. 65916, In the Supreme Court of the State of Nevada (August 9, 2016)

28. Order Denying Rehearing, Thomas v. State, Case No. 65916, In the Supreme Court of the State of Nevada (September 22, 2016)

29. Defendant's Motion to Strike State's Notice of Intent to Seek Death Penalty Because the Procedure in this Case is Unconstitutional, State v. Chappell, Case No. C131341, District Court, Clark County (July 23, 1996)

30. Verdict Forms, State v. Powell, Case No. C148936, District Court, Clark County (November 15, 2000)

31. Minutes, State v. Strohmeyer, Case No. C144577, District Court, Clark County (September 8, 1998)

32. Verdict Forms, State v. Rodriguez, Case No. C130763, District Court, Clark County (May 7, 1996)

33. Verdict Forms, State v. Daniels, Case No. C126201, District Court, Clark County (November 1, 1995)

34. Declaration of Andrew Williams (May 25, 2017)

35. Declaration of Antionette Thomas (June 2, 2017)

36. Declaration of Charles Nash (June 19, 2017)

37. Declaration of Darrell Thomas (July 19, 2017)

38. Declaration of David Hudson (May 24, 2017)

39. Declaration of James A. Treanor (May 22, 2017)

40. Declaration of Kareem Hunt (June 19, 2017)

41. Declaration of Linda McGilbra (May 24, 2017)

42. Declaration of Paul Hardwick, Sr. (May 24, 2017)

43. Declaration of Peter LaPorta (July 2011)

44. Declaration of Shirley Nash (May 24, 2017)

45. Declaration of Ty'yivri Glover (June 18, 2017)

46. Declaration of Virgie Robinson (May 25, 2017)

47. Certification Hearing Report, In the Matter of Thomas, Marlo Demitrius, District Court, Juvenile Division Case No. J29999 (February 8, 1990)

48. Marlo Thomas Various Juvenile Court Records

49. Marlo Thomas Various School Records

50. Operation School Bell, Dressing Children in Need (K-8) in Clark County Schools

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on October 20, 2017, a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

In accordance with EDCR 7.26(a)(1), the undersigned hereby certifies that on this October 20, 2017, a true and correct copy of the foregoing EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT was served by United States Mail/UPS, postage prepaid, and addressed as follows:

Jeffrey M. Conner
Assistant Solicitor General
Office of the Nevada Attorney General
100 North Carson Street
Carson City, Nevada 8701-4717

Timothy Filson, Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

/s/ Jeremy Kip
An Employee of the
Federal Public Defender,
District Of Nevada

EXHIBIT 21

EXHIBIT 21

0014
MARLO THOMAS
INMATE NO. 50682
Ely State Prison
P.O. Box 1989
Ely NV 89301

PETITIONER IN PROPER PERSON

FILED
MAR 6 3 35 PM '08
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

MARLO THOMAS, Petitioner, vs. WARDEN OF ELY STATE PRISON, and THE STATE OF NEVADA, Respondent.	CASE NO. C 136862 DEPT. NO. XV PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL DATE: _____ TIME: _____

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON, WHITE PINE COUNTY, ELY, NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, LAS VEGAS NV

3. Date of judgement of conviction: NOVEMBER 28, 2005

4. Case number: C 136862

5. (a) Length of sentence: 2 SENTENCES OF DEATH

(b) If sentence is death, state any date upon which execution is scheduled: STAYED

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes XX No _____

If "yes", list crime, case number and sentence being served at this time: OTHER CHARGES RELATED TO THIS CASE WHICH WERE AFFIRMED AND NOT

REMANDED FOR A NEW PENALTY HEARING

7. Nature of offense involved in conviction being challenged: 2 COUNTS OF MURDER WITH USE OF A DEADLY WEAPON

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No XX

12. Did you appeal from the judgement of conviction? Yes XX No _____

I APPEALED THE SENTENCE OF DEATH FOLLOWNG A SECOND PENALTY HEARING AFTER REMAND

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 46509

(c) Result: AFFIRMED

(d) Date of result: 12-28-06

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this

judgement in any court, state or federal? Yes XX No ____

16. If your answer to No. 15 was "yes," give the following information:

(a) as to any first petition, application or motion:

(1) Name of court: UNITED STATES SUPREME COURT

(2) Nature of proceeding: PETITION FOR WRIT OF CERTIORARI

(3) Grounds raised: DENIAL OF RIGHT OF CONFRONTATION

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No X

(5) Result: CERTIORARI DENIED

(6) Date of result: OCTOBER 4, 1999

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: UNKNOWN

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT

(2) Nature of proceeding: STATE HABEAS CORPUS

(3) Grounds raised: SEE ATTACHED

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes XX No ____

(5) Result: PETITION DENIED

(6) Date of result: SEPTEMBER 6, 2002

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: NOTICE OF ENTRY OF ORDER FILED SEPTEMBER 10, 2002

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No XX

Citation or date of decision: _____

(2) Second petition, application or motion? Yes XX No ____

Citation or date of decision: NV SUPREME COURT CASE NO. 40248

(3) Third or subsequent petitions, applications or motions? Yes ___ No _X_

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes: _____ No: __ If yes, identify: _____

I DO NOT KNOW IF THE ATTORNEY APPOINTED TO ASSIST ME WILL RAISE ANY OF THE ISSUES.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE REMANDED PENALTY HEARING AND ON DIRECT APPEAL FROM THE REMANDED PENALTY HEARING.

THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal?

Yes: ___ No: _XX_ If yes, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper

which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No __XX___

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

TRIAL ATTORNEY: PETE LAPORTA AND LEE McMAHON

DIRECT APPEAL: MARK BAILUS AND LEE McMAHON

POST CONVICTION PROCEEDINGS: DAVID SCHIECK

APPEAL FROM DENIAL OF POST CONVICTION PROCEEDINGS: DAVID SCHIECK

REMANDED PENALTY HEARING: DAVID SCHIECK AND CLARK PATRICK

APPEAL FROM DENIAL OF REMANDED PENALTY HEARING: DAVID SCHIECK

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack? SENTENCED TO DEATH

Yes _____ No _____ If yes, specify where and when it is to be served, if you know: ____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL AT THE REMANDED PENALTY HEARING

Supporting FACTS (Tell your story briefly without citing cases or law.):

I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND

POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

(b) Ground two: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL FROM THE REMANDED PENALTY HEARING

Supporting FACTS (Tell your story briefly without citing cases or law.):

I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding; and pursuant to NRS 34.820 moves this Court for an Order to appoint counsel to assist Petitioner in these proceedings.

SIGNED at ELY STATE PRISON on march 4, 2008.

Marlo Thomas
MARLO THOMAS, INMATE #50682

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Marlo Thomas
MARLO THOMAS, INMATE #50682

12 (continued)
Did you appeal from the judgement of conviction? Yes XX No _____

I APPEALED FROM THE JUDGEMENT OF CONVICTION OF THE TRIAL AND THE FIRST PENALTY HEARING

13. (continued)

If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT
(b) Case number or citation: CASE NO. 31019
(c) Result: CONVICTION AND SENTENCE AFFIRMED
(d) Date of result: 11-25-1998

16 (continued)

(c) as to any third petition, application or motion:

(1) Name of court: UNITED STATES SUPREME COURT

(2) Nature of proceeding: PETITION FOR WRIT OF CERTIORARI

(3) Grounds raised: DENIAL OF RIGHT OF CONFRONTATION

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __X__

(5) Result: CERTIORARI DENIED

(6) Date of result: JANUARY 14, 2008

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: UNKNOWN

ISSUES RAISED ON DIRECT APPEAL (31019)

On direct appeal, THOMAS raised the following issues to the Nevada Supreme Court.

1. The trial court erred in declaring co-defendant, Kenya Hall, unavailable for the purpose of introducing preliminary hearing transcripts at trial.

2. The state committed prosecutorial misconduct by not offering to grant immunity to co-defendant, Kenya Hall, when he asserted he would not testify pursuant to his privilege against self-incrimination found in the fifth amendment.

3. The trial court violated the appellant's due process rights by allowing an unrecorded hearing outside the presence of the defendant.

4. The trial court erred in overruling appellant's objection to the state's peremptory challenge of the only African American juror.

5. The trial court erred in the admission of certain prejudicial autopsy photos.

6. The trial court erred in the admission of an enlarged diagram of data already in evidence.

7. The trial court erred in not declaring a mistrial after a witness testified at trial that the appellant had previously been in jail.

8. The evidence adduced at appellant's trial was insufficient to support appellant's convictions.

9. The trial court erred in allowing cumulative and otherwise inadmissible evidence of prior bad acts during the penalty phase of appellant's trial.

10. The trial court erred in admitting certain hearsay testimony into evidence during the penalty phase.

11. The statutory scheme adopted by Nevada fails to properly limit victim impact statements.

12. The prosecutor committed misconduct during the closing argument of the penalty phase of appellant's trial by appealing to the passions and prejudice of the jurors and by denigrating the proper consideration of mitigating factors.

13. The sentence of death was disproportionate to the evidence adduced during the two phases of appellant's trial.

14. The trial court erred in admitting a set of jury instructions during the guilt and penalty phases which violated the due process rights of the appellant.

15. The trial court committed constitutional error in allowing the jury to be death qualified.

16. Whether the cumulative error of improper conduct by the prosecutor, the reception of inadmissible evidence, and erroneous rulings of the court deprived appellant a fair trial.

ISSUES RAISED ON STATE HABEAS CORPUS (C136862)

1. Trial counsel failed to make contemporaneous objections on valid issues thereby precluding meaningful appellate review of the case in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

2. Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel failed to raise these issues on direct appeal, both failures being in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

3. Trial counsel was not prepared for critical stages of the proceedings and failed to

conduct proper investigation prior to trial in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

4. Trial counsel failed to adequately represent THOMAS during the course of the trial proceedings by failing to properly prepare jury instructions, cross-examine witnesses, and present evidence at both the trial and penalty stages of the proceedings in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

5. Appellate counsel failed to file a complete record on appeal as required by Supreme Court Rule 250 and failed to raise meritorious issues on direct appeal in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

6. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

7. THOMAS' conviction and sentence is invalid under the State and Federal Constitutional guarantees of due process, equal protection, impartial jury from cross-section of the community, and reliable determination due to the trial, conviction and sentence being imposed by a jury from which African Americans and other minorities were systematically excluded and under-represented. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

ISSUES RAISED ON APPEAL FROM DENIAL OF STATE HABEAS CORPUS (40248)

1. Thomas received ineffective assistance of counsel

2. It was an abuse of discretion to deny Thomas a full evidentiary hearing on his petition for post conviction habeas corpus.

REVERSED FOR SECOND PENALTY HEARING

ISSUES RAISED ON APPEAL FROM REMANDED PENALTY HEARING (46509)

1. The court erred in admitting evidence in violation of Thomas' rights under the Sixth Amendment to confront witnesses against him.

2. The court improperly limited the mitigation and instructions on mitigation offered by Thomas.

3. The court erred by not limiting penalty hearing evidence to avoid violation of the eighth amendment and due process right to a fundamentally fair penalty hearing.

4. The sentence of death must be reversed because Nevada's death penalty scheme is unconstitutional.

5. The state violated the order of the court bifurcating the evidence at the penalty hearing

50682 #

MARLO THOMAS

PO Box 1989

ELY, NV 89301

LAS VEGAS NV P&DC 5 MAR 2003

5

AA1428

EXHIBIT 22

EXHIBIT 22

WRIT
BRET O. WHIPPLE
Nevada Bar No. 6168
BRET O. WHIPPLE ATTY AT LAW
1100 S. Tenth Street
Las Vegas, NV 89104
(702) 257-9500 [phone]
(702) 974-4008 [fax]
Attorney for Petitioner
Marlo Thomas

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

E.K. MCDANIEL, Warden
Ely State Prison, et al.,

Respondent.

Case No. **C136862**
Dept. No. **XXIII**

Date of Hearing: 8/30/10
Time of Hearing: 9:30

(Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, Ely, Nevada 89301**

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District, Las Vegas, Nevada, Clark County**

3. Date of judgment of conviction:

4. Case Number: **C136862**

5. (a) Length of sentence:

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes___ No__X__

If "yes", list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged:

8. What was your plea? (check one)

(a) Not guilty __X__ (c) Guilty but mentally ill ___

(b) Guilty _____ (d) Nolo contendere ___

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A**

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury __**X**__

(b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ___X___

12. Did you appeal from the judgment of conviction?

Yes ___ No __X____

13. If you did appeal, answer the following:

(a) Name of court:

(b) Case number or citation:

(c) Result:

(d) Date of result:

14. If you did not appeal, explain briefly why you did not: **By following the advice of counsel and pleading guilty, Peitioner could not appeal is conviction.**

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes___ No __X___

16. If your answer to No. 15 was "yes," give the following information:

(a) As to any first petition, application or motion, give the same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ___

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes __ No__

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. **N/A**

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? **No.**

(1) First petition, application or motion?

Yes ___ No ___

(2) Second petition, application or motion?

Yes ___ No ____

(3) Third or subsequent petitions, applications or motions?

Yes__ No ____

Citation or date of decision.

(e) If you did not appeal from the adverse action on any petition, application

or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length) **N/A**

_____

_____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: **N/A**

(a) Which of the grounds is the same:

_____(b) The proceedings in which these grounds were raised:

_____(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) **N/A**

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes___ No _X___.

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes ____ No __**X**__

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. Each claim is presented below.

INTRODUCTION:

Marlo Thomas has been convicted of two counts of first degree capital murder. Mr. Thomas has an unusual procedural history that brings him to this court. He has two different sentencing proceedings. His first sentencing proceeding was overturned by the Nevada Supreme Court. As a result, the State had to present its case for death before another jury. The second penalty jury sentenced Mr. Thomas to death. However, they did so without the benefit of a wealth of mitigation evidence that counsel failed to prepare and present.

This honorable court appointed Bret Whipple counsel pursuant to Supreme Court Rule 250 to investigate and file Mr. Thomas' state post conviction petition related to his second penalty phase trial. This court denied any additional investigative funds to appointed counsel. It is a well-settled matter of law that defendants sentenced to death in Nevada are entitled to effective assistance of post conviction counsel. Crump v. Warden, 113 Nev. 293 (1997) (relying upon N.R.S. 34.820(1)(a)). Without the ability to secure funds to fully investigate the potential, viable claims in this case, present counsel has no strategic justification for his failure to pursue Mr. Thomas' possible claim of mental retardation

Current counsel's believe that such evidence exists comes in large part from the testimony of Dr. Thomas Kinsora. Dr. Kinsora is a neuropsychologist who was hired to test Mr. Thomas. Dr. Kinsora testified in the first penalty trial. The jury in the second penalty trial was denied the benefit of his observations. Dr. Kinsora identifies several areas that current counsel must investigate in order to assure that both Mr. Thomas' constitutional Due Process rights under the Fourteenth Amendment and his rights to effective assistance of counsel under the Sixth Amendment are protected.

GROUND ONE

MR. THOMAS' CONVICTION AND SENTENCE ARE INVALID UNDER THE 1st, 6TH, AND 14TH FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE NEVADA CONSTITUTION BECAUSE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AS IS MANDATED BY Strickland v. Washington, 466 U.S. 668 (1984)

Legal Authority Relevant to All Claims of Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution guarantees that an accused person shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly defined when the assistance of counsel becomes ineffective and an accused person is denied this right. In Strickland v. Washington, 466 U.S. 668 (1984), the Court established a two-prong test for determining ineffective assistance of counsel at trial. See also Porter v. McCollum, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009). To prevail under Strickland, a defendant must demonstrate both that his "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. To satisfy the second prong of Strickland, a defendant must show that his trial counsel's performance prejudiced his defense such that he suffered actual prejudice and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. This test has also been adopted in Nevada. See Hurd v. State, 114 Nev. 182, 953 P.2d 270 (1998). Further, trial counsel's actions must be based on reasonable strategic decisions. Strickland, 466 U.S. at 691.

In this case, Mr. Thomas' trial counsel, David Schieck and Daniel Albregts made a series of errors that so undermined the proper functioning of the adversarial process that the outcome of Mr. Thomas' proceedings cannot be relied upon as have produced a just result.

A. Prior Counsel Failed to Properly Present Evidence Related to Mr. Thomas' Possible Mental Retardation That Was Readily Available to Them From Dr. Kinsora's Orignial Testimony.

1. Dr. Kinsora Testified That Mr. Thomas May Be Mentally Retarded.

Dr. Kinsora gave Mr. Thomas a series of neuropsychological tests that yielded over thirty different measurements of Mr. Thomas' neurocognitive functioning. (Exhibit A, II-19-20). Mr.

Thomas' full scale IQ fell in the eighth (8th) percentile. Id. at II-22. Dr. Kinsora testified that someone in this range would be considered to have borderline intellectual functioning. Dr. Kinsora also determined that Mr. Thomas' reading skills were in the fourth (4th) percentile range, and Dr. Kinsora testified that 96% of the population can read better than Mr. Thomas. Mr. Thomas' spelling and math ability were both in the first (1st) percentile. Overall, Mr. Thomas' full scale IQ was in the eighth percentile. Dr. Kinsora described this as "very, very poor. That's considered borderline intellectual functioning". (II-22).

In 2002, the United States Supreme Court determined that it was cruel and unusual punishment to execute someone who is mentally retarded. Atkins v. Virginia, 536 U.S. 304 (2002). Dr. Kinsora testified that the mentally retarded range occurs at 69. Mr. Thomas was approximately 10 points off or six percentile points from the mentally retarded range. This is critical testimony and central to Mr. Thomas' defense. Even though the IQ score of 79 puts Mr. Thomas out of the mentally retarded range, the Flynn Effect must be considered when calculating Mr. Thomas' full scale IQ. The Flynn Effect is the principle that after an IQ test has been normed, people's scores start to creep upward over time. For the general population, the score creep is accepted at 0.33 points per year. For the mentally retarded population, the score creep is closer to 0.45 points per year.

It is counsel's belief that Dr. Kinsora administered one of the IQ tests that were normed in the mid-1970s. As such, Mr. Thomas full scale IQ could be off anywhere from seven (7) to over nine (9) points lower than the score of 79 Dr. Kinsora reached. (21 years multiplied by 0.33 and 0.45 respectively). This decline in Mr. Thomas' IQ puts him either at the low end of high functioning individuals with mental retardation or below the level for mental retardation. In order to get a much more accurate picture of Mr. Thomas' full scale IQ, it would be necessary to hire a neuropsychologist to travel to Ely, Nevada and conduct a minimum of two days of testing.

An individual's IQ is only one element that has to be proven for Mr. Thomas to qualify for relief under Atkins. To be found mentally retarded, counsel must show that Mr. Thomas suffers from significant adaptive deficits, and that those adaptive deficits existed prior to his eighteenth birthday. Id.

Dr. Kinsora provides insight into the possibility that Mr. Thomas meets both the second and the third prong of the Atkins requirements. He testified that an evaluation of Mr. Thomas' psychological records from his childhood revealed that he had "significant learning problems" (II-13). Mr. Thomas also "qualified as learning disabled very early on [and] [h]e was way behind in school".

One significant thing to point out is that Mr. Thomas had been tested prior to his eighteenth birthday (1981 and 1984) according to Dr. Kinsora. Dr. Kinsora notes that his findings were "pretty much consistent with where he was when [Mr. Thomas] was in the program for emotionally and behaviorally disturbed kids and for learning disabilities". (II-23).

Without the benefit of a more accurate evaluation of Mr. Thomas' neurocognitive functioning and an investigation into any adaptive deficits he had prior to the age of eighteen, post-conviction counsel will not be able to perform in accordance with the rigors demanded by the Constitution and set forth in Strickland.

2. Mr. Thomas May Suffer From Fetal Alcohol Spectrum Disorder (FASD).

Although Mr. Thomas does not currently display the physical characteristics associated with individuals who have FASD, there is evidence to support this diagnosis. There is no one test that can definitively declare that Mr. Thomas has FASD; however, by reconstructing his social history and performing neurocognitive tests, a diagnosis of FASD can be hypothesized. Some of the hallmarks of FASD include: deficits in cognition or intellect, reasoning, memory, or concentration. (II-17).

Mr. Thomas' mother admitted that during the time she was pregnant with him, she drank wine or vodka every day "until she was extremely (II-14). This occurred throughout her pregnancy with Mr. Thomas. This level of alcohol consumption would be consistent with a diagnosis of FASD.

One of the cognitive deficits seen in individuals with FASD is a difficulty with concentration. One of the tests administered to Mr. Thomas measured his concentration skills. According to Dr. Kinsora, "Mr. Thomas had a very, very–a very, very hard time with this test and performed at the less than one percentile on the first trial and at the one percentile on the second trial". (II-24). In fact the test was so difficult for Mr. Thomas to perform that Dr. Kinsora did not force him to attempt

a third or a fourth scoring.

Mr. Thomas also struggled with problem solving or reasoning tasks. On one test, Mr. Thomas scored below the sixteenth percentile and fell in the "impaired range". Dr. Kinsora estimated that Mr. Thomas performed at the level of a 13-14 year-old in his ability to solve problems. (II-26).

Counsel requests the necessary funds to do a comprehensive and adequate investigation into Mr. Thomas social history to determine whether or not he suffers from FASD. Without this investigation, counsel cannot prepare a defense for Mr. Thomas that satisfies the demands of the Constitution.

B. Trial Counsel Failed to Investigate and Present Evidence That Mr. Thomas' Mother Virtually Abandoned Him at a Young Age, He Suffered From Physical Abuse, and an Impoverished Upbringing and, As a Result, Mr. Thomas Developed Severe Behavioral Problems.

Mr. Thomas' physical abuse started before he was born. His mother reported that she was frequently physcially abused by Marlo's father and that the "punched and kicked [her] in the stomach many times while she was pregnant". (II-14-15). Mr. Thomas' mother admitted that she continued to physically abuse him when he was a child.

The environment in which Mr. Thomas was raised was less than ideal:

> His early childhood was apparently not particularly conducive to good–to being raised as a –you know, with normal development. He had his father who was incarcerated when he was rather young, he–his mother apparently did quite a bit of physical whipping him (sic) and things like that. His brother was apparently the main person who raised him because his mother worked quite a bit. (II-15).

Mr. Thomas suffered from behavioral issues from an early age. He spent time in Children's Behavioral Services, and was later placed in Miley Achievement Center, which is an achievement center for severely emotionally disturbed kids. (II-15)

Mr. Thomas felt an acute sense of abandonment from his mother. Dr. Kinsora testified that Mr. Thomas' felt his mother loved his other brothers more than him. He also suffered from very poor peer relations and had a hard time gettin along with anyone that was his age. He frequently felt picked on by his peers. (II-16).

All of these elements of Mr. Thomas' social history are important and need to be fully investigated. Mr. Thomas has a right to have this generally mitigating information presented to a

finder of fact. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel would be per se ineffective for making any strategic decisions about Mr. Thomas' case in the absence of a comprehensive investigation into his social history.

Counsel had no tactical or strategic justification within the range of reasonable competence for his failure to properly investigate factual witnesses and material facts in this case.

C. Trial Counsel Failed To Properly Excuse Potential Venire Persons Who Could Prejudice the Panel

Mr. Thomas believes and therefore alleges that prior counsel failed to properly excuse two jurors--Mr. Quenzer and Ms. Mowen–based upon the information included in their juror questionnaires. Their responses during voir dire infected the panel so much so that the fairness the Constitution demands is absence from Mr. Thomas' penalty trial.

1. Mr. Quenzer

Mr. Quenzer is a restaurant manager who works for the company that owns Longhorn Steakhouse. He does not sit on the jury. However, there is a very lengthy discussion about whether or not he would overly identify with the victims. Additionally, it is eventually revealed that one of his friends that he used to work with at another restaurant was murdered in a robbery.

2. Ms. Mowen

Ms. Mowen's sister was the victim in a capital murder case. Ms. Mowen testified during the victim impact portion during the capital trial of Dante Johnson. When she was questioned during voir dire in Mr. Thomas' case, she stated that in Mr. Johnson's case, the **death penalty was completely warranted.**

There is no strategic justification for allowing either of these potential venire persons to be questioned in front of the other potential panel members. To do so allowed the jury to sit with and among people who had been intimately and personally touched by murder. Prior counsel did not ask to do individual voir dire of these individuals or to have them stricken from the panel prior to the commencement of the penalty phase.

D. Prior Counsel Failed to Challenge the District Court Judge's Failure to Properly Admonish the Jurors When They Left the Courtroom

Mr. Thomas contends that he was denied his right to a fair trial because the district court failed to admonish the jury pursuant to NRS 176.40 1 prior to every recess. (PT 11/01/05 pg. 23). The record reveals two occasions on which the court did not provide the full statutory admonishment.

In Bollinger v. State, the Nevada Supreme Court stressed the importance of fully admonishing the jury before each and every recess in accordance with the mandatory provisions of NRS 175.401. Therefore, the district court erred in failing to do so.

The Nevada Supreme Court again cited the importance of fully admonishing the jury before each and every recess in accordance with the mandatory provisions of NRS 175.401 in Blake v. State,. This opinion was issued on October 20, 2005 and the district court should be considered to be on notice of the Nevada Supreme Court's disapproval of the practice of failing to admonish the jury. These failures to admonish the jury would appear to be pervasive in Judge Loehrer's courtroom as she was the subject of the Court's opinion in the Blake case.

NRS 175.401 provides:

> At each adjournment of the court, whether the jurors are permitted to separate or depart for home overnight, or are kept in charge of officers, they must be admonished by the judge or another officer of the court that it is their duty not to:
> 1. Converse among themselves or with anyone else on any subject connected with the trial;
> 2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
> 3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

Trial counsel should have objected to the court's failure to admonish the jury. Mr. Thomas believes and therefore alleges that the court's failure to admonish the jury allowed them to act in an impermissible fashion and taint the proceedings with error.

E. Trial Counsel Failed to Have the Bench Conference Recorded

Numerous portions of this capital proceeding were closed to the public in the form of off-the-

record bench conferences.[1] The off-the-record bench conferences and conversations were never transcribed. The trial judge additionally failed to take any other measures to effectuate the public interest in observation and comment on these judicial proceedings. Mr. Thomas is informed and believes, and therefore alleges, that during these unrecorded conferences, the trial judge took material, substantial actions, including ruling on evidentiary matters and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of Mr. Thomas' capital murder case in particular.

The trial judge failed to articulate any reasons for the failure to record critical proceedings in Mr. Thomas' trial, and no such reasons exist. The failure of the trial judge to secure an adequate record of these capital proceedings violated Mr. Thomas' constitutional rights, as well as those of the public to free and open proceedings. The trial judge's failure also violated Mr. Thomas' rights under international law, which guaranteed every person a fair and public hearing by a competent, independent, and impartial tribunal.[2] The failure of trial counsel to request the transcription of these proceedings violated Mr. Thomas' constitutional rights which guarantee him the right to effective assistance of counsel in securing a fair and open trial as well as a record of the proceedings against him.

These constitutional violations were prejudicial per se; no showing of specific prejudice is required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure to secure a complete record substantially and adversely affected Mr. Thomas' constitutional rights.

F. Trial Counsel Failed to Object to the Prosecutors Numerous References Whereby They Equate the Death Penalty With Holding an Individual Accountable for Their Crime

_____The prosecutors impermissibly equate imposing the death penalty with holding an individual accountable for their actions. They do this with Juror McIntosh (PT 10/31/2005 pg. 72 lines 2-12), Juror Adona (Id. at pg. 85 lines 17-24), and Juror McGrath (Id. at pg. 125 lines 14-22). Prior counsel never objected to this line of questioning. This becomes an issue again during closing argument

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when the State reminds the jury that "each and every one of you told us when we were selecting this jury that you believe people should be held accountable for their actions and you believe in the appropriate case that you could return with a verdict of death. (PT 11/04/2005 pg. 167 lines 17-21). Trial counsel failed to object to this misstatement of what the venire panel said and allowed the prosecution to again conflate the issues of accountability and the imposition of the death penalty. Mr. Thomas was prejudiced by this failure and this court cannot be confident with the outcome given prior counsels' failure to properly object to the statements of the State.

G. Trial Counsel Failed to Present Favorable Evidence From Correctional Officers

The State presented numerous witnesses from the Nevada Department of Corrections who spoke of Mr. Thomas' history of violent behavior while incarcerated. Trial counsel failed to contact and present the testimony of correctional officers that could have refuted the testimony of those correctional officers presented by the State.

By failing to present this evidence, the State was able to paint a picture of Mr. Thomas whereby he was cast in the light of a dangerous individual and the jury was given a view of Mr. Thomas' years of incarceration that was not fully in line with the actuality of the years he spent behind bars. Mr. Thomas was highly prejudiced by this failure and this court cannot be confident in the outcome given prior counsel's failure to properly investigate and present favorable evidence regarding Mr. Thomas. There cannot be any strategic or tactical reason for this choice.

GROUND TWO

MR. THOMAS CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, A PUBLIC TRIAL, FREEDOM OF THE PRESS, A RELIABLE SENTENCE, EFFECTIVE ASSISTANCE OF COUNSEL, AND ADEQUATE REVIEW OF THE SENTENCE OF DEATH, DUE TO THE TRIAL COURT'S NUMEROUS FAILURES. U.S. CONST. ART. VI; AMENDS. I, V, VI, VIII, XIV; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ART. XIV.

A. The Trial Court Failed to Record Integral Portions of the Proceedings.

Numerous portions of this capital proceeding were closed to the public in the form of off-the-record bench conferences.[3] The off-the-record bench conferences and conversations were never

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transcribed. The trial judge additionally failed to take any other measures to effectuate the public interest in observation and comment on these judicial proceedings. Mr. Thomas is informed and believes, and therefore alleges, that during these unrecorded conferences, the trial judge took material, substantial actions, including ruling on evidentiary matters and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of Mr. Thomas' capital murder case in particular.

The trial judge failed to articulate any reasons for the failure to record critical proceedings in Mr. Thomas' trial, and no such reasons exist. The failure of the trial judge to secure an adequate record of these capital proceedings violated Mr. Thomas' constitutional rights, as well as those of the public to free and open proceedings. The trial judge's failure also violated Mr. Thomas' rights under international law, which guaranteed every person a fair and public hearing by a competent, independent, and impartial tribunal.[4] The failure of trial counsel to request the transcription of these proceedings violated Mr. Thomas' constitutional rights which guarantee him the right to effective assistance of counsel in securing a fair and open trial as well as a record of the proceedings against him.

These constitutional violations were prejudicial per se; no showing of specific prejudice is required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure to secure a complete record substantially and adversely affected Mr. Thomas' constitutional rights.

B. The Trial Court Failed to Properly Admonish the Jury Each and Every Time They Left the Courtroom.

Mr. Thomas contends that he was denied his right to a fair trial because the district court failed to admonish the jury pursuant to NRS 176.40 1 prior to every recess. (PT 11/01/05 pg. 23). The record reveals two occasions on which the court did not provide the full statutory admonishment.

In Bollinger v. State, the Nevada Supreme Court stressed the importance of fully admonishing the jury before each and every recess in accordance with the mandatory provisions of

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NRS 175.401. Therefore, the district court erred in failing to do so.

The Nevada Supreme Court again cited the importance of fully admonishing the jury before each and every recess in accordance with the mandatory provisions of NRS 175.401 in Blake v. State,. This opinion was issued on October 20, 2005 and the district court should be considered to be on notice of the Nevada Supreme Court's disapproval of the practice of failing to admonish the jury. These failures to admonish the jury would appear to be pervasive in Judge Loehrer's courtroom as she was the subject of the Court's opinion in the Blake case.

NRS 175.401 provides:

> At each adjournment of the court, whether the jurors are permitted to separate or depart for home overnight, or are kept in charge of officers, they must be admonished by the judge or another officer of the court that it is their duty not to:
> 1. Converse among themselves or with anyone else on any subject connected with the trial;
> 2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
> 3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

Trial counsel should have objected to the court's failure to admonish the jury. Mr. Thomas believes and therefore alleges that the court's failure to admonish the jury allowed them to act in an impermissible fashion and taint the proceedings with error.

C. The Trial Court Erred By Refusing to Remove the Leg Shackles from Mr. Thomas' Legs

On the opening day of the trial, David Schieck asked that the Marshalls be allowed to remove Mr. Thomas' leg restraints. The trial Judge denied the request and said:

> You can take the arm restraints off. He can't fly, but he might be able to run. And certainly a person who's already been convicted of two first degree murders with the use of a deadly weapon has more reason to flee than someone who is either not yet convicted or someone who doesn't know what penalty they received the first time around. So leave the leg chains on.

(PT 10/31/2005 pgs. 6-9).

It is a well-settled matter of law that the United States Supreme Court has indicated that a defendant has a right to appear in front of a jury without physical restraints or jail clothing, and the

trial court may not reference the fact that the defendant is incarcerated. See Estelle v. Williams, 425 U.S. 501, 504-05, 96 S.Ct. 1691, 48 L.Ed.2d, 126 (1976); see also Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991).

The trial court's eventual solution to this problem is to prohibit Mr. Thomas and his counsel not to stand when the jury came into the courtroom or at any other time to keep the jury from seeing the leg restraints.

D. Trial Court Allowed the Prosecutors to Introduce Testimonial Hearsay in the Penalty Phase in Violation of Crawford.

At the penalty hearing, the prosecutors introduced the testimony of Nevada Highway Patrol Trooper Baily to testify to the statements made by Kenya Hall. Trooper Bailey based is testimony solely on the transcript of the interview he conducted with Mr. Hall–not upon his memory of the interview. The admission of testimonial hearsay from Trooper Bailey denied Mr. Thomas the opportunity to confront and cross-examine Mr. Hall about Mr. Hall's version of the events of the robbery and murder.

The Sixth Amendment to the Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. In its landmark decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that the Confrontation Clause bars admission of "testimonial statements" of a witness who does not appear at trial, unless the witness is unavailable to testify, and the defendant previously had the opportunity to cross-examine the declarant. *Id.* at 53-54, 124 S.Ct. 1354. The United States Supreme Court has also specifically held that once the activity of a sentencer stops being an exercise of discretion and becomes constitutionally significant fact-finding, the right to confrontation attaches. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *see also* United States v. Buckland, 289 F.3d 558, 568 (9th Cir.2002) (en banc) (holding that functional equivalent of an element of a crime must be treated as "any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt"), Proffitt v. Wainwright, 685

F.2d 1227, 1254-55 (11th Cir.1982), Coble v. Dretke, 444 F.3d 345, 353-54 (5th Cir.2006).[5] The penalty hearing in a capital murder trial is clearly a criminal prosecution. Due process demands that a defendant in such a hearing be allowed to present a defense, and confront and cross-examine the evidence against him, at the very least, regarding the alleged aggravators. Mr. Thomas was denied this opportunity.

Mr. Thomas was denied the right to confront and cross-examine the witnesses against him that established aggravating elements and eligibility for the death penalty. The prosecutors cannot prove beyond a reasonable doubt that this error did not impact the sentence they jury delivered.

E. The Trial Judge Impermissibly Coached the Prosecutor

In the midst of the discussion regarding the confrontation clause, the trial judge begins coaching the prosecutor. The judge says, "Isn't that the witness I asked 'do I get to ask a question?' [that means] something that you said in opening statements hasn't come in yet." (PT 11/02/2005 pg. 8). Trial counsel responds that if the State doesn't ask the right questions I don't think the Court should help them out". Id. This overt bias to the State is prejudicial per se and no showing of specific prejudice is required in order to obtain relief when the trial judge is actively working to ensure that the State is making its case.

F. The Trial Judge Impermissibly Allowed the Prosecutors to Argue in Violation of Clearly Established Law

The State argued that there must be some causation or connection between the fact and the thing that the person did before it becomes a mitigator. (PT 11/0202005 pg. 267). Mr. Thomas' counsel objected and the trial judge overruled the objection. This violates well settled Supreme Court law. Tennard v. Dretke, 124 S. Ct. 2562 (2004). (The Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence. A State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death. Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances).

The prosecutor further argues that three of the mitigators occur after the murder.[6] These are mitigating factors established by the legislators of the State of Nevada. Again, this argument is in direct violation of the Eighth Amendment and well-established Supreme Court law. Tennard v. Dretke, 124 S. Ct. 2562 (2004).

CONCLUSION

Mr. Thomas' conviction is unconstitutional under the federal and state constitutions for each of the reasons herein. His judgment of conviction must therefore be vacated.

Wherefore, Petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Las Vegas, Clark County, Nevada on the 8th day of July, 2010.

/s/ Bret O. Whipple
BRET O. WHIPPLE
Nevada Bar No. 6168
BRET O. WHIPPLE ATTY AT LAW
1100 S. Tenth Street
Las Vegas, NV 89104
(702) 257-9500 [phone]
(702) 974-4008 [fax]
Attorney for Petitioner
Marlo Thomas

VERIFICATION

Pursuant to N.R.S. 34.730(1) I, Bret O. Whipple, swear under penalty of perjury that the pleading is true except as to those matters stated on information and belief and as to such matters, counsel believes them to be true.

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[6] Counsel did not object to these statements. The failure to object to these questions is ineffective assistance of counsel because Mr. Thomas was prejudiced by the State being allowed to effectively dismiss statutory mitigators.

I am the counsel of record for Marlo Thomas and have his personal authorization to commence this action.

/s/ Bret O. Whipple, Esq.

BRET O. WHIPPLE, ESQ,
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Attorney for Petitioner
Marlo Thomas

EXHIBIT 23

EXHIBIT 23

SUPP
BRET O. WHIPPLE, ESQ.
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Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

MARLO THOMAS, Petitioner, vs. RENEE BAKER, Warden of Ely State Prison, et al., Respondent.	Case No.: 96C136862-1 Dept. No.: 23 **SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**

COMES NOW, Petitioner MARLO THOMAS, by and through his attorney BRET O. WHIPPLE, ESQ., and hereby files this Supplemental Petition for Writ of Habeas Corpus and Supplemental Points and Authorities in Support thereof.

DATED this 31st day of March, 2014.

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Nevada Bar No.6168

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POINTS AND AUTHORITIES

I.

STATEMENT OF THE CASE

Petitioner Marlo Thomas is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada pursuant to a judgment of conviction and sentence of death. Mr. Thomas was charged on April 23, 1996, with Conspiracy to Commit Murder and/or Robbery; Murder with Use of a Deadly Weapon (two counts); Robbery with Use of a Deadly Weapon; Burglary While in Possession of a Firearm; and First Degree Kidnapping with Use of a Deadly Weapon. The case arose out of the stabbing deaths of Matthew Gianakis and Carl Dixon at the Lone Star restaurant at Cheyenne and Rainbow in Las Vegas, Nevada.

When the case reached District Court, the State filed a Notice of Intent to Seek the Death Penalty setting forth the following aggravating circumstances: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence upon the person of another, Attempt Robbery, Case No. 96794; (2) the Murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, Battery with Substantial Bodily Harm, Case No. C134709; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary; (4) the Murder was committed while the person was engaged in the commission of or an attempt to commit any Robbery; (5) the Murder was committed to avoid or prevent a lawful arrest; and (6) the defendant has, in the immediate proceeding, been convicted of more than one offense of Murder in the first or second degree.

On June 16, 1997, a jury trial commenced before the Honorable Joseph Bonaventure, Eighth Judicial District Court, Department VI. Trial counsel were Lee Elizabeth McMahon and

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Peter LaPorta of the Special Public Defender's Office. At the conclusion of trial, Mr. Thomas was convicted of Count I – Conspiracy to Commit Murder and/or Robbery; Count II – Murder of the First Degree with use of a Deadly Weapon; Count III – Murder of the First Degree with Use of a Deadly Weapon; Count IV – Robbery with the Use of a Deadly Weapon; Count V – Burglary While in Possession of a Firearm; Count VI – First Degree Kidnapping with Use of a Deadly Weapon.

The penalty hearing took place on June 25, 1997, the jury found in its' special verdict the existence of all six (6) charged aggravating circumstances and found no mitigating circumstances and based thereon returned two verdicts of death.

Mr. Thomas' direct appeal was denied by the Nevada Supreme Court on November 25, 1998, and his conviction and sentence of death affirmed. Subsequently, Mr. Thomas filed a Petition for Writ of Habeas Corpus (Post Conviction) in the Eighth Judicial District Court. On August 27, 2001, newly appointed counsel, David M. Schieck, filed a Supplemental Petition for Writ of Habeas Corpus (Post Conviction) on behalf of Mr. Thomas. Mr. Schieck's Supplemental Petition addressed several errors committed by Mr. Thomas' trial counsel leading up to and during trial. After an evidentiary hearing, and additional briefing by both sides, the District Court denied Mr. Thomas' petition.

On September 18, 2002, Mr. Thomas appealed the District Court's denial of his petition to the Nevada Supreme Court. The Supreme Court found that Mr. Thomas' trial counsel was ineffective for failing to object to certain penalty phase jury instructions. The Court remanded the case back to District Court to conduct a new penalty hearing. Mr. Schieck, along with Daniel Albregts represented Mr. Thomas during his second penalty hearing. As witnesses for

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the defense, counsel called several of Mr. Thomas' family members and persons who have associated with Mr. Thomas in prison to testify as to Mr. Thomas' character. However, defense counsel did not hire or call to the stand a psychologist to testify as to any of Mr. Thomas' mental health issues, or present to the jury other necessary mitigation evidence to argue against the death penalty. Again, a jury sentenced Marlo Thomas to death.

Subsequently, Mr. Thomas filed another Petition for Writ of Habeas Corpus (Post Conviction) to raise issues of ineffective assistance of counsel on behalf of Mr. Schieck and Mr. Albregts at his second Penalty Hearing. This honorable court appointed undersigned counsel pursuant to Supreme Court Rule 250. A review of the case history made it immediately apparent that a Neuropsychological and Psychological evaluation of Mr. Thomas was necessary to determine whether additional mitigating evidence existed that should have been presented by defense counsel at Mr. Thomas' second penalty hearing. This court approved funds to hire Jonathan H. Mack, Psy.D, to review Mr. Thomas' records and complete the evaluations. This Supplement now follows.

II.

ARGUMENT

The Sixth Amendment of the United States Constitution guarantees that an accused person shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly defined when the assistance of counsel becomes ineffective and an accused person is denied this right. In *Strickland v. Washington,* 466 U.S. 668 (1984), the Court established a two-prong test for determining ineffective assistance of counsel at trial. *See* also *Porter v. McCollum*, 130 S.Ct. 447, 175 L. Ed. 2d 398 (2009). To prevail under *Strickland*, a defendant must demonstrate both that his "counsel's performance was deficient" and "that the deficient

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performance prejudiced the defense." *Id.* at 687. To satisfy the second prong of *Strickland*, a defendant must show that his trial counsel's performance prejudiced his defense such that he suffered actual prejudice and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This test has also been adopted in Nevada *See Hurd v. State*, 114 Nev. 182, 953 P.2d 270 (1998). Further, Trial counsels' actions must be based on reasonable strategic decisions. *Strickland*, 466 U.S. at 691.

In this case, Mr. Thomas' trial counsel, Mr. Schieck and Mr. Albregts made a series of errors that so undermined the proper functioning of the adversarial process that the outcome of Mr. Thomas' proceedings cannot be relied upon as having produced a just result. It is readily apparent from consulting with Mr. Thomas, and reviewing his records, that he suffers from several neuropsychological impairments. This evidence should have been presented as mitigating evidence at Mr. Thomas' second penalty hearing.

A. **Penalty hearing counsel was ineffective for failure to investigate and present evidence at the penalty hearing that Mr. Thomas is Mentally Retarded, and therefore, may not be sentenced to death as it would be a violation of the 8th amendment's prohibition against cruel and unusual punishment.**

In 2002, the United States Supreme Court determined that it was cruel and unusual punishment to execute someone who is mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002). However, the Court did not define mental retardation themselves, but left it up to the States to develop their own ways to enforce this constitutional restriction. *Id. at 317*. In Nevada, the legislature enacted NRS 174.098 to set forth the procedure for raising issues of mental retardation in a capital case. *Ybarra v. State*, 247 P.3d 269, 273 (2011). Under NRS 174.098(7),

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mentally retarded is defined as "significant sub-average general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period."

Here, Dr. Mack found substantial evidence that Mr. Thomas falls into the category of mental retardation. In coming to such a conclusion, Dr. Mack completed a thorough evaluation, *See* Exhibit A, including a review of Mr. Thomas' records and administering a barrage of tests. The following is a list of the records reviewed and the tests completed:

Tests administered:

Beck Anxiety Inventory
Beck Depression Inventory- II
Beck Hopelessness Scale
Boston Diagnostic Aphasia Screening Examination, Complex Ideational Material Subtest
Conners' Adult ADHD Rating Scales-Long Version Self-Report
Controlled Oral Word Association Test/Animal Naming
Grooved Pegboard
Halstead-Reitan Neuropsychological Test Battery
Aphasia Screening Test
The Booklet Category Test-II
Grip Strength Test
Latteral Dominance Examination with Right/Left Orientation
Manual Finger Tapping Test
Reitan-Klove Sensory Perceptual Examination with Visual Field Screening
Seashore Rhythm Test
Speech Sounds Perception Test
Tactual Performance Test
Trail Making Tests, A and B
Ruff Figural Fluency Test
Stroop Color and Word Test
Test of Memory Malingering
Wechsler Adult Intelligence Scale-IV
Wide Range Achievement Test-4
Wisconsin Card Sorting Test

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Records Reviewed:

Confidential Psychological Evaluation by Eric Smith, Ph.D.	11/13/1972
Clark County School District Special Student Services Psychological Report by Jerry Swan School Psychologist	11/12/1981
Clark County School District Special Student Services Psychological Report by Jerry Swan, School Psychologist	2/2/1984
Neuropsychological Assessment by Thomas F. Kinsora, Ph. D.	1997
Chronological Life History of Marlo Thomas	10/26/2011
Marlo Thomas Psycho-Medical-Social History Synopsis	11/04/2011
Investigative Memorandum, Regarding Social History Report and Narrative by Tena S. Francis	11/08/2011

In Nevada, the Supreme Court found three concepts particularly influential in finding mental retardation: "(1) significant limitations in intellectual functioning, (2) significant limitations in adaptive functioning, and (3) age of onset." *Ybarra,* 247 P.3d at 273-274.

1. Mr. Thomas should be considered as an individual with significant limitations in intellectual functioning because he was found to have an IQ of 72.

The first concept considered by the Court in determining mental retardation is generally measured by intelligence (IQ) tests. *Id* at 274. The Court found that persons with IQ scores between 70 and 75 are considered in the category of sub-average intellectual functioning. *Id.*

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Here, Dr. Mack administered the Wechsler Adult Intelligence Scale-IV (WAIS-IV), which tested and scored Mr. Thomas in six categories: Verbal Comprehension, Perceptual Reasoning, Working Memory, Processing Speed, Full Scale, and General Ability. (*See* Exhibit A, page 24). The WAIS-IV is a reliable and valid measure of intellectual functioning. Mr. Thomas' Full Scale IQ score was found to be 72. *Id.* This puts Mr. Thomas' impairment in the 3rd percentile rank. *Id.* Because he is in the 70-75 range contemplated under *Ybarra*, Mr. Thomas is considered to be an individual with significant limitations in intellectual functioning.

2. Mr. Thomas should be considered as an individual with a significant deficit in adaptive behavior.

The Supreme Court found that "adaptive behavior is critical to a mental retardation diagnosis." *Ybarra* 247 P.3d at 274. A significant deficit in adaptive behavior may be established when the individual has been shown to have had a difficulty adjusting to ordinary demands in daily life due to a lack of conceptual, social, and practical skills. *Id.*

As a child, Mr. Thomas had chronic enuresis, the inability to control ones urination. Due to this problem, Mr. Thomas was routinely teased by his peers and called "stinky." *See* Exhibit A, Page 34. He has had a long history of academic learning difficulties, emotional and behavioral dyscontrol, dysregulation of aggression, and anger starting at an early age. *Id.* Dr. Mack found that Mr. Thomas' history supports the fact that "Mr. Thomas had neurodevelopmental brain damage with borderline intellectual functions, severe learning disabilities, and communication deficits documented at an early age." *Id.* Mr. Mack suggests Mr. Thomas' bladder control issues may have been an indication of childhood anxiety. *Id.* Also, Dr. Mack found that Mr. Thomas' 113 errors on the Halstead Category Test is in the range of neurocognitive deficits that impair activities of daily life to a significant extent. (*Id.* at 35).

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In sum, for Mr. Thomas, adjusting to the ordinary demands in everyday life was nearly impossible due to his numerous impairments which caused a lack of conceptual, social and practical skills.

3. The results of Mr. Thomas' evaluations substantiate the presence of chronic, predominantly neurodevelopmental, impairment, which indicates the onset of retardation prior to Mr. Thomas becoming 18 years old.

The Court in *Ybarra* determined that it was relevant that the individual was under the age of 18 at the time of the onset of the mental retardation, to ensure mental retardation rather than another mental impairment that occurred later in life, and that the person is not feigning mental retardation to avoid capital punishment. *Ybarra*, 247 P.3d at 275. This concept is not intended to "exclude some people with intellectual disabilities from the mental retardation category, but rather to differentiate between individuals with mental retardation and individuals with other mental deficits caused by injuries or diseases that occurred during adulthood." *Id.*

Here, Mr. Mack determined that the neuropsychological testing that he completed did "absolutely substantiate the presence of a chronic, likely predominantly neurodevelopmental, encephalopathy in the moderate brain damage range." (*See* Exhibit A, Page 36). Additionally, under the Test of Memory Malingering (TOMM), Mr. Thomas' performance, along with his observable level of cooperation and motivation, showed that the results are considered valid and reliable estimates of his current psychological and neuropsychological functioning. *Id at 23.* Mr. Thomas truthful and honest participation in the barrage of tests administered by Dr. Mack, give reliability to Dr. Mack's results. Therefore, Mr. Thomas should be considered by this court as an individual who falls into the category of mentally retarded prior to the age of 18.

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Due to the fact that Mr. Thomas falls into all three concepts the Nevada Supreme Court has established for determining whether an individual is mentally retarded, and therefore, may not be sentenced to the death penalty, this Court must find that prior counsel was ineffective for failing to investigate and present this issue to the jury at Mr. Thomas' second penalty hearing.

B. Penalty hearing counsel was ineffective for failure to investigate and present evidence at the penalty hearing that Mr. Thomas suffered neurological impairment due to Fetal Alcohol Syndrome, and other mitigating evidence from Appellant's childhood.

Dr. Mack found that Mr. Thomas was severely exposed to alcohol on a daily basis while in the whom of his mother Georgia. *See* Exhibit A, Page 34. Mr. Thomas' neuropsychological profile and behavioral characteristics are highly consistent with the known chronic effects of Fetal alcohol Spectrum Disorder. *Id.* In addition, Dr. Mack found evidence that Mr. Thomas was abused as a child and infant, as his father would repeatedly kick Georgia in the stomach when she was pregnant with Mr. Thomas, and Mr. Thomas' father exposed him to vodka. All of this information that came about through Dr. Mack's research should have been brought forth to the jury as mitigation evidence during Mr. Thomas' second penalty hearing. Therefore, prior counsel was ineffective, and a new penalty hearing is warranted.

III.

CONCLUSION

Based on the Points and Authorities herein contained, it is respectfully requested that Marlo Thomas' Petition be granted and the sentence of death be set aside, or in the alternative, that an evidentiary hearing be granted in order to further flush out the issues presented in his Petition.

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VERIFICATION

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

BRET O. WHIPPLE, being first duly sworn, deposes and says:

That he is the attorney of record for Petitioner in the above entitled matter; that he has read the foregoing Petition, knows the contents thereof, and that the same is true of his own knowledge, except for those matters therein stated on information and belief, and as to those matters, he believes them to be true; that Petitioner, Marlo Thomas personally authorizes him to commence this Writ of Habeas Corpus action.

BRET O. WHIPPLE, ESQ.

SUBSCRIBED and SWORN to before me
this 31 day of March, 2014.

NOTARY PUBLIC in and for said
County and State

ALBERTO CASTRO
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 06-16-17
Certificate No: 13-11217-1

EXHIBIT A

EXHIBIT A

October 20, 2013

Brett Whipple, Esq.
Justice Law Center
1100 S. Tenth Street
Las Vegas, NV 89104

RE: **Marlo Thomas**
REPORT: Neuropsychological and Psychological Evaluation
DATE(S) OF EVALUATION: 4/2/2012 and 4/3/2012
DATE OF BIRTH: 11/6/1972
AGE: 39
MEDICATION: None
YEARS OF EDUCATION: 12 years
EXAMINERS: Jonathan H. Mack, Psy.D.

Dear Mr. Whipple:

The following represents my report of my neuropsychological evaluation of Marlo Thomas, whom I evaluated on 4/2/12 and 4/3/12. As you know, Mr. Thomas is currently on death row for capital murder in the state of Nevada, and this evaluation was performed at your request to address neuropsychological impairments that may provide mitigating circumstances related to his sentencing. This report is based on my clinical interview of Mr. Thomas, administration of a battery of neuropsychological tests by me, and an extensive review of records summarized below.

TESTS ADMINISTERED:

Beck Anxiety Inventory
Beck Depression Inventory-II
Beck Hopelessness Scale
Boston Diagnostic Aphasia Screening Examination, Complex Ideational Material Subtest
Conners' Adult ADHD Rating Scales-Long Version Self-Report
Controlled Oral Word Association Test/Animal Naming
Grooved Pegboard
Halstead-Reitan Neuropsychological Test Battery
- Aphasia Screening Test
- The Booklet Category Test-II
- Grip Strength Test
- Lateral Dominance Examination with Right/Left Orientation
- Manual Finger Tapping Test
- Reitan-Klove Sensory Perceptual Examination with Visual Field Screening
- Seashore Rhythm Test
- Speech Sounds Perception Test
- Tactual Performance Test

Trail Making Tests, A and B
Ruff Figural Fluency Test
Stroop Color and Word Test
Test of Memory Malingering
Wechsler Adult Intelligence Scale-IV
Wide Range Achievement Test – 4
Wisconsin Card Sorting Test

RECORDS REVIEWED:

DATE	SUMMARY	DOCUMENT
11/12/1981	Clark County School District Special Student Services Psychological Report was reviewed. The WISC-R, WRAT, PIAT, PPVT, Beery VMI, Motor Free, and Behavior Problem Checklist were the instruments used for this evaluation. WISC-R Verbal IQ = 85 Information , ss = 6 Similarities, ss = 8 Arithmetic, ss = 8 Vocabulary, ss = 9 Performance IQ = 86 Picture Completion, ss = 8 Picture Arrangement, ss = 8 Block Design, ss = 9 Object Assembly, ss = 10 Coding, ss = 5 Full Scale IQ = 84 PPVT IQ = 81 WRAT Reading, SS = 66, 1st Percentile Spelling, SS = 69, 2nd Percentile Arithmetic, SS = 84, 14th Percentile PIAT Math, SS = 82, 12th Percentile Reading Recognition, SS = 72, 3rd Percentile Spelling, SS = 69, 2nd Percentile Beery VMI Age 6-5 Motor Free Perceptual Age 6-8 Behavior Problem Checklist Acting out and aggressive tendencies.	Clark County School District Special Student Services Psychological Report by Jerry Swan, School Psychologist

	SUMMARY: "The results of this evaluation would suggest that Marlo is currently functioning in the slow learner range of intellectual development and that current achievement levels are below the expected level in reading and spelling. The obtained discrepancy was of a magnitude that it would meet the significant ability – achievement discrepancy criteria for special education services. Significant behavioral concerns were also identified, specifically acting out and aggressive tendencies in unstructured settings." RECOMMENDATIONS: "It is recommended that the Multidisciplinary Diagnostic Team consider placement in the resource room program on the basis of a learning disability. A behavioral control problem is also recommended relative to unstructured time. Behavior in the classroom should be closely monitored and if this area becomes a problem, the Multidisciplinary Team should be reconvened to consider appropriate alternatives."	
2/2/1984	Clark County School District Special Student Services Psychological Report was reviewed. The WRAT, PIAT, SIT, Bender, and Behavior Problem Checklist were the instruments used for this evaluation. <u>Slosson Intelligence Test (SIT)</u> IQ = 83, M.A. = 83 <u>WRAT</u> Reading, SS = 75, 5th Percentile Spelling, SS = 62, 1st Percentile Arithmetic, SS = 82, 12th Percentile <u>PIAT</u> Math, SS = 85, 16th Percentile Reading Recognition, SS = 74, 4th Percentile Reading Comprehension, SS = 72, 3rd Percentile Spelling, SS = 65, 1st Percentile <u>Behavior Problem Checklist</u> Aggressive behavior, failure to follow school rules, disruptive behavior and insubordination. DISCUSSION/SUMMARY: "Marlo was evaluated to determine current levels of functioning and to address appropriate programming. He was initially placed in the resource program on the basis of a learning disability with secondary behavioral concerns relative to unstructured settings. Current information would suggest that behavior has become the factor of primary educational significance. Inappropriate behavior has become a major factor in structured and unstructured settings. Specific areas of concern include: aggressive behavior, failure to follow school rules, disruptive behavior and insubordination." RECOMMENDATIONS: "It is recommended that the MDT consider eligibility as an	Clark County School District Special Student Services Psychological Report by Jerry Swan, School Psychologist

	educationally handicapped student on the basis of the discordant peer relationships, failure to adapt and function at an age appropriate level, and aggressive and acting out behaviors. Although the learning deficits still exist and need to be addressed they would appear to be secondary contributory factors at this time. It would appear that the possibility of a more restrictive educational environment should be pursued as a means of meeting Marlo's educational needs."	
11/13/1972	Confidential Psychological Evaluation by Eric Smith, Ph.D. was reviewed. Mr. Thomas, 12-years-old at the time of evaluation, was referred due to his aggressive behavior and because he was charged with Trespassing and Battery. He allegedly entered a house unlawfully and kicked a female occupant as he left. Mental Status: Marlo was cooperative with examiner. Mild deficits were noted in attention span and concentration. Memory, orientation, level of consciousness, perceptual processes, and thought content were unremarkable. Intellectual functioning appeared below average, mood was composed with limited affect, and mood changes were not noted. Judgment appears to be "extremely poor." No serious history of substance abuse or suicide attempts was noted. Diagnosis: 312.00 Conduct Disorder Prognosis: "The probability for further acts of antisocial behavior is high and the court will most likely witness a repetitive and persistent pattern. This, in turn, will obviously impair both his school and social functioning. Marlo's disorder precursor to the antisocial personality and he will need a highly controlled living system which includes all aspects of functioning."	Confidential Psychological Evaluation by Eric Smith, Ph.D.
Undated, 1997	Neuropsychological Assessment by Thomas F. Kinsora, Ph.D. was reviewed. Mr. Thomas was awaiting trial for his alleged connection to the robbery of the Lone star restaurant and the murder of two employees at that restaurant on 4/15/96. Social History Mr. Thomas reported that he has three brothers, ages 29, 28 and 16, and that he was primarily raised by his older brother because his mother often was working as a custodian when he was at home. His brothers were characterized as "strict authoritarians" who tried to keep Mr. Thomas out of trouble. He reported that his mother kept the house well-stocked with food, took the children in for medical attention, and sought help for Mr. Thomas' behavioral problems. He stated that emotional support and nurturing were "very good" from his mother and brothers. Physical and sexual abuse were each denied, and Mr. Thomas stated that discipline consisted of restriction and occasional spanking. Mr. Thomas reported getting in trouble often because of difficulties controlling his temper and for fighting. He attended many different schools, including alternative schools that instituted strict behavioral modification programs. At age 13, he was found guilty of felony battery and was sent to Elko, NV for six months. This charge was	Neuropsychological Assessment by Thomas F. Kinsora, Ph.D.

related to beating an adult with a pool cue, and Mr. Thomas claimed that he was helping a friend who was being beaten by the adult. During his juvenile years, Mr. Thomas was reportedly picked up for over ten incidences of battery, two incidences of trespassing, evading a police officer, vagrancy and prowling, three incidents of grand larceny, possession of a stolen vehicle, domestic violence, robbery with the use of a deadly weapon and curfew violations. Many of these incidences were dismissed. Mr. Thomas served an unstated amount of time in Elko, NV for the stolen vehicle at 16-years-old, and he spent six years in the Nevada State Penitentiary for attempted robbery.

Education/Work History

Mr. Thomas has 11 years of education. He moved schools frequently, including nine school changes by 4th grade. Part of his education occurred at correctional facilities and alternative schools that had behavioral components. Mr. Thomas reported persistent problems with reading, spelling, and arithmetic. Psychological reports suggest significant difficulties in each of these areas and the presence of pathognomonic signs of dyslexia including letter reversals and poor letter-sound association skills. His grades were C's and D's. His verbal IQ was measured at be 85 and 81 at various points, his performance IQ at 86 and 92, and his full scale IQ at 84 at 85. Reading, spelling and arithmetic scores have all fallen well below his grade level and age level across assessments.

Vocationally, Mr. Thomas was employed at Lone Star Restaurant for several months prior to his arrest. He held several jobs at McDonald's and made money doing other odd jobs at other times.

Social History according to Georgia Thomas, Marlo's Mother

Georgia reported that she became extremely intoxicated on wine and vodka everyday when she was pregnant with Marlo. She was frequently abused by Marlo's father while pregnant, including being kicked and punched in the stomach. She did not recall if Marlo's delivery was difficult. Georgia stated that Marlo was a quiet baby who rarely cried. She recalled difficulty with toilet training and that Marlo had bladder incontinence nearly every other day until he was 12. Marlo reportedly had difficulty with anger control and hyperactivity as a child, and unknown medications were tried. He accepted love and affection and liked to be hugged. Marlo tended to sympathize with others and defend those who could not defend themselves. He reportedly liked animals and often took strays home. He was never observed to be cruel to animals, and he was never observed to set fires.

Georgia reported that she viewed Marlo as "temperamental, argumentative, and unable to get along with authority." Peers reportedly called him "Stinky" and picked on him "incessantly." Because he refused to shower and because he smelled of urine from his enuresis. Georgia reported that he spent time with peers who were similarly rejected and that he was very eager to find acceptance and excitement through various means that were often illegal, including experimenting with drugs and stealing vehicles. Marlo ran away on two occasions during elementary school, but always returned home.

Georgia reported that she "beat [Marlo] up" and frequently "whipping his behind" when he misbehaved. She reported that Marlo believed that others were out to get him, that no one loved him, and that his mother preferred her other children. She reported that Marlo's behavior began using drugs frequently in the month prior to the Long Horn Restaurant incident. Georgia stated that his behavior changed, and there was an incident in which he came home "drunk and drugged up" and attempted to beat everyone up at his mother's house. She did not know what drugs Marlo may have been using.

Neuromedical History

Marlo was using no medications at the time of the evaluation, and his past medical history was negative for significant illnesses or ongoing medical problems. Developmental milestones were on time. Marlo was diagnosed with a "hyperactive disorder" according to his mother and placed on a variety of unknown medications for a short time. Marlo reported that he enjoyed smoking marijuana and drank alcohol occasionally. No significant neuromedical conditions, early childhood illnesses or head injuries were reported by Mr. Thomas. He is unaware of neuro-toxic exposure.

Behavioral Observations

Mr. Thomas appeared to be a good historian who neither overstated accomplishments nor over-criticized himself. He offered a rationale for each of his illegal actions, and in most cases, he believed that he was unfairly treated or falsely accused. Mr. Thomas talked excessively at times, but mechanical aspects of speech were unremarkable. Test results appear to be valid based on understanding and effort, and all other observations were unremarkable.

Tests Administered

Boston Naming Test
Controlled One-Word Association Test
Finger Oscillation Test
Grooved Pegboard Test
Hare Psychopathy Checklist-Revised (PCL-R)
Interview
Minnesota Multiphasic Personality Inventory-2 (MMPI-2)
Paced Auditory Serial Addition Test (PASAT)
Proverb Screen
Recognition Memory Test
Rey Auditory Verbal Learning Test
Rey Complex Figure
Short Category Test
Test of Problem Solving
Trails A & B
Wechsler Adult Intelligence Scale-Revised (WAIS-R)
Wechsler Memory Scale-Revised (selected subtests)
Wide Range Achievement Test-Revised (WRAT-R)
Wisconsin Card Sorting Test

Test Results

Overall, it appears that Mr. Thomas put forth adequate effort and did not attempt to appear impaired in his cognitive or personality functioning.

Intellectual Testing
WAIS-R
FSIQ = 79, 8th percentile
VIQ = 82, 12th percentile
PIQ = 78, 7th percentile

Academic Achievement
WRAT-R
Word Reading = 4th percentile
Spelling = 1st percentile
Arithmetic = 1st percentile

Dr. Kinsora concluded that these academic difficulties appear to be due to true learning disability, limited intellectual capacity, and an impoverished environment. Analysis of spelling errors suggested "great difficulty translating auditory information into correct sound units in written language." His reading problems appear to "come from an inability to decode sounds of written information."

Attention, Concentration, Mental Speed
Trails A = 31", average
Trails B = 113", mildly impaired
Digit Symbol = 41", mildly impaired
PASAT = severely impaired
Digit Span Forward = average
Digit Span Backward = mildly impaired

Dr. Kinsora concluded that "Mr. Thomas demonstrates attention, concentration, and mental processing speed that are significantly below average when compared to other his age and with similar education. His ability to manipulate information in his mind and his ability to concentrate when solving personal or hypothetical problems will likely be significantly below normal for his age. The severity of his deficits is consistent with a mild but significant level of organic brain dysfunction.

Language Skills
"Simple visual confrontational naming was intact, no significant difficulty was noted enunciating multisyllabic words, and repetition of language was intact. No deficits related to auditory comprehension were noted. His ability to think abstractly is clearly in the low average range compared to others his age." With regard to functional impairments, "language skills are intact but reflect an impoverished background with limited and intellectual resources."

Spatial-Constructional Abilities
Rey Complex Figure = average, with organized approach
Block Design , T = 37, mildly impaired
Object Assembly, T = 42, low average

Dr. Kinsora concluded that "overall, Mr. Thomas' perceptual and constructional skills are adequate but in the borderline range. Functionally, will have at least mild difficulties in any situation that require him to analyze spatial details, differentiate subtle features, or

	put complex objects or products together. *Memory* WMS-R Logical Memory = 19/50, 17th percentile Rey Complex Figure, Delayed Recall = average Rey Auditory Verbal Learning Test = average for delayed, immediate, and recognition memory, though intrusions were "slightly high." Dr. Kinsora concluded that "Mr. Thomas's memory and new learning skills are well within normal limits and no functional problems should be noted in this area. His learning is adequately organized and follows a typical pattern of recall. *Frontal Systems/Self-Regulation* COWAT = average TRAILS B = 113", mildly impaired WCST = average Short Category Test = low average Mr. Thomas was administered the TOPS, a measure of problem-solving skills in which he was required to generate solutions and rationales for 13 hypothetical problems. On this measure he performed at the level of a 14-year, 4-month old person. Dr. Kinsora concluded that "Mr. Thomas possesses significantly impaired skills related to social judgment and social problem solving. He may fail to understand social situation and may fail to apply good judgment in his attempts to solve personal issues. He has difficulty rapidly generating solutions to problems, yet if given time he is able to use feedback given to him to change his behavior." *Motor Skills* Overall, both fine motor speed and fine motor dexterity were bilaterally intact. *Social/Emotional Functioning* MMPI-2: No validity scales were elevated, and this profile appears to be valid. His profile was elevated on multiple clinical scales. He showed a particularly high elevation on scale 9 (Hypomania), and further clinically significant elevations on scales 7 (Anxiety), 8 (Schizophrenia), 6 (Paranoia), and 4 (Psychopathic Deviate). According to Dr. Kinsora, Mr. Thomas' profile is consistent "with an individual who has experienced significant hypomanic episodes, characterized by excessive energy, feelings of imperturbability and grandiosity. He also appears to be significantly paranoid with persistent feelings of persecution and betrayal. Likewise, he admits to persistent bizarre sensory experiences and intrusive thoughts that may be related to an underlying formal thought disorder, such as seen in schizophrenia. Impulse control is a problem. He feels dejected and alienated from others, and does not appear to have a good grasp of who he is and his place in society. He has great difficulty with authority." HARE PCL-R: Factor 1 = 7	

Factor = 16
Total adjusted score = 24.2
This total score is consistent with the score for 51.1% of the prison population. His profile is not consistent with that seen in severe sociopathic individuals with no capacity for remorse, but is generally consistent with that seen in an individual with an antisocial personality disorder.

Summary and Recommendations:
Malingering and suboptimal effort were not noted. The following pattern of performance emerged from the assessment:

1. Intellectual functioning is in the borderline range at 79, and both verbal reasoning and visual/perceptual abilities are consistent with this score.
2. Academic skills testing suggest a learning disorder for reading, writing and arithmetic.
3. Attention, concentration and mental processing speed are significantly below average. Complex forms of concentration are severely impaired.
4. Basic language skills including word finding and comprehension are adequate, though vocabulary is "rather poor."
5. Visual processing and constructional skills are in the borderline-impaired range.
6. Memory skills are fairly intact.
7. Social problem solving is clearly impaired and he has great difficulty generating solutions to problems while under the duress of time or stress.
8. Motor skills are grossly intact in terms of speed and dexterity.
9. Personality assessment revealed a highly suspicious man with persistent feelings of betrayal, impulse control problems, and difficulties with authority.

According to Dr. Kinsora, Mr. Thomas "has a great deal of difficulty managing his impulses in society. He has limited intellectual skills and when faced with problems, he is unable to properly arrive at solutions. His routine response to difficulty is anger and physical threats. His anger has and will likely continue to get him into trouble in society for some time to come. His sense of being persecuted and perpetually wronged by other stems from his childhood and his unique manner of interpreting his world. Unfortunately, this world view has caused him to act out against authority and society. I do not believe, however, that Mr. Thomas is a cold sociopath who has no remorse for his actions. In fact he seems to have very strong beliefs and a code of moral[ity]. In this sense, he is capable of showing remorse and has the ability to care deeply for others. Such qualities are lacking in a true sociopath.

"With some qualification, he fits within the diagnosis of Antisocial Personality Disorder. Research suggests that the criminal behavior and antisocial traits dissipate significantly in the fourth decade of life for most of these individuals, at which time they typically become law abiding citizens despite their violent, crime ridden early life. M.

	Thomas will likely function well within the structure provided by the correctional system where there are fewer ambiguities and more immediate feedback regarding the appropriateness of his behavior than are found in society. <u>ICD-9 Diagnostic Impressions</u> Antisocial Personality Disorder.	
11/09/2009	Request for Funds for Investigative Assistance in Nevada vs. Marlo Thomas was reviewed. Marlo has been convicted of two counts of first degree capital murder. It is necessary to fully investigate any and all adaptive deficits that existed before Mr. Thomas was 18 years of age. Factors such as mental retardation and Fetal Alcohol Syndrome Spectrum Disorder, maternal abandonment, and a number of other mitigating factors that were not presented at his capital sentencing trial must be investigated by a competent neuropsychologist. Dr. Kinsora testified that Mr. Thomas had low intellectual functioning based on his evaluation of Mr. Thomas in 1996-1997 following his arrest for the present crime. Dr. Kinsora testified that Mr. Thomas was considered to be in the borderline range of intellectual functioning as his full scale IQ fell in the 8th percentile. He also stated that Mr. Thomas' reading skills were in the 4th percentile range and his spelling skills were in the 1st percentile. Mr. Thomas was reportedly four IQ points from the mentally retarded range. In the 2002 case *Atkins vs. Virginia*, the US Supreme Court ruled that it was cruel and unusual punishment to execute someone who is mentally retarded. Taking into account the Flynn Effect, which states that an IQ score can increase by 0.33 points per year or up to 0.45 point per year for someone who is mentally retarded, Mr. Thomas' score could be seven to ten points lower than the measured IQ of 79. Dr. Kinsora asserts that Mr. Thomas' IQ may, then, qualify as falling in the mentally retarded range. Dr. Kinsora stated that Mr. Thomas meets the other two prongs of the mentally retarded diagnosis under *Atkins* as he showed significant adaptive functioning deficits due to his learning problems and that these problems occurred before his 18th birthday. There is evidence that Mr. Thomas may suffer from Fetal Alcohol Spectrum Disorder (FASD) although he does not currently display the physical characteristics associated with FASD. Some of the hallmarks of FASD reportedly consist of deficits in cognition or intellect, reasoning, memory, or concentration. Regarding concentration, Dr. Kinsora testified that Mr. Thomas performed at the 1st percentile rank or lower over two trials of an unnamed concentration task (PASAT) and that Mr. Thomas "had a very, very … hard time with this test." Dr. Kinsora also stated that Mr. Thomas is impaired in his ability to solve problems, functioning at the level of a 13-14 year-old according to his estimation. Finally, Mr. Thomas' mother admitted that she drank wine and vodka every day until she was "extremely drunk." This level of alcohol consumption is consistent with a diagnosis of FASD. Dr. Kinsora stated that Mr. Thomas' mother virtually abandoned him at a young age, he suffered from physical abuse, an impoverished upbringing, and as a result, Mr. Thomas developed severe behavioral	Request for Funds for Investigative Assistance in Nevada vs. Marlo Thomas

	problems. More specifically, Mr. Thomas' mother was punched and kicked in her stomach while pregnant with Mr. Thomas "many times" according to her report. He was also "whipped" by his mother, and his father was incarcerated at a young age. Dr. Kinsora testified that Mr. Thomas believed that his mother loved his brothers more than him, creating a sense of abandonment. He also suffered from "very poor" peer relations for much of his childhood according to Dr. Kinsora. In regards to personality functioning, Dr. Kinsora testified that Mr. Thomas has an MMPI-2 profile consistent with someone who has hypomanic episodes, difficulty controlling their impulses, difficulty with authority, feelings of paranoia, and persistent intrusive thoughts. Dr. Kinsora testified regarding Mr. Thomas' Hare Psychopathy Checklist profile. Dr. Kinsora stated that Mr. Thomas is "kind of an antisocial personality. He has a great deal of difficulty with authority. He's had a very hard life growing up, he gotten into multiple brushes with the law. He has difficulty controlling his behavior. But he differs qualitatively or in several ways from what we call the cold sociopath, the person who may glibly go about or happily go about using people and hurting people throughout their lifetimes." Dr. Kinsora continues to testify that Mr. Thomas believes that his actions are justified, typically. He stated that his problem solving is "defective" and that Mr. Thomas is different from someone who has no emotion or kills "for the fun of it," leading to the conclusion that Mr. Thomas is not a "cold sociopath" but often loses his temper due to his difficult childhood. Dr. Kinsora added that his paranoid ideation is involved in his criminal past, again creating a sense that Mr. Thomas feels justified for his crimes. When asked, Dr. Kinsora testified that he would diagnose Mr. Thomas with the following: -ADHD, Predominantly Hyperactive/Impulsive Type -Reading Disorder (possible Dyslexia) -Disorder of Written Expression -Mathematics Disorder -Learning Disorder, NOS (related to Borderline Intellectual Functioning) -Antisocial Personality Disorder -Intermittent Explosive Disorder Dr. Kinsora stated that Antisocial Personalities tend to "burn out" by the person's fourth decade of life. He added that Mr. Thomas would function "well, in general" in the prison system because of "controls" on his behavior that are not present outside of the prison system. He reported that Mr. Thomas' past troubles within the prison system were related to his "hot temper," his inability to control his impulses, and his difficulties with social reasoning and problem solving.	
10/26/2011	Chronological life history of Marlo Thomas was reviewed. Mr. Thomas' father, Bobby Lewis, reportedly beat Mr. Thomas' mother, Georgia, while she was pregnant. He was described as "extremely violent and kicked and punched Georgia in the abdomen. Georgia reportedly drank wine and vodka every night to the point of "extreme intoxication." She also worked at an industrial laundry during her pregnancy, so that she was exposed to chemicals that made her ill. Her daily symptoms included: lightheadedness, nausea, vomiting, and	Chronological Life History of Marlo Thomas

headache.

Mr. Thomas was born on 11/6/1972 at his mother's apartment. His father beat her the day of his birth, and Georgia's father beat Bobby "badly" in retaliation. Mr. Thomas is described as being a "sickly child." He had flu-like symptoms for a full month beginning when he was several weeks old. Dr. Laruso, Mr. Thomas' doctor, prescribed strong antibiotics, though Georgia believed that he should have been hospitalized. Mr. Thomas was reportedly dropped on his head by a babysitter, but he was not taken to the hospital. Mr. Thomas' father and a friend reportedly gave Mr. Thomas an undetermined amount of Vodka between that ages of one and two years old causing him to sleep for an unusually long time. Georgia reportedly had difficulty waking him up for approximately two hours. Georgia reportedly did not take care of her children and expected Darrel, Mr. Thomas' older brother, to raise the children in many ways. She was neglectful with homework, grocery-shopping, cooking, laundry and bill-paying. She also made no effort to make sure the children attended school. Georgia reported that she beat Marlo, neglected him, and did not bring him for medical treatment when it was necessary. She explained that this was because of her "hatred" for Bobby. Bobby reportedly told Mr. Thomas that he was not his child because of his lighter skin tone, and Mr. Thomas began asking why his father didn't love him beginning at age 6. Mr. Thomas was reportedly "shunned" overall. Mr. Thomas and his brothers reportedly switched schools frequently because they moved often, generally due to inability to pay bills. Georgia described Mr. Thomas as a "mean" child and that he bit and hit and picked fight with neighborhood children. He also repeated bad behaviors despite punishment, appearing not to understand why he was being punished. He was also described as "quiet" and not interested in toys. Mr. Thomas reportedly suffered from enuresis until 12-years-old and ran away on at least two occasions during his elementary school years.

Bobby left the family for good when Mr. Thomas was four-years-old, and Georgia began dating Paul Hardwick whom she dated for 12 years. Bobby wanted to see the children but was not permitted to do so by Georgia. Mr. Thomas fell of out of a moving car when he was five-years-old and sustained a closed head injury. No medical treatment was received. Mr. Thomas was apparently unable to learn school material or complete homework from kindergarten forward despite his older brother, Darrell, reportedly helping him. Teachers often stated that it was an inability to pay attention that led to Mr. Thomas' academic difficulties. Mr. Thomas reportedly misinterpreted the actions of others assuming that the other person was disrespecting him or accusing him of something. Mr. Thomas had no impulse control and got in fights nearly every day. He was unable to complete complex chores around the house. Mr. Thomas refused to bathe or change his clothes causing him to "stink." He was also unable to match his shirt and pants so that he looked "silly." Bobby reentered the children's life when Mr. Thomas was seven, and Bobby began visiting again.

Paul reportedly did not contribute to the home or work and was not faithful to Georgia, but was "a good stand-in father" according to Mr.

Thomas. By 1980, Mr. Thomas lived in a neighborhood characterized by gangs and violence. Mr. Thomas often got into fights at school where he acted "weird" and was "short-tempered."

In the second grade, Mr. Thomas was given a psychological evaluation. His WISC-R scores were as follows: FSIQ 84; Verbal 85; Perceptual 86. WRAT scores were at the 1st percentile for reading, 2nd percentile for spelling, and 14th percentile for math. He scored slightly below his chronological age on the Beery VMI at the 6.5 age equivalent. The examiner noted that Mr. Thomas had "difficulty with language related concepts" and stated he lacked "phonetic analysis skills." He was placed in the Resource Classroom and was labeled as Learning Disabled. By fourth grade, Mr. Thomas had attended 10 different schools. Around this time, his father was sentenced to life in prison for kidnap, burglary, use of a deadly weapon, and sexual assault. Mr. Thomas reported a somewhat contradictory story in which his father was paroled after a short prison stint.

With regard to his teenage years, Mr. Thomas used marijuana and cocaine frequently. He was designated as Specialized Emotionally Handicapped at Children's Behavioral Services (CBS) due to "severe acting out behaviors." Consequently, he did not attend mainstream school. He was kicked out of CBS in 12/1984 for being "agitated and disruptive, verbally and physically." Mr. Thomas was re-evaluated because he was unable to excel in the resource program. His FSIQ was 83. He was described as a "slow learner" and was at the 5th percentile for reading, 1st percentile for spelling, and 12th percentile for math. The evaluator noted the following: "poorly developed phonetic analysis skills;" "comprehension comparable to and limited by decoding skills;" spelling and written language is an area of significant difficulty;" and "significant deficits in encoding." It was recommended that Mr. Thomas be considered educationally handicapped, and his behavior was the primary factor in education. Mr. Thomas was then enrolled at Miley Achievement Center which has small class sizes and groups children by their behavior. When they behave better, they move up to other classes progressively until they can be mainstreamed. He struck a teacher here and was detained. His disposition was judicial remand. Mr. Thomas also struck a student at Miley Behavioral Services. This charge was amended to battery and his disposition on 1/2/85 was probation. Following these incidents, Georgia requests that Mr. Thomas be enrolled in a mainstream school, where he begins his sixth grade year. When Mr. Thomas is 11-years-old, he was also charged with evading a police officer and vagrancy/prowling, charges that were dismissed.

At age 12, Mr. Thomas had a court-ordered psych evaluation by Eric Smith, PhD. He was referred by juvenile probation for the dismissed charge above. Dr. Smith concluded the following: "Although his manner of speech is coherent, Marlo's stream of speech is sometimes incoherent. Mild deficits in attention span and concentration. Below average intellectual functioning. Impulse control and judgment very poor. Conduct disorder, undersocialized, aggressive. Headed towards ASPD diagnosis."

On 1/2/85, Mr. Thomas was placed on formal probation for the above

cases. He was charged with disorderly conduct, and battery was added 5 days later, though the second charge was denied. On 10/2/85, Mr. Thomas was charged with four counts of battery, though all of these charges were later dismissed.

In 1986, Georgia tires of Mr. Harding's cheating and kicks him out of the house. Mr. Thomas' older brother, Larry, moves out of the house the same year. Mr. Thomas returned to Miley Achievement Center for his eighth grade year, but he withdraws on 3/27/87 to attend a mainstream junior high school. After one month, he is transferred back to Miley. He earned B's at Miley. Mr. Thomas' older brother, Darrell, moved out of the house as soon as he turned 18, marrying his first wife. Darrell reported that he "checked in" on Mr. Thomas and his other younger brother to make sure that they were being cared for by Georgia. A teacher named Sherron Robinson befriended Mr. Thomas at Miley. They had off-site lunches together, and he visited her at his house. Mr. Thomas reportedly had a crush on her. Mr. Thomas was arrested on 7/9/87 for Grand Larceny and Battery with a Deadly Weapon. The battery charge was later dropped. The larceny charge was for stealing a bike from a rack outside a junior high that Mr. Thomas had attended in the past. Darrell reported that Mr. Thomas was often treated unfairly by the police as they would approach him, insisting that he talked to them. In these types of situations, Mr. Thomas was generally unable to control himself from mouthing off, and would be handcuffed.

A psychological evaluation was completed on 7/22/86 related to the grand larceny charge. Tests were the Carlson Psychological Survey (CPS) and Junior-Senior High School Personality Questionnaire (HSPQ). Mr. Thomas was classified as "Type 3" on the CPS: immature and rebellious, looking for approval from peers even by way of bad acts, not anti-social. Immaturity was seen as a cause for his difficulty coping with structured settings as this personality type typically follows other peers rather than regard the rules. The HSPQ showed that he was "obedient and easily led by others." Overall, it appeared that Mr. Thomas was easily manipulated by peers.

On 9/2/87, Mr. Thomas was adjudicated delinquent and made a ward of the court for an incident on 7/9/87 in which he struck a security officer when the man attempted to apprehend him for shoplifting. He then stole a mall security vehicle and crashed it during his getaway. Mr. Thomas was then sent to the Third Cottage Program, which is a juvenile detention dorm on the same campus as the regular juvenile detention dorms. Third Cottage residents live in single-person rooms about the size of a prison cell according to Mr. Thomas. He attended school and was punished by being locked in his room. He allegedly assaulted another student at Third Cottage in the dining hall with a fork or knife. Mr. Thomas was placed in "closed status" for his remaining time at Third Cottage. He was kicked out of school for disruptive behavior 7 times in 3 weeks at Third Cottage, often agitating his peers by throwing gang signs. Mr. Thomas was then sent from Third Cottage to Zenoff Hall, where he "exhibited hostile, threatening behavior towards staff and peers." Consequently he was sent to Nevada Youth Treatment Center (NYTC) at Elko, and his commitment ended on 6/21/88.

In 1988, a NYTC Treatment Plan was submitted to the court stating that his intellectual functioning was in the Borderline range according to the Wide Range Intelligence and Personality Test. His capacity score on the same test was "above" this level. The Tennessee Self Concept Scale revealed a profile diagnosis of "Psychological Problem a Conduct Disorder, and Acting Out Types of Behavior." On the Jesness Behavior Checklist, Mr. Thomas scored above the 50th percentile on three observer ratings and below the 31st on eleven others. He was determined to be functioning at the following grade levels: 4.7 for reading; 4.1 for language; and 6.9 for math.

After his release from Elko, he discovers that he has a child with his ex-girlfriend, who was involved with Mr. Thomas' best friend during his incarceration. Mr. Thomas is convinced the baby is his, but he does not continue to pursue this relationship because the child's mother states that it is her current boyfriend's. Mr. Thomas' youth parole counselor details his prior involvement with the law and notes Marlo's "total lack of impulse control and an inability to control his temper is cause for his problems." He had a curfew violation, so he was referred to parole and remained on parole. Mr. Thomas attended three different schools, including an alternative school, in his 11th grade year. On 12/27/89 Mr. Thomas was arrested for battery of his nine year old cousin and was released pending a plea hearing for 02/1990. On 12/28/89, Mr. Thomas and another man, Champ, went to a third man's hotel room offering to sell him crack. This man refused, and Mr. Thomas and his friend beat the victim. Mr. Thomas attempted to "bash" the victim with a "boulder." The victim suffered a broken wrist and had his teeth knocked out.

On 1/4/90, Mr. Thomas was arrested for robbery. On 2/8/90, he was certified as an adult and committed to Clark County Detention Center where he remained for three weeks. He was released and no further action was taken, though he was withdrawn from another high school when they are notified of his arrest. On 3/8/90, he was arrested for auto theft. This was reduced to a misdemeanor on 7/25/90, credit for time served. On 4/10/90, he was charged with robbery with use of a deadly weapon and obstruction of a police officer after a teenager tried to buy drugs from and he stole the teen's money. He pleads guilty to attempted robbery on 10/23/90 and sentenced to six years in state prison. As of 11/20/90, Mr. Thomas had eight outstanding warrants regarding traffic matters.

Sometime in 1991, Mr. Thomas becomes reacquainted with his father, who is also in Ely State Prison. They visit one another in the visiting room. On 9/30/91, Mr. Thomas allegedly attacked an inmate.

In 1992, Mr. Thomas' cousin, Jody, died in a drug deal. Sometime in the same year, he exposed himself in prison, made threats, was generally "very disrespectful," and torn sheets were confiscated from him. Mr. Thomas threatened officers again in 1993. He threw urine into a female guard's face in 1994, and he was discharged later in that year.

After he is released from prison, Mr. Thomas sought out his child.

	The child's mother continued her relationship with Mr. Thomas' friend, and this man asked Mr. Thomas if he could continue to act as the child's father. Mr. Thomas agreed, knowing that he would be back in prison at some point. Mr. Thomas reportedly tried to be "showy," drove a Cadillac, and tried to make himself look important by running with "thugs" according to his older brother, Darrell. In the summer of 1995, he began a relationship with Angela Love with whom he was with until his arrest for murder eight months later. On 3/5/96, Mr. Thomas noticed that his wife's rings were missing. He confronted two neighbors, and recovered two of the rings, but not Angela's wedding ring. Mr. Thomas was then arrested and bailed out by Angela. Mr. Thomas was reportedly intoxicated and violent to both Angela and his younger brother, PJ, in the weeks leading up to his arrest for murder. On 4/15/96, Mr. Thomas planned a robbery with Kenya Hall, a 15-year-old, so that Angela would have money if and when he went to jail for the offenses involving the rings above. He reported that he did not intend for anyone to get hurt during this robbery. He reported that he and Kenya drank alcohol and smoked blunts that day. Carl Dixon and Matt Gianakis were the victims of these murders. On 6/27/97, Dr. Kinsora testified that Mr. Thomas had an IQ of 79, 82 for Verbal and 78 for Perceptual. Mr. Thomas was diagnosed with ADHD, Reading Disorder (Dyslexia), Math Disorder, Borderline Intellectual Functioning, Antisocial Personality Disorder, Intermittent Explosive Disorder, and Impulse Control Disorder. Since his sentence to death, there have been several incidents at Ely State Prison.	
11/04/2011	Marlo Thomas Psycho-Medical-Social History Synopsis was reviewed. Age 0 – **Prenatal assault to Marlo's brain**: Mother's consumption of alcohol; beating sustained by mother at hands of father; Mother's exposure to toluene and other toxins. 1 Month – Suffered from possible respiratory infection, admitted to hospital. Birth to Age 4 – **Witnessed violence:** Father and mother were extremely violent to each other in front of children. Birth to Teenage Years – **Abandonment:** Emotionally and physically, by mother and father. Father denied paternity. Mother hated Marlo because of resemblance to his father. Both parents shunned and berated him. Father disappeared completely from Marlo's life. Approximately 1 Year of Age – **Closed Head Injury**: Marlo was dropped on his head by a babysitter. 1 to 2 Years of Age – **Intoxication:** Marlo is given alcohol by his father; his mother is unable to wake him for several hours.	Marlo Thomas Psycho-Medical-Social History Synopsis

	Age 2 through Teenage Years – **Victim of Physical Violence:** Various. 5 Years Old – **Closed Head Injury:** Marlo fell out of a moving car, striking the pavement. 5 Years old through Teenage Years – **Problems in school from beginning:** Marlo is "not capable" of doing homework; he is "antagonistic" to peers and teachers; suffers from enuresis; is "tormented" by peers because of enuresis and other reasons; Marlo attends many different schools. Age 9 – **Low IQ:** On 11/12/81, Marlo's FSIQ is 84, VIQ is 85 and PIQ is 86 according to the WISC-R. The PPVT Intelligence Test measures his IQ to be 81. WRAT ranks him in the 1st and 2nd percentile for reading and spelling, respectively, and the 14th in math. He reportedly lacked phonetic analysis skills. He was at the 6.5 and 6.8 grade levels on the Beery VMI. He was placed in the Learning Disabled category in the Resource Room at his school. Age 11 – Marlo's father is sent to prison for what is believed to be murder. Age 11 – **Specialized Education:** Marlo is placed in the Specialized Emotionally Handicapped (SHE) program at Children's Behavioral Services (CBS). Marlo was described as "agitated and disruptive, verbally and physically" by CBS. He moves in and out of the CBS program until he is sent to state prison at 17 years old. Age 11 – **Entry into Juvenile Court:** Marlo is frequently charged with batter, robbery and other charges related to behavioral difficulties at school. Age 11 – **CCSD Psych Evaluation:** FSIQ = 83. Learning deficits were determined to be secondary to behavior problems. Spelling and written language was significant deficit, more specifically in encoding. Math was a relative strength. Marlo was classified as Educationally Handicapped by this point. Age 12 – **Court-ordered psych evaluation:** 11/13/84 by Eric Smith. He was referred by juvenile probation for the dismissed charge above. Dr. Smith concluded the following: "Although his manner of speech is coherent, Marlo's stream of speech is sometimes incoherent. Mild deficits in attention span and concentration. Below average intellectual functioning. Impulse control and judgment very poor. Conduct disorder, undersocialized, aggressive. Headed towards ASPD diagnosis." Age 14 – **CCSD psych re-evaluation:** 03/87 by James A. Treanor, school psychologist. WISC-R scores: FS 85, VIQ 81, PIQ 92. Age 14 & 15 – **Court ordered psych evaluation:** Tests were the Carlson Psychological Survey (CPS) and Junior-Senior High School Personality Questionnaire (HSPQ). Mr. Thomas was classified as "Type 3" on the CPS: immature and rebellious, looking for approval	

	from peers even by way of bad acts, not anti-social. Immaturity was seen as a cause for his difficulty coping with structured settings as this personality type typically follows other peers rather than regard the rules. The HSPQ showed that he was "obedient and easily led by others." Overall, it appeared that Mr. Thomas was easily manipulated by peers. Age 14 & 15 – Adjudicated delinquent and made ward of court for larceny and battery offenses. His P.O. recommended placement in a lock-down institution, though none were available at the time in Nevada. P.O. stated that Marlo "has a total lack of impulse control and an inability to control his temper." He was committed to NNYTC twice where he stayed for a total of 14 months. Age 15 – **Institutional psych evaluation:** a NYTC Treatment Plan was submitted to the court stating that his intellectual functioning was in the Borderline range according to the Wide Range Intelligence and Personality Test. His capacity score on the same test was "above" this level. The Tennessee Self Concept Scale revealed a profile diagnosis of "Psychological Problem a Conduct Disorder, and Acting Out Types of Behavior." On the Jesness Behavior Checklist, Mr. Thomas scored above the 50th percentile on three observer ratings and below the 31st on eleven others. He was determined to be functioning at the following grade levels: 4.7 for reading; 4.1 for language; and 6.9 for math. Age 17 – Arrested for "strong-arm type robberies." On two occasions, Marlo was arrested only after returning to the scene of his crimes while the victims were still there, speaking to police about the incident. He received a six-year sentence. Age 18 to 21 – Marlo was incarcerated in state prison. Age 23 – Date of robbery and murders. Age 24 – **Defense psych evaluation by Dr. Kinsora:** Dr. Kinsora testified that Mr. Thomas had an IQ of 79, 82 for Verbal and 78 for Perceptual. Mr. Thomas was diagnosed with ADHD, Reading Disorder (Dyslexia), Math Disorder, Borderline Intellectual Functioning, Antisocial Personality Disorder, Intermittent. Age 24 – Sentenced to death row.	
11/08/2011	Investigative Memorandum, Regarding Social History Report and Narrative by Tena S. Francis was reviewed. **POSSIBLE MITIGATING ISSUES** <u>Possible Intellectual Deficiencies</u> Marlo had serious learning disabilities that were observed beginning in kindergarten. Because of his behavioral issues, however, determining the nature and etiology of his deficits is difficult. Reports from family members regarding adaptive behavior indicate that he may suffer from symptoms related to intellectual disability or mental retardation.	Investigative Memorandum, Regarding Social History Report and Narrative by Tena S. Francis

Possible Neurological Impairment

Marlo's mother drank excessively and consistently throughout her pregnancy with Marlo. She also worked during pregnancy at an industrial laundry where she became sick due to exposure to chemicals, likely toluene. Additionally, Marlo frequently used PCP, cocaine, and marijuana beginning as an adolescent.

Dysfunctional Family

Marlo's family consisted of an absent father, physical violence against the children, emotional neglect, psychological maltreatment, constant school and home relocations, and drug/alcohol addictions. Neither of his parents nor his step-parent appeared to be able to meet the emotional needs of Marlo and his siblings. Greater detail is listed in each of the above areas:

a. Ineffective parenting – "Substance dependence and emotional instability prevented Marlo's parents from identifying, understanding, and responding appropriately to their children's psychological and physical needs. Marlo's parents proved to be ineffective in many ways. As noted … Marlo's father was absent from the home (emotionally) throughout Marlo's life due to alcoholism, drug use and his denial of paternity. He was absent (physically) for most of Marlo's childhood. Marlo's mother (Georgia Thomas) was unavailable to provide for the emotional needs of her children. Because Marlo's mother played a critical role in his life as a genetic contributor, caretaker, attachment figure and role model, it is important to understand the patterns of behavior that he learned from his relationships; not just with Marlo, but with al the members of the family. It is apparent that Marlo did not learn to show affection, to solve problems, or how to communicate effectively from his mother."
b. Absent father – "Research indicates that the most important figure in the life of a child is the same-sex parent. Research also indicates the lack of father (or the presence of a negative father figure) has a serious impact on the development of a male child. Marlo spent much of his childhood either being with a man who refused paternity or being without his father and in the presence of a negative replacement father-figure."
c. Physical abuse of the children – "Undoubtedly, Marlo was traumatized by the anger and violence he was subjected to, both as victim and as a witness. Research indicates the pattern of treatment a child receives during his childhood is as traumatic as any single act of violence. When Marlo was a child, anger and violence was all around him. Children in this position have no place to feel safe and no one to make them feel safe. This does incredible damage to a child's psychological and emotional self. And, the absence of protective forces in Marlo's life exacerbated the long-term consequences of the trauma. The trauma Marlo endured at home made it impossible for him to attend to those matters set aside for children. Documenting childhood trauma is important for every aspect of a capital case, as trauma is often a cause for false confessions, offers explanation for the manner in which the client interacted with police, etc.
d. Psychological abuse – It is widely recognized that the psychological maltreatment of a child is as serious a problem as

	physical abuse. There is ample evidence that Marlo was mistreated as a child. His father pushed him away, denying paternity. Marlo's mother did not hide her dislike for Marlo; he reminded her of his abusive father. e. Neglect – Neglect is defined as the failure of caretakers to provide for basic needs of children and to provide for an adequate level of care. There are many kinds of neglect; the type seen in Marlo's life is emotional neglect (the child's needs for security, support, affection and nurturance are not met). Characteristics of neglectful parents include at least one trait seen in Marlo's mother: lack of judgment and/or lack of motivation and energy (due to her own emotional problems). <u>Marlo's Addictive Disease</u> "Although more information is needed, it is clear that Marlo was drug dependent beginning in adolescence."	

INTERVIEW OF MARLO THOMAS:

Marlo Thomas is a 39-year-old, African-American male who was interviewed at Ely State Prison on April 2, 2012.

MEDICAL/PSYCHIATRIC HISTORY:

Mr. Thomas said he has had a few concussions in his lifetime. He said he had this occur with some arguments in his current incarceration at Nevada State Prison, Ely. Mr. Thomas denied a history of significant headaches, dizziness, tinnitus, vertigo, or loss of sense of taste or smell. He said he has glasses for reading and astigmatism, but otherwise denied blurred vision or diplopia. Photophobia and phonophobia were denied. He said he has some ankle pain due to arthritis.

Mr. Thomas said he hears people calling his name and does not see who it is. He said he hears voices every now and then. He said he talks to himself. He said he saw a couple of people who were ghosts, which may have been shapes or silhouettes. He said he was not thinking there were other people in his cell. He said he has seen a lot of death. He said he saw a silhouette two times this year, and has seen them before in the past as well.

He said he sleeps six to seven hours a night. He said his hearing is not good, and that it is hard for him to comprehend things. He said his concentration is decreased.

In regard to emotional symptoms, Mr. Thomas said he would not commit suicide because he believes in God. He said he has nightmares of the homicides and that the homicides stay with him in his sleep. He said every person has the potential to kill someone. He said he has flashbacks of the homicides and nightmares and cannot shake them. He said he has remorse for what he did to those individuals and began to cry when he said this. He said he gets frustrated easily and is easily irritated.

Mr. Thomas feels like he may have high blood pressure and diabetes.

EDUCATIONAL/VOCATIONAL/CRIMINAL/SOCIAL HISTORY:

Mr. Thomas said he finished high school and was in special education in Las Vegas. He said he should have been in special education earlier, but he was stubborn and started it in sixth grade. He said he appears to understand things a lot when he does not. He said he has been in Ely State Prison since the early 1990s.

When he was 17, he was involved in an attempted robbery with his cousin. He turned 18 before he was convicted. He served four and a half years. He was released in 1994 and within eight months he had two jobs. He married his girlfriend when he got out of prison. He had a job at the Lone Star Restaurant. When he first got out of prison, he worked at McDonald's as a cook and was there for two and a half months. He said he then began work at Lone Star. He was confused about the name of the restaurant calling it Lone Star, All Star and Long Horn at different points. He said he stayed at Lone Star for two to three months, and while there his wife was fighting with his neighbors, and an argument ensued. He wanted to go home to his wife, but he was fired because he had not gone into work to help his wife, and they did not want to let him take a few days off.

He went over to get his last check and once he arrived at the restaurant there were two prep cooks in the kitchen. Mr. Thomas was a dishwasher. One of the prep cooks was named Matt. Mr. Thomas said he had a history of arguing with Matt, who would throw knives into pots and pan. He said the other prep cook involved was Carl. He said Carl let him in. Mr. Thomas said as he was heading to the office, he also tried to see if he could get his job back. His wife had lost her job, and she "went downhill." He saw Matt walking past him and headed to the restroom. He hung out in the restrooms. The restaurant was pretty big. He introduced his brother-in-law who was with him. His name was Kenya. His wife, Angela, stayed in the car. She is 37 now. He has no kids by her and had one child, for whom he was never there. He said he chooses not to speak of this son.

He said the homicides were in April 1996. He said he knocked on the door of the manager's office. The manager was in there, and the safe was open. The manager was counting the money. When they walked in he said his name was Marlo and he asked him for his check. An argument pursued early in the morning. Mr. Thomas said he always carried a gun. He said the guy gave him his check. Mr. Thomas demanded the money in the safe. The manager gave the money to Kenya. He gave the gun to Kenya as well. Matt and Carl went to the restroom. Mr. Thomas went to the restroom, and they were in there. Matt was at the stall/urinal and Carl was by the sink. He said Matt stepped away from the urinal towards the stalls and Carl was by the sink looking in the mirror. When he walked in things were quiet. He started talking to Carl.

Mr. Thomas said he has two counts of murder, two charges of kidnapping, and charges related to robbery. Mr. Thomas said he leaned against the door to the stall. He said he held them inside the restroom and he still does not understand the kidnapping charge. Matt said he did not want to be involved in the conversation. A "tussle" started. Kenya

had his gun in his hand. Carl was by the sink. Carl had a prep knife with him and he had a towel. He said there was a wall between the sink and the door. He said Matt had his hands on Mr. Thomas's shirt and he was pushing him away towards the door and he saw the knife and grabbed it and stabbed Matt in the arm. Carl ran to the sink and tried to help Matt and he stabbed Carl. He said he kept stabbing Carl. Kenya came out of the office. The manager had just left. Carl fell and he died in the restroom and Matt died on the way to the hospital.

Mr. Thomas said he feels the murders were provoked and that he went into the bathroom to prevent a surprise attack. He said he went in there to try to stall them and there was a lot of money in the safe and he said the whole incident spiraled out of control. He said he liked Carl a lot. He said he feels it is terrible that Carl died. He said he feels the murders occurred very quickly. He said he wishes he could change the past and undo his actions. He said he did not go in there with the intent to rob.

Observationally and by history, he appears very impulsive, has poor judgement, and a hair trigger temper, and he admits to these. He said he was teased in school because of his slowness with comprehension, problems spelling, problems with saying a word and forgetting what the word means. He said his learning disability causes him difficulty understanding, and he cannot figure something out. He said he was teased a lot in school and got into fights a lot. He said he started to steal at 13 years old and got away from his mother as soon as he could. He got in with older guys and copied and imitated them, and they led him in the wrong direction. He said he wanted to follow in line. He said the outcome was very terrible. He said he is easily manipulated.

He said Kenya, Angela's brother, was 14 at the time of the homicides. He said Kenya was released in 2006.

He said he was more aggressive in the past and used to be extremely aggressive. He said he is more comfortable as a person now, and he does not have to fake it to please people.

His mother is Georgia Ann Thomas, whom he said drank a lot of Boone Farms Wine. He said his father smoked and used alcohol. He said his father got out of prison in 2009 and he died. He said he has three older brothers and one younger brother. All are on the street except one, Shaeke, who is in prison in California for robbery. He said his oldest brother is 49 and his mother may be 71. He said he has not seen his mother since 2005.

SUBSTANCE HISTORY:

He said around age 14 he began using marijuana and drinking beer. He used PCP every day and cocaine until he was 21 years old. On the day of the crime, he said he had taken cocaine the night before the arrest. He had done ¼ ounce of cocaine and two sticks of "cherm" the night before the arrest. He also smoked about one ounce of marijuana a day, about five blunts a day. He did not smoke cigarettes.

BEHAVIORAL OBSERVATIONS, MENTAL STATUS AND MEASURES OF NEUROPSYCHOLOGICAL EFFORT:

Beck Inventories

Test Type	Raw Score
Beck Depression Inventory-II	38
Beck Anxiety Inventory	23
Beck Hopelessness Scale	11

Test of Memory Malingering

Trial	Score	Cutoff
Trial 1	47	
Trial 2	50	<45

Mr. Thomas cried when talking about the homicides. During the Tactual Performance Test, in which he was blindfolded, he asked if I was laughing at him. He approached to tasks was disorganized, but he did persist. He said his feels he may have high blood pressure and diabetes. This is not yet confirmed. He said he can never forget what he did.

The Beck Inventories are face-valid measures of depression, anxiety and hopelessness. On the BDI-II, Mr. Thomas reported a severe level of depression. He reported a moderate-to-severe level of anxiety on the BAI. Mr. Thomas reported moderate hopelessness on the BHS.

The Test of Memory Malingering (TOMM) is a measure of mental effort on a memory task. Intact performance on the TOMM is generally considered to be predictive of valid and reliable performances across the neuropsychological test battery. Mr. Thomas' score of 50/50 on Trial 2 of the TOMM was above the cutoff for good effort at less than 45. Given Mr. Thomas' performance on the TOMM, along with his observable level of cooperation and motivation, the results of this evaluation are considered a valid and reliable estimate of his current psychological and neuropsychological functioning.

NEUROPSYCHOLOGICAL TEST FINDINGS:

( ) = standard deviation units from the mean in a (+) positive or (-) negative direction
SS = standard score (mean of 100, standard deviation of 15)
ss = scaled score (mean of 10, standard deviation of 3)
wnl = within normal limits
T = T-score (mean of 50, standard deviation of 10)
" = Seconds
PR = Percentile Rank
NDS= Neuropsychological Deficit Scale
HRB= Heaton 2004 Normative Data

INTELLECTUAL FUNCTIONS:

Wechsler Adult Intelligence Scale-IV

Index	Composite Score	Percentile Rank
Verbal Comprehension	85	16
Perceptual Reasoning	71	3
Working Memory	69	2
Processing Speed	81	10
Full Scale	72	3
General Ability	76	5

Wechsler Adult Intelligence Scale-IV, Verbal Comprehension

Verbal Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Similarities	18	6	9	
Vocabulary	25	7	16	
Information	11	9	37	S

Wechsler Adult Intelligence Scale-IV, Perceptual Reasoning

Perceptual Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Block Design	24	6	9	
Matrix Reasoning	5	3	1	W
Visual Puzzles	9	6	9	

Wechsler Adult Intelligence Scale-IV, Working Memory

Working Memory Subtests	Raw	ss	Percentile Rank	Strength or Weakness
Digit Span	19	6	9	
Arithmetic	6	3	6	W

Wechsler Adult Intelligence Scale-IV, Processing Speed

Processing Speed Subtests	Raw	ss	Percentile Rank	Strength or Weakness

Symbol Search	24	7	16	
Coding	46	6	9	

Wechsler Adult Intelligence Scale-IV, Discrepancy Comparisons

Discrepancy Comparisons	**Score 1**	**Score 2**	**1st - 2nd**	**Sig.**
Verbal Comprehension-Perceptual Reasoning	85	71	14	Y
Verbal Comprehension-Working Memory	85	69	16	Y
Verbal Comprehension-Processing Speed	85	81	4	N
Perceptual Reasoning-Working Memory	71	69	2	N
Perceptual Reasoning-Processing Speed	71	81	-10	N
Working Memory-Processing Speed	69	81	-12	N
Full Scale-General Ability	72	76	-4	Y

The Wechsler Adult Intelligence Scale-IV (WAIS-IV) is a reliable and valid measure of intellectual functioning. Mr. Thomas' Full Scale IQ (FSIQ) was in the Borderline/mild-to-moderate range of impairment at the 3rd percentile rank. His General Ability Index (GAI) was slightly higher in the Borderline/mild-to-moderate range of impairment at the 5th percentile rank, partially due to a low Working Memory score, which is not included in the GAI.

On the Verbal Comprehension Index (VCI), Mr. Thomas scored in the low/below average range at the 16th percentile rank. His score on the Perceptual Reasoning Index (PRI) was in the Borderline range at the 3rd percentile rank. There was a significant discrepancy between these two indices in favor of Verbal Comprehension. Mr. Thomas scored in the extremely low range on the Working Memory Index (WMI), at the 2nd percentile, indicating difficulty with attention and concentration. A significant discrepancy between the VCI and the WMI was present, again in favor of Verbal Comprehension. Finally, Mr. Thomas' Processing Speed Index (PSI) was in the Borderline/mildly impaired range at the 10th percentile rank.

With regard to specific subtests, Mr. Thomas showed a relative strength at the 37th percentile rank on the Information subtest, part of the VCI, requiring general knowledge. He showed relative weaknesses on the Arithmetic subtest, assessing Working Memory, at the 6th percentile rank as well as the Matrix Reasoning subtest, part of the Perceptual Reasoning Index, at the 1st percentile rank.

ATTENTION AND CONCENTRATION:

Conners' Adult ADHD Rating Scales-Long Version Self-Report

Scale	Raw Score	T-Score	Percentile Rank
A. Inattention/Memory Problems	13	54	68
B. Hyperactivity/Restlessness	12	48	42-45
C. Impulsivity/Emotional Lability	17	59	83
D. Problems with Self-Concept	7	53	61-63
E. DSM-IV Inattentive Symptoms	15	74	99
F. DSM-IV Hyperactive-Impulsive Symptoms	9	54	66-68
G. DSM-IV ADHD Symptoms Total	24	68	96
H. ADHD Index	20	66	95

Speech Sounds Perception Test

# Errors	T-Score	Percentile Rank	NDS
20	30	2-3	3

Seashore Rhythm Test

# Correct	T-Score	Percentile Rank	NDS
16	29	2	3

The Conners' Adult ADHD Rating Scales-Long Version Self-Report was administered to Mr. Thomas to assess his perception of his attentional difficulties. A total of three subscales were in the range of clinical significance. Mr. Thomas' DSM-IV ADHD Symptoms Total score was significant at the 96th percentile rank. This was largely due to his report of Inattentive Symptoms, which was highly significant at the 99th percentile rank. His ADHD Index score was also significantly elevated at the 95th percentile rank.

The Speech Sounds Perception Test and Seashore Rhythm Test are auditory, verbal and auditory, non-verbal measures of attention and processing, respectively. Mr. Thomas' score on the Speech Sounds Perception Test was in the mild to moderate range of impairment at the 2nd-3rd percentile ranks. His performance on the Seashore Rhythm Test was moderately impaired at the 2nd percentile rank.

MEMORY FUNCTIONS:

Tactual Performance Test

Variable	Raw Score	T-Score	Percentile	NDS

			Rank	
Memory	6	39	14	1
Localization	1	39	14	1

The Tactual Performance Test measures incidental recall, which is memory for items in which the examinee is not cued beforehand of the need to remember. Mr. Thomas' incidental recall was mildly impaired at the 14th percentile rank on this measure. His Localization score was also mildly impaired at the 14th percentile rank.

LANGUAGE FUNCTIONS:

Controlled Oral Word Association Test

Total Score	T-Score	Percentile Rank
23	39	14

Animal Naming

Total Score	T-Score	Percentile Rank
15	45	30-32

BDAE Complex Ideational Material Subtest

Raw Score	T-Score	Percentile Rank
10/12	37	9-10

Aphasia Screening Test

Pathognomonic Signs
Dysnomia, Spelling Dyspraxia, Central Dysarthria, Constructional Dyspraxia

Wide Range Achievement Test-4

Subtest	Standard Score	Percentile Rank	Grade Equivalent
Word Reading	75	5	4.9
Sentence Comprehension	72	3	6.0
Spelling	77	6	5.5
Math Computation	71	3	4.0

Reading Composite	71	3	

Verbal fluency is the ability to recite words rapidly to certain categories. Mr. Thomas' phonemic fluency, defined as stating as many words as possible beginning with certain letters, was in the mild range of impairment at the 14th percentile rank. His semantic fluency, or his ability to cite as many words as possible belonging to a conceptual category, was in the average range at the 45th percentile rank.

The Complex Ideational Material subtest of the Boston Diagnostic Aphasia Battery was given to Mr. Thomas to assess his level of auditory, semantic comprehension. His score on this measure was 10/12, which is mildly impaired at the 9th-10th percentile rank.

The Aphasia Screening Test screens for pathognomonic signs of language impairment. On this measure, Mr. Thomas showed pathognomonic signs of dysnomia, spelling dyspraxia, central dysarthria, and constructional dyspraxia.

On the Wide Range of Achievement Test-4, Mr. Thomas demonstrated consistently impaired academic skills. Mr. Thomas' Word Reading ability was mildly impaired at the 5th percentile rank, 4.9 grade equivalent. His Sentence Comprehension skills were also mildly-to-moderately impaired at the 3rd percentile rank, 6.0 grade equivalent. The Reading Composite score is made up of the Word Reading and Sentence Comprehension scores, and this composite was mildly-to-moderately impaired at the 3rd percentile rank. Mr. Thomas' Spelling ability was in the mild-to-moderate range of impairment at the 6th percentile rank, 5.5 grade equivalent. His Math Computation score was in the mild range of impairment at the 3rd percentile rank, 4.0 grade equivalent.

MOTOR & PERCEPTUAL-MOTOR FUNCTIONS:

Lateral Dominance Exam

	Right	Left	Mixed
Hands	X		
Feet			X

Right-Left Orientation

Raw Score	T-Score	Percentile Rank
15	16.9	.06-.07

Grip Strength

Hand	Kilograms	T-Score	Percentile Rank
	34	32	4

Right Dominant			
Left Non-Dominant	33	31	3

Manual Finger Tapping Test

Hand	Raw Score	T-Score	Percentile Rank	NDS
Right Dominant	52.2	48	42-45	1
Left Non-Dominant	49.4	51	53-55	0

Grooved Pegboard

Hand	Raw Score	T-Score	Percentile Rank
Right Dominant	94	36	8
Left Non-Dominant	89	40	16

Trail Making Test A

Time	Errors	T-Score	Percentile Rank	NDS
30"	0	50	50	1

Tactual Performance Test

Hand	Time (minutes)	# Blocks Placed	T-Score	Percentile Rank
Dominant	10.1	10	42	21-23
Non-Dominant	14.0	8	34	5-6
Both	8.3	10	32	4
Total	32.4	28	35	7

On the Lateral Dominance Examination, Mr. Thomas was right-hand dominant for his hands and mixed-dominant for his feet. Mr. Thomas' right-left orientation was severely impaired at the .06th-.07th percentile rank. His answers were incorrect for all prompts involving pointing at the examiner's body, but he was able to correctly answer all prompts that asked him to touch the examiner's body. Mr. Thomas made one additional error when asked to touch his own right ear with his left hand.

On a measure of Grip Strength Mr. Thomas was mildly impaired for both his right dominant and left non-dominant hands at the 4th and 3rd percentile ranks, respectively. On a measure of Finger Tapping, Mr. Thomas' score was in the average range for both hands

at the 42nd-45th percentile rank for his right, dominant hand and at the 53rd-55th percentile rank for his left, non-dominant hand. On the Grooved Pegboard, a measure of manual dexterity, Mr. Thomas performed in the mild range of impairment for both hands. His score was at the 8th percentile rank for his right, dominant hand and at the 16th percentile rank for his left, non-dominant hand.

Simple sequencing, as assessed by Trail Making Test A, was average at the 50th percentile rank.

The Tactual Performance Test is a measure of tactile-kinesthetic problem solving. Mr. Thomas' Total score on this test was in the mild range of impairment at the 7th percentile rank. His performance with his Dominant hand was in the low average range at the 21st-23rd percentile rank. Mr. Thomas' score with his Non-Dominant hand was mildly impaired at the 5th-6th percentile rank. Finally, his score on the Both hands trial was in the mild-to-moderate range of impairment at the 4th percentile rank.

SENSORY-PERCEPTUAL FUNCTIONS:

Sensory Imperception				Sensory Suppressions		
Modality	Right	Left		**Modality**	Right	Left
Tactile	0	0		**Tactile**	0	0
Auditory	0	0		**Auditory**	0	0
Visual	0	0		**Visual**	1	0
Total	0	0		**Total**	1	0

Finger Agnosia

Hand	Errors
Right	1/20
Left	2/20

Fingertip Number Writing

Hand	Errors
Right	8/20
Left	9/20

Tactile Form Recognition Test

Hand	Errors	Time	T-Score	Percentile Rank
Right	2	20"	29	2
Left	3	19"	29	2

Sensory-Perceptual Total Score

Hand	Errors	T-Score	Percentile Rank
Right	12	29	2
Left	14	25	1
Total	26	29	2

The Reitan-Klove Sensory-Perceptual examination was administered to Mr. Thomas. Mr. Thomas' visual fields were full to confrontation screening. Extraocular movements and convergence appeared intact. Auditory, tactile, and visual stimulation were bilaterally intact with no imperceptions on either side. Bilateral, simultaneous processing of the auditory and tactile modalities was intact. Mr. Thomas made one error in regards to simultaneous processing of the visual modality on the right side. Therefore, Mr. Thomas had one right-sided suppression error. There was significant bilateral dysgraphesthesia with 8 errors on the right and 9 on the left spread relatively evenly across all of the fingers representing severe impairment. Mr. Thomas had minimal finger dysgnosia bilaterally with one error on his right hand and two errors on his left hand on the Tactile Finger Recognition Test. Mr. Thomas made two tactile dystereognostic errors on the right side and three errors on the left side on the Tactile Form Recognition Test representing severe impairment. Tactile processing speed was moderately impaired for both the right and left hands. The Sensory-Perceptual Total scores were bilaterally impaired on this measure.

EXECUTIVE FUNCTIONS, SEQUENCING AND MENTAL FLEXIBILITY:

Trail Making Test B

Time	Errors	T-Score	Percentile Rank	NDS
156"	4	34	5-6	3

The Booklet Category Test-II

# Errors	T-Score	Percentile Rank	NDS
113	25	1	3

Wisconsin Card Sorting Test

	Raw Score	T-Score	Percentile Rank
Number of Categories Completed	5		11-16
Trials to Complete First Category	10		>16
Failure to Maintain Set	2		11-16
Learning to Learn	-3.3%		11-16
Total Number of Errors	48	37	9-10
Perseverative Responses	26	38	12
Perseverative Errors	23	37	9-10
Percent Perseverative Errors	18.0%	39	13
Nonperseverative Errors	25	37	9-10
Percent Conceptual Level Responses	53.1%	39	13

Ruff Figural Fluency Test

Subtest	Raw Score	Corrected Score	T-Score	Percentile Rank
Total Unique Designs	45	58	36.9	8-9
Perseverations	111		<13	<0.02
Error Ratio	2.4667	2.4467	<25	<0.02

Stroop Color and Word Test

Subtest	Raw Score	Age/Education Predicted Score	T-Score	Percentile Rank
Word	52	98	18	.09-.10
Color	36	74	18	.09-.10
Color-Word	18	38	31	3
Interference	3-5		45-47	30-39

Complex sequencing, as assessed by Trail Making Test B, was in the mildly-to-moderately impaired range for speed at the 5th-6th percentile rank. Mr. Thomas made four errors on this task.

The Booklet Category Test-II is a measure of concept formation and nonverbal problem solving. Mr. Thomas made 113 errors on this task, which is in the moderate range of impairment using the Halstead-Reitan scoring criteria.

The Wisconsin Card Sorting Test is a measure of mental flexibility and the ability to Shift Mental Set. Mr. Thomas completed 5/6 categories, which is in the mildly impaired range at the 11th-16th percentile rank. He made 48 Total Errors, which was mildly impaired at the 9th-10th percentile rank. Twenty-three of these errors were Perseverative Errors, and 25 were Nonperseverative errors, and each of these scores was in the mildly impaired range at the 9th-10th percentile rank. Finally, Mr. Thomas exhibited Failure to Maintain Set on two occasions, which is in the mildly impaired range at the 11th-16th percentile rank.

The Ruff Figural Fluency Test is a measure of design fluency. Mr. Thomas's score for Total Unique Designs was mildly impaired at the 8th-9th percentile rank. He made 111 Perseverative errors on this task, which was severely impaired at less than the 0.02 percentile rank. Mr. Thomas's Error Ratio was also in the severe range of impairment at less than the 0.02 percentile rank.

The Stroop Color and Word Test was administered to Mr. Thomas to assess processing speed and mental flexibility. On both the Word and Color tasks, he scored in the severe range of impairment at the .09-.10 percentile rank. On the Color-Word task, Mr. Thomas scored in the mildly-to-moderately impaired range at the 3rd percentile rank. Mr. Thomas scored n the average range on the Interference task at the 30th-39th percentile rank.

GENERAL MEASURES OF NEUROPSYCHOLOGICAL FUNCTIONING:

Neuropsychological Deficit Scale (NDS)

Indicator	Raw Score
General Neuropsychological Deficit Scale score	47

Right Neuropsychological Deficit Scale score	9
Left Neuropsychological Deficit Scale score	12
Halstead Impairment Index	0.7

The Halstead-Reitan Neuropsychological Battery yields different summary scores for the assessment of brain damage. The General Neuropsychological Deficit Scale (NDS) score of 47 indicates that Mr. Thomas has moderate neuropsychological impairment. Mr. Thomas had an Impairment Index of 0.7, indicating moderate impairment. His right and left NDS scores were 9 and 12.

FORMULATIONS AND IMPRESSIONS:

Marlo Thomas is a 40-year-old, African-American male. History indicates a strong probability of severe exposure to alcohol on a daily basis during pregnancy with his mother Georgia. Although Mr. Thomas does not have the pathognomonic facial features of Fetal Alcohol Syndrome, his neuropsychological profile and behavioral characteristics are highly consistent with the known chronic effects of Fetal Alcohol Spectrum Disorder. In addition, Mr. Thomas reportedly had intrauterine exposure to Talwin as well as trauma due to his mother being repeatedly kicked in the stomach by Mr. Thomas. Also, Mr. Thomas was also reportedly exposed to vodka as an infant and his mother could not wake him for two hours. He was reportedly dropped on his head on another occasion as an infant. As an older child, Mr. Thomas had chronic enuresis, smelled of urine, and was teased by peers and called "Stinky." He has a long history of academic learning difficulties, emotional and behavioral dyscontrol, dysregulation of aggression, and anger starting at an early age. He was raised in an environment where his mother did not pay the attention to him that she paid to his siblings, and his father disowned him and rejected him. The history supports the idea that Mr. Thomas had neurodevelopmental brain damage with borderline intellectual functions, severe learning disabilities, and communication deficits documented at an early age. The enuresis may have been an indication of childhood anxiety or possibly due to other causes.

Mr. Thomas's prior diagnoses by Dr. Kinsora are Attention Deficit Hyperactivity Disorder, Intermittent, Explosive Disorder, specific learning disorders, Learning Disorder NOS, and Antisocial Personality Disorder. Unfortunately, Dr. Kinsora failed to conduct a thorough, comprehensive neuropsychological battery on Mr. Thomas, including the Halstead-Reitan Battery, nor did he administer tests of executive frontal dysfunction.

Current neuropsychological assessment is reflective of moderate impairment of neuropsychological functions on a diffuse basis. The GNDS score of 47, the Halstead Impairment Index of 0.7, the Halstead Category Test score of 113 errors, Trail-Making Test B of 156 seconds with 4 errors, Tactual Performance Test Localization score of 1/10, and intellectual functions overall in the lower borderline range with full scale IQ of 72 and General Ability Index of 76, are all confirmatory to this statement.

Neuropsychological testing is indicative of diffuse brain damage; however, with a very specific localization of dysfunction in the anterior frontal cortex with 26 perseverative responses on the Wisconsin Card Sorting Test and 111 perseverations on the Ruff Figural Fluency Test, which is one of the worst scores I have ever seen, and is at a T-score of less than 13 or less than the 0.02 percentile rank.

Mr. Thomas's 113 errors on the Halstead Category Test is in the range of neurocognitive deficits that impair activities of daily life to a significant extent. Neuropsychological testing confirms deficits in the areas of comprehension of written language and comprehension of spoken, auditorily perceived language, as well as in the interpersonal, social realm with extremely disinhibited impulse control and control of emotions.

In the book, ADHD and Fetal Alcohol Spectrum Disorders by K.D. O'Malley, the author cites that 75 to 80% of people with Fetal Alcohol Spectrum Disorder have IQs over 70. On page 40, the author states that people with FASD often have emotional dysregulation, emotional lability, clumsiness, behavioral and motoric disorganization, and ADHD due to sensory processing difficulties. On page 26 of that book, the author states that FASD causes "specific CNS irritability and dysregulation" due to neurotoxic effects of alcohol toxicity on neurotransmitters, sleep regulation, and so forth. On page 222, the author states that individuals with FASD with low executive function tend to predict the expression of violent or aggressive behaviors.

"A Meta-Analytic Review of the Relation of Antisocial Behavior and Neuropsychological Measures of Executive Function," 2000, by Morgan and Lilienfeld document the existence of the relationship between executive frontal deficits and antisocial behavior. This is a meta-analysis of 39 studies yielding a total combined N of 4,589.

Comprehensive neuropsychological evaluation of Mr. Thomas indicates a current full scale IQ of 72, at the 3rd percentile rank, which is 2 points above the upper level of the definition of Mental Retardation by DSM-IV-TR, which is an IQ of approximately 70 or below. Mr. Thomas has functional deficits in at least two areas including functional academic skills, communication, and also in the area of social/interpersonal skills. The third prong of mild mental retardation requires an age of onset before 18 years. The Flynn effect of an increase of 0.3 IQ points per year based on current testing using the WAIS-IV, which was published in 2008, which yields a Flynn effect of at least 1.3 to the current data, suggesting a full IQ scale score very close to 70. However, this score was deflated by Working Memory at the 2nd percentile rank, related to Mr. Thomas's severe attentional deficits/ADHD. There is also now a 14-point split between Verbal Comprehension at 85 and Perceptual Reasoning at 71. This discrepancy was not appreciated on earlier testing conducted prior to the age of 18 on Mr. Thomas. In 1981, his WISCAR score yielded a verbal IQ of 85, a performance IQ of 86, and an overall scale IQ of 84, at the age of about 10. A Slosson Intelligence Test, which is less reliable and comprehensive, yielded an IQ of 83 in 1984. A report by Dr. Kinsora gives some different numbers, but IQs were generally in the 80s.

Thus, overall, it is difficult to diagnose Mr. Thomas with mild mental retardation due to his IQ scores before the age of 18. However, the neuropsychological testing does absolutely substantiate the presence of a chronic, likely predominantly neurodevelopmental, encephalopathy in the moderate brain damage range in Mr. Thomas with broad diffuse effects in attention including auditory verbal and nonverbal attention processing, auditory comprehension, word finding, central dysarthria, constructional dyspraxia, auditory/verbal dysgnosia/auditory comprehension defect, and marked and predominant executive frontal dysfunction across five out of six measures of executive frontal function including Controlled Oral Word Association Test, Trail-Making Test B, Booklet Category Test II, Wisconsin Card Sorting Test, Ruff Figural Fluency Test, and the Stroop Color and Word Test. The Stroop is the least robust measure of executive frontal function, which showed severe impairments in terms of processing speed, but not interference, which is partly explained by the fact that individuals with reading disability typically do better on Color and Word than they do on the Word and Color scores, due to the fact that since they have difficulty reading, as the word is not a salient distractor for those individuals.

There may have been some contributing factor to Mr. Thomas's chronic use of PCP, cocaine, and marijuana, but it is my opinion that due to the severity of the executive frontal deficits of this individual, essentially 14 years after his last exposure to these substances, the effects of the drugs on his behavior were likely not the causative factor, as opposed to his brain damage and especially executive frontal dysfunction.

Diagnostic impressions using DSM-IV-TR and ICD-9 criteria are as follows:

Axes		**Codes**	**Descriptions**
Axis I	Clinical Disorders	310.9	Chronic Encephalopathy Secondary To Neurodevelopmental Dysfunction;
		310.1	Personality Change Due To Conditions Classified Elsewhere/Organic Personality Disorder;
		310.0	Frontal Lobe Syndrome;
		314.01	Attention Deficit Hyperactivity Disorder, Combined Type;
		315.00	Reading Disorder, by history;
		315.2	Disorder of Written Expression, by history;
		315.1	Mathematics Disorder, by history;
		304.80	Remote Polysubstance Dependence/Abuse including phencyclidine, cocaine, and marijuana in institutional remission.
Axis II	Personality Disorders/MR	V62.89	Borderline Intellectual Functioning;
Axis III	Medical Conditions		Fetal Alcohol Spectrum Disorder/Prenatal Alcohol Exposure and Prenatal Talwin

			Disorder, by history.
Axis IV	Psychosocial Problems		Incarceration on death row.
Axis V	Global Assessment of Functioning		40/100

CONCLUSIONS:

It is my considered professional opinion, as stated within a reasonable degree of neuropsychological and psychological scientific certainty, that Mr. Thomas had the above-specified disorders at the time of the commission of the two homicides on April 15, 1996. It is my opinion that Dr. Kinsora's diagnosis of Antisocial Personality Disorder was largely inappropriate because the antisocial behavior that Mr. Thomas certainly displayed up to the time of the incidents in question, are entirely predictable by his Fetal Alcohol Spectrum Disorder, his ADHD, his borderline intellectual functioning, and his executive frontal dysfunction. These diagnostic entities explain his propensity towards emotional dyscontrol, effective impulsivity, and dysregulation of aggressive behavior as a consequence of an organic brain syndrome, fetal alcohol exposure and, in essence, the overall consequence of organic brain damage.

Therefore, I agree that, of course, Mr. Thomas has a history of antisocial behavior, but this behavior is explained by organic brain damage and organic personality syndrome. It is also clear Mr. Thomas's history of emotional neglect and abuse by his parents further contributed to and aggravated his already extremely compromised brain and organically disinhibited behavior.

Based on my understanding of the facts of the crime, the murders in question were not specifically premeditated, but were rather impulsive. It is my opinion that Mr. Thomas was under a state of extreme emotional disturbance on the one hand, and an inability to conform his conduct to the requirements of law as a consequence of his above cited disorders.

The above opinions are offered within a reasonable degree of psychological and neuropsychological certainty, based on all the information available to me and reviewed above. I reserve the right to amend my opinions if more information is received.

Sincerely yours,

Jonathan H. Mack, Psy.D.
New Jersey Professional Psychology License #35SI00232100
Pennsylvania Professional Psychology License #PS004877L
Director, Forensic Psychology and Neuropsychology Services, P.C.
Registrant, National Register of Health Service Providers in Psychology
JHM/nvp

EXHIBIT 24

EXHIBIT 24

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MARLO THOMAS,
#1060797

Defendant.

CASE NO: 96C136862-1

DEPT NO: XXIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 4/28/14
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable STEFANY A. MILEY, District Judge, on the 28th day of April, 2014, the Petitioner not being present, represented by BRET O. WHIPPLE, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Marlo Thomas was convicted of two counts of First Degree Murder and sentenced to death in 1997 for the early-morning robbery at the Lone Star Steakhouse and the stabbing deaths of two employees who were present during the robbery, Matthew Gianakis and Carl

IN THE SUPREME COURT OF THE STATE OF NEVADA
* * * * * * * * * *

MARLO THOMAS, Appellant, v. WILLIAM GITTERE, et al., Respondents.	No. 77345 District Court Case No. 96C136862-1 (Death Penalty Case)

APPELLANT'S APPENDIX

Volume 6 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
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Attorneys for Appellant

INDEX

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

that would require a new trial. (Ans. Brf. p. 10) The State seems to want to ignore that the error in this case just kept accumulating to the point that a new trial is mandated.

Similarly when the Court offered a curative instruction as a result of the "back in jail" comment made by Emma Nash, defense counsel declined to do so. (Ans. Br. p. 11) This was after defense counsel had moved for a mistrial claiming that the prejudicial comment denied THOMAS of a fair trial. (4 RA 667) The failure of defense counsel to correct the prejudicial impact of the improper comment could be construed as per se ineffective assistance of counsel. (See Argument below.)

The State correctly notes that the District Court was of the opinion that a blanket objection to jury instructions did not constitute ineffective assistance of counsel, apparently under the impression that such an objection preserved federal constitutional claims. It is still to be determined that such a non-specific objection preserved any rights for THOMAS. To the extent that such an objection fails for lack of specificity trial counsel was clearly ineffective.

The State has described in detail the evidence presented at the penalty hearing that was not the subject of objection by trial counsel. The nature of the heinous evidence presented included that THOMAS, during a fight in junior high school, had kicked a teacher in her leg when she tried to separate the combatants and that he had stolen bicycles at two different junior high schools. (Ans. Br. p. 13-14) The State fails to

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discuss that trial counsel failed to request a limiting instruction on the use of this and other evidence by the jury at the penalty hearing.

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ARGUMENT

I.

THOMAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

THOMAS respectfully urges that this Court should abandon many of it's earlier opinions concerning appellate review of post-conviction cases and decide that, conclusively, a claim of ineffective assistance of counsel will be independently reviewed as a mixed question of law in fact. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (2000) The deference that has been accorded trial counsel at the District Court level in the face of clear factual presentations requires nothing less. See, Lay v. State, 116 Nev. 1185, 14 P.3d 1256 (2000). Only by performing such a review can this Court reach the proper decision.

1. Trial counsel failed to make contemporaneous objections on valid issues thereby precluding meaningful appellate review of the case in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

The State in it's Answering Brief completely avoids the fact that the failure to object to numerous valid issues precluded appellate review on direct appeal. Instead, for the most part, it appears that the State's position is that if an objection had been made it might not have been sustained. Such

speculation is inappropriate in the context of a capital case such as the one at bar.

The error was magnified by the failure to request an instruction limiting the use of such evidence by the jury in deciding the penalty (discussed below). The abundance of cumulative and improper testimony should have been the subject of objection to preserve the issue for subsequent appellate and post-conviction review.

A. The Trial Court Erred in Allowing Cumulative and Otherwise Inadmissible Evidence of Prior Bad Acts During the Penalty Phase of Appellant's Trial.

THOMAS set forth in his Opening Brief the unconstitutional problems with the Nevada capital sentencing scheme. The failure to provide guidance and rational limits to the admissibility of "character evidence" renders the statutory provision unworkable and results in the arbitrary and capricious imposition of the death penalty. This clearly violates the Eighth Amendment to the United States Constitution and mandates the reversal of the death sentence against THOMAS.

B. The Statutory Scheme Adopted by Nevada Fails to Properly Limit Victim Impact Statements.

The record is clear that this Court and the Nevada Legislature have consistently failed to enact any barriers to the presentation of victim impact evidence. The failure to limit this type of evidence violates the Eighth Amendment to the United States Constitution and results in the arbitrary and

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capricious imposition of the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976).

C. The Prosecutor Committed Misconduct During the Closing Argument of the Penalty Phase of Appellant's Trial by Appealing to the Passions and Prejudice of the Jurors and by Denigrating the Proper Consideration of Mitigating Factors.

The State takes the position in it's Answering Brief that the District Court correctly determined that trial counsel did not have a good faith basis to object to the arguments and therefore was not ineffective in failing to object. (Ans. Brf. p. 29; AA pg. 242) The problem with this argument and with the "finding" by the District Court is that the testimony at the evidentiary hearing was directly to the contrary.

Both Lee McMahon and Peter LaPorta testified that they had no tactical or strategic reason for the failures to object to the majority of the challenged arguments. It is not insignificant to remind this Court that the same office that represented THOMAS at trial handled the direct appeal and raised the issue of improper closing argument despite the failure of contemporaneous objection. Trial counsel allowed the death sentence to be returned based on a totally improper disparagement of mitigating evidence. See Hollaway v. State, 116 Nev. 732, 9 P.3d 987 (2000).

The District Court was clearly erroneous in it's refusal to grant relief on this issue alone.

D. The Trial Court Erred in Using a Set of Jury

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Instructions During the Guilt and Penalty Phases Which Violated the Due Process Rights of the Appellant.

As with the majority of the issues that exist in this case, THOMAS is faced with the failure of trial counsel to object and preserve valid claims on appeal. The State correctly points out that the failure to object and preserve an issue for appeal lessens the standard of review of the issue. Hewitt v. State, 113 Nev. 387, 936 P.2d 330 (1997). By making such an argument the State is conceding that trial counsel was ineffective in failing to preserve the issue.

It seems completely disingenuous for the State to first argue that trial counsel was effective and then turn around and argue that the failure of trial counsel presents a procedural bar to review of valid constitutional claims. It seems that the State is more interested in finding loopholes than in discussing the merits of the claims raised by THOMAS.

THOMAS has set forth in the Opening Brief the specific instructions that should have been the subject of objection by trial counsel and, despite the failure of objection, were raised on direct appeal. This Court has the obligation, based on the per se ineffectiveness of trial counsel, to review each of these claims. After doing so the Court will be convinced that THOMAS did not receive effective assistance of counsel and therefore reverse his conviction and sentence.

2. Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel

failed to raise these issues on direct appeal, both failures being in violation of THOMAS' rights under the sixth amendment to effective counsel and under the fifth and fourteenth amendments to due process and a fundamentally fair trial.

This Court must be reminded that the District Court in this capital case refused to grant an evidentiary hearing on the majority of the claims raised by THOMAS. In the absence of such an evidentiary hearing, the State invites this Court to engage in rank speculation as to the possible motives or strategies of trial counsel. No where is such speculation more invited than with respect to the issue raised in this section. There is a reason that the decisions of this Court approve of evidentiary hearings on claims of ineffective assistance of counsel: to create a record upon which a proper decision can be made and reviewed. Such a record does not exist in this case due to abuse of discretion by the District Court.

A. Trial Counsel Failed to Ask That the Jury Be Admonished Concerning the "Back in Jail" Comment of Witness Nash.

The State argues that there was a "reasonable tactical reason" for trial counsel not to request a curative instruction. (Ans. Brf. p. 42). The State must have a crystal ball in order to make such a statement. THOMAS was denied an evidentiary hearing on this issue wherein trial counsel could have been asked about such a tactical reason. The State cites to Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994), but Riley

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provides no support. In Riley there was a full evidentiary hearing and counsel was able to articulate a tactical basis for the decision not to request an accomplice construction.

No such record exists in this case and it would be improper for this Court to now manufacture such an explanation.

B. Trial Counsel Failed to Object and Move to Strike Overlapping Aggravating Circumstances and Appellate Counsel Failed to Raise the Issue on Direct Appeal.

THOMAS has fully briefed and discussed this issue in the Opening Brief and will not repeat said arguments. THOMAS will note that at some point this Court will be required to address the overly broad and vague statutory scheme created by the Nevada Legislature and abused by prosecutors throughout the State. The Court will either do so in response to valid state claims or by mandate from the federal system. It would seem more constitutionally reasonable to start now and not wait for the federal mandate.

C. Trial Counsel Failed to Object to Prejudicial and Inflammatory Comments During the Opening Statement of the Prosecution and Appellate Counsel Failed to Raise the Issue on Direct Appeal.

The District Court found that trial counsel was ineffective for failing to object to the cited Opening Statement remarks, but found that such comments did not rise to the level that a new trial was required. It is respectfully submitted that the District Court should have examined the

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other issues and based on the cumulative error granted relief to THOMAS.

Too long have prosecutors been allowed to violate their ethical bounds and then hide behind harmless error like their mother's apron. See Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962). At what point does this Court say enough is enough? It only takes once and the conduct will stop. Until then this Court is an accomplished to the intentional misconduct.

D. Trial Counsel Failed to Object to Numerous Instances of Improper Closing Argument at the Penalty Hearing and Appellate Counsel Failed to Raise the Issue on Direct Appeal and Argue That the Prosecutorial Misconduct Was Plain Error.

The State and THOMAS obviously have different opinions as to the latitude given the State to make improper closing arguments at the penalty hearing in a capital case. The instances specified by THOMAS are egregious, repetitive, and intentional. THOMAS can add little to that set forth in his pleadings and Opening Brief.

3. Trial counsel was not prepared for critical stages of the proceedings and failed to conduct proper investigation prior to trial in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

The State asserts that trial counsel effectively cross-

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examined Kenya Hall at the preliminary hearing despite not even having a copy of the statement given by Mr. Hall to the police several weeks before the preliminary hearing. (Ans. Brf. p. 55) This "effective" cross-examination of an accomplice and co-defendant consumed a grand total of eleven pages. (RA 190-201) Once Hall refused to testify at trial THOMAS was forced to accept the reading of the woeful cross-examination from preliminary hearing before the jury. The virus of ineptness was thus interjected into the trial.

The total lackadaisical attitude of trial counsel is evident from the record and the District Court erred in failing to grant relief to THOMAS.

4. Trial counsel failed to adequately represent THOMAS during the course of the trial proceedings by failing to properly prepare jury instructions, cross-examine witnesses, and present evidence at both the trial and penalty stages of the proceedings in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

This issue has been fully briefed and discussed by THOMAS in his Opening Brief and THOMAS therefore relies upon same as though fully set forth hereat.

5. Appellate counsel failed to file a complete record on appeal as required by Supreme Court Rule 250 and failed to

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raise meritorious issues on direct appeal in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

The State takes the position that appellate counsel in capital cases is not required to raise all colorable issues citing to Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). This, of course, is the same office that will claim that an issue is procedurally barred from review on post conviction habeas corpus if the issue is not raised on direct appeal. Until such time as the District Attorney's Office stops talking out of both sides of their mouth, capital defendants will continue to assert that all viable claims should be raised on direct appeal.

6. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

This issue has been fully briefed and discussed by THOMAS in his Opening Brief and THOMAS therefore respectfully relies upon the content of such argument and urges that this court grant appropriate relief.

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7. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantees of due process, equal protection, impartial jury from cross-section of the community, and reliable determination due to the trial, conviction and sentence being imposed by a jury from which African Americans and other minorities were systematically excluded and under-represented. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

This issue with fully briefed and discussed by THOMAS in his Opening Brief and THOMAS therefore respectfully relies upon the content of such argument and urges that this court grant appropriate relief.

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II.

IT WAS AN ABUSE OF DISCRETION TO
DENY THOMAS A FULL EVIDENTIARY HEARING ON
HIS PETITION FOR POST CONVICTION HABEAS CORPUS

THOMAS respectfully submits this issue based on the arguments and authorities contained in the Opening Brief on file herein.

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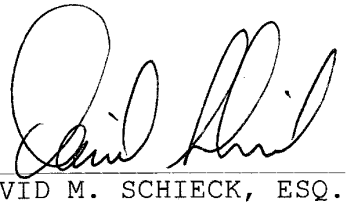
CONCLUSION

Based on the authorities contained herein and in the Opening Brief, it is respectfully requested that the Court reverse the conviction and sentence of MARLO THOMAS and remand the matter to District Court for a new trial.

Dated this 8 day of September, 2003.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: Sept 8, 2005

BY _____
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 8 day of September, 2003, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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100 N. Carson Street
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KATHLEEN FITZGERALD, an employee
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EXHIBIT 15

EXHIBIT 15

120 Nev., Advance Opinion 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40248

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed in part, reversed in part, and remanded.

David M. Schieck, Las Vegas,
for Appellant.

Brian Sandoval, Attorney General, Carson City; David J. Roger, District Attorney, and Clark A. Peterson, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

In April 1996, appellant Marlo Thomas robbed a manager and killed two employees at a restaurant where he formerly worked. He was convicted of two counts of first-degree murder and four other felonies and received two sentences of death. Thomas appealed, and this court

affirmed his conviction and sentence.[1] He filed a post-conviction petition for a writ of habeas corpus, and the district court denied the petition. He appeals. We conclude that Thomas's counsel were ineffective in failing to object to an incorrect instruction on sentence commutation at the penalty phase of his trial and that a new penalty hearing is required.

FACTS[2]

At about 7:30 a.m. on April 15, 1996, Thomas drove with his wife Angela and Angela's fifteen-year-old brother, Kenya Hall, to the Lone Star Steakhouse in Las Vegas. The month before, Thomas had lost his job as a dishwasher at the restaurant. Angela waited in the car while Thomas and Hall went to the back door. Stephen Hemmes, a Lone Star employee, was leaving and spoke briefly with Thomas. Thomas then knocked on the back door, and another employee, Matthew Gianakis, let him and Hall enter. Thomas and Hall went to the office of the manager, Vincent Oddo. Thomas pulled out a .32-caliber revolver, pointed it at Oddo, and ordered him to open the safe and give them money. Thomas handed the gun to Hall and told him to take the money from Oddo. Hall remained in the office, took two or three bags of money from Oddo, and allowed Oddo to run out of the building. Hall then returned to the car.

Thomas left the office, obtained a meat-carving knife, and sought out the two employees who were at the restaurant that morning, Gianakis and Carl Dixon. Thomas stabbed Dixon to death in the bathroom. He then chased Gianakis down and stabbed him twice.

---

[1]Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998).

[2]See id. at 1132-36, 967 P.2d at 1115-17.

Gianakis staggered to a gas station next door before dying. After returning to the car and learning that Oddo had escaped, Thomas told Hall "you're not supposed to leave witnesses."

Thomas, Hall, and Angela returned to the house in Las Vegas where they were staying, the home of Thomas's aunt, Emma Nash, and cousin, Barbara Smith. Thomas told Nash and Smith that if anyone asked they should say that they had not seen him. Smith noticed that Thomas's clothes and shoes were bloody. Thomas told Smith that he had to get rid of two people and gave her $1,000 to give to his mother. He gave the .32-caliber revolver to Nash. He then changed clothing and took his bloody clothes and shoes and the knife used in the murders to the desert behind the house. The police later recovered the items, and the blood on the clothes was determined to be consistent with Dixon's.

Thomas, Hall, and Angela drove home to Hawthorne, where they were soon arrested. In a videotaped statement, Thomas admitted to police that he had killed the two men but claimed that he had acted in self-defense. He and Hall were charged with two counts of murder with use of a deadly weapon and one count each of robbery with use of a deadly weapon, first-degree kidnapping with use of a deadly weapon, conspiracy to commit murder and/or robbery, and burglary while in possession of a firearm. Hall pleaded guilty to robbery with use of a deadly weapon and testified against Thomas at Thomas's preliminary hearing. Before Thomas's trial, however, Hall moved to withdraw his guilty plea and moved to prevent the State from calling him to testify against Thomas. In response, the State moved to use Hall's preliminary hearing testimony at Thomas's trial. The trial began in June 1997, and the district court

granted Hall's motion not to testify and the State's motion to use Hall's earlier testimony.

The jury found Thomas guilty on all charges. It then returned two verdicts of death, finding no mitigating circumstances and finding the following six aggravating circumstances for each murder: Thomas had been previously convicted of a felony involving the use or threat of violence, an attempted robbery in 1990; he had been previously convicted of a felony involving the use or threat of violence, a battery causing substantial bodily harm in 1996; the murder was committed during the commission of a burglary; the murder was committed during the commission of a robbery; the murder was committed to avoid or prevent a lawful arrest; and Thomas had been convicted of more than one murder in the immediate proceeding. Thomas was further sentenced to serve consecutive prison terms for the robbery, kidnapping, conspiracy, and burglary.

Thomas appealed, and this court affirmed his conviction and sentence. He filed a timely habeas petition, and the district court held an evidentiary hearing on some of his claims before denying the petition.

DISCUSSION

As a preliminary matter, we note that Thomas's counsel did not adequately cite to the record in his briefs or provide this court with an adequate record. In support of factual assertions, counsel simply cites the supplemental habeas petition filed below. This is improper.[3] Additionally,

[3]NRAP 28(e) provides: "Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found." The rule also

continued on next page . . .

counsel failed to include many necessary parts of the record in the Appellant's Appendix. We are able to address the merits of a number of claims only because the State provided a seven-volume appendix that includes necessary parts of the record.[4]

Thomas claims that his trial and appellate counsel were ineffective in a number of ways. These claims are properly presented because this is a timely, first post-conviction petition for a writ of habeas corpus.[5] A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.[6] To establish ineffective assistance of counsel, a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[7] To show prejudice, the claimant must show a reasonable

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. . . *continued*
prohibits a brief to this court from incorporating by reference briefs or memoranda filed in district court.

[4]In the reply brief, Thomas's counsel states his belief that this court has the direct appeal record and chastises the State for wasting paper in its appendix. Counsel is mistaken. The clerk of this court does not retain the direct appeal record. Rather, SCR 250(7)(b) provides that the "clerk of the district court shall retain the original record . . . and shall not transmit a record on appeal to the supreme court." Appellant has the ultimate responsibility to provide this court with "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

[5]See, e.g., Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[6]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[7]Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

probability that but for counsel's errors the result of the trial would have been different.[8] Judicial review of a lawyer's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy.[9] The constitutional right to effective assistance of counsel extends to a direct appeal.[10] To establish prejudice, the claimant must show that an omitted issue would have had a reasonable probability of success on appeal.[11]

A petitioner for post-conviction relief is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief.[12] The petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.[13] The petitioner has the burden of establishing the factual allegations in support of his petition.[14]

Thomas asserts that the district court erred in holding an evidentiary hearing on only some of his claims rather than all of them. We conclude that the court did not err in denying those claims implicating the validity of Thomas's conviction. We conclude, however, that the record

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[8]Id. at 988, 923 P.2d at 1107.

[9]Strickland, 466 U.S. at 689.

[10]Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

[11]Id. at 998, 923 P.2d at 1114.

[12]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

[13]Id. at 503, 686 P.2d at 225.

[14]Bejarano v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996).

shows that Thomas's counsel were ineffective in regard to the penalty phase of his trial. We therefore reverse the district court's order in part and remand for a new penalty hearing.

Instruction regarding the power of the Pardons Board to modify sentences

We agree with Thomas that his trial counsel should have objected to the following penalty phase instruction: "Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date." This instruction was incorrect in regard to sentences of life in prison without possibility of parole. This court originally required the instruction in capital cases in 1985 in Petrocelli v. State.[15] However, we also expressly stated in Petrocelli that the instruction was to be used "unless and until the law on the subject is modified."[16] Such a modification occurred in 1995 with the enactment of NRS 213.085. Under that statute, for offenses committed on or after July 1, 1995, the Pardons Board cannot commute either a death sentence or a prison term of life without possibility of parole to a sentence allowing parole.[17] Thomas committed his crimes in April 1996, and his trial was in June 1997. Consequently, if he had received sentences of life in prison without possibility of parole, there was no circumstance or condition under

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[15]101 Nev. 46, 56, 692 P.2d 503, 511 (1985), modified by Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998).

[16]Id.

[17]Sonner, 114 Nev. at 326-27, 955 P.2d at 677.

which the Pardons Board would have been able to modify those sentences—contrary to the Petrocelli instruction. There is therefore a reasonable probability that jurors mistakenly believed that Thomas could eventually receive parole even if they returned sentences of life in prison without parole and that this belief contributed to their decision to render verdicts of death.

In Sonner v. State, we stated that in certain circumstances a jury could "occasionally be misled" by the Petrocelli instruction, but there we were referring to cases involving crimes committed before July 1, 1995, where a sentence of life in prison without possibility of parole could still be modified to one allowing parole.[18] But for cases like Thomas's, where NRS 213.085 categorically precludes commuting life in prison without possibility of parole to a sentence allowing parole, the instruction misstates the law and is always misleading. Moreover, in concluding that the defendant in Sonner was not prejudiced, we stressed that the prosecutor did not argue to the jury that the defendant posed a future danger.[19] Here, by contrast, the prosecution strongly emphasized the future danger that Thomas posed. Although the prosecution spoke only of Thomas's danger in a prison setting, jurors would also have considered the future danger he posed outside prison if they were concerned that a term of life in prison without parole might be modified to allow parole.

Because Thomas has established ineffectiveness of counsel in regard to this issue, a new penalty hearing is required. Consequently,

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[18]Id. at 327, 955 P.2d at 677.

[19]Id. at 325, 955 P.2d at 676.

most of Thomas's claims regarding the penalty phase of his trial require no discussion, but we address all of his claims relevant to the guilt phase.

Other claims

Thomas alleges ineffective assistance by trial counsel in regard to certain claims raised on direct appeal after trial counsel failed to preserve them. On direct appeal, this court determined that no plain error existed and declined to consider the issues.[20] Thomas raises some of these issues again, arguing that if trial counsel had preserved them, full appellate review by this court would have led to relief. First, he complains that counsel did not object to victim impact evidence. He asserts that the "Nevada capital statutory scheme imposes no limits on the presentation of victim impact testimony and . . . can result in the arbitrary and capricious imposition of the death penalty." This assertion is unfounded. Victim impact evidence "must be excluded if it renders the proceeding fundamentally unfair"[21] or "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."[22] It is also inadmissible if it is "impalpable or highly suspect."[23] Thomas does not explain how the victim impact evidence in his case was improper. Second, he claims that a number of jury instructions were erroneous. He challenges the instruction stating

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[20]See Thomas, 114 Nev. at 1149 n.5, 967 P.2d at 1125 n.5.

[21]Floyd v. State, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002), cert. denied, 123 S. Ct. 1257 (2003).

[22]NRS 48.035(1); Floyd, 118 Nev. at 175, 42 P.3d at 261.

[23]Leonard v. State, 114 Nev. 1196, 1215, 969 P.2d 288, 300 (1998).

that premeditation "may be as instantaneous as successive thoughts of the mind." He cites Byford v. State,[24] where we disapproved of this instruction and set forth new instructions. However, Byford applies prospectively[25] and was decided in 2000, while Thomas was tried and convicted in 1997. Thomas asserts next that the instructions should have stated that if the intent to rob was not formed until after the murders, then a robbery did not occur and the felony-murder rule did not apply. But the facts here clearly showed that the intent to rob preceded the murders. Moreover, "in robbery cases it is irrelevant when the intent to steal the property is formed."[26] Thomas challenges the instruction that directed jurors to do "equal and exact justice" between him and the State, claiming that it violated his presumption of innocence. This challenge is meritless.[27] Also meritless is his challenge to the instruction that a verdict "may never be influenced by sympathy."[28] He challenges the instruction on reasonable doubt as well, but the instruction is required by statute and has been upheld by this court.[29] Finally, we reject his

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[24]116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000).

[25]Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[26]Chappell v. State, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998).

[27]See Leonard, 114 Nev. at 1209, 969 P.2d at 296.

[28]See Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 803-04 (1996).

[29]NRS 175.211; Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995).

challenge to the instruction informing the jury that it did not need to agree unanimously on a theory of first-degree murder as long as its verdict of first-degree murder was unanimous.[30] Thomas fails to establish ineffective counsel in regard to any of these issues.

Thomas claims that his trial counsel were ineffective in response to his aunt's testimony referring to his prior time in jail. On direct appeal, Thomas argued that the district court should have granted a mistrial because of the remark.[31] We concluded that the error "was harmless because the evidence against Thomas was overwhelming, the comment was unsolicited by the prosecutor and inadvertently made, and Thomas declined the court's offer to admonish the jury."[32] Thomas now maintains that his trial counsel should have had the court admonish the jury. Although the district court did not allow an evidentiary hearing on this claim, it is apparent that counsel reasonably feared that an admonishment might have reinforced the effect of the aunt's statement. Further, we see no probability of a different result if an admonishment had been given.

Thomas asserts that his trial and appellate counsel should have challenged the aggravating circumstances involving robbery, burglary, and avoiding lawful arrest as improperly "overlapping." This assertion has no merit. Thomas offers little analysis and cites none of our

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[30]See Evans v. State, 113 Nev. 885, 894-96, 944 P.2d 253, 259-60 (1997).

[31]Thomas, 114 Nev. at 1142, 967 P.2d at 1121.

[32]Id.

caselaw regarding duplicative aggravators.[33] We have specifically held that the use of robbery and burglary as separate aggravators is proper.[34]

Thomas claims that his trial and appellate counsel failed to challenge numerous improper remarks by the prosecutors. To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.[35] The statements should be considered in context, and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."[36] We conclude that two of the remarks in question, made in the closing argument of the penalty phase, were improper and that counsel unreasonably failed to challenge them. We need not decide whether this failure was prejudicial since we have already determined that a new penalty hearing is necessary.

First, the prosecutor asserted, "This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers." This argument was improper. This court has held that prosecutors "may not argue facts or inferences not supported by the evidence."[37] The State has not pointed to any defense argument that justified the assertion or to any evidence that supported it. The State relies on Collier v. State, where

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[33]E.g., Hernandez v. State, 118 Nev. 513, 529-30, 50 P.3d 1100, 1111 (2002), cert. denied, 537 U.S. 1197 (2003).

[34]Homick v. State, 108 Nev. 127, 137-38, 825 P.2d 600, 607 (1992).

[35]Darden v. Wainwright, 477 U.S. 168, 181 (1986).

[36]United States v. Young, 470 U.S. 1, 11 (1985).

[37]Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

this court recognized that counsel may properly "discuss general theories of penology."[38] But the prosecutor's claim here was stated as fact, not theory, and in Collier this court specifically concluded that the prosecutor improperly referred to facts outside the record in arguing that the defendant could not be rehabilitated.[39] Thus, trial and appellate counsel should have challenged these remarks.

Second, the prosecutor argued: "The defendant is deserving of the same sympathy and compassion and mercy that he extended to Carl Dixon and Matt Gianakis. Don't let justice be robbed in the name of mercy." Thomas cites Lesko v. Lehman,[40] where the Third Circuit concluded that a prosecutor who implored a jury to make a death penalty determination in the cruel and malevolent manner shown by the defendants toward their victims exceeded the bounds of permissible advocacy. The comments were "calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence."[41] In Williams v. State,[42] this court distinguished Lesko and concluded that it was permissible for the prosecutor to ask the jury to show a capital defendant the same mercy that he showed his victim because the prosecutor was responding to a

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[38]101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985), modified on other grounds by Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990).

[39]Id.

[40]925 F.2d 1527, 1545 (3d Cir. 1991).

[41]Id.

[42]113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997), receded from on other grounds by Byford, 116 Nev. 215, 994 P.2d 700.

comment by defense counsel raising the issue of mercy. Even though Thomas's counsel did not invoke "mercy" or "sympathy" or "compassion" in closing argument, the State cites Williams and maintains that the prosecutor's argument was justified because counsel said: "I would ask you to spare his life and to impose the severe punishment of imprisonment without the possibility of parole." Under the State's view, anytime a defense counsel asks the jury not to impose death—i.e., in every capital penalty hearing—the State can urge the jury to treat the defendant as mercilessly as the defendant treated the victim. Our ruling in Williams was not this broad. The remark here was improper, and counsel should have challenged it.

Thomas claims that his trial counsel were not prepared for critical proceedings and did not conduct adequate investigation. He complains that they did not confer with him before the trial and were responsible for too many other cases. This claim remains largely conclusory and fails to demonstrate prejudice. Thomas does claim specifically that his counsel was not prepared to cross-examine Hall, Thomas's codefendant, at the preliminary examination; Thomas contends that better cross-examination would have revealed that Hall was lying and had been forced to testify. The record as a whole belies this contention.

Thomas claims that his trial counsel were ineffective because they made no opening statement and called no witnesses in the guilt phase. He states that his affidavit "attached to the Supplemental Petition spells out the witnesses that should have been called." As noted above, NRAP 28(e) prohibits a brief to this court from incorporating by reference briefs or memoranda filed in district court. Furthermore, this claim has

no merit: the affidavit names only witnesses allegedly relevant to the penalty phase and fails to explain what the witnesses' testimony would have been or how it might have altered the outcome of the trial.

Thomas claims that his appellate counsel failed to file a complete record on appeal. Thomas specifies only that the record filed did not include transcripts of the hearing on his motion to dismiss his attorneys. He says that the transcripts would have substantiated his claim that he did not receive effective assistance of counsel. No prejudice is apparent, however, because this court generally declines to address claims of ineffective assistance of counsel on direct appeal.[43]

Thomas also asserts that his appellate counsel was ineffective in failing to challenge the jury instruction on implied malice, which stated: "Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." He contends that the instruction is erroneous because it establishes a presumption of malice and uses terms that are archaic, without rational content, and merely pejorative. This court has previously rejected these contentions.[44]

The remaining claims are procedurally barred. Thomas asserts that this court's review of capital cases is unconstitutional because our opinions are arbitrary, unprincipled, and result-oriented. He offers no cause for failing to raise this claim earlier and does not establish prejudice: the claim lacks specific supporting facts, authority, or analysis

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[43]See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

[44]See Cordova v. State, 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000); Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001).

to indicate that it has any merit. He also claims that the statutory mechanism for review of capital cases is faulty because this court is not required to consider whether mitigating circumstances exist and to weigh them against aggravating circumstances. Again he provides no cause for not raising this claim earlier. He also cannot establish prejudice. NRS 177.055(2)(e)[45] requires this court to consider on direct appeal: "Whether the sentence of death is excessive, considering both the crime and the defendant." We have already held that this provision requires us to consider any mitigating evidence;[46] it also necessarily requires us to assess the weight of mitigators and aggravators. Finally, Thomas alleges that African-Americans were underrepresented on his jury and that Clark County systematically excludes African-Americans from criminal jury pools. He does not argue that his counsel were ineffective in any way, and he offers no cause for failing to raise this claim at trial or on direct appeal. Thomas also fails to articulate prejudice.[47]

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[45]This provision was formerly in subsection (d) of NRS 177.055(2). See 2003 Nev. Stat., ch. 137, § 6, at 770.

[46]Hollaway v. State, 116 Nev. 732, 741-42, 6 P.3d 987, 994 (2000).

[47]See Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274-75 (1996) (setting forth the standard for a claim of systematic exclusion).

CONCLUSION

We affirm the judgment of the district court insofar as it upholds Thomas's conviction. We reverse the judgment insofar as it upholds Thomas's death sentences and remand this matter to the district court for a new penalty hearing.[48]

Shearing, C.J.

Agosti, J.

Rose, J.

Becker, J.

Maupin, J.

Gibbons, J.

[48]This matter was submitted for decision by the seven-justice court. The Honorable Myron E. Leavitt, Justice, having died in office on January 9, 2004, a six-justice court decided this matter.

EXHIBIT 16

EXHIBIT 16

ORIGINAL

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FILED IN OPEN COURT
NOV 28 2005 20
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BY Theresa Lee
THERESA LEE DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
MARLO THOMAS,
#1060797
Defendant.

Case No. C136862
Dept No. XV

JUDGMENT OF CONVICTION

WHEREAS, on the 10th day of July, 1996, Defendant, MARLO THOMAS, entered a plea of Not Guilty to the crime of COUNTS 2 & 3 - MURDER WITH USE OF A DEADLY WEAPON (Felony), NRS 200.010, 200.030, 193.165; and

WHEREAS, the Defendant MARLO THOMAS, was tried before a Jury and the Defendant was found guilty of the crime of COUNTS 2 & 3 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony), in violation of NRS 200.010, 200.030, 193.165, and the Jury verdict was returned on or about the 18th day of June, 1997.

Thereafter, another trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT 2, that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who, at anytime before a penalty hearing is conducted, is or has been, convicted of a felony involving the use or threat of violence to the person of another, to-wit: in 1990 the Defendant was convicted of the crime of Attempt Robbery.
2. The murder was committed by a person who, at anytime before a penalty hearing is conducted, is or has been convicted of a felony involving the use of threat of violence to the person of another, to-wit: in 1996 the Defendant was convicted of the crime of Battery Resulting in Substantial Bodily Harm.
3. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.
4. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first of second degree.

That on or about the 5th day of November, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT 2 - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Carl Dixon) in the Nevada State Prison located at or near Carson City, State of Nevada.

The same jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT 3, that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who, at anytime before a penalty hearing is conducted, is or has been, convicted of a felony involving the use or threat of violence to the person of another, to-wit: in 1990 the Defendant was convicted of the crime of Attempt Robbery.
2. The murder was committed by a person who, at anytime before a penalty hearing is conducted, is or has been convicted of a felony involving the use of threat of violence to the person of another, to-wit: in 1996 the Defendant was convicted of

the crime of Battery Resulting in Substantial Bodily Harm.

3. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.
4. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first of second degree.

That on or about the 5th day of November, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT 3 - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Matthew Gianakis) in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 28th day of November, 2005, the Defendant being present in court with his counsel, DAVID SCHIECK, Special Public Defender and DANIEL ALBREGTS, Esquire, and CHRIS J. OWENS, Chief Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant to DEATH for COUNT 2 - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Carl Dixon); and to DEATH for COUNT 3 – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Matthew Gianakis).

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 28 day of November, 2005, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#96F07190A/mb
LVMPD EV# 9604150488
1° MURDER W/WPN - F

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EXHIBIT 17

EXHIBIT 17

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 46509

APPELLANT'S OPENING BRIEF

APPEAL FROM REMANDED PENALTY HEARING
AND SENTENCE OF DEATH

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 46509

APPELLANT'S OPENING BRIEF

APPEAL FROM REMANDED PENALTY HEARING
AND SENTENCE OF DEATH

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 46509

STATEMENT OF ISSUES

1. WHETHER THE COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION OF THOMAS' RIGHTS UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

2. WHETHER THE COURT IMPROPERLY LIMITED THE MITIGATION AND INSTRUCTIONS ON MITIGATION OFFERED BY THOMAS

3. WHETHER THE COURT ERRED BY NOT LIMITING PENALTY HEARING EVIDENCE TO AVOID VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR PENALTY HEARING

4. WHETHER THE SENTENCE OF DEATH MUST BE REVERSED BECAUSE NEVADA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL

5. WHETHER THE STATE VIOLATED THE ORDER OF THE COURT BIFURCATING THE EVIDENCE AT THE PENALTY HEARING

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

STATEMENT OF THE CASE

In June 1997 MARLO THOMAS was convicted of two counts of first-degree murder and four other felonies and received two sentences of death. On direct appeal this Court affirmed his conviction and sentence. Thomas v. State, 114 Nev. 1127, 967 P.2d 111 (1998). Thereafter THOMAS filed a Post Conviction Petition for a Writ of Habeas Corpus and the District Court denied the petition. He filed an appeal from denial of the petition and this Court issued its Opinion on February 10, 2004 which affirmed in part, reversed in part, and remanded the matter for a new penalty hearing. The Opinion stated in pertinent part: "We conclude that Thomas's counsel were ineffective in failing to object to an incorrect instruction on sentence commutation at the penalty phase of his trial and that a new penalty hearing is required." Thomas v. State, 120 Nev.Ad.Op. 7 (2004)

The remanded penalty hearing commenced on October 31, 2005 and concluded on November 4, 2005 with the jury imposing two sentences of death. The jury found the existence of four aggravating circumstances: (1) Prior violent felony conviction; (2) Prior violent felony conviction; (3) Murder to prevent lawful arrest and (4) convicted of more than one count of murder in the immediate proceeding (11 APP 2647-2648). The jury found that seven (7) mitigating circumstances had been established: (1) Accepted responsibility for the crime; (2) Cooperated, but diverted the truth; (3) Demonstrated remorse; (4) Defendant has counseled others against criminal acts; (5) Defendant has suffered both learning and emotional disabilities; (6) Defendant found religion; and (7) Father's denial of son (Marlo) (11 APP 2649.

The District Court held formal sentencing on November 28, 2005 and the Judgement of Conviction was filed in open court along with the Order of Execution. THOMAS filed his Order to Stay Execution on December 12, 2005 and the Notice of Appeal was timely filed on December 23, 2005.

STATEMENT OF FACTS

A. TRIAL TESTIMONY

For purposes of this Brief THOMAS will incorporate the Facts from the decision of this Court on the direct appeal, with the caveat that THOMAS has consistently maintained that no proper investigation was conducted before the trial and therefore the testimony presented was virtually unopposed at trial and does not accurately portray the facts of the case. (See e.g. Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein the Court found that the overwhelming evidence that appeared after trial was entirely different from the evidence that came to light after post-conviction pleadings.) Additionally the District Court denied THOMAS an evidentiary hearing on the majority of the factual claims raised on post-conviction and therefore he was unable to make a record on the failures of trial counsel. Finally the remand was for purposes of a new penalty hearing only and therefore the facts presented at trial are not subject to challenge by THOMAS.

> "In March, 1996, Thomas worked at the Lone Star Steakhouse in Las Vegas as a dishwasher until he was laid off from his job. Apparently Thomas had trouble showing up for work because he lived some distance away in Hawthorne with his wife, Angela Love Thomas.
>
> On Sunday, April 14, 1996, Thomas, Angela, and Angela's fifteen-year-old brother, Kenya Hall, drove from Hawthorne to Las Vegas and arrive at the house of Thomas' aunt, Emma Nash, and cousin Barbara Smith. At about 7:30 a.m. on Monday, April 15, 1996, the three travelers drove to the Lone Star Steakhouse in order for Thomas to try to get his job back. The restaurant was closed to the public that early in the day. Angela waited in the car while Thomas, accompanied by Hall, entered the Lone Star. No discussion about robbery occurred at any time between Thomas and Hall. According to Thomas, he possessed a loaded 9-millimeter weapon. As they were walking toward the building from the parking lot, a delivery truck arrived nearby. Thomas expressed dismay and returned to the car to retrieve another loaded gun before approaching the building again. At this time, Thomas possessed both a loaded .32-caliber revolver and a loaded 9-millimeter weapon.

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

The two went to the back door where employees usually enter. Stephen Hemmes, a Lone Star employee, was leaving temporarily because he did not have work appropriate shoes. Thomas and Hemmes spoke for a few minutes, and Thomas inquired as to who was acting as manager that morning. Hemmes replied that the manager was Vincent Oddo, and Thomas stated that he did not like Oddo. Thomas further asked when Hemmes would return, Hemmes answered that he would return in approximately twenty minutes, and he left. Thomas then knocked on the back door, and another employee, Matthew Gianakis, opened the door for them to enter.

Thomas and Hall walked through the kitchen toward the manager's office. Thomas knocked on the office door, and Oddo, who was on the phone, let them in. In Thomas' videotaped confession, (FOOTNOTE OMITTED) Thomas stated that he and Oddo discussed Thomas' job, which led to an argument, and that Thomas left the office. Thomas further stated that he had no intent to commit robbery; however, he admitted that he returned to the office with Hall a minute later and pulled out his .32-caliber revolver. Thomas stated that Oddo became frightened and told Thomas and Hall to take whatever money they wanted. Despite the fact that Thomas admitted pointing the gun directly at Oddo, Thomas claimed that Oddo initiated the robbery by giving them money.

Both Hall and Oddo testified that upon Thomas' arrival at the manager's office, Thomas immediately snatched the phone from Oddo's hand, hung it up, and pulled out his .32-caliber revolver. Thomas pointed it directly at Oddo's face and demanded that Oddo open the safe and give them the money. Oddo complied, and Thomas handed the gun to Hall and requested that Hall retrieve the money from Oddo. It is disputed whether Thomas told Hall to shoot Oddo. Although frightened and confused, Hall took the gun from Thomas, remained in the office with Oddo, took two or three bank bags of money from Oddo, allowed Oddo to run out of the building, and left to return to the car.

After Thomas gave Hall the gun, but before any money exchanged hands, Thomas left the office because he knew that two employees and former co-workers, twenty-one year old Gianakis and twenty-four year old Carl Dixon, were 'circling around.' According to Thomas' videotaped confession, Thomas went to the men's restroom, which was also a hangout for the employees, to find the two men. Upon entering the bathroom, Thomas saw Gianakis at the sink and Dixon in a stall. Thomas also observed that Gianakis had laid a meat-carving knife with a five- to seven- inch blade on the bathroom counter. Thomas blocked the door to prevent the two from leaving the bathroom while the robbery was taking place in the manager's office. A struggle ensued between the three men, and Thomas picked up the knife and stabbed Dixon several times until Dixon fell to the floor.

Meanwhile, Gianakis ran from the bathroom, and Thomas ran after him, stabbing him once in the front and once in the back.

Evidence was also presented at trial that Thomas specifically enticed or attempted to entice the two victims into the bathroom. Hall's testimony revealed that Thomas explained that he told Dixon he needed to talk in the bathroom. Once Dixon entered the bathroom with Thomas, Thomas began stabbing him. Thomas told Hall that he then called to Gianakis to join him in the bathroom, but Gianakis refused to enter. Then, according to Hall, Thomas chased Gianakis around the comer and stabbed him twice.

After returning to the car, Thomas asked Hall if Hall had killed Oddo. Upon learning that Hall had not, Thomas stated that Hall should have done so because 'you're not supposed to leave witnesses.' At some point, the money from Oddo's office was transferred from the bank bags to a dark blue pillowcase.

Oddo, who had escaped after giving Hall the money, ran across the street to call for help. Gianakis, who had just been stabbed twice, stumbled next door to a gas station/mini-mart and collapsed, dying shortly thereafter. Dixon's dead body remained on the bathroom floor.

The medical examiner testified at trial that Dixon suffered fifteen defensive stab wounds on his extremities and three to five severe stab wounds on his right chest about six inches deep, penetrating his heart, lungs, pulmonary artery, and aorta. The cause of Dixon's death was multiple stab wounds. The medical examiner further testified that Gianakis suffered two fatal stab wounds, one to his chest and one to his back, penetrating both his heart and left lung. The cause of Gianakis' death also was stab wounds.

Thomas, Hall, and Angela returned to Nash and Smith's house. Thomas told both Nash and Smith that if anyone asked, they should state that they had not seen him. Smith noticed that Thomas' clothes and shoes were bloody. The blood on the clothes and shoes was later determined to be consistent with Dixon's blood. Thomas gave Smith the money-filled pillowcase, and she started counting the contents. Thomas told her that "I did it" and that he had to take care of something and get rid of two people. He also stated to Nash that one of the two men got away (referring to Gianakis) and Thomas hoped that he (Gianakis) died. Thomas gave $1,000.00 to Smith to give to his mother, and he gave the .32-caliber revolver to Nash to give to her son. Thomas then changed his attire and took his bloody clothes and shoes, the knife used in the Lone Star bathroom, and the 9-millimeter gun into the desert beyond the house's backyard. The police recovered all the items except for the 9-millimeter gun, which was never found.

> Thomas, Hall, and Angela packed the pillowcase containing the rest of the money into the car trunk and drove back to Hawthorne, where they were arrested."

Thomas v. State, 114 P.2d 1127, 1132-1134, 901 P.2d 647 (1998)

B. PENALTY HEARING IN 1997

The facts of the previous penalty hearing are not relevant to the current appeal, except to note that the jury found the existence of six (6) aggravating circumstances and no mitigating circumstances. The aggravating circumstances found by the jury were: (1) prior felony involving violence, (2) prior felony conviction involving violence, (3)murder during the commission of a burglary, (4) murder during the commission of a robbery, (5) murder to prevent a lawful arrest, and (6) conviction of more than one offense of murder.

C. REMANDED PENALTY HEARING IN 2005

As a result of motions filed by THOMAS prior to the penalty hearing, the District Court ruled that robbery would be stricken as an aggravating circumstance. (13 APP 3146) The Court also determined that the penalty hearing would be a bifurcated proceeding with the first phase consisting of evidence of aggravation and mitigation and the jury engaging in the weighing process. (13 APP 3150-3151)

The State called several witnesses to describe the events of April 15, 1996 at the Lone Star restaurant. Stephen Hemmes worked at the restaurant as a prep cook, however, he showed up for work wearing the wrong shoes and was sent home to change. (11 APP 2488) As he left the restaurant he ran into THOMAS who indicated he was there to get his job back. (11 APP 2489) When Hemmes arrived back at the restaurant the police had already arrived. (11 APP 2490)

Vince Oddo was the kitchen manager at the Lone Star and was working in his office when there was a knock on his door and when he opened the door THOMAS was standing there holding a gun. (11 APP 2491-2492) At THOMAS' request he opened the safe and started putting

all the money in bags. (11 APP 2492) Kenyon Hall was now holding the gun and Oddo gave him the bags of money. (11 APP 2493)

After Oddo handed Hall the money he heard yells of "no" and "stop" and when Hall started in that direction, Oddo ran the other way and exited through the front door and ran across the street to the Albertson's. He called 9-1-1 and returned to the Lone Star when the police arrived. (11 APP 2493) The amount of money in all the bags was $3,500.00. (11 APP 2494)

On April 15, 1996 Sidney Sontag was at the Rebel gas station on North Rainbow and Cheyenne. (11 APP 2495) He was standing in line when a young man came stumbling in and said he had been stabbed at the Lone Star. (11 APP 2496) Sontag administered CPR until paramedics arrived and transported the young man. He later learned he had died at the hospital. (11 APP 2496)

Trooper David Bailey of the Nevada Highway Patrol and along with other troopers made a felony stop of a green Mitsubishi in Hawthorne, Nevada. (11 APP 2497-98) Three individuals, THOMAS, Hall, and Angela Thomas were in the vehicle and were arrested. Bailey recognized Hall and later conducted an interview with him. (11 APP 2498) Over defense objection Bailey was allowed to summarize the out-of-court statements made by Hall after his arrest in Hawthorne. (11 APP 2498)

The preliminary hearing testimony of Hall was read to the jury just as it had been allowed to be read to the jury during the original trial when Hall invoked his Fifth Amendment right not to be compelled to testify. (11 APP 2512-2527)

Homicide Detective Dave Mesinar summarized the various crime scene photographs and diagrams and related the contents of THOMAS' statement after he was arrested. (11 APP 2528-32) THOMAS stated that there was a confrontation in the men's room when he told the employees they could not leave the restroom. Dixon tried to leave and was

pushed by THOMAS and Gianakis tried to intercede and THOMAS grabbed the knife and stabbed Gianakis. Dixon then grabbed THOMAS around the neck at which time THOMAS repeatedly began to stab Dixon until he fell. (11 APP 2532)

THOMAS' bloody clothes, shoes, a blue steel revolver, and a knife were recovered at THOMAS' aunt's house at 2505 Cartier. (11 APP 2533) Emma Nash, THOMAS' aunt indicated that when THOMAS came to the house his clothes were bloody and he had been crying and wanted to change his clothes and leave for Hawthorne. (11 APP 2534)

Carl Dixon had 19 stab wounds to the left side of the chest, 3 to the right side of the chest, 9 stab and defensive wounds on the left arm, six defensive wounds on the right hand, and a stab wound in the left thigh. (11 APP 2536) Matt Gianakis had two stab wounds, one to the chest and one to the back. (11 APP 2536)

The Mitsubishi automobile was processed in Hawthorne after THOMAS, Hall, and Angela were arrested. Recovered in the trunk was a blue pillow case containing $5,857 in cash. (11 APP 2537) This was consistent with the information received from Emma Nash.

The previous testimony of Barbara Smith was read to the jury as Ms. Smith was deceased. (11 APP 2655-56) She was living at 2505 W. Cartier on April 14, 1996. Thomas, Angela Hall, and Kenyon Hall came to visit. They stayed Sunday night and on the next morning she saw THOMAS and he was shaky and had blood on his clothing. (11 APP 2656) He told her that he had something to tell her and showed her a bag of money which he dumped on her bed and started counting. (11 APP 2656-57) She noticed speckles of blood on the money and THOMAS told her he had to get rid of two people. (11 APP 2657) THOMAS left a thousand dollars with her to give to his mother and exchanged shoes with her son, Patrick. (11 APP 2657)

At the remanded penalty hearing Emma Nash also was deceased and

therefore her previous testimony was read to the jury. (11 APP 2658-59) Nash saw the money on the bed and Barbara crying and she asked THOMAS if he had done anything to get him in trouble. (11 APP 2660) He told her that his mother needed $1,000.00 and he got it for her. (11 APP 2660)

In order to establish the existence of the aggravating circumstances of previous violent felony convictions, the State called North Las Vegas police officer Michael Holly. Holly related that on August 10, 1990 he arrested THOMAS for robbery with use of a deadly weapon for robbing $475.00 from an employee of the 7-11 store at Las Vegas Boulevard and Civic Center. (11 APP 2663-64) Certified copies of the judgement of conviction and discharge form Nevada State Prison for the same offense were admitted. (11 APP 2664)

The previous testimony of Loletha Jackson was read to the jury over the objection of THOMAS. (11 APP 2666-67) She testified that THOMAS came into her residence on May 5, 1996 and argued with Pam Davis and then hit Jackson in the face with a gun and stomped on her chest area. (11 APP 2667) A certified copy of the judgement of conviction for this incident was admitted into evidence. (11 APP 2668)

In mitigation THOMAS called a number of witnesses. David Hudson, a cousin of THOMAS' had worked for the Clark County School District for 21 years. (12 APP 2690) Hudson was 7 years older than THOMAS and did not spend a lot of time with him except at family outings or when Hudson would go over to his mother's house. (12 APP 2692) THOMAS was a normal child although his older brothers Larry and Darrell would pick on him. (12 APP 2693) His father was never around and had no involvement in THOMAS' life. (12 APP 2694) THOMAS mother was the meanest aunt Hudson had. (12 APP 2694) She was very strict and made the boys clean and cook and would spank them. (12 APP 2694)

On the morning of the incident, Hudson received a call to come over to his sister Emma's house. When he arrived he was told that THOMAS had robbed a place where he used to work and that THOMAS was very erratic and upset while he was at the house. (12 APP 2696-98) The next he heard from THOMAS was about a year and a half before the remanded penalty hearing and THOMAS told him that he was seriously giving his life over to God. (12 APP 2699) He believed that THOMAS could have a productive life in prison if THOMAS tuned his life over to the Lord and he could be useful as a minister or pastor in prison. (22 APP 2700)

THOMAS' aunt Eliza Bosley explained that she had lived with THOMAS and his mother and brothers for a period of time. (12 APP 2706) During the time Bosley lived with them she noticed that the two middle boys, THOMAS and Darrell, were treated more harshly, being restricted to the house, doing chores and did not get anything until a long period of time had passed. (12 APP 2708) THOMAS' father was in prison and was never around. (12 APP 2709) The only father figure was his Aunt Shirley's husband. (12 APP 2709)

THOMAS did not receive a lot of attention from his mother or get a chance to be a kid, instead having to do chores or babysit his younger brother. (12 APP 2710) Eventually THOMAS took to the streets to get attention from people. (12 APP 2710) THOMAS visited Eliza for a couple of hours the night before the incident and he seemed dazed in appearance as if he was under the influence of drugs or alcohol. (12 APP 2713)

Bosley had spoken with THOMAS over the phone while he was in prison and they would talk about scriptures from the Bible.

Shirley Nash, another of THOMAS' aunts, was close with THOMAS and his mother while he was growing up. She lived with them for the first 3 years of his life and then she and her husband moved out and THOMAS

and his mother moved in with them. (12 APP 2719) THOMAS' father went to prison when he was about 6 or 7 and THOMAS never saw him again. (12 APP 2720) When his father went to prison THOMAS' behavior changed and he started acting out like he was looking for attention. (12 APP 2720) Nash's husband tried to provide a father figure; THOMAS refused to accept him saying he wasn't his father. (12 APP 2721)

There was discipline in THOMAS' house and if he did something wrong his mother used to use a belt on him. (12 APP 2722) THOMAS would go to church on Sundays but started getting in trouble with the law because of the people he was hanging around with. (12 APP 2722) It was Nash's opinion that he started hanging out with kids like that because they showed him more attention than he was getting at home. (12 APP 2723)

Nash was aware of both times THOMAS went to prison and thought he had mellowed out after the second time, but then he starting seeing a girl named Angela. She thought THOMAS should get rid of Angela because she had a bad attitude and wasn't any good. (12 APP 2725-26)

Nash heard on TV about the incident and was heartbroken and sad because she couldn't believe he would do something like that. (12 APP 2727) Her son Charles worked at the Lone Star and she was aware that THOMAS knew both Carl and Matt and had socialized with them. (12 APP 2729) They used to come over to her house and Charles was very hurt because he, too, could not believe THOMAS would do something like that. (12 APP 2729-2730)

Charles Nash was one year younger than his cousin MARLO THOMAS. (12 APP 2734) He didn't see THOMAS' dad too much and his dad was most definitely not a part of THOMAS' life. (12 APP 2737) Nash believed that THOMAS started hanging around with a bad crowd because he was neglected at home, and would always be blamed for things he didn't do. (12 APP 2738) Nash, after THOMAS got out of prison got him a job at

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the Lone Star. (12. APP 2739) Nash was good friends with both Carl and Matt. (12 APP 2740)

Nash knew Angela before she ever met THOMAS and knew that she used crack and other drugs. (12 APP 2742)

Darrell Thomas was a pastor at Philadelphia Church since 1993 and was employed at Republic Services. (12 APP 2751) MARLO was four years younger. (12 APP 2752) They had the same father who left when MARLO was about 10 years old and was never involved with the family or raising the boys after he left. (12 APP 2753) Because their mother worked swing shift, they would have to do chores, cleaning and cook for themselves. (12 APP 2754)

MARLO started getting into school fights when he was in the 5th or 6th grade. (12 APP 2755) Darrell moved out of the house when he was 18, but on occasion would be called back to the house to straighten things out when incidents occurred. (12 APP 2756) He told their mother that in his opinion MARLO had some mental problems.

Paul Hardwick was MARLO'S younger bother by 8 years and at the time of the hearing was employed at H2O Environmental, a company that dealt with clean-up of spills and accidents on the roadways. (12 APP 2760) His first recollection of MARLO was when he was in kindergarten and MARLO rode 3.2 miles on his bicycle to pick him up at school when he had a problem being away from home. (12 APP 2761)

MARLO would always tell Paul to be better than him and to learn from his mistakes, and was always giving him positive feedback. (12 APP 2764) He used to do the same for their cousin that lived with them at the time. (12 APP 2764)

MARLO'S mother, Georgia Thomas, had lived in Las Vegas for over 30 years and worked at Clark High School for 26 years and before that at McCarren Airport for four years. (12 APP 2767) She had four boys, 2 (Darrell and Marlo) by Bobby Lewis who was verbally and physically

abusive to her. (12 APP 2768-2769) After Paul was born she shifted her attention to him and didn't pay much attention to MARLO. (12 APP 2771) Mr. Lewis denied that MARLO was his child and would buy things for Darrell and would not buy anything for MARLO. (12 APP 2772)

A few times when Lewis beat Georgia in front of MARLO he would try to stop him and Lewis would push MARLO out of the way. When Georgia put Lewis out of the house he broke out all of the windows and she had to call the police. (12 APP 2774)

When MARLO was in grade school he began to act out some, like he was angry and would get into fights that Georgia didn't believe or accept. (12 APP 2777-78) She would discipline MARLO by beating him, in fact, she beat him all the time. In hindsight she thought that if she had listened and paid attention things would have been different. (12 APP 2778) Instead of getting him help she would whip him with whatever she could find to whip him with. (12 APP 2779)

She spent most of her time and attention with Paul and the only attention that MARLO received were whippings and hollering. (12 APP 2779)

When MARLO was a teenager he was placed into a mental school but she really didn't care because her main concern was Paul. (12 APP 2780) When MARLO got to high school he started to get into trouble with the law and eventually ended up in prison for a conviction he sustained. (12 APP 2784) MARLO went to prison for six years and when he first got out of prison he was doing really good. (27 APP 2784)

Georgia first met Angela when MARLO brought her home, and she didn't like her because she got into drugs again and he changed again and became violent and wouldn't go to work. (12 APP 2786)

Georgia saw MARLO the night before the incident and in her opinion he appeared to be high. (12 APP 2787) She heard about the Lone Star on the TV and called everyone and then went to Emma Nash's

house, who told her that she had seen MARLO and that he had done something bad. (12 APP 2789) She saw MARLO on the way to Emma's house and he was crying and when she asked why Angela told her to let him go that they had to go. (12 APP 2790)

After argument of counsel the jury deliberated and returned verdicts finding that the aggravators outweighed the mitigators and as such the case proceeded to the second phase with all possible punishments available to the jury.

The State's presentation of evidence included a large number of reports concerning THOMAS' juvenile and prison records. THOMAS objected to the admission of the documentary evidence without the declarant being available for cross-examination. (13 APP 2916-17; 2918)

The records supervisor for the Department of Parole and Probation for Juvenile Services, Pat Smith, presented a Petition and Certification of THOMAS as an adult which contained the purported contents of an interview with Georgia Thomas. (13 APP 2921-22) Smith's testimony was based solely upon reading reports prepared by other persons years before her testimony. (13 APP 2922)

John Springgate worked for adult Parole and Probation in the 1990's. (13 APP 2923) He presented PSI reports, over THOMAS' objection, dated November 20, 1990 for attempt robbery and June 6, 1996 for battery with substantial bodily harm. (13 APP 2921-2925) The reports showed that THOMAS was sent to prison for six years when he was 17 years old. (13 APP 2925)

Alkareem Hanifa's prior testimony was read to the jury indicating that he was the victim of a robbery on December 28, 1989 wherein THOMAS hit him in the head with a large rock and took money out of his pocket. (13 APP 2927) Hanifa suffered a broken wrist, a bump on his forehead and lost a couple of teeth. (13 APP 2928)

On August 12, 1998 Cathy Frazier was working undercover security at the Meadows Mall. (13 APP 2929) She observed six juveniles shoplifting and called for backup. On of the individuals she approached was THOMAS who told her to get out of his face, called her a bitch, and punched her in the face. (13 APP 2929) THOMAS also struck a store manager who was assisting her knocking out a couple of teeth and then took off running. (13 APP 2930)

Paul Wheelock worked as a correctional officer for the Nevada Department of Prisons on August 1, 1996 (13 APP 2930) Wheelock was working the yard labor crew picking up trash and THOMAS, who was locked in his cell, was giving him a hard time about the composition of the crew. Wheelock opened the cell door to find out what the problem was and THOMAS took a swing at him that missed and Wheelock moved him and then put handcuffs on him. (13 APP 2931-32)

Correctional Officer Richard Johnson had an incident with THOMAS on August 9, 1993. (13 APP 2933) Johnson was walking across an open yard when THOMAS started getting loud and out of hand and escalating the situation. Johnson, pursuant to policy, handcuffed THOMAS and took him to holding to see the shift sargeant. When they got to holding and attempted to take the cuffs off, THOMAS took a swing at Johnson. Use of a tazar was threatened and THOMAS complied and was left in holding. (13 APP 2934-36) Johnson identified 14 separate disciplinary reports on THOMAS that were admitted into evidence. (13 APP 2936)

Wendy Cecil was a friend of Carl Dixon and recalled that Dixon had told her that he had caught THOMAS stealing money and THOMAS put a knife to his back and told him that if he said anything he would kill him. (13 APP 2939)

In 1994 Gina Morris was employed as a correctional officer at Ely State Prison. One of her responsibilities was to provide meals to

inmates. (13 APP 2941) On April 12, 1994 she was trying to give THOMAS some kool-aid through is food slot and THOMAS took a cup and threw a really bad-odored substance that hit the side of her face. It was burning her face and she went to the infirmary to clean off. (13 APP 2942) In the disciplinary report THOMAS denied that the substance was urine, but rather tea. (13 APP 2943)

The testimony of Marty Neagle was read to the jury, and indicated that at the time of his testimony he was a correctional sergeant at Ely State Prison and had been employed by the prison for 12 years and eight months. He had an incident with THOMAS on March 3, 1994. (13 APP 2943) He was called to the yard due to a fight between two inmates and went in with a squad in order to remove the inmates one at a time to their cells. (13 APP 2944) THOMAS was one of the inmates on the ground and urged the others to get up and kick the officers' asses and that he would kill every one of them. (13 APP 2945)

Correctional Officer Margaret Wood worked in the lock down unit at Ely State Prison and was acquainted with THOMAS. (13 APP 2948) She described THOMAS as very angry and always calling her names and exposing himself to her. (13 APP 2949) On one occasion THOMAS finished cleaning his cell and placed a cleaning brush on his food slot and when she picked it up his penis was under the brush and she touched it. (13 APP 2949)

Robert Sedlacek was a senior correctional officer having worked for the Department of Corrections for 15 years. On December 30, 1994 upon returning from his shower THOMAS attempted to grab the two officers escorting him through the food slot, and being unsuccessful "captured" the food slot by grabbing it with his hands so the door could not be closed. The officers decided to just wait and eventually THOMAS released his hold on the slot and the door was closed. (13 APP

2951-52)

Roger Edwards was a correctional officer for two and a half years at Ely State Prison. (13 APP 2955) Edwards described the amenities given to each inmate and those generally available. (13 APP 2956) Edwards described from a disciplinary report an incident which occurred on April 27, 1992 wherein a female officer confiscated torn bed sheets used to pass items and THOMAS verbally berated her and threatened to harm her when he got out of prison. (13 APP 2958)

Edwards also read from a report concerning an incident of April 3, 1993 wherein THOMAS was involved in a fight with another inmate and received a cut on his cheek from a prison made shank. (13 APP 2958)

Next, Edwards read from a report of an incident of August 24, 1993 wherein THOMAS attacked another inmate with his fist and a sock containing five rocks. This incident prompted the firing of two shotguns rounds. (13 APP 2959) On April 12, 1994 a report was generated that THOMAS had propelled a cup of strong-odored urine on correctional officer Boyten who was delivering dinner trays. (13 APP 2959)

Edwards described THOMAS as a security risk of high, maximum level. On September 17, 1993 Edwards had contact with THOMAS and when Edwards picked up the phone from THOMAS he became verbally abusive and threw paper and trash onto the tier. THOMAS also threatened that he would get Edwards when he got out. (13 APP 2960)

An incident occurred on February 21, 1998 involving THOMAS and correctional officer Gregory Freeman. THOMAS had begun flooding the tier and was being escorted into the shower by two other officers when THOMAS turned and spit at Freeman which hit the shield of his helmet and a little came underneath and got into his mouth. (13 APP 2965-66) Freeman went to medical and had a standard series of blood draws to check for diseases. The incident was the result of Edwards refusing

give THOMAS additional "kite" forms. (13 APP 2966)

Flooding is taking an item of cloth such as a bed sheet or jump suit and plugging the toilet and then continually flushing the toilet until the water spread onto the tier. (13 APP 2966) THOMAS received 90 additional disciplinary segregation days over the incident. (13 APP 2967)

David Williams was involved as a correctional officer in a series of incidents with THOMAS in October 1998, culminating in a write-up on October 22nd. (13 APP 2967) On that day THOMAS had taken a shower and refused to come out of the shower for several hours. When THOMAS was eventually led back to his cell he attempted to head butt Williams and minimal force had to be used to put THOMAS on the floor. (13 APP 2968) Williams described THOMAS as a very dangerous inmate with a reputation for being dangerous, aggressive and verbally abusive and capable of attempting to hurt prison staff. (13 APP 2969)

Vanessa Heidt knew THOMAS from the time he spent in her unit at High Desert State Prison. (13 APP 2970) Over a period of time in August, 2005 THOMAS repeatedly refused to comply with directions to remove coverings he had place don the windows of his cell. Finally on August 23, 2005 she wrote up a disciplinary report concerning his non-compliance. (13 APP 2970)

On September 28, 2005 as a result of the covering of his cell window, Heidt prepared an additional disciplinary reporting prompting THOMAS to threaten to kill her, and taunted her, became belligerent and called her names. (13 APP 2971) THOMAS also yelled to other inmates that she was gong to testify and lie on him at the hearing and that when he returned there was going to be a war. (13 APP 2971)

Fred Dixon, the father of Carl Dixon read a statement to the jury which purportedly was the same statement as was read at the first penalty hearing. (13 APP 2973) Dixon deviated from his statement by

blurting the following statement that was interrupted before it's conclusion by an objection by THOMAS: "It [the loss of his son] was caused by a person who is in my opinion the lowest form of social sewage --" (13 APP 2973)

Matt Gianakis' father, Alexander Gianakis, likewise read a prepared statement to the jury. (13 APP 2975) The State then rested. (13 APP 2976)

THOMAS, in the second phase of the bifurcated penalty hearing called witnesses from Ely State Prison. Damian Rivero was serving a sentence for robbery with use of a weapon. Rivero was in the same unit with THOMAS for many years, starting in 1998, and never saw him have problems with other inmates. It was his opinion that THOMAS avoided problems with officers as well as with other prisoners and that other inmates created more problems than THOMAS. (13 APP 3021) He had seen correctional officers mistreat THOMAS, and THOMAS had advised him to avoid problems with the officers, but Rivero did not follow his advise. (13 APP 3022)

Ronnie Joey Sellers was a high risk inmate in administrative segregation. He was in the prison system fro 15 to 16 years. (13 APP 3023) Sellers had seen THOMAS interact with other inmates and had never seen any problems. (13 APP 3024) Sellers described for the jury that as an HRP inmate he was only allowed out of his cell one hour per day for yard and every third day for shower. The yard is small with 40 laps equaling one mile, with a basketball court (sometimes there was a basketball, sometimes not) and a chin-up bar. (13 APP 3025) Sellers was HRP because he was labeled as "leadership of a security threat group". There was a period of time in the 1990's that Sellers was not friendly with THOMAS because of a conflict between his group and the blacks. (13 APP 3026)

James Jackson first went to prison when he was 12 years old. He

first met THOMAS in 1977 at Southern Desert Correctional Center and was housed with him a few times in Ely. THOMAS was seven or eight years older and had given him advice while he was in prison. If Jackson was about to do something wrong THOMAS would talk to him and calm him down. (13 APP 3027) He felt THOMAS had a positive effect on him and he had never seen THOMAS have problems with other inmates. He had seen correctional officers enticing him and giving him false write-ups. THOMAS had also talked to him about religion. (13 APP 3028)

Floyd Anthony was in prison for robbery with use of a deadly weapon. He was assigned to Ely State Prison and had known THOMAS for about 14 years. He had never known THOMAS to have problems with other inmates, but he had had problems with correctional officers, but at times the problems were provoked. (13 APP 3029)

THOMAS gave Anthony advice afer his mother passed away in 1998. He was ready to just trip out and THOMAS convinced him that he still had a chance and had kids out there and changed his whole life to the point that he may be paroled. (13 APP 3030)

Warden Dwight Neven of High Desert State Prison had been the Associate Warden of Programs at Ely State Prison for roughly 10 years and was familiar with THOMAS and his extensive disciplinary history. THOMAS was a behavioral problem at Ely State Prison and one of Neven's responsibilities was to hold regular HRP reviews of THOMAS. (13 APP 3031) THOMAS was always very respectful and civil to him. It was common for inmates to be loud and profane at Ely State Prison. (3 APP 3032)

While at High Desert State Prison THOMAS was non-problematic and Neven had found in his experience that as an inmate grows older he becomes less of a problem, surrendering to the system, and maturing. (13 APP 3032-33)

THOMAS spoke in allocution to the jury and expressed remorse for what happened and that he was not the person he was when the events occurred. (13 APP 3037) He accepted responsibility as the person at fault for the situation and apologized for taking two precious lives. (13 APP 3037)

ARGUMENT

I

THE COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION OF THOMAS' RIGHTS UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

A. The Court Erred in Admitting the out of Court Statements of Kenyon Hall During the Penalty Hearing.

In Crawford v. Washington, 541 U.S. 36, 69 (2004) the Court held "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation. The Court stated: "we leave for another day any effort to spell out a comprehensive definition of testimonial."

The Court did note that a statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. Id. at 51.

In the instant case a crucial issue involved the admissibility of the taped statement to the police and subsequent testimony at the preliminary hearing of Kenyon Hall.

When Trooper David Bailey testified the State elicited the contents of the out of court statement given by Hall:

> "Q Can you briefly tell the members of the jury what Kenyon Hall told you at that interview?
>
> MR. SCHIECK: Objection, hearsay. It denies the right to confrontation.
>
> MR. SCHWARTZ: Your Honor, we're in a penalty phase where hearsay is admissible.
>
> THE COURT: Objection is overruled. In the trial it would have been inadmissible, but it is admissible in this proceeding." (11 APP 2498).

Later in the proceedings the State proposed to admit into evidence the entire transcript of the statement given by Hall. The Court initially ruled that the transcript would not be admitted but

that the State could recall Bailey to testify further concerning the contents of the statement. (2653-2655). When recalled Bailey took a copy of the statement with him and used it to refresh his recollection as to what Hall had told him when giving his statement (11 APP 2665).

In response to the State asking Bailey whether Hall's mother was present during the statement, THOMAS asked on cross-examination who else was present during the interview (11 APP 2665). Based thereon the Court changed it's mind and allowed the transcript of the statement to be introduced into evidence (11 APP 2666).

During the closing argument at the first phase of the penalty hearing the State relied heavily upon the contents of the statement of Hall which had been admitted into evidence by the Court over the objection of Thomas, arguing in part:

> "Kenyon Hall gave a rather lengthy statement to Trooper David Bailey that same day or the very next day after the horrific crimes that had occurred at the Lone Star. The pages aren't numbered and the exhibit has been admitted, and I counted the pages and on page 21, there is an answer by Kenyon Hall referring to what Marlo Thomas said to him.
>
> Hall: He said, uh, he -- was telling Angela that he had went in there and that, uh, he started talking to the manager or something like that, and he told him to open the safe and give me the gun, and told me, point it at his head and shoot him once he opens the safe. And he said he would be back....." (12 APP 2833-34).

Admission of the contents of the out of court interrogation statement was prejudicial to THOMAS in that at the Preliminary Hearing, under oath, Hall testified that THOMAS had not told him to shoot the manager in the head. Thus, the only evidence of any intent to harm anyone during the robbery came from an out of court statement that THOMAS could not confront with cross-examination. Admission of the statement contents violated the Sixth Amendment and mandate reversal of the penalty imposed.

B. The Court Erred in Admitting Records and Reports from the Department of Prisons and Parole and Probation Without Calling the Declarant or Author Thereof to Testify and Be Subject to Cross-examination.

At the settling of jury instructions at the first phase of the penalty hearing the State proposed to be allowed to enter into evidence exhibit 86 which the State described as a

> "certification order from juvenile court for -- that attempt robbery with use of a deadly weapon lists all other juvenile evidence leading up to that crime in 1990.
>
> In addition this is where they did the interview of the mother for preparation of that certification order and in here in states -- this is something that she denied saying or said she wouldn't say that was true -- Mrs. Thomas reports her relationship with Marlo was good and Marlo was spoiled rotten and somewhat independent. She rates her degree of parental control as fair. Mrs. Thomas states Marlo's older brother is no longer living in the home, Marlo believes he is able to do his dirt. Mrs. Thomas is not married to Marlo's biological father, Bobby Lewis, whose been incarcerated in prison. She states that there has been no indication or suspicion Marlo has been involved in drugs, but she does believe he will get into drugs if he thinks he can make a quick buck" (12 APP 2812-13)

After further discussion, THOMAS articulated the basis for the objection as it related to the hearsay nature of this and other similar documents that would be offered by the State during the course of the penalty hearing:

> "MR. SCHIECK: [The State is] going to bring in a piece of paper that's manufactured by somebody who wrote a report which makes it hearsay. There's no way we can confront that report because there's no one to cross-examine it. So now we're violating the 6th Amendment along with violating the bifurcation of the trial.
>
> THE COURT: Well, Mr. Schieck, you know the instruction that you agreed to is that hearsay is admissible at a penalty hearing. And that's what that report is.
>
> MR. SCHIECK: The statute says hearsay is admissible at a penalty hearing. The 6th Amendment says it's not, because it denies the right to confront the declarant, the person who authored the document. There's no way for us to cross-examine that document or the author of the document." (12 APP 2815).

In Russeau v. Texas, 171 S.W.3d 871 [Tx.Crim.App] (2005), a capital murder case, the court of criminal appeals of Texas affirmed the defendants conviction but reversed as to punishment, remanding for a new punishment hearing on the ground that "incident reports' and "disciplinary reports" admitted under the business records exception to the hearsay rule; contained statements which appeared to have been written by correction officers and which purported to document numerous and repeated disciplinary offenses on the part of Russeau while incarcerated. Further, in writing the statements, the corrections officers relied upon their own observation or the observation of others. The individuals who supposedly observed the offenses did not testify at trial.

The Texas Court held that the reports were testimonial statements and, as such, were inadmissible under the confrontation clause, because the State did not show that the declarants were unavailable to testify and Russeau never had an opportunity to cross-examine any of them. The Texas Court stated that:

> "Indeed, the statements in the reports amounted to unsworn, ex parte affidavits of government employees and were the very type of evidence the clause was intended to prohibit." (at 881)

Inmate reports and disciplinary reports are testimonial. Therefore, this Court should find that their admission into evidence violative of the confrontation clause and reverse MARLO THOMAS' sentence of death and remand the case to the District Court.

II.

THE COURT IMPROPERLY LIMITED THE MITIGATION AND INSTRUCTIONS ON MITIGATION OFFERED BY THOMAS

A. The Court Erred in Refusing to Instruct the Jury That the Absence of Premeditated Intent to Kill Could Be Considered as a Mitigating Circumstance.

During the settling of jury instructions the Court reviewed the Instruction on mitigating factors offered by THOMAS and made the following comments and ruling:

> "THE COURT: Marlo Thomas accepted responsibility for the crime, Marlo Thomas was cooperative with authorities and voluntarily gave a statement, Marlo Thomas expressed remorse for the incident, Marlo Thomas was raised without the benefit of a father figure, Marlo Thomas says it occurred during a confrontation and as such there was no premeditated intention to cause death.
> I don't think that can be in there, because we -- I didn't try the case the first time around, but it was charged as an open murder, either premeditated, deliberate, willfully, and whatever, or felony murder, so I don't think (6) can be in there.
>
> MR. SCHIECK: It's the McConnell holding, your Honor. We don't know whether the jury found it was death during the commission of a robbery.
>
> THE COURT: This is instructing them. This is instructing them. This is an instruction from the Court. I'm not commenting on the evidence, and I'm not giving that one.
> You can ask for it. Give it up here, you're requested, not given. 6 is coming out." (12 APP 2802-2803; 11 APP 2584).

The ruling by the District Court violated the holding in Lockett v. Ohio, 438 U.S. 586, 604 (1978) that the jury must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As such the ruling violated THOMAS' rights under the Eighth and Fourteenth Amendments.

THOMAS had the absolute right to submit to the jury based on his

statements to the police that there was no premeditated intent to kill anyone in the Lone Star. The jury should have been afforded the opportunity to consider same as mitigation in the remanded penalty hearing. This is true no matter how improbably the Court may have felt the evidence. Besides being mitigation, the lack of premeditation was part of THOMAS' theory of defense to imposition of the death penalty. Williams v. State, 99 Nev. 530, 665 P.2d 260 (1993).

B. The State Committed Error in Limiting the Consideration of Mitigation in It's Closing Argument.

The State also improperly argued the necessary findings for a mitigating circumstance:

> "So mitigator has to be something that is extenuating or reducing the degree of the defendant's moral culpability. Now, there are a lot of sad things that occur in people's lives, anybodies life. But that doesn't necessarily by the status of that event or the unfortunate circumstances of that event necessarily mitigate the culpability or reduce the culpability of an act by that person.
>
> In other words, there has to be some causation, connection between that fact and the thing that the person did before it becomes a mitigator.
>
> MR. SCHIECK: Your Honor, that's not correct.
>
> THE COURT: The instructions will be given to the jury"

(12 APP 2853-54).

A prosecutor may not misstate the law on mitigation or otherwise mislead the jury about how to impose a sentence. Comments telling jurors they cannot consider certain factors of mitigation or that they cannot show the defendant mercy are unconstitutional. Whenever a prosecutor tells jurors that they cannot consider evidence the defense presents as mitigation, he or she violates the Eighth and Fourteenth Amendments. In Penry v. Lynaugh, 492 U.S. 302, 326-328 (1980) the Court found that it is not enough "simply to allow the defendant to produce mitigating evidence to the sentencer," and that there must be

no impediment -- including prosecutorial argument -- to the sentencer's full consideration and ability to give effect to mitigating evidence.

As detailed above in Lockett v. Ohio, supra, the consideration of mitigating factors offered by the defendant in a capital case cannot be limited and still remain within the guidelines of the Constitution. The argument of the prosecution violated the proscription against limiting mitigation and requires reversal of the conviction.

C. The District Court Erred in Limiting the Defense Theory of Mitigation in the Case Involving the Failure to Charge Angela Love.

During the cross-examination of Detective Mesinar, THOMAS established that there was a factual basis to charge Angela Love under a variety of theories including accessory, aiding and abetting, and accessory after the fact. Mesinar actually arrested Angela for the crime and submitted the case to the District Attorney's office and they declined to prosecute. (11 APP 2541). The following exchange occurred during the re-direct examination of Detective Mesinar (11 APP 2543):

> "Q The decision made by the district attorney, is that a different kind of decision?
>
> A Yes, I believe it was.
>
> Q And that's based upon a standard of proof that's different?
>
> . . .
>
> THE COURT: Mr. Albregts, please. Whether or not -- the instructions are whether or not the State charges one, all, half of them is a decision for the prosecuting attorney. It's not something for the jury to worry or be considered about. She's not on trial here now.
>
> And why the district attorney didn't decide to prosecute her is not a defense in the case because we are not here to defend the case. It's not even mitigation. So I don't know why you brought it up." (11 APP 2543)

Whether or not the Court or prosecution believed that the fact that Angela Love was given a free ride by the State while the harshest penalty possible was sought against THOMAS, he should have been allowed to offer the evidence as a possible source of mitigation. THOMAS presented the testimony from several witnesses that he was doing fine after his release from prison until he started dating Angela. It was at that time that he started doing drugs again and lost his employment and went downhill, culminating in the events at the Lone Star Restaurant. When he had contact with his Aunt and cousin on the night before the incident both described him as being out of it and as if he was on drugs. This condition could be directly related to Angela.

THOMAS does not contend that Angela was an active participant in the events that transpired within the Lone Star, however it is fair argument that her involvement with THOMAS was a factor that led to the incident. The jury should have been allowed to consider her involvement and lack of punishment as a factor in mitigation of the sentence imposed against THOMAS.

III.

THE COURT ERRED BY NOT LIMITING PENALTY HEARING EVIDENCE TO AVOID VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR PENALTY HEARING

A. The Trial Court Should Not Have Admitted Cumulative and Otherwise Inadmissible Evidence of Prior Bad Acts During the Penalty Phase.

Prior to the first penalty hearing in this case the District Court refused to allow an evidentiary hearing on this issue and the Nevada Supreme Court did not address the issue on direct appeal even though it was raised. At the remanded penalty hearing THOMAS filed a Motion asking the Court to address the merits of the issue. (10 APP 2393-2400). The Court declined to grant the Motion.

There are competing and irreconcilable principles at work in the current capital sentencing procedures in Nevada. Specifically, NRS 175.552 provides that at a penalty hearing virtually everything is admissible:

> "In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced."

This statutory language must be contrasted to the plain meaning of the holdings in a number of cases that:

> Evidence of unrelated crimes for which a defendant has not been convicted is inadmissible during the penalty phase if it is dubious or tenuous, or if its probative value is outweighed by danger of unfair prejudice, confusion or issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence."

Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179 (1991). *See also,* Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983) and Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000).

THOMAS contends that the evidence offered by the State at the penalty hearing amounted to the entire history of THOMAS' contacts with the criminal justice system beginning at the age of 12. This evidence spanned a time frame in excess of 12 years, and continued beyond his incarceration for the instant offenses. At the first penalty hearing the State called 20 witnesses. Of these 20, three offered "victim-impact" statements. The remaining 17 witnesses related many of the same instances of prior bad acts of THOMAS. Further, there were multiple listing and re-listing of these same offenses by the State during closing arguments.

At the remanded penalty hearing the State offered basically the same evidence, although much of it was summarized by a number of witnesses, and only two victim impact witnesses testified. The complete description of the evidence presented by the State at the remanded penalty hearing is set forth in the Statement of Facts hereinabove. The inherent problem with allowing unbridled victim impact testimony is illustrated by the following:

Fred Dixon, the father of Carl Dixon read a statement to the jury which purportedly was the same statement as was read at the first penalty hearing. (13 APP 2973) Dixon deviated from his statement by blurting the following statement that was interrupted before it's conclusion by an objection by THOMAS: "It [the loss of his son] was caused by a person who is in my opinion the lowest form of social sewage --" (13 APP 2973). Even though THOMAS interrupted the diatribe with an objection the damage was already done by a witness that should have known better and who should have been properly prepared by the State before being allowed to take the stand.

The testimony concerning other incidents, were mostly uncharged criminal acts, ranged from improper verbal comments, to allegedly inciting other prisoners, and the urine incidents. Of particular

note, however, is the multitude of witness, many of whom, in their duplicative efforts, were testifying as to events of which they had no personal knowledge over hearsay and authenticity objections. Clearly the State desired to bolster their position that THOMAS was deserving of death by placing a parade of law enforcement people with the indicia of authority in front of the jury. Since the evidence primary consisted of unauthenticated, hearsay evidence, the State should have been limited on the number of witnesses.

Instead, and in the unbridled enthusiasm to achieve a penalty of death, the State reached back to THOMAS' pre-teen days and presented the jury with a barrage of authority figures who testified that THOMAS was a bad person deserving of the death penalty. This type of cumulative evidence and questionably relevant testimony is without any discernible limits under Nevada's existing precedent, and is prejudicial and misleads the jury and propels them into returning a verdict of death.

This Court in an exercise of discretion should limit the testimony that the State introduces at the penalty hearing and not repeated testimony of a hearsay nature of prior acts.

B. The Statutory Scheme Adopted by Nevada Fails to Properly Limit Victim Impact Statements.

At the penalty hearing in the case at bar the State presented testimony from Fred Dixon and Alexander Gianakis. The Nevada capital statutory scheme imposes no limits on the presentation of victim impact testimony and as such can result in the arbitrary and capricious imposition of the death penalty.

The Nevada Supreme Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires notice of evidence to be presented at a penalty hearing and that one day's notice is not

adequate. In the context of a penalty hearing to determine whether the defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990). In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), the United State Supreme Court held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. The procedures established by the Nevada statutory scheme and interpreted by this Court have therefore created a liberty interest in complying with the procedures and are protected by the Due Process clause.

Without limitations being placed on the presentation of such prejudicial testimony the Nevada statutory scheme cannot pass Constitutional muster and mandates reversal of the penalty imposed against THOMAS.

IV.

THE SENTENCE OF DEATH MUST BE REVERSED BECAUSE NEVADA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL

"Under contemporary standards of decency, death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers."

Woodson v. North Carolina, 428 U.S. 280, 296, 96 S.Ct. 2978, 2987, 49 L.Ed.2d 944 (1976).

Despite this clear statement of the United States Supreme Court, Nevada law permits imposition of the death penalty for virtually any and all first-degree murders. THOMAS contends that the sentence of death imposed against him must be set aside because the Nevada death penalty statutes, and case law interpreting those statutes, do not sufficiently narrow the number of people eligible for the death penalty, and are therefore unconstitutional. The scheme also allows unbridled discretion with the prosecuting authority as to which cases to seek death. Neither the Nevada statutes defining eligibility for the death penalty nor the case law interpreting these statutes sufficiently narrows the class of persons eligible for the death penalty.

NRS 200.030(1) defines the crime of first degree murder, and NRS 200.030(4) specifies the penalties for first degree murder. The death penalty is one of four possible punishments for first degree murder. NRS 200.030(4)(a) specifies that a jury may impose a penalty of death, when the jury has found the defendant guilty of first degree murder, if "one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

Specific aggravating circumstances are defined in NRS 200.033, and possible mitigating circumstances are defined in NRS 200.035. The list of mitigating circumstances is not considered exclusive. The

statute specifically provides that "any other mitigating circumstance" may be considered by a jury. NRS 200.035(7).

This Court has the discretion, authority, and obligation to consider whether a particular statutory punishment is constitutional For many years Courts have affirmatively considered the constitutionality, under federal law, of punishments adopted by the legislative branch, and have struck down those punishments deemed unconstitutional. Weems v. United States, 217 U.S. 349 (1910) (first time that the U.S. Supreme Court invalidated a penalty prescribed by a legislature for a particular offense).

By 1947, eight members of the United States Supreme Court considered the law well established that state criminal penalties must pass muster under federal constitutional standards. Louisiana ex rel. Francis. v. Resweber, 329 U.S. 459 (1947). This Court has the discretion, authority, and obligation to examine Nevada's statutory penalty for murder which imposes a penalty of death, and determine whether that penalty as administered under Nevada's statutory scheme, is constitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1 of the Nevada Constitution. Furthermore, the constitutional prohibition against cruel and unusual punishment is "not a static concept, but one that must be continually re-examined in the light of contemporary human knowledge." Robinson v. California, 370 U.S. 660 (1962).

THOMAS urges this Court to not defer to historic rulings of constitutionality, but rather conduct a fresh appraisal of the validity of Nevada's law. "A penalty that was permissible at one time in our. . . history is not necessarily permissible today." Furman v. Georgia, 408 U.S. 238, 329 (1972). "[S]tare decisis" should "bow to changing values, and the question of the constitutionality of capital punishment at a given moment" should always "remain open." 408 U.S.

at 330. There are certain principles that must be followed in order to render a death penalty statute constitutional.

A. The Death Penalty Statutory Schemes Must Truly Narrow the Class of Persons Eligible for the Penalty.

In 1972, the United States Supreme Court declared Georgia's death penalty statutory scheme to be unconstitutional. Furman v. Georgia, 408 U.S. 238 (1972). In Furman, two justices wrote that the death penalty always violated the Eighth Amendment; four justices declared that the death penalty was not per se unconstitutional under the Eighth Amendment; and three justices wrote that the death penalty statute in question in that particular case violated the Eighth Amendment. The precise holding of Furman is difficult to determine because the justices filed six separate opinions in that case.

Four years later, in Gregg v. Georgia, the United States Supreme Court upheld Georgia's revised death penalty statutory scheme. Gregg v. Georgia, 428 U.S. 153 (1976). Gregg is crucial to death penalty law because the Court took the six separate opinions rendered in Furman and explained precisely what the holding in Furman happened to be:

> "While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313, 92 S.Ct., at 2764 (concurring). Indeed, the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of (capital crimes), many just as reprehensible as these, the petitioners (in Furman were) among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . (T)he

> Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id., at 309-310, 92 S.Ct., at 2762 (Stewart, J., concurring). (FN36)
>
> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg, 428 U.S. 188-89.

The most important concept in Furman and Gregg is that the sentencing jury's discretion must be limited. That discretion must be limited because a sentencing jury "will have had little, if any, previous experience in sentencing," 428 U.S. at 192, and therefore, any killing, any murder, may seem horrendous to a group of people not experienced in evaluating killings. Realistically, the only way that the jury's discretion can be "limited," as clearly required by the Constitution pursuant to Furman and Gregg, is for aggravating circumstances to be interpreted in a genuinely restrictive way.

Since 1976, the requirements of Furman and Gregg have provided the chief test for determining whether state death penalty statutory schemes are constitutional. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court struck down a Georgia death sentence because the aggravating circumstance was vague and failed to guide a jury in distinguishing which cases deserved the death penalty. The Court noted that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433.

In Zant v. Stephens, 462 U.S. 862 (1983), the U.S. Supreme Court reaffirmed that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant

compared to others found guilty of murder." 462 U.S. at 877.

In summary, Furman and Gregg express concern about the freakish and inconsistent imposition of capital punishment. These cases seek to make the death penalty less arbitrary by requiring states to implement carefully drafted statutes that direct the discretion of juries and limit that discretion in such a way that the majority of murder cases, where the death penalty is not appropriate, can be identified and separated from the small minority of murder cases where the death penalty is appropriate.

B. Nevada's Death Penalty Statutory Scheme, as Adopted by the Legislature, Is Unconstitutional Because It Fails to Narrow the Categories of Persons Eligible for the Penalty.

Nevada's legislature has specified that fifteen "circumstances" may be considered "aggravating," and that the existence, beyond a reasonable doubt, of one circumstance in a particular first degree murder case renders that defendant eligible for the death penalty.

NRS 200.033 specifies the fifteen aggravating circumstances:

1. The murder was committed by a person under sentence of imprisonment.
2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:
   (a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or
   (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

   For the purpose of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilty by a judges or judges sitting without a jury.
3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.
4. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault,

arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

6. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For the purposes of this subsection, "peace officer" means:

(a) An employee of the department of prisons who does not exercise general control over offenders imprisoned within the institutions and facilities of the department but whose normal duties require him to come into contact with those offenders, when carrying out the duties prescribed by the director of the department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to NRS 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

Despite the fact that Nevada has the highest per capita death rate in the United States, the Nevada Legislature has in the last few years continued to expand the aggravators by adding additional aggravating circumstances to the statute:

10. The murder was committed upon a person less than 14 years of age.

11. The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to

nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the dead person known or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio, or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism. for the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

Even if these fifteen aggravators are applied with the most restrictive interpretation possible, they fail to honor the spirit of Furman and Gregg by not channeling the jury's discretion in such a way as to separate "compellingly bad" murder cases from those that are less offensive. Moreover, it is interesting that the Nevada Legislature continues to add aggravators to its list, thereby expanding the number of persons eligible for the death penalty, in spite of the Supreme Court's admonishments in Furman and Gregg. See 2001 Special Session, 229, 2007, 2945.

Nevada's statutory scheme is so arbitrary and "freakish" that it serves no useful purpose in channeling a jury's discretion to distinguish the few cases where the penalty is appropriate from the many cases where the death penalty is not appropriate. Under this statutory scheme, virtually all people who kill are eligible for the death penalty. The final decision regarding who should die and who should live is arbitrary and capricious.

C. The Death Review Committee of the Clark County District Attorney's Office Utilizes a Procedure Which Is Exercised Arbitrarily and Capriciously and Does Not Provide Procedural Grounds for Review or Withdrawal of the Decision to Seek the Death Penalty.

It appears that there is no published policy or procedure by the Clark County District Attorney's Office regarding the criteria for authorizing the assigned Deputy to seek the Death Penalty (a potential cost of "between $2.5 million and $5 million for legal assistance for every inmate who fights a death sentence" according to Assemblyman Bernie Anderson, D-Sparks in testimony before the Senate Judiciary Committee. See, Death Penalty Opponents Testify Before Senate Panel, Ed Vogel, Las Vegas Review-Journal, Thursday, March 13, 2003).

The State has never provided insight into the internal procedures applied by the District Attorneys office, instead arguing successfully that it was within the sole province of the executive branch to make the decision without oversight from the Court. A defendant in a capital case in Clark County is effectively barred from meaningful participation before the Death Review Committee. Usually a Defendant can offer evidence which the State should have considered in order to ensure that the action of the Death review committee was not arbitrary or capricious.

The procedures of the "Death Review Committee" as currently constituted presents a number of concerns that have been voiced in

Mandatory Justice: The Death Penalty Revisited, The Constitution Project, February 6, 2006, specifically:

> Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced. (2005 update)
>
> Persons with sever mental disorders whose capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgement in relation to the conduct, or to conform their conduct to the requirements of law was significantly impaired at the time of the offense should be excluded from death eligibility.
>
> Each Jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex an difficult, two approaches are appropriate. One very important component--perhaps the most important--is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring member of all races into every level of the decision-making process.
>
> In order to (a) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner,, (b) provide a check on broad prosecutorial discretion, and (c) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

Furman v. Georgia, 408 U.S. 238 (1972) is the seminal case of modern death penalty jurisprudence, holding that the judge or jury may not be allowed too much sentencing discretion in determining whether defendants would live or die. Subsequent courts have interpreted Furman to prohibit the imposition of the death penalty under sentencing procedures that "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Rather, Furman requires a state's sentencing scheme to provide a meaningful basis for distinguishing the few cases in which the death penalty should be imposed from the many cases in which it should not. This can be achieved only by narrowing the class of criminal defendants eligible for the death penalty prior to the trial itself.

The obligation to "narrow" this class NECESSARILY inures to State

at the very beginning of the case proceedings. The State has an obligation to implement and practice internal proceedings that will prevent due process and/or vagueness and over breadth challenges in the seeking of the death penalty. Just as the vagueness and over breadth concepts are interrelated, a procedure to approve the death penalty may be applied too broadly, in part, because its proceedings or procedures are vague. Conversely, vague procedures may be overbroad because of their inconsistent application; they do not reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of similar crimes. To not consider mitigation pretrial basically allows the State to impermissibly avoid it's constitutional restrictions in seeking the death penalty. See e.g. Zant v. Stephens, 462 U.S. 874; Stringer v. Black, 503 U.S. 222, 235 (1992).

Based on the foregoing, THOMAS submits that Nevada's statutory scheme for imposing the death penalty is unconstitutional pursuant to Furman and Gregg, and the penalty of death should be vacated.

V.

THE STATE VIOLATED THE ORDER OF THE COURT BIFURCATING THE EVIDENCE AT THE PENALTY HEARING

At the Motion hearing prior to trial the Court ordered that the penalty hearing be bifurcated with the first phase consisting on only evidence of mitigation and aggravation with any other character evidence only admissible at the second phase. (13 APP 3151-3157)

The State was asking questions on cross-examination of Marlo's mother, Georgia, when the State intentionally violated the order of the Court concerning bifurcation of evidence. The testimony, in pertinent part, was as follows:

"Q You remember saying that you did not think he was in to drugs?

A In 1990?

Q Yes.

A I don't know sir.

Q You remember telling them that he would get into drugs if it provided him with quick money?

A No, I don't remember that.

Q You remember telling him that you felt he was becoming more dangerous?

A In 1990?

Q Yes.

A Can I ask you a question? What was he supposed to be - did in 1990?

Q That was the attempt robbery?

THE COURT: Well, he and Sherman held up the guy with a knife and stole his paycheck money, Mr. Beltran.

THE WITNESS: The man from the motel?

MR. OWENS: This is the one at the convenience store.

THE WITNESS: No.

Q You don't remember saying that?

A No.

Q Would those statements be true back in 1990?

A Was he on drugs in 1990?

Q No, would he get into drugs if it provided him with quick money -- would that have been a true statement back then?

MR. ALBREGTS: I would object. It assumes that the statement was made.

THE COURT: Your objection is noted, but overruled. If you know, thinking back, he was 18. Answer his questions.

THE WITNESS: You Honor, way back in 19 -- when Marlo was 18, Marlo was acting out a lot. I don't remember. I'm not saying -.

BY MR. OWENS: I know you don't remember saying that, but thinking back to 1990 and the way Marlo was, would it be fair to say that he was spoiled rotten back then?

A I'm not going to say that now because I don't remember.

Q And do you remember him back then being a person that would get into drugs or do things for quick money?

MR. SCHIECK: Could we approach?

THE COURT: No, she can answer the question.

BY MR. OWENS: Is that the kind of person Marlo was back then?

A No.

MR OWENS: That's all I have." (12 APP 2795-2797).

Under the Nevada death penalty scheme, like the death penalty schemes of other states, the jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. NRS 175.554(3)

THOMAS submits that it is unconstitutional and a violation of Nevada statute to introduce "character", "bad act" or other evidence suggesting that he is a bad person and is not relevant to the statutory aggravating circumstances. Such evidence is often admitted during the penalty phase of a capital trial. See, Allen v. State, 99

Nev. 485, 488, 665 P.2d 238, 240 (1983) (citing NRS 175.552(3). In the event that such evidence is permitted to be introduced by the prosecution of a case, it must not be heard by the jurors prior to the time that they determine whether THOMAS is eligible for the death penalty.

The "aggravating circumstances/mitigating factors" scheme for determining death eligibility is essential to the process of narrowing the class of defendants who are death eligible. Arave v. Creech, 507 U.S. 463, 470-74, 113 S.Ct. 1534, 123 L.ED.2d 188 (1993); Middleton v. State, 114 Nev. 1098, 968 P.2d 296, 314 (1998). Character evidence must not be used to determine whether a defendant is death eligible. The Nevada Supreme Court "did not hold in Allen that evidence outside the purview of NRS 200.033 could serve to render a defendant death eligible. Only enumerated aggravating circumstances pursuant to NRS 200.033 can do this." Id.

Only after the jury has determined that a defendant is death eligible - after considering the statutory aggravating circumstances and mitigating factors - may the jury consider character evidence against the defendant. Middleton, 968 P.2d at 314. "At this final stage, evidence presented pursuant to NRS 175.552(3) can influence the decision to impose death, but this comes after the narrowing to death eligibility has occurred." Id.

Support for a bifurcated penalty phase is also found in a decision by the United States Supreme Court. In Buchanan v. Angelone, 522 U.S. 269, 118 S.Ct. 757, 760, 139 L.Ed.2d 702 (1998), the Court explained as follows:

Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750

(1994). In the eligibility phase the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id. at 971, 114 S.Ct., at 2634. In the selection phase, the jury determines whether to impose a death sentence upon an eligible defendant. Id. at 972, 114 S.Ct. at 2634-2635.

Moreover, this rationale was clearly adopted by the Nevada Supreme Court. In Evans v. State, 117 Nev. 609, 634; 28 P.3d 498, 515 (2001) the Nevada Supreme Court explained as follows:

> To determine that a death sentence is warranted, a jury considers three types of evidence: evidence relating to aggravating circumstances, mitigating circumstances, and any other matter which the court deems relevant to sentencing. The evidence at issue here was the third type, other matter evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death eligible, i.e., after it has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can consider other matter evidence in deciding on another sentence. Id, at pg. 634

Once the District Court determined to conduct a bifurcated penalty hearing to comply with Due Process, the Eighth Amendment and the Nevada statutory scheme, the Court was obligated to enforce it's ruling and the State required to abide by the ruling. Presentation on cross-examination of character evidence tainted the bifurcated process and allowed the jury to consider improper factors in weighing aggravation against mitigation. This error invalidates the death eligibility determination and mandates either a new penalty hearing or the imposition of a life sentence.

CONCLUSION

Based on the arguments and authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court vacate the sentence of death imposed against MARLO THOMAS and remand the matter to District Court for further proceedings consistent with the decision of the Court.

Dated this 29 day of May, 20006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 30 day of May, 2006, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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EXHIBIT 18

EXHIBIT 18

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 46509

APPELLANT'S REPLY BRIEF

APPEAL FROM REMANDED PENALTY HEARING
AND SENTENCE OF DEATH

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STATUTES

PRELIMINARY STATEMENT

As this matter was before the Court on remand from the Supreme Court on THOMAS' appeal from the denial of his post conviction Petition for Writ of Habeas Corpus, both parties have relied upon the factual statement contained in the direct appeal of THOMAS. Thomas v. State, 114 Nev. 1127, 901 P.2d 647 (1998). THOMAS' trial occurred in June 1997 and since that time he has been held in the Nevada Department of Prisons. As such the most recent factual information that could be presented at the remanded penalty hearing was by necessity confined to events which transpired while THOMAS was incarcerated.

Both parties have agreed that the facts presented at the 1997 penalty hearing are not relevant to the current proceedings, however, it is noteworthy that at the first penalty hearing the jury found the existence of no mitigating circumstances, while at the remanded hearing the jury found seven (7) mitigating circumstances. (11 APP 2649). It will never be known whether the jury at the first penalty hearing would have returned a verdict of death had it been presented with these existing mitigating circumstances, likewise it is unknown the extent to which the negative aspects of THOMAS' prison record since 1997 influenced the decision at the second penalty hearing. The dichotomy between the special verdict in the two hearings illustrates the constitutional perils of remanded penalty hearings after the passage of many years.

Similarly, the unfairness of the proceedings is highlighted by the ability of the State to present evidence of the underlying murder cases in support of urging the jury to return a death

verdict, while prohibiting the defense from presenting evidence that creates a lingering or residual doubt as to the accuracy of the factual basis of the convictions. There is no constitutional mandate that at a remanded sentencing hearing in a capital case residual or lingering doubt can be considered as a mitigating circumstance because lingering doubts over a defendant's guilt are not an aspect of the defendant's character, record, or a circumstance of the offense. Evans v. State, 112 Nev. 1172, 926 P.2d 265; Homick v. State, 108 Nev. 127, 141, 825 P.2d 600, 609 (1992).

The Court in Smith v. Balkcom, 660 F.2d 573, 581 (5th Cir. 1981) stated the need for residual doubt to be a consideration:

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt - doubt based upon reason - and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt - this absence of absolute certainty - can be real...Even [this] serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremediable penalty of death."

The State called witnesses Stephen Hemmes, Vincent Oddo and Stephen Sontag to testify concerning the events of the underlying crimes, even though the jury was instructed that they could not consider guilty or innocence as part of their deliberations. Thus although the parties for purposes of this appeal are proceeding on the facts from the finding of guilt at trial, a fairer process would allow that a defendant at a remanded penalty hearing be allowed to present evidence in response to the prior finding.

ARGUMENT

I

THE COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION OF THOMAS' RIGHTS UNDER THE SIXTH AMENDMENT TO CONFRONT WITNESSES AGAINST HIM

A. The Court Erred in Admitting the out of Court Statements of Kenyon Hall During the Penalty Hearing.

The State takes two positions with respect to the admissibility of the out-of-court statement of Kenyon Hall to the police; that the statement has sufficient indicia of reliability to make it admissible under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and that THOMAS opened the door during cross-examination to the admission of the hearsay statement. The State is incorrect in both assertions.

The State cites to the direct appeal opinion herein which allowed the admission of Hall's preliminary hearing testimony at trial based on Hall's refusal to testify at trial. (Answering Brief page 16). THOMAS is not challenging the admission of the under-oath testimony from the preliminary hearing of Hall under NRS 171.198(6)(b), but rather the admission of the out-of-court interrogation which occurred when Hall was arrested. Hall was subjected to cross-examination at the preliminary hearing (although the effectiveness of such cross-examination was challenged as a violation of the right to effective assistance of counsel under the Sixth Amendment), however, he was not subject to cross-examination at the time he gave his statement to the police. It is that distinction that brings the issue within the purview of the Confrontation Clause and the holding of the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354

(2004). The preliminary hearing testimony was admissible hearsay, but the out-of-court statement contained therein was hearsay within hearsay. This made it inherently unreliable and a violation of the confrontation clause.

The State cites to United States v. Littlesun, 444 F.3d 1196 (2006) for the proposition that Crawford does not apply to sentencing hearings. The Court in Littlesun, supra, indicated that Crawford did not explicitly overrule existing precedent, and as such hearsay is admissible at sentencing so long as accompanied by some minimal indicia of reliability. Littlesun, 444 F.3d at 4559. Littlesun is distinguishable in that it concerns sentencing on a drug offense after a guilty plea and does not address the special need for reliability in death penalty hearing. It is respectfully urged that the due to the severity and irreversibility of the death sentence and because of its qualitative difference from other punishments that there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. See Woodson v. North Carolina, 428 U.S. 280, 305, 98 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). THOMAS respectfully urges that the need for heightened reliability applies to the introduction of hearsay without the ability to confront the declarant in a capital sentencing hearing.

Although hearsay may be generally admissible at a sentencing hearing, it is respectfully urged that this Court find that the need for Confrontation Clause protection mandates a different standard at a death penalty sentencing.

Most recently in United States v. Mills, 2006 U.S. Dist. Lexis 62066 the Court found that the constitutional right to

confrontation applies to both phases [eligibility and selection] of federal capital sentencing stating, inter alia,

> "Thus, while the Court recognizes the policy reasons encouraging the admission of the maximum quantum of evidence during the selection phase, that policy is insufficient to overrule Defendant's right to confront witnesses during such a critical position of the capital trial."

Mills, U.S. Dist. Lexis 62066 at 38.

With respect to the State's position that THOMAS "sought to take unfair advantage of [the initial] favorable evidentiary ruling and pressed a number of key issues, which included impugning the memory of Officer Bailey and suggesting that Hall's statement to police was coerced" (Answering Brief page 16), and therefor opened the door to the admission of the statement, the State has misinterpreted the proceedings below. THOMAS did not suggest that the statement was coerced, the State has extrapolated a question as to the number of persons present during the interview on cross-examination in response to the State asking on direct examination if Hall's mother was present into suggesting that the statement was coerced. The record belies such a finding. Additionally, if the State feels that asking the number of persons present suggests coercion then the problem becomes whether there is sufficient indicia of reliability to allow admission of the hearsay.

A review of the record shows that:

> "THE COURT: Anything else we want to take up outside the presence of the jury?
>
> MR. OWENS: We wanted to offer a copy of the statement that Kenya Hall gave to Trooper Bailey. They don't' have an objection to foundation, but they want to make the same objection as they did yesterday as to hearsay, or was it Crawford, Mr. Schieck?
>
> MR. SCHIECK: Yes, Crawford.

THE COURT: So the State is moving to admit the transcript of Kenya Hall's conversation with Trooper Bailey conducted in Hawthorne on April 15th of 1996. And what is your objection, Mr. Schieck?

MR. SCHIECK: The objection is that under the confrontation clause under the Sixth Amendment that out-of-court testimonial statements are not admissible under the US Constitution and --

. . .

MR. SCHIECK: The admission is what's unconstitutional. There's no ability to confront the declarant here in court.

THE COURT: Mr. Owens.

MR. OWENS: I don't know if it was Mr. Schieck or somebody else had argued the same thing, Crawford's application. We had this over in Department XII a few weeks ago. There are no cases of Crawford that I'm aware of that are applying it to the penalty phases. I've heard that allegation, but I have yet to see the cases. Trooper Bailey testified yesterday that as to the conversation he had with Kenya Hall. We just want to have that conversation in its entirety to put before the jury.

THE COURT: Well, didn't we read Kenya Hall's preliminary hearing testimony?

MR. OWENS: We read his preliminary hearing testimony, but that's not as comprehensive as his statement is.

THE COURT: His preliminary hearing testimony would be what does not violate Crawford, and that was used at trial.

MR. SCHIECK: Well, I'm not going to concede that it doesn't violate Crawford.

THE COURT: IT was at a hearing where Mr. Thomas was under oath, and Mr. Thomas was represented and where Mr. Thoma's (sic) representatives had the right to cross-examine Kenya Hall, and it was admitted and it was read. And the question is in a penalty proceeding can the transcript of an out-of-court statement be admitted, and I think that to be safe, to always err on the side of caution so we're not looking at ourselves ten years from now in number three, it would be better not to admit the statement.

MR. OWENS: We're going to have to recall the officer who testified at length about the statement that he took

from --

THE COURT: Why didn't you ask him the right questions yesterday?

MR. OWENS: We're not sure if we did. We think that we did.

THE COURT: You have an overnight transcript. You can review it.

MR. OWENS: We'll take a look at it and see, but we think there was one key area that came up yesterday that wasn't covered. We thought this was the cleanest way to put that in, just put the statement in. If Crawford starts applying to sentencing hearings, which is what we're in right here, the judge wouldn't be able to read a PSI. We'd have to have a hearing, we'd have to cross-examine every person that put information in that PSI. Crawford has not been extended to that sentencing process. If it ever did, it would be ridiculous, and that's the process we're in here with this jury. It's already come in in large part. We just want the full statement in its context rather than just the paraphrasing that we got from Trooper Bailey. It's already come in.

MR. SCHIECK: Over our objection which we raise confrontation.

THE COURT: I allowed Trooper Bailey to testify regarding a conversation because hearsay is admissible in a penalty proceeding. However, that was your chance to get that in. If you have to recall him, you have to recall him, but I'm not going to allow the transcript of the conversation.

MR. SCHIECK: Just as yesterday we would object to him recalling and having him testify. Yesterday we objected on hearsay and on confrontation." (11 APP 2654-55)

Therefore, THOMAS respectfully asserts that the Court erred in the admission of out-of-court statements of Kenyon hall and the sentence must be vacated and the case remanded for further proceedings.

B. The Court Erred in Admitting Records and Reports from the Department of Prisons and Parole and Probation Without Calling the Declarant or Author Thereof to Testify and Be Subject to Cross-examination.

The State is entirely correct that THOMAS is concerned about the introduction of the two separate sets of records from the Department of Prisons and Parole and Probation during the penalty hearing (Answering Brief page 18).

With respect to the Certification Order from Juvenile Court in 1990 the Court did not allow it's admission during the first phase of the bifurcated hearing, but did allow the State to inquire of Mrs. Thomas as to statements attributable to her in the report as prior inconsistent statements. Without calling the declarant of the hearsay report, the State should not have been permitted to introduce the actual report into evidence.

The Certification Order itself is different in nature from the statement addressed above attributable to Kenyon Hall, which was an out of court statement during the course of an interrogation wherein the officer who took the statement was available to testify. With respect to the Certification Report and Order the author of the document was not called to verify the contents or lend any indicia of reliability to the contents of the report. For instance, was the report based on a written form completed by Mrs. Thomas or the result of a face to face interview? Was the report

written by the person who conducted the face to face interview or was in prepared based on a report written by the person who conducted the interview. All of these factors were not presented by the State and as such, even if this Court were to follow the reasoning of the Littlesun court, there was no indicia of reliability presented upon which to base the admission of the documentary hearsay.

The State, again, accuses THOMAS of intentionally trying "to take unfair advantage of the bifurcated nature of the penalty hearing by eliciting favorable character evidence in the mitigation phase, but then denying the State the right to impeach their witnesses with prior inconsistent statements." (Answering Brief page 19) As discussed above, use of a hearsay written report containing an alleged prior consistent statement is not proper impeachment. This argument by the State ignores the clear precedent that the aggravating circumstances must be weighed against the mitigating circumstances before the other character evidence can be considered by the jury. In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) the Court reiterated that in

> "deciding whether to impose a death sentence, [the jury] may not consider general character evidence until they have determined that a defendant is eligible for the death penalty..."

Byford, 116 Nev. at 239.

Thus any impeachment using other character evidence not related to proof of aggravating circumstances should not be admissible as impeachment of mitigation evidence presented by the defendant at the weighing stage of the eligibility process in a capital trial.

II.

THE COURT IMPROPERLY LIMITED THE MITIGATION AND INSTRUCTIONS ON MITIGATION OFFERED BY THOMAS

A. The Court Erred in Refusing to Instruct the Jury That the Absence of Premeditated Intent to Kill Could Be Considered as a Mitigating Circumstance.

The State cites to a 1986 case, Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986), for the proposition that the refusal to give a proposed non-statutory mitigating jury instruction is reviewed under an abuse of discretion standard. Such an argument ignores the large body of case law since the Howard decision that modifies, if not impliedly overruling said holding. In Howard, supra, the trial court even refused to instruct on the statutory mitigating circumstances and the Court found that the failure was not an abuse of discretion or judicial error because there was no evidence to support the statutory mitigators and although the subject of objection at trial was not raised on direct appeal. Howard, 102 Nev. at 578. The jury only received one mitigator instruction, i.e., "any other mitigating circumstance." Id.

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) this Court considered a claim that it was error to refuse to instruct the jury on the defense theory of mitigation. The Court found that the trial court may have erred in refusing the instruction. The Court went on to state:

> "NRS 175.554(1) therefore requires instructions on alleged mitigators upon which evidence has been presented and does not restrict such instructions to the enumerated statutory mitigators. Therefore, Byford was entitled to appropriate jury instructions on unenumerated mitigating circumstances for which he had presented evidence."

Byford, 116 Nev. at 238.

The State also cites to Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998) as being analogous to the instant case. In Castillo, the trial court refused to give an instruction that listed five (5) non-statutory mitigating circumstances; that Castillo had (1) admitted his guilt of the offense charged; (2) had demonstrated remorse for the commission of the offense, (3) cooperated with police after he was identified as a suspect (4) had not planned to commit the murder and (5) had a difficult childhood. This Court found that the "catch-all" definition of mitigating circumstances was sufficient, a position that the Court retreated from in Byford, supra.

In Holloway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Court found that the jury required further instruction regarding its responsibilities in assessing the evidence during the penalty phase:

> "The record before us exhibits sufficient evidence to support the conviction for first-degree murder. However, it also reveals a number of potential mitigating factors. For example, there was substantial evidence that Hollaway was remorseful following the murder. There was extensive evidence that alcoholic intoxication played a major role in the crime. The record also showed that Hollaway and Whiting had been arguing incessantly when the killing occurred. Further, the crime did not threaten or endanger any other persons. Also, Hollaway did not flee or conceal the crime in any way or deny his actions; rather he immediately reported the crime and admitted his guilt." (emphasis added)

Hollaway, 116 Nev. at 743.

The mitigation instruction in the instant case that included that there was a lack of premeditation in the homicide is the equivalent to that found in Hollaway that the killing occurred during an argument. THOMAS' jury was therefore not properly

instructed in the penalty defense theory of mitigation in the penalty hearing. Although the Court has not deemed such error to be plain or constitutional error, in the instant case there was a timely tender of the proposed mitigation instruction, and the failure should be reviewed under an abuse of discretion standard.

The refusal of the District Court to fully instruct the jury on THOMAS' theory of mitigation reasonably prevented the jury from giving full consideration to the mitigation proffered by THOMAS. The fact that THOMAS described the incident as having occurred during a confrontation and not with premeditated intent to cause death should have been open to full consideration by the jury. The denial of proper instruction violated the Eighth and Fourteenth Amendments. See, Lockett v. Ohio, 438 U.S. 586, 602-609, 98 S.Ct. 2954 (1978) plurality opinion; Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005).

B. The State Committed Error in Limiting the Consideration of Mitigation in It's Closing Argument.

The State takes the position that the closing argument of the prosecutor properly tells the jury that "there should be some connection between a fact and a defendant's actions before it has much weight as a mitigating factor." (Answering Brief page 22). This argument in the Answering Brief incorrectly reflects the statement made by the prosecutor in his closing which drew the objection. Specifically the prosecutor told the jury: "In other words, there has to be some causation, connection between that fact and the thing that the person did before it becomes a mitigator" (12 APP 2853-54). There is clearly no requirement that a mitigator has to have a causal connection to the murder to be considered by

the jury. Whenever a prosecutor tells jurors that they cannot consider evidence the defense presents as mitigation, he or she violates the Eighth and Fourteenth Amendments. Penry v. Lynaugh, 492 U.S. 302, 326-328 (1980).

The relevant authority is clear that the "catch-all" mitigation provision in a state's statutory scheme encompasses anything that happened before and after the crime or later. Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005). Argument to the jury that it could not consider mitigating evidence of post conviction conduct in determining whether the defendant should receive a sentence of life imprisonment violates the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586, 602-609, 98 S.Ct. 2954 (1978) (plurality opinion).

It was improper argument for the prosecutor to tell the jury that there should be a connection between the fact and the defendant's actions before it can be mitigation. In fact, events that transpire long after the underlying crime and which have no connection whatsoever to the actions of the defendant, are properly admitted as mitigation.

C. The District Court Erred in Limiting the Defense Theory of Mitigation in the Case Involving the Failure to Charge Angela Love.

The State, in part, makes the point for THOMAS on the error of the trial court in limiting examination concerning the involvement of Angela Love in the events that proceeded and transpired at the Lone Star Restaurant. The State acknowledges the propriety of the defense "theory that Angela Love was a bad influence on [Thomas] or that her involvement with Defendant precipitated the murder and was a factor to be considered in mitigation" (Answering Brief page 24-

25). The comment by the trial court was that the information concerning Love was "not even mitigation. So I don't know why you brought it up" (11 APP 2543), was totally contrary to existing precedent, and in itself forms a basis for reversal of the sentence.

The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." Penry v. Lynaugh, 492 U.S. 302, 328 (1980). In Penry the absence of instructions concerning certain mitigation evidence resulted in the case being remanded for a resentencing.

While the District Court and the prosecution may not agree that the failure to prosecute the person who aided and abetted in the commission of the homicide is mitigation, the decision is not left to the prosecutor. It is a jury of the defendant's peers that is called upon to make the ultimate decision. If any one juror believe that the selective prosecution of the case was a factor upon which to spare the life of THOMAS, it would have thwarted the State's efforts to obtain a death sentence. It was error to deny THOMAS the ability to present and argue the full available mitigation to his jury.

III.

THE COURT ERRED BY NOT LIMITING PENALTY HEARING EVIDENCE TO AVOID VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR PENALTY HEARING

A. The Trial Court Should Not Have Admitted Cumulative and Otherwise Inadmissible Evidence of Prior Bad Acts During the Penalty Phase.

THOMAS agrees that Nevada law allows the admission of character evidence at the penalty phase of a capital trial. NRS 175.552. The problem that exists is that the discretion of the trial court in controlling the admission of such evidence is unbridled and as such can result in the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. Death penalty statutes must be structured to prevent the penalty being imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972).

Nevada cases do recognize that there must be some discretion exercised in the admission of unrelated or uncharged other acts at a penalty hearing:

> Evidence of unrelated crimes for which a defendant has not been convicted is inadmissible during the penalty phase if it is dubious or tenuous, or if its probative value is outweighed by danger of unfair prejudice, confusion or issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence."

Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179 (1991). *See also,* Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983) and Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000), however rarely, if ever, do

the trial courts limit the admission of evidence proffered by the State.

The State cites a number of cases that allow for the admission of other bad acts so long as the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Pellegrini v. State, 104 Nev. 625, 630-31, 764 P.2d 484 (1988); McKenna v. State, 114 Nev. 1044, 1051-1052, 968 P.2d 739, 744 (1988). In the instant case the Court should have limited the quality and quantity of the "prison incident" evidence that was presented to the jury. The cumulative effect of the volume of evidence outweighed any probative value to said evidence. The Opening Brief and the State's Answering Brief contain fairly full descriptions or summaries of the evidence that was presented, with the competing points of view whether the presentation of this type of evidence needs to be controlled.

In addition to preventing introduction of evidence in contravention of the confrontation clause the Court should have placed some limiting factors upon the prison records probative value. The failure to do so violates the Eighth Amendment and resulted in the arbitrary and capricious imposition of the death sentence.

B. The Statutory Scheme Adopted by Nevada Fails to Properly Limit Victim Impact Statements.

As set forth in the Opening Brief, THOMAS respectfully urges that this Court enact guidelines on the presentation of victim impact testimony at a penalty hearing in a capital case. The Court has adequately set forth such guidelines with respect to the statement of allocution made by the defendant at his penalty

hearing. Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992), *cert. denied* 117 S.Ct at 519 (1996). A similar pronouncement would be appropriate for victim impact testimony. Even though such testimony is given under oath with the opportunity to cross-examine, such is an illusory control mechanism, with such cross-examination rarely, if ever, conducted due to the negative impact same would likely have on the jury.

The failure to have such a framework in place resulted in the rehearsed violation of admissibility by the father of Carl Dixon stating with respect to THOMAS that he was "a person who is in my opinion the lowest form of social sewage". (13 APP 2973). While THOMAS understands and accepts that victim impact testimony is admissible as stated in Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994), citing to Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991) that : "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id, 501 U.S. at 827, 111 S.Ct. at 2609.

The inherent problem with making such evidence admissible without restraint is that death sentences could be imposed based on the status of the victim and not the death worthiness of the defendant. Such evidence also invites prosecutor misconduct in arguing for the death penalty to the jury. For instance in Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) the Court found that:

> "The prosecutor's statement to the jury that Whiting's family would have no more holidays with their daughter and their sister was improper. *See* Quillen v. State 112

> Nev. 1369, 1182, 929 P.2d 893, 901 (1996). The statement encouraged the jury to impose a sentence under the influence of passion: 'holiday arguments' are meant only to appeal to jurors emotions and arouse their passions. *Id.*"

Holloway, 116 Nev. at 742-743.

The question remains whether, if during testimony concerning victim impact, the witnesses referred to missing their daughter or sister at Christmas would be deemed as improper and meant to appeal to "jurors emotions and arouse their passions" when the same statement is misconduct if made in the context of closing argument. This Court must set appropriate limits and the failure to do so has resulted in the arbitrary, capricious, and "freakish" imposition of the death penalty.

IV.

THE SENTENCE OF DEATH MUST BE REVERSED BECAUSE NEVADA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL

The State takes the position that "Nevada has adopted a statutory scheme which clearly satisfies the concerns expressed in Furman and the solutions proposed by Gregg. As in the Georgia scheme which passed muster in Gregg, Nevada has set forth a series of statutory [aggravating] factors; one of which must be proven beyond a reasonable doubt before a sentence of death can be imposed" (Answering Brief page 31). The State, however, in making this argument, misses the point: the Nevada aggravating circumstances are so broad as to fail to legitimately narrow the class of murders eligible for the death penalty, and the ultimate decision on whether to seek death in decided in an uncontrolled decision making process of the prosecuting authority without review procedures to avoid arbitrary and capricious decisions.

The State while defending the aggravating circumstances legislatively created and carried out by the executive branch through the prosecutors office, hails the decision of this Court in McConnell v. State, 120 Nev. Ad. Op. 105, 102 P.3d 606 (2004) as narrowing the discretion of the statutory scheme. The fact that the judicial branch was compelled to intervene is clear evidence that the Nevada statute is overbroad and results in the arbitrary and capricious eligibility for the death penalty. This is an obligation that the Court undertakes under the mandatory review provisions of NRS 177.055(2) because the Court is:

> "also cognizant that because the death penalty is unique in its severity and irrevocability, this Court must carefully review every death sentence to minimize the risk that the penalty is imposed in error or in arbitrary

and capricious manner."

Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000).

Until such time as there is a legitimate narrowing of the aggravating circumstances that allow the State the exercise discretion on which cases are death penalty eligible the Nevada scheme will be unconstitutional in violation of the Eighth Amendment. THOMAS' sentence should therefore be vacated and the case remanded for imposition of a sentence less than death.

V.

THE STATE VIOLATED THE ORDER OF THE COURT BIFURCATING THE EVIDENCE AT THE PENALTY HEARING

The State takes the position that THOMAS was not entitled to a bifurcated penalty hearing and as such any violation of the order to the District Court bifurcating the hearing was not error in the case. While THOMAS does not concede that a bifurcated penalty hearing is not constitutionally mandated, most current decisions of this Court do not require such a procedure. Accord Weber v. State, 121 Nev. Ad. Op. 57, 119 P.3d 107 (2005); McConnell v. State, 120 Nev. Ad. Op. 105, 102 P.3d 606 (2004). THOMAS reasserts that once the District Court determined to conduct a bifurcated penalty hearing to comply with Due Process, the Eighth Amendment and the Nevada statutory scheme, the Court was obligated to enforce it's ruling and the State required to abide by the ruling. Presentation on cross-examination of character evidence tainted the bifurcated process and allowed the jury to consider improper factors in weighing aggravation against mitigation. This error invalidates the death eligibility determination and mandates either a new penalty hearing or the imposition of a life sentence.

CONCLUSION

Based on the arguments and authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court vacate the sentence of death imposed against MARLO THOMAS and remand the matter to District Court for further proceedings consistent with the decision of the Court.

Dated this 21 day of October, 2006.

RESPECTFULLY SUBMITTED:

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BY _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 21, 2006

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 20th day of October, 2006, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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SPD02965

AA1377

EXHIBIT 19

EXHIBIT 19

122 Nev., Advance Opinion 114

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46509

FILED

DEC 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a sentence of death following a second penalty hearing after remand. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed.

David M. Schieck, Special Public Defender, Clark County,
for Appellant.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this case, we review appellant Marlo Thomas's death sentence, returned by a jury after a second penalty hearing conducted pursuant to a remand by this court.

FACTS

Appellant Marlo Thomas and his brother-in-law, 15-year-old Kenya Hall, were charged with two counts of first-degree murder with the use of a deadly weapon and other crimes. The charges resulted from their early-morning robbery of the Lone Star Steakhouse and the stabbing deaths of two employees who were present during the robbery, Matthew Gianakis and Carl Dixon. Thomas was a former employee of the restaurant. Vince Oddo, the kitchen manager, was also present during the robbery but escaped without injury. He called 911 after his escape, and when police responded to the scene, Oddo identified Thomas as one of the perpetrators. Thomas, Hall, and Thomas's wife Angela Love were arrested later that day.

After their arrest, Hall was interviewed by Nevada Highway Patrol Officer David Bailey. Hall confessed to his role in the crimes and implicated Thomas. He agreed to plead guilty to lesser charges in exchange for testifying against Thomas. He testified at Thomas's preliminary hearing but then refused to testify any further and sought to withdraw his guilty plea. His preliminary hearing testimony was read into the record at Thomas's trial. A jury convicted Thomas of two counts of first-degree murder with the use of a deadly weapon, conspiracy to commit murder and/or robbery, robbery with the use of a deadly weapon, burglary while in possession of a firearm, and first-degree kidnapping with the use of a deadly weapon. After a penalty hearing, the jury returned two verdicts of death for the murders. Thomas was also sentenced to consecutive terms totaling life in prison without the possibility of parole for the remaining convictions.

This court affirmed Thomas's conviction and sentence on direct appeal.[1] Thomas then sought post-conviction relief in a petition for a writ of habeas corpus. On appeal from the denial of his petition, this court concluded that Thomas's trial counsel were ineffective for failing to object to an improper penalty phase jury instruction on the possibility of sentence commutation. Accordingly, this court remanded the case for a new penalty hearing.[2]

On remand, the district court ordered that the penalty hearing be bifurcated into an eligibility phase and a selection phase. The State alleged four aggravators: (a) Thomas had a prior conviction for a felony involving violence or the threat of violence;[3] (b) he had a second such conviction;[4] (c) the murder was committed to avoid or prevent a lawful arrest;[5] and (d) Thomas was convicted in the instant proceeding of more than one murder.[6]

In the eligibility phase, the State read Hall's preliminary hearing testimony into the record. Other witnesses testified as to the facts of the crimes and the investigation. The State admitted the judgment of conviction for Thomas's 1990 conviction for attempted robbery, and the arresting officer from that incident testified that the victim told him

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[1]Thomas v. State (Thomas I), 114 Nev. 1127, 967 P.2d 1111 (1998).

[2]Thomas v. State (Thomas II), 120 Nev. 37, 83 P.3d 818 (2004).

[3]NRS 200.033(2)(b).

[4]Id.

[5]NRS 200.033(5).

[6]NRS 200.033(12).

Thomas and a cohort had robbed him at knifepoint but he did not know which assailant had the knife. The State also admitted a judgment of conviction for Thomas's 1996 conviction for battery with substantial bodily harm, and the victim testified that Thomas had beaten her with a gun and stomped on her chest. Officer Bailey testified about Hall's statements during questioning.

In mitigation, Thomas called family members who described his father's denial that Thomas was his son, his mother's beatings and harsh treatment of Thomas, his counseling of family members not to take his path, his scholastic and psychological problems as a child, Angela Love's bad influence on him, and his recent mellowing of temper and conversion to Christianity. Thomas called his mother to testify, and the State cross-examined her about statements she made about Thomas in 1990 which were contained in a juvenile court order certifying Thomas as an adult for that charge (exhibit 86). The State sought admission of exhibit 86 but was refused. After deliberating on death eligibility, the jury found all four aggravators. The jurors found seven mitigators, in that Thomas had: (1) accepted responsibility for the crimes; (2) "cooperated with the investigation but diverted the truth"; (3) demonstrated remorse; (4) counseled others against criminal acts; (5) suffered learning and emotional disabilities; (6) found religion; and (7) been denied by his father. The jurors determined that the aggravators outweighed the mitigators, and the hearing proceeded to the selection phase.

At the selection phase, the State called Patricia Smith, a Division of Parole and Probation records supervisor, who authenticated a set of 25 juvenile court petitions charging 11- to 17-year-old Thomas with crimes including vandalism, car theft, battery, and robbery (exhibit 85).

Smith also authenticated exhibit 86, the juvenile court order listing Thomas's entire juvenile history and certifying 17-year-old Thomas as an adult in the 1990 robbery case, in which Thomas eventually pleaded guilty to attempted robbery.

Another division employee, John Springgate, authenticated two presentence investigation reports prepared for Thomas's convictions in 1990 of attempted robbery and in 1996 of battery with substantial bodily harm. Two victims of Thomas's prior crimes testified about those incidents. The State called ten corrections officers to testify about Thomas's behavior while in prison. Some of the officers authenticated prison discipline documents which included statements of other people, and some of the officers authenticated documentary exhibits they had not authored or which pertained to incidents they were not involved in.

Finally, the fathers of Carl Dixon and Matthew Gianakis gave victim-impact testimony. Mr. Dixon referred to Thomas as "the lowest form of social sewage" and was immediately interrupted by an objection from Thomas's counsel. Without formally sustaining the objection, the district court advised Mr. Dixon to limit his testimony to the impact of his son's death on his family.

Thomas called five fellow inmates. They collectively testified that Thomas avoided problems in prison, counseled others to avoid problems, and gave them good advice. One testified that verbal abuse is mutual between inmates and prison staff and that some staff provoke disciplinary infractions. Thomas also called the warden of his present institution, who testified that Thomas was always respectful and polite to him and that inmates can mellow with time and maturity. Thomas's final witness was his mother. Thomas gave a statement in allocution, in which

he expressed remorse and asked for forgiveness for "[stealing] two precious lives." After deliberations, the jury returned two verdicts of death. Thomas now appeals.

DISCUSSION

Application of Crawford v. Washington and the Confrontation Clause to the eligibility phase of a bifurcated capital penalty hearing

Thomas argues that the district court violated his right to confrontation[7] as interpreted in Crawford v. Washington[8] during the eligibility phase by allowing Officer Bailey to testify about Hall's statements during questioning and by admitting the transcript of the questioning. This claim lacks merit. We held in Summers v. State[9] that Crawford and the Confrontation Clause do not apply during a capital penalty hearing.

Admission of "other matter" evidence at the eligibility phase

Thomas also argues that the district court erred by allowing the State to present "other matter" evidence during the eligibility phase.

As we stated in Hollaway v. State, there are three proper purposes for which the State may introduce evidence at a capital penalty hearing: "to prove an enumerated aggravator, to rebut specific mitigating evidence, or to aid the jury in determining the appropriate sentence after any enumerated aggravating circumstances have been weighed against

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[7]U.S. Const. amend. VI.

[8]541 U.S. 36 (2004) (holding that the Confrontation Clause bars admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination).

[9]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112, December 28, 2006).

any mitigating circumstances."[10] Evidence submitted for the third purpose is what we mean by "other matter" evidence, and it is "not admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances."[11] As we indicated in Hollaway, evidence presented to "rebut specific mitigating evidence" is not "other matter" evidence, and it is permissible during the eligibility phase. If the defendant presents evidence relating to his character, childhood, mental impairments, etc., the State is entitled to rebut that evidence. However, Hollaway requires that the rebuttal evidence be targeted toward specific mitigation evidence; if it is not, it is not true rebuttal and is instead "other matter" evidence which the State can only present during the selection phase. Thomas's case is illustrative.

In mitigation during the eligibility phase, Thomas called his mother to testify. She testified that Thomas's childhood was "good" until she had a baby, at which point she stopped paying much attention to Thomas. In grade school, Thomas was angry and began to act out and get in fights, but when the school told her that Thomas needed help she denied it and argued with the school because she did not want to believe that Thomas was troubled. When Thomas was in high school, his behavior escalated into trouble with the law, and she would beat him for his misbehavior. After serving six years for attempted robbery, Thomas was released; he behaved well until he met Angela Love and began using drugs, at which point he became violent and would not go to work.

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[10]116 Nev. 732, 746, 6 P.3d 987, 997 (2000).

[11]Id.

On cross-examination, the State produced exhibit 86, the juvenile court order certifying Thomas as an adult for his 1990 robbery charge and containing statements purportedly by Ms. Thomas. The State asked Ms. Thomas if, in 1990, she said Thomas was "spoiled rotten" and "independent" or that her "parental control of him had been fair." Ms. Thomas said she did not recall making those statements. The State's conduct here was unobjectionable; the questions were proper rebuttal given Ms. Thomas's specific testimony that she had ignored Thomas and beaten him.

However, the State also asked her if she had said in 1990 that Thomas was "becoming more dangerous" or "would get into drugs or do things for quick money." The State's use of these statements was improper because they were not true rebuttal; Ms. Thomas did not testify on direct examination that Thomas was not dangerous or violent, was not involved in drugs, or would not commit crimes. In fact, Ms. Thomas testified on direct examination that she knew Thomas got in fights, was in trouble with the law, committed crimes, and had used drugs before he met Angela Love. Since these prior statements were not used to prove an aggravator or to rebut specific mitigating evidence, these statements were "other matter" evidence and were not proper at the eligibility phase.[12] However, Thomas did not object at the time, and we conclude that the error was minimal and did not affect his substantial rights.[13]

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[12]See id.

[13]See NRS 178.602.

The State's comments on mitigating evidence at the close of the eligibility phase

Thomas argues that the district court erred by allowing the State to argue in its eligibility phase closing that there has to be "some causation, connection" between "the sad things" that occur in a person's life and the crime before "the sad thing" becomes a mitigating circumstance. Thomas objected, but the district court did not rule on the objection, instead saying, "The instructions will be given."

We agree with Thomas that the State's argument was improper. We have never required the defendant to show "causation" between a claimed mitigating circumstance and the crime. The prosecutor phrased his comment as if it were a matter of law rather than the State's position, which the jury could accept or reject. However, we conclude that the impropriety was not prejudicial. The statement was the second of two attempts by the State to make this argument. The first time, the State argued that "a mitigator is not any kind of hard luck fact in a person's life, it really isn't." Thomas objected, and the court sustained the objection "based on the fact that the Supreme Court has said anything can be a mitigator." The statement at issue came on the heels of that exchange. Further, the jury was instructed that mitigating circumstances are "factors . . . [which] may be considered, in the estimation of the jury, in fairness and mercy, as extenuating or reducing the degree of the Defendant's moral culpability." The jury was also instructed that it could consider as mitigating circumstances that "Marlo Thomas was raised without the benefit of a father figure" and had suffered as a child and young adult with learning and emotional disabilities. The instructions correctly required no "causation" between these factors and the crime.

Nevertheless, we caution the State to avoid such misleading argument in the future.

Admission of alleged testimonial hearsay at the selection phase

Thomas also argues that the State violated Crawford and the Confrontation Clause at the selection phase by admitting evidence of his juvenile criminal history and his behavior while in prison. This claim lacks merit. As we held in Summers,[14] Crawford and the Confrontation Clause do not apply at a capital penalty hearing.

Bad acts evidence and victim-impact testimony at the selection phase

Next, Thomas argues that cumulative bad acts testimony and an improper victim-impact statement rendered his penalty hearing fundamentally unfair. The State called as witnesses two Division of Parole and Probation employees, ten correctional officers, the victim of Thomas's 1990 attempted robbery, and the fathers of the two murder victims.

NRS 48.035(2) provides that relevant evidence "may be excluded if its probative value is substantially outweighed by . . . needless presentation of cumulative evidence." (Emphasis added.) "It is within the district court's sound discretion to admit or exclude evidence,"[15] and this court reviews that decision for an abuse of discretion or manifest error.[16]

Thomas apparently argues that the testimony of correctional officers about his behavior while in prison was unnecessarily cumulative.

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[14]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112); see also Johnson v. State, 122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 113, December 28, 2006).

[15]Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004).

[16]Id. at 1007-08, 103 P.3d at 29.

We conclude that the evidence was not excessively cumulative. Each of the corrections officers called gave evidence about different incidents with Thomas, except for part of the testimony by Officer Edwards, who detailed an incident where Thomas threw urine in a guard's face; that guard had already testified about the incident. This was the only testimony that repeated previous evidence. The jury was entitled to learn that Thomas had a lengthy prison disciplinary record and criminal history, and each incident presented revealed Thomas's capacity for threatening and potentially dangerous behavior. We conclude the district court did not abuse its discretion in allowing this evidence.

When giving his victim-impact testimony, Carl Dixon's father referred to Thomas as "the lowest form of social sewage" and was immediately interrupted by an objection from defense counsel. The district court admonished Mr. Dixon to restrict his testimony to the impact of his son's death on his family. There is no indication that the State arranged for Mr. Dixon to refer to Thomas in this manner or knew that he intended to. While the statement was improper, it does not require reversal. The court properly admonished Mr. Dixon. Presumably the jury expected that the victims' families abhorred Thomas. Further, Mr. Dixon did not express his views about sentencing, which is forbidden.[17]

Mitigating evidence and instructions at the selection phase

Thomas also argues that the district court erred during the selection phase by limiting his presentation of mitigating evidence and refusing a mitigation instruction.

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[17]See, e.g., Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001).

Lack of premeditation

Thomas requested that the jury be instructed that "[t]he homicide occurred during a confrontation and as such there was no premeditated intent to cause the death." The district court refused to give the instruction. We conclude the district court did not err.

This court has held that NRS 175.554(1) requires the district court to instruct on "alleged mitigators upon which evidence has been presented and does not restrict such instructions to the enumerated statutory mitigators."[18] Evidence that Thomas lacked premeditation was admitted through the playing of a videotape of Thomas's interrogation, in which he said he killed Dixon and Gianakis in self-defense. Thus, Thomas was entitled to an instruction that he was alleging lack of premeditation as a mitigating circumstance.[19]

However, Thomas's proposed instruction was improper because it was worded as a theory of law. NRS 175.554(1) requires instruction on mitigating circumstances alleged by the defense, not instruction on theories of law. Moreover, it was an unsupported theory of law. While a killing during a confrontation may be more commonly charged as second-degree murder or manslaughter, Thomas points to no

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[18]Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000).

[19]Thomas was charged with the murders under alternate theories of premeditation and felony murder. The jury verdicts do not indicate under which theory (or theories) it found Thomas guilty. Because jurors could have found him guilty based on felony murder, the general rule against alleging "residual doubt" as a mitigating circumstance does not appear to be implicated here. See Evans v. State, 112 Nev. 1172, 1202, 926 P.2d 265, 284-85 (1996).

authority for the proposition that premeditation to kill—"[a] cold, calculated judgment and decision" rather than "a mere unconsidered and rash impulse"[20]—cannot as a matter of law be formed during a confrontation. Further, the district court gave the catchall instruction set out in NRS 200.035(7), so the jurors were informed that they could find "any other mitigating circumstance," and Thomas argued to the jury that the lack of premeditation mitigated the crimes.

The role of an uncharged alleged participant in the crimes

Thomas claims that the district court erred by limiting his ability to argue that his wife Angela Love's responsibility for getting him back into drugs, her involvement in the crimes, and the State's failure to charge her for her role in the robbery constituted mitigating circumstances. This claim warrants no relief. Thomas established from at least two witnesses that Love was a bad influence on him and that he was doing well until he met her and got back into drugs. As to the failure to charge Love, on cross-examination of Detective Mesinar, who summarized the trial evidence for the jury, Thomas established that Mesinar submitted Love's case to the district attorney, who declined to prosecute her. On redirect, the State questioned Mesinar about the differing standards of proof for arrest and for proving a case. Thomas objected, but only based on the State's leading the witness.

In ruling on Thomas's objection, the district court said in the jury's presence, "And why the district attorney didn't decide to prosecute her is not a defense in the case because we're not here to defend the case. It's not even mitigation. So I don't know why you brought it up." In his

[20]Byford, 116 Nev. at 237, 994 P.2d at 715.

reply brief, Thomas argues that this statement was error because it improperly limited the jury's ability to consider mitigating evidence. This argument is improper here because a reply brief is limited to answering any new matter set forth in the opposing brief.[21] Further, it lacks merit. NRS 175.552(3) provides that aggravating and mitigating circumstances must relate to "the offense, defendant or victim and on any other matter which the court deems relevant to sentence." Thomas fails to show how evidence that Love was not charged was relevant to his sentence or that admission of such evidence was required by the Constitution.[22]

Constitutionality of Nevada's death penalty scheme

Thomas argues that Nevada's death penalty scheme does not sufficiently narrow the class of people eligible for the death penalty. Thomas claims this argument is supported by Nevada's addition of six aggravating circumstances (NRS 200.033(10)–(15)) in the last 13 years. Other than arguing that the addition of aggravators to the statute expands rather than narrows the class of eligible persons, Thomas provides no reason for this court to depart from its previous holdings that Nevada's death penalty scheme is constitutional. We most recently so

[21]See NRAP 28(c).

[22]See Kaczmarek v. State, 120 Nev. 314, 336-37, 91 P.3d 16, 31-32 (2004).

held in 2005, in Weber v. State,[23] and each of these six aggravators was added before Weber.[24]

Thomas also argues that the Clark County District Attorney's Office bars a defendant from meaningful participation in the decision to seek death. This court has held that "[t]he matter of the prosecution of any criminal case is within the entire control of the district attorney," absent any unconstitutional discrimination.[25] Thomas points us to no authority in any jurisdiction for the proposition that the Constitution or Nevada law requires a prosecutor to allow a defendant any participation in the death penalty charging process. We have noted that executive privilege may prohibit forced disclosure of information about the charging process.[26]

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[23]121 Nev. 554, 585, 119 P.3d 107, 128 (2005); see also Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001).

[24]The child-under-14 and hate-crime aggravators were added in 1995, the multiple-murders aggravator in 1993, the nonconsensual-sexual-penetration aggravator in 1997, the school-property-or-functions aggravator in 1999, and the terrorism aggravator in 2003. See 1995 Nev. Stat., ch. 3, § 1, at 3; id. ch. 110, § 1, at 139; 1993 Nev. Stat., ch. 44, § 1, at 77; 1997 Nev. Stat., ch. 356, § 1, at 1294; 1999 Nev. Stat., ch. 319, § 4, at 1338; 2003 Nev. Stat., ch. 470, § 5, at 2947.

[25]Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973).

[26]See Labastida v. State, 112 Nev. 1502, 1506 n.3, 931 P.2d 1334, 1337 n.3 (1996) (indicating that the former district attorney could not give opinion testimony as to a dispute within the district attorney's office about charges to be filed in the case, but suggesting that "factual evidence . . . from a knowledgeable witness" could be admissible), modified and superseded on other grounds on rehearing, 115 Nev. 298, 986 P.2d 443 (1999).

Thomas also argues that the courts should have some oversight role in the decision to seek death. This court has indicated that the decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033[27] and reviewable for abuse of that discretion, such as when the intent to seek the death penalty is not warranted by statute or is improperly motivated by political considerations[28] or race, religion, color, or the like.[29] Thomas points us to no authority in any jurisdiction for the proposition that the Constitution or Nevada law requires additional judicial oversight of the charging process.

Mandatory death sentence review

This court is required pursuant to NRS 177.055(2)(c)-(e) to review every death sentence and independently consider whether the evidence supports the finding of an aggravating circumstance or circumstances, whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the sentence of death is excessive, considering both the crime and the defendant.

Sufficiency of the evidence supporting the four aggravators

The evidence clearly supported the four aggravators found by the jury.

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[27]See generally Young v. District Court, 107 Nev. 642, 647-48, 818 P.2d 844, 847-48 (1991).

[28]See id.

[29]Cairns, 89 Nev. at 115, 508 P.2d at 1017.

NRS 200.033(12) provides that first-degree murder is aggravated when "[t]he defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree." Here, Thomas was convicted of two first-degree murders during the guilt phase of his 2000 trial, and this court affirmed those convictions.[30]

NRS 200.033(2)(b) provides that first-degree murder is aggravated by the offender's prior conviction for a felony "involving the use or threat of violence." Thomas's 1990 conviction for attempted robbery and 1996 conviction for battery with substantial bodily harm were both proved by admission of the judgments of conviction. Each crime involved the use or threat of violence.[31]

NRS 200.033(5) provides that first-degree murder is aggravated by its commission "to avoid or prevent a lawful arrest." Thomas killed two potential witnesses to his robbery, thereby preventing two people who knew him from identifying him later.[32]

Influence of passion, prejudice, or any arbitrary factor

As discussed above, Carl Dixon's father improperly referred to Thomas as "the lowest form of social sewage" during his victim-impact statement, but the district court immediately admonished Mr. Dixon, and there is no indication that this improperly influenced the jury.

Jurors found seven mitigating circumstances, several of which involved Thomas's childhood, character, and remorse for his crimes. The

[30]Thomas I, 114 Nev. 1127, 967 P.2d 1111.

[31]See NRS 200.380(1); NRS 200.481(1)(a).

[32]See generally Canape v. State, 109 Nev. 864, 874, 859 P.2d 1023, 1029-30 (1993).

record does not reveal that the jury imposed the death sentence while "under the influence of passion, prejudice or any arbitrary factors."

Excessiveness of the death sentence

Thomas brutally murdered two young men by stabbing them to death at their place of work. While the restaurant manager was opening the safe in the office, Thomas handed his gun to his 15-year-old brother-in-law, left the office, and went to the kitchen to find the two victims. According to Hall, Thomas either lured or trapped 24-year-old Carl Dixon in the restroom and inflicted three to five severe stab wounds to Dixon's right chest and 15 defensive stab wounds to his extremities. Thomas then chased down 21-year-old Matthew Gianakis and stabbed him twice.[33] Thomas committed the murders while robbing his former employer. He had two previous convictions for crimes of violence and a substantial juvenile criminal history, as well as an extensive disciplinary record in prison, including numerous attempted and completed assaults on prison staff and a threat to kill a guard.

Thomas's childhood and upbringing were certainly not the best, and Thomas apparently has made some effort to counsel others against taking his path. However, the facts of this case are compelling: Thomas robbed his former employer at gunpoint, left the actual robbery to seek out two potential witnesses, and stabbed them both repeatedly. The victims were young men who should have been safe at their place of work. Thomas also had a violent criminal history and has shown a capacity for continued violence while in prison. We therefore conclude that the sentence of death was not excessive.

[33]Thomas I, 114 Nev. at 1133-34, 967 P.2d at 1115-16.

CONCLUSION

Thomas's penalty hearing, while not free of error, was fair. We conclude that none of arguments on appeal establish reversible error.

We therefore affirm Thomas's death sentence.

_____, J.
Hardesty

We concur:

_____, J.
Becker

_____, J.
Gibbons

_____, J.
Parraguirre

ROSE, C.J., with whom, MAUPIN, J., and DOUGLAS, J. agree, concurring:

For the reasons stated in my concurring and dissenting opinion in Summers v. State,[1] I believe that capital defendants have a Sixth Amendment right to confront the declarants of testimonial hearsay statements admitted during an unbifurcated capital penalty hearing. Where the hearing is bifurcated into death-eligibility and selection phases, as it was in Thomas's case, I believe that the right to confrontation extends only to evidence admitted during the eligibility phase. Here, testimonial hearsay–Officer Bailey's testimony about Hall's statements and the transcript of that interrogation–was admitted during the eligibility phase, but Hall was unavailable to testify and Thomas had a prior opportunity to cross-examine him. I therefore concur in the majority's conclusion that it was not error under the Confrontation Clause and Crawford v. Washington[2] to admit this evidence.

_____, C.J.
Rose

We concur:

_____, J.
Maupin

_____, J.
Douglas

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[1]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112, December 28, 2006).

[2]541 U.S. 36 (2004).

EXHIBIT 20

EXHIBIT 20

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 46509 **PETITION FOR REHEARING AND MOTION TO RECUSE THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE FROM FURTHER INVOLVEMENT IN THE CASE**

COMES NOW, Appellant MARLO THOMAS, by and through his attorneys DAVID M. SCHIECK, SPECIAL PUBLIC DEFENDER, and RANDALL H. PIKE, Deputy Special Public Defender, and petitions this Court for rehearing of the direct appeal decided on December 28, 2006 in Thomas v. State, 122 Nev.Ad.Op. 114 (2006).

In addition, Appellant moves the Court to order that the Clark County District Attorney's Office be recused from further involvement in the case.

This Petition is made and based on NRAP 40(c)(2)(ii), the arguments and authorities herein contained, and the records and briefs on file with this Court.

DATED: 3/23/07

SUBMITTED BY:

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ARGUMENT

I.

BASED UPON THE LACK OF DISCLOSURE BY THEN JUSTICE BECKER, THE COURT OVERLOOKED, MISAPPLIED OR FAILED TO CONSIDER A STATUTE, PROCEDURAL RULE, REGULATION OR DECISION DIRECTLY CONTROLLING A DISPOSITIVE ISSUE IN THE CASE

NRAP 40 provides in relevant portion as follows:

"(a)(1) A petition for rehearing may be filed within eighteen (18) days after the filing of the court's decision pursuant to Rule 36 unless the time is shortened or enlarged by order. The three day mailing period set forth in Rule 26(c) does not apply to the time limits set by this rule. The petition shall state briefly and with particularity the points of law or fact which in the opinion of the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that this court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that this court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

(2) This court considers a decision by a panel or the en banc court resolving a claim of error in a criminal case, including a claim for post-conviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. Rehearing is available only under the limited circumstances set forth in subsection (c) of this Rule. Petitions for rehearing filed on the pretext of exhausting state remedies may result in sanctions pursuant to subsection (g) of this Rule."

NRAP 40 goes on to set forth when a rehearing may be considered:

"(c)(2) The court may consider rehearings in the following circumstances:

(i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation

or decision directly controlling a dispositive issue in the case."

In the present case Counsel for MARLO THOMAS, after the 4-3 decision issued by the Supreme Court, learned that a member of the majority opinion of the Court had, immediately after signing the Order in this matter, accepted an appointment with the Clark County District Attorney's office. It appears from the evidence available that the offending Justice had, prior to the signing of the Decision in this matter been engaging in negotiations with the District Attorney's office, and that after negotiations had commenced, she failed to recuse herself from consideration of the case(s) and/or advise counsel for the Defense.

Based upon the record and facts that have come to the attention of the Defendant after the issuance of the Order in this matter, there are sufficient facts to warrant a confidential investigation by either the Attorney General's office, the Nevada Commission on Judicial Discipline, and/or the Supreme Court regarding the actions of departing Justice Nancy Becker and her subsequent employment with the District Attorney's Office. Her actions between the time of her loss of the election and her subsequent employment appear to have violated the Canons of Judicial Conduct. It appears, however, that the best use of limited Judicial time would best be served by a rehearing by the present Court, en banc, which lacks the potential taint of the appearance of impropriety attendant with the previous opinion issued by the Court.

Of concern are the death penalty cases that were the subject of non-unanimous decisions by the Nevada Supreme Court. These cases are: Thomas v. State 122 Nev. Adv. Opinion 12; and Johnson v. State 122 Nev. Adv. Opinion 13. Also of concern is the non-death case of

Summers v. State 122 Nev. Adv. Opinion 14.

The appearance of impropriety directly falls under Canon 3E(1) of the Nevada Code of Judicial Conduct. The facts, as they present themselves are as follows:

11/8/06 Justice Becker loses the election. As Justice Rose announces his intentions to retire, Justice Becker is thereafter seeking employment within the State of Nevada.

12/22/06 The Supreme Court, *en banc* approves and signs an Order "amending the commentary to Canon 3E(1)." Justice Becker is signatory to this Amendment.

12/28/06 The offending Opinions are issued. Justice Becker, being the potential swing vote, becomes a member of the slight majority.

On or before **1/4/07** John L. Smith of the Review Journal becomes aware that the Clark County District Attorney's Office has offered the now former Justice a job. Specifically, his words (Review Journal 1/05/07) "Nancy Becker is considering accepting a newly created position as an appellate attorney in the district attorney's office. Before she can accept the job [the District Attorney will have to find the necessary funds to pay Becker's salary."

1/16/07 the official announcement of the District Attorney that former Justice Becker is now employed by the office. (This date is both important and raises suspicion in that it is the due date for any petitions or motions for rehearing to be filed).

With the New Year's Holiday intervening, this gave Mr. Smith, less than 3 working days in which to obtain the information either from Justice Becker directly or from a representative of the District Attorney's office.

The fact that the commentary of 12/22/06 was set to "be effective February 1, 2007" is alarming, and could be construed to have been engineered by former Justice Becker to allow for her employment with the District Attorney's office. From the facts known at the time, she was the **only** Justice that appeared to be actively seeking employment post service on the Court.

Additionally, the commentary itself, merely offered guidance to

judges leaving or contemplating leaving office. The Canon already was designed to address the situation. The "effective date" of a commentary does not mean that the rule is modified on that date. Clearly, under the Canon **as it existed on December 28, 2006**, Justice Becker would have known that it was inappropriate for her to be involved in judicial decisions if she was in negotiations with or contemplating employment with the Clark County District Attorney's Office. This is particularly true of those cases involving the death penalty, as "death is different".

The prohibition of this conduct by Justice Becker is not peculiar to the Nevada Judicial Code of Ethics. Indeed, the relevant opinion of the United States Judicial Conference's Committee on Codes of Conduct, as stated in its compendium of selected opinions, states: It is permissible for a judge who is considering leaving the bench, to explore future employment possibilities with law firms, on a private, dignified, basis. The judge must, of course, recuse from all cases handled by any such law firm during any such negotiations, and for a reasonable period after the negotiations terminate (the exact length of time depending upon the nature of the discussions, the reasons for termination, etc.). Judicial Conference of the United States, Committee on Code of Conduct for United States Judges, Compendium of Selected Opinions, § 2.5 (2003). Bankruptcy Servs. v. Ernst & Young (In re CBI Holding Co.), 424 F.3d 265, 266-267 (2d Cir. 2005). See also, Scott v. United States, 559 A.2d 745, 747 (D.C. 1989):

> We must decide the appropriate remedy for a violation of Canon 3 (C) (1) of the American Bar Association's Code of Judicial Conduct which requires that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." CODE OF JUDICIAL CONDUCT Canon 3 (C) (1). n1 The trial judge