friends, his neighbors, his father's associates, or other people who were aware of his early life.

19. In addition to his abusive upbringing, Mr. McKenna described horrors he witnessed and experienced at the Spring Mountain Youth Camp, and later at the Northern Nevada Youth Training Center. With more time, I may have been able to corroborate Mr. McKenna's allegations of wrongdoing at these facilities, and present evidence establishing the relationship between risk factors such as child abuse/neglect and criminal behavior.

20. We presented testimony of a witness who was an employee of the Spring Mountain Youth Camp. Although he was not at the camp at the time Mr. McKenna was there, the witness testified to the poor conditions of the facility after Mr. McKenna left. Unfortunately, the prosecutor argued that the Spring Mountain Youth Camp was not open during the time we claimed Mr. McKenna was there. It has since been reported to me that Mr. McKenna was at the camp when he was thirteen years old and that, although the camp was not officially open, a number of juvenile boys were placed there to assist with building the facility. With additional time to investigate the instant matter, I may have been able to uncover this critical information.

21. Mr. McKenna's life-long incarceration was a key component of the government's argument in support of a death sentence. Many of Mr. McKenna's criminal acts occurred while he was incarcerated. His other crimes were committed during two brief periods of supervised release. It was my belief that Mr. McKenna's lifelong incarceration was, in a way, mitigating evidence. Accordingly, I hired Anthony Casas, an expert on prisons, in an attempt explain to the jury what life was like in prison. It is entirely possible that, with additional time, we may have been able to uncover additional information about Mr. McKenna's prison experiences, such as information regarding his incarceration(s) at San Quentin and Folsom prisons in California.

22. During Mr. McKenna's trial, I was contacted by Edwin Pogue, a former warden at Nevada State Prison during Mr. McKenna's incarceration there. Mr. Pogue volunteered to testify. Mr. Pogue seemed to take responsibility for Mr. McKenna's membership in a prison gang. Mr. Pogue testified that prison conditions during the early years of Mr. McKenna's incarceration were deplorable. The men were mistreated and neglected. Mr. Pogue also testified that Mr. McKenna was transferred to prisons in California during a time of racial tension and race riots. According to Mr. Pogue, Mr. McKenna essentially had no choice but to join one of the racially-segregated prison gangs in order to survive.

23. The information imparted by Mr. Pogue suggested that additional investigation of Mr. McKenna's incarceration history and experiences might be of great value to us. Any compelling evidence we uncovered could have been considered by our prison expert, Mr. Casas. Having worked in the California prison system, Mr. Casas may have been familiar with the racial problems and prison organizations about which Mr. Pogue testified. Providing the jury with an understanding of prison life could have explained (and thereby mitigated) certain of Mr. McKenna's behaviors.

24. I did not have time to conduct any investigation into the Aryan Warriors organization. McKenna was alleged to have been a leader in this organization and the prosecutorm used this association to imply Mr. McKenna was a racist. I have since been told that the early Aryan Warriors were focused on personal protection and making money rather than fomenting racial discord. With additional time to investigate this issue, I may have been able to discover this information and present it to jurors, thereby mitigating the prosecutor's suggestion(s) that Mr. McKenna was a racist. .

25. Although my investigation in Mr. McKenna's case was hurried and incomplete, I attempted to present a mental health expert, Dr. Stephen Pittel, a professor of psychology at U.C. Berkeley. Dr. Pittel explained that, without more corroborative information, he could not provide much of an expert opinion. My choices were to put him on the stand with the limited amount of information available and let him identify potentially mitigating factors, or exclude the testimony entirely. I opted for the former.

26. I recall that Dr. Pittel's testimony regarding Mr. McKenna's reaction to losing his unborn child was exceedingly compelling. I faintly recall noticing tears the eyes of some jurors. If this limited information aroused the jury's emotions to such an extent, I would like to think that additional anecdotes of a similar nature would have greatly enhanced our psychiatric presentation.

27. The security at Mr. McKenna's trial was nothing short of shocking. I am not a security expert, so I cannot speak to the necessity of the seemingly excessive security measures imposed upon us. But I can say that I've never seen anything like it in my years of practice. While Mr. LaPorta described the excessive security on the record, a better practice would have been to submit a video recording of the entire scenario.

28. In addition to the metal detectors placed at the entrance to the courthouse, there was also a metal detector outside the doors to Judge Leavitt's courtroom. Inside the courtroom, officers dressed in army fatigues were stationed (to the best of my recollection) in all four corners. Each officer was armed with what appeared to be a large, automatic-type weapon. Their presence created an atmosphere of danger and intimidation. This could not have been lost on our jury.

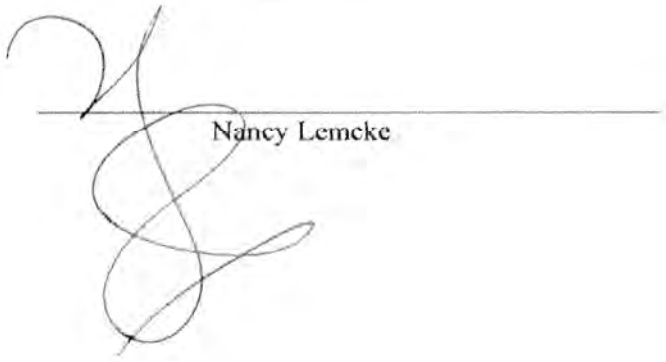
29. Mr. McKenna's mode of transport to and from court evoked images of Hanibal Lecter from the Academy-Award winning movie, *Silence of the Lambs*. He was brought in by wheelchair, blindfolded, with big black mits on his hands, and shackled. He was also outfitted with a stun belt. While we were informed that the extra security was a necessary precaution to prevent an escape attempt, we were never provided with details as to the nature of any such alleged threat.

30. After Mr. McKenna's trial ended, I received a phone call from Ralph Denton. Mr. Denton saw a news reports concerning the trial and offered information concerning Pat McKenna's father. Mr. Denton told me that everything we presented regarding Pat McKenna's father, Chuck McKenna, was accurate. Mr. Denton knew Chuck McKenna in the mid and late 1960's and was familiar with his violent behavior. Mr. Denton provided specific examples of Chuck McKenna's violent acts. Mr. Denton could have corroborated our claims regarding Chuck McKenna's violent ways, something critical to our defense.

31. It is my current understanding Mr. McKenna was exposed to environmental toxins during his early child hood; toxins that may have impacted his then-developing brain. Had we had additional time to investigate his early childhood, we may have been able to uncover this information and present it to the jury, together with an explanation of any possible link between his exposure to such toxins and his later behavior. The same can be said of certain aspects of our investigation of Mr. McKenna's familial background. With additional time, we could have better developed multi-generational data about his family, thereby explaining things such as (what has recently been reported to me) as a family history of addiction. Additionally, had I known of evidence that Mr. McKenna inhaled leaded gasoline as a teenager, I would have closely examined and investigated the possibility of neurological impairment.

32. There are a number of reasons why I feel Mr. McKenna's defense was lacking. Certainly, the limited time afforded us to prepare this matter for trial stands first and foremost in my mind.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this Declaration is signed on July 8th, 2011.



Nancy Lemcke

EXHIBIT 185

EXHIBIT 185

DECLARATION OF NANCY LEMCKE

I, Nancy Lemcke, hereby declare as follows:

1. I am currently employed as an attorney with the Clark County Public Defender's Office. In 1996-97, I was employed as an attorney with the Nevada State Public Defender's Office. I was admitted to practice law in 1994.

2. The Nevada State Public Defender's Office was appointed by the court to represented Donald William Sherman on July 11, 1996, with attorney David Schieck, Esq. Peter LaPorta from the office was originally appointed to represent Mr. Sherman but I replaced him as both Mr. Sherman and the Court were concerned about Mr. LaPorta's inattentiveness to Mr. Sherman's case. Mr. Schieck and I represented Mr. Sherman during the pre-trial, trial and penalty phase proceedings. Mr. Sherman's case was my fourth or fifth murder case.

3. Before we began our defense case in chief, the state brought an oral motion in limine to prevent us from eliciting testimony from witnesses that Dianne Bauer was involved in her father's death, including any testimony that Dianne Bauer had spoken to Mr. Sherman about being sexually molested by her father.

4. In opposition to the state's motion, I made offers of proof to the court summarizing the anticipated trial testimony of the defense witnesses. I did not anticipate the prosecution's oral motion, which immediately preceded the defense case-in-chief. Consequently, it is entirely possible that I may not have placed each and every relevant piece of testimony from each witness before the trial court. To the extent that I omitted any relevant information from my proffer, I did not possess a strategic justification for so doing.

5. When the trial court granted the state's motion, it completely eviscerated our defense. It was originally our intention to argue a diminished capacity defense by presenting evidence that Mr. Sherman was manipulated into confronting Lester Bauer because of Dianne Bauer's allegations that she and her daughter, Jessica Miller, had been sexually molested by Lester. I do not have any independent recollection of the exact parameters of the court's ruling as it applied to the penalty phase of the trial.

6. When the court granted the state's motion, it completely derailed our defense and forced us to present alternative theories in closing argument to the jury. Because our primary defense was undermined, we decided that we had to argue to the jury that Mr. Sherman did not commit the offense, and, in the alternative, that if he did there was a lesser degree of culpability on his part that only warranted a conviction for second-degree murder. While I do not have a very good recollection of the factors which precipitated that decision, I seem to recall that we decided to pursue the alternative defense because there was little, if any, evidence inside the victim's home indicating that Mr. Sherman was there. Therefore, we made a strategic decision to argue alterative theories to the jury in closing argument. I was very uncomfortable arguing alterative theories to the jury in closing argument, and consequently, I believe that my closing argument did not go over well with the jury.

7. My understanding of the Clark County District Attorney's Office "open file" policy is that everything relevant to the case would be disclosed except for attorney work product. The open file policy does not necessarily cover NCICs. Accordingly, I filed a motion

with the Court requesting that the Court compel production of NCIC printouts for any/all witnesses for the state.

8. I have reviewed a substantial amount of documentary evidence that was shown to me by the Federal Public Defender's Office that was not disclosed to the defense at the time of trial. The information that was not disclosed appears to show that the state's informant witness, Michael Placencia, received an ex parte dismissal of a contempt of court sentence that was imposed against him for a prior battery conviction in exchange for his cooperation with the state. Additionally, the prosecution did not disclose that its other informant witness, Christine Kalter, was previously a narcotics informant for the authorities who conducted controlled drug buys for Metro. At the time of trial, the prosecution never disclosed to me, or any other member of Don Sherman's defense team, any of the information contained in the following documents:

a. Justice Court Intake Services Information Sheets, dated 10/25/95, 3/27/96, 3/29/96, and 4/18/96 (showing that Placencia was not eligible to receive OR releases). The justice court intake sheet dated 4/18/96 indicates that Placencia was to be released from his contempt of court sentence on the battery conviction on August 22, 1996;

b. Guilty plea agreement and judgement of conviction in State v. Michael Placencia, No. C135501 (filed May 6, 1996);

c. Blackstone printouts in Eighth Judicial District Court Case No. 96-C-135501-C, State v. Michael Placencia, indicating dismissals of charges of destruction of personal property, destruction of private property, and felony theft;

d. Justice court printouts noting an OR release that was provided to Michael Placencia on December 17, 1996;

e. Justice court Intake Services Information Sheet, dated 10/25/95 and 11/6/95, reflecting a felony conviction for Michael Placencia for possession of controlled substance in 1991;

f. Ex parte phone conversation from Sargent Gayland Hammack to Judge Deborah Lippis, memorialized on the letterhead of Annette Sheffield, Secretary to Judge Deborah J. Lippis;

g. Sticky note, undated, "Rel. to File. Waiting for DA to work out release - if any.";

h. Declaration of Warrant/Summons for Christine Kalter, dated October 13, 1995, Event #950922-0500;

i. Reporter's Transcript of Preliminary Hearing, State v. Christine Michelle Kalter, No. 95F9229X (November 22, 1995);

j. Petition for Writ of Habeas Corpus, Application of Christine Michelle Kalter, No. C132416X (filed January 8, 1996), and Return to Writ of Habeas Corpus (filed January 25, 1996);

k. Reporter's Transcript of Alford Plea, State v. Christine Michelle Kalter, No. C132416 (February 23, 1996);

l. Reporter's Transcript of Sentencing, State v. Christine Michelle Kalter, No. C132416 (August 27, 1996);

m. Cooperating Individual Agreement, LVMPD form Nos. 161, 163 (3-92);

n. Longview, Washington, Police Report, No. 94-10712, pages 9 - 17.

o. Stacey Maher's revelation during trial that the state quashed a bench warrant on her behalf in a pending criminal case;

p. Docket sheets in State v. Stacey Lynn Maher, Justice Court Case No. 96M22591X;

q. Blackstone entries for Stacey Lynn Maher, Eighth Judicial District Court Case Numbers 96-C-136395-C and 96-C-140240-D (showing that Maher's criminal cases are sealed).

9. It was represented to me by the Federal Public Defender's Office that all of the information above was located in the justice court and district court files for Michael Placencia, Christine Kalter and Stacey Maher. I did not have a strategic justification for not looking in the case files of the state's witnesses to find this evidence. I was relying upon the representations of the state regarding its compliance with constitutional disclosure obligations.

10. I have reviewed documentary evidence indicating that Dianne Bauer made allegations of sexual abuse involving her daughters, Jessica and Megan Miller. This evidence was represented to me by the Federal Public Defender's Office as originating from the child custody case files of Rodney Miller and Penny Langdon and Dianne Bauer and Jerry Tracy. I did not have a strategic justification for not investigating and presenting these records to the jury.

11. I have reviewed documents that were represented to me by the Federal Public Defender's Office as originating from the Sandpoint Police Department concerning Mr. Sherman's prior murder conviction in Idaho. I reviewed the following records:

a. Report of the FBI Criminalistics Laboratory, dated March 31, 1982 (showing that glass from the grocery store window was found on the shoes and shirt worn by Jeffrey Hyrniak on the night of the offense);

b. Sandpoint Police Department, interview with Jeffrey Hyrniak, dated December 13, 1981, at 1 (showing that the Nike tennis shoes impounded by the police were a size eight);

c. Sandpoint Police Department Property Reports, dated December 13, 1981 (showing that size eight shoes were taken from the person of Jeffrey Hyrniak);

d. Declaration of Gregore J. Sambor, dated September 15, 2004 (reflecting interview with laundry department at Ely State Prison showing that Mr. Sherman is currently being issued size ten boots);

12. The discovery from the Sandpoint Police Department would have allowed me to rebut the state's evidentiary presentation at sentencing by showing that the co-defendant, Jeffrey Hyrniak, lied to the police before trial and at the preliminary hearing when he testified that his role in the offense was limited to that of a getaway driver. I did not have a strategic justification for not investigating and presenting this evidence during cross-examination of Andrew Anderson and on direct examination of Phillip Robinson.

13. I have also reviewed documentary evidence from the Sandpoint Police Department that was not provided to the Idaho defense attorney at the time of Mr. Sherman's trial. I have reviewed the following:

a. Bonner County Sheriff, Voluntary Statement of Lyle Belgrade, dated December 13, 1981 (showing that Mr. Sherman was seen directly after the offense wearing

black zip up boots);

b. Handwritten notes from Sandpoint Police Department, entry dated December 12, 1981, at 6:30 p.m. (showing that the confidential informant for the police was Pam Dawson);

c. FBI Criminal History Record, No. 852 939 B, pertaining to Fedor ("Ted") Hyrniak (reflecting armed robbery and brandishing a weapon convictions);

d. Transcript of taped interview with Jeannie Hendershott, dated December 13, 1981 (showing that Jeannie Henderschott lied to the police during her first interview by saying that she was not told about the facts of the offense by Jeffrey Hyrniak);

e. Enhanced transcription of handwritten note, undated, purportedly written by Jeffrey Hyrniak (describing his arrangement with the authorities to provide information about the offense in exchange for his release from jail);

f. Sandpoint Police Department, Interview with Chuck Hull, dated December 19, 1982.

If I, or any other member of the defense team, had obtained the information detailed above from the Sandpoint Police Department, we would have been able present the jury with additional information showing Mr. Sherman's diminished culpability relative to Jeffrey Hyrniak. The information above could have also been used to show that Hyrniak's father, Ted Hyrniak, had a greater role in the offense than he testified about in his preliminary hearing testimony.

14. I have reviewed a handwritten letter from Lily Marley, the wife of the deceased grocery store clerk, dated June 11, 1992, explaining that she forgave Mr. Sherman for his actions.

It was represented to me by the Federal Public Defender's Office that this letter was obtained from Gail Stinton, Mr. Sherman's mother. I did not have a strategic justification for not investigating and using the letter from the victim's wife to rebut the state's presentation of victim impact testimony from the prior murder.

15. I was very distraught with our defense expert, Stephen Pittel. Pittel charged us the maximum allowable amount for expert services, but did an incredibly poor job with 'collateral witness interviews', something I feel is essential for a mitigation psychologist to conduct. I recall arranging numerous witness interviews for Dr. Pittel, only to have him fail to actually conduct the interview(s). I conducted nearly all – if not all -- of the family member interviews, reduced the contents of those interviews to writing, and forwarded them to Dr. Pittel. Dr. Pittel's failure to conduct the collateral witness interviews himself became fertile ground for cross examination at trial. Additionally, Pittel told me right before he took the witness stand that he had been arrested some time prior for possession of controlled substance. He indicated that the charges were ultimately dismissed. I believe that Pittel's testimony was compromised on cross-examination due to his failure to make sufficient effort to get mitigating information from the reporting sources.

16. I have reviewed a memorandum, dated January 3, 1997, that I wrote to Stephen Pittel wherein I discussed the possibility of hiring an institutionalization expert in Mr. Sherman's case. The memo discussed the possibility of a hiring Jim Etsen from Sacramento, California, as an expert. I do not recall whether I had a strategic justification for not investigating and presenting an institutionalization expert to rebut the state's

future dangerousness presentation in the penalty phase.

17. I have reviewed a transcript from the voir dire proceedings where Judge Huffaker spoke with a potential juror, Ms. McPherson, about whether she could consider the death penalty as a sentencing option. Ms. McPherson was evidently expressing reservations about the death penalty due to her religious beliefs. In response, Judge Huffaker essentially told her that the death penalty was the normal way to punish those convicted of murder in the Bible, specifically in the Book of Judges. The judge also engaged in a debate with another juror who expressed her belief that her religion made her unable to consider the death penalty as a sentencing option. The judge tried to suggest that the Bible does not present an impediment to imposing the death penalty.

18. I did not raise a contemporaneous objection to the judge's comments about the position of the Bible with respect to the death penalty. The defense ultimately objected when the judge tried to rehabilitate a juror who was not life qualified by posing hypotheticals involving provocation-type killings – i.e., factual circumstances appropriate for a manslaughter conviction – in an apparent attempt to get the juror to concede that he could impose a penalty of less than death in that situation. I do not recall that we had a strategic justification for not raising a contemporaneous objection to the trial judge's comments about the Bible's position on the death penalty. The significance of improper judicial

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commentary cannot be overstated as, in my experience, jurors tend to rely heavily on pronouncements by the Court.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Clark County, Nevada, on October 26, 2005.

Nancy Lemcke, Esq.

EXHIBIT 186

EXHIBIT 186

DECONSTRUCTING ANTISOCIAL PERSONALITY DISORDER AND PSYCHOPATHY: A GUIDELINES-BASED APPROACH TO PREJUDICIAL PSYCHIATRIC LABELS

*Kathleen Wayland**
*Sean D. O'Brien***

I. INTRODUCTION

Randall Dale Adams was on trial for his life for the murder of a Dallas police officer.[1] Under Texas law, the jury can return a sentence of death only if the prosecution proves beyond a reasonable doubt that Adams would be dangerous in the future.[2] To meet this burden, Doctors John Holbrook and James Grigson[3] told the jury that they evaluated Adams, and concluded that he had antisocial personality disorder ("ASPD") and that he was a sociopath—a remorseless killer, devoid of morality, incapable of empathy, and bent on self-gratification.[4] Grigson

* Kathy Wayland, Ph.D., is a clinical psychologist who consults with capital defense teams and specializes in issues related to mitigation themes, psychological trauma, and mental health.

** Sean D. O'Brien is an Associate Professor at University of Missouri-Kansas City School of Law, where he teaches courses in criminal law, the death penalty, and mental health law. We are deeply grateful for the invaluable assistance of the people who reviewed this document and provided thoughtful and valuable edits, suggestions, resources, and assistance: John Edens, Ph.D.; David Freedman, M.Phil., M.S.; James Pultz; Andrew Rowland, Ph.D.; and Russ Stetler. We give a special thanks to our Research Assistants, UMKC School of Law graduate Gregory Doty and student Matthew Miguel Peters, whose excellent, hard work was vital to the quality and integrity of our final product.

1. *See* Adams v. State, 577 S.W.2d 717, 719 (Tex. Crim. App. 1979) (en banc).

2. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)–(b) (West 2006).

3. In more than one hundred trials that ended in death verdicts, Grigson testified that he found the defendant to be an incurable sociopath who was one hundred percent certain to kill again. *See* RON ROSENBAUM, TRAVELS WITH DR. DEATH AND OTHER UNUSUAL INVESTIGATIONS 206-07 (1991) (analyzing numerous cases Grigson has taken part in). Grigson was sanctioned by the American Psychiatric Association for egregious misconduct in the performance of court-ordered competency evaluations. Mark D. Cunningham & Alan M. Goldstein, *Sentencing Determinations in Death Penalty Cases*, *in* 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 407, 413 (Alan M. Goldstein ed., 2003).

4. *See Adams*, 577 S.W.2d at 731.

told the jury that, because of his sociopathic personality, Adams would certainly kill again.[5] The prosecutor told the jury that failing to execute Adams would endanger police officers, "the thin blue line" protecting society from anarchy.[6] The jury returned a verdict of death, and the Texas Court of Criminal Appeals affirmed, finding that the testimony of Grigson and Holbrook was sufficient proof of Adams's future dangerousness to justify his execution.[7]

The rest of Adams's story is well known. Only three days before his scheduled capital punishment, the Supreme Court stayed Adams's execution and granted certiorari.[8] Finding that the Texas requirement that capital jurors swear their verdict will not be "affected" by moral reservations about the death penalty is unconstitutional, the Supreme Court ordered a new sentencing trial.[9] It was subsequently revealed that the police manufactured the testimony of the eyewitness who identified Adams as the shooter.[10] She had previously identified someone other than Adams from the line-up, and was told she had selected the wrong person.[11] Her initial written statement to the police, which had been withheld from the defense, described the shooter as a light-skinned Mexican or black male with a three-inch afro.[12] Adams was a balding Caucasian with a pale complexion.[13] Based on this and other new evidence establishing his innocence, Texas courts set aside Adams's conviction and released him.[14] The story of his wrongful conviction is told in the documentary, *The Thin Blue Line*.[15]

Adams was the first of several Texas defendants who were sentenced to death when juries determined that they would kill again, and who were subsequently proven innocent of having ever killed before.[16] These and other cases raise serious concerns about the use of

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5. *See id.*

6. *See* Charles Musser, *Film Truth, Documentary, and the Law: Justice at the Margins*, 30 U.S.F. L. REV. 963, 974 (1996); *see also* THE THIN BLUE LINE (Miramax Films 1988).

7. *Adams*, 577 S.W.2d at 731.

8. Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES, June 26, 2011, at A24.

9. Adams v. Texas, 448 U.S. 38, 50-51 (1980).

10. *Ex parte* Adams, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (en banc).

11. *Id.* at 286.

12. *Id.*

13. THE THIN BLUE LINE, *supra* note 6.

14. *Ex parte Adams*, 768 S.W.2d at 294.

15. THE THIN BLUE LINE, *supra* note 6.

16. Graves v. Dretke, 442 F.3d 334, 336, 345 (5th Cir. 2006); Graves v. Cockrell, 351 F.3d 143, 146 (5th Cir. 2003); Guerra v. Collins, 916 F. Supp. 620, 623, 636-37 (S.D. Tex. 1995); *Ex parte* Toney, AP-76056, 2008 WL 5245324, at *1 (Tex. Crim. App. Dec. 17, 2008); *Ex parte* Blair, No. AP-75954, 2008 WL 2514174, at *1-2 (Tex. Crim. App. June 25, 2008); *Ex parte* Brandley, 781 S.W.2d 886, 894-95 (Tex. Crim. App. 1989); Skelton v. State, 795 S.W.2d 162, 163, 170 (Tex.

ASPD and related constructs, such as psychopathy, in life-and-death matters. Indeed, diagnostic criteria for personality disorders, including ASPD, have been debated and criticized on many grounds, including lack of validity and reliability.[17] The use of related constructs, such as psychopathy, is also controversial. As shown in Mr. Adams's case, expert testimony about these conditions has potentially enormous prejudicial consequences.

This Article examines the use of evidence about ASPD in death penalty cases, and how compliance with the American Bar Association ("ABA") Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines")[18] and the Supplementary Guidelines for the Mitigation Function of Capital Defense Teams ("Supplementary Guidelines")[19] (together "ABA and Supplementary Guidelines") reduce the risk that such evidence will result in an unfair sentence of death. In Part II, we examine the construct of ASPD and related concepts, how such testimony is presently used in cases involving the death penalty, and data demonstrating the impact of such testimony on capital decision makers.[20] In Part III, we discuss scientific and ethical controversies within the clinical and research community surrounding ASPD and psychopathy, such as issues related to the subjectivity of these constructs, flaws in the reliability and validity of the constructs, and associated assessment methods and instruments.[21] Part IV explains how a thorough psychosocial history, conducted in accordance with prevailing ABA and mental health standards, can avoid or counter opinions of ASPD.[22] We conclude that constructs of ASPD or psychopathy should not be used in capital sentencing proceedings because they are unreliable and prejudicial.[23] Until courts begin excluding such evidence, capital defendants are best protected when their defense teams strictly comply with the ABA and Supplementary Guidelines.

Crim. App. 1989).

17. Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 19 BEHAV. SCI. & L. 333, 334 (1998).

18. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], *available at* http://www.ambar.org/2003Guidelines.

19. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

20. *See* discussion *infra* Part II.

21. *See* discussion *infra* Part III.

22. *See* discussion *infra* Part IV.

23. *See* discussion *infra* Part V.

II. AN OVERVIEW OF ANTISOCIAL PERSONALITY DISORDER AND PSYCHOPATHY

ASPD is one of ten disorders currently grouped in the personality disorder category.[24] According to the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), "[t]he essential feature of [ASPD] is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[25] Other terms that have historically been used include sociopathy, dissocial personality disorder, and psychopathy. While these terms are often used interchangeably with ASPD in the legal field, they are not identical, and a diagnosis of ASPD is not the same as labeling someone a "psychopath" or "sociopath."[26] Therefore, using these terms as though they are synonymous is incorrect and often causes confusion. "Psychopathy" is not officially recognized in our current diagnostic nomenclature, as defined in the United States by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5").[27]

As set forth in the DSM-5, specific diagnostic criteria for ASPD are as follows:

> A. A pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
>
> (1) Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest
>
> (2) Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

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24. Personality disorders are defined as "an enduring pattern of inner experience that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-5]. The DSM-5 supersedes the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition Text Revision ("DSM-IV-TR"), published in 2000. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter DSM-IV-TR]. Despite proposals for significant changes to the existing personality disorder structure, "the categorical listing of personality disorders in the DSM-5 remains virtually unchanged from the previous edition." Mark Moran, *Continuity and Changes Mark New Text of DSM-5*, PSYCHIATRIC NEWS 1 (Jan. 18, 2013), http://psychnews.psychiatryonline.org/newsarticle.aspx?articleid=1558423. Thus, the controversies discussed in this Article will persist with the DSM-5.

25. DSM-5, *supra* note 24, at 659.

26. Norman Poythress et al., *Identifying Subtypes Among Offenders with Antisocial Personality Disorder: A Cluster-Analytic Study*, 119 J. ABNORMAL PSYCHOL. 389, 390 (2010).

27. The DSM-5 text language notes that ASPD has also been referred to as psychopathy. DSM-5, *supra* note 24, at 659; *see also* Poythress et al., *supra* note 26, at 390 (discussing these issues).

(3) Impulsivity or failure to plan ahead

(4) Irritability and aggressiveness, as indicated by repeated physical fights or assaults

(5) Reckless disregard for safety of self or others

(6) Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations

(7) Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least 18 years of age.

C. There is evidence of conduct disorder[28] with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode.[29]

In addition to the criteria listed above, the DSM-5 describes persons with ASPD as "lack[ing] empathy and tend[ing] to be callous, cynical, and contemptuous of the . . . rights . . . of others."[30] Such persons "may have an inflated and arrogant self-appraisal . . . and may be excessively opinionated, self-assured, or cocky. They may display a glib, superficial charm and can be quite voluble and verbally facile."[31] None of these characteristics engender empathy for a capital defendant, and they are severely prejudicial. Yet, these characteristics are also subjectively judgmental and sufficiently ambiguous in order to mask manifestations of severe mental illness, as discussed below in Part IV.[32] To fully understand the danger of an unreliable diagnosis of ASPD to capitally charged or convicted clients, it is important to know the ways in which ASPD is used by courts and prosecutors.

Recently, prosecution forensic examiners are using the construct of psychopathy, which is not a diagnosis in the DSM-5. While the term psychopathy has had a variety of meanings over the past century, the concept was narrowed in the first half of the twentieth century to focus largely on interpersonal traits.[33] The modern concept of psychopathy is attributed to Hervey Cleckley's *The Mask of Sanity*, which was published in 1941.[34] Canadian psychologist Robert Hare, who attempted

28. DSM-5, *supra* note 24, at 469-70.

29. *Id.* at 659.

30. *Id.* at 660.

31. *Id.*

32. *See* discussion *infra* Part IV.

33. *See infra* note 35 and accompanying text.

34. HERVEY CLECKLEY, THE MASK OF SANITY (1941). Cleckley's work has been criticized for ignoring evidence of severe mental illness among the patients he used to define psychopathy. Dorothy O. Lewis, *Adult Antisocial Behavior, Criminality, and Violence*, *in* KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2258, 2260 (5th ed. 2003) [hereinafter Lewis, *Adult Antisocial Behavior*]. Among Cleckley's white collar criminal case studies, one psychiatrist

to operationalize the work of Cleckley, describes psychopathy as "a specific form of personality disorder with a distinctive pattern of interpersonal, affective, and behavioral symptoms."[35] According to Hare, "psychopaths are grandiose, arrogant, callous, superficial and manipulative; affectively, they are short-tempered, unable to form strong emotional bonds with others, and lacking in guilt or anxiety; and behaviorally, they are irresponsible, impulsive, and prone to delinquency and criminality."[36]

Hare developed the Psychopathy Checklist ("PCL")[37] and the Psychopathy Checklist-Revised ("PCL-R"),[38] which have become widely used in forensic settings. His original objective was to develop an instrument that would operationalize the construct of psychopathy.[39] The PCL-R is a checklist that consists of the following twenty items:

1. Glibness/superficial charm
2. Grandiose sense of self-worth
3. Need for stimulation/proneness to boredom
4. Pathological lying
5. Conning/manipulative
6. Lack of remorse or guilt
7. Shallow affect
8. Callous/lack of empathy
9. Parasitic lifestyle
10. Poor behavioral controls
11. Promiscuous sexual behavior
12. Early behavioral problems
13. Lack of realistic, long-term goals
14. Impulsivity
15. Irresponsibility
16. Failure to accept responsibility for own actions

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observed that the "flamboyant ways the massive ill-gotten gains were used," such as purchasing mink tuxedos and massive art collections, suggest "more serious psychopathology than mere character disorders." *Id.* at 2259. Another of Cleckley's "so-called psychopaths" was so mentally ill that he "had been confined in mental hospitals for almost half his adult life," and his history of manic episodes included jumping fully clothed into a creek in the middle of winter and running naked through the streets of town. *Id.* at 2260.

35. Robert D. Hare et al., *Psychopathy and Sadistic Personality Disorder*, *in* OXFORD TEXTBOOK OF PSYCHOPATHOLOGY 555, 555 (Theodore Millon et al. eds., 1999).

36. *Id.* at 555-56.

37. Robert D. Hare, *A Research Scale for the Assessment of Psychopathy in Criminal Populations*, 1 PERSONALITY & INDIVIDUAL DIFFERENCES 111, 114-18 (1980).

38. ROBERT D. HARE, THE HARE PSYCHOPATHY CHECKLIST-REVISED 1 (Multi-Health Systems, 2d ed. 1991).

39. Hare has expressed grave reservations about misuses of his instrument, which has been extended far beyond the goals for which it was designed. *See infra* notes 210-24 and accompanying text.

17. Many short-term marital relationships
18. Juvenile delinquency
19. Revocation of conditional release
20. Criminal versatility[40]

The Sixth Circuit Court of Appeals recently relied on fifteen of the PCL-R characteristics to justify a federal prisoner's sentence of death, asserting that the defendant's behavior "fits the checklist for severe psychopathy in the psychiatric literature."[41]

Testimony labeling a capital defendant antisocial or psychopathic has one overriding purpose: to obtain and carry out a sentence of death. In the most general sense, such evidence is dehumanizing. A prosecution expert in one capital trial testified that the defendant was a psychopath, and used an analogy to suggest that the defendant was not actually human:

> The psychopath, as I say, has the ability to look very normal. However, if you know what you are looking for, it is kind of like seeing a bowl of fruit, and you say to yourself, gosh that bowl of fruit looks wonderful, it looks very good. But when you get close to the bowl of fruit and pick it up you realize that it's fake fruit. And the psychopath is a lot that way.[42]

The ASPD or psychopathy label invokes the stereotype of "unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human."[43]

Judicial decisions discussing ASPD and psychopathy almost uniformly reflect reliance on the dehumanizing stereotype. In *Guinan v. Armontrout*,[44] the court affirmed a death sentence by relying on testimony that Frank Guinan's antisocial personality made him "aggressive, impulsive, unreliable in maintaining employment," and resulted in his "getting in trouble with the law again at [an] early age."[45] The court summarized the impact of the ASPD diagnosis on Guinan's sentencing profile:

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40. Hare et al., *supra* note 35, at 558 tbl.22.1. The core features of the PCL and the PCL-R are taken from Cleckley's 1950 list of the sixteen characteristics he believed to be typical of the psychopath. Lewis, *Adult Antisocial Behavior*, *supra* note 34, at 2260.

41. United States v. Gabrion, 648 F.3d 307, 319 (6th Cir. 2011).

42. United States v. Barnette, 211 F.3d 803, 821, 823 (4th Cir. 2000) (quoting the trial testimony of prosecution expert Doctor Scott Duncan).

43. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 549 (1995) [hereinafter Haney, *The Social Context*].

44. 909 F.2d 1224 (8th Cir. 1990).

45. *Id.* at 1229, 1234.

> In sum, there is simply no evidence in the record or the psychiatric evaluation to suggest that Guinan's mental problems can be characterized as anything more than personality disorders evidenced by violent and inappropriately aggressive behavior. *We suspect that most capital murder defendants are likely to fit this personality profile. Whether evidence of this type would be considered mitigating by a jury is highly doubtful.* The psychiatric evaluation portrays Guinan as an individual prone to violent outbursts due to an aggressive personality disorder which is extremely resistant to treatment.[46]

This image fits the stereotype of the "typical criminal" which attributes deviant behavior "exclusively to negative traits, malevolent thoughts, and bad moral character."[47] Craig Haney, a nationally renowned social psychologist with many years of experience in the assessment of persons accused of violent behavior, warns that the fictional stereotype of the psychopathic criminal facilitates the jury's decision to "assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict."[48] The gratuitous comment in *Guinan* that most death row inmates are probably antisocial demonstrates the considerable sway that this stereotype holds over capital decision makers, jurors, and judges alike.[49] Thus, if believed, testimony that the defendant has ASPD or is psychopathic diminishes substantially the likelihood that a jury will perceive him or her as a unique, complex human being who is worthy of their mercy.

In addition to appealing to this dehumanizing stereotype, prosecutors often use expert testimony that the defendant is antisocial to

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46. *Id.* at 1230 (emphasis added). Resistance to treatment is one of the assumptions about ASPD that is open to debate. *See* text accompanying *infra* notes 141–43.

47. Craig Haney, Comment, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 145 (2006).

48. *Id.* (quoting Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 692 (1989)). Other researchers have found substantial evidence that there exist considerable differences in how mental illness is conceptualized by the mental health field and the lay public; and laypersons' perceptions of such illnesses are particularly important in the legal field, as jurors' reactions to evidence of mental illness can be stigmatizing and cause the defendant to be perceived as dangerous. *See* John F. Edens et al., *Bold, Smart, Dangerous and Evil: Perceived Correlates of Core Psychopathic Traits Among Jury Panel Members*, 7 PERSONALITY & MENTAL HEALTH 143, 143, 150 (2013). In a study to further investigate layperson perceptions of psychopathy, an ethnically diverse sample of 285 community members attending jury duty reviewed a vignette about a capital murder trial and rated perceptions of the defendant's psychopathic characteristics according to items loosely based on trait labels on the PCL-R. *Id.* Study results indicated that laypersons associate psychopathy with boldness (social dominance and fearfulness), intelligence, violence potential, and "evil." *Id.* The results raise serious questions about the potential for stigmatization of people labeled as psychopaths in forensic settings. *Id.*

49. *Guinan*, 909 F.2d at 1230.

accomplish specific strategic purposes. For example, ASPD is commonly used to imply that the defendant is "a dangerous individual, incapable of rehabilitation in the prison system."[50] Further, prosecutors and courts use ASPD to portray a defendant as "'selfish [and] very impulsive,' showing 'little in the line of responsibility' or concern 'for the needs or wants of others,' and 'hav[ing] little in the line of guilt or remorse.'"[51] This is of considerable significance because it is well established that capital sentencing verdicts are heavily influenced by the jurors' perceptions of the defendant's remorse.[52] Professor Scott Sundby's analysis of Capital Jury Project[53] data shows that "a jury that believes the defendant is truly remorseful is very likely to settle on a life sentence."[54] However, if a jury is convinced that the defendant is antisocial, even his sincere expressions of remorse may be misinterpreted as sociopathic manipulation.[55]

Perhaps most troublesome is the attempt by some forensic examiners to equate ASPD with evil. This has been challenged on both scientific and ethical grounds. Doctor Robert Simon, a clinical professor of psychiatry at Georgetown Medical School, warns that "[d]iagnoses such as psychopathology, personality disorder, and conduct disorder may be used by some as more of a moral judgment than a clinical diagnosis."[56] However, Doctor Michael Welner, who frequently testifies

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50. *Id.*; *see also* Satterwhite v. Texas, 486 U.S. 249, 253 (1988) (the prosecution presented expert testimony that defendant had "a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence"); Hammet v. Texas, 448 U.S. 725, 729 (1980) (Marshall, C.J., dissenting) (noting "a customary pattern of conduct" by Texas authorities to present "punishment-stage testimony by the court-appointed psychiatrist that the defendant has an antisocial personality and is likely to commit future violent crimes"); Holsey v. Warden, 694 F.3d 1230, 1252 (11th Cir. 2012) (quoting a prison psychologist's report that defendant's "'Antisocial Personality' . . . suggests a very high risk for being assaultive and/or otherwise violent").

51. Eddings v. Oklahoma, 455 U.S. 104, 126 n.8 (1982) (Burger, C.J., dissenting) (quoting the testimony of the state's mental health expert). Chief Justice Warren E. Burger was also influenced by the same doctor's testimony that "91% 'of your criminal element' would test as sociopathic or antisocial." *Id.*

52. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558 (1998) (citing Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, J. SOC. ISSUES, Summer 1994, at 125, 137); *see also* John Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1049-50 (2008).

53. *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (describing the background, purposes, and methodology of the Capital Jury Project).

54. Sundby, *supra* note 52, at 1568.

55. In the Capital Jury Project data analyzed by Professor Sundby, some jurors were certain that the defendant was not remorseful "because they believed any indications of remorse were merely hollow acts for the jury's benefit." *Id.* at 1567.

56. James L. Knoll, IV, *The Recurrence of an Illusion: The Concept of "Evil" in Forensic*

on behalf of the prosecution in death penalty cases, claims that evil can be diagnosed and scientifically measured.[57] In defense of his "Depravity Scale," which purports to measure "evil," Welner contends that "[d]efining evil is only the latest frontier where psychiatry . . . will bring light out of darkness."[58] Welner's approach reinforces deeply entrenched and misinformed cultural stereotypes of violent offenders.[59] Simon counters that "psychiatrists don't know anything more about [evil] than anyone else," yet "[o]ur opinions might carry more weight, under the patina or authority of the profession."[60] "Most psychiatrists assiduously avoid the word evil, contending that its use would precipitate a dangerous slide from clinical to moral judgment that could put people on death row unnecessarily and obscure the understanding of violent criminals."[61]

In addition to helping the prosecution establish aggravating, dehumanizing themes, presenting evidence about ASPD and psychopathy can undermine the defense mitigation case in multiple ways. First, an opinion that the defendant has ASPD arguably makes it seem reasonable to dismiss statements of the defendant because antisocial persons "can tell a non-truth or they can tell a lie easily, maybe quickly, and they're not going to feel a lot of hesitation about that, they're not going to feel any pain of conscience about telling that lie."[62] Thus, the client's description of events and life history is often discounted, and both self-reported and observed symptoms of mental illness are often dismissed as the product of malingering.[63]

Psychiatry, 36 J. AM. ACAD. PSYCHIATRY L. 105, 111 (2008).

57. Michael Welner, *Response to Simon: Legal Relevance Demands that Evil Be Defined and Standardized*, 31 J. AM. ACAD. PSYCHIATRY L. 417, 418-19 (2003).

58. *Id.* at 421. Yet another psychiatrist, Doctor Michael Stone of Columbia University, has developed a twenty-two level hierarchy of "evil" behavior. *See* Adam Liptak, *Adding Method to Judging Mayhem*, N.Y. TIMES, Apr. 2, 2007, at A14. Stone argues: "[W]e are talking about people who commit breathtaking acts, who do so repeatedly, who know what they're doing, and are doing it in peacetime . . . . We know who these people are and how they behave [and it's time to give their behavior] the proper appellation." Benedict Carey, *For the Worst of Us, the Diagnosis May Be 'Evil,'* N.Y. TIMES, Feb. 8, 2005, at F1 [hereinafter Carey, *For the Worst of Us*] (internal quotation marks omitted).

59. For in-depth discussions of the superficial and erroneous media portrayals of violence, see CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 38-39 (2005); Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 725-26 (2009).

60. Carey, *For the Worst of Us*, *supra* note 58.

61. *Id.*

62. Sanborn v. Parker, 629 F.3d 554, 572 (6th Cir. 2010).

63. *See, e.g.*, Worthington v. Roper, 631 F.3d 487, 493 (8th Cir. 2011) (explaining that the state's expert concluded that, because Worthington was antisocial, he was malingering symptoms of mental illness); *see also* United States v. Gabrion, 648 F.3d 307, 320 (6th Cir. 2011) (noting that testimony that Marvin Gabrion had ASPD supported a finding that he was malingering and

Second, because most jurisdictions exempt ASPD from the definition of "mental disease or defect,"[64] the diagnosis is used to exclude the possibility of legally cognizable mental impairment.[65] Such examiners give the jury "only superficial and schematic details of the lives of capital defendants, typically only those 'facts' that underscore their deviance and that facilitate their dehumanization."[66] Without question, evidence that the defendant has the characteristics associated with ASPD is significantly harmful to his chances for survival.[67] The overwhelming weight of legal authority views evidence that the defendant has ASPD as inherently aggravating.[68]

Third, ASPD is often used as a counter-narrative to major mental illness evidence presented in mitigation.[69] When the defense presents a

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therefore mentally competent to proceed).

64. *See* ALASKA STAT. § 12.47.010(c) (2012); ARIZ. REV. STAT. ANN. § 13-502(A) (2012); ARK. CODE ANN. § 5-2-312(b) (2012); CAL. PENAL CODE § 25.5 (West 2012); COLO. REV. STAT. ANN. § 16-8-101(2) (West 2012); CONN. GEN. STAT. ANN. § 53a-13(c) (West 2012); DEL. CODE ANN. tit. 11, § 401(c) (West 2012); FLA. STAT. ANN. § 916.106(13) (West 2013); GA. CODE ANN. § 17-7-131(a)(1)-(2) (2013); HAW. REV. STAT. § 704-400(2) (2012); IDAHO CODE ANN. § 18-207(1) (2013); 720 ILL. COMP. STAT. ANN. 5/6-2(b) (West 2013); IND. CODE § 35-41-3-6(b) (West 2013); KAN. STAT. ANN. § 59-2946(f)(1) (West 2012); KY. REV. STAT. ANN. § 504.020(2) (2012); ME. REV. STAT. ANN. tit. 17-A, § 39(2) (West 2012); MD. CODE ANN. CRIM. PROC. § 3-109(b) (2012); MO. ANN. STAT. § 552.010 (West 2012); MONT. CODE ANN. § 46-14-101(2) (2011); N.D. CENT. CODE § 12.1-04.1-01(2) (2012); OR. REV. STAT. ANN. § 161.295(2) (West 2013); S.C. CODE ANN. § 17-24-10 (2012); TENN. CODE ANN. § 39-11-501 (2012); TEX. PENAL CODE ANN. § 8.01 (2012); VT. STAT. ANN. tit. 13, § 4801 (West 2012); WIS. STAT. ANN. § 971.15 (West 2012); Commonwealth v. McHoul, 226 N.E.2d 556, 563 (Mass. 1967) (holding that Massachusetts follows the Model Penal Code test for defects excluding responsibility, which excludes antisocial conduct from the definition of mental disease or defect) (citing MODEL PENAL CODE § 4.01 (1962)); State v. Lorraine, 613 N.E.2d 212, 224 (Ohio 1993) (stating that, under Ohio law, "a behavior or personality disorder does not qualify as a mental disease or defect").

65. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 309 (1989) (noting that prosecution expert testified that Penry's impulsiveness and "inability to learn from experience" was due to ASPD rather than mental retardation); Hammet v. Texas, 448 U.S. 725, 728-29 (1980) (presuming that a defendant with ASPD was competent to waive appeals and submit to execution without further mental health inquiry); *Sanborn*, 629 F.3d at 562 (explaining that Parramore L. Sanborn's inability to hold a job, plan for his future, and pay his debts was caused by ASPD, not mental impairment); United States v. Paul, 534 F.3d 832, 844-45 (8th Cir. 2008) (presuming that a defendant with ASPD was competent to waive appeals and submit to execution without further mental health inquiry).

66. Haney, *The Social Context*, *supra* note 43, at 549.

67. *Worthington*, 631 F.3d at 503.

68. Kokal v. Sec'y, Dep't of Corr., 623 F.3d 1331, 1349 (11th Cir. 2010); *accord* Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir. 2010); Reed v. Sec'y, Dep't of Corr., 593 F.3d 1217, 1248 (11th Cir. 2010); Cummings v. Sec'y, Dep't of Corr., 588 F.3d 1331, 1368 (11th Cir. 2009); Parker v. Sec'y, Dep't of Corr., 331 F.3d 764, 788 (11th Cir. 2003); Weeks v. Jones, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994).

69. *See, e.g.*, Fairbank v. Ayers, 650 F.3d 1243, 1250 (9th Cir. 2011) (noting that, in the closing argument, the prosecution highlighted the fact that defendant did not suffer from a mental illness); *Reed*, 593 F.3d at 1229 (noting on cross-examination that the defendant's psychological evaluator admitted that ASPD "is what really underlies a sociopath").

mitigating social history of the effects that living with mental illness had on the client, the prosecution often rebuts this testimony with a diagnosis of ASPD, arguing that the problems presented by the defense as mitigation are in fact character traits or moral weaknesses, not mental illness.[70]

Because prosecutors easily turn the defense's ASPD evidence against the defendant,[71] no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment. Similarly, it is inherently unreasonable for a post-conviction attorney to claim that trial counsel was ineffective for failing to call a psychologist who diagnosed the defendant as antisocial; the claim is often doomed to failure by the many negative traits associated with ASPD and psychopathy.[72] If left unchallenged in a capital case, ASPD and related constructs are quite literally the "kiss of death." This is particularly true when courts and lawyers view the ASPD label as an immutable fact, rather than a highly questionable opinion.[73]

Defense teams working in compliance with well-established professional norms avoid the ASPD trap by conducting a thorough investigation that will inevitably establish an alternative and humanizing picture of the client. Experience in death penalty cases demonstrates over and over again that diagnoses of ASPD, psychopathy, or related constructs are inherently unreliable and misleading; these labels are applied when the defense fails to conduct a thorough investigation of the client's life circumstances, which provides crucial context for behaviors that are superficially labeled "antisocial." In virtually every case, a thorough investigation conducted according to the ABA and

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70. *See, e.g.*, *Fairbank*, 650 F.3d at 1249-50; *Reed*, 593 F.3d at 1233-34.

71. *See* Morton v. Sec'y, Dep't of Corr., 684 F.3d 1157, 1164, 1167-68 (11th Cir. 2012) (noting that the defense presented evidence that the defendant's abusive childhood caused him to develop ASPD, and the jury assessed the punishment at death); *Fairbank*, 650 F.3d at 1250 (noting that the prosecution successfully argued that the defendant's evidence that he had ASPD and was genetically predisposed to criminal behavior did not constitute a mental disease and failed to humanize the defendant); Looney v. State, 941 So. 2d 1017, 1028-29 (Fla. 2006) ("[A] diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation."); Leavitt v. Arave, 646 F.3d 605, 623-24 (9th Cir. 2011) (Reinhardt, C.J., dissenting) ("[C]ourts generally treat an individual's failure to control a personality disorder, or to suppress an anti-social or psychopathic personality, as more blameworthy than an individual's response to an organic brain disorder."); Sanborn v. Parker, 629 F.3d 554, 572 (6th Cir. 2011) (referring to the defense expert's testimony of Sanborn's ASPD as "perhaps even more damning" than the findings of the state's expert); *Reed*, 593 F.3d at 1246 (11th Cir. 2010) (stating that evidence of antisocial personality disorder is "not 'good' mitigation").

72. *See, e.g.*, *Parker*, 331 F.3d at 788 (holding that it was valid trial strategy not to present damaging psychological evidence that the defendant "was antisocial and a sociopath"); *accord Cummings*, 588 F.3d at 1364-65.

73. We discuss this distinction at length. *See infra* Part IV.B–C.

Supplementary Guidelines provide important data and context that refutes the diagnosis of ASPD and enables the jury to interpret the defendant's past behavior in the context of his life circumstances and impairments. As this Article demonstrates, when an expert concludes that the defendant has ASPD or psychopathy, it is the investigation of the client's life history, not the defendant, which is shallow and superficial.

III. CONTROVERSIES AND LIMITATIONS OF ASPD AND RELATED CONSTRUCTS

As noted, the labels "antisocial" and "psychopath" derive their unique power over judges and juries from invoking dehumanizing stereotypes masquerading as scientific fact. Yet, invariably those labels are exposed as mere epithets, most often applied by experts who rely only upon rudimentary data from a limited set of sources.[74] Therefore, capital defense counsel have a special duty to become familiar with the issues that are raised by the inflammatory and unreliable nature of such evidence.[75] In order to understand the superior power of

74. Capital defendants are frequently diagnosed with ASPD after a single or limited interview, and without critical life history information. Yet, it is well known that "a single diagnostic interview, regardless of how reliable, does not capture the essence of what is happening to a patient. . . . [A]ccurate diagnosis must be part of the ongoing clinical dialogue with the patient." Robert Freedman et al., *The Initial Field Trials of DSM-5: New Blooms and Old Thorns*, 170 AM. J. PSYCHIATRY 1, 3-4 (2013); *see also* Douglas Liebert & David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 164 AM. J. FORENSIC PSYCHIATRY 43, 45-46 (1994). In addition, obstacles to client disclosure of sensitive information are often profoundly more pronounced in forensic interviews than in clinical settings, where clients voluntarily seek assistance and the outcome and goals of interviews are dramatically different. *Id.* Because the accuracy of a mental health assessment flows directly from extensive, reliable data, the ABA and Supplementary Guidelines require a thorough investigation of the client's life history, including family history at least three generations back, that follows parallel tracks of client and collateral witness interviews and an exhaustive documentary record. *See* Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 724-32 (2008); *see also* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 974-77 (2008); George Woods et al., *Neurobehavioral Assessment in Forensic Practice*, 35 INT'L J.L. & PSYCHIATRY 432, 438 (2012) (emphasizing that "a comprehensive perspective must be applied to the forensic inquiry at hand").

75. "Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination." ABA GUIDELINES, *supra* note 18, Guideline 1.1 cmt., at 924. Furthermore, capital defense counsel have a special duty to "raise every legal claim that may ultimately prove to be meritorious." *Id.* at 927; *see id.* Guideline 10.8, at 1028-29. "Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices." *Id.* Guideline 10.8 cmt., at 1032; *see* Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1175-79 (2003).

mitigating narratives, capital defense teams must be aware of the contentious debates surrounding the diagnosis of ASPD and the construct of psychopathy.[76]

ASPD, psychopathy, and personality disorders in general have all been criticized in clinical and research settings on multiple grounds. Some researchers question whether these constructs and instruments to measure them should be precluded in forensic settings, including capital trials.[77] The controversies about these diagnoses and labels of deviance have enormous practical (life and death) implications for forensic practice and capital defense teams. In this Part, we will review some of these controversies and the assessment instruments that are currently used to diagnose psychopathy and predict future dangerousness.[78] We will first discuss personality disorders and ASPD, addressing both scientific and ethical controversies; then we will do the same with psychopathy and related issues. These unresolved controversies, and the ensuing ethical dilemmas, raise serious questions about the use of these constructs in capital trials because their methodology and lack of reliability are incompatible with the ABA Guidelines and with the Eighth Amendment principle that capital sentencing determinations must "aspire to a heightened standard of reliability."[79]

A. Controversies Surrounding Personality Disorders and ASPD

The diagnosis of ASPD has a controversial history in the mental health field, as do most personality disorders, the class of mental disorders in which ASPD is included. Our discussion will focus on scientific and ethical concerns.

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76. This also applies to mental health experts working in forensic settings. As noted by John Edens, a leading researcher in forensic psychology, "it seems ethically mandated that those who work in [forensic] settings be familiar with relevant empirical literature." John F. Edens, *Unresolved Controversies Concerning Psychopathy: Implications for Clinical and Forensic Decision Making*, 37 PROF. PSYCHOL. RES. & PRAC. 59, 59 (2006) [hereinafter Edens, *Unresolved Controversies*].

77. *See* Donald N. Bersoff, *Some Contrarian Concerns About Law Psychology and Public Policy*, 26 LAW & HUM. BEHAV. 565, 571-72 (2002); Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, 61 AM. PSYCHOLOGIST 828, 835 (2006); Cunningham & Reidy, *supra* note 17, at 338-39; John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?,"* 29 LAW & HUM. BEHAV. 55, 66, 69, 71, 76-77 (2005) [hereinafter Edens et al., *Predictions*]; Edens, *Unresolved Controversies*, *supra* note 76, at 60-61; John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & L. 603, 605-07 (2005) [hereinafter Edens et al., *Impact of Mental Health Evidence*].

78. We are differentiating between the *diagnosis* of ASPD, which is officially recognized in our current diagnostic nomenclature, and the *construct* of psychopathy, which is not officially recognized in current diagnostic manuals such as the DSM-5. *See generally* DSM-5, *supra* note 24.

79. Ford v. Wainwright, 477 U.S. 399, 411 (1986).

1. ASPD: Scientific and Research-Based Controversies

The Diagnostic and Statistical Manual of Mental Disorders, Third Edition ("DSM-III"),[80] published in 1980, represented a significant change in the approach to diagnostic nomenclature in the United States. While the full extent of those changes is beyond the scope of this Article, we note that the DSM-III adopted, for the first time, a five level diagnostic scheme for classifying illnesses and disorders (Axis I through Axis V).[81] Multi-axial assessment was included to better capture various aspects of an individual's functioning in order to facilitate treatment planning and predict outcomes.[82] The five axial scheme included assessment of mental disorders, consideration of medical conditions that have psychiatric components, assessment of exposures to psychosocial stressors, and evaluation of an individual's psychological functioning at the current time and during the past year.[83]

The major mental illnesses were placed on Axis I in DSM-III.[84] The personality disorders were placed on Axis II with Mental Retardation and other developmental disorders.[85] The decision to place the personality disorders on a separate axis has been called "pragmatic,"[86] and has had serious implications for how these disorders are viewed by persons in the mental health field. A British sociologist who has written about mental health and social policy issues noted that "the essence of personality disorder is that it is . . . driven by a number of unique aspects, such as the absence of physical and mental symptoms, lack of biochemical basis for treatment, and rejection as a serious mental disorder by many psychiatrists."[87]

For capital defense teams, this distinction reinforces the importance of conducting a thorough psychosocial history investigation. The absence of historical data establishing physical and mental symptoms

80. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III].

81. *Id.* at 23.

82. *Id.* at 11-12, 27.

83. *Id.* at 23, 26-28.

84. *See id.* at 15-19 (listing the various disorders listed under Axis I).

85. Thomas A. Widiger & Tracie Shea, *Differentiation of Axis I and Axis II Disorders*, 100 J. ABNORMAL PSYCHOL. 399, 399 (1991).

86. *Id.*; *see also* W. John Livesley et al., *Categorical Distinctions in the Study of Personality Disorder: Implications for Classification*, 103 J. ABNORMAL PSYCHOL. 6, 12-13 (1994).

87. Nick Manning, *DSM-IV and Dangerous and Severe Personality Disorder—An Essay*, 63 SOC. SCI. & MED. 1960, 1961 (2006). While the DSM-IV cautions that the coding of personality disorders on Axis II "should not be taken to imply that their pathogenesis or range of appropriate treatment is fundamentally different from . . . disorders coded on Axis I," clinical and research views have often been contrary to this position. DSM-IV-TR, *supra* note 24, at 26-28.

can mean the difference between a diagnosis of a personality disorder and an Axis I disorder.[88]

Placing the personality disorders on Axis II elevated the importance of the personality disorder category[89] and enlarged their role in the diagnostic process.[90] However, the differentiation of personality disorders from Axis I disorders has been criticized as "often problematic and perhaps at times even illusory."[91] Moreover, it has generated pejorative attitudes towards patients diagnosed with personality disorder, given common assumptions that many of the personality disorder diagnoses are not amenable to treatment.[92] While this assumption has been challenged,[93] it is nevertheless a common belief that often works to patients' and forensic clients' detriment.[94]

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88. See, for example, *Parkus v. Delo*, 33 F.3d 933, 936 (8th Cir. 1994), in which both prosecution and defense mental health experts testified at trial that Parkus was antisocial, and both changed their opinions when confronted with previously unknown historical records more consistent with symptoms of schizophrenia and dementia. Next, compare *Wilson v. Trammell*, 706 F.3d 1286, 1290 (10th Cir. 2013), in which trial and habeas counsel relied primarily on social history interviews with the defendant and his mother, along with the trial psychologist's computer-scored personality testing. The court found the uncorroborated history unpersuasive, and affirmed Wilson's death sentence "because the description in the valid MMPI-2 of the Defendant's profile—a Type C offender in the Megargee typology—explicitly describes the vision of evil evoked by the word *psychopath*." *Wilson*, 706 F.3d at 1309.

89. *See* Thomas A. Widiger & Alan J. Frances, *Toward a Dimensional Model for the Personality Disorders*, *in* PERSONALITY DISORDERS AND THE FIVE-FACTOR MODEL OF PERSONALITY 23, 24 (Paul T. Costa, Jr. & Thomas A. Widiger eds., 2d ed. 2002); *see also* Manning, *supra* note 87, at 1962.

90. W. John Livesley, *Conceptual and Taxonomic Issues*, *in* HANDBOOK OF PERSONALITY DISORDERS: THEORY, RESEARCH, AND TREATMENT 3, 12 (W. John Livesley ed., 2001).

91. Widiger & Shea, *supra* note 85, at 399. Criticisms have been raised about the lack of adequate discussion of the rationale for this distinction—while the various editions of the DSM say little about the reason for the distinction, researchers have suggested the differentiation of Axes I and II may have been based on the presumption that Axis I disorders have biological origins, whereas Axis II disorders have psychosocial origins. *See generally, e.g.*, DSM-III, *supra* note 80. However, there is evidence of the importance of biogenetic and psychosocial components in both Axis I and II disorders. *See* Richard F. Farmer, *Issues in the Assessment and Conceptualization of Personality Disorders*, 20 CLINICAL PSYCHOL. REV. 823, 829 (2000); Livesley et al., *supra* note 86, at 13.

92. Cunningham & Reidy, *supra* note 17, at 345-46; Manning, *supra* note 87, at 1962-63; Richard Rogers & Ken Dion, *Rethinking the DSM III-R Diagnosis of Antisocial Personality Disorder*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 21, 27 (1991).

93. *See, e.g.*, Roger Mulder & Andrew M. Chanen, *Effectiveness of Cognitive Analytic Therapy for Personality Disorders*, 202 BRIT. J. PSYCHIATRY 89, 89 (2013); K. Roy MacKenzie, *Group Psychotherapy*, *in* HANDBOOK OF PERSONALITY DISORDERS: THEORY, RESEARCH, AND TREATMENT, *supra* note 90, at 504, 504-05; William E. Piper & Anthony S. Joyce, *Psychosocial Treatment Outcome*, *in* HANDBOOK OF PERSONALITY DISORDERS: THEORY, RESEARCH, AND TREATMENT, *supra* note 90, at 326, 326-29; Joel M. Town et al., *Short-Term Psychodynamic Psychotherapy for Personality Disorders: A Critical Review of Randomized Controlled Trials*, 25 J. PERSONALITY DISORDERS 723, 724 (2011).

94. Knoll, *supra* note 56, at 113; Rogers & Dion, *supra* note 92, at 27; *see also* Cunningham

More generally, the literature suggests that many professionals were dissatisfied with the DSM-III's handling of criteria for the entire category of personality disorders.[95] Challenges to the personality disorder classification scheme adopted with the publication of the DSM-III in 1980 appeared almost immediately after its publication[96] and have continued to the present day, through the publications of the Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised ("DSM-III-R") in 1987, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") in 1994, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision ("DSM-IV-TR") in 2000, and the DSM-5 in 2013.[97] In spite of contentious debates over a wide range of changes that were proposed for the DSM-5, the personality disorder nomenclature remains virtually unchanged from the DSM-IV-TR, although the multi-axial system has been abandoned.[98]

& Reidy, *supra* note 17, at 333, 345 (noting that the diagnosis of ASPD "may have a profoundly aggravating effect on sentencing considerations, particularly in creating expectations that no rehabilitation is possible and that future criminal violence is inevitable").

95. For example, "a survey of 146 psychologists and psychiatrists in 42 countries on their views of DSM-III reported that 'the personality disorders led the list of psychiatric categories with which respondents were dissatisfied.'" Manning, *supra* note 87, at 1963-64 (citing Jack D. Maser et al., *International Use and Attitudes Towards DSM-III and DSM-III-R: Growing Consensus in Psychiatric Classification*, 100 J. ABNORMAL PSYCHOL. 271, 275 (1991)). Also, "[a] majority of respondents (56%) considered personality disorders problematic, well ahead of the next most cited category, mood disorders, (28%)." Manning, *supra* note 87, at 1964 (citing Michael B. First et al., *Personality Disorders and Relational Disorders*, *in* A RESEARCH AGENDA FOR DSM-V 123, 125 (David J. Kupfer et al. eds., 2002)).

96. Allen Frances, *The* DSM-III *Personality Disorders Section: A Commentary*, 137 AM. J. PSYCHIATRY 1050, 1050-53 (1980).

97. *See* Andrew E. Skodol, *Personality Disorders in DSM-5*, 8 ANN. REV. CLINICAL PSYCHOL. 317, 321 (2012) [hereinafter Skodol, *Personality Disorders in DSM-5*]; Andrew E. Skodol et al., *Personality Disorder Types Proposed for DSM-5*, 25 J. PERSONALITY DISORDERS 136, 140 (2011) [hereinafter Skodol et al., *Personality Disorder Types Proposed*]; Andrew E. Skodol et al., *Proposed Changes in Personality and Personality Disorder Assessment and Diagnosis for* DSM-5 *Part I: Description and Rationale*, 2 PERSONALITY DISORDERS: THEORY, RES. & PRAC. 4, 14 (2011) [hereinafter Skodol et al., *Proposed Changes*].

98. *See, e.g.*, AM. PSYCHIATRIC ASS'N, RATIONALE FOR THE PROPOSED CHANGES TO THE PERSONALITY DISORDERS CLASSIFICATION IN DSM-5, at 1 (2012) [hereinafter AM. PSYCHIATRIC ASS'N, RATIONALE], *available at* http://www.yumpu.com/en/document/view/8702305/rationale-for-the-proposed-changes-to-the-personality-dsm-5; Robert F. Bornstein, *Reconceptualizing Personality Pathology in DSM-5: Limitations in Evidence for Eliminating Dependent Personality Disorder and Other DSM-IV Syndromes*, 25 J. PERSONALITY DISORDERS 235, 240-41 (2011); Michael B. First, *The Problematic DSM-5 Personality Disorders Proposal: Options for Plan B*, 72 J. CLINICAL PSYCHIATRY 1341, 1342 (2011); Skodol et al., *Proposed Changes*, *supra* note 97, at 8, 11-12; Thomas A. Widiger et al., *Proposals for DSM-5: Introduction to Special Section of Journal of Personality Disorders*, 25 J. PERSONALITY DISORDERS 135, 135 (2011); Mark Zimmerman, *A Critique of the Proposed Prototype Rating System for Personality Disorders in DSM-5*, 25 J. PERSONALITY DISORDERS 206, 207 (2011); Mark Zimmerman, *Is There Adequate Empirical Justification for Radically Revising the Personality Disorders Section for DSM-5?*, 3 PERSONALITY

One fundamental problem with the classification of personality disorders has been described as the DSM's "top-down approach," which is based on the assumption that there are a discrete number of personality types, each of which is qualitatively different in nature.[99] A review by the DSM-5 Personality and Personality Disorders Workgroup noted that "no such set of types has been found, even in large, diverse samples, and using sophisticated statistical modeling strategies," and "human personality varies continuously."[100] These and other concerns fueled efforts for a major reconceptualization of the personality disorders classification in the DSM-5.[101] Many critics of the DSM-IV paradigm believe that current personality disorder categories do not do justice to the complexity and continuous nature of personality traits across the human population. As used in the sentencing phase of a capital case, reducing the defendant to a handful of undesirable personality traits runs counter to the Eighth Amendment's "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."[102]

Another significant criticism of the personality disorder criteria for the DSM generally is that they "were not empirically based and are not sufficiently specific, so they may apply equally well to other types of mental disorders (e.g. schizophrenia)."[103] This lack of specificity means that particular behaviors or symptoms may be seen in many conditions, and often in many people with no illness at all, providing little ability to differentiate or parse illnesses. As noted by the Chair of the DSM-5 Personality and Personality Disorders Work Group, "the DSM-IV-TR criteria were poorly defined, not specific to [personality disorders], and were introduced in the DSM-IV without theoretical or empirical

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DISORDERS: THEORY, RES. & TREATMENT 444, 445, 452 (2012).

99. AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 1.

100. *Id.*

101. *See* Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 320-24; Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 154-55; Skodol et al., *Proposed Changes*, *supra* note 97, at 5. The DSM-5 retains the structure of the Personality Disorders classification adopted by the DSM-IV-TR. Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 320-24. This decision occurred after highly contentious debates about how personality disorders should be conceptualized in the DSM-5. *Id.* Doctor Theodore Millon, a leading personality disorder researcher, has stated, "[i]t's embarrassing to see where we're at. We've been caught up in digression after digression, and nobody can agree . . . . It's time to go back to the beginning, to Darwin, and build a logical structure based on universal principles of evolution." Benedict Carey, *Thinking Clearly About Personality Disorders*, N.Y. TIMES, Nov. 27, 2012, at D1 [Carey, *Thinking Clearly*].

102. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

103. Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 137. This problem is of enormous significance in death penalty litigation where, for strategic and political reasons, prosecutors often seek personality disorder diagnoses and dispute the presence of Axis I diagnoses.

justification."[104] Due to this lack of specificity, the same observed behavior or symptom could be said to be part of the basis for a number of conditions, which opens the door to examiner bias and expectation. A psychiatrist who, for whatever reason, does not establish sufficient rapport with a subject may be pre-disposed to diagnose one condition over another. Similarly, cultural and ethnic biases may exert a greater influence where, as in the case of personality disorders, the criteria and definitions provide little differential guidance.[105]

Additional problems with the current personality disorder diagnostic scheme have been identified.[106] These include extensive co-occurrence among personality disorders;[107] excessive within-diagnosis heterogeneity;[108] lack of synchrony with modern medical approaches to diagnostic thresholds;[109] temporal instability;[110] poor coverage of

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104. Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 318, 333.

105. *See* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 894-96 (2008).

106. Paul T. Costa, Jr. & Thomas A. Widiger, *Introduction: Personality Disorders and the Five-Factor Model of Personality*, *in* PERSONALITY DISORDERS AND THE FIVE-FACTOR MODEL OF PERSONALITY 3, 3 (Paul T. Costa Jr. & Thomas A. Widiger eds., 2d ed. 2002); Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 321; Thomas A. Widiger & Lee Anna Clark, *Toward DSM-V and the Classification of Psychopathology*, 126 PSYCHOL. BULL. 946, 954 (2000).

107. "Most patients diagnosed with [a personality disorder] meet criteria for more than one," and in fact, often meet criteria for several, with some researchers arguing that the co-occurrence may be seven or more. Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 321; *see* Jonathan Shedler & Drew Westen, *Dimensions of Personality Pathology: An Alternative to the Five-Factor Model*, 161 AM. J. PSYCHIATRY 1743, 1752-53 (2004); Widiger & Frances, *supra* note 89, at 25-26; *see also* AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 1. This has raised serious concerns about the validity of the personality disorder classification. The issue of co-morbidity is explicitly acknowledged in the DSM-IV-TR and DSM-5. DSM-IV-TR, *supra* note 24, at 686; DSM-5, *supra* note 24, at 5. The essence of this problem is that, for clients who are seen by two (or more) clinicians who decide a personality disorder is present, there is little agreement about which personality disorder is correct. This was true of the DSM-IV-TR, and remains a problem as of recently published test-retest reliability results from DSM-5 field trials. Darrel A. Regier et al., *DSM-5 Field Trials in the United States and Canada, Part II: Test-Retest Reliability of Selected Categorical Diagnoses*, 170 AM. J. PSYCHIATRY 59, 65-67 (2013). *See generally* AM. PSYCHIATRIC ASS'N, DSM-IV SOURCEBOOK (Thomas A. Widiger et al. eds., 1998) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-IV SOURCEBOOK].

108. For example, there were over 250 ways to meet diagnostic criteria for borderline personality disorder in the DSM-IV-TR, and, as will be discussed below, an exponentially larger set of symptom combinations are possible with ASPD diagnoses. AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 1. This means that people with markedly different symptom patterns can meet criteria for the same diagnosis, even if they share a small number of behaviors in common (or even only one common behavior). *See* AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 1; Skodol et al., *Personality Disorders in DSM-5*, *supra* note 97, at 332; Widiger & Frances, *supra* note 89, at 26; Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 140; Skodol et al., *Proposed Changes*, *supra* note 97, at 15.

109. Modern medical approaches embrace measures of severity, for example, multiple stages of cancer or levels of hypertension, whereas the DSM adopts a dichotomous classification system that results in a binary decision as to whether a personality disorder is absent or present. This has

personality psychopathology;[111] arbitrary diagnostic thresholds;[112] lack of clear boundaries between pathological and "normal" personality functioning;[113] and poor convergent validity.[114]

The controversies surrounding the personality disorder classification scheme extend equally to ASPD. According to Doctor Richard Rogers, a nationally recognized forensic psychologist, "[p]rofound ambivalence undergirds most professional discussions of antisocial personality disorder."[115] This diagnosis has "sparked controversy and defied consensus for the last three decades," and the notion that there is a unitary ASPD diagnosis is merely an illusion.[116] The final DSM-5 ASPD criteria were not tested despite extensive field

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been raised as a major concern with the current personality disorder classification, as research suggests that severity may be the most important single predictor in assessing personality pathology, and the DSM does not address this issue in a useful way. *See* Skodol, *Personality Disorders in DSM-5*, *supra* note 97, at 327-28; Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 152-53; Skodol et al., *Proposed Changes*, *supra* note 97, at 5-6.

110. For example, since personality disorders are defined as pervasive and unremitting (i.e., as fixed), it would be expected that ASPD diagnoses of individuals would remain constant over time. DSM-5, *supra* note 24, at 645. However, that assumption has been challenged. *See, e.g.*, Cunningham & Reidy, *supra* note 17, at 335.

111. Considerable evidence shows the "Personality Disorder Not Otherwise Specified" is the most frequently diagnosed personality disorder in clinical practice, and is the most common diagnosis used in research settings. AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 2; Roel Verheul & Thomas A. Widiger, *A Meta-Analysis of the Prevalence and Usage of the Personality Disorder Not Otherwise Specified (PDNOS) Diagnosis*, 18 J. PERSONALITY DISORDERS 309, 314-15 (2004). This belies the theory underlying the concept of personality disorder—that there is a clearly defined personality to be described, and supports concerns that existing diagnoses are inadequate to capture the complexity of personality. *Cf.* AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 2.

112. No clinical or empirical justification was provided for the number of criteria deemed necessary to meet diagnostic criteria for the ten personality disorders included in the DSM. Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 137, 158; *see also* Widiger & Frances, *supra* note 89, at 25-26.

113. The current personality disorder diagnostic scheme has been criticized for inadequately distinguishing between normal and pathological personality functioning, thus leading to additional concerns about the validity of personality disorder diagnoses. *See* Skodol, *Personality Disorders in DSM-5*, *supra* note 98, at 321; Skodol et al., *Personality Disorder Types Proposed*, *supra* note 97, at 137-38; Skodol et al., *Proposed Changes*, *supra* note 97, at 16; Andrew E. Skodol & Donna S. Bender, *The Future of Personality Disorders in DSM-V?*, 166 AM. J. PSYCHIATRY 388, 388 (2009).

114. For example, research shows that significant disagreement has resulted in personality disorder assessments when different methods of assessment are used (for example, unstructured versus structured interviews and personality questionnaires). AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 3. This has been identified as one of the most serious problems with the current personality disorder scheme, and relates to the difficulty of translating criteria into assessments that yield similar results. *Id.* "The importance of these findings cannot be overemphasized. These data mean that the entire personality disorder literature is built upon shifting sands." *Id.*

115. Rogers & Dion, *supra* note 92, at 21.

116. Rogers et al., *Prototypical Analysis of Antisocial Personality Disorder: A Study of Inmate Samples*, 27 CRIM. JUST. & BEHAV. 234, 234, 237 (2000).

trials, and thus "political and nonempirical considerations appear to have overridden . . . diagnostic validity."[117]

ASPD has been criticized on numerous specific grounds, among them the lack of coherence among differing versions of ASPD in various editions of the DSM.[118] There is also what has been called the "innumeracy problem," that is, the seemingly innumerable possibilities for reaching threshold for a diagnosis of ASPD.[119] The innumeracy problem is even more pronounced with ASPD than with other (personality) disorders. Unlike any other diagnosis in the DSM, this diagnosis requires evidence of symptoms of conduct disorder as a prerequisite for finding ASPD, thus greatly enhancing the number of possible combination of symptoms that could result in an ASPD diagnosis.[120] The diagnostic criteria for ASPD overlap with other disorders, a circumstance which raises doubts about the integrity of the inclusion and exclusion criteria and greatly increases the difficulty of accurate diagnosis and assessment.[121]

ASPD is diagnosed in part on criminal history, which means that a large percentage of inmates have been or could be diagnosed with ASPD.[122] The high prevalence of this diagnosis in inmates renders it of

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117. *Id.* at 236; *see also* Robert Hare, *Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion*, PSYCHIATRIC TIMES, Feb. 1, 1996, at 39 [hereinafter Hare, *A Case of Diagnostic Confusion*].

118. It has been noted that comparison of criteria listed in sequential versions of the DSM often had little in common. Cunningham & Reidy, *supra* note 17, at 334. These authors questioned whether ASPD diagnosis has sufficient reliability and validity for forensic purposes. *Id.* Other commenters have countered that these dramatically changing diagnostic standards were not driven by research, and noted that they "begin to doubt seriously the usefulness of ASPD as a unitary diagnosis." Rogers & Dion, *supra* note 92, at 24.

119. This is a consequence of the current polythetic classification scheme used in the DSM, in which diagnoses are made by choosing a specified number of required symptoms from a longer list. Many researchers have found it troubling that individuals can be diagnosed with the same disorder, yet have few, if any, features in common. Rogers & Dion, *supra* note 92, at 24, 26. Innumeracy is arguably most problematic with the diagnosis of ASPD, which requires evidence of "conduct disorder symptoms *prior* to the age of 15," and three of seven symptoms of ASPD. *Id.* Thus, in effect, a diagnosis of ASPD requires consideration of two sets of criteria rather than one, as is the case with respect to other mental disorders. *See id.*

120. Linda J. Gerstley et al., *Antisocial Personality Disorder in Patients with Substance Abuse Disorders: A Problematic Diagnosis?*, 147 AM. J. PSYCHIATRY 173, 173 (1990).

121. There is also considerable overlap between criteria for ASPD and substance abuse disorders. *See* Cunningham & Reidy, *supra* note 17, at 336; Gerstley et al., *supra* note 120, at 174-75; Widiger & Shea, *supra* note 85, at 401; *see also infra* notes 314-19 and accompanying text (discussing the diagnostic similarity of ASPD and substance abuse criteria). This is particularly problematic in the context of capital litigation, as many clients have severe and chronic histories of poly-substance abuse. *See infra* note 317.

122. For example, estimates of incarcerated male inmates who meet diagnostic criteria for ASPD range from 49–80%. Cunningham & Reidy, *supra* note 17, at 340. "The diagnosis of [ASPD] alone then describes little about prison behavior and recidivism outcome except that the individual

little value in fulfilling the Eighth Amendment's command that the death penalty "must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution."[123] This illustrates the innumeracy problem: it has been estimated that there are over three million possible symptom variations for the diagnosis of ASPD in the DSM-III-R,[124] and 3.2 million symptom combinations for the DSM-IV.[125] This further illustrates the lack of precision and clarity in the criteria for ASPD.[126]

Imprecise criteria and over-inclusion of symptoms are especially troublesome because they greatly heighten the risk of unreliable assessments, and can render diagnoses meaningless. In addition, excessive focus on antisocial behavior without attention to contextual factors such as trauma history, thought or mood disorders, and neuropsychological dysfunction, may lead to failure to identify relevant diagnostic considerations.[127] For example, language such as "impulsivity," "irritability," or "irresponsibility" can describe symptoms consistent with a range of Axis I disorders, yet they are often labeled antisocial. In the absence of a contextualized understanding of what drove such behaviors, it is difficult (if not impossible) to separate symptoms from subjective judgments.[128]

Axis II personality disorder diagnoses (including ASPD) are based on strictly defined behavioral criteria, even more so than Axis I diagnoses. For this reason, they have been criticized as too narrow.[129] They do not capture the richness and complexity of personality syndromes and deemphasize aspects of mental life and inner experience that are central components of personality syndromes.[130] Yet,

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is similar to most prison inmates, and thus [ASPD] is not in and of itself an indication of a particularly dangerous or incorrigible inmate within the prison environment." *Id.*

123. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (internal quotation marks omitted).

124. Rogers & Dion, *supra* note 92, at 24.

125. Rogers et al., *supra* note 116, at 237.

126. For example, Criterion C of ASPD in the DSM-5 requires "evidence of Conduct Disorder." DSM-5, *supra* note 24, at 659. No further clarity is added, with the exception of text language in two places requiring "some" evidence of conduct disorder. DSM-IV-TR, *supra* note 24, at 702, 705. When one turns to conduct disorder, there is a list of fifteen potential symptoms in Criterion A, with the "guidance" that this must involve a "repetitive and persistent pattern of behavior . . . as manifested by the presence of at least three" of the criteria in the past year, and at least one in the past six months. DSM-5, *supra* note 24, at 459. What constitutes a "repetitive and persistent" pattern of behavior is not further specified. DSM-IV-TR, *supra* note 24, at 702. In highly adversarial litigation settings, this lack of clarity and precision is often a recipe for disaster.

127. *See* Cunningham & Reidy, *supra* note 17, at 337.

128. *See infra* notes 362-68, 374-77 and accompanying text.

129. Shedler & Westen, *supra* note 107, at 1744.

130. *Id.*

the ability to capture this richness and complexity is central to effective capital representation.[131]

Another problem with the diagnosis of ASPD is the absence of symptom weighting, that is, each criterion receives equal weighting regardless of severity. For example, in the DSM-III-R, "stealing newspapers is equated with a bank heist, and having no fixed address for 30 days is treated the same as having no known address for five years."[132] Understanding the context in which a crime was committed—(for instance, stealing food to help feed a family)—is strangely missing from the diagnosis or text language for this and other diagnostic criteria.

Yet another troubling feature of the ASPD diagnosis, only partially addressed in the DSM-IV-TR, is that it "confuses arbitrariness with objectivity"[133] and arguably shows a general insensitivity to social class differences in life experience: "[T]he criterion 'significant unemployment for six months or more within five years when expected to work and work was available' appears more arbitrary than objective. For example, successful business consultants, performers, and entertainers may choose not to work over others' objections and yet remain financially comfortable."[134]

While the above quotes refer to the DSM-III-R, the DSM-IV-TR also fails to provide sufficient guidance; the diagnostic criteria were updated to "sudden changes of jobs, residences, or relationships" or "repeated failure to sustain consistent work behavior or honor financial obligations," which would apply to many responsible individuals in the recent economic downturn, or communities in which unemployment and underemployment are chronically high.[135] Similarly, a cognitively impaired person might need assistance caring for a child, maintaining

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131. *See* Eric M. Freedman, *Introduction: Re-stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 669-71 (2008).

132. Rogers & Dion, *supra* note 92, at 26. While the specific references to stealing and having no fixed address were not included in the DSM-IV-TR, there is still no language to guide someone in weighing one example of behavior against another with respect to specific diagnostic criteria. *Id.*

133. *Id.*

134. *Id.*

135. DSM-5, *supra* note 24, at 659-60. This is especially problematic in cases involving minority defendants, who are more apt to live in communities in which unemployment is chronically high, typically more than double that of white people, due to poor educational and employment opportunities and discrimination in the job market. *See* Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 52-54, 57-58 (1994) (discussing social and economic conditions in segregated minority communities that deny economic opportunity); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 228 (rev. ed. 2012) ("As unemployment rates sank to historically low levels in the late 1990s for the general population, jobless rates among noncollege black men in their twenties rose to their highest levels ever, propelled by skyrocketing incarceration rates.").

consistent work behavior, or honoring financial obligations.[136] There is still plenty of room for honest disagreement about whether there is evidence for specific symptoms.

To summarize, the personality disorder category generally, and the diagnosis of ASPD specifically, have been the subject of multiple critiques and debate, and these issues are not settled in the mental health field. All of these issues become particularly problematic in the highly adversarial and often emotionally and politically charged context of capital cases, where ASPD and psychopathy become tools in the hands of prosecutors intent on obtaining death verdicts. It has been our experience that in this situation, where the stakes could not be higher, the potential for misdiagnosis is at its peak, as compared to other contexts where mental health assessments and diagnoses occur. All of the debates that surrounded efforts to address these issues in the DSM-5 suggest that these controversies will continue to haunt this contentious category of disorders. Given the high potential for prejudice and mistake, it is especially important that capital defense teams protect clients from unreliable and inflammatory mental health labels.[137]

2. Ethical Controversies

Ethical concerns have been raised about the personality disorder classification system generally, and, in particular, the diagnosis of ASPD. Doctor Gillian Bendelow, a medical sociologist, noted that, with respect to personality disorders, "the vexed question of the value-laden nature of interpreting symptoms, which are unable to be 'measured' in the same manner as high cholesterol or low insulin levels, continues to haunt psychiatric practice and the subsequent provision of evidence-based healthcare."[138] This is part of a larger critique and set of concerns about the potential for psychiatry to be an agent of social control that began over a hundred years ago when mental patients were being placed in paupers' prisons; it continues to the present day when over half of all

136. *See* AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 157, 159, 162, 165 (11th ed. 2012).

137. The ABA Guidelines state:

> [T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase," counsel must "[c]reat[e] a competent and reliable mental health evaluation consistent with prevailing standards . . . . Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.

ABA GUIDELINES, *supra* note 18, Guideline 4.1 cmt., at 956 (footnotes omitted).

138. Gillian Bendelow, *Ethical Aspects of Personality Disorders*, 23 CURRENT OPINION PSYCHIATRY 546, 546 (2010).

people in jails and prisons in the United States have a recent history or active symptoms of mental disorder.[139] In this context, ASPD is often used to achieve non-therapeutic goals: identifying individuals for isolation and punishment instead of treatment.

Another ethical concern is the highly prejudicial nature of the "personality disorder" label. A recent opinion-editorial purporting to describe individuals diagnosed with personality disorders, published in *The New York Times*, illustrates the oversimplified, dismissive, and prejudicial characterizations of persons with personality disorder diagnoses:

> For years they have lived as orphans and outliers, a colony of misfit characters on their own island: the bizarre one and the needy one, the untrusting and the crooked, and grandiose and the cowardly.
>
> Their customs and rituals are as captivating as any tribe's, and at least as mystifying. Every mental anthropologist who has visited their world seems to walk away with a different story, a new model to explain those strange behaviors.[140]

Besides the stigmatizing stereotype, also ethically troubling is the common assumption that individuals diagnosed with a personality disorder, particularly ASPD, are unchangeable, fixed in their ways, and therefore not amenable to treatment.[141] Personality, in this view, is said to be an immutable character trait that a person is born with and that remains stable throughout life. This assumption has often resulted in stigmatization and denial of treatment options to patients, which is

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139. At midyear 2005, more than half of all prison and jail inmates had a mental health problem, and fifty-four percent of jail inmates reported symptoms that met the criteria for mania. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1-3 (2006), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=789.

140. Carey, *Thinking Clearly*, *supra* note 101.

141. Rogers and Dion, *supra* note 92, at 27; *see also* Guinan v. Armontrout, 909 F.2d 1224, 1229 (8th Cir. 1990) (discussing a court-ordered psychiatric evaluation which diagnosed the appellant with ASPD). This issue appears unresolved in the literature. Although it is a common assumption that ASPD is not amenable to treatment, there is evidence that the overall quality of treatment outcome studies is poor and insufficient to allow conclusions to be drawn. *See, e.g.*, Simon Gibbon et al., *Psychological Interventions for Antisocial Personality Disorder (Review)*, *in* 6 COCHRANE LIBRARY 27 (2010); Najat Khalifa et al., *Pharmacologic Interventions for Antisocial Personality Disorder (Review)*, *reprinted in* 9 COCHRANE LIBRARY 23 (2010). In addition, there is some evidence for the efficacy of specific treatment modalities for the personality disorders, including ASPD. *See, e.g.*, Mulder & Chanen, *supra* note 93 at 90; Piper & Joyce, *supra* note 93, at 324; Luis H. Ripoll et al., *Evidence-Based Pharmacotherapy for Personality Disorders*, 14 INT'L J. NEUROPSYCHOPHARMACOLOGY 1257, 1259, 1261 (2011); Town et al., *supra* note 93, at 733. Finally, in contrast to the frequently cited testimony of prosecution experts in capital trials that ASPD is unremitting, it often wanes in symptom intensity with age, particularly in the fourth decade of life. DSM-5, *supra* note 24, at 661; Cunningham & Reidy, *supra* note 17, at 335-36.

especially egregious when patients have been misdiagnosed and other more appropriate (possibly more "treatable") diagnoses have been overlooked. In one study of forensic psychiatric nurses' approach to treatment in a high security psychiatric hospital in the United Kingdom, patients who were described using lay notions of badness (evil) were "excluded from the usual medical, symptom-centered approach."[142] Perhaps ironically, the behaviors that constitute ASPD have been repeatedly demonstrated to recede with aging (decline in aggression and criminality after age forty) but the diagnosis, once the criteria are met, is unaffected by these changes in behavior and the ASPD label persists across time for the individual.[143] This, of course, makes it easier for the prosecutor to argue for the death penalty.

Upon publication of the DSM-III in 1980, the diagnosis of ASPD focused almost exclusively on observable behaviors.[144] This has been described as a "major regressive step" because the "DSM has returned to an accusatory judgment rather than a dispassionate clinical formulation."[145] A sociologist who has focused on legal and ethical issues in biomedicine and mental health noted: "A diagnosis of ASPD is seldom appropriated willingly by individuals to characterize their subjective distress; rather, it is commonly applied to involuntary patients placed in forensic mental health services. Correspondingly, ASPD plays an important role in debates regarding mental health and criminal policy, and especially their intersections."[146]

Given the negative implications of ASPD and the contexts in which it is often diagnosed (that is, adversarial forensic proceedings), it is not surprising that the diagnosis itself is often interpreted as a damning judgment of the individual. In the highly politically and emotionally charged death penalty arena, the diagnosis of ASPD is repeatedly used as a tool to inflame jurors and fact finders into imposing sentences of death.

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142. Knoll, *supra* note 56, at 113.

143. Cunningham & Reidy, *supra* note 17, at 335-36, 344.

144. Rogers & Dion, *supra* note 92, at 21.

145. *Id.* at 21-22. An example of how the personality disorders and ASPD result in "accusatory judgments" can be clearly seen in the language used by Benedict Carey in *The New York Times*. Carey, *For the Worst of Us*, *supra* note 58.

146. Martyn Pickersgill, *Standardizing Antisocial Personality Disorder: The Social Shaping of a Psychiatric Technology*, 34 SOC. HEALTH & ILLNESS 544, 545 (2012) (citation omitted).

B. Controversies Surrounding Psychopathy and Related Assessment Instruments

Interest in the concept of psychopathy–which, we repeat, is not a DSM diagnostic category—has exploded in the past decade,[147] and the literature is vast.[148] It has become the subject of intense debate, and many questions remain unresolved.[149] Accompanying the renewed interest in psychopathy, research into instruments for assessing the risk of violence has "expanded significantly and has included work on many measures in varied populations and settings."[150] While a number of risk assessment instruments have been developed,[151] the PCL-R is the instrument most often used to assess an individual's risk of future dangerousness.[152] Although the PCL-R "was not "designed to be a risk assessment instrument per se," Doctor John F. Edens and his colleagues

147. There is also a literature that attempts to identify psychopathic characteristics in youths (deemed "fledgling psychopaths" by one researcher in this area). *See* Donald R. Lyman, *Early Identification of the Fledgling Psychopath: Locating the Psychopathic Child in the Current Nomenclature*, 107 J. ABNORMAL PSYCHOL. 566, 567 (1998). Needless to say, this has generated controversy in the mental health field. *See* Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 LAW & HUM. BEHAV. 219, 229 (2002). The Supreme Court has noted that, "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled," and that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper v. Simmons, 543 U.S. 551, 570, 573 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014-16 (2003)).

148. For example, a PubMed search performed on March 27, 2013 using "psychopathy" and "psychopath" as search terms showed that between 1943 and 1973, these terms were used on average sixty-five times per decade; between 1973 and 1993, they were used on average 167 times per decade; between 1993 and 2003, they were used 316 times; and between 2003 and 2013, they were used 1098 times. U.S. Nat'l Library of Med., PUBMED (Mar. 27, 2013), http://www.ncbi.nlm.nih.gov/pubmed (search "PubMed" for "psychopath and psychopathy" for each publication date range listed).

149. Edens, *Unresolved Controversies*, *supra* note 76, at 60-61; John F. Edens et al., *Psychopathic, Not Psychopath: Taxometric Evidence for the Dimensional Structure of Psychopathy*, 115 J. ABNORMAL PSYCHOL. 131, 131-32 (2006) [hereinafter Edens et al., *Psychopathic*]; John F. Edens & John Petrila, *Legal and Ethical Issues in the Assessment and Treatment of Psychopathy*, *in* HANDBOOK OF PSYCHOPATHY 573, 573 (Christopher J. Patrick ed., 2006).

150. Jay P. Singh & Seena Fazel, *Forensic Risk Assessment: A Metareview*, 37 CRIM. JUST. & BEHAV. 965, 965 (2010) ("Searching for all previously published literature with the term *risk assessment* on the PsychINFO search engine in 1999 would have yielded a total of 1,965 citations, whereas the same search in 2009 gave a total of 6,093 records.").

151. *See, e.g.*, Edens et al., *Predictions*, *supra* note 77, at 65, 68, 71, 73; Scott I. Vrieze & William M. Grove, *Multidimensional Assessment of Criminal Recidivism: Problems, Pitfalls, and Proposed Solutions*, 22 PSYCHOL. ASSESSMENT 382, 382 (2010).

152. Patrick J. Kennealy et al., *Do Core Interpersonal and Affective Traits of PCL-R Psychopathy Interact with Antisocial Behavior and Disinhibition to Predict Violence?*, 22 PSYCHOL. ASSESSMENT 569, 569 (2010).

note that "it has frequently been used to assess the risk of violence and recidivism in civil and forensic settings."[153] The PCL-R has been promoted widely as an instrument that predicts re-offending, and, as a result, many in forensic mental health appear to assume a link between the assessment of psychopathy under the PCL-R and future dangerousness. A growing body of research has challenged this assumption.

Statements by proponents as well as critics of psychopathy and the PCL-R illustrate the widely divergent views of researchers in this area. Proponents of the construct of psychopathy and use of the PCL-R claim that psychopathy is "arguably the single most important clinical construct in the criminal justice system,"[154] that the PCL-R is "unparalleled as a measure for making risk assessments,"[155] and that the "failure to consider psychopathy when conducting a risk assessment may be unreasonable (from a legal perspective) or unethical (from a professional perspective)."[156]

On the other hand, critics argue that psychopathy is "an elusive concept with moral overtones"[157] that "remains a mythical entity," which "should be discarded"[158] because "diagnostic groupings . . . seldom have sharp and definite limits[,] . . . [w]orst of all is psychopathic personality."[159] Critics also argue that "close inspection of available empirical research does not provide much evidence to suggest that psychopathy is associated with the types of future violence that are at issue in death penalty cases."[160] Although proponents of the psychopathy construct, as defined by the PCL-R, strongly advocated for its inclusion

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153. Edens et al., *Predictions*, *supra* note 77, at 65; *see also* Robert D. Hare, *Psychopathy: A Clinical and Forensic Overview*, 29 PSYCHIATRIC CLINICS N. AM. 709, 710 (2006).

154. Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, *in* PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 188, 189 (Theodore Millon et al. eds., 1998).

155. Randall T. Salekin et al., *A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist Revised: Predictive Validity of Dangerousness*, 3 CLINICAL PSYCHOL.: SCI. & PRAC. 203, 211 (1996).

156. Stephen D. Hart, *Psychopathy and Risk for Violence*, *in* PSYCHOPATHY: THEORY, RESEARCH, AND IMPLICATIONS FOR SOCIETY 355, 368 (David J. Cooke et al. eds., 1998).

157. John Gunn, *Psychopathy: An Elusive Concept with Moral Overtones*, *in* PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 32, 32 (Theodore Millon et al. eds., 1998).

158. Ronald Blackburn, *On Moral Judgments and Personality Disorders: The Myth of Psychopathic Personality Revisited*, 153 BRIT. J. PSYCHIATRY 505, 511 (1988).

159. Aubrey Lewis, *Psychopathic Personality: A Most Elusive Category*, 4 PSYCHOL. MED. 133, 139 (1974).

160. Edens et al., *Predictions*, *supra* note 77, at 66 (citation omitted); *see also* David Freedman, *Premature Reliance on the Psychopathy Checklist-Revised in Violent Risk and Threat Assessment*, 1 J. THREAT ASSESSMENT 51, 60-61 (2001) [hereinafter Freedman, *Premature Reliance*].

in DSM-IV, it was rejected following its poor performance in field trials, and has not been recognized as an official diagnosis in any edition of the DSM.[161]

1. Psychopathy: Scientific and Research-Based Controversies

Despite some overlap between the diagnosis of ASPD and the construct of psychopathy, these terms represent distinct concepts that are frequently (and erroneously) used interchangeably. Traditionally, affective and interpersonal traits (for example, egocentricity, shallow affect, manipulativeness, selfishness, and lack of empathy or remorse) have been considered core elements of the construct of psychopathy, whereas ASPD has focused more on behavioral criteria related to violations of social norms.[162] Below, we will summarize some of the more noteworthy debates about the construct of psychopathy, and the reliability and validity of risk assessment instruments, such as the PCL-R.[163]

a. Controversies over the Construct of Psychopathy

A number of intensely debated issues regarding the construct validity of psychopathy remain unresolved. These include the generalizability of psychopathy across gender and ethnic groups, whether variants or subtypes of psychopathy exist, and the nature of the underlying factor structure of the PCL-R.[164] Edens, a national expert in forensic psychology, summarized common assumptions about psychopathy that are controversial and remain unresolved: "Once a Psychopath, Always a Psychopath";[165] "Where the Psychopath Goes,

161. *See* AM. PSYCHIATRIC ASS'N, RATIONALE, *supra* note 98, at 1. *See generally* AM. PSYCHIATRIC ASS'N, DSM-IV SOURCEBOOK, *supra* note 107.

162. *See* Edens et al., *Psychopathic*, *supra* note 149, at 131; Hare, *supra* note 117, at 39.

163. "Risk assessment" refers to predictions about the likelihood that a given individual will or will not be dangerous or violent in the future. The PCL-R is of particular consequence to this Article, as it was developed to make determinations about whether or not an individual is a "psychopath," and has been incorporated into other currently used risk assessment instruments. *See* Freedman, *Premature Reliance*, *supra* note 160, at 52; *see also* Edens et al., *Predictions*, *supra* note 77, at 65.

164. See Edens et al., *Psychopathic*, *supra* note 149, at 164, for a discussion of these issues. See Freedman, *Premature Reliance*, *supra* note 160, at 56-57, for a discussion about the potential influence of race on PCL-R scores, noting that, while data are sparse, available research suggests there are important differences in the performance of African-Americans and Caucasians on PCL-R scores and that certain PCL-R items appear to be particularly subject to race bias.

165. Edens, *Unresolved Controversies*, *supra* note 76, at 60 (noting that, while a lot of literature is based on the belief that psychopathy is an immutable aspect of personality, there is little or no support for this).

Violence Will Surely Follow";[166] "Psychopaths Cannot Be Treated";[167] "Clinical Evaluations of Psychopathy Are Highly Reliable";[168] and "Psychopaths Are Qualitatively Different from Other Offenders."[169]

According to Edens, these assertions "reflect areas in which [he has] observed clinicians and researchers drawing overly forceful, categorical, or sweeping conclusions about psychopathy in the courtroom, in formal or informal talks, and/or in print."[170]

Whether psychopathy represents a "taxon," that is, a fundamentally distinct class of individuals who differ qualitatively from the rest of society, is an issue critical to capital defense. Because psychopathy plays an increasing role in legal decision-making across the world, this question has broad and significant implications.[171] Edens and his colleagues have noted "the increasing role of the highly charged label of *psychopath* in the legal system, where the PCL-R has been used to find indeterminate commitment, rebut insanity defenses, and bolster support for the death penalty in capital murder trials."[172] In the death penalty context, jurors and fact finders may make life-and-death decisions based on the assumption that "psychopaths" are fundamentally different from the rest of humanity.[173]

While earlier research supported the view "that there are fundamental, qualitative differences between psychopaths and nonpsychopaths,"[174] an increasing body of literature indicates that psychopathy is, in fact, a dimensional, rather than categorical, construct (or taxon).[175] In a study specifically examining this question, Edens and

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166. *Id.* While there is evidence to suggest that elevated PCL-R scores may identify violence-prone individuals, the evidence does not support "absolutist assertions . . . that individuals who are psychopathic will necessarily engage in violent conduct in the future." *Id.*

167. *Id.* at 61-62. Although some early outcome studies concluded that psychopathy was untreatable, these studies were methodologically weak; more recent reviews have challenged these findings. *See id.*

168. *Id.* at 62. There is evidence of significant disagreement in the scoring of the PCL-R, particularly in highly adversarial legal settings. *See* discussion *infra* notes 215-33.

169. Edens, *Unresolved Controversies*, *supra* note 76, at 63. In fact, recent research shows that people who are labeled "psychopaths" do not differ from other offenders in kind; the difference is rather in degree. *See id.*

170. *Id.* at 59. For additional information regarding misperceptions about psychopathy, see Joanna M. Berg et al., *Misconceptions Regarding Psychopathic Personality: Implications for Clinical Practice and Research*, 3 NEUROPSYCHIATRY 63, 65 (2013).

171. *See, e.g.*, Bersoff, *supra* note 77, at 571; Cunningham & Reidy, *supra* note 17, at 340-41; Edens et al., *Predictions*, *supra* note 77, at 64; Edens & Petrila, *supra* note 149, at 573-74.

172. *See* Edens et al., *Psychopathic*, *supra* note 149, at 132 (citation omitted).

173. Edens & Petrila, *supra* note 149, at 575, 582.

174. Edens et al., *Psychopathic*, *supra* note 149 at 132.

175. *See* Edens & Petrila, *supra* note 149, at 583-84; Jean-Pierre Guay et al., *A Taxometric Analysis of the Latent Structure of Psychopathy: Evidence for Dimensionality*, 116 J. ABNORMAL PSYCHOL. 701, 706-08 (2007); Glenn D. Walters et al., *A Taxometric Analysis of the Psychopathy*

his colleagues concluded that their results "offer no compelling support for the contention that psychopathy is a taxonic construct and contradict previous reports that psychopathy is underpinned by a latent taxon."[176] The implications of this debate are potentially enormous, particularly in the context of capital litigation. Prosecution experts employing a taxonic approach portray a purportedly psychopathic defendant as something other than human. If "psychopathy" is in fact a dimensional construct, the idea that a "psychopath" is in effect non-human is erroneous and enormously prejudicial. If it is dimensional, this suggests that many people in our world have some psychopathic traits.

A related concern is whether the mental health "field is in danger of equating the PCL-R with the theoretical construct of psychopathy,"[177] and whether the danger is increased by the use of the "PCL-R as a common metric for psychopathy."[178] Jennifer L. Skeem and David J. Cooke point out that "a PCL-R score is not psychopathy any more than an intelligence score is intelligence itself."[179] To clarify the significance of this issue, it has long been assumed that the construct of psychopathy is primarily defined by the interpersonal-affective domain (for example, egocentricity, shallow affect, manipulativeness, selfishness, or lack of empathy), as captured by Factor 1 of the PCL-R.[180] The specific characteristics included in Factor 1 have been thought to best capture Cleckley's original description of psychopathy. However, the research does not support the predictive validity of Factor 1. Instead, Factor 1 adds almost nothing at all to the predictive strength of the PCL-R, and is less predictive of future violence than Factor 2 (testing behavioral factors more related to violation of social norms).[181] Further, prior

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Checklist: Screening Version (PCL:SV) Further Evidence of Dimensionality, 19 PSYCHOL. ASSESSMENT 330, 336 (2007). By definition, dimensional means that there are various degrees of severity that exist on a continuum, and that individuals labeled as "psychopaths" are not a discrete class of individuals, thus are not fundamentally different from the rest of society. *See* Edens et al., *Psychopathic*, *supra* note 149, at 131. Conversely, a taxonic construct defines a discrete entity or identifiable class of individuals who are fundamentally different from others. *Id.*

176. Edens et al., *Psychopathic*, *supra* note 149, at 131; *see also* Guay et al., *supra* note 175, at 706-08.

177. Jennifer L. Skeem & David J. Cooke, *Is Criminal Behavior a Central Component of Psychopathy?: Conceptual Directions for Resolving the Debate*, 22 PSYCHOL. ASSESSMENT 433, 433 (2010).

178. *Id.* at 433 (internal quotation marks omitted).

179. *Id.* at 437.

180. *See id.* at 434.

181. Kennealy et al., *supra* note 152, at 569, 574, 576-77; *see also* Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 619; John F. Edens et al., *Inter-Rater Reliability of the PCL-R Total and Factor Scores Among Psychopathic Sex Offenders: Are Personality Features More Prone to Disagreement than Behavioral Features?*, 28 BEHAV. SCI. & L. 106, 115 (2010) [hereinafter Edens et al., *Inter-Rater Reliability*]; Glenn D. Walters, *Predicting Institutional*

criminal behavior has been found to predict scores on the PCL-R, with Factor 2 being a better predictor of recidivism than total score (which includes both Factor 1 and Factor 2 combined).[182] Given these findings, the use of the PCL-R for assessing violence risk and conceptualizing psychopathy invites "mistaken assumptions that violence risk reflects detachment, predation, and inalterable dangerousness,"[183] characteristics commonly associated with psychopathy. Arguably, the label "psychopath" should be avoided altogether to circumvent the "emotional baggage" of stigmatization and the perception of untreatability.[184] This issue takes on added significance in the context of death penalty litigation, where the "psychopath" label is prejudicial. Capital jurors and fact finders may assume that this label establishes a high risk of future violence, even though it, in fact, provides little to no predictive information.[185]

b. Do Risk Assessment Instruments Deliver What They Promise?

The recent interest in the construct of psychopathy is accompanied by the use of instruments that purport to quantify the risk of future dangerousness. However, there are troubling warnings from a growing number of studies that question the enthusiastic embrace of these risk prediction instruments and their ability to provide reliable and valid

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Adjustment and Recidivism with the Psychopathy Checklist Scores: A Meta-Analysis, 27 LAW & HUM. BEHAV. 541, 542, 550, 553 (2003); Glenn D. Walters et al., *Incremental Validity of the Psychopathy Checklist Facet Scores: Predicting Release Outcome in Six Samples*, 117 J. ABNORMAL PSYCHOL. 396, 402 (2008). Arguably, these findings challenge the essence of the construct of psychopathy, such as personality characteristics contained in Factor 1. Kennealy et al., *supra* note 152, at 577. "At first glance, the PCL-R's predictive utility seems consistent with a belief that psychopaths are 'remorseless predators who use charm, intimidation and, if necessary, impulsive and cold-blooded violence to attain their ends.'" *Id.* at 569 (quoting Robert D. Hare, *A Case of Diagnostic Confusion*, *supra* note 117). This belief is more consistent with "public perceptions of psychopathy . . . than empirical evidence." *Id.*

182. Marta Wallinius et al., *Facets of Psychopathy Among Mentally Disordered Offenders: Clinical Comorbidity Patterns and Prediction of Violent and Criminal Behavior*, 198 PSYCHIATRY RES. 279, 282 (2012).

183. Kennealy et al., *supra* note 152, at 577.

184. *Id.* at 570 (citing Paul Gendreau et al., *Is the PCL-R Really the "Unparalleled" Measure of Offender Risk?: A Lesson in Knowledge Cumulation*, 29 CRIM. J. & BEHAV. 397, 413 (2002)). As noted by Canadian forensic psychologists, "[p]sychopathy is commonly equated with untreatability in the professional mind . . . but this widespread belief is perhaps forensic psychology's most clear-cut example of overzealous acceptance of limited research findings." Caleb D. Lloyd et al., *Psychopathy, Expert Testimony, and Indeterminate Sentences: Exploring the Relationship Between Psychopathy Checklist-Revised Testimony and Trial Outcome in Canada*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 323, 326-27 (2010) (citation omitted).

185. *See infra* notes 239-51 and accompanying text.

assessments of an individual's risk for future violence and recidivism. Concerns about the PCL-R are of particular interest to this Article.[186] Especially important is the problem of false positive rates—frequently at or above fifty percent in nearly a dozen studies—when the PCL-R is used to try to predict violent recidivism.[187] The data suggests that problems associated with risk assessment conclusions gathered from the PCL-R are so serious that inferences drawn from them could damage the integrity of the adjudicative process.[188] Several authors have questioned the wisdom and ethics of the use of instruments like the PCL-R in forensic examinations in death penalty proceedings where the stakes are so high.[189]

Another issue of the utmost significance in capital litigation is that the PCL-R has demonstrated minimal ability to predict future violence in prison,[190] a prediction that is arguably the only outcome measure relevant to death penalty cases, where sentencing options are most often death or life imprisonment, usually without the possibility of parole. In fact, rates of prison violence are low; most capital defendants do not engage in serious violence in prison, and they are no more likely than other high-security inmates to engage in prison violence.[191] Edens

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186. Identified problems include low base-rates of violence in institutional settings; lack of consistency in the literature about scores used to determine what constitutes a high ("psychopathic") score; failure to define severity of violence; unacceptably high false-positive rates; implausible probability values; differences in criteria used to develop different measures; questions about the best methods to arrive at overall probability estimates; failure to consider context; and predictor overlap. *See generally* Freedman, *Premature Reliance*, *supra* note 160; David Freedman, *False Prediction of Future Dangerousness: Error Rates and Psychopathy Checklist-Revised*, 29 J. AM. ACAD. PSYCHIATRY & L. 89 (2001); Vrieze & Grove, *supra* note 151, at 383-86, 388. More generally, studies into test validity and reliability are often conducted by the designer of the instrument; researchers have found such studies authored by tool designers reported predictive validity findings around two times higher than those reported by independent authors. Jay P. Singh et al., *Authorship Bias in Violence Risk Assessment? A Systematic Review and Meta-Analysis*, PLOS ONE, Sept. 2013, at 1, 4-6, *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0072484.

187. Freedman, *Premature Reliance*, *supra* note 160, at 92. These data suggest that, for every person who is correctly identified with the PCL-R, many more are misclassified. *See id.* at 54.

188. *See* Bersoff, *supra* note 77, at 571-72; Edens et al., *Predictions*, *supra* note 77, at 77; Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 606-07, 617-18; Freedman, *Premature Reliance*, *supra* note 160, at 54.

189. Bersoff, *supra* note 77, at 571-72; Edens et al., *Predictions*, *supra* note 77, at 77; Willem H. J. Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High-Risk of Misuse, and Lack of Reliability*, 27 MED. L. 449, 454 (2008).

190. Edens et al., *Predictions*, *supra* note 77, at 66-68; *see also* Bersoff, *supra* note 77, at 572; John F. Edens, *Misuses of the Hare Psychopathy Checklist-Revised in Court: Two Case Examples*, 16 J. INTERPERS. VIOLENCE 1082, 1084-85, 1089 (2001) [hereinafter Edens, *Misuses*]; Freedman, *Premature Reliance*, *supra* note 160, at 89, 91, 94.

191. Mark D. Cunningham & Jon R. Sorensen, *Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. AM. ACAD. PSYCHIATRY L. 61, 62 (2010).

suggests that "it would seem hard to defend the PCL-R in an effort to identify inmates who are likely to be violent given the modest relationships in the literature [between PCL-R scores and prison violence]."[192] As a recent study about the utility of the PCL-R concluded:

> a) this checklist is not a reliable tool, b) the conclusions that are linked to these PCL-R scores with regard to the treatability of psychopathy are incorrect, harmful and unethical, c) can easily be misused in legal and forensic psychiatric settings to dispose of problematic psychopaths, and d) the diagnostic category psychopathy should be rejected firmly because some of the items are subjective, vague, judgmental and practically unmeasurable, and the term psychopathy itself seems to be judgmental.[193]

In spite of Hare's advice that accurate diagnosis involves expert observer (clinical) ratings based on a semi-structured interview and review of case history materials supplemented with behavioral observations whenever possible,[194] determinations of psychopathy can be made without a clinician even meeting the test subject.[195] Edens notes that the PCL-R instrument allows it to be scored without an interview if sufficient high-quality file data are available, but "[h]ow exactly one defines 'high-quality' file data is unclear."[196]

A growing body of literature has employed sophisticated methods, including systematic reviews and meta-analyses, to examine these issues. These studies raise additional concerns about the reliability of assessment instruments (including the PCL-R and other instruments) used to predict future violence. One study reviewed data from seventy-three samples that included over 24,000 participants from thirteen countries, and concluded that, "[w]hen used to predict violent offending, risk assessment instrument tools produced low to moderate positive

192. Edens, *Unresolved Controversies*, *supra* note 76, at 61.

193. Martens, *supra* note 189, at 449. Edens and colleagues echo similar concerns, especially considering the frequency with which prosecution experts in death penalty cases offer predictions of future violence. Edens et al., *Predictions*, *supra* note 77, at 61-63. "[T]here are strong reasons to question the accuracy of predictions of violence risk by prosecution experts in capital murder trials." *Id.* at 61. "These data clearly call into question the validity of expert testimony asserting that capital defendants are continuing threats to society." *Id.* at 63. "There is little reason to believe that risk statements offered by prosecution experts in [capital murder trials] provided much probative information about the likelihood that a capital defendant will go on to harm others in the future." *Id.* at 77. "This relative absence of probative value should be considered in the context of the likely prejudicial effects that such expert testimony may have." *Id.*

194. ROBERT D. HARE ET AL., OXFORD TEXTBOOK OF PSYCHOPATHOLOGY 557 (Theodore Millon et al. eds., 1999).

195. Walters et al., *supra* note 175, at 336.

196. Edens, *Misuses*, *supra* note 190, at 1090.

predictive values . . . and higher negative predictive values."[197] These researchers wrote that "[o]ne implication of these findings is that, even after 30 years of development, the view that violence, sexual, or criminal risk can be predicted in most cases is not evidence based."[198] Further implications of this research are "that these tools are not sufficient on their own for the purposes of risk assessment," and "that risk assessment tools in their current form *can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case*."[199]

A meta-review of risk assessment instruments "suggests that the view of some experts who have, in the past, argued that the Psychopathy Checklist measures are unparalleled in their ability to predict future offending . . . should now be reconsidered."[200] Another systematic review, a meta-analysis of sixty-eight studies involving almost 26,000 participants, concluded that, "[t]o date, no single risk assessment tool has been consistently shown to have superior ability to predict offending."[201] Finally, a meta-analysis of nine commonly used risk assessment instruments found that the PCL-R Factor 1 (the factor commonly associated with "psychopathy") predicted violence no better than chance for men.[202] In other words, it performed no better than a coin toss. These authors concluded that "there is no appreciable or clinically significant difference in the violence-predictive efficacy of the nine tools . . . . After almost five decades of developing risk prediction tools, the evidence increasingly suggests that the ceiling of predictive efficacy may have been reached with the available technology."[203]

In sum, there is a significant body of research that consistently indicates that claims about the value of instruments such as the PCL-R to predict future violence were much too optimistic, and at times were

197. Seena Fazel et al., *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-analysis*, 345 BRIT. J. MED. 1, 1 (2012).

198. *Id.* at 5.

199. *Id.* (emphasis added).

200. Singh & Fazel, *supra* note 150, at 981-82. The meta-review consisted of "systematically searching for and descriptively summarizing all available meta-analyses and systematic reviews" to identify inconsistences in study findings. *Id.* at 966.

201. Jay P. Singh et al., *A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Metaregression Analysis of 68 Studies Involving 25,980 Participants*, 31 CLINICAL PSYCHOL. REV. 499, 500 (2011). The authors note that "[s]uch uncertainties are important given that risk assessment tools have been increasingly used to influence decisions regarding accessibility of inpatient and outpatient resources, civil commitment or preventative detention, parole and probation, and length of community supervision in many Western countries, including the US." *Id.*

202. Min Yang et al., *Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, 135 PSYCHOL. BULL. 740, 740 (2010).

203. *Id.* at 759.

based on flawed methodology. While there are clearly prominent advocates as well as critics of the constructs of personality disorders, ASPD and psychopathy in the mental health field, empirical support is lacking for key assumptions on which it depends for admission as relevant scientific evidence, particularly in capital cases.[204]

c. Subjectivity and Bias in Forensic Settings

There are increasing concerns about the application of the PCL-R in forensic settings due to the potential for misuse and damage to the integrity of legal proceedings—situations in which the risk of error has severe consequences.[205] Hare, the developer of the PCL-R, has raised numerous concerns about its potential for misuse in forensic settings, including issues related to the qualifications and training of evaluators.[206] Hare notes that "[t]he PCL-R Manual . . . outlines recommended qualifications for clinical use of the instrument."[207] Nevertheless, he cautions that, even if the examiner meets minimum qualifications, "there is no guarantee that he or she has the professional experience, competence, and integrity to score the items in a careful, unbiased manner."[208] Hare raised specific concerns about the substitution of "clinical experience" and "informed opinion" in scoring of the PCL-R, which can result in inaccurate scoring of individual items,[209] and blatant misuse of the PCL-R, "[t]hrough ignorance or misguided intentions, some unqualified individuals have managed to use the PCL-R in court proceedings."[210]

Further, Hare has raised concerns about conceptual confusion, or conflation of the construct of psychopathy, with the diagnosis of ASPD.[211] He noted he had reviewed many forensic reports where clinicians diagnosed clients with ASPD who had not administered the PCL-R, and yet they invoked the PCL-R literature in their testimony.[212] "This is a very misleading practice" because "most individuals with

204. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993) ("Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.").

205. Martens, *supra* note 189, at 454.

206. *See* Robert D. Hare, *The Hare PCL-R: Some Issues Concerning Its Use and Misuse*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 99, 107 (1988).

207. *See id.*

208. *Id.*

209. *Id.* at 109.

210. *Id.*

211. *Id.* at 108.

212. *Id.*

antisocial personality disorder are not psychopaths."[213] Hare pointed out that "literature relating the PCL-R to treatment outcome and to the risk for recidivism and violence may have little or no relevance for an individual with a diagnosis of antisocial personality disorder."[214]

In addition to the issue of a given clinician's competence, another important concern raised by Hare involves the potential for inaccurate, biased ratings in applied forensic settings, because of "the assessment biases [the clinician] may have."[215] Hare considers this a serious matter, "particularly in jurisdictions . . . where it is not uncommon for prosecutors and defense lawyers to seek out and retain 'the right expert.'"[216] Although Hare asserts that the scoring criteria are "quite explicit,"[217] he has observed that "experts hired by the defense always seem to come up with considerably lower PCL-R ratings than do experts who work for the prosecution."[218] This is understandably "of considerable concern" to Hare "because a PCL-R rating carries more serious implications for the individual and for the public than do most psychological assessments."[219]

A growing literature has also raised concerns that the PCL-R is less reliable in field (rather than research) settings,[220] due in part to the potential for evaluator bias in PCL-R rating scores.[221] While studies

213. *Id.*
214. *Id.*
215. *Id.* at 113.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*

220. *Reliability* and *validity* are critical characteristics of any assessment procedure. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 n.9. Reliability refers to the extent to which the same PCL-R scores are obtained for a particular individual, regardless of who administers the instrument; the expectation is that independent evaluators will obtain the same or similar results. *Id.* Validity refers to the ability of the measuring instrument (for example, the PCL-R) to actually measure the property (for example, psychopathy) it is supposed to measure. *See id.*; Dave DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court: A Case Law Survey of U.S. Courts (1991-2004)*, 12 PSYCHOL. PUB. POL'Y & L. 214, 214 (2006); Salekin et al., *supra* note 155, at 204-05.

221. *See, e.g.*, Marcus T. Boccaccini et al., *Do Some Evaluators Report Consistently Higher or Lower PCL-R Scores than Others?: Findings from a Statewide Sample of Sexually Violent Predator Evaluations*, 14 PSYCHOL. PUB. POL'Y & L. 262, 262 (2008); Edens et al., *Inter-Rater Reliability*, *supra* note 181, at 114; Daniel C. Murrie et al., *Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?*, 32 LAW & HUM. BEHAV. 352, 352 (2008) [hereinafter Murrie et al., *Interrater*]; Daniel C. Murrie et al., *Field Validity of the Psychopathy Checklist-Revised in Sex Offender Risk Assessment*, 24 PSYCHOL. ASSESSMENT 524, 524 (2012) [hereinafter Murrie et al., *Field Validity*]. These results raise critical, provocative questions about the use of the PCL-R in extremely high-stakes adversarial legal proceedings such as capital cases. Together, these studies clearly suggest the need for caution and further investigation. *See* John Edens et al., *Taking Psychopathy Measures*

show strong interrater agreement for PCL-R scores in well-designed research settings, conditions in real world settings differ significantly.[222] While "forensic psychologists have traditionally assumed that results from well-designed studies generalize to field settings[,] . . . recent research suggest[s] this assumption may not be safe."[223] Taken together, these findings raise serious questions about the reliability of the PCL-R in adversarial legal proceedings.

"[R]ecent field reliability research suggests that some evaluators assign consistently higher PCL-R scores than others . . . ."[224] Evaluator bias appears to be attributable to at least two independent sources of error.[225] Several studies suggest that individual differences in evaluators may account for some of the variability in PCL-R scores in forensic proceedings.[226] In addition, some PCL-R items are clearly more subjective than others.[227] Although general concerns have been raised about the bias in PCL-R ratings in real-world cases, the inferential personality items (Factor 1), thought to be most central to psychopathy, appear to be particularly susceptible.[228] Possible explanations include differences in raters' own subjective thresholds for Factor 1 items (reflecting interpersonal/affective traits) and differences in how

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"Out of the Lab" and into the Legal System: Some Practical Concerns, *in* HANDBOOK OF PSYCHOPATHY AND THE LAW 250 (Kent A. Kiehl & Walter P. Sinnott-Armstrong eds., 2013); *see also* Cailey S. Miller et al., *Reliability of Risk Assessment Measures Used in Sexually Violent Predator Proceedings*, *in* PSYCHOLOGICAL ASSESSMENT 944, 944 (2012).

222. Murrie et al., *Interrater*, *supra* note 221, at 354. For example, most reliability values in the PCL-R literature reflect protocols in which two or more clinicians witness the same interview and review the same collateral materials. *Id.* at 353. In applied (adversarial) forensic settings, interviews are more often conducted at different points in time, and evaluators may review different materials. *Id.*

223. Murrie et al., *Field Validity*, *supra* note 221, at 525.

224. *Id.* (citing Boccaccini et al., *supra* note 221, at 263).

225. Boccaccini et al., *supra* note 221, at 276-77; Murrie et al., *Interrater*, *supra* note 221, at 357-58; Daniel C. Murrie et al., *Rater (Dis)agreement on Risk Assessment Measures in Sexually Violent Predator Proceedings: Evidence of Adversarial Allegiance in Forensic Evaluation?*, 15 PSYCHOL. PUB. POL'Y & L. 19, 24 (2009) [hereinafter Murrie et al., *Rater (Dis)agreement*]; *see also* Edens et al., *Inter-Rater Reliability*, *supra* note 181, at 116.

226. Boccaccini et al., *supra* note 221, at 263-64, 276. In this study, researchers found that over thirty percent of the variability in PCL-R scores was attributable to differences among evaluators, regardless of which side of the case they worked on. *Id.* at 276.

227. Studies have consistently demonstrated that there is more subjectivity and room for disagreement on items related to the interpersonal items of the PCL-R (considered more indicative of traditional notions of psychopathy) than on historical items (traditionally associated with antisocial behavior). *See* Miller et al., *supra* note 221, at 950; *see also* Terrence W. Campbell, *The Validity of the Psychopathy Checklist-Revised in Adversarial Proceedings*, 6 J. FORENSIC PSYCHOL. PRAC. 43, 45-47 (2006); Edens et al., *Inter-Rater Reliability*, *supra* note 181, at 107; Murrie et al., *Interrater*, *supra* note 221, at 360.

228. Edens et al., *Inter-Rater Reliability*, *supra* note 181, at 109.

evaluators might evoke different levels of Factor 1 traits due to their own interviewing styles.[229]

A second source of potential PCL-R scoring bias is partisan adversarial allegiance; that is, the tendency for forensic evaluators to reach opinions that support the party who retained them. "For decades, observers have complained – although usually through anecdotes and impressions rather than empirical data – of bias or partisanship by expert witnesses."[230] These concerns are validated by recent evidence of systematic differences in PCL-R rating scores, with scores skewed in the direction supporting the party who retained the evaluator.[231] Similar concerns have been raised by the National Research Council ("NRC") about the reliability of commonly accepted forensic science techniques,[232] and this new evidence of bias in the use of the PCL-R raises specific questions about forensic psychology—an area not addressed in the NRC report.[233]

Evidence of the potential for individual and partisan allegiance bias, and the lack of field reliability of PCL-R application in forensic proceedings, have serious implications for scientifically competent and ethical forensic practice. This raises additional questions about the PCL-R's evidentiary value in highly adversarial capital litigation proceedings.[234] Researchers in this area have concluded that, "as the

229. *Id.* at 116. In further support of individual bias, an exploratory study found that raters' PCL-R scoring tendencies related to their own personality traits. Audrey K. Miller et al., *On Individual Differences in Person Perception: Raters' Personality Traits Relate to Their Psychopathy Checklist-Revised Scoring Tendencies*, 18 ASSESSMENT 253, 259 (2011).

230. Murrie et al., *Rater (Dis)agreement*, *supra* note 225, at 46.

231. *See* Murrie et al., *Interrater*, *supra* note 221, at 355; Murrie et al., *Rater (Dis)agreement*, *supra* note 225, at 23. The strongest evidence for partisan adversarial allegiance derives from a recent study that showed a clear pattern of bias in PCL-R scores *in an experimental design*. Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCH. SCI. 1889, 1890-91, 1893, 1895 (2013) [hereinafter Murrie et al., *Are Forensic Experts Biased*]. This study assessed potential adversarial allegiance and addressed the question of whether forensic experts are biased by the side that retained them. *Id.* The study adds critical and important information to the literature discussed, as the study design involved a random assignment of experts trained in use of two risk assessment instruments (including the PCL-R) to either the defense or the prosecution. *Id.* Partisan adversarial allegiance was found, even in this instance that did not involve real-world settings (e.g., actual retention by the prosecution or defense). *Id.* This study adds further weight to earlier studies based on naturalistic designs, and increases concerns about the objectivity of forensic experts when using instruments such as the PCL-R. *See id.*

232. NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 184-85 (2009).

233. Murrie et al., *Are Forensic Experts Biased*, *supra* note 231, at 1895.

234. As an important side note, another potential bias involves the threat to academic freedom in resolving disputes about the PCL-R. This was addressed recently by prominent psychologists Norman Poythress and John Petrila. *See* Norman Poythress & John P Petrila, *PCL-R Psychopathy: Threats to Sue, Peer Review, and Potential Implications for Science and Law. A Commentary*, 9 INT'L J. FORENSIC MENTAL HEALTH 3, 4, 9 (2010). These forensic experts discussed the

amount of variance attributable to evaluators approaches the amount of variance attributable to the offender, any score or opinion from the evaluator becomes less useful and fails to serve the purpose for which evaluators serve in court: to provide nonbiasing assistance to the trier of fact."[235]

2. Psychopathy: Ethical Controversies

The use of forensic evidence about psychopathy to persuade judges or juries to execute a defendant raises serious ethical concerns. These include the prejudicial nature of the construct itself, the equation of psychopathy with "wickedness" and "evil," and the implication that psychopathic individuals are subhuman. Consider, for example, Cleckley's assertions in his influential book on psychopathy:

> We are dealing here not with a complete man at all but with something that suggests a subtly constructed reflex machine which can mimic the human personality perfectly. . . . So perfect is this reproduction of a whole and normal man that *no one who examines him in a clinical setting can point out in scientific or objective terms why, or how, he is not real.* And yet we eventually come to know or feel we know that reality, in the sense of full, healthy experiencing of life, is not here.[236]

Similar, dehumanizing language was used more recently by Doctor Reid Meloy, who has written extensively about psychopathy:

> [T]he psychodynamics of the psychopath bring us closer to what we see as [his] evil . . . . It is phylogenetically a prey-predator dynamic, *often viscerally or tactilely felt by the psychiatrist as an acute autonomic fear response in the presence of the patient . . . the hair standing up on the neck, goosebumps, or the more inexplicable "creepy" or "uneasy" feeling. These are atavistic reactions that may signal real danger and should never be ignored . . . .*[237]

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implications of a recent threat of litigation against the authors of an article that questioned the role of criminal behavior in the construct of psychopathy. *Id.* The editor of the scientific journal that accepted the article for publication (following the peer-review process) was also threatened with litigation. *Id.* Poythress and Petrila cautioned that "litigation threats can have chilling effects on academic freedom." *Id.* Litigation threats, uncommon in the mental health field, have the potential to negatively affect the greatly valued process of peer review as a means of ensuring academic integrity and scientific reliability and validity. *Id.* at 4, 7, 9.

235. Boccaccini et al., *supra* note 221, at 277.

236. ERROL MORRIS, A WILDERNESS OF ERROR: THE TRIALS OF JEFFREY MACDONALD 368-70 (2012) (emphasis added) (citing HERVEY CLECKLEY, THE MASK OF SANITY (5th ed. 1976)).

237. J. Reid Meloy, *The Psychology of Wickedness: Psychopathy and Sadism*, 27 PSYCHIATRIC ANNALS 630, 631 (1997) (emphasis added) (footnotes omitted). Both of these statements present an alarmingly subjective, dehumanizing portrayal of the "psychopath" as non-human, which has been

The use of such inflammatory language, cloaked as medical science, inevitably stigmatizes capital defendants and prejudices capital jurors and fact finders.[238] Because of the PCL-R's susceptibility to producing unreliable results in the hands of biased examiners, ethical concerns are growing about its unreliability and misuse of the PCL-R in forensic contexts.

3. Psychopathy Evidence More Prejudicial than Probative

The PCL-R and the construct of psychopathy have only recently been introduced into the sentencing phase of capital murder trials.[239] Such evidence has quickly taken hold in capital litigation to support expert testimony offered by the prosecution that a defendant will be a continuing threat to society if he is not executed.[240] Accumulating evidence suggests that, when juries perceive capital defendants to present a risk of future dangerousness, they are more likely to return a

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contradicted by a number of studies indicating that there is no evidence the concept represents a discrete category of individuals. It is noteworthy that Meloy and Cleckley agree that it is difficult to assess clearly whether an individual is a psychopath, except in some "atavistic" or gut-level recognition of this "reality." *See id.* The subjective nature of Meloy's methodology was instrumental in the Colorado homicide conviction of Timothy Lee Masters, who was ultimately proven completely innocent. Miles Moffeit, *Release Likely Today as Missteps Surface*, DENVER POST, Jan. 22, 2008, http://www.denverpost.com/ci_8039377. Without interviewing Masters, but based on interpretation of violent images depicted in Masters's artwork and writings, Meloy testified that the "defendant perceived himself as a warrior character without empathy or feeling who engaged, through fictional narratives and pictures, in a variety of killings." State v. Masters, 33 P.3d 1191, 1196 (Colo. App. 2001). The Colorado Supreme Court found that Meloy's testimony was crucial to Masters's conviction. No physical evidence linked him to the crime, and "Dr. Meloy's testimony provided an explanation for the seemingly inexplicable." Masters v. State, 58 P.3d 979, 991 (Colo. 2002) (en banc). Without it, "lay jurors would be tremendously disadvantaged in attempting to understand Defendant's motivation for killing [Peggy] Hettrick." *Id.* at 992. Based on exonerating DNA tests, and other evidence developed with the assistance of police detectives who always had reservations about his guilt, Masters was released from prison on the motion of prosecuting attorneys in 2008. Moffeit, *supra*.

238. *See, e.g.*, Lloyd et al., *supra* note 184, at 324. Caleb D. Lloyd and his colleagues state:

> Concerns have been raised that expert testimony provided in trial courts, especially testimony in regards to psychopathy, may promote unfounded prejudice or inflate weakly supported research findings to bias criminal justice decision makers . . . minimally, professional integrity requires a measure of caution when considering emotionally charged diagnoses in the courts or applying standardized instruments to situations for which these instruments were not originally intended . . . .

Id.

239. John F. Edens et al., *Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent "A Continuing Threat to Society,"* 29 J. PSYCHIATRY & L. 433, 434, 439 (2001) [hereinafter Edens et al., *Psychopathy and the Death Penalty*]; *see also* Cunningham, *supra* note 77, at 828, 829-30; Cunningham & Goldstein, *supra* note 3, at 425.

240. *See, e.g.*, Bersoff, *supra* note 77, at 571; Cunningham & Reidy, *supra* note 17, at 333; DeMatteo & Edens, *supra* note 220, at 215, 218; Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 616-18; Edens et al., *Psychopathy and the Death Penalty*, *supra* note 239, at 436-37, 439; Edens et al., *Predictions*, *supra* note 77, at 77.

death sentence.[241] The label "psychopath" has a profound effect on lay persons' views of capital defendants, because it tends to obscure and overwhelm other relevant mental health evidence.[242] This may explain the increasing use of such evidence by the prosecution.[243]

Given the prejudicial effect of expert testimony that the defendant is a psychopath who may kill again, mental health researchers recognize that it "has arguably become one of the most controversial types of evidence admitted."[244] Due to the "limited probative value of the PCL-R in capital cases and the prejudicial nature of the effects noted in this study,"[245] Edens and his colleagues "recommend that forensic examiners avoid using it in capital trials."[246] They also argue for ethical guidelines limiting the use of psychopathy evidence:

> Although the courts have typically allowed experts considerable latitude regarding what constitutes admissible evidence in these cases, this by no mean obviates experts' ethical responsibility to "use assessment instruments whose validity and reliability have been established for use with the members of the population tested" or the need to "take reasonable steps to avoid harming their

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241. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001); Mark Constanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 196 (1992); Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 616, 618; John F. Edens & Jennifer Cox, *Examining the Prevalence, Role and Impact of Evidence Regarding Antisocial Personality, Sociopathy and Psychopathy in Capital Cases: A Survey of Defense Team Members*, 30 BEHAV. SCI. & L. 239, 242, 247 (2012).

242. *See* DeMatteo & Edens, *supra* note 220, at 232; Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 607; John F. Edens et al., *Psychopathic Traits Predict Attitudes Toward a Juvenile Capital Murderer*, 21 BEHAV. SCI. & L. 807, 822-24 (2003). As stated by Lloyd and his colleagues:

> Pejorative labeling and adverse effects are accomplished through experts' selective presentation of the concept of psychopathy or exaggeration of its implications. . . . [E]ven when psychopathy is correctly applied, research supports the conclusion that perceptions of dangerousness are heightened beyond an experts' indicated risk level when a diagnostic label is given.

Lloyd et al., *supra* note 184, at 325.

243. DeMatteo & Edens, *supra* note 220, at 232.

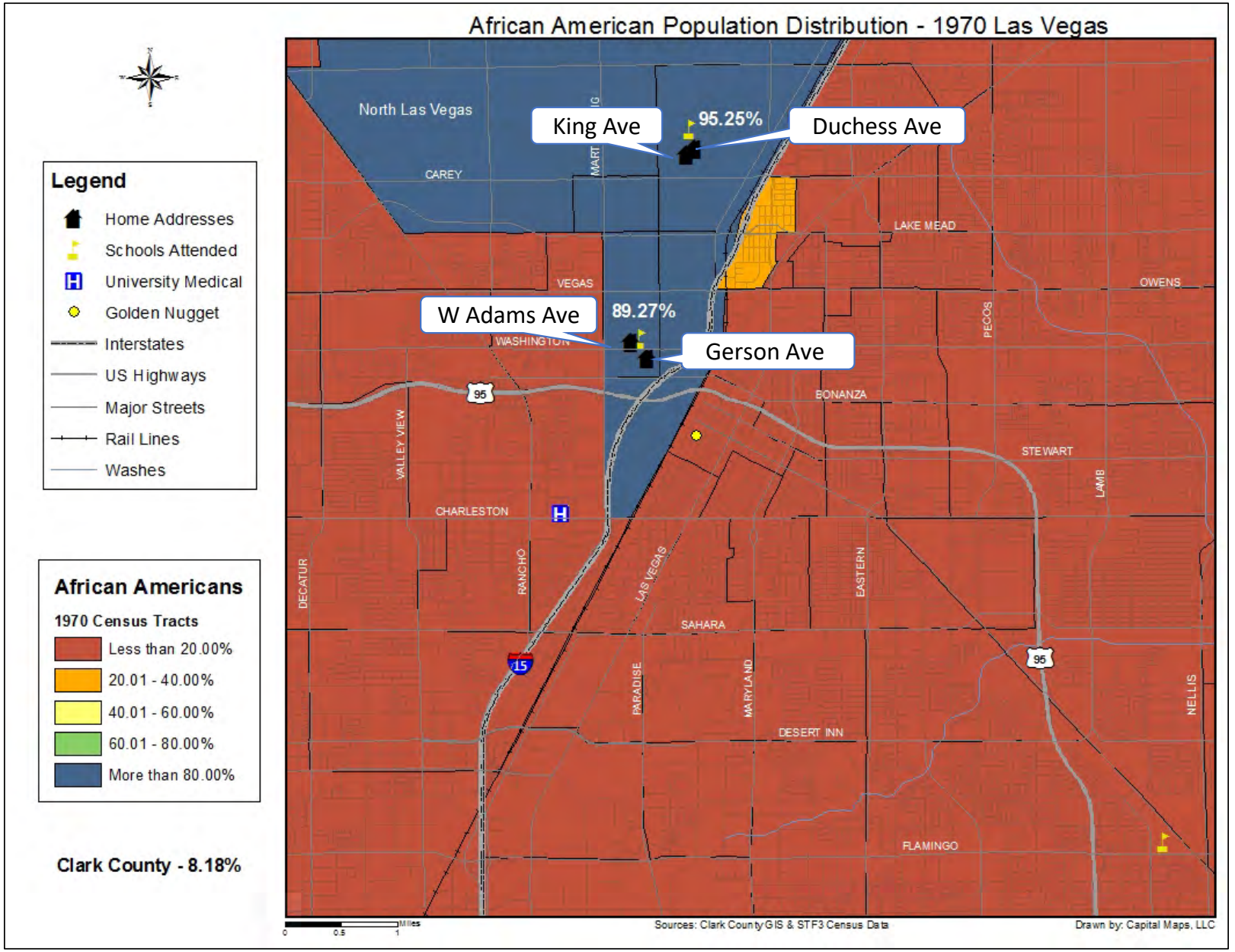
244. Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 605 (citing Cunningham & Reidy, *supra* note 17, at 336-37); Charles P. Ewing, *"Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J.L. & MED. 407, 412-13, 415 (1983); *see also* Brief for the American Psychological Association & the Missouri Psychological Association as Amicus Curiae Supporting Respondent at 20, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

245. Edens et al., *Impact of Mental Health Evidence*, *supra* note 77, at 603. This study examined the effects of data about psychopathy on layperson attitudes; test subjects reviewed a capital murder case where results of the defendant's psychological examination were experimentally manipulated. *Id.*

246. *Id.*

Marlo Thomas Maps

July 2017


African American Population Distribution - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans
1970 Census Tracts
Less than 20.00%
20.01 - 40.00%
40.01 - 60.00%
60.01 - 80.00%
More than 80.00%
Clark County - 8.18%
King Ave
95.25%
Duchess Ave
W Adams Ave
89.27%
Gerson Ave
North Las Vegas
CAREY
MAIN
VEGAS
WASHINGTON
LAKE MEAD
OWENS
PECOS
BONANZA
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

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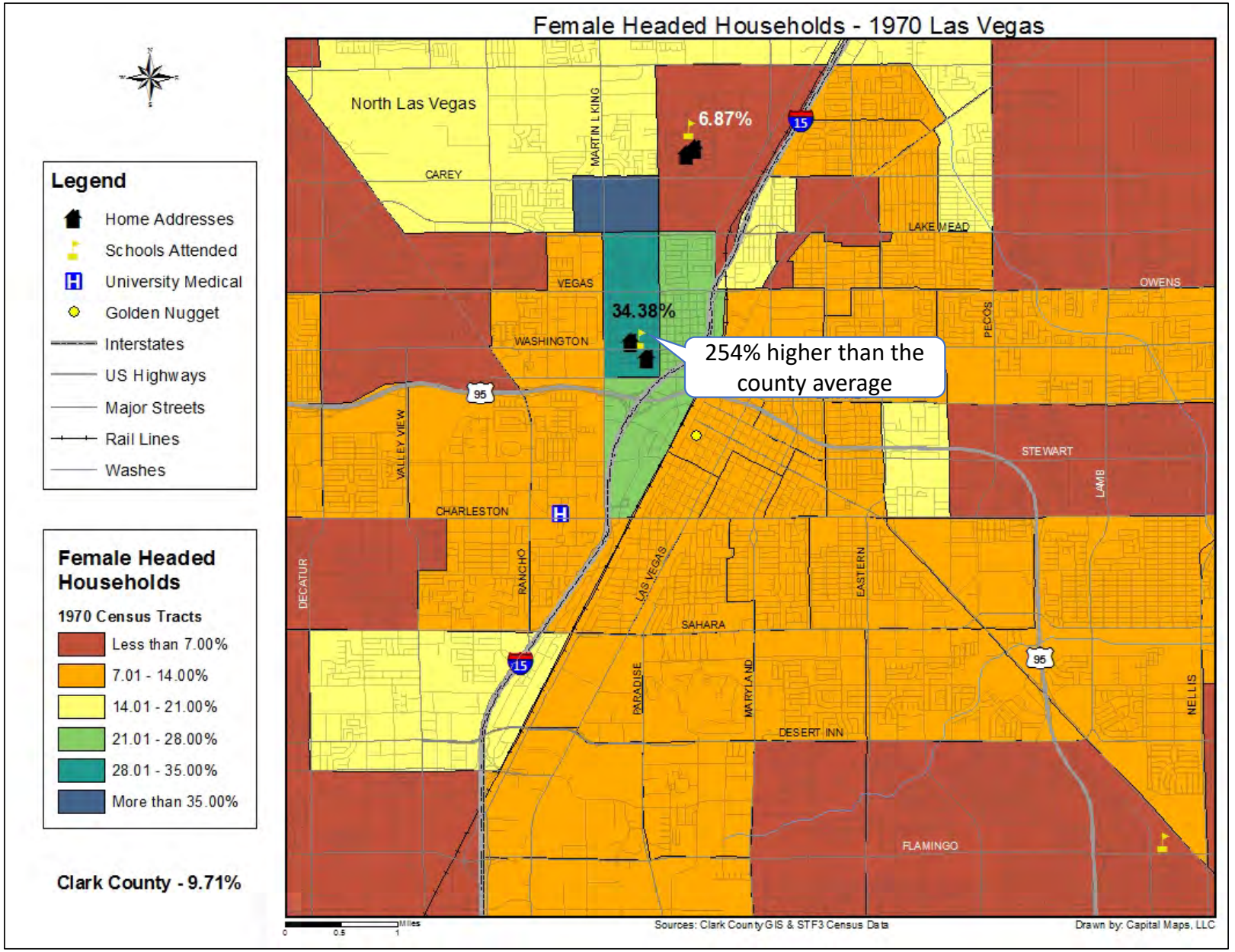
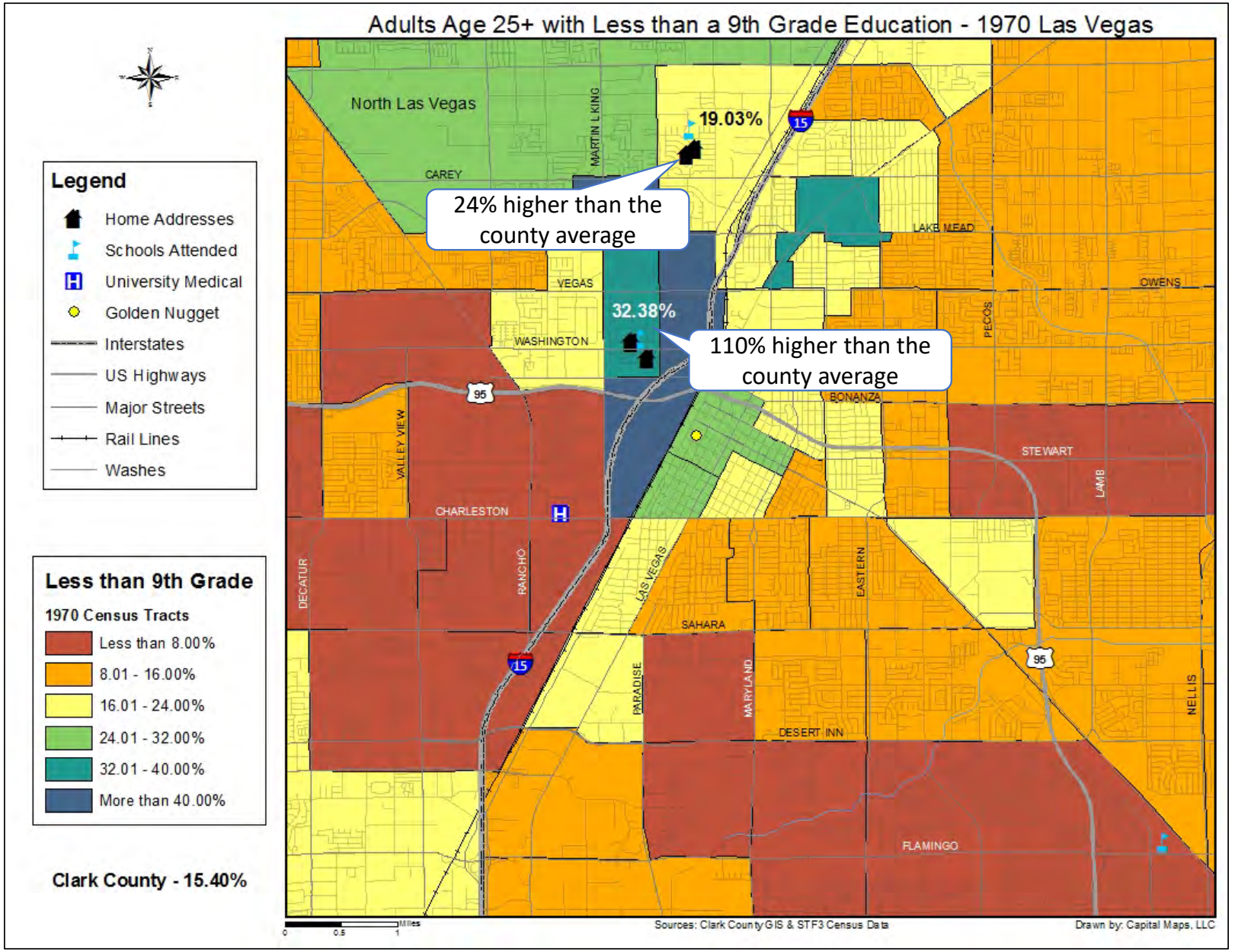
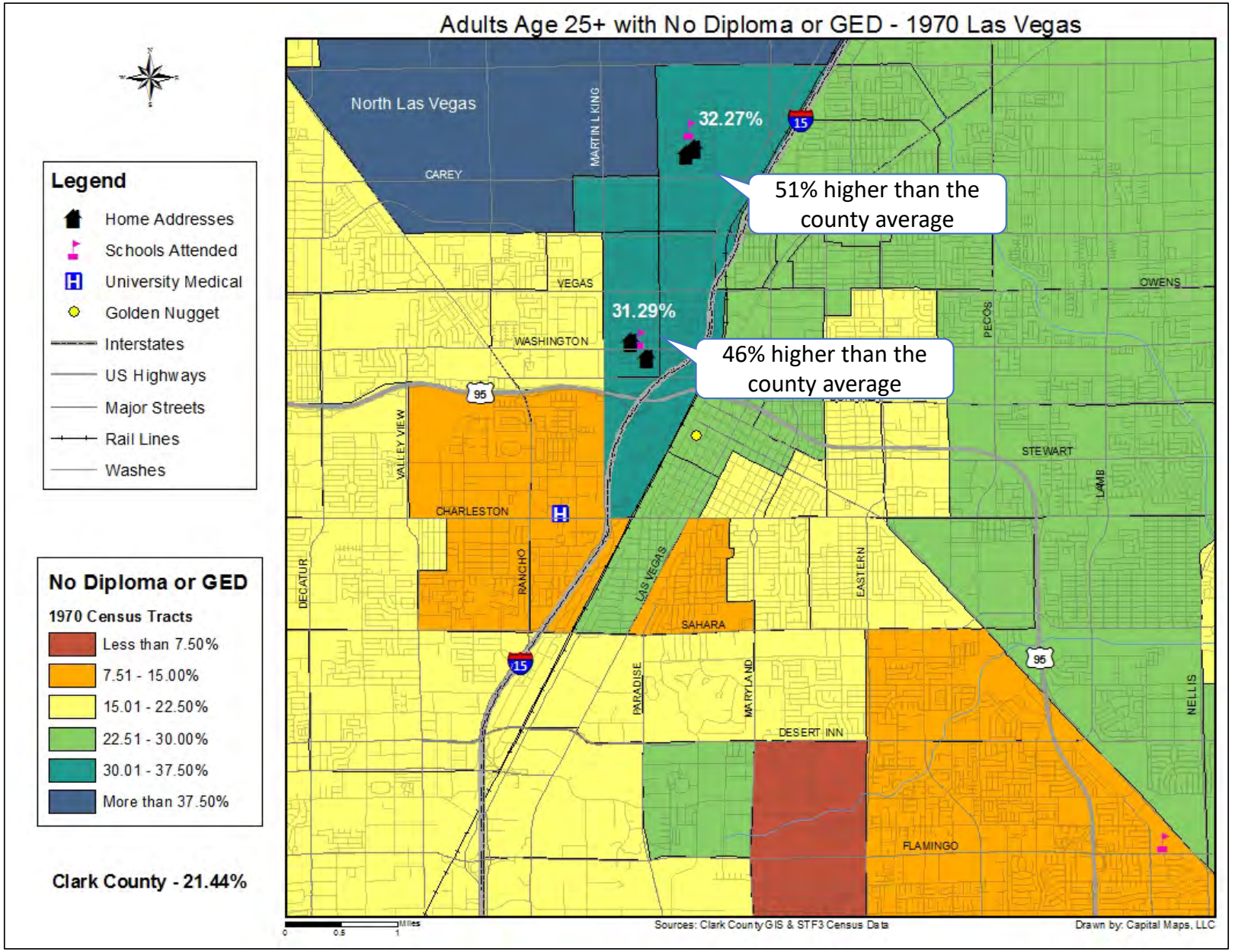

Female Headed Households - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Female Headed Households
1970 Census Tracts
Less than 7.00%
7.01 - 14.00%
14.01 - 21.00%
21.01 - 28.00%
28.01 - 35.00%
More than 35.00%
Clark County - 9.71%
North Las Vegas
CAREY
MARTIN L KING
6.87%
LAKE MEAD
VEGAS
34.38%
WASHINGTON
254% higher than the county average
OWENS
PECOS
95
VALLEY VIEW
STEWART
LAMB
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
15
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

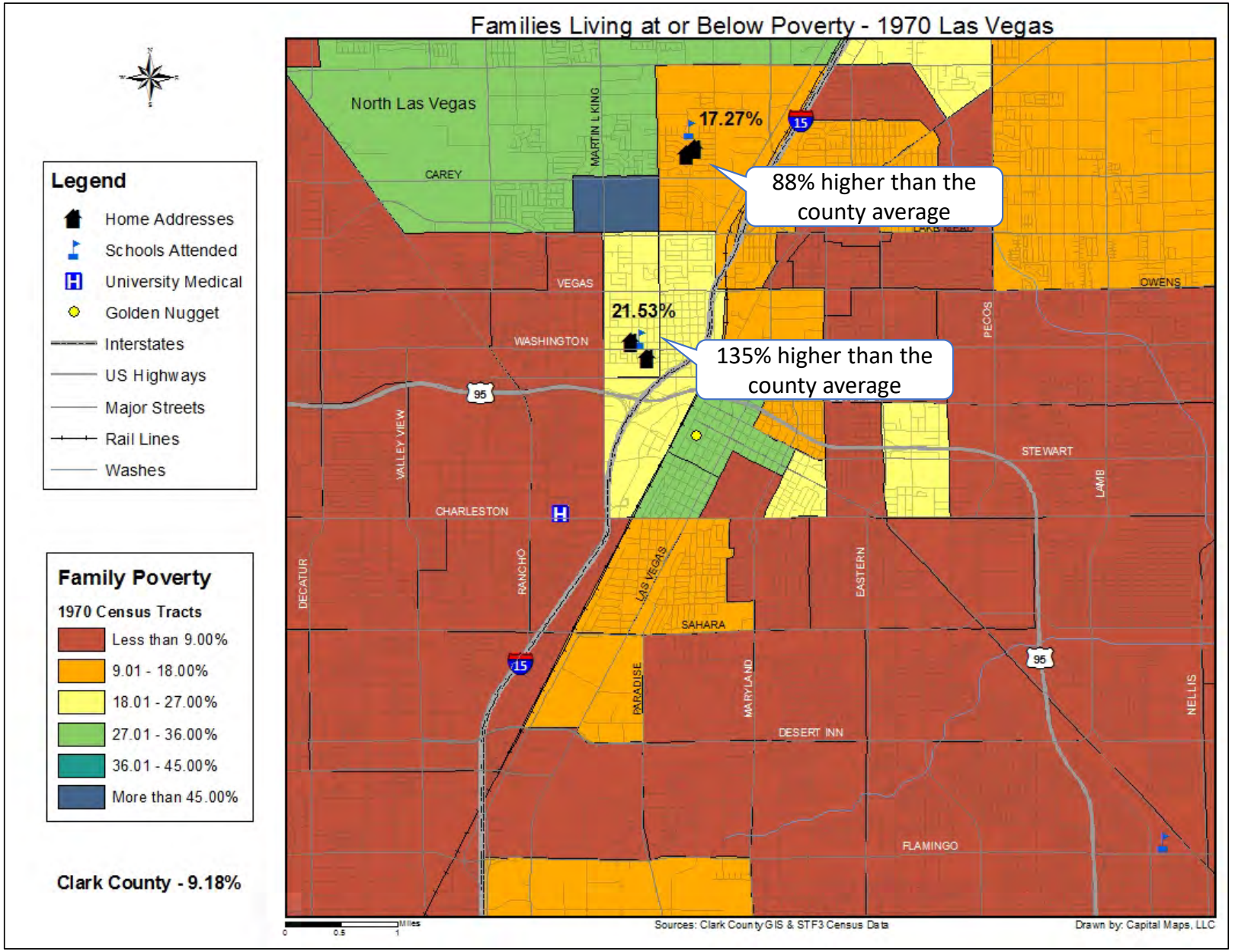
AA6605


Adults Age 25+ with Less than a 9th Grade Education - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Less than 9th Grade
1970 Census Tracts
Less than 8.00%
8.01 - 16.00%
16.01 - 24.00%
24.01 - 32.00%
32.01 - 40.00%
More than 40.00%
Clark County - 15.40%
19.03%
24% higher than the county average
32.38%
110% higher than the county average
North Las Vegas
CAREY
MARTIN L KING
LAKE MEAD
VEGAS
WASHINGTON
OWENS
PECOS
BONANZA
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

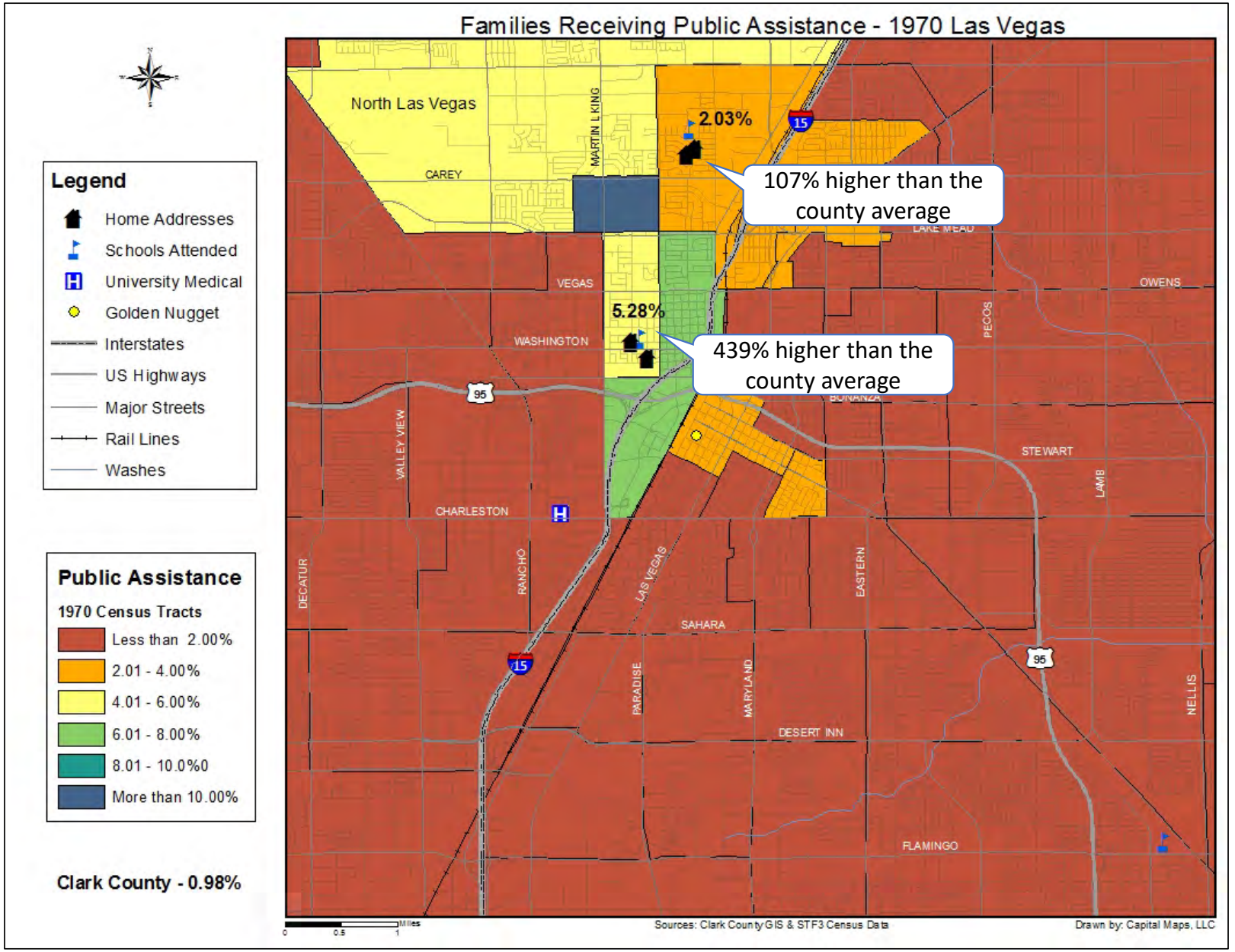
AA6606


Adults Age 25+ with No Diploma or GED - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
No Diploma or GED
1970 Census Tracts
Less than 7.50%
7.51 - 15.00%
15.01 - 22.50%
22.51 - 30.00%
30.01 - 37.50%
More than 37.50%
Clark County - 21.44%
North Las Vegas
CAREY
MARTIN L KING
VEGAS
WASHINGTON
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
SAHARA
PARADISE
MARYLAND
DESERT INN
EASTERN
PECOS
OWENS
STEWART
LAMB
NELLIS
FLAMINGO
95
15
32.27%
31.29%
51% higher than the county average
46% higher than the county average
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

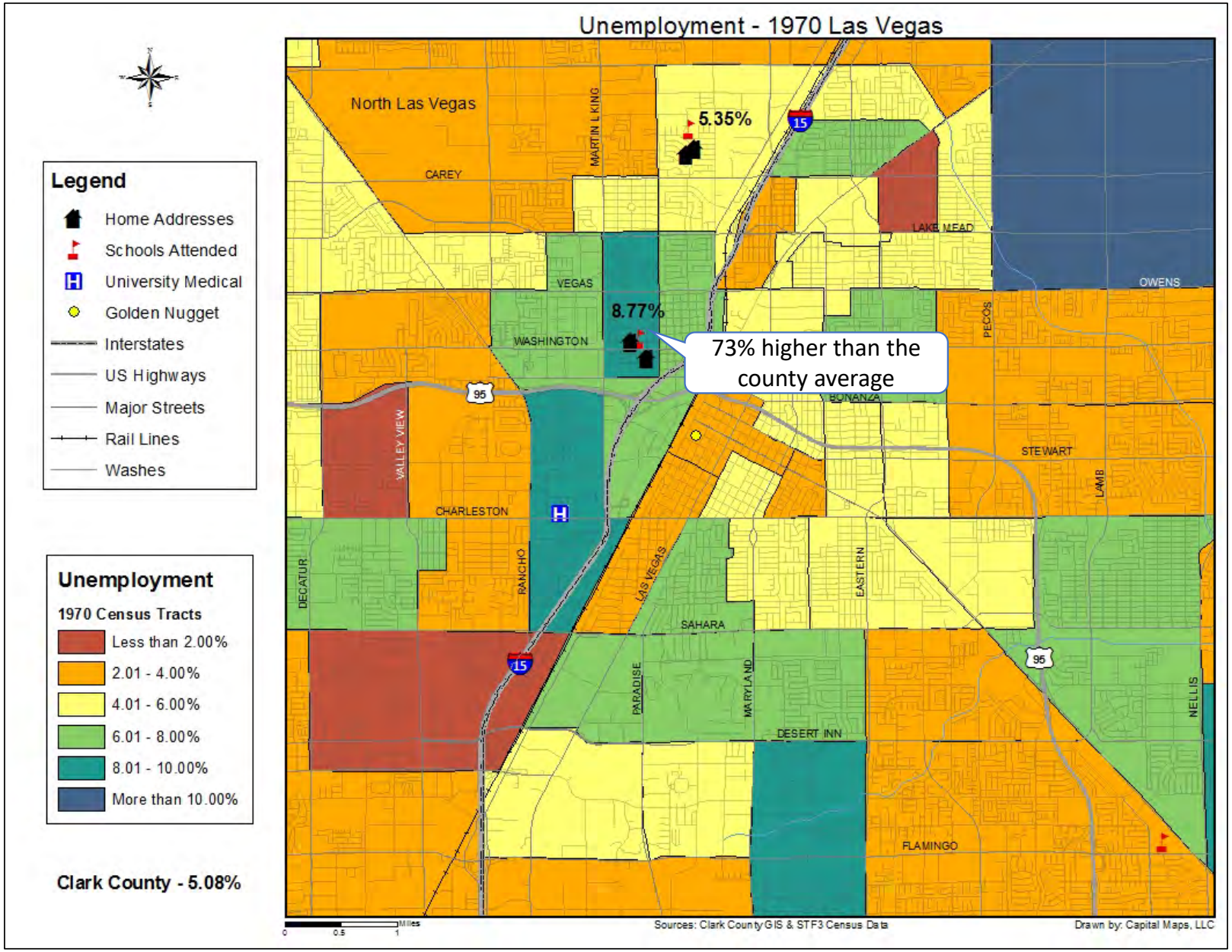
AA6607


Families Living at or Below Poverty - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Family Poverty
1970 Census Tracts
Less than 9.00%
9.01 - 18.00%
18.01 - 27.00%
27.01 - 36.00%
36.01 - 45.00%
More than 45.00%
Clark County - 9.18%
North Las Vegas
CAREY
MARTIN L KING
17.27%
88% higher than the county average
VEGAS
21.53%
WASHINGTON
135% higher than the county average
OWENS
PECOS
95
VALLEY VIEW
CHARLESTON
STEWART
LAMB
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
15
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

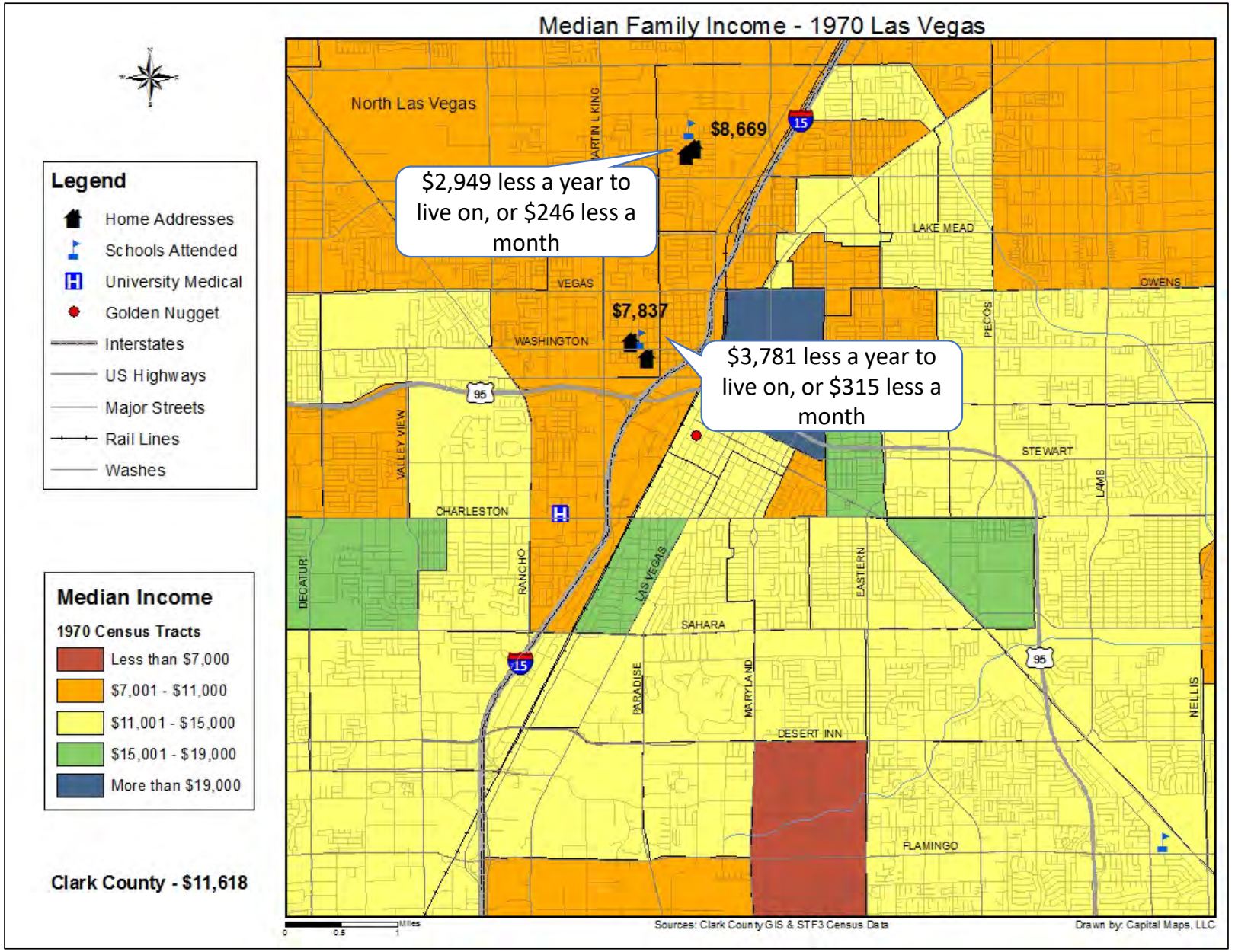
AA6608


Families Receiving Public Assistance - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Public Assistance
1970 Census Tracts
Less than 2.00%
2.01 - 4.00%
4.01 - 6.00%
6.01 - 8.00%
8.01 - 10.0%0
More than 10.00%
Clark County - 0.98%
North Las Vegas
CAREY
MARTIN L KING
2.03%
107% higher than the county average
VEGAS
WASHINGTON
5.28%
439% higher than the county average
LAKE MEAD
OWENS
PECOS
BONANZA
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

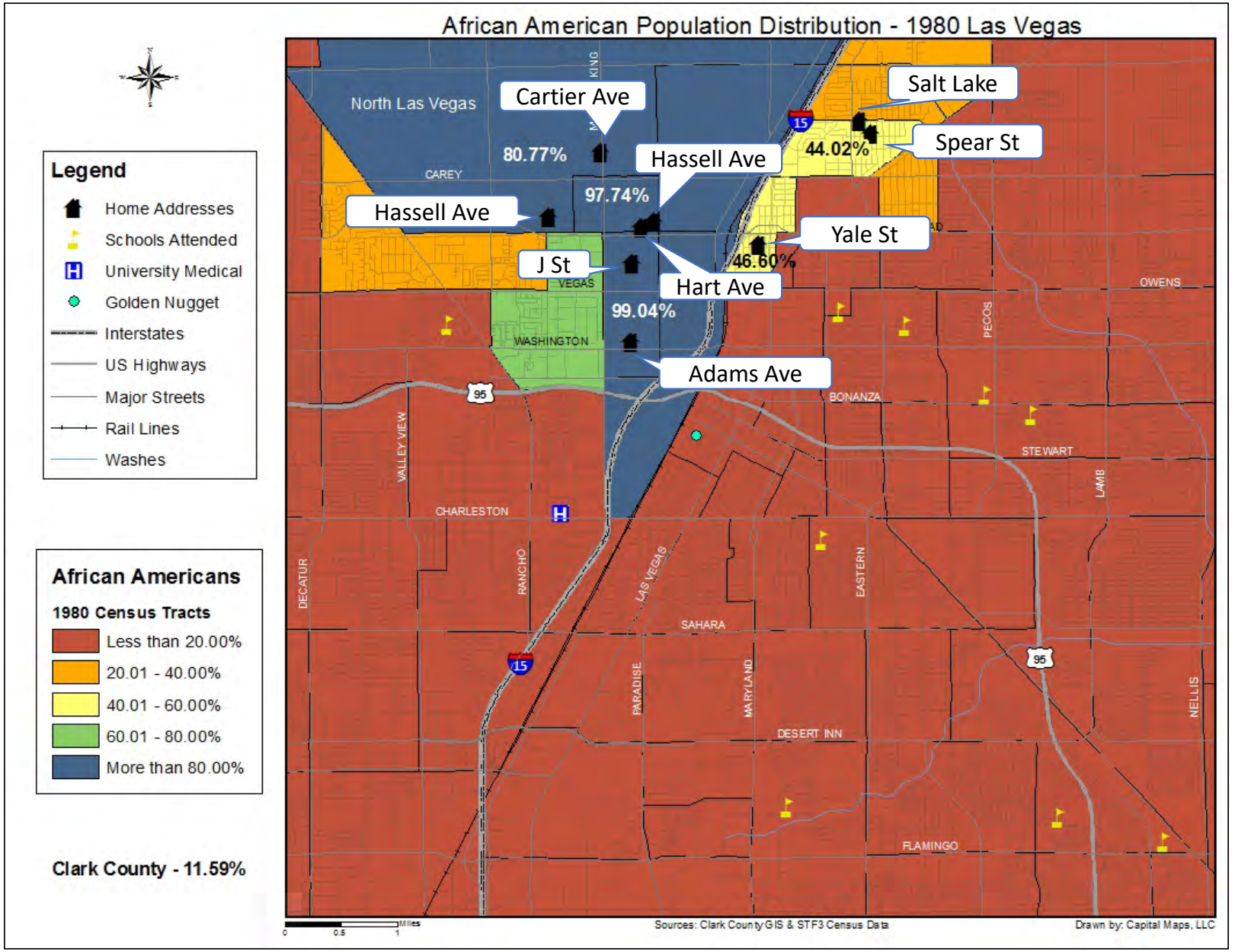
AA6609


Unemployment - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Unemployment
1970 Census Tracts
Less than 2.00%
2.01 - 4.00%
4.01 - 6.00%
6.01 - 8.00%
8.01 - 10.00%
More than 10.00%
Clark County - 5.08%
North Las Vegas
CAREY
MARTIN L KING
5.35%
LAKE MEAD
OWENS
VEGAS
8.77%
WASHINGTON
PECOS
73% higher than the county average
BONANZA
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

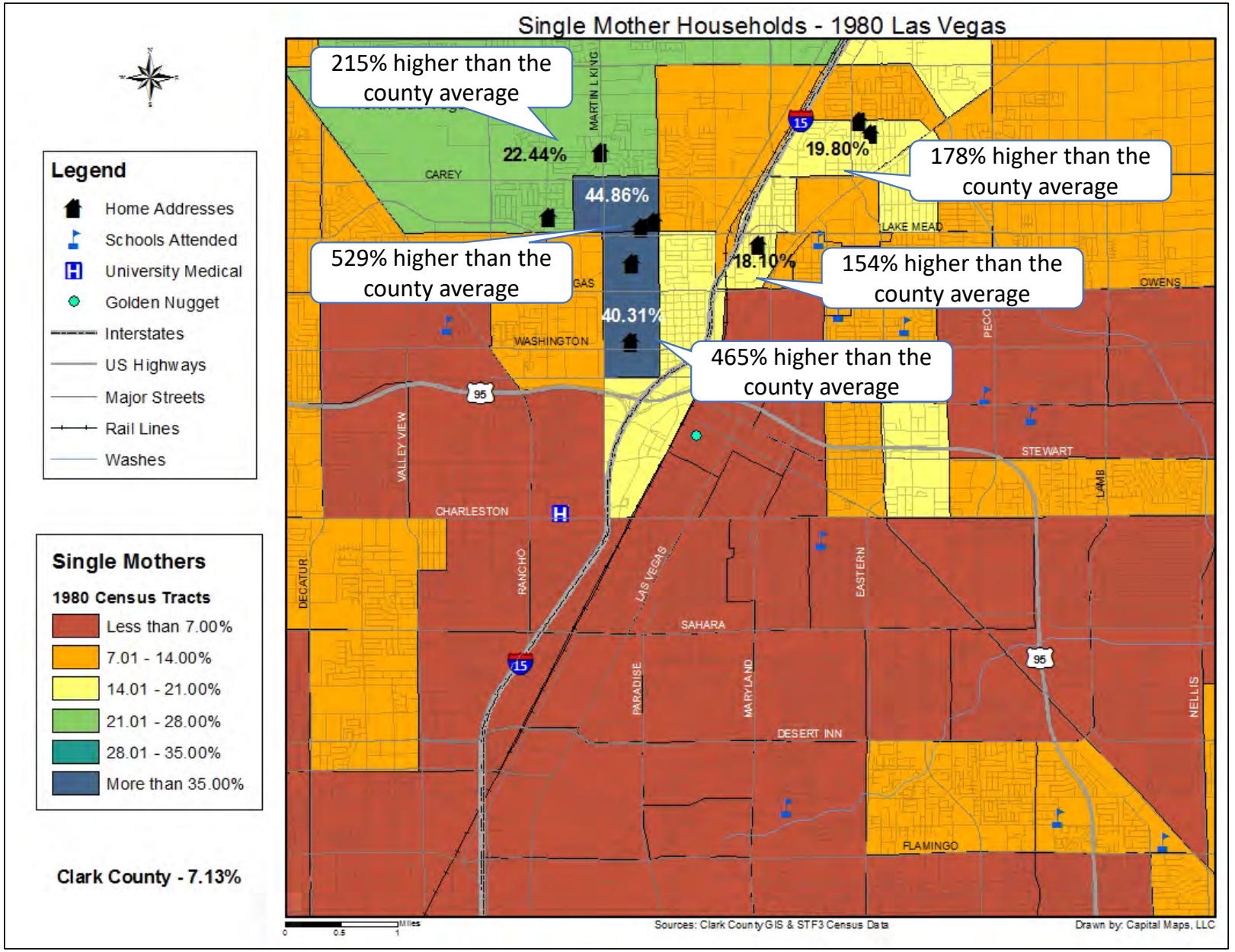
AA6610


Median Family Income - 1970 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Median Income
1970 Census Tracts
Less than $7,000
$7,001 - $11,000
$11,001 - $15,000
$15,001 - $19,000
More than $19,000
Clark County - $11,618
North Las Vegas
$8,669
$2,949 less a year to live on, or $246 less a month
$7,837
$3,781 less a year to live on, or $315 less a month
LAKE MEAD
VEGAS
WASHINGTON
OWENS
PECOS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

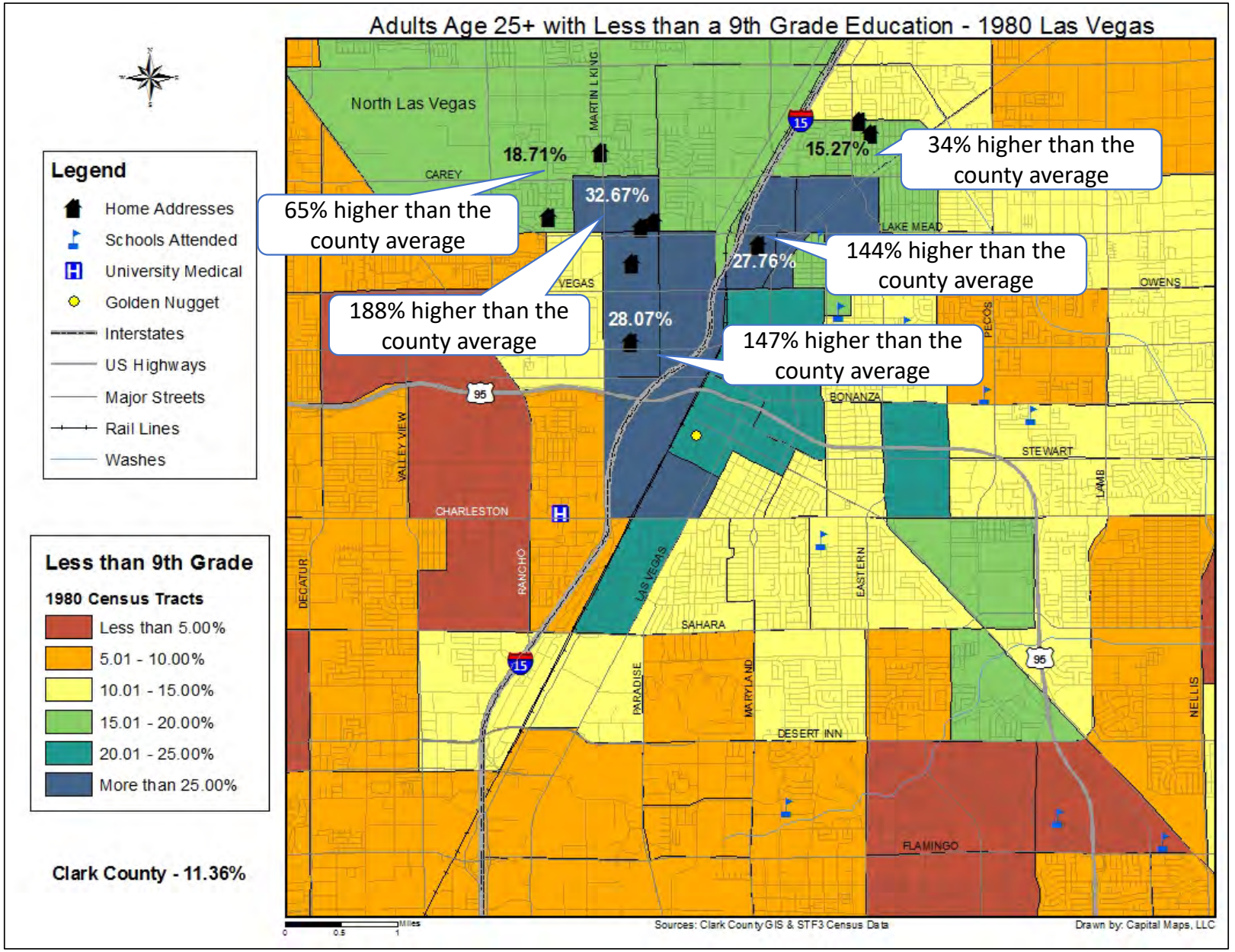
AA6611


African American Population Distribution - 1980 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans
1980 Census Tracts
Less than 20.00%
20.01 - 40.00%
40.01 - 60.00%
60.01 - 80.00%
More than 80.00%
Clark County - 11.59%
North Las Vegas
Cartier Ave
80.77%
Hassell Ave
97.74%
Hassell Ave
Salt Lake
44.02%
Spear St
Yale St
46.60%
J St
Hart Ave
99.04%
Adams Ave
CAREY
VEGAS
WASHINGTON
BONANZA
STEWART
OWENS
CHARLESTON
SAHARA
DESERT INN
FLAMINGO
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
PARADISE
MARYLAND
EASTERN
PECOS
LAMB
NELLIS
15
95
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

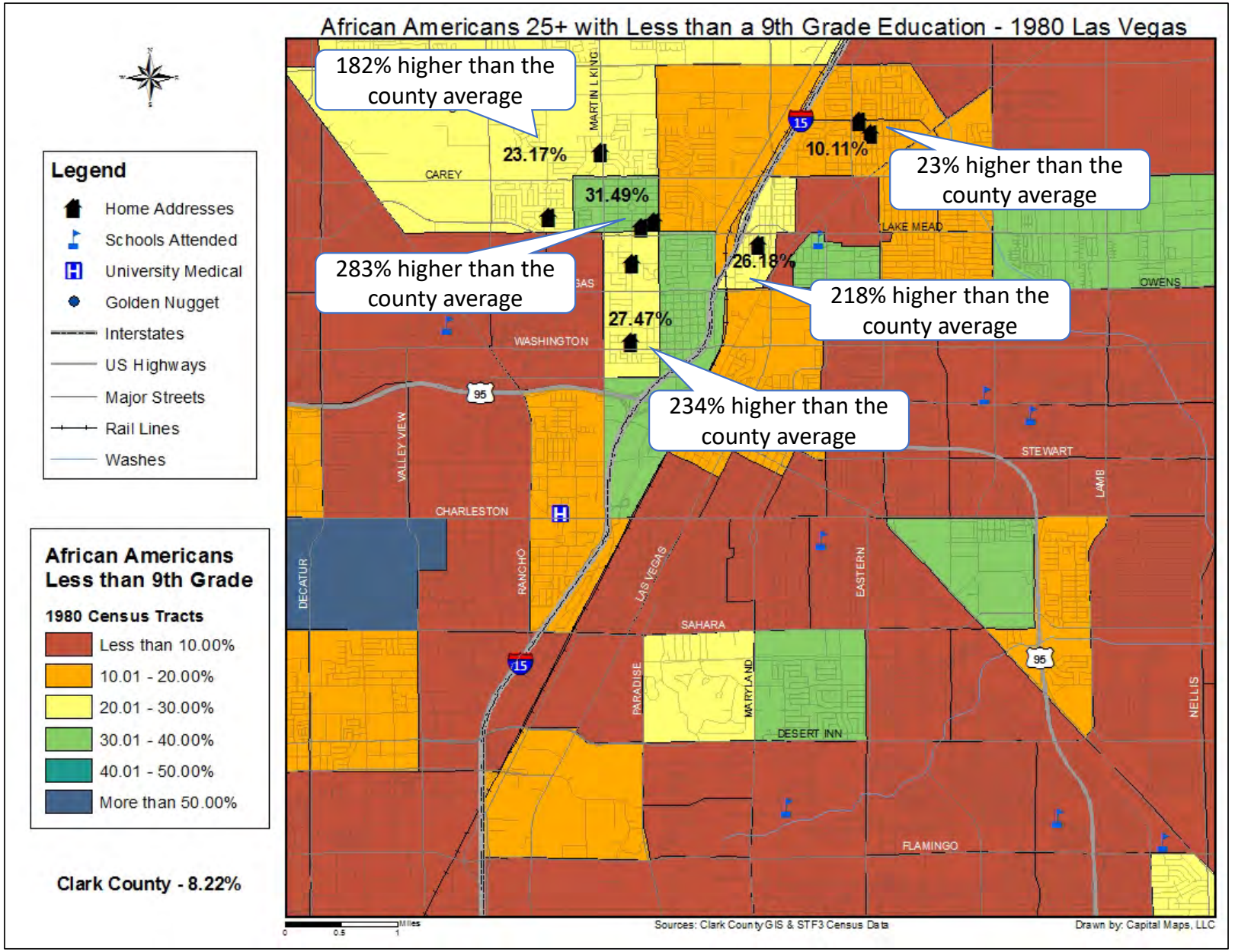
AA6612


Single Mother Households - 1980 Las Vegas
215% higher than the county average
22.44%
44.86%
529% higher than the county average
40.31%
465% higher than the county average
19.80%
178% higher than the county average
18.10%
154% higher than the county average
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Single Mothers
1980 Census Tracts
Less than 7.00%
7.01 - 14.00%
14.01 - 21.00%
21.01 - 28.00%
28.01 - 35.00%
More than 35.00%
Clark County - 7.13%
CAREY
MARTIN L KING
LAKE MEAD
OWENS
WASHINGTON
GAS
PECO
VALLEY VIEW
STEWART
LAMB
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

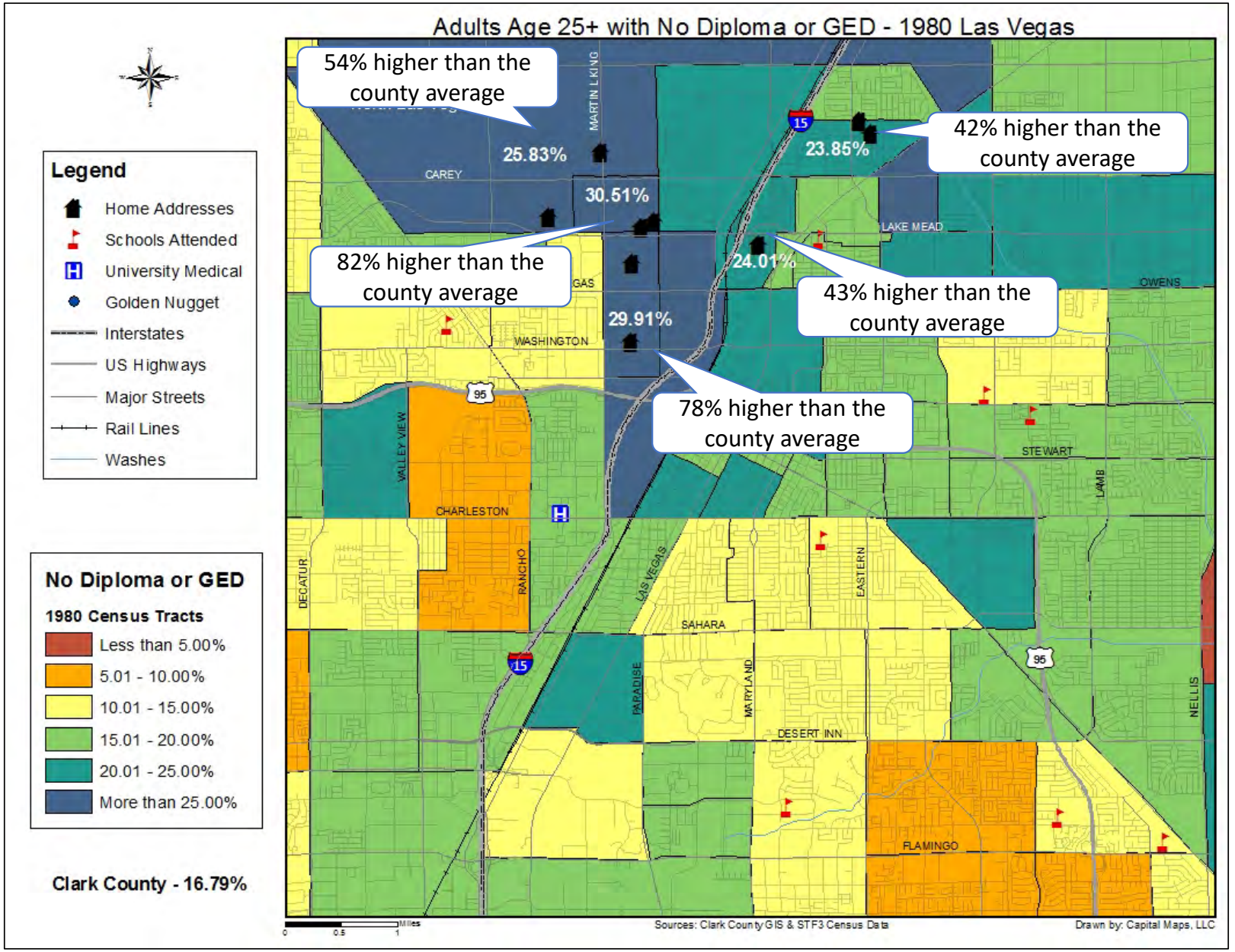
AA6613


Adults Age 25+ with Less than a 9th Grade Education - 1980 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Less than 9th Grade
1980 Census Tracts
Less than 5.00%
5.01 - 10.00%
10.01 - 15.00%
15.01 - 20.00%
20.01 - 25.00%
More than 25.00%
Clark County - 11.36%
18.71%
32.67%
28.07%
27.76%
15.27%
65% higher than the county average
188% higher than the county average
144% higher than the county average
147% higher than the county average
34% higher than the county average
North Las Vegas
CAREY
VEGAS
LAKE MEAD
OWENS
BONANZA
STEWART
CHARLESTON
SAHARA
DESERT INN
FLAMINGO
MARTIN L KING
PECOS
LAMB
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
EASTERN
PARADISE
MARYLAND
NELLIS
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

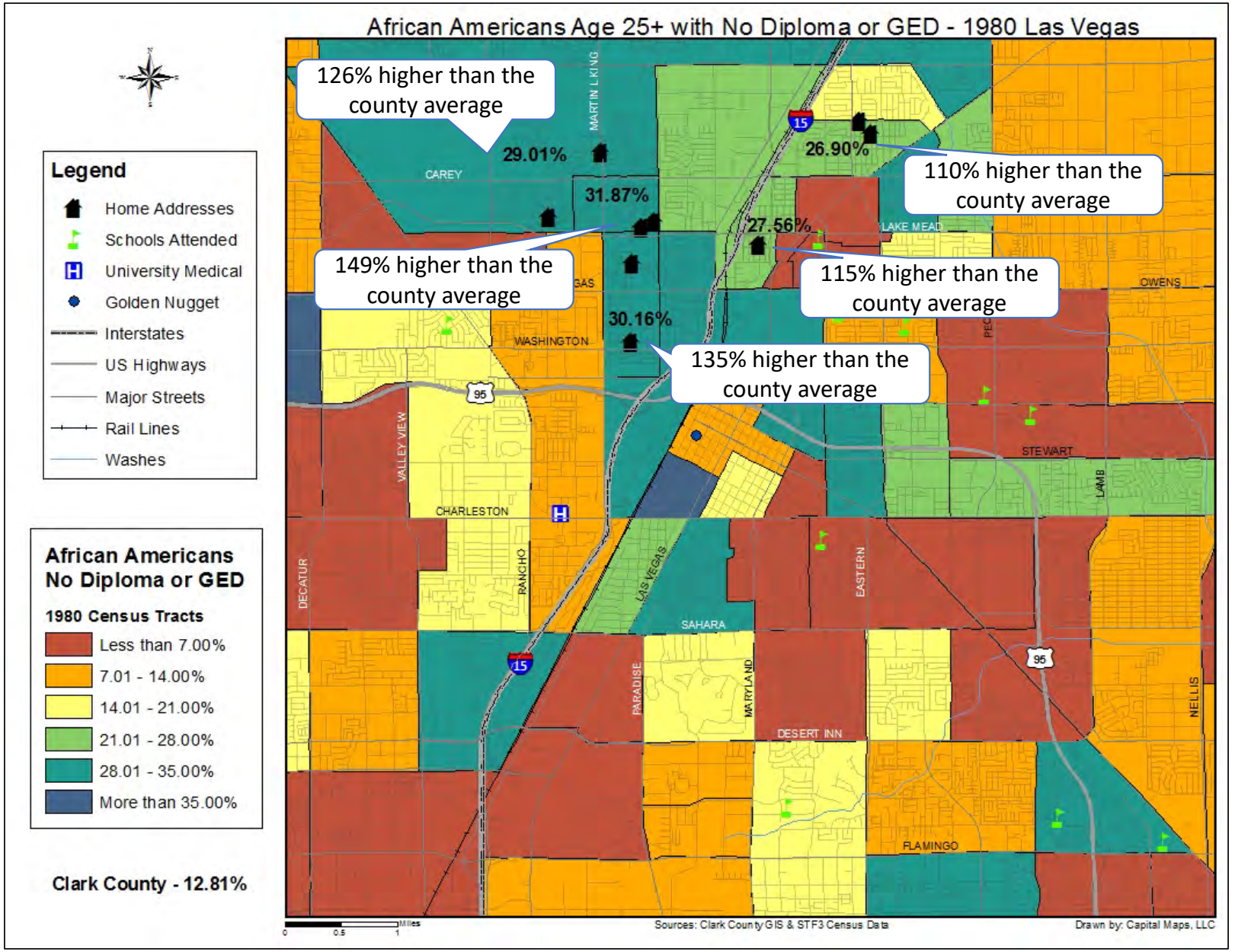
AA6614


African Americans 25+ with Less than a 9th Grade Education - 1980 Las Vegas
182% higher than the county average
23.17%
31.49%
283% higher than the county average
27.47%
234% higher than the county average
10.11%
23% higher than the county average
26.18%
218% higher than the county average
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans Less than 9th Grade
1980 Census Tracts
Less than 10.00%
10.01 - 20.00%
20.01 - 30.00%
30.01 - 40.00%
40.01 - 50.00%
More than 50.00%
Clark County - 8.22%
CAREY
MARTIN L KING
LAKE MEAD
OWENS
WASHINGTON
VALLEY VIEW
CHARLESTON
STEWART
LAMB
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

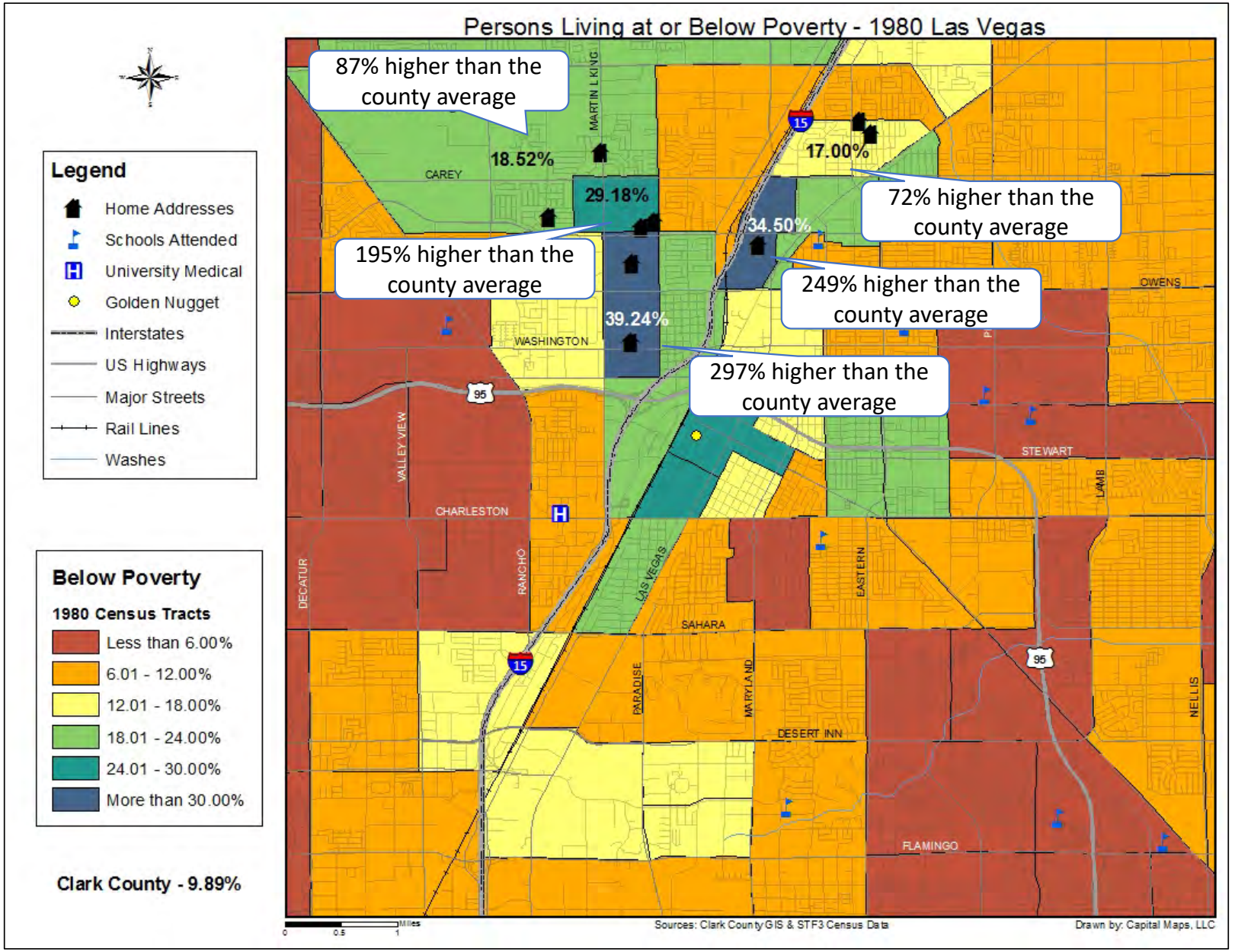
AA6615


Adults Age 25+ with No Diploma or GED - 1980 Las Vegas
54% higher than the county average
42% higher than the county average
82% higher than the county average
43% higher than the county average
78% higher than the county average
25.83%
30.51%
23.85%
24.01%
29.91%
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
No Diploma or GED
1980 Census Tracts
Less than 5.00%
5.01 - 10.00%
10.01 - 15.00%
15.01 - 20.00%
20.01 - 25.00%
More than 25.00%
Clark County - 16.79%
CAREY
MARTIN L KING
LAKE MEAD
GAS
OWENS
WASHINGTON
VALLEY VIEW
CHARLESTON
STEWART
LAMB
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

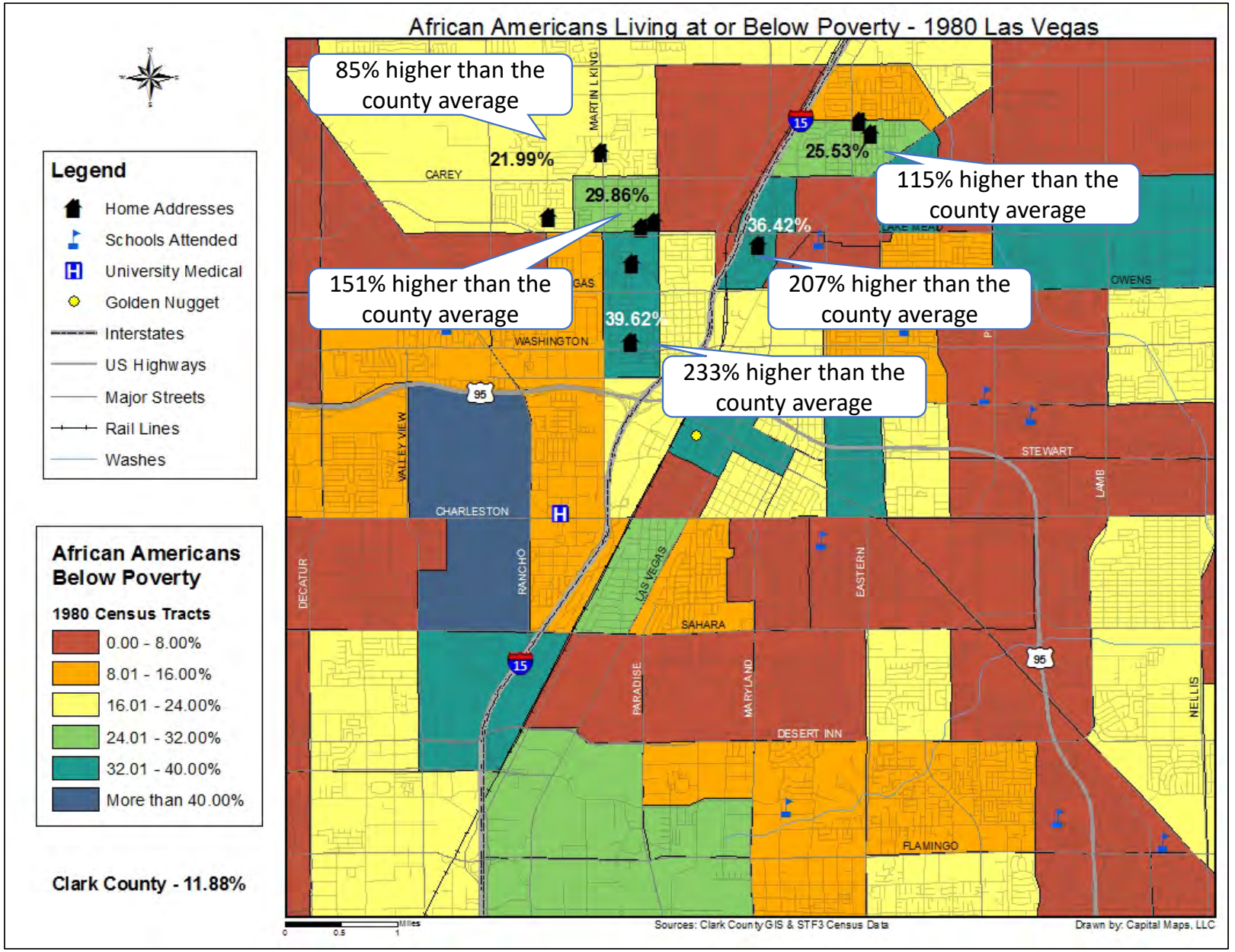
AA6616


African Americans Age 25+ with No Diploma or GED - 1980 Las Vegas
126% higher than the county average
29.01%
31.87%
149% higher than the county average
30.16%
135% higher than the county average
27.56%
115% higher than the county average
26.90%
110% higher than the county average
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans No Diploma or GED
1980 Census Tracts
Less than 7.00%
7.01 - 14.00%
14.01 - 21.00%
21.01 - 28.00%
28.01 - 35.00%
More than 35.00%
Clark County - 12.81%
CAREY
MARTIN L KING
WASHINGTON
LAKE MEAD
OWENS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

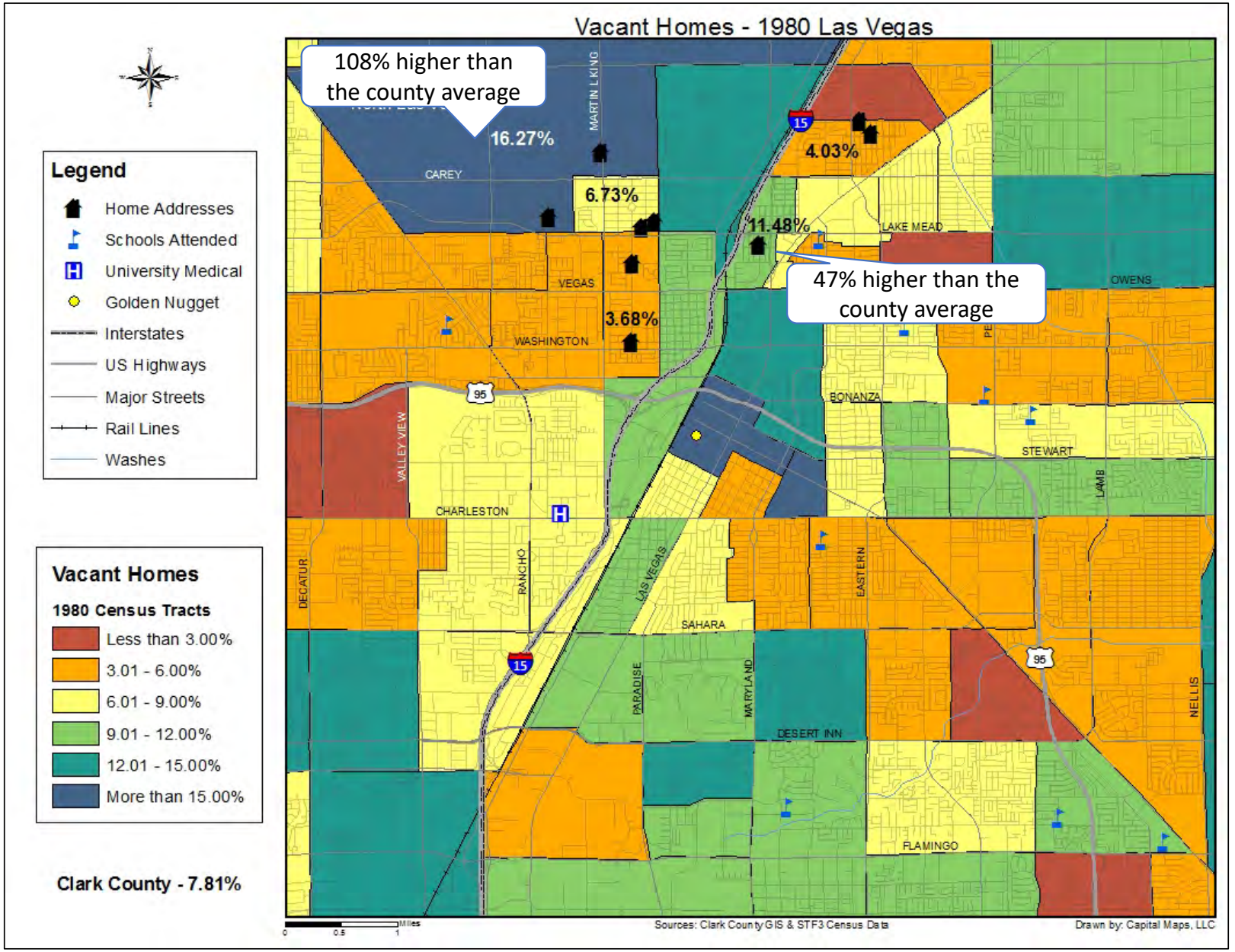
AA6617


Persons Living at or Below Poverty - 1980 Las Vegas
87% higher than the county average
18.52%
29.18%
17.00%
72% higher than the county average
34.50%
195% higher than the county average
249% higher than the county average
39.24%
297% higher than the county average
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Below Poverty
1980 Census Tracts
Less than 6.00%
6.01 - 12.00%
12.01 - 18.00%
18.01 - 24.00%
24.01 - 30.00%
More than 30.00%
Clark County - 9.89%
CAREY
MARTIN L KING
WASHINGTON
OWENS
STEWART
LAMB
CHARLESTON
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

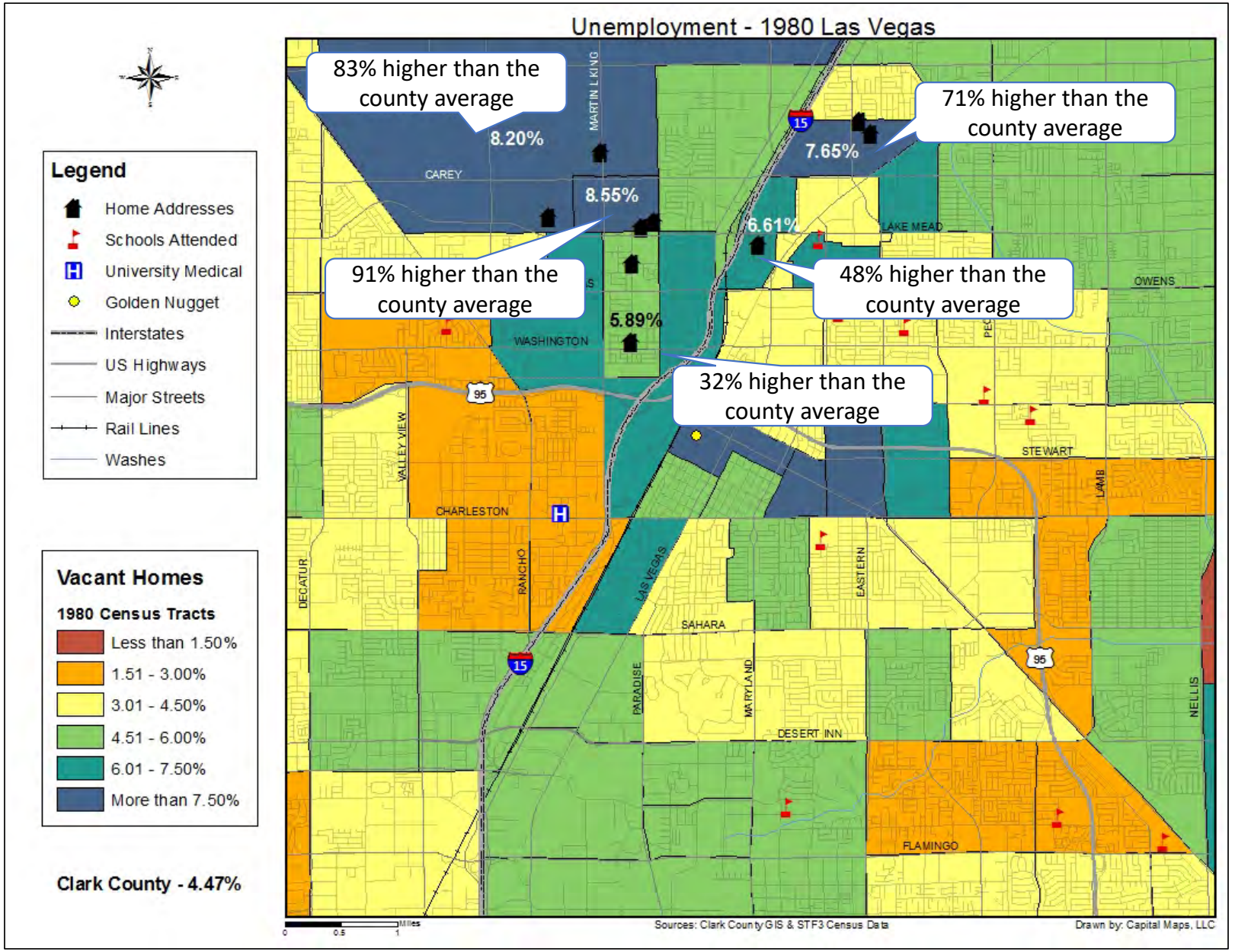
AA6618


African Americans Living at or Below Poverty - 1980 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans Below Poverty
1980 Census Tracts
0.00 - 8.00%
8.01 - 16.00%
16.01 - 24.00%
24.01 - 32.00%
32.01 - 40.00%
More than 40.00%
Clark County - 11.88%
85% higher than the county average
21.99%
29.86%
151% higher than the county average
39.62%
233% higher than the county average
36.42%
207% higher than the county average
25.53%
115% higher than the county average
CAREY
MARTIN L KING
GAS
WASHINGTON
OWENS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
RANCHO
DECATUR
LAS VEGAS
SAHARA
EASTERN
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

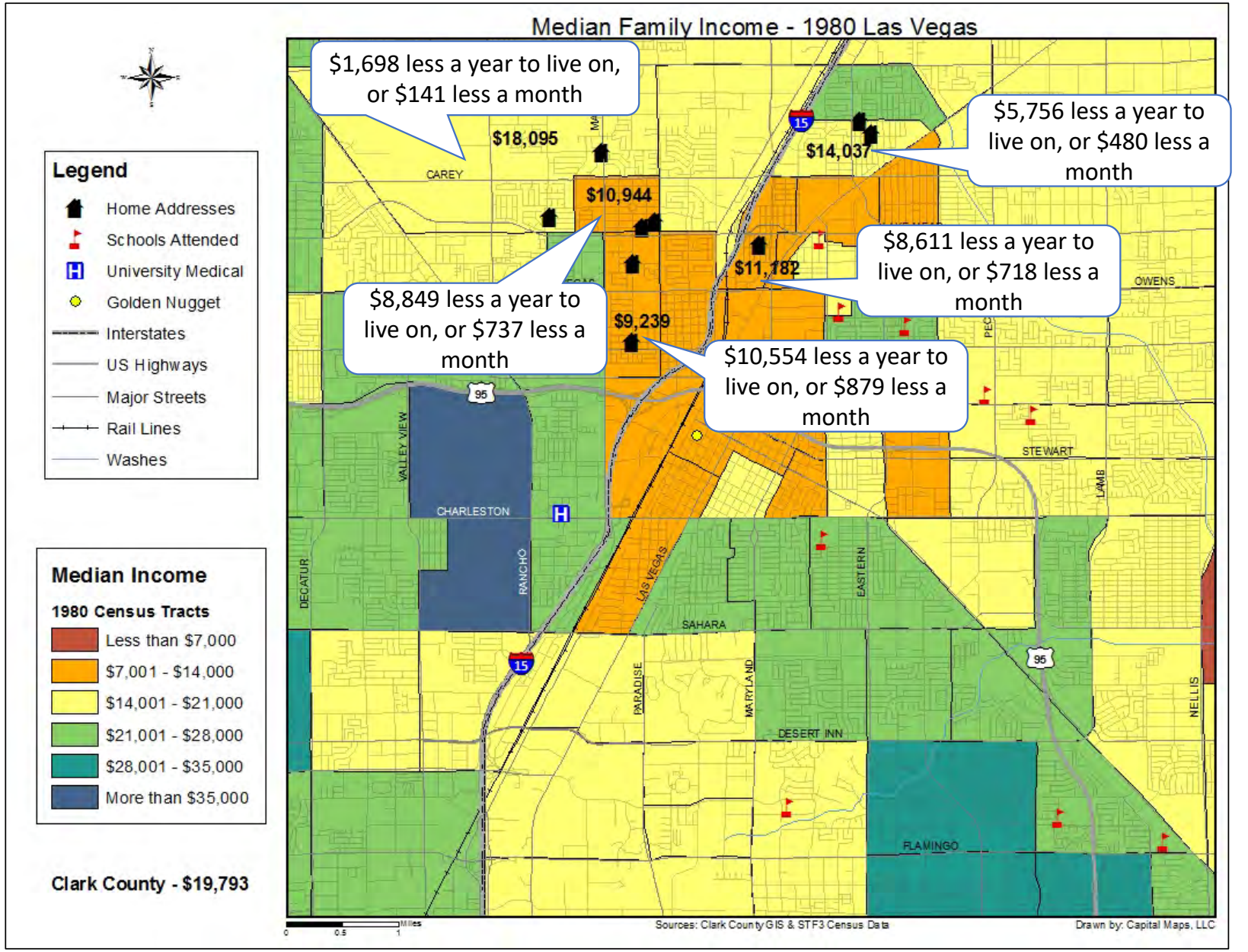
AA6619


Vacant Homes - 1980 Las Vegas
108% higher than the county average
47% higher than the county average
16.27%
6.73%
3.68%
11.48%
4.03%
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Vacant Homes
1980 Census Tracts
Less than 3.00%
3.01 - 6.00%
6.01 - 9.00%
9.01 - 12.00%
12.01 - 15.00%
More than 15.00%
Clark County - 7.81%
CAREY
VEGAS
WASHINGTON
LAKE MEAD
OWENS
BONANZA
STEWART
LAMB
NELLIS
CHARLESTON
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
FLAMINGO
MARTIN L KING
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

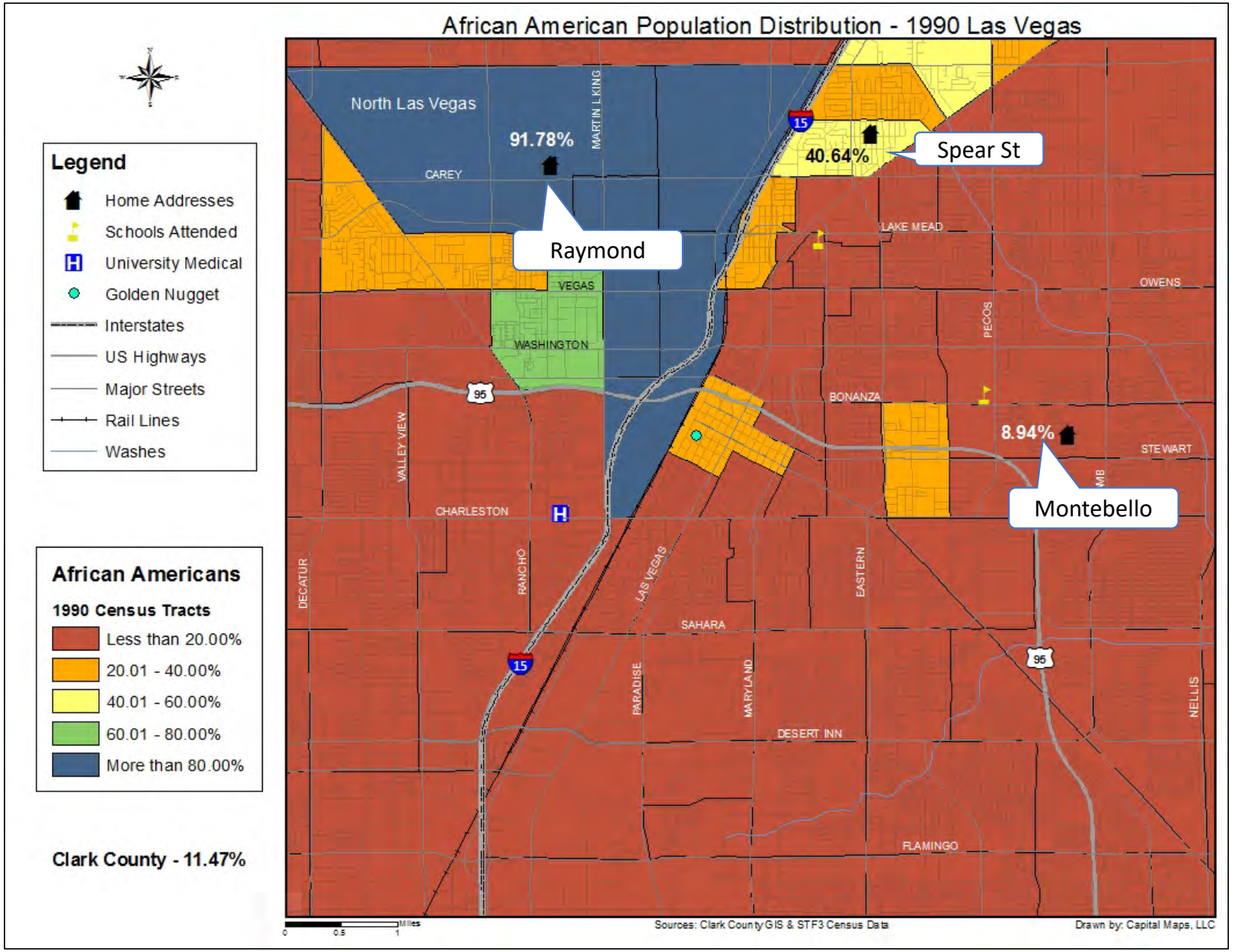
AA6620


Unemployment - 1980 Las Vegas
83% higher than the county average
71% higher than the county average
91% higher than the county average
48% higher than the county average
32% higher than the county average
8.20%
8.55%
7.65%
6.61%
5.89%
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Vacant Homes
1980 Census Tracts
Less than 1.50%
1.51 - 3.00%
3.01 - 4.50%
4.51 - 6.00%
6.01 - 7.50%
More than 7.50%
Clark County - 4.47%
CAREY
WASHINGTON
LAKE MEAD
OWENS
STEWART
CHARLESTON
SAHARA
DESERT INN
FLAMINGO
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
EASTERN
PARADISE
MARYLAND
NELLIS
LAMB
MARTIN L KING
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

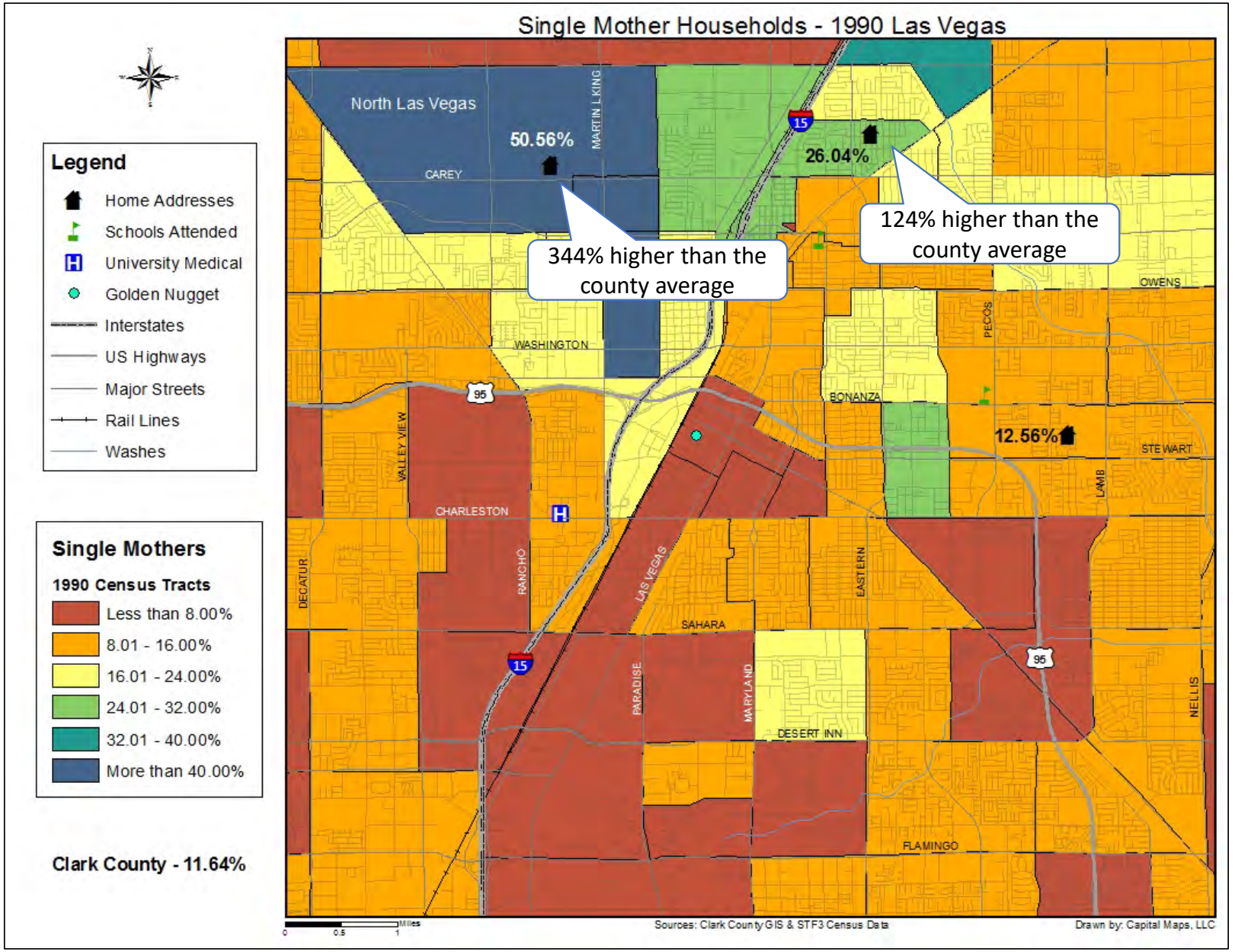
AA6621


Median Family Income - 1980 Las Vegas
$1,698 less a year to live on, or $141 less a month
$5,756 less a year to live on, or $480 less a month
$8,611 less a year to live on, or $718 less a month
$8,849 less a year to live on, or $737 less a month
$10,554 less a year to live on, or $879 less a month
$18,095
$14,037
$10,944
$11,782
$9,239
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Median Income
1980 Census Tracts
Less than $7,000
$7,001 - $14,000
$14,001 - $21,000
$21,001 - $28,000
$28,001 - $35,000
More than $35,000
Clark County - $19,793
CAREY
OWENS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
RANCHO
DECATUR
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

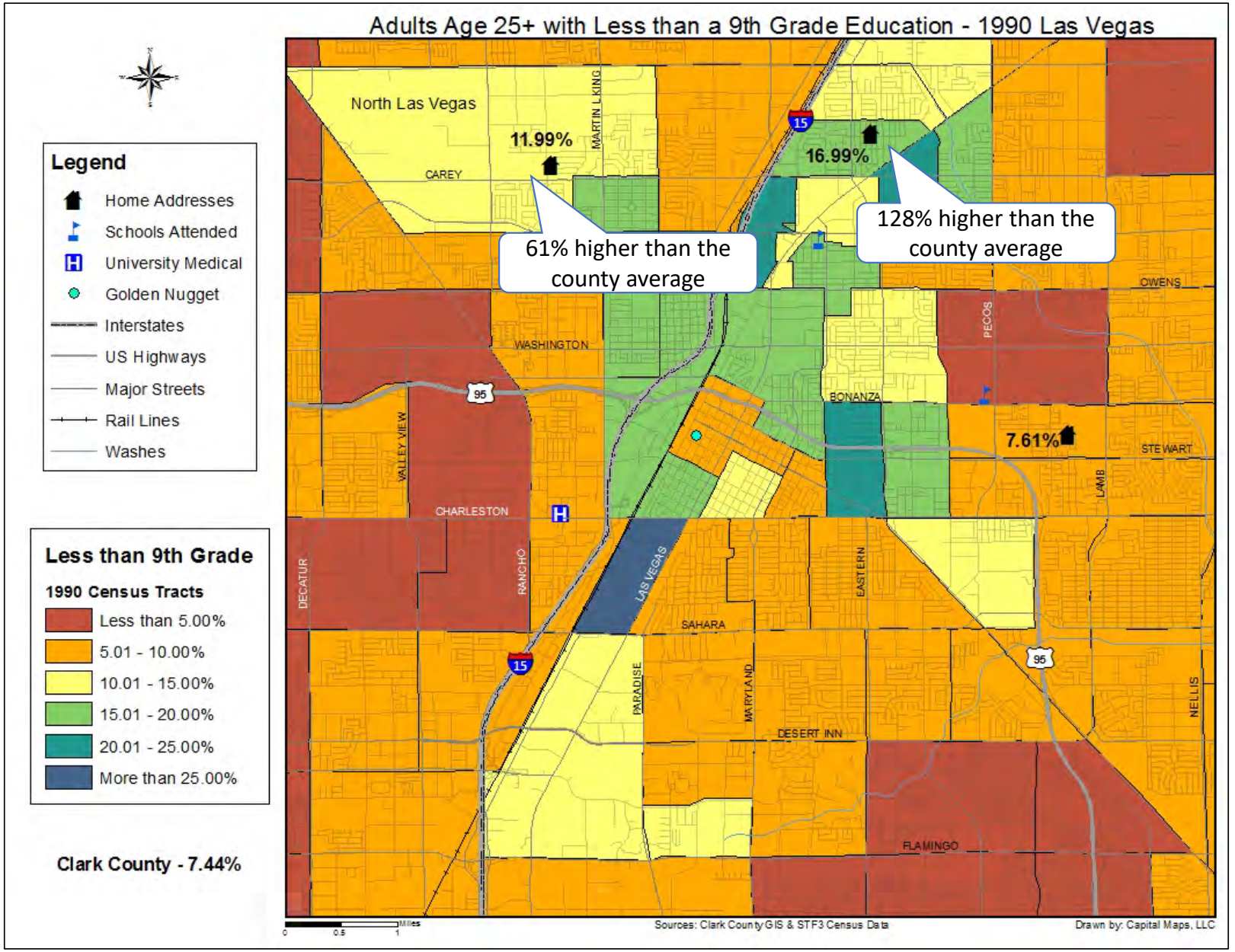
AA6622


African American Population Distribution - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans
1990 Census Tracts
Less than 20.00%
20.01 - 40.00%
40.01 - 60.00%
60.01 - 80.00%
More than 80.00%
Clark County - 11.47%
North Las Vegas
91.78%
Raymond
40.64%
Spear St
8.94%
Montebello
CAREY
MARTIN L KING
LAKE MEAD
OWENS
PECOS
VEGAS
WASHINGTON
BONANZA
STEWART
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
15
95
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

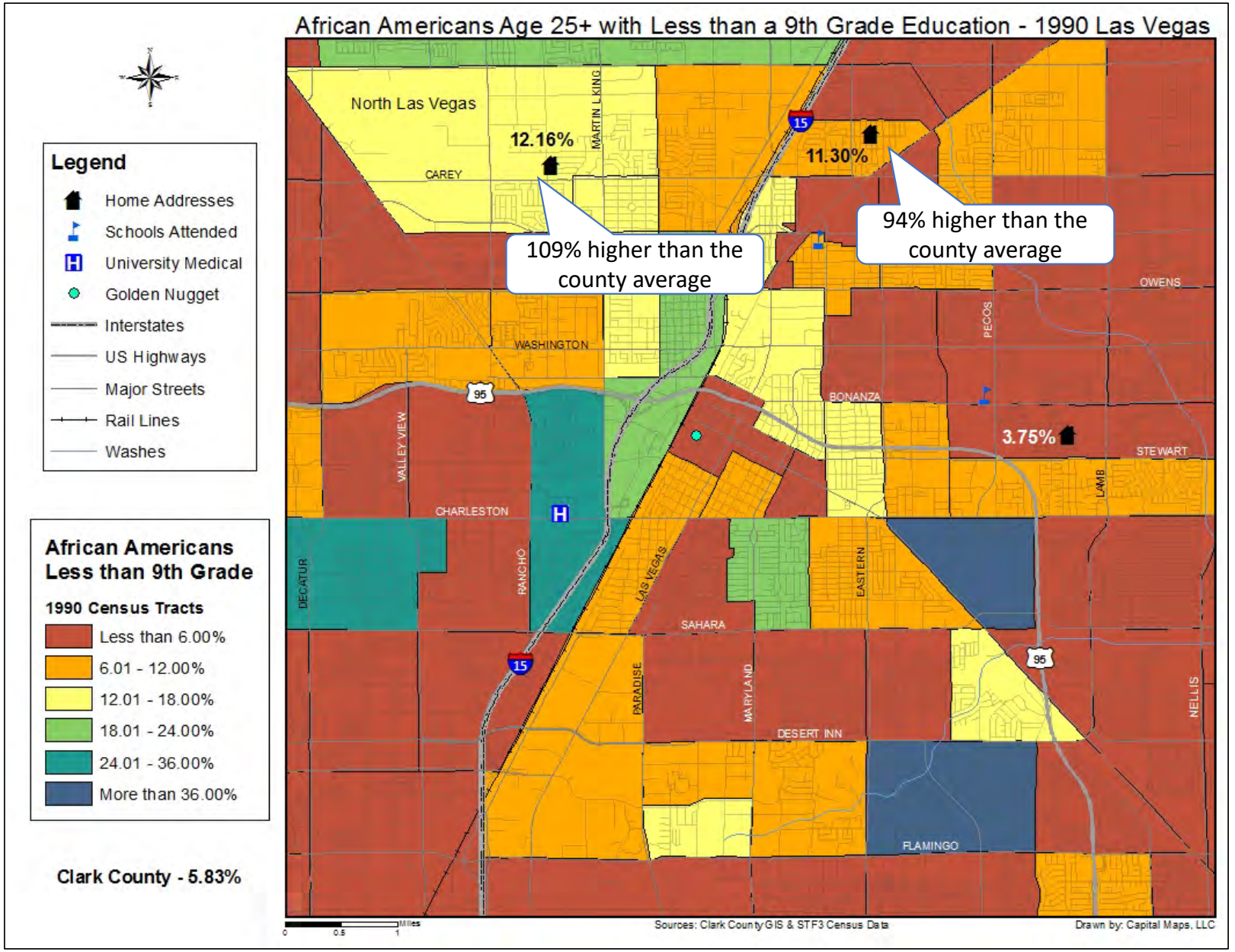
AA6623


Single Mother Households - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Single Mothers
1990 Census Tracts
Less than 8.00%
8.01 - 16.00%
16.01 - 24.00%
24.01 - 32.00%
32.01 - 40.00%
More than 40.00%
Clark County - 11.64%
North Las Vegas
50.56%
26.04%
12.56%
344% higher than the county average
124% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
BONANZA
OWENS
PECOS
STEWART
LAMB
NELLIS
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
FLAMINGO
15
95
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

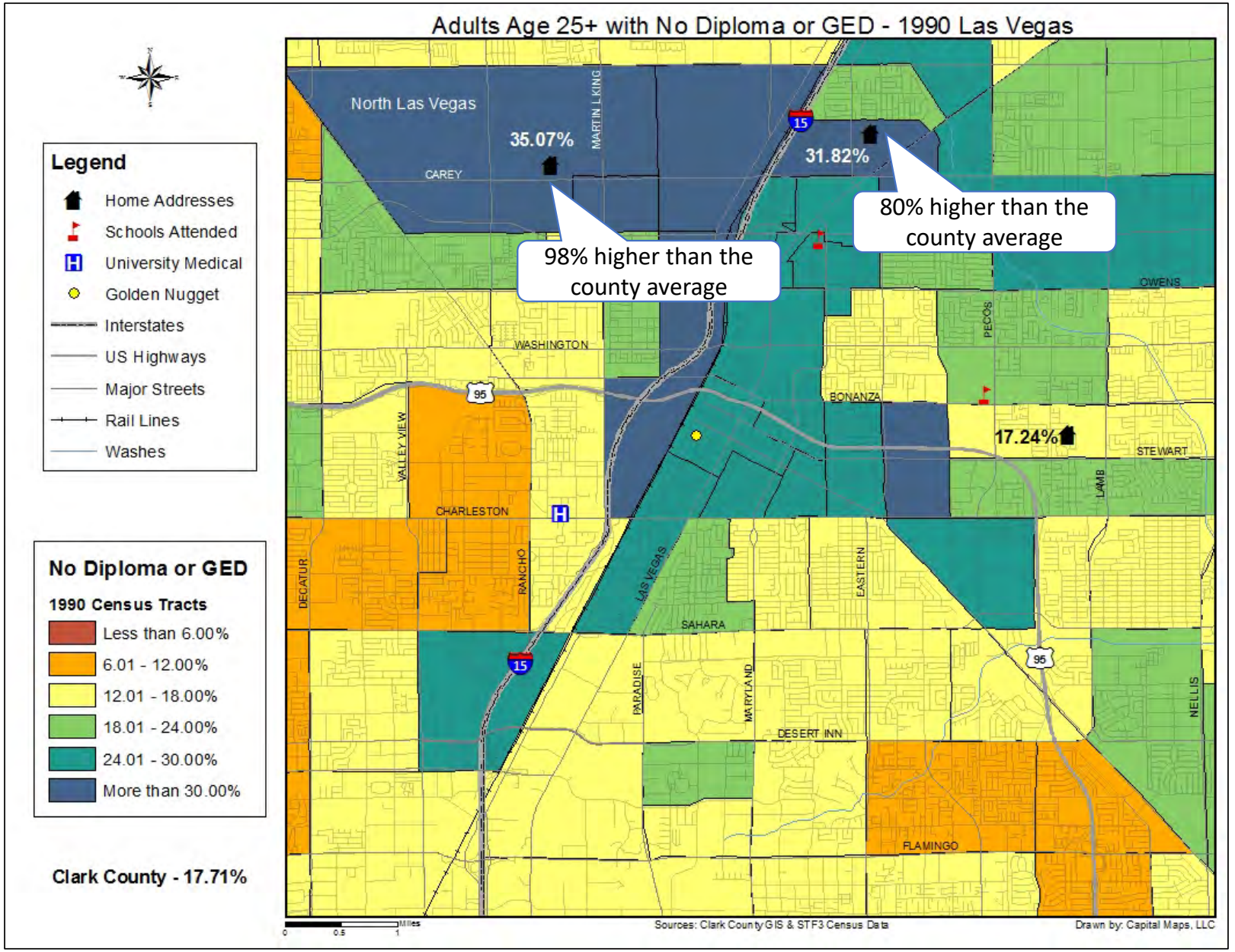
AA6624


Adults Age 25+ with Less than a 9th Grade Education - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Less than 9th Grade
1990 Census Tracts
Less than 5.00%
5.01 - 10.00%
10.01 - 15.00%
15.01 - 20.00%
20.01 - 25.00%
More than 25.00%
Clark County - 7.44%
North Las Vegas
11.99%
16.99%
7.61%
61% higher than the county average
128% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
SAHARA
PARADISE
MARYLAND
EASTERN
DESERT INN
FLAMINGO
BONANZA
PECOS
OWENS
LAMB
STEWART
NELLIS
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

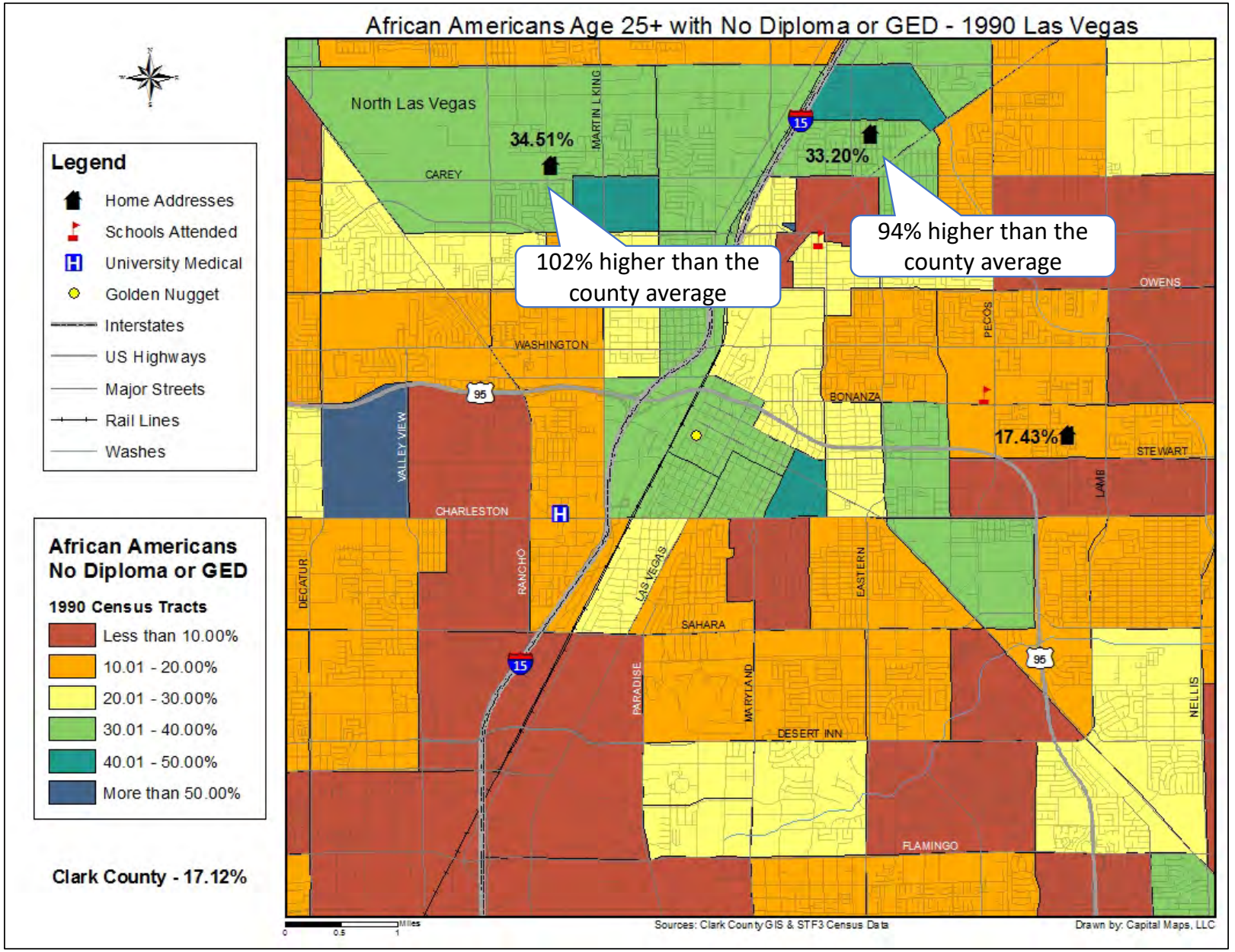
AA6625


African Americans Age 25+ with Less than a 9th Grade Education - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans Less than 9th Grade
1990 Census Tracts
Less than 6.00%
6.01 - 12.00%
12.01 - 18.00%
18.01 - 24.00%
24.01 - 36.00%
More than 36.00%
Clark County - 5.83%
North Las Vegas
12.16%
11.30%
3.75%
109% higher than the county average
94% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
VALLEY VIEW
CHARLESTON
RANCHO
DECATUR
LAS VEGAS
SAHARA
PARADISE
MARYLAND
DESERT INN
EASTERN
BONANZA
PECOS
OWENS
LAMB
STEWART
NELLIS
FLAMINGO
15
95
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

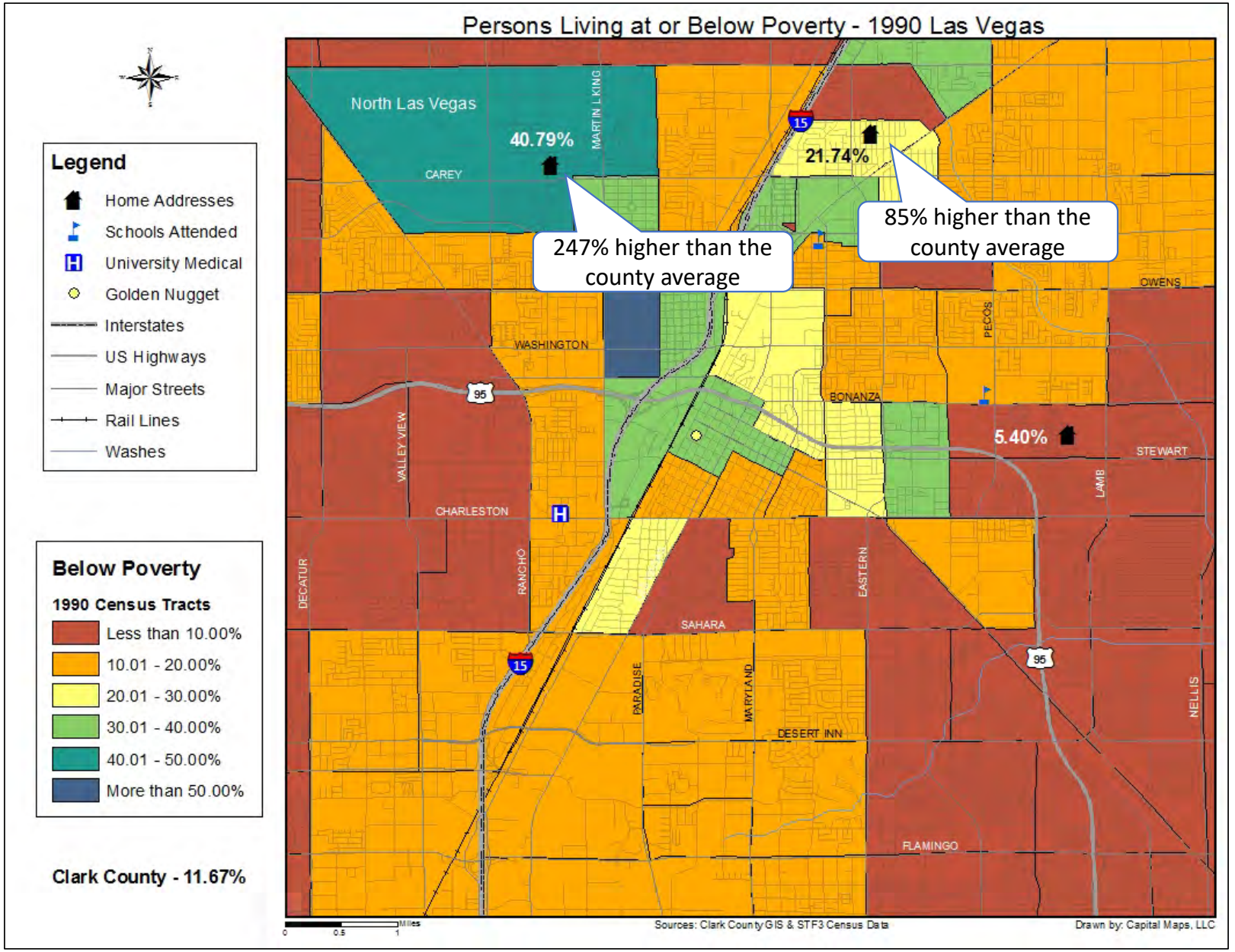
AA6626


Adults Age 25+ with No Diploma or GED - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
No Diploma or GED
1990 Census Tracts
Less than 6.00%
6.01 - 12.00%
12.01 - 18.00%
18.01 - 24.00%
24.01 - 30.00%
More than 30.00%
Clark County - 17.71%
North Las Vegas
35.07%
31.82%
17.24%
98% higher than the county average
80% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
SAHARA
PARADISE
MARYLAND
EASTERN
DESERT INN
FLAMINGO
BONANZA
PECOS
OWENS
STEWART
LAMB
NELLIS
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

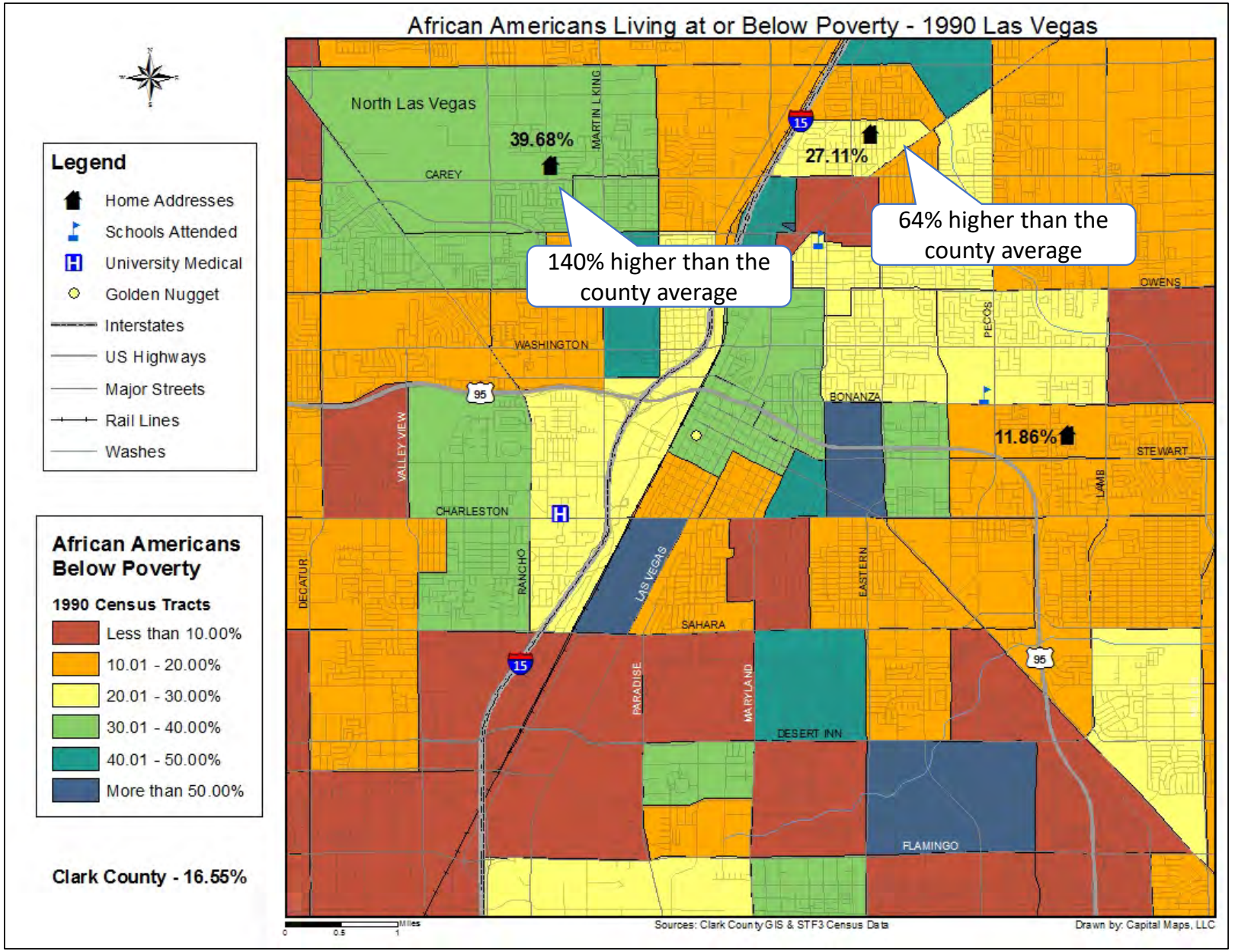
AA6627


African Americans Age 25+ with No Diploma or GED - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans
No Diploma or GED
1990 Census Tracts
Less than 10.00%
10.01 - 20.00%
20.01 - 30.00%
30.01 - 40.00%
40.01 - 50.00%
More than 50.00%
Clark County - 17.12%
North Las Vegas
34.51%
33.20%
17.43%
102% higher than the county average
94% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
BONANZA
OWENS
PECOS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
15
95
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

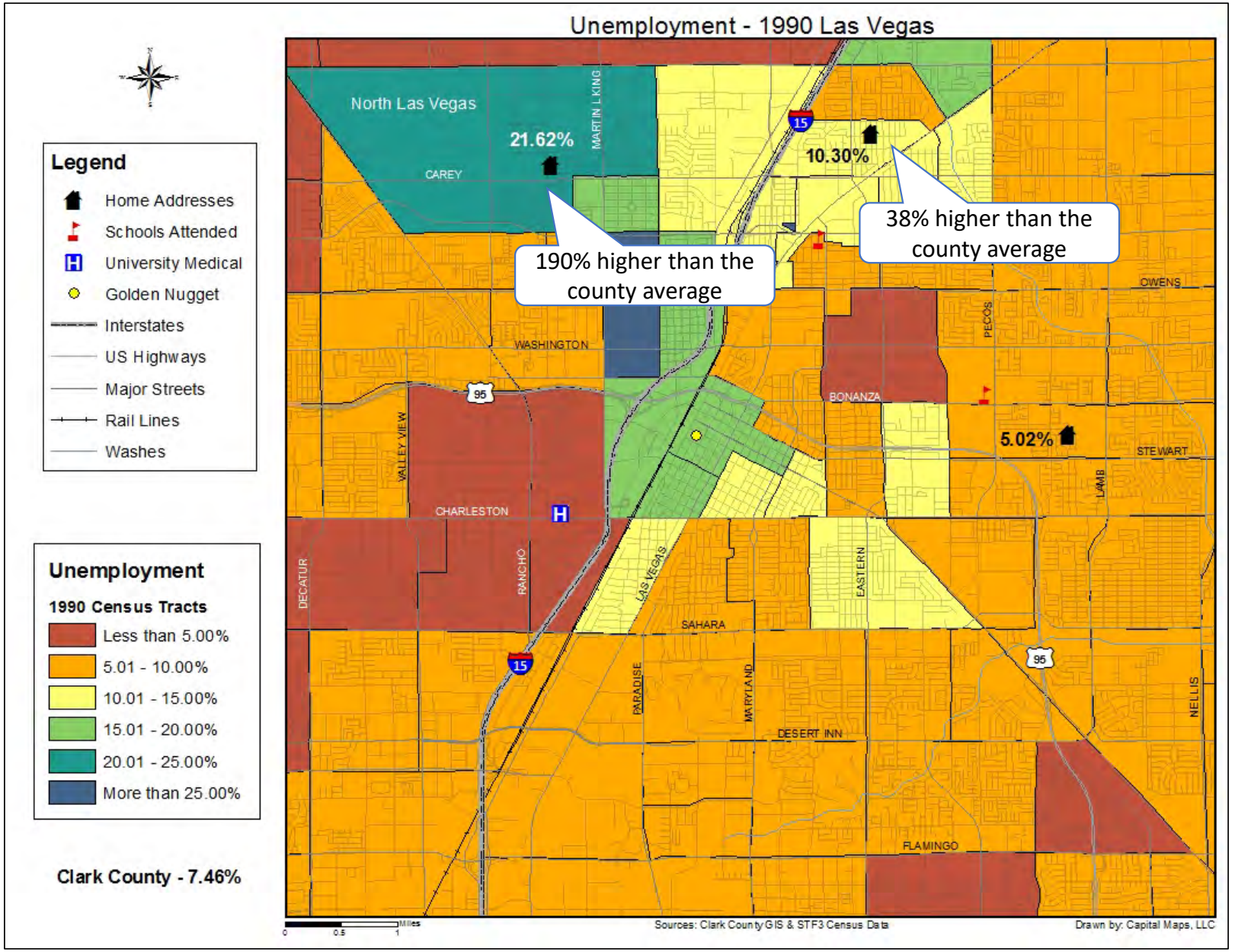
AA6628


Persons Living at or Below Poverty - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Below Poverty
1990 Census Tracts
Less than 10.00%
10.01 - 20.00%
20.01 - 30.00%
30.01 - 40.00%
40.01 - 50.00%
More than 50.00%
Clark County - 11.67%
North Las Vegas
CAREY
MARTIN L KING
40.79%
247% higher than the county average
21.74%
85% higher than the county average
OWENS
PECOS
WASHINGTON
BONANZA
5.40%
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

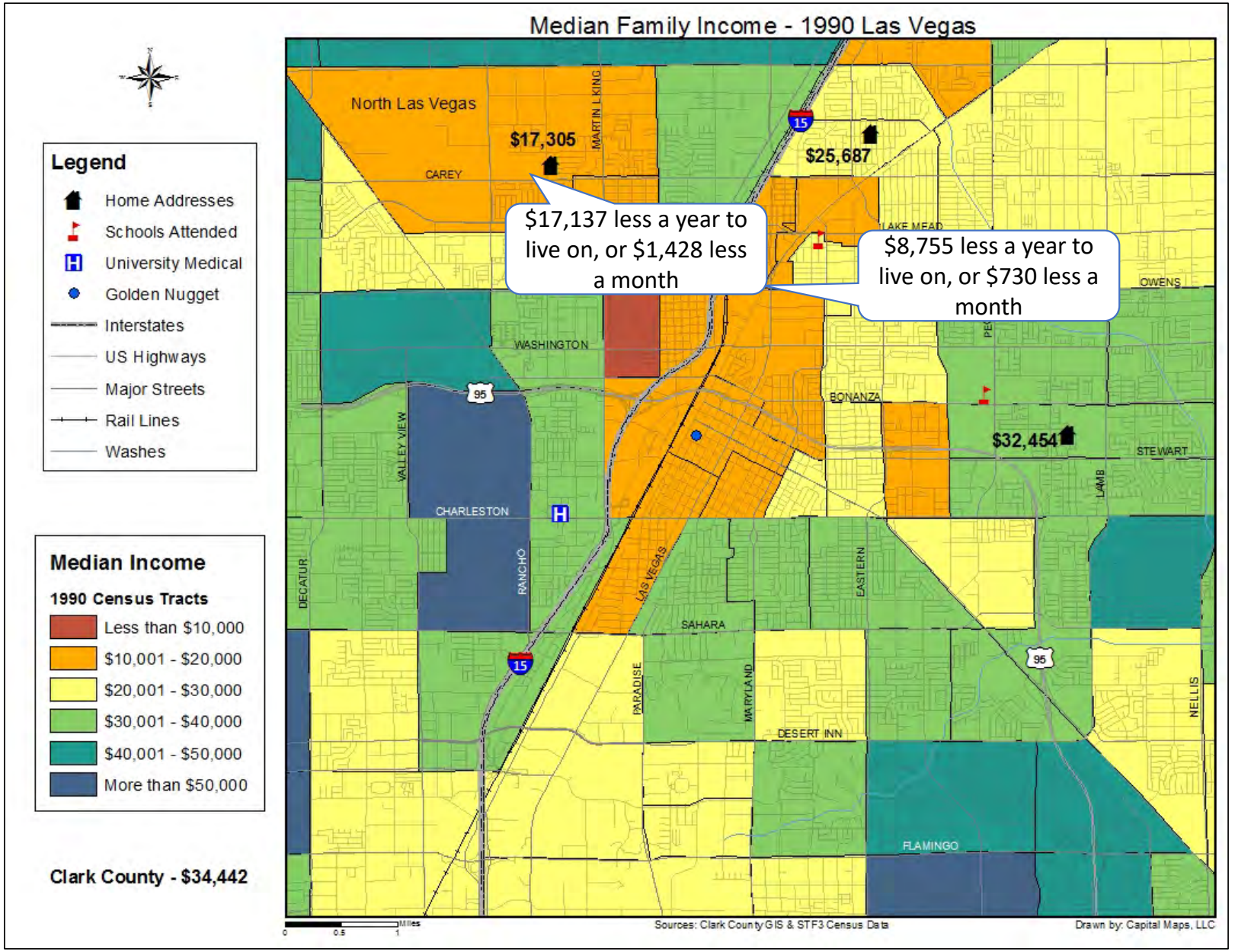
AA6629


African Americans Living at or Below Poverty - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
African Americans Below Poverty
1990 Census Tracts
Less than 10.00%
10.01 - 20.00%
20.01 - 30.00%
30.01 - 40.00%
40.01 - 50.00%
More than 50.00%
Clark County - 16.55%
North Las Vegas
39.68%
27.11%
11.86%
140% higher than the county average
64% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
BONANZA
OWENS
PECOS
STEWART
LAMB
VALLEY VIEW
CHARLESTON
RANCHO
DECATUR
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
FLAMINGO
15
95
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

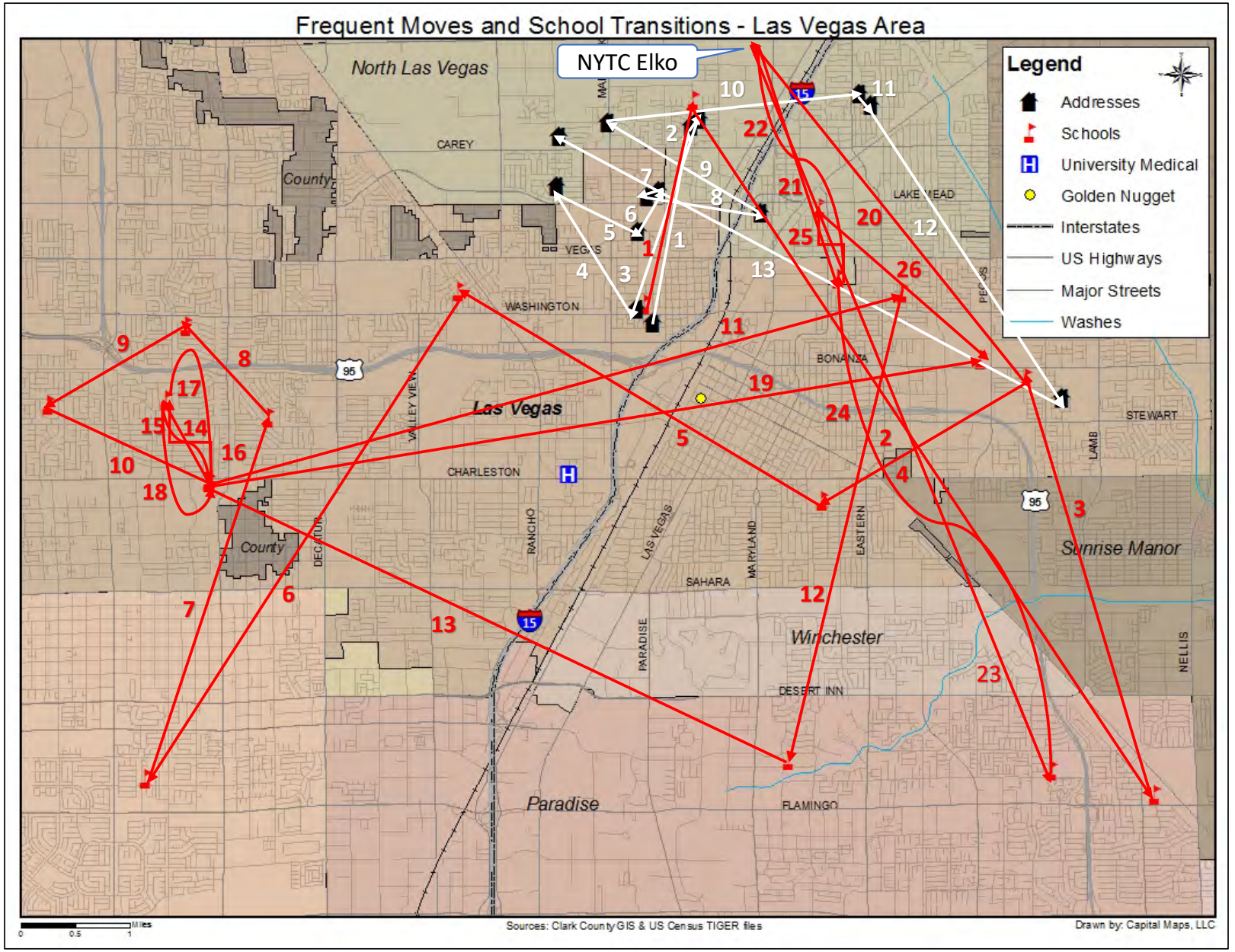
AA6630


Unemployment - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Unemployment
1990 Census Tracts
Less than 5.00%
5.01 - 10.00%
10.01 - 15.00%
15.01 - 20.00%
20.01 - 25.00%
More than 25.00%
Clark County - 7.46%
North Las Vegas
21.62%
10.30%
5.02%
190% higher than the county average
38% higher than the county average
CAREY
MARTIN L KING
WASHINGTON
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
SAHARA
PARADISE
MARYLAND
EASTERN
DESERT INN
FLAMINGO
BONANZA
PECOS
OWENS
STEWART
LAMB
NELLIS
95
15
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

AA6631


Median Family Income - 1990 Las Vegas
Legend
Home Addresses
Schools Attended
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Rail Lines
Washes
Median Income
1990 Census Tracts
Less than $10,000
$10,001 - $20,000
$20,001 - $30,000
$30,001 - $40,000
$40,001 - $50,000
More than $50,000
Clark County - $34,442
North Las Vegas
$17,305
$25,687
$32,454
$17,137 less a year to live on, or $1,428 less a month
$8,755 less a year to live on, or $730 less a month
CAREY
MARTIN L KING
LAKE MEAD
OWENS
WASHINGTON
BONANZA
STEWART
LAMB
VALLEY VIEW
CHARLESTON
DECATUR
RANCHO
LAS VEGAS
EASTERN
SAHARA
PARADISE
MARYLAND
DESERT INN
NELLIS
FLAMINGO
95
15
Miles
0
0.5
1
Sources: Clark County GIS & STF3 Census Data
Drawn by: Capital Maps, LLC

AA6632


Frequent Moves and School Transitions - Las Vegas Area
NYTC Elko
Legend
Addresses
Schools
University Medical
Golden Nugget
Interstates
US Highways
Major Streets
Washes
North Las Vegas
Las Vegas
Paradise
Winchester
Sunrise Manor
CAREY
WASHINGTON
CHARLESTON
BONANZA
SAHARA
FLAMINGO
DESERT INN
STEWART
LAKE MEAD
VALLEY VIEW
DECATUR
RANCHO
LAS VEGAS
MARYLAND
EASTERN
PARADISE
LAMB
NELLIS
Sources: Clark County GIS & US Census TIGER files
Drawn by: Capital Maps, LLC

AA6633

EXHIBIT 182

EXHIBIT 182

DECLARATION OF DAVID SCHIECK

I, David Schieck, hereby declare as follows:

1. I am currently the Special Public Defender for Clark County, Nevada. In 1996-98, I was in private practice. I was appointed to represent Gregory Neal Leonard on January 10, 1996. I represented Mr. Leonard during the pre-trial, trial, and sentencing phases of his trial in the first Tony Antee homicide trial in May of 1997, the Thomas Williams homicide trial in August of 1997, the second Antee trial in December of 1997, and the third Antee trial in December of 1998.

2. The Nevada State Public Defender's Office was appointed as co-counsel in Mr. Leonard's cases. Peter LaPorta was the attorney from the State Public Defender who represented Mr. Leonard. When the State Public Defender's Office was formed, the pay scale for State employees was not adequate to hire attorneys that were qualified under Nevada Supreme Court Rule 250. Consequently, the first attorneys hired by the office to do capital cases, including Mr. LaPorta, were not qualified under Rule 250. I was appointed by the court as primary counsel because I was qualified under Rule 250. This was the arrangement that existed in the capital cases of Gregory Leonard, Donald Sherman, and William Castillo.

3. I have reviewed the following documents which were represented to me as originating from the Clark County Justice Court:

   a. Bench Memoranda written by Judge Oesterle, State v. Jesus Cintron, Justice Court Case No. 96F08808X, dated April 30, 1997 (reflecting continuance obtained by Peggy Leen for Cintron to pay off his court fines), September 3, 1997 (reflecting

Cintron's violation of probation by committing another offense), September 3, 1997 (reflecting intention of Ms. Leen to make representations to the court regarding Cintron's commission of another offense while on probation), September 10, 1997 (reflecting Judge Oesterle's intention to revoke Cintron's probation but for the representations of Ms. Leen), October 23, 1997 (noting attorney for district attorney making representations on behalf of Ms. Leen and reflecting Judge Oesterle's decision to reduce the amount of bench warrant against Cintron to amount of his fine), and February 9, 1998 (reflecting continuance obtained by Ms. Leen for Cintron to pay off his court fines);

b. Justice Court Referral, State v. Jesus Cintron, Justice Court Case No. 96F08808X, dated January 29, 1997, with attached sticky note reading "Peggy Leen from the DA's office wants to speak to the Judge off the record";

c. Notice of Motion and Motion to Recall Bench Warrant and Continue for Payment, State v. Jesus Cintron, Justice Court Case No. 96F08808X, dated January 26, 1998 (motion to quash bench warrant and continue case for payment of court fine filed by Peggy Leen);

d. Docket Sheet, State v. Jesus Cintron, Justice Court Case No. 96F08808X (showing that Peggy Leen entered appearance as counsel of record for the state in the prosecution of Cintron on April 30, 1997, and September 10, 1997);

e. CCDC Booking Document, State v. Jesus Cintron, Justice Court Case No. 97F10223X, dated July 17, 1997 (noting OR release for Jesus Cintron);

f. Reporter's Transcript of Status Check, State v. Jesus Cintron, Justice Court Case

No. 97F10223X, dated December 10, 1997 (noting that Cintron had not completed court ordered conditions or paid off his fine, reflecting imposition of ninety day suspended sentence);

g. Reporter's Transcript of Status Check, State v. Jesus Cintron, Justice Court Case No. 97F10223X, dated March 11, 1998 (noting that Cintron had not completed any of his court ordered conditions and reflecting oral issuance of bench warrant for Cintron's arrest);

h. Justice Court Arraignment Work Sheet, State v. Jesus Cintron, Justice Court Case No. 97F10223X, dated March 11, 1998 (reflecting close of case despite Cintron's failure to comply with any court ordered conditions and disappearance of ninety day suspended sentence for contempt of court);

i. Justice Court Printout, State v. Jesus Cintron, Justice Court Case No. F97000381X (reflecting screening by district attorney's office for criminal forfeiture charge, dated August 25, 1997);

j. Bench Warrant, State v. Phyllis Fineberg, Justice Court Case No. 96M18079X (reflecting existence of active bench warrant against Phyllis Fineberg during her trial testimony in the Thomas Williams case).

4. None of the documents above were supplied to the defense, and none of the information contained in those documents was disclosed by the State. I was not made aware of anything that Peggy Leen or other representatives from the district attorney's office had done on Cintron's behalf apart from the testimony that Ms. Leen elicited from Cintron on the witness stand. If information from these documents would have been disclosed, I

would have used it during the litigation of the state's motion in limine to preclude the defense from questioning Jesus Cintron about benefits he received by the state in exchange for his testimony. I did not have a strategic justification for not obtaining the justice court records for Jesus Cintron and Phyllis Fineberg. I relied upon the open file representations of the State, the testimony of Jesus Cintron as elicited by Ms. Leen, the representation of Ms. Leen on the record, as well as the State's purported compliance with the discovery orders of the trial court in the Antee and Willliams cases issued in response to our motions for disclosure of benefits anticipated or received by the state's witnesses.

5. I have reviewed a copy of a declaration signed by Deborah Shively wherein she states that she was approached while in jail by a representative for the Clark County District Attorney's Office who offered her benefits in the form of reduction or dismissal of criminal charges against her if she would testify for the state. I did not receive any discovery of information from the State regarding the offer of benefits to Ms. Shively to testify against Mr. Leonard.

6. I have reviewed the following documents which were represented to me as originating from the files of the Clark County District Attorney's Office:

   a. Page Three of LVMPD Voluntary Statement of Phyllis Fineberg, dated January 4, 1995 (noting that Fineberg could not identify two of the pawned rings as belonging to Thomas Williams);

   b. LVMPD Voluntary Statement of David Donahue, dated November 29, 1994 (corroborating fact that Phyllis Fineberg used Thomas Williams' car to engage in

acts of prostitution on the night of Williams' death);

c. LVMPD Statement of Luis Alvarez, dated November 26, 1994 (reflecting fight between Phyllis Fineberg and Thomas Williams);

d. LVMPD Voluntary Statement of Lynne Spencer, dated November 29, 1994.

7. The above documents were not supplied to the defense by the State. I relied upon the State's open file representations to include all witness interviews relevant to the case. If this evidence had been disclosed, I would have made a record about it during the litigation of the state's motion in limine to preclude the defense from eliciting evidence of Phyllis Fineberg's prostitution on the evening of Thomas Williams' death.

8. The arrangement between myself and the State Public Defender's Office in both cases was that they would handle the investigative tasks because they had a full time investigator, Jerome Dyer, assigned to the case. It was also my understanding that the State Public Defender's Office would handle any expert witnesses. The case files were also primarily maintained by the State Public Defender's Office.

9. I authored memoranda in Mr. Leonard's case which I faxed to the State Public Defender's Office to document the lack of investigation before each of the trials. It was often difficult for me to get in contact with Mr. LaPorta to talk about the case during the pre-trial period. At the point that I realized that investigative tasks were not being completed by the office, I began sending out faxed memos to the State Public Defender to document the lack of progress on investigative tasks. I hoped that the faxes would spur the office to complete those investigative tasks. I have reviewed those memos and I believe that they accurately reflect my concerns at the time regarding the progress of the investigation.

10. By the start of the Thomas Williams trial in August of 1997, very little investigative work had been completed by the State Public Defender's Office. As reflected in my memos, I do not believe that the investigator, Jerome Dyer, actually located or interviewed any mitigation witnesses before trial. Mr. Dyer appeared to be to be uninterested in performing investigative tasks on Mr. Leonard's case. Mr. Dyer ultimately took a vacation to Australia just before the beginning and during the Thomas Williams trial and did not provide us with any assistance. I found this out on the day that the trial started when another investigator, Maxine Miller, who had not done any previous work on the case, came into the court room to ask what needed to be done. Due to the loss of an investigator directly before trial, crucial witnesses for the defense, including Jerry Leonard and Rose Lewis, were never subpoenaed and did not show up for trial. I did not otherwise have a strategic justification for not subpoenaing crucial defense witnesses for trial.

11. I have reviewed investigative reports that were generated by the Clark County Public Defender's Office regarding their interviews with mitigation witnesses before they withdrew from Mr. Leonard's case. I did not review these investigative reports before trial because the Clark County Public Defender had a pattern and practice of not disclosing investigative reports after conflicting off of a case. I did not have a strategic justification for not obtaining discovery of investigative reports from the Clark County Public Defender by informal or formal means.

12. I have reviewed the declaration of Wendy Saxon, Ph.D, a clinical psychologist that was retained in Mr. Leonard's case to provide assistance in the mitigation investigation and

during jury selection. I believe that Dr. Saxon's statements about the lack of a mitigation investigation before the Thomas Williams trial are accurate. It was Mr. LaPorta that was assigned to provide background materials relating to mitigation issues to Dr. Saxon. However, Mr. LaPorta apparently did not supply Dr. Saxon with Mr. Leonard's medical, school, and military records. There was no strategic justification for not providing Dr. Saxon with relevant mitigation records.

13. Dr. Saxon was not ultimately used for the third trial which was the second Antee trial, the first having ended in a mis-trial. I believe that the third trial had to be continued and that there was not any money left for her, and the trial judge would not approve additional money for her to be at the December 1998 trial.

14. I have reviewed a summary of a social history for Mr. Leonard that was created by the Federal Public Defender's Office and a proposed jury instruction listing the mitigating circumstances that could have been investigated and presented at the penalty phase of Mr. Leonard's trials. The social history includes information from friends and family members relating to Mr. Leonard's childhood and family background as well as information about the positive aspects of his character. I did not have a strategic justification for not investigating and presenting this information to the jury at the penalty phase of Mr. Leonard's trials. As explained above, I was relying upon the State Public Defender's Office to do mitigation investigation because their office had a full time investigator specifically assigned to the case.

15. Mr. LaPorta was responsible for working with the mitigation expert in Mr. Leonard's case. I have reviewed the language in Mr. LaPorta's retention letter to Louis Etcoff,

Ph.D, and it appears that the interrogatories posed to Dr. Etcoff were not calculated to lead to the development of mitigation evidence. I believe that the retention letter was a form letter that had previously been used by the office. There was also no discussion between Mr. LaPorta and myself regarding the testing battery that should be performed by Dr. Etcoff. Dr. Etcoff was left on his own to decide what testing to perform, and he ultimately administered personality tests, including the MMPI and the MCMI. In my experience, the personality tests given to Mr. Leonard were not the type of testing that usually leads to the development of viable mitigation evidence. In Mr. Leonard's case, Dr. Etcoff's personality testing did not produce viable mitigation evidence.

16. There was also no discussion between Mr. LaPorta and myself regarding the background materials to provide to Dr. Etcoff. Apparently, Dr. Etcoff and Dr. Saxon were both provided with the police reports on the case, the witness statements, and the preliminary hearing testimony. There was no strategic justification for not providing Drs. Etcoff and Saxon with available medical, military, and criminal history records pertaining to Mr. Leonard as well as information from collateral reporting sources regarding his childhood and family background.

17. Mr. LaPorta presented the testimony of Richard Hall, Ph.D, a clinical psychologist who provided a violence risk assessment of Mr. Leonard at the penalty phase of the Thomas Williams trial. I do not recall discussing the possibility of having Dr. Hall or another expert in risk assessment testify in the penalty phase of the third Antee trial. There was no strategic justification for not investigating and presenting evidence that Mr. Leonard would make a positive adjustment in a structured setting. I have also reviewed the

statement of a correctional officer at the Clark County Detention Center which was represented to me as originating from the trial file. There was no tactical reason why that officer could not have testified about Mr. Leonard's positive adjustment in a structured setting, and his information could also have been provided to an expert in risk assessment for the purposes of a diagnoses.

18. I believe that the State obtained a copy of Dr. Etcoff's report even though he did not testify because Judge Bonaventure ordered that it be disclosed. Discovery was ordered because the state of the law regarding discovery was in flux at the time. I did not have a strategic justification for not raising an objection on the record to the judge's discovery order or for moving for a protective order to prevent the State from cross-examining Dr. Hall with Dr. Etcoff's report at the penalty hearing.

19. At the third Antee trial, Mr. Leonard represented to us that he did not want us to call the six mitigation witnesses that we were prepared to testify in the penalty phase. The basis for Mr. Leonard's purported waiver was that he did not want to put his family through the rigor of being subject to cross-examination by the State. We had also been unsuccessful in getting a verdict of less than death from the jury in the Thomas Williams case with the mitigation evidence that was presented at that penalty hearing.

20. In response to Mr. Leonard's concerns, the State offered to forego cross-examination of the six mitigation witnesses thereby removing the basis for Mr. Leonard's waiver. The trial court then asked the witnesses whether they would care to testify and treated their silence as a "no". I do not believe that Mr. Leonard's purported waiver of mitigation evidence was knowing and intelligent because he was not personally canvassed about

whether he still wished to waive the presentation of mitigation evidence after the State agreed not to cross-examine the witnesses. I did not have a strategic justification for not asking the trial court for a one day recess so that Mr. Leonard could make a knowing and intelligent decision about whether the mitigation witnesses should testify given the State's offer not to cross-examine them.

21. Assuming that Mr. Leonard validly waived the presentation of the six mitigation witnesses, his purported waiver was no broader in scope. Mr. Leonard did not communicate with us that he did not want us to present any other type of mitigation evidence at the penalty hearing. Mr. Leonard never attempted to impose any limitations on our mitigation investigation before trial. Therefore, assuming that Mr. Leonard's waiver was valid, it would not have encompassed the investigation and creation of the social history that I reviewed or the presentation of mitigation evidence through an expert(s) at the penalty hearing.

22. I represented to the trial court that the defense made a strategic decision not to offer a closing argument in the penalty phase of the third Antee trial because prosecutor Peggy Leen had given a relatively calm closing argument, and we did not want to open the door to provide her with the opportunity to give a rebuttal argument. I still stand by that strategic decision. However, if I would have put on all of the mitigating evidence that I reviewed at the Federal Public Defender's Office, I would have chosen to give a closing argument despite the possibility of a powerful rebuttal argument by the State.

23. It was represented to me that a notice of additional aggravating circumstances was filed by the State on the first day of trial in the third Antee trial alleging the prior murder

statutory aggravating circumstance from Mr. Leonard's conviction of the Thomas Williams homicide. I have reviewed a copy of former Nevada Supreme Court Rule 250(II)(A)(3), which requires that the notice of intent alleging additional aggravating circumstances be filed not less than fifteen days before the beginning of trial. I did not have a strategic justification for not raising a motion to strike the state's notice of additional aggravating circumstances as untimely filed. I believe that such a motion could have been successful because the State would not have been able to demonstrate good cause for its failure to file the notice for the year and a half between the conclusion of the Thomas Williams trial and the start of the third Antee trial.

24. I have reviewed a type written list of assignments to complete which discusses the need to file a motion to suppress the body of Tony Antee as obtained by the police during an illegal search of Mr. Leonard's apartment. This document appears to be in the type face that I used so I believe that I was the author of the list. I do not have any other independent recollection of considering a suppression motion, and I did not discuss the possibility of raising one with Mr. LaPorta. I do not recall having a strategic justification for not filing a motion to suppress the evidence obtained in Mr. Leonard's apartment after his arrest outside of the apartment.

25. I have reviewed portions of the trial transcript where the state elicited evidence from its police witnesses that Mr. Leonard invoked his Fourth Amendment rights to prevent them from searching his home after previously waiving his rights and allowing them to search the maintenance shed where he was first located. I did not have a strategic justification for not raising an objection to the state's evidentiary presentation which improperly

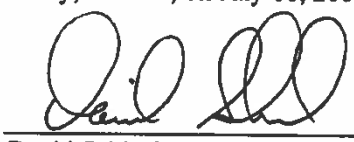
allowed the jury to make a negative inference against Mr. Leonard based on his assertion of his constitutional rights. In the heat of the trial, I knew that there was an objection that should have been raised but I did not immediately recognize the legal basis for it.

26. I have reviewed the portion of the trial transcript from the third Antee trial where the State elicited evidence from LVMPD Detective David Mesinar that he was a homicide detective and that he recognized Mr. Leonard's voice on a pager message because he had previously had at least three conversations with him in the months before Mr. Antee was killed. I have also reviewed the transcript of the closing argument where the State emphasized the factual basis for Detective Mesinar's recognition of Mr. Leonard's voice. I did not have a strategic justification for not raising an objection to the foundational questioning of Detective Mesinar and/or for not objecting to Mesinar testifying that he was a homicide detective. I believe that the way the testimony came out at trial imparted the prejudicial inference that Mr. Leonard was a suspect in another murder. After trial, I interviewed a male juror who informed me that he understood from Detective Mesinar's testimony that Mr. Leonard was a suspect in another murder, and that this fact was one of the reasons that Mr. Leonard was not acquitted in a case where the guilt phase evidence was otherwise not strong.

27. I have reviewed the portion of the trial transcript from the Thomas Williams trial where the state memorialized on the record an oral motion in limine to prevent the defense from cross-examining state's witness Phyllis Fineberg about the fact that she committed an act of prostitution on the night of Thomas Williams' death. I did not have a strategic justification for not raising an objection to the state's motion. In the Thomas Williams

case, it was our defense strategy to show that Phyllis Fineberg, who claimed to be recently engaged to Williams, was culpable in Williams' death because she had a fight with him the night of his death and was overheard by a state's witness saying that she was going to kill him. Eliciting evidence of Fineberg's prostitution would have assisted our defense by explaining that her fight with Williams that evening started because she was using his car to engage in acts of prostitution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Clark County, Nevada, on July 16, 2007.



David Schieck

EXHIBIT 183

EXHIBIT 183

DECLARATION OF RICHARD G. DUDLEY, JR., M.D.

I, Richard G. Dudley, Jr., M.D., hereby declare as follows:

1. I am a physician, licensed to practice medicine in the State of New York. My medical specialty is psychiatry, and I am board certified in psychiatry by the American Board of Psychiatry and Neurology, for which I later served as an examiner in psychiatry for the oral part of the board certification examinations. I received my medical degree from Temple University School of Medicine in 1972, and I completed my residency in psychiatry at Northwestern University Institute of Psychiatry in 1975.

2. Upon the completion of my training in psychiatry, I worked for what was then called the New York City Department of Mental Health, Mental Retardation & Alcoholism Services, where I eventually became the Deputy Commissioner. Then I became the medical director of the Washington Heights-West Harlem Community Mental Health Center, which provided the full range of mental health services to the western part of upper Manhattan.

3. Since 1984, I have been engaged in the private practice of psychiatry. Approximately fifty percent of my private practice has been focused on the psychiatric evaluation and treatment of adolescents and adults, the overwhelming majority of whom have been African-American males. The other portion of my practice has been in forensic psychiatry. I have been retained as an expert in psychiatry in both civil and criminal matters, including capital litigation at both the trial level and post-conviction and I have testified as an expert witness in psychiatry in numerous state and federal courts throughout the United States.

4. During the course of my career, I have also held academic appointments. From 1982 to 1994, I was a Teaching Attending Physician in the Department of Psychiatry at New York Medical College, Lincoln Hospital Division, where I trained residents in psychiatry. I then became involved in medical student education at The City University of New York Medical School at City College, where I was a Visiting Associate Professor of Medicine and Acting Director of

the Department of Behavioral Sciences from 1985 to 1992. In 1984, I also became an Adjunct Assistant Professor of Law at New York University School of Law. Over my years there I team-taught various courses, most of which focused on expert evidence and have included courses on the use of mental health experts in capital litigation. I retired from teaching at the law school in 2005. In addition, given my academic and clinical focus on ethno-culturally competent mental health evaluations, I have regularly been invited to lecture and/or train groups of mental health professionals and groups of attorneys on issues related to such ethno-cultural competence.

5. I have served on numerous panels, committees, and commissions, both locally and nationally. I have also been engaged as a consultant by various mental health and human services programs. I am a Distinguished Fellow of the American Psychiatric Association, a Fellow of the American College of Psychiatrists, and a Fellow of the New York Academy of Medicine. My curriculum vitae, which provides further details on all of the above noted and includes a list of my publications, is attached to this declaration. See Ex. A.

PURPOSE OF THIS DECLARATION AND SOURCES OF INFORMATION

6. Federal habeas corpus counsel for Marlo Thomas, the Office of the Federal Public Defender, asked me to identify significant influences on Marlo's development and functioning throughout his life, including familial relationships; community and environmental influences; and neurocognitive, psychiatric, and psychological factors and symptoms. In addition to the overview provided below, I am prepared to expand on these themes at an evidentiary hearing, should I be called to do so.

7. The professional opinions that follow, which I hold to a reasonable degree of medical certainty, are based on a review of records and documents related to Marlo and biologically-related members of his family, declarations of Marlo's family and acquaintances, and my direct psychiatric examination of Marlo. The information upon which I relied in forming my opinions is of the nature, scope, and reliability of information generally employed by mental health

professionals when conducting such forensic evaluations, especially those performed in the context of capital litigation. I have also reviewed documents pertaining to Marlo's capital trial, resentencing, and state post-conviction proceedings, and the declarations and testimony of Jonathan Mack, Psy.D. and Thomas Kinsora, Ph.D.

IMPOVERISHED FAMILY ROOTS IN RURAL LOUISIANA

8. Marlo's parents, Georgia Thomas and Bobby Lewis, were born in racially segregated Tallulah, Louisiana. Bobby was born on January 28, 1949, to Will Bouldin and Pearlene Lewis. He was their fourth and youngest child. Will was a widower with six older children from his first marriage.

9. The family lived in one of the black areas of Tallulah known as the Fairground, for the location of the annual fair. Bobby and his siblings walked ten miles each way to attend the segregated black schools. Bobby stayed in school through the sixth grade.

10. Will, Pearlene, their four children and periodically some of the half-siblings, plus an aunt and a cousin, shared a five bedroom home. The family had little income. Will was a pensioner and Pearlene received a check for being partially blind. Bobby and his siblings worked the cotton fields.

11. Some summers, the family traveled to Mississippi to visit Will's older children. During one of these trips, when Bobby was nine, Will introduced him to bear fighting. Bobby wrestled bear cubs during these trips until he was twelve or thirteen years old. After that, increasing racial tension in the South made travel to Mississippi too dangerous. Bobby was a violent youth, who fought in school and in the neighborhood. He spent two years in prison for fighting before moving to Las Vegas.

12. The factors that contributed to Bobby's history of violence are unknown to this psychiatrist. However, the practice of fighting bear cubs and the activities that surround such events clearly promote violent behavior, and so it is disconcerting that a father would encourage such a young boy to participate in this activity. This is even more disconcerting when a young

boy, such as Bobby, is already prone to violent, problematic behavior, and when the appropriate parental responses should have focused on stemming such behavior instead of fostering it. All of this would suggest that early in his life Bobby was taught some very troublesome things about violence and about being a father, all of which ultimately impacted on his son, Marlo.

13. Georgia was born on May 15, 1950. She was the sixth of thirteen children born to TJ Thomas and Jessie Mae Brown. TJ married Jessie when she was twelve years old. He physically abused her and the children and ran around with other women.

14. The family lived in a black section of Tallulah, in a four room home that TJ and his brother built from wooden planks. The house was lit by candles and had two bedrooms, a living room, a kitchen, and an outhouse. TJ worked in the cotton fields and at the mill. Jessie and some of the children, including Georgia, also worked the cotton fields.

15. It is important to note that both of Marlo's parents were raised in the pre-civil rights era, segregated South, where their families lived in poverty. In addition to the fact that this very much limited their options in life, it presented challenges to their development of a positive sense of themselves which they had to find some way to at least cope with. It is important to recognize that this reality is the base upon which the other problems they experienced in life were superimposed, and that as this set of realities interacted with later problems, each magnified the impact of the other. Therefore, racism, as it is expressed through segregation and poverty, is a significant factor in the development of both of Marlo's parents, and its impact on their development contributed to their inability to provide Marlo with the parenting that he required.

16. Before Georgia was eight years old, Jessie left the home to escape TJ's abuse; she didn't take her children. Shortly after Jessie left, TJ completed the parental abandonment of Georgia and her siblings. He headed to Las Vegas with his twin brother, JT. Georgia's twelve year old sister, Annie, was forced

to care for her and the other seven children then living in the home. A local schoolteacher showed them how to get food from the trash at the back of stores. Georgia and her siblings saw their mother sometimes around town but Jessie did not come home until two years had passed and she was certain TJ would not return.

17. Georgia's repeated exposure to extreme incidences of violence during her early childhood years, perpetrated against her, her mother, and her siblings, coupled with such profound neglect followed by total abandonment by both parents, clearly had a significant impact on her development. It has been well established that young girls who are repeatedly exposed to domestic violence are at high risk of becoming adult victims of domestic violence; that young girls who are physically abused are at high risk of becoming women who abuse their own children; and that young girls who are physically and emotionally neglected are at high risk of similarly neglecting their own children. As is noted later in this declaration, all of this is exactly what happened with Georgia, in that what she learned to expect from later intimate relationships, how she managed those relationships, and how she raised her own children, were all influenced by her early childhood experiences.

18. Shortly after Jessie returned home, when Georgia was around ten, Jessie, Georgia, and some of the other children were injured in an accident involving the truck that took them to the cotton fields. Georgia was unable to walk for a long time after the accident. TJ came back to Tallulah but instead of caring for or at least supporting the children, he got married and returned to Las Vegas with his new wife, Shirley Beatrice Kie. TJ was in his early thirties and Shirley Beatrice was seventeen, similar in age to his eldest daughters. TJ was also still married to Jessie. When Georgia was around eleven, TJ and Shirley Beatrice returned to Tallulah and took the children to Las Vegas. Jessie remained in Tallulah.

19. This second separation from her mother and the return to her father's custody, occurring when Georgia was still a child, only further confirmed what she had already learned, which is that she couldn't trust anyone to consistently be there for her, including her own mother. This, in turn, only further impaired her capacity to form the type of parental attachment and bond required to foster the healthy development of her own children.

20. Starting in Tallulah for some, and after the move to Las Vegas for others, TJ raped Georgia and her sisters. He fathered children by several of his daughters, some of whom bear the physical and intellectual hallmarks of the incest. The father of Georgia's youngest son, PJ, heard rumors that her first son, Larry, was fathered by TJ.

21. TJ abused Shirley Beatrice as he had Jessie. She also suspected something sexual was going on between TJ and his children, and feared for the safety of her own daughters. When Georgia was around nineteen, Shirley Beatrice left Las Vegas and took her children to Kansas City. TJ followed shortly after, once again leaving his youngest children to fend for themselves.

22. Women who were sexually abused when they were children often evidence various types of difficulties, including difficulties specifically related to their sexual behavior and an even broader range of difficulties related to their sense of self, their ability to regulate their mood, and/or their capacity for intimate adult relationships. The impact of the sexual abuse that Georgia endured was made all the more severe due to multiple factors. These multiple factors include the fact that the sexual abuse was at the hands of her father; the fact that at the time, Georgia, like each of her sisters, believed that she was the only one who was being sexually abused by her father; the fact that neither her mother nor her step-mother protected her from the abuse; and the fact that the sexual abuse was superimposed upon all of the other above-noted childhood difficulties she had endured. Therefore, as discussed below, it is not at all surprising that Georgia came to evidence a full range of the problems seen in women who were sexually abused when they were children.

23. The incest between TJ and his daughters was a well-known secret in Marlo's family. When he met with this psychiatrist, Marlo denied knowing about the incest. Georgia never told him she had been sexually molested and it was hard for him to believe his aunts and cousins wouldn't have said something. If they had discussed something like that, Marlo concluded, he must have been unavailable at the time because he was gone to juvenile so much.

24. In addition to the molestation by TJ, incidents of sexual assault occurred throughout Marlo's family. Family members were both victims and perpetrators. It is unclear to what extent Marlo was aware of all this. However, he appears to have known something about his cousin Matthew Young, who was convicted of statutory sexual offenses with underage girls. Marlo referred to Matthew as a sexual deviant who would probably have sex with his sister. Marlo's older brothers, Larry and Darrell, also have convictions for sexual offenses committed against young girls. Marlo was generally aware of the allegations but did not know the extent of the underlying incidents.

25. When this psychiatrist asked him about any inappropriate sexual boundaries growing up, Marlo admitted seeing his aunts having sex with their boyfriends. He shared with the mitigation investigator that, when he was around age seven, his cousin and babysitter Victoria Hudson tried to kiss him inappropriately and come on to him. Marlo told Georgia, who slapped Victoria. Victoria herself had been the victim of sexual abuse by her uncle, Georgia's brother John.

26. In addition, Marlo described his father, his younger brother's father, some of the other men in his family, and many of his father's male friends as "players"; even as a child he met many of the various women that these men were involved with; and he noted that this type of male behavior was presented to him as normal, and in fact, ideal. Clearly, all of this also influenced his understanding of sex and male sexuality, as well as his view of others as simply sexual objects.

27. As noted above, it remains unclear to this psychiatrist whether or not Marlo is actually unaware of the extent of the multi-generational inappropriate sexual behavior of members of his family. It is also unclear to this psychiatrist whether or not Marlo himself has been sexually victimized in ways that he is unable to remember and/or report. However, it is clearly acknowledged by Marlo that he experienced some of the manifestations of this family history in that during his early childhood years he was inappropriately exposed to sexual activity and he was more generally raised in an environment where there was a lack of appropriate sexual boundaries. It is also clear that these experiences, beginning in his early childhood years, impacted on his sexual development and resultant sexual behaviors, including the inappropriate sexual behaviors he evidenced while incarcerated.

28. Marlo had his first sexual experience when he was around ten years old. His girlfriend, Trena, was a year younger. He reported that they were both virgins and had no idea what they were doing so it took them all afternoon. Their sexual relationship continued until Marlo got locked up in juvenile. When Marlo was released Trena was dating one of his friends, Ty-yivri Glover, known as "Tennessee," but she and Marlo had sex a couple more times. Marlo got locked up again and Trena discovered she was pregnant. Trena repeatedly denied Marlo was the father, but he heard from her family that he was. Marlo was released after the baby was born. He felt an instant bond with the child.

29. Tennessee had been raising the baby and Marlo told him he could continue to act as the child's father. Marlo regrets those words more than anything. When he was sent to High Desert after the current offenses, Trena's brother was there. He had lots of pictures of the child, who was a teenager by then. He looked like Marlo's nieces and nephews and had the signature Thomas nose. Marlo has since tried to track the child down and discovered that he was in legal trouble. Marlo believes the child inherited bad traits from him,

like he did from his own father, Bobby. Marlo wants the opportunity to apologize to the child for being in the streets instead of there for him.

EARLY CHILDHOOD OF ABUSE AND NEGLECT

30. After moving to Las Vegas, Georgia fought a lot and acted out in school. When she was fourteen or fifteen, she was sent to a reform school. Georgia shared some of this with Marlo. She told him she ran away from home as a child because she didn't want to be there. When Georgia became pregnant with her first child, Larry, at the age of fifteen, TJ sent her back to her mother in Tallulah.

31. Back in Tallulah, Georgia met Marlo's father, Bobby Lewis. Bobby was violent to her from the beginning. Georgia gave birth to Larry on December 29, 1966, when she was sixteen years old. She returned to Las Vegas when Larry was nine months old, pregnant with her second child, Darrell. Bobby was the father and he followed her to Las Vegas. Darrell was born on February 7, 1968, when Georgia was seventeen.

32. By the time she was nineteen, Georgia was living in an apartment in the Gerson Park housing projects, a dangerous and impoverished neighborhood in the Westside of Las Vegas. Bobby was still in her life and, when she was twenty-one years old, Georgia fell pregnant with Marlo.

33. Georgia knew she was pregnant about a month into her pregnancy. She continued to drink hard alcohol almost daily. It was her escape from living with Bobby's abuse and she didn't know it was bad for the baby. When he met with this psychiatrist, Marlo said he remembers Georgia drinking when she was pregnant with his younger brother, PJ, and he was aware she drank when she was pregnant with him too. When asked if he thought Georgia didn't know drinking was bad for the baby or if she just couldn't control it, Marlo responded, "I think she just didn't care."

34. Upon further exploration of Marlo's response to the question of why his mother might have continued to drink during her pregnancies with him and his brother PJ, it became clear that despite his stated desire to feel strongly

attached to his mother, at some very basic level he always felt that she really didn't care about him. This clearly indicates that Georgia's inability to attach to her children, which was a product of her own extremely difficult childhood, was profoundly felt by Marlo and thereby had a significant impact on his development. A positive attachment to a parent is step one in the eventual development of a positive sense of the self and the capacity to attach to others, as well as critical to the eventual development of other psychological functions, such as mood regulation and impulse control.

35. Marlo was exposed to additional threats in utero. Georgia took Ritalin and high blood pressure medication. She worked at an industrial laundry throughout the pregnancy. The chemicals caused her to suffer from nausea, headaches, and vomiting. Georgia also continued to receive beatings from Bobby.

36. Marlo was born on November 6, 1972, at the apartment in Gerson Park. Georgia had gone to the women's hospital but was told she was not in labor and sent home. She went back to the hospital after Marlo's birth. The day Georgia brought Marlo home from the hospital, Bobby beat her.

37. Marlo's in utero exposure to alcohol, various medications and other toxins, and possible physical trauma as a result of his father's abuse of his mother placed him at high risk for the development of mental health difficulties even before he was born. The attentional difficulties, hyperactivity, and difficulties learning from experience that he reportedly exhibited during his early childhood years are likely the result of his in utero exposure.

38. When Marlo was first released from prison in 1995, he questioned Georgia and learned a lot about his history and her relationship with Bobby. She described it as an on and off relationship. When she became pregnant with Marlo, Bobby denied paternity, but when Marlo was born he looked just like him. Still, according to Georgia, it was not until Marlo was a few years old that Bobby accepted he was his kid. Marlo understands that, in contrast, Bobby claimed Darrell immediately.

39. Family members describe Bobby as extremely violent towards Marlo. Georgia told him that, when he was around six or seven, Bobby used to collect him and Darrell for overnight visits. She knew Bobby was abusing the boys because they returned with bruises. Marlo doesn't remember this but he can remember the beatings he received from Bobby from the age of seven or eight. The beatings were excessive. One time Marlo was so upset, he told Bobby he hated him and wished he were dead. In response, Bobby kicked him. Marlo told Georgia and she called her brothers, who confronted Bobby. At least once, Marlo called the police to report Bobby's violence but Bobby and Georgia denied the abuse.

40. Although Marlo didn't know that his father had initially denied paternity until his mother told him this when he was older, he does remember being singled out for more severe physical abuse by his father, feeling rejected by his father, and his mother's failure to protect him from the abuse that he endured at the hands of his father. Therefore, long before he learned that his father had initially denied paternity, he felt that his father didn't care about him either. He noted that he had always told himself that he would never want his children to feel the same way he felt about his father, and noted that that now makes the fact that he wasn't in his own son's life all the more difficult for him to accept.

41. Marlo remembers his parents fighting. He thought Bobby physically abused Georgia because she was very strong minded. Bobby had a pimp mentality and treated Georgia accordingly. When he couldn't control her, he slapped and beat her. Georgia tried to fight back but couldn't really stop him and the violence just escalated. There was no sense of balance in the relationship. Bobby's treatment of Georgia also contributed to the animosity Marlo felt towards him. Marlo wonders whether or not the tendency to commit domestic violence if you cannot control your spouse is unique to black men or something that all men do.

42. Not surprisingly, upon further exploration, it became clear that Marlo had still not been able to fully figure out how men in general and black men in particular, should deal with the women in their lives. On the one hand, he now views the male, physically abusive "player" as repulsive; but on the other hand, he realizes that he has exhibited some of those same qualities, despite the fact that his father wasn't really in his life; and so he can only conclude that those qualities are genetically transmitted, which really bothers him. He noted that since his late teenage years he has tried to be different, and noted that he is distressed by the fact that despite his efforts, he still, at times, repeats some of those same behaviors that he views as so repulsive and unacceptable.

43. Georgia was involved with a lot of different men. By the time Marlo was eight years old, she was dating Paul Hardwick, Sr., and pregnant with Marlo's younger brother, Paul Jr. PJ was born on May 21, 1980, shortly after Georgia's thirtieth birthday. Georgia testified at Marlo's trial that she completely neglected him after the new baby came. Whenever Marlo sought her attention, she responded with violence.

44. Georgia treated Darrell and Marlo differently than Larry and PJ. Because of her hatred for Bobby, she physically abused his sons to a much greater extent. Georgia treated Marlo the worst and was excessively violent towards him. She told him she didn't love him and wished he had never been born. Marlo knew he was treated differently than his brothers and believed Georgia didn't love him.

45. When he met with this psychiatrist, Marlo shared that, growing up, he thought the abuse from Georgia was "tough love" and was a normal thing to experience. On reflection, he believes the physical abuse was a result of Georgia's own upbringing, although they never discussed this. Marlo acknowledged that some of the things he experienced growing up made it challenging to maintain a positive ego. He has been trying over the years to work on that.

46. It was clear during the course of this discussion that Marlo recognized that the way his mother treated him was at least in part a result of her own childhood difficulties. However, it was also clear that he always felt that he was much more physically abused and rejected by her than his brothers were; that this must mean that there is also something about him that contributed to her mistreatment of him; and that ultimately, he internalized that belief and has thereby found it extremely difficult to establish a more positive sense of himself. He then again noted that he has learned that trying to block all those questions about himself out of his mind, and simply presenting himself as a fearless, confident man doesn't work very well. He noted that what he hasn't figured out is some better way to deal with these issues.

47. Georgia moved around a lot. Sometimes she and the boys lived with her sisters and their families. During those times, Marlo was physically disciplined by his aunts and uncles, in addition to Georgia and his older brothers. This lack of stability and the fact that virtually everyone that Marlo was exposed to was harsh with him further contributed to his sense that there was something wrong with him.

48. There was one family member who, for a short period of time, provided Marlo with a safe respite from the difficulties that he endured in his home. When Marlo was about thirteen years old, his mother kicked him out of the house and sent him to live with her brother, Tony Thomas, Jr., who was clearly the most high functioning of her siblings. Marlo lived with his uncle Tony for about two years, during which time he was fully integrated into Tony's family. With considerable assistance and support from Tony and his family, Marlo's mental state, his behavior, and even his academic functioning began to improve, which is evidence that a safe and nurturing environment can make a big difference in the life of a child, even one who was already as damaged as Marlo was. Unfortunately, however, when Marlo's mother saw that he had begun to improve, she took him back, despite Tony's desire to keep Marlo. Apparently, Marlo wanted to stay with Tony as well, in that he

cried when he was told that he would be returning to his mother's home. Therefore, Marlo was returned to the same environment that had harmed him, without any of the type of parental nurture and support that might have helped him, and the gains that he had begun to make were quickly lost.

49. Neither Bobby nor Georgia were affectionate in any way. Marlo was never hugged and does not like to hug now. When he met with this psychiatrist, Marlo said it's not that he didn't want to be hugged as a child, but Georgia insisted she was raising boys to be boys. Georgia said she was just happy to know Marlo made it home at night, as opposed to feeling the need to be affectionate and hug him. On reflection, he now thinks this was bullshit and that Georgia was just an unaffectionate person. He noted however that back when he was growing up, he felt that he was just unlovable.

50. Marlo then noted however that he does have fond memories of Georgia singing happy birthday to him each year. It was very special to him that she did that and he thinks it is only him and maybe PJ that she did it for, not Larry or Darrell. The rest of the time, she remained unaffectionate.

51. Georgia didn't talk to her sons and they never ate meals together as a family. Marlo said it was not like on television where people eat meals together and talk about their day. Even on Thanksgiving, Georgia cooked a big dinner but they didn't sit down and eat it together. The only exception was when they had picnics in the car. Georgia sometimes stopped at the store to pick up a pound of her favorite deli meat and a loaf of bread and they ate sandwiches in the car. Other times she picked up a bucket of Kentucky Fried Chicken which they ate in the car. These meals in the car were the only times the family ate in the same place at the same time. However, even then, they didn't talk to each other while they ate.

52. When he met with this psychiatrist, Marlo talked about the difference between what kids expect from their parents and what they get from them, and whether some of that was cultural. He wondered if the affection shown by parents to kids was different depending on ethno-cultural issues and

cultural processes. When Marlo was a kid watching white families on television doing things like sitting around the dinner table talking, he didn't know if that was a white thing or if all kids should expect something like that. It is only later that Marlo began to realize he wanted those things for himself. Even then, he wasn't sure if he wanted it because he had seen it on television, or if he somehow knew he needed it. He also wondered if he wasn't getting it because there was something wrong with him, or if that's just the way black families were. This is part of what prompted Marlo to ask Georgia so many questions when he got out of prison.

53. Upon further exploration, it was clear that Marlo always realized that he wasn't getting what he emotionally needed from his mother or his father. It was also clear that this always raised the extremely painful likelihood that this was due to the fact that there was something wrong with him ... that he was an unlovable child. Even now, he attempted to avoid facing that difficult to accept possibility by reaching for evidence that his parents really did care, such as his mother singing happy birthday to him, despite all the evidence to the contrary. While at some level Marlo realizes that in reality, the problem was that his parents were simply unable to provide him with what he needed because of their own difficult childhoods, he has not yet been able to use that information to alter the impact of his childhood experiences and in turn, his perceptions about himself.

54. Both Georgia and Bobby had drinking problems. Marlo saw Georgia drink a lot but he never saw her drunk or blacked out. He mainly saw her drink wine coolers, but she drank hard alcohol with her sisters. Twice a year, around May and November, Marlo's whole family got together for fish fries at his aunt Jonnie's house. Jonnie and his uncles went fishing and brought back buckets of catfish. He noted that in essence, the fish fries consisted of fish, hot sauce, alcohol, cards, and gossip.

UNSTABLE AND UNGUIDED ADOLESCENCE

55. In January, 1984, when Marlo was eleven years old, Bobby was arrested for the kidnap and rape of a former girlfriend, Virgie Robinson. The whole family witnessed the arrest. Marlo cried as the police put Bobby in the car. On May 8, 1985, Bobby was sentenced to life in prison. Marlo was unaware until after his father had died that Bobby went to prison for rape. The official family story had been that Bobby was incarcerated for shooting a man.

56. Although, as noted above, Marlo had not had a very positive relationship with his father, Bobby was the only father he knew and he had continued to hope that his father would eventually love him and care for him. Therefore, the more complete removal of his father from his life was devastating for him, and all that he could do was attempt to maintain a sense of connection with his father by talking to his father's old friends about him. He described his father's old friends as "wine-os". However, since his father's old friends tended to tell him what at least appeared to be positive things about his father, those discussions helped Marlo feel better about his father despite their history and despite the fact that his father had been arrested and sentenced to life in prison.

57. No other father figure took Bobby's place. Marlo met his maternal grandfather TJ, but never really spent time with him because he lived in Kansas City. When he was older and sick, TJ came to Las Vegas to live with his daughter, Marlo's aunt Annie, for a while before he died. Marlo spent time with his grandfather's twin, JT, but didn't really know much about him either. JT never acted substantively as a parent but he was physically around which was more than Bobby or TJ. Georgia had boyfriends but the only ones to live in the house were Bobby and then PJ's dad, who was never a father figure to Marlo.

58. Marlo described his relationship with Bobby as up and down over the years. When he was a teenager, Georgia took him to visit Bobby in Indian Springs. Bobby was trying to act like a parent which Marlo found weird because he

had never done that before. Georgia told Marlo that, during one of those visits, he told Bobby, "I'm not sure you're my father." Bobby exploded and asked Marlo, "Why are you visiting me then?" Marlo replied, "I'm here with my brother." It was sometime during these teenage visits Marlo realized that, because he was following in Bobby's footsteps, he would also end up going to prison.

59. Marlo reported that during the process of talking to his father's old friends, their kids became his friends. He asked Bobby's friends lots of questions about him because Bobby was really a stranger to Marlo. The friends described Bobby as a ladies' man. He drove a pink Cadillac and wore flashy clothes. He thought he was every woman's dream. Later, Marlo met some of the women Bobby was involved with.

60. When he met with this psychiatrist, Marlo said he resents Bobby because his father should have given him a better life. Marlo was angry at Bobby for not being a father, yet he inherited all his bad qualities and is upset about that. However, as a late adolescent, Marlo ended up trying to prove to Bobby that he was better than him: if I have all these bad qualities, I'm going to be even better at being bad than Bobby, and maybe then my father will like me. Marlo noted that it wasn't until he was older that he focused on the extent to which he followed in Bobby's footsteps. It was very upsetting for him to realize that.

61. Marlo noted, for example, that when he was a late adolescent he wanted to have more girlfriends than Bobby and was involved with a lot of women. One time, Georgia told him he was immature about women. She asked if he would want his sisters treated the way he treated women. Marlo's response was that he didn't have sisters, so Georgia asked would he want her treated that way. Marlo remembers thinking that the men in her life were already treating her like that. Marlo describes both Bobby and Paul, Sr., as players who had other women besides Georgia.

62. It was not until Marlo was older that he realized womanizing was lying to someone who cared about you so really you were a fraud. This had a strong impact on him because he never wanted to think of himself as being fake. It was only then that he realized how childish and immature his behavior had been. He reflected that someone must think something is wrong with them to be a fake. Marlo asked if that's what was wrong with him. He believes that his womanizing was a way of showcasing the things he did well instead of working on the other areas of himself.

63. As noted above, Marlo reported that he had tried to change his behaviors and not be just like his father, and this included the way he treated women. Unsurprisingly in this regard, Marlo went to the other extreme and then tried to help women instead of mistreating them. However he then tended to pick women who had serious problems of their own and tried to help/save them; but as noted below, the fact that these women were extremely difficult if not impossible to save caused him considerable distress and difficulty.

64. Marlo talked about Georgia moving a lot when he was growing up. Things were never really stable and they never settled in one place. Eventually they went full circle back to the area around Gerson Park where he had lived as an infant.

65. The neighborhoods where Marlo grew up were extremely violent and he lost many friends to violence. Gang activity was rampant. Marlo's aunts and cousins lived in different gang territories and he had to cross those lines to visit them. As a child, Marlo was chased by gang members when visiting family. Therefore, in addition to being physically abused and being exposed to domestic violence within his home, Marlo was also repeatedly exposed to neighborhood/street violence. Being so totally surrounded by and repeatedly exposed to violence, especially in the absence of the type of parenting that might have helped mitigate its effects on his development, had multiple effects on Marlo. More specifically, it made it all the more difficult for him to develop a positive sense of himself and regulate his mood and this also

resulted in the development of trauma-related symptoms such as hypervigilance and over-reactivity to situations perceived as threatening. As an understandable psychological defense against such painful symptoms, Marlo began to transmit the message that 'no one could hurt him' and in fact, 'everyone should be afraid of him because he might hurt them first.'

66. When he met with this psychiatrist, Marlo acknowledged that when he was younger he had respect confused with fear. He thought people respected him but now realizes they were afraid of him. Marlo related this to the gang activity in his neighborhood. Marlo made sure he had a reputation in the streets that he would never back down so people were afraid of him. Gangs were very much the fabric of the community in which he was raised. It was very stressful for Marlo that his aunts, uncles, and cousins lived in different neighborhoods and were on the other side of territorial conflicts. He worried that one day a conflict he was involved in might harm a family member. Not wanting anything to happen to his family is what motivated Marlo to pull away from the gangs.

67. Georgia was a hard worker but she struggled financially. Marlo and his brothers often went hungry. Crime was a means of survival in the neighborhoods where Marlo was raised and in his immediate and extended family. Marlo started selling drugs when he was thirteen. Later, he and Bobby were discussing drugs and Bobby admitted he used to sell heroin.

68. Marlo's first exposure to robbery was with his older cousin, Jodi. Marlo does not like to admit he looks up to anyone, but he looked up to Jodi. When Marlo was thirteen or fourteen, Jodi took him to rob a drug dealer. They obtained three or four kilos of cocaine from the robbery. After that, Marlo committed robberies whenever he couldn't get his hands on drugs to sell. The robberies were always with Jodi or his younger cousin Sherman. When Georgia asked Marlo where he was getting all his money, he said he found it in the street. Marlo had begun drinking alcohol and using drugs as a young adolescent and was using PCP by this time.

69. In one of Marlo's juvenile probation and parole reports, Georgia described him as quick thinking, a money chaser, and didn't think of the consequences. Marlo was upset because Georgia said this to the white man writing the report but had never said it to him. When Marlo asked Georgia about it, she asked who he was to question her and told him he shouldn't be out in the streets, that "you are who you want to be." This made Marlo resent Georgia even more because she had never tried to make it better for him.

70. Marlo wishes he'd had a family that expected more from him and feels he should have expected more from himself. It distresses him that he did not live up to what he could have been. Part of this was Marlo positioning himself as the failure of him and his brothers. Marlo's perception is that Darrell virtually never got into trouble, PJ never got into trouble, and Larry only got into some trouble and then moved on with his life in a positive way. Marlo sees himself as the black sheep of the family, in that despite the fact that he managed to break away from the gang lifestyle, he never really latched on to some more positive direction for himself.

71. Marlo is described by friends and family as developmentally delayed. In school, Marlo was identified as having severe learning problems, as well as severe emotional and behavioral problems. Marlo thinks he had undiagnosed ADD as a child; he had a short attention span and could not focus. He couldn't sit still and was a nuisance in class. They pushed him through school anyway. Marlo didn't really learn to read or write until he went to prison the first time, when the older inmates taught him.

72. Georgia was frustrated with Marlo's behavior but lacked the skills and emotional investment to try to change it. She initially resisted the school district's attempts to place him in a more structured environment. Eventually, Georgia agreed to let them send Marlo to Miley Achievement Center, an extremely structured behavioral program for severely emotionally handicapped students.

73. Miley was located at the mental health center. It had lock down units and psychiatrists on staff. Punishment included standing at attention, facing the wall, in a designated time-out room. Marlo remembers that, if a child did not voluntarily go to the room, or did not retain their position at the wall, they were physically placed there by teachers, assisted by orderlies from the mental health facility when needed. Marlo has described Georgia's agreement to send him to Miley as the worst thing she ever did to him.

74. Unfortunately, the structured behavioral program at Miley was not designed to meet Marlo's mental health needs. His problematic behavior was the result of the combination of his long-standing, repeated exposure to violence, both in and outside of his home, the almost complete absence of parental protection, nurture and support, and otherwise having been raised in a chaotic and unstable environment where there was also rampant substance abuse, a lack of sexual boundaries, and the modeling of other negative behaviors. Simply punishing him for the behaviors that had resulted from all of those childhood difficulties, without helping him to identify and address those difficulties, was not an appropriate therapeutic intervention. Instead, such a program placed the blame for his mental health difficulties totally on him, which ultimately only further contributed to his self-loathing, mood dysregulation, behavioral difficulties and other mental health difficulties.

75. Marlo was discharged from Miley when he was sent to juvenile detention. He had numerous contacts with the juvenile justice system but he struggled to comply with the programs. At the age of seventeen, Marlo was certified to adult court. Less than a month after his eighteenth birthday, he began a six year term in prison. Georgia's response to this was Marlo was responsible, he should man up and take what's coming.

76. This, of course, raises yet another issue, which is Marlo's age and level of cognitive development when he was certified as an adult following the difficulties that he had while a juvenile. It has been well established that juveniles have not yet developed the brain/cognitive capacity for rigorous

assessment, reasoning, decision-making and problem solving that adults have; this is due to the fact that the juvenile brain is not yet fully developed and the fact that juveniles lack cumulative knowledge and life experience required to perform these adult mental functions; and in Marlo's case, this maturation process was even further delayed as a result of his pre-existing cognitive deficits. Therefore it was unreasonable to presume that Marlo had the cognitive capacity to identify, understand, and address the difficulties that he was experiencing; without further assessment, it was unreasonable to assume that he was just a bad guy whose underlying problems could never be addressed; and the insight that he has gained and the changes he has made in his life since then lend support to the opinion that those assumptions about Marlo were, in fact, incorrect.

77. When Marlo got to prison and the older inmates helped with his reading, they gave him books on race and Islam. He was first introduced to Islam when Louis Farrakhan visited Las Vegas. Marlo experienced segregation and racism growing up. As he began to read and learn more, it helped him better understand issues of race. Marlo wasn't clear about how some of the difficulties he saw black people experiencing—domestic violence, poor neighborhoods, gangs, abuse—was because they were black. It was only when he started learning about Islam that any of this got put into context.

78. Marlo also talked about how he saw men raped and murdered in prison. He was protected to a certain extent because of his affiliation with the neighborhood he grew up in. He nevertheless had to fight a lot to survive. Marlo acknowledged that when he first went to prison he had behavioral issues. He talked about how he has continued to evolve since then. He has matured and has a different attitude. Marlo tries to mentor the younger inmates and teach them the importance of respect and the real meaning of respect. He admitted it is emotional to talk with them but he continues to do it because he feels that it is extremely important to do so, even if he can only make a difference for a few of them. Marlo talked about Dr. Kinsora's

testimony at his first trial. He suggested Marlo was out of control and needed a controlled environment. At the time, Marlo found it upsetting, but now realizes some of it may have been accurate. Marlo used to worry about people's opinions of him, but he has come to recognize that some of it was to do with what he was putting out there and he had to redirect that. Marlo wanted to disprove the notion that he couldn't change or improve.

79. Marlo talked about the testimony of the correctional officers at his retrial. At the time, Marlo wasn't thinking about the consequences of his actions, which is something he is much more in tune to now. Marlo was struggling with issues in his twenties that you would hope someone would struggle with when they were seventeen or eighteen. This is consistent with the reports of family members and school records reflecting Marlo was delayed in his development.

80. Marlo and Bobby had father son visits when they were both in prison. Marlo discovered that Bobby could not read and write, and that Bobby was ashamed because of it. Marlo believes that Bobby never got to be comfortable with himself, and that his educational deficits made that worse. Marlo's own problems were with spelling and writing, but he developed and got better over time.

81. During these visits, when Marlo asked about it, Bobby tried to minimize the abuse he inflicted on him and Georgia. Bobby apologized for the abuse but Marlo didn't know what to think of the apology in light of the minimization. Marlo heard that Bobby apologized to Georgia too right before he died. After he died, Georgia told Marlo how much she loved Bobby, despite talking negatively about him for Marlo's whole life. Marlo concluded the only thing he could tell for sure about his parents is that they both had very difficult lives and that they had a very dysfunctional relationship.

82. Bobby was more forthcoming with Marlo after he got out of prison when they talked on the phone. Marlo thought Bobby was paranoid at times because he

talked about fears something might happen to Marlo or Darrell when he was just now developing a relationship with them.

83. Marlo was so young when Bobby was incarcerated, he never had the chance to have much of a relationship with him. He learned about Bobby's sexual assault case after his death. He also learned that Bobby couldn't pass the psychiatric test to be released on parole and wondered if that meant he was mentally ill. Marlo concluded that, despite the father son visits, these late-coming revelations indicated that he really didn't know who Bobby was.

EIGHT MONTHS OF LIFE AS AN ADULT

84. Marlo was released from prison on August 19, 1995, at the age of twenty-two. He was ready to turn his life around. He was working, not using drugs, and in good physical shape. Tennessee, the childhood friend who raised the child Marlo may have fathered by Trena, introduced him to Angela Love.

85. Marlo initially thought it was just a sexual relationship, but Angela was saying all the right things and they got hooked on each other. They got a studio apartment and he was paying the bills. Eventually, Angela proposed to him and they got married. Marlo vividly remembers their wedding night. They stayed in a hotel and Angela fell asleep in the bath tub. Eventually Marlo went to check on her. She got mad at him because he waited so long to check on her that she could have drowned.

86. Marlo's family disliked Angela and believed she was a negative influence on him. Angela and Georgia had a very bad relationship but it was difficult for Marlo to do anything about that. When he addressed Georgia on the issue, her response was always, "It's my house I can do what I want." Marlo doesn't think Georgia understood the importance of his relationship with Angela. Georgia knew Angela used drugs and was concerned that Marlo would return to using drugs. Marlo always tried to minimize this concern to Georgia.

87. Marlo describes himself as trying to be an adult in the real world. Georgia instilled a work ethic in her sons and required them to be working. Marlo began working at McDonalds but the wages weren't enough to support him

and Angela. On February 19, 1996, he took a second job at the Lone Star Steakhouse. The commute to McDonalds was too long without a car so Marlo just kept the job at Lone Star.

88. Marlo always wanted a city job but didn't have the connections to get one. He also made other efforts to get a better job, but his history of incarceration made that extremely difficult for him. Then, he made some bad decisions, in that he slipped back into crime, selling drugs to supplement his income. But now he wasn't as good at it because he had been off the streets incarcerated, so he was more vulnerable to getting caught, as well as more vulnerable to most of the other dangers associated with being out in the street.

89. Marlo talked about the incident that led to his arrest a few weeks before the offenses, and that caused him to lose his job at Lone Star. Angela and Marlo were staying with Georgia. Angela told Marlo she had left her rings on the windowsill while she did the dishes, and they had been stolen by the neighbors. Marlo confronted the neighbors, who said Angela had sold them the rings in exchange for drugs. The situation escalated to violence. Marlo was arrested and went to jail. Therefore, he failed to show up for work and he was fired.

90. After Angela bailed Marlo out, they argued about what the neighbors had said. Angela finally admitted she was using drugs and eventually admitted selling the rings. However by then, the damage was done. Marlo had been arrested and lost his job. He started using drugs again. Family members report that Marlo started using heavier drugs, including crack cocaine, methamphetamine, and PCP after he met Angela. Witnesses who saw Marlo leading up to and shortly after the offenses describe Marlo as appearing intoxicated. One witness saw Marlo, Angela, and the codefendant smoking crack the night before.

91. When Marlo met with this psychiatrist, he claimed that prior to the incident with the ring, he didn't know Angela was on drugs, despite Georgia sharing her suspicions and despite the fact that as a prior drug dealer, he should

have been able to tell if a person was high on drugs. He made it sounds like, until the ring incident, everything was wonderful with Angela. He was totally in love with her and thought she was "the one." They met at a time when Marlo was trying to get his life together and Angela was supportive of that. The ring incident seemed to come from nowhere. Prior to that, Marlo had no sense that anything was wrong with the relationship, other than the constant conflict between Angela and Georgia. In retrospect, Marlo can see Georgia had real concerns about Angela that he wasn't in touch with at all. After the ring incident, Marlo realized Angela was toxic, and he had to get her out of his life.

92. Marlo's need for a real attachment in his life was so strong that it blinded him to what were very likely early clues that Angela was not right for him. Therefore, intellectually knowing that Angela was toxic for him, and emotionally accepting that fact and the fact that she had misled him were two very different things for Marlo. This was especially the case given that until then, he had thought that he was doing everything he could do to overcome his past and all that that past had meant to him; he had felt that he had finally met someone he could trust and that they could work together to build a better life; and although he had been having some difficulties, including the financial difficulties that had led him to temporarily return to selling drugs, he was still convinced that he could overcome those difficulties and move forward in a positive way. Therefore, although he knew that he had to end his relationship with Angela if he was going to survive, it was extremely difficult for him to affirmatively take that step.

93. Marlo was under a lot of pressure. He was twenty-three years old and just out of prison. He was trying to live up to the expectations of his mother and brothers, plus the expectations that come with being Muslim. There were bills to pay; his relationship with Angela was up and down, and he was dating another woman on the side. Georgia was pressuring him to get rid of Angela. Then Georgia and Angela had another argument that escalated into

a physical fight. PJ got involved, Marlo slapped PJ, and Georgia kicked Angela out of the house. In sum, he was facing a mounting series of pressures in the months preceding the offenses. Everything was falling apart.

94. Marlo was overwhelmed by this combination of pressures/psycho-social stressors due to the magnitude of the stressors, the various meanings that the stressors had for him in light of his above-described life experiences and resultant psychiatric difficulties, and the fact that he was ill-equipped to figure out a way to handle the stressors as a result of both his limited cognitive capacity and limited life experiences.

95. Marlo came up with a plan to return Angela to her mother in Hawthorne, Nevada. He told Angela they were going to visit her mother, but his true intention was to leave her there. Once back in Hawthorne, Angela figured out what Marlo was trying to do; so she made it impossible for him to arrange to buy a ticket to return to Las Vegas on his own; and then after offering him the option of driving him back to Las Vegas, she made Marlo take her and Kenya back to Las Vegas with him.

96. Marlo talked about the day of the crimes. He went to the restaurant because he wanted his job back. He tried to explain his position to the manager but the manager wasn't listening. The safe was open so Marlo told Kenya to take the money. Kenya didn't want to. Marlo gave Kenya the gun. Marlo says he wasn't thinking, because Kenya was only fourteen or fifteen and hadn't been involved in anything like that before. Marlo took the money because he was angry about not getting his job back. He wasn't really thinking.

97. Marlo went to the bathroom to stall Matt and Carl so they didn't interrupt the robbery. He stood in the doorway to the bathroom. However, they wanted to go and see what was happening because they thought Kenya was out there stealing food, and if food went missing during their shift, the cost would be deducted from their paycheck. So then Matt started tussling with Marlo and grabbed him round the neck. Carl was punching Marlo in the body and grabbed him round the waist, trying to lift him off his feet. Marlo tried to

move Matt's hand off his neck and as he looked down he saw the knife and grabbed it. He stabbed Matt in the arm but Matt kept choking him. When Matt stopped fighting him, Marlo started stabbing Carl. Marlo had never stabbed anyone before. It was not clear to him if he was actually stabbing them or how deep the knife was going. Everything happened quickly. Marlo thinks the whole struggle lasted a minute and a half, and the stabbing part maybe a minute of that. Marlo didn't realize how many times he had stabbed them, he just wanted them to get off him. He is still trying to figure out how that moment happened that destroyed two lives and destroyed his life as well.

98. As Marlo described the above-noted events surrounding the killings, it was clear that he felt that he was being attacked by two young men who were comparable to him in age, size, and strength, and that he was unsuccessfully attempting to defend himself against both of them. It is the opinion of this psychiatrist that these events triggered an exacerbation of the symptoms that had resulted from Marlo's above-described trauma history; therefore, he felt he was at serious risk of harm; and therefore, when he saw and then had the opportunity to grab the knife, he impulsively did so. This opinion is further supported by the fact that Marlo's description of the stabbings had a dissociative-like quality, in that he had no sense of how much time had elapsed, he had no sense of how many times he had stabbed them, where he had stabbed them and how deeply he had stabbed them, and he had no sense of the damage that had been done.

99. Marlo noted that he is extremely sorry it ended that way. He had seen Matt around but he knew Carl better. Marlo has been trying to deal with what happened ever since. He feels great remorse and it hurts him every day. Marlo can't get the boys out of his mind. He sees their faces and thinks about them and the pain he has caused their families every day. For years, he had dreams about it. Even when he tried not to think about it, their faces popped up. Upon further exploration, it became clear that Marlo was talking about

two different things here, both of which lend further support to the above-noted opinion about what prompted the killings and Marlo's intent at the time of the killings.

100. First of all, it became clear that Marlo had never been involved in anything like this before, and that the incident itself was re-traumatizing for Marlo. More specifically, he described the development of increased trauma-related symptoms following the incident with content that is specifically connected to that incident, including nightmares about the incident, flashbacks in the form of visualizations of the victims' faces, intrusive memories of the incident, despite efforts to avoid thinking about the incident, and an inability to fully realize that the incident occurred.

101. It also became clear that Marlo was expressing the enormous amount of remorse he feels for the death of these two young men and the impact that those deaths/losses have had on their families, despite the fact that it was not his intent to kill them. He noted that despite being well aware of the fact that the victims' families and others will never be able to hear how remorseful he is, to this day he still feels compelled to express that remorse. He noted however that he knows that none of that undoes what he has done, and although he recognizes that he should be punished for what he has done, it is still important to him to verbalize his remorse.

102. The information contained in this declaration, which forms the basis for the opinions I have rendered, was all available at the time of Marlo's first trial in 1997. The rigorous development of a full social history, and an ethno-culturally competent psychiatric evaluation of Marlo, would have generated this same information; this would have resulted in similar, if not identical, opinions; and that information and those opinions could have then been considered for presentation at the time of Marlo's trial, and at his penalty retrial in 2005.

103. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in New York, New York, on July 24, 2017.

Richard G. Dudley, Jr., M.D.

EXHIBIT A

EXHIBIT A

CURRICULUM VITAE

Richard G. Dudley. Jr, M.D.

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New York, New York 10025

(212) 222-5122

EDUCATION:

* Temple University School of Medicine Philadelphia, Pennsylvania
  M.D., 1972
* Northwestern University Medical Center Chicago, Illinois
  R6 Internship
* Northwestern University Institute of Psychiatry Chicago, Illinois
  Psychiatric Residency, completed 1975

LICENSURE AND CERTIFICATION:

* License for the Practice of Medicine, State of New York
* Diplomate, American Board of Psychiatry and Neurology

PAST ACADEMIC APPOINTMENTS:

* Visiting Associate Professor of Medicine, Department of Behavioral Sciences
  City University of New York Medical School at City College
* Adjunct Assistant Professor of Law, School of Law
  New York University

PROFESSIONAL EMPLOYMENT HISTORY:

* January '76 to Present: Private Practice of Psychiatry

At present, the practice includes a clinical practice primarily focused on adolescents and adults (evaluation, consultation, and both individual and family psychotherapy); a forensic practice (I regularly appear as a psychiatric expert in various types of legal proceedings throughout the United States); and consultation/education (the development and/or presentation of continuing medical education programs, as well as education programs for other health professionals, attorneys, and the public).

* September '85 to June '05: Associate Professor of Medicine
Behavioral Sciences
CUNY Med School at City College

From September, 1985 to August, 1992, I was Director of the Department of Behavioral Sciences, at which time my primary responsibility was to direct the full-year/required course in behavioral sciences. The goal of this course was to help students acquire knowledge, skills and attitudes which would assist them in becoming effective primary care physicians, for a range of persons from different cultural backgrounds, through the incorporation of contributions from the fields of psychiatry, psychology, social work, sociology, and anthropology. After I retired from the position of Director, I continued to teach in the course.

* September '84 to April '05: Adjunct Assistant Professor, then
Visiting Lecturer
School of Law
New York University

Initially, as an Adjunct, I team-taught full seminars on "Expert Evidence" and also team-taught Family Law. Then, I transferred to the Law Clinic, funded under a different mechanism, where I team-taught "Expert Evidence" with various law professors in connection with clinical seminars. Lectures included an exploration of the interface between the behavioral and social sciences and the law, and how lawyers might more appropriately work with psychiatric experts. In other settings I have lectured on various other aspects of law and psychiatry to judges, attorneys, law students and others.

* July ‘82 to June ‘94: Teaching Attending Physician
Department of Psychiatry
New York Medical College
Lincoln Hospital Division

Responsibilities included course, seminar and case conference teaching, as well as individual psychotherapy case supervision for psychiatry residents, and the direction of the psychotherapy group for psychiatry residents. Previously, through the department’s Consultation and Liaison Service, I also taught as part of the Chairman’s Rounds for the Department of Internal Medicine.

* January ‘79 to October ‘84: Assistant Director
Professional Services Dept.
Roche Laboratories, Div. of
Hoffmann-La Roche, Inc.

The principal responsibilities were to actively and creatively participate in the medical aspects of marketing Roche products and services, and to direct the activities of the Professional Services Product Group. As a participant on Marketing Teams, I helped to develop marketing strategies and plans, train Roche Field Representatives and implement various promotional programs. My responsibilities also included the coordination of Phase IV research efforts, and the development of scientific exhibits, medical education films, monographs, and symposia for physicians.

* April ‘76 to July ‘82: Psychiatric Consultant
Mental Health Programs
Children’s Aid Society of
New York City

Responsibilities included teaching, diagnostic evaluations and treatment of selected cases.

* December ‘77 to December ‘78: Medical Director
Washington Heights-West Harlem
Community Mental Health Center

Responsibilities included the design, development and then day-to-day operation of a full, twelve service community mental health center. When I accepted this position, the center had just been funded, and every program element and support system had to be developed. Once the twelve service chiefs and other key administrative staff were hired, and basic support systems were developed and put into place, I supervised the chiefs, developed in-service training programs and

worked towards the development of program elements not covered by the original grant, for example, research programs, transitional housing programs, and vocational rehabilitation programs.

* January ‘76 to December ‘77: New York City Department of Mental Health, Mental Retardation & Alcoholism Services

Assistant to the Commissioner January ‘76 to November ‘76

June Jackson Christmas, M.D. - Commissioner

Deputy Commissioner February ‘77 to December ‘77

Primary responsibilities included the development of new clinical programs/services, as well as the ongoing monitoring, evaluating, and upgrading of the existing mental hygiene service system. This system included all of the medical centers, voluntary hospitals and agencies, and the municipal hospitals and public mental hygiene programs in all five boroughs.

November ‘76 to January ‘77: [On leave from the Department]

Coordinator/Team Leader
Carter-Mondale Transition Planning Group

The focus of this effort was to develop policy options in the areas of mental health, mental retardation, alcoholism, drug abuse and the developmental disabilities for the incoming administration.

* January ‘74 to December ‘75 Staff Psychiatrist
Lower North Community
Mental Health Center
Chicago Board of Health

Responsibilities included diagnostic evaluations, treatment and some supervision and teaching. In addition, there was primary responsibility for the Center’s adolescent program.

PROFESSIONAL ORGANIZATIONS:

* American Psychiatric Association - Distinguished Life Fellow
Scientific Program Committee, 1998-2001
Delegate, APA Assembly 1979-1983

* New York County District Branch (APA)
  Committee of Black Psychiatrists 1984-1986
  Committee on Legislation 1980-1983
  Committee on Emergency Psychiatry 1978-1979
* American College of Psychiatrists – Fellow
  Awards Committee 1993-2001
  Nominations Committee 1989-1992
* Black Psychiatrists of America
  Nominations Committee 1985-1987
  Program Committee 1980-1982
  President, Metropolitan New York Chapter 1978-1988
* National Medical Association
* New York Academy of Medicine - Fellow
* One Hundred Black Men 1977-1982
  Health Committee 1979-1981
* American Orthopsychiatric Association 1988-1991
  Program Committee 1989-1990
* American Society for Adolescent Psychiatry 1984-1988
* American Academy of Psychiatry & the Law 1984-1988
* American Medical Association 1970-1976
  Council on Long Range Planning and Development 1973-1975
  Council on Mental Health 1971-1975
* American Medical Student Association Foundation 1979-1980
  Board of Directors 1979-1980
* American Medical Student Association 1970-1973
  Director, Video Journal 1971-1973
  Board of Trustees 1971-1972
* Student National Medical Association 1969-1972

OTHER PROFESSIONAL ACTIVITIES:

* Consultant in creative approaches to medical education, using a variety of media
* Lecturer/speaker for professional health and/or law related organizations and groups, as well as non-professional groups throughout the United States and, to a limited extent, abroad -- frequent guest on various television programs, as well as host and guest on radio programs.
* City University of New York Institute for State and Local Governance, Advisory Board, 2015-present

* Executive Session on Policing and Public Safety, Harvard Kennedy School, sponsored by the National Institute of Justice, 2013-2015
* Commission on Safety and Abuse in America's Prisons, 2005-2006
* Housing Works, Inc., Board of Directors 2005-present
* Vera Institute of Justice, Board of Directors 1989-2014
* Hospital Audiences, Inc., Clinical Advisory Board
* Examiner in Psychiatry, American Board of Psychiatry & Neurology
* Highbridge-Woodycrest Center, Inc., Board of Trustees 1991-2004
* Co-Principal Investigator, Minority Education, Research & Training Institute [New York State Department of Mental Health] 1990-1994
* Public Member, Fatality Review Panel, Child Welfare Administration (formerly Special Services for Children), NYC Human Resources Admin. 1990-1992
* Family Court Advisory Committee, First Judicial Department 1987-1989
* Program Development Committee, NYU AIDS Mental Health Project (NIMH Contract No. 278-87-005) first 3 years
* Coordinator of Training for Volunteers Minority Task Force on AIDS 1986-1988
* Poison Control Advisory Committee, N.Y. City Department of Health 1980-1981
* Education/Training Consultant, N.Y. State Office of Mental Health 1979
* Consultant, Conference on Minority Mental Health Manpower, HEW-ADAMHA Minority Advisory Committee 1979
* Member, Mental Health Committee, Task Force on the New York City Fiscal Crisis 1978
* Chairperson, Task Panel on the Mental Health of Black Americans, The President's Commission Mental Health 1978
* Physician Resources, Inc. Board of Consultants 1977-1979
* Board of Directors, and Chairman of the Ambulance Committee, New York City Regional Emergency Services Council 1977-1978
* Task Force on Services to Emotionally Disturbed Adolescents, New York City Human Resources Administration 1977
* Advisory Board, Center for Physician Career Development, American Medical Student Association Foundation 1977
* American Bar Association -- Young Lawyer's Section Committee on Mental Health, Physician Member/Consultant, 1974-1975
* The Thresholds (rehabilitation program for young psychiatric patients) Board of Directors 1974-1975

OTHER SELECTED ACTIVITIES:

* Walter Nicks Dance Theatre Workshop
  Chairman, Board of Directors 1985-1994
* Amistad World Theatre
  Chairman, Board of Directors 1983-1989
* National Urban League
  Black Executive Exchange Program 1979-1981
  Committee on Mental Health 1976-1979
* National Association for the Advancement of Colored People Advisory Committee, Project Rebound 1977-1978
* National Advisory Committee on Ethics 1975-1978
* New York City Black Citizens for a Fair Media Psychiatric Consultant 1977-1978
* Young Life, Inc. 1968-1972
* Big Brothers of America 1970-1972

SELECTED HONORS:

* New Jersey Black Achiever of Business and Education 1982
* Award of Merit, Black Psychiatrist of America 1977
* "Who's Who in America" 1976–1977
* American Biographical Institute
  "Community Leaders and Noteworthy Americans" Ninth Edition
* Dictionary of International Biography – Cambridge, England
  "Men of Achievement" Fifth Edition
* Solomon Carter Fuller Institute
  Traveling Fellow 1975
* Outstanding Young Men of America 1972
* National Medical Fellowship Recipient 1969–1971

PUBLICATIONS:

Dudley, Richard G. Jr., M.D. Childhood Trauma and Its Effects: Implications for Police. New Perspective in Policing Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2015, NCJ 248686

Davis PC, Chandler E, Dudley RG: The Place of Families in Juvenile Defense: Work After *Miller v. Alabama*. New England Journal on Criminal and Civil Confinement, 19 (No. 2):293-301, 2013

Dudley R.G.: Being Black and Lesbian, Gay, Bisexual or Transgender. Journal of Gay & Lesbian Mental Health, Volume 17/number 2/April-June 2013, pgs 183-195

Dudley R.G., Blume Leonard P: Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment. The Hofstra Law Review, 36 (No 3): 963-988, 2008.

Dudley RG: Offering Psychiatric Opinion in Legal Proceedings When Lesbian or Gay Sexual Orientation Is an Issue in Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities, Jones BE & Hill MJ (eds), APA Review Psychiatry. Vol. 21, American Psychiatric Publishing, Inc., Washington, D.C. 2002

Dudley RG: All alike but each one different: orphans of the HIV epidemic in Orphans of the HIV Epidemic, Levine C (ed) Unit Hospital Fund, New York. 1993

Dudley RG: Serotonin partial agonists in the treatment of anxiety and depression: Introduction. Journal of Clinical Psychiatry, 51:30, 1990.

Bing EG, Nichols SE, Goldfinger SM, Fernandez F, Cabaj R, Dudley RG, Krener P, Prager M, Ruiz P: The many faces of AIDS: Opportunities for intervention. New Directions For Mental Hea1th Services - Psychiatric Aspects of AIDS, 48:69-81, 1990.

Dudley R.G: Blacks in policy-making positions in Black Families in Crisis- The Middle Class, Coner-Edwards AF and Spurlock J (eds), Brunner/Mazel, New York, 1988.

Davis PC, Dudley RG: The black family in modern slavery. The Harvard Blackletter Journal - Harvard School 4:9-15, 1987.

Davis P, Dudley RG: Family evaluation and the development of standards for child custody determination. Columbia Journal of Law and Social Problems, 19 (No. 4):505-515, 1985.

LECTURES, PRESENTATIONS, AND EDUCATIONAL VIDEOTAPES

Described upon request

January/2016

EXHIBIT 184

EXHIBIT 184

Declaration
of
Nancy Lemcke

I, Nancy Lemcke, under penalty of perjury, declare the following to be true and correct to the best of my knowledge.

1. I am an attorney licensed to practice law in Nevada. In 1996, I was employed by the State Public Defender, in the newly created Special Public Defender's office. I had been practicing law for about two years.

2. I represented Patrick McKenna at his 1996 penalty phase trial. I was the second chair assigned to assist lead counsel Peter LaPorta. As best I can recall, this case was assigned to our office pursuant to an Order issued by the Hon. Philip M. Pro, United States District Court Judge, directing a rehearing of the penalty phase. I recall that Judge Pro's Order directed that the re-trial of the penalty hearing occur within a certain period of time. I was assigned to the case roughly a few weeks before the re-hearing was scheduled to commence. When I first reviewed the file, it appeared as though very little had been done in the way of investigation, case preparation, pre-trial litigation, etc.. I immediately set about doing what I thought needed to be done in order to prepare the matter for the penalty phase rehearing.

3. In addition to Mr. LaPorta and myself, Mr. McKenna's defense team consisted of our investigator, Jerry Dyer, and our secretary, Rebecca Clements. Mr. Dyer had come to our office after retiring from the Federal Bureau of Investigation. I don't recall that he had ever worked as a defense investigator; moreover, I do not recall that he had any experience conducting capital mitigation investigation(s).

4. I began my work on Mr. McKenna's case by reviewing the case file, which consisted of past discovery and information from Mr. McKenna's previous trials. I prepared an investigative plan, which is attached to this Declaration. My investigation plan, created approximately 10 days before trial, was as comprehensive as I could make it. The list of needed work was long; I knew it would be exceedingly difficult if not impossible to complete before trial.

5. The State presented extensive evidence from Mr. McKenna's previous criminal offenses. There were at least ten serious past offenses and potential witnesses were scattered all over the Nevada and other states. Most of these offenses occurred decades before our trial–which made our attempts to investigate even more challenging. Some of the offenses were never prosecuted which meant any

available records or other information was limited. My plan was to obtain and review as much information as possible about the prior offenses, and interview any/all witnesses with information pertaining thereto. Yet, the time constraints within which we were working simply did not allow for this. This was a critical problem because the prosecutor's arguments in support of a death verdict focused almost entirely on Mr. McKenna's previous offenses. These circumstances, including the short time we had to prepare, compromised Mr. McKenna's defense.

6. In addition to investigating Mr. McKenna's criminal history – which comprised the bulk of the government's case-in-chief – I knew it was important to identify and investigate potentially mitigating evidence for Mr. McKenna. This was a daunting task in Mr. McKenna's case. The offense for which he was being resentenced occurred in 1979, approximately seventeen years before our trial. Mr. McKenna was convicted and sentence to death in two previous trials which occurred in 1980 and 1982. Mitigation evidence was neither presented or developed in either of Mr. McKenna's previous trials. Therefore, we were required to start a mitigation investigation from scratch -- with a fifty year-old client -- and complete the investigation in days or weeks. A mitigation investigation always includes a thorough examination and investigation of the defendant's childhood. Because of Mr. McKenna's age, accessing some of this information was more difficult than I typically experienced with capital cases, a problem only compounded by the time constraints within which we were required to prepare the matter for trial.

7. The responsibility for drafting pre-trial motions fell largely, if not entirely, on me. I drafted roughly thirty motions addressing issues such as jury selection and the discovery of evidence relating to the prosecution's witnesses.

8. In at least one of my pre-trial motions, I sought information about Mr. McKenna's prior offenses as well as information regarding the credibility of the witnesses I anticipated prosecutors would call at trial. I was unable to convince the trial judge that such information could be critical to Mr. McKenna's defense. Our office was not authorized to obtain NCIC "rap sheets" (disclosing the out-of-state criminal histories) on certain of the government's witnesses. This information may have been extremely useful in assailing the reliability of the prosecution's evidence and/or witnesses. However, even if I had been given access to the information I requested, any follow-up investigation would likely have been compromised by the limited amount of time we had to prepare.

9. At trial, the State presented the prior testimony of two witnesses from Mr. McKenna's earlier trials: Michael Jones and Seboon Hairs. In the pre-trial

motions that we filed, I attempted to obtain information regarding the credibility of both of these witnesses. Had I been given access to the requested information, and had that information disclosed, or led to the discovery of, evidence that assailed the credibility of one or both of these witnesses, I would have tried to present that evidence at trial.

10. I asked Jerry Dyer to interview and investigate Mr. Hairs but I do not recall what, if anything, Mr. Dyer did. Had we discovered evidence which questioned the truthfulness of Hairs' previous testimony and/or his credibility, I would have sought to either exclude his testimony entirely or, at a minimum, to present this information to the jury. Had I learned that Hairs' credibility and been impugned as a result of a California prosecutor's investigation, I would have sought to admit this information at trial..

11. I do not remember asking Jerry Dyer to investigate the credibility of Michael Jones' previous testimony. To the best of my recollection, Jones committed suicide after his testimony in Mr. McKenna's preliminary hearing.

12. I remember that David Rossi testified for prosecutors in Mr. McKenna's previous trials. I vaguely recall learning that Rossi later recanted this testimony. I have some recollection of trying to contact Rossi to ascertain the details of his recantation. This may have involved a telephone call to Mr. Rossi – I vaguely recall that Mr. Rossi appeared to be mentally ill and incapable of providing useful information.

13. I found Pat McKenna to be a very cooperative client; he did not want to be sentenced to the death. Although he was designated as co-counsel in his case, Mr. McKenna's input to his defense was limited by circumstances and conditions imposed by the jail and courthouse security. For example, we could only communicate with Mr. McKenna by telephone because Mr. McKenna was not allowed visits at the jail. In-person interviews are not only more productive, they can be critical when you need to get to know a client and earn his trust. Without a clients' trust, it is extremely hard to investigate sensitive mitigation issues like childhood abuse. I spent many hours on the phone with Mr. McKenna in order to get pieces of information that I could use at trial.

14. In addition to the time constraints imposed upon me, there were many other challenges in developing mitigation evidence for Mr. McKenna's trial. Mr. McKenna is the eldest of five children. My recollection is that the McKenna siblings experienced mental and/or physical abuse at the hand(s) of their father. There was no counseling or intervention to help the boys cope with the stressors

and/or abuses they encountered. Accordingly, my questions of the McKenna siblings regarding their upbringing provoked emotional responses–it was like pulling a scab off wounds that had never healed. Information of this sort is most effectively obtained via a series of in-person meetings with each witness. However, there was simply not enough time to conduct these critical interviews in such a manner.

15. I obtained as much information as I could from Tim and Ken McKenna--the two brothers who were easiest to contact. Mike McKenna, closest to Patrick McKenna in age, should have been an integral part of my investigation. He was most likely to have viewed the events of his childhood in a similar manner as my client. However, Mike lived in another state and I did not have the time necessary to establish a relationship with him. I understood that the youngest brother, Chuckie, was a drug addict. Although he lived in Nevada, I did not have the time required to collect information from an active drug user.

16. I wished I had the time and resources to thoroughly interview and investigate each of Mr. McKenna's siblings. The dysfunction in their own lives (dysfunction punctuated by alcohol and drug addiction, domestic violence, criminality, etc.) was corroboration of the abusive childhood they shared with Mr. McKenna. Under the circumstances I faced, I could only present Tim and Ken McKenna's testimony. It was obvious to me that they found it terribly difficult to discuss the violence in their home. It is entirely possible that they did not completely disclose to me the full extent of the abuses suffered in their childhood home. Much of my contact with each witness was by phone. I found both men willing to speak to me and, had I been provided more time to work with them, I would like to think that their testimony would have been even more compelling.

17. Although Tim and Ken McKenna willingly provided information, the jury may have been left with an erroneous impression of their testimony. The prosecutor suggested that Tim (a real estate agent) and Ken (an attorney) were successful men who overcame their childhood. The prosecutor used their apparent successes to imply Pat McKenna's childhood sufferings were both nominal and surmountable, and that his later criminal behavior was the result of choice, and not in any way the product of his abusive upbringing.

18. Mr. McKenna's brothers were unable to provide me with witnesses to corroborate their testimony. Their parents were deceased and there was no extended family to whom I could turn for corroborative information. With so little time to prepare for trial, I was unable to investigate and obtain names of Mr. McKenna's childhood

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 27 of 35

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Stefany Miley, District Judge

RENE L. VALLADARES
Federal Public Defender

JOANNE L. DIAMOND
Assistant Federal Public Defender
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Attorneys for Appellant

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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

OBSERVATION OF JURY VENIRES

In order to determine the percentage of minorities in venires for trials in Eighth Judicial District courts, prospective jurors were observed and counted on a total of six occasions: three in September, 1992; one in May, 1993; and two in July 1993. On these six occasions a total of 1,137 prospective jurors were observed in the juror orientation room at the Clark County Courthouse[2].

On five occasions, the counts were conducted as individuals lined up at the front desk in the juror orientation room to receive their paychecks and badges. On one occasion, they were observed as they waited in a separate room. For the most part, jurors were called up to the desk in groups of thirty, and lined up in single file. This facilitated the counting procedure considerably.

The objective of the observation was to count the total number of prospective jurors, and the number of females, males, African-Americans, whites, and "other" racial minorities (including Asian, Hispanic, Native American, etc.) Because the methodology involved observing jurors and making an on-the-spot determination about whether to categorize each individual as White, African-American, or Other we include no separate classification for people of Hispanic origin, which generally indicates a Spanish-speaking person of Latin American origin, of any race. The results of the observations are summarized below:

[2]Observations were conducted by John S. DeWitt, Ph.D., President of Litigation Technologies, Inc. He was accompanied on two occasions by Mia B. Sanderson, a partner in the firm. On two other occasions, he was accompanied by Nancy Downey, M.A., of Downey Research Associates, a Las Vegas research and consulting firm.

	OBSERVATION DATE							
Juror Type	9-14-92	9-21-92	9-28-92	5-24-93	7-12-93	7-19-93	Total	%
White	170	182	174	77	170	221	994	87.4
African-Amer.	11	17	9	5	10	16	68	6.0
"Other"	12	13	7	12	13	18	75	6.6
TOTAL	193	212	190	94	193	255	1,137	100.0

To summarize, the racial composition of the jury venires observed at Clark County Courthouse was as follows:

Race	Number	Percent
White	994	87.4
African-American	68	6.0
Other	75	6.6
Total	1,137	100.0

ASSESSMENT OF DISPARITY BETWEEN COMPOSITION OF VENIRES AND COMPOSITION OF THE ADULT POPULATION

In order to determine whether there is any significant disparity between the percentage of racial minorities in the general population and the jury venires, we first had to collect census data about the racial composition of the general population.

1990 U.S. Census data for Clark County[3] indicate that the racial composition of the population 18 years of age and over is as follows:

Race	Number	Percent
White	465,855	83.2
African-Amer.	46,333	8.3
Other	47,614	8.5
Total	559,802	100.0

[3]U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census: 1990 Census of Population, General Population Characteristics, Nevada (Pp. 1, 15, 17).

In the past the U.S. Bureau of the Census has acknowledged that the census undercounts the population and has released estimates of the undercount for each state. Estimates of the undercounts for the 1990 census have not been released yet, but in 1980 the Nevada undercount was estimated to be 3.46 percent, which was the second highest among the 50 states. Because there is good reason to believe that racial minorities are more likely to be undercounted, it is probably fair to assume that the percentage of racial minorities in Clark County's population is actually higher than reported above. As a result, the disparities discussed below are probably marginally smaller than they would be if the census were accurate.

A comparison of the racial composition of Clark County's population with the racial composition of the jury venires observed at the Clark County Courthouse yields the following table:

Race	Observed at Courthouse	General Population
White	87.4	83.2
African-Amer.	6.0	8.3
Other	6.6	8.5
Total	100.0	100.0

Absolute disparity

When assessing whether a particular cognizable group is under-represented in the venire, there are two commonly accepted ways to proceed. In the first, and less useful approach, one looks at the disparity between the group's proportion in the general population and its proportion in the venire. This is known as the "absolute disparity." For example, if a racial minority constitutes 10 percent of the population and just 5 percent of the venire, then the absolute disparity for that group is 5 percent - the difference between the two percentages.

In this study, the absolute disparity between the population and the venire for African-American and other racial minorities can easily be calculated by computing the difference between the two percentages, as summarized in the following table:

Race	Jury Venire	General Population	Absolute Disparity
White	87.4%	83.2%	+ 4.2%
African-Amer.	6.0%	8.3%	- 2.3%
Other	6.6%	8.5%	- 1.9%

Thus, in terms of absolute disparity, whites are over-represented by 4.2 percent, while African-Americans are under-represented by 2.3 percent and other races are under-represented by 1.9 percent.

Comparative disparity

However, the absolute disparity does not reveal anything about the magnitude of the disparity in relationship to the group's relative proportion of the population. In order to do that, one must use a quantitative index which expresses absolute disparity as a percentage of the cognizable group's relative size in the general population. This is accomplished by means of the comparative disparity index, or CDI[4]. If, for example, the absolute disparity between representation in the population and representation in the venire is 5 percent for a particular racial minority, as in the example above, the comparative disparity is arrived at by computing the absolute disparity, then dividing the absolute value of that difference by the group's percentage of the population, and multiplying that result by 100 in order to express the result as a percentage (.05 - .10 x 100 = 50%.)

In this study, the comparative disparity between representation in the population and representation on venires is calculated as follows:

Race	Absolute Disparity	Percent of Population	Comparative Disparity
White	4.2%	83.2% x 100 =	+ 5.1%
African-Amer.	2.3%	8.3% x 100 =	- 27.7%
Other	1.9%	8.5% x 100 =	- 21.4%

In other words, according to the comparative disparity index, African-Americans are substantially

[4]See Kairys, Kadane and Lehoczsky, Jury Representativeness: A mandate for Multiple Source Lists, 65 Cal. L. Rev. 776 (1977). Also see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases. 80 Harv. L. Rev. 338 (1966).

under-represented by more than one-quarter (27.7%), and other minorities are under-represented by 21.4%). In effect, there were 27.7 percent fewer African-Americans on the observed venires than one would expect based on the proportion of African-Americans in the population. Likewise, there were 21.4 percent fewer Asians, Hispanics, Native Americans, and other racial minorities (in aggregate) than one would expect.

One consequence of this is a greatly reduced chance that an African-American or a member of one of the other racial minorities will be on a venue sent to a particular courtroom for a jury trial, and thus a greatly reduced chance that an African-American or a member of another racial minority will be selected to serve on a jury for a criminal or civil case in the Eighth Judicial District.

Statistical Significance Test

The statistical significance test is a means of determining the probability that the disparity has occurred by chance alone. If the probability is very low, chance is rejected as the source of the disparity, and it may be concluded that some other factor or factors, such as systematic bias or discrimination in the selection process, produces the disparity.

Using a statistical significance test described in several authoritative sources[5], we are able to calculate probabilities that under-representation of African-Americans and other racial minorities (or over-representation of whites) discussed above did not occur by chance alone. The results of the test are summarized in the following table:

Race	Number of Standard Deviations	Probability of Chance
African-American	2.82	p=.0024
Other	2.3	p=.0107

The table indicates that for African-Americans the likelihood that the disparity occurred due to chance rather than other factors is less than 3 in 1,000. For other minorities the likelihood that it occurred due to chance alone is approximately 1 in 100. In other words, the disparities are highly significant, statistically. Several Supreme Court opinions[6] have cited the statistical significance standard as a

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[5]National Jury Project, Jurywork: Systematic Techniques, Release #8, (1989; D. Baldno & J. Cole, Statistical Proof of Discrimination (Shepard's Mc Graw-Hill 1980); Finkelstein, Footnote 4).

[6]Castaneda v. Partida, 430 U.S. at 496 n.17; Alexander v. Louisiana, 405 U.S. at 630 n.9; Whitus v. Georgia, 385 U.S. at 552 n.2.

measure of the significance of disparities, and in Castaneda v Partida[7] the Court set out a statistical significance cutoff of "two or three standard deviations" as one method of distinguishing unconstitutional from allowable disparities. By that standard, the leval of under-representation observed in the sample indicates an unconstitutional disparity for African-Americans and other racial minorities.

Hispanics

Our observation of potential jurors did not entail a count of Hispanics as a separate category. Some of the individuals classified as Other were clearly Hispanic, just as some were clearly Asian. But such distinctions, based only on a brief observation of physical characteristics, were in several cases difficult to make, and we felt that it might be misleading or inaccurate to record or report such distinctions.

We consider it likely, however, that most if not all of the Hispanics in the groups observed were actually classified as Other in our count. Thus, we can reasonably suggest that the number of Hispanics was probably some fraction of the total number of individuals classified as Other (5.4 percent were classified as Other.) Census data indicate that 11.2 percent of the population of Clark County is Hispanic[8], and thus it is likely that Hispanics are in fact substantially under-represented on jury venires. There is an indication that further study of the potential under-representation of Hispanics is warranted.

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[7]Castaneda v. Partida, Footnote 6.

[8]U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census: 1990 Census of Population.

SELECTION PROCEDURES USED IN EIGHTH JUDICIAL DISTRICT COURT

In order to learn how the selection process works, a face-to-face interview was held with the Eighth Judicial District Court's Court Administrator and the Jury Commissioner on September 28, 1992. The purpose of the interview was to learn about the process by which the general population is reduced to petit jury venires. In addition to learning about the various steps in the process, we wanted to learn who performs each step, and what criteria are used in the qualification and excusal processes. Salient information gathered in that interview is presented in the following section:

According to the Court Administrator and the Jury Commissioner[9] potential jurors for trials in the Eighth Judicial District Court are drawn from only one source - a registration list provided by the Nevada Department of Motor Vehicles. The list, containing over 600,000 names, includes information about motor vehicle licensees and DMV ID card holders 18 years of age or older who are residents of Clark County. The list is on a computer tape which the DMV furnishes to Clark County's Computer Information Systems Department. The Information Systems Department unloads the data from the tape into the county's mainframe computer. The list is updated every six months by means of a new tape from the DMV.

In the past, the jury pool was composed of names from voter registration lists as well as the DMV list. However, studies showed that 97 percent of the registered voters were also on the DMV list, so in 1983 a decision was made to use only the DMV list.

Each week the county provides the Jury Commissioner's office with a list of about 3,000 names randomly selected, from all zip code areas in the county. (As of January 1, 1993, the Jury Commissioner's office began selecting 2,500 names per week, rather than 3,000.) The Court Administrator feels that the process is more objective if the county pulls the names and the Jury Commissioner's office isn't involved. The county uses a comprehensive jury selection software program, which has been in use since about 1983. This selection process has been challenged three times and found valid each time, according to the Court Administrator. Obtaining specific information about how the computer randomizes and selects names from the Clark County Computer Information Systems Department personnel who run the program and analyzing that data is beyond the scope of this survey.

Summonses are then sent to those 3,000 individuals. About 25 percent are returned because of bad addresses (mostly expired forwarding addresses), while just under one quarter who are summoned do not respond, and about 1,600 respond by telephone as instructed. The court has no enforcement staff and does not send out a second summons to people who don't respond to the first one. They do not make an attempt to ascertain addresses of people whose summonses are returned as undeliverable.

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[9]The former Court Administrator who was interviewed was Anna Peterson. The current Court Administrator is Charles Short. The Jury Commissioner is Shirley Blake.

The 1,600 or so individuals who call the Jury Commissioner's office in response to the summonses are asked several questions to determine eligibility, and to provide information to the judge and attorneys for use in voir dire. In addition to data affecting eligibility, data is collected about the person's occupation, education, spouse's occupation, and prior jury service. If eligible, individuals are then randomly assigned a "badge number" and told to report for jury duty on a specific date. They are also instructed to call before coming in, so they won't have to come in if the case settles. If a person doesn't show up for jury duty after being assigned a badge number (and thus a department), the process for following up varies. Sometimes the judge will ask the Jury Commissioner's office to call the person and tell them to come in, and sometimes the judge will simply tell them to send out an order to show cause for not appearing. About 600 of the 1,600 who respond to the summons actually qualify and report for jury duty.

Jurors are paid $9.00 for reporting to the courthouse if they are not selected for jury duty. If they survive voir dire and are selected to serve on a jury, they are paid $15.00 for each of the first 3 days, and $30.00 for every day thereafter. They are also paid mileage. The court uses a "one day/one trial" system, in which people who come to court but are not selected for a trial, as well as those who are selected to serve, are exempted from further jury duty for a period of at least three years. This system eases the burden on people, so that they aren't called back on multiple occasions if they are not selected, or if they serve on a jury.

A staff of 3 full-time and 2 or 3 part-time people handles the telephone calls that come in response to the summonses. This staff is responsible for determining eligibility. To be eligible, a person must be a citizen of the United States, a resident of Clark County, not a convicted felon (unless rights have been restored), and be able to read and understand English. By statute, those over 65 who request excuses, those with permanent disabilities, and others listed in NRS 6.020 are exempted. Temporary exemptions are given to full-time students, people claiming medical excuses, people whose income is based strictly on commission, and people in positions exempted by law[10].

Those not exempted or ascertained to be ineligible are told to report for jury duty and to let the judge deal with their excuses, if any, in the courtroom. The Jury Commissioner's office tries to maintain a personal touch, by speaking with each potential juror individually on the telephone. The staff is instructed to be very careful not to excuse jurors except for the reasons stated above. The policy is to let the judges decide on all other requests for exemption.

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[10]The question whether the grounds for excusal accepted by the Jury Commissioner, based upon Eighth Judicial District Court Rule 6.50, are consistent with the statutory grounds prescribed by NRS 6.020 and 6.030, is a legal issue which is beyond the scope of this study. Similarly, whether the Court Administrator is authorized to grant excusals, which under the statute are to be granted by the court, is also a legal question not within this study's ambit. Compare Eighth Judicial District Court Rule 6.50 with NRS 6.030.

When jurors arrive at the courthouse they are directed to a room where they are given a badge, a handbook about the jury system, and their check for the first day's service. They are also shown an orientation film and given an opportunity to ask questions, after which they are assigned to petit jury venires for various departments, based on groupings of badge numbers.

According to the Court Administrator the procedures used by the Eighth District Court have been reviewed over a period of several years by a consultant, Dr. Thomas Munsterman, who is associated with the National Center for State Courts. He last visited in mid-1992. The Court Administrator has set a goal of reaching all the standards set by the National Center for State Courts, but recognizes that the Eighth Judicial District has not yet reached that goal with respect to some of the standards.

DISCUSSION AND CONCLUSIONS

There are four possible stages in the process leading to the selection of jurors for venires in the Eighth Judicial District Court, which may contribute to the observed disparity. These four sources are:

- The source list
- The sampling process
- Procedures for dealing with non-response to summonses
- Standards for excusing

The source list

The American Bar Association's Standards Relating to Juror Use and Management states that "The jury source list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible." At least some of the disparity ascertained in this study might result from the use of a single source list provided by the Nevada Department of Motor Vehicles, rather than using multiple sources.

As a single source, the list does appear to be reasonably inclusive. Population projections for Clark County for 1992 indicate a population of 677,665 for residents 18 years of age or older[11]. Figures provided by the Nevada DMV show that as of July, 1992 there were a total of 616,406 licensees and ID card holders over the age of seventeen in Clark County[12]. Thus, the DMV list includes 90.1 percent of the adult population of the county.

A list which excludes 10 percent of the jury eligible population may, however, contribute to the under-representation of racial minorities on jury venires in Clark County. A list which is not fully inclusive could be skewed against racial minorities because of economic and other factors which might affect obtaining driver's licenses or DMV ID cards. However, the DMV does not keep records on the race of licensees and ID cardholder, so it is not possible to determine whether the source list is as representative of the adult population as is feasible.

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[11]See Nevada Population Information, prepared by the State Demographer's Office; Nevada Small Business Development Center, Bureau of Business and Economic research; College of Business Administration, University of Nevada, Reno. This estimates Clark County's 1992 population to be 897,570. 1990 Census data estimates 24.5 percent to be under 18 years of age. Thus, Clark County's projected 1992 population of individuals 18 years of age or older is approximately 677,665.

[12]See report provided by State of Nevada Department of Motor Vehicles, run date 7/27/92.

Nevertheless, augmenting the single source list with other lists is a method used in a number of other states to improve inclusiveness in this initial stage of the jury selection process. Augmenting the present list with just one other source, a list of registered voters, would increase inclusiveness by several percentage points, and use of one or more other lists, such as city directories, welfare recipients, naturalized citizens, or utility customers to name just a few could ensure that the master jury pool is as inclusive as possible.

The sampling process

Random sampling is an important part of the jury selection process at two stages. First, the names of those chosen to be summoned each week should be selected randomly. The Court Administrator states that this selection process is done by staff at Clark County's Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random.

Procedures for dealing with non-response to summonses

According to information provided by the Court Administrator, it appears that failure to follow up on non-responses to summonses might be a major factor contributing to under-representation of racial minorities on jury venires in the Eighth Judicial District.

Only about 1,600 (53.3%) of the 3,000 summonses mailed out each week generate responses. About 25% are returned as undeliverable, while the remainder, about 22%, fail to generate responses for reasons that have not been determined.

Because the court does not attempt to ascertain correct addresses for summonses which are undeliverable (mostly as a result of expired forwarding addresses), and does not resummon those who don't respond, nearly one-half of the total available jury pool is effectively eliminated from consideration at this rather early stage of the selection process[13].

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[13]Assessing the possible effect of anticipated discrimination upon the willingness of minority individuals to attempt to participate in the jury selection system is beyond the scope of this study. It is certainly conceivable that many minorities, particularly low-income minorities, may fail to retain a jury summons from fear of any contact with the justice system or from a belief that members of minority groups would be excluded as a matter of course from participating in a system which is perceived as disproportionately involving members of their own communities as defendants.

Standards for excusing potential jurors

The Court Administrator's stated policy is to excuse potential jurors using conservative criteria, telling most of those who present excuses based on hardship, inconvenience, or biases of various sorts to report for jury duty and leaving it to the judge to decide whether or not to excuse them. Records are kept but not compiled concerning the number excused for various reasons. But if it is actually the case that only about 600 (37.5%) of the 1,600 who respond to their summonses qualify and are not excused, then this is potentially a stage of the selection process at which the observed under-representation of racial minorities on venires may arise[14].

Conclusion

The study shows that racial minorities are under-represented on jury venires for Eighth Judicial District courts. The disparity is statistically significant, and with respect to African-Americans there is less than 3 chances in 1,000 that the observed disparity occurred by chance rather than as a result of other factors. With respect to other minorities, there is approximately 1 chance in 100 that it occurred by chance alone.

The limitations of this study preclude conclusive identification of the causes of the observed disparities. The procedures followed in three areas deserve further study. First, a single source list is used to generate names of adults in Clark County. This list, provided by the Nevada DMV, includes about 90 percent of the adult population. Second, about one-quarter of those summoned do not receive the summons because it is returned to the Jury Commissioner's office as undeliverable, and no attempt is made to ascertain correct addresses for those individuals. In addition, nearly one-quarter of the summonses are not returned, for unknown reasons, and those individuals are not re-summoned. Finally, among those who do respond to the summons, over 60 percent are either disqualified from jury duty or are temporarily or permanently excused from serving by the Jury Commissioner's office. The net effect of these procedures is that out of every 100 adult members of Clark County's population, only about 18 ever reach the stage of being assigned to a jury venire, while 82 do not.

The precise cause of the disparity between the percentage of racial minorities in the adult population and the number observed in jury venires, and the particular stage of the selection process at which the disparity arises cannot be precisely identified due to the financial limitations on the scope of this study and further observations and analysis will be required to determine whether the observed disparity violates the state or federal constitution. Based upon measures adopted in other states, it

[14]To the extent that members of the minority groups may comprise a less affluent segment of the community, a policy of allowing excusals based upon a claim of financial hardship, dependence upon commission work, or child-care difficulties may create a disparate impact.

is possible that the disparity could be reduced if some or all of the following measures were implemented:

- Use of multiple source lists to ensure that the jury pool is as inclusive and as representative as possible.
- Implementation of measures to ascertain correct, deliverable addresses for those individuals whose summonses are returned as undeliverable.
- Re-summoning of those who don't respond to their initial summons.
- Limitation of informal disqualification and excusal of potential jurors, and requiring documentation of the impact of such excusals upon minority representation.

1. STEPHEN GLEN KIRK
2. JOHN McDONALD
3. JOSEPH ZEPEDA
4. ROBERT GIBSON
5. BRAD KNESS
6. PUNAN BHAKTA
7. MELVIN BERGMAN
8. THOMAS CALDWELL
9. PHILIP QUINN
10. THOMAS THOWSEN
11. ANDREW ESPINOZA
12. BARRY HAZELETT
13. LINDA HULING
14. LOUIS DeFALCO
15. PATRICIA GREEN
16. TIMOTHY WADE
17. ROBERT GRADY
18. KEVIN CONNORS
19. ALEXIS REKWARD
20. ALAN SCHEIB
21. DONALD DIBBLE
22. CHISTOPHER CARTER
23. JOSEPH MATVAY
24. DAVID HORN
25. KATHY MARBLE
26. RANDAL McLAUGHLIN
27. CHARLES DUNCAN
28. WILLIAM FLOWERS
29. JEFFEREY BUBIER
30. DEBRA McCRACKEN
31. MARJORIE HOLLAND
32. TERRY COOK
33. ROBERT JORDAN
34. RAMON WARREN
35. STEVEN SCARBOROUGH
36. RICHARD GOOD

INTEROFFICE MEMORANDUM

To: JOANNA RASH

CC:

From: Michael Neil O'Callaghan

Date: June 13, 1994

Subject: WALKER WITNESSES FOR REBUTTAL

Please contact the following *potential* rebuttal witnesses for late Thursday and early Friday:

Mary Ann Stamm (909)782-4170, Cal. Dept. of Justice, (re: hair comparison)

Tim Wade, Blythe PD, H (619)922-6492, W (619)922-6111, (re: impound Walker's and Riker's hair sample)

Robert Whitney, Blythe PD (619)922-6111, (re: obtaining hair samples from murder victim John Phippin at autopsy)

Jeff Wade, Blythe PD, W (619)922-6111, (re: impound of bathroom towel with Walker's hair)

Marvin Spreyne, Riverside Co. SO, Indio Sherriff's Station, Indio CA, (re: impound towel from bathroom which had Walker's hair sample at Sahara Motel on 4-16-92 in Blythe)

Tim Carr, Riverside Co. SO, Indio Sherriff's Station, Indio CA, (re: impound towel from bathroom which had Walker's hair sample at Sahara Motel on 4-16-92 in Blythe)

Darryll Garber, Riverside Co. Medical Examiner (office elsewhere), (re: autopsy of John Phippin on or about 4-12-92 in file number 74843)

FROM THE DESK OF...

MICHAEL NEIL O'CALLAGHAN
DEPUTY DISTRICT ATTORNEY
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 SOUTH THIRD STREET, SUITE 701
LAS VEGAS, NEVADA 89155-2212

702-455-4805
Fax: 702-383-8465

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY COURTHOUSE
200 SOUTH THIRD STREET
COURT ADMINISTRATION LAS VEGAS, NEVADA 89155-0001
(702) 455-4277
FACSIMILE (702) 386-9104

November 12, 1993

Michael Pescetta, Executive Director
Nevada Appellate and Post Conviction Project
330 South Third Street, Suite 701
Las Vegas, Nevada 89101

Re: Jury Composition Study

Dear Mike:

The Jury Services Commissioner and I appreciate the opportunity to preview the jury composition study. The review raised concerns with the study's conclusions, as well as with the methodology utilized to reach the conclusions. Our concerns with the data collected and utilized to identify potential sources of disparity in composition are noted as follows:

- The baseline information from the preliminary 1990 U.S. Census for Clark County is representative of the racial composition of the general population. In contrast, the racial composition of the jury venires observed at the Clark County Courthouse would represent only those individuals 18 years or older who are citizens of this country. Do you know if the statistical data from the 1990 census identified only those U.S. citizens ages 18 or older? We are having difficulty independently correlating the percentages on page 9 with the 1990 Clark County census data.

- Further confusion is created by the data's presentation (again referring to Page 9). The section titled "Assessment of Disparity Between Composition of Venires and Composition of the Adult Population" implies the population chart on that page totaling 741,459 represents only the adult population for Clark County in 1990. However, on page 17 it indicates the projected adult population for Clark County residents ages 18 and over is 677,663 in 1992. The two population references indicate that the adult population in Clark County decreased by approximately 10 percent from 1990 to 1992. We could not locate population data for Clark County which supports the adult population trends inferred.

- The baseline information represents census data which is self-reported. The study recorded population based on visual observation. Discussion with urban planners indicates this distinction in reporting of a population's racial composition will create natural disparity between the two data sets.

The essence of our concern with the study methodology drives at the heart of the findings of disparity and the attempt to identify at what stage the selection process may be occurring. Did the study make an "apples to apples" comparison of 1990 census for Clark County residents ages 18 and older who also are U.S. citizens to jurors who have the same characteristics? If it did, this reduces the potential that the study's methodology created the statistical presentation of racial disparity.

With respect to juror selection procedures used in the Eighth Judicial District as defined by the Jury Composition Preliminary Study, several procedures require clarification:

- Page 15, paragraph 2, the statement, "If a person doesn't show up for jury duty after being assigned a badge (and thus a department), the process for following up varies," is not accurate. Jurors assigned badge numbers are rarely assigned departments at the time of their badge number assignment.

- Page 18, paragraph 1, the statement, "The Court Administrator states that this selection process is done by staff at Clark County Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection process procedures used by Clark County, it is not possible to say with any degree of certainty that selection at this stage is random," is misleading to the reader. The author(s) fails to indicate that during discussion of this issue, we provided the name of Mr. Bill Cadwallader, the Information Systems Analyst assigned to the Juror Service Program. We specifically referred the study's author to Mr. Cadwallader for any information regarding the random selection methodology used by the juror system software in identifying jurors. Mr. Cadwallader indicates he is not aware of any attempt by this study's author(s) to obtain this information.

- Page 18, paragraph 2, the statement, "Potential jurors should also be randomly assigned to panels for specific trials. Apparently this is done by assigning badge numbers to individuals as they call the Jury Commissioner's Office in response to summons. These badge numbers are grouped sequentially to form panels which are then assigned to the

various departments. But, if it is the case that badge numbers are assigned sequentially as calls are received, then the randomness of the assignment process is called into question," causes some concern.

The first concern with the statement is the inferrence of the word "apparently." One would expect that questioning the randomness of the juror selection process would be based on fact rather than conjecture. This is particularly true where a little more research could have accurately defined the process. The second concern involves the description of the assignment process. The description, as written, is not accurate.

- Page 18, the bottom paragraph states, "While we cannot say for certain that this is the major cause of under representation of racial minorities on jury venires in the county, that conclusion appears to be warranted. If minorities are more transient and tend to move more often than others, then they are less likely to receive a summons sent to them."

The first sentence attempts to reach the conclusion that undeliverable mail is the major cause for the alleged under representation of minorities on jury venires. Even assuming the study demonstrates minorities are under represented on jury venires, the conclusion that undeliverable mail is the cause has no empirical basis and is conjecture. In analyzing the second sentence which claims that minorities are more transient, if this is accurate, no matter what juror source list we use, minorities will be under represented. You would have, in effect, structural under representation of minorities for juror venires. Similar to structural unemployment for the work place, this would mean some level of under representation for minorities will exist regardless of efforts to eliminate such under representation.

- Page 19, second paragraph, the statement, "Records are not kept (or at least compiled) concerning the number excused for various reasons, so it is not possible here to determine whether inordinate numbers of excuses are being given," is inaccurate. Records are retained indicating the reason for excusal. Jury personnel previously interviewed by the author(s) do not recall any request for such data.

- Due to our concerns with the methodology utilized by the study, Clark County Internal Audit recieved a coppy of the draft. Although several of their concerns mirror those detailed herein, attached is that review of the study.

With respect to the juror selection procedures used in the Eighth Judicial District Court, we are instituting two new elements which should improve the efficiency and effectiveness of the summons process. In January of 1993 we established a formal, automatic letter follow-up system for jurors postponing and not scheduling after the postponement date lapsed. Also, we are working with Clark County Information Systems to incorporate zip plus four mailing codes on the summons envelope. Other jurisdictions have reported as much as a 10 percent increase in summons deliveries and responses due to this approach. We expect the zip+4 approach to be operational within 6 months.

Sincerely,

Charles J. Short
Acting Court Administrator

CJS:na

cc: Chief Judge Nancy Becker
Shirley Blake

MEMORANDUM

INTERNAL AUDIT DEPARTMENT

JEREMIAH P. CARROLL II, C.P.A.
Director

TO: Chuck Short, Acting District Court Administrator

FROM: Jeremiah P. Carroll, Director of Internal Audit

SUBJECT: Jury Composition Study

DATE: October 12, 1993

You have asked us to review the report on the jury composition study prepared for the Nevada Appellate and Postconviction Project. We question whether the findings support the conclusions reached in the report. We are not saying that disparity is or is not occurring, however, we are saying that this report doesn't prove that the jury selection process is invalid nor does it prove that disparities arise as a result of procedures followed by the Eighth Judicial District Courts.

This report was read by three audit personnel with the following credentials:

(1) Director, Certified Public Accountant (CPA), with thirteen years of auditing and research experience,

(2) Auditor, CPA, MBA, with fifteen years of auditing and research experience, and

(3) Auditor, CPA, MBA, with twenty years of auditing and research experience.

Each of these individuals have voiced concerns in various areas of the report. The following is a listing of the areas we question either individually or collectively:

- The Executive Summary of Findings makes a positive declaration that the "study revealed a significant disparity," however, in the explanatory paragraphs following the terms: "probably arises," "probably is less," "probably occurs," and "might result" are used. These are not conclusive statements that disparity exists or is, in fact, caused by the condition observed.

- The physical observation of prospective jurors is not, in our opinion, conclusive evidence of determining minority background. Therefore, the entire projection of sample observations to the population throughout the report is statistically insupportable because observations alone do not conclusively identify racial categories in all cases.

- Additionally, the number of observations (six) is insufficient to determine with any degree of certainty that the sample is representative of the population. Most analysts would require more than forty days of observations to obtain a 95% reliance level of confidence rather than use six days of observation. Therefore, most statistics shown in the assessment of disparity section of the report are questionable; as well as any conclusions reached.

- Part of the report is an inference that the jury selection should be representative of the general population when in fact the jury selection should be representative of the total population qualified for selection (i.e., electors who have sufficient knowledge of the English language and who have not been convicted of a felony). The report author does not investigate this provision and its effect on minority representation. The report does state, however, the qualifications for jury service.

- The report states that until information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random. The report author does not state that he was denied this information. Even so, unavailability of information doesn't mean that procedures to assure random selection don't exist.

- The report states assigning people to panels is done by assigning badge numbers to people as they phone in. The report then states "the randomness of the assignment process is called into question." This is not true as far as any racial disparity is concerned. What you have done is shown a preference for people who call in early, regardless of race.

- The report states that records are not kept concerning the number of jurors excused for various reasons. The report author then states that this may result in "under-representation of minorities," without giving any justification except to imply that there may be "inordinate numbers of excuses being given." This is not evidence to show that jurors are not properly excused.

- The report author then states that minorities who respond to a summons "might be more likely to mention financial hardships" or other excuses. He states this in support of the contention that minorities may be under-represented in jury venires. There is no evidence that shows that minorities are more likely to request to be excused or that Jury Commissioner's Office "readily" accepts such requests from minorities.

- In the conclusions to the report, the report writer again makes references to areas of disparity using the following terms: "might result," "does not appear," "may," and "might serve as barriers." These are not conclusive statements that disparity is caused by jury selection procedures, if in fact the disparity exists.

I have one question on the study procedures. Certain additional procedures could have been performed to mitigate the confusion in the "study." We questioned why statistical studies were not performed on the areas the report author found in fault. A study could have been done on returned mail in an attempt to determine minority status of the prospective juror. Additionally, jurors excused from court could have been surveyed. Was the report author prohibited from doing this?

While we believe that this report doesn't prove that disparities arise as a result of procedures followed by the Eighth Judicial District Courts, the courts can work to enhance reaching all eligible prospective jurors and non-responsive potential jurors. Other alternatives are available to enhance the process and should be utilized if feasible.

If you have any questions regarding these comments, please call me at extension 3269.

NEVADA APPELLATE AND POSTCONVICTION PROJECT

330 SOUTH THIRD STREET, SUITE 701
LAS VEGAS, NEVADA 89101
702-384-6010
FAX 702-384-6944

A NON-PROFIT CORPORATION

September 8, 1993

Honorable Nancy Becker
Chief Judge
Eighth Judicial District Court
200 South Third Street
Las Vegas, Nevada 89155

CONFIDENTIAL

Re: Jury Composition Study

Dear Chief Judge Becker

On Friday, I spoke to Mr. Short, the Acting Court Administrator, about the preliminary study of jury composition in Clark County which the Project has commissioned. I provided Mr. Short with a copy of the preliminary report for him to review, so that any factual errors which the report may contain could be corrected before it is distributed to anyone else. Mr. Short indicated that he is suggesting significant changes in the report and we will carefully review his suggestions before the document is made public.

I appreciate the amount of time and effort Mr. Short is devoting to this issue. I believe that the more non-controversial factual issues we can identify, the more cost-effective any steps to improve the system will ultimately be, whether those measures are taken by the Court Administrator or as a result of litigation in particular cases. I would like to acknowledge Ms. Peterson's and Mr. Short's cooperation, and the Court's support of them, in facilitating our inquiry into this issue. This attitude is by no means universal among courts or administrators.

I do want to correct one misunderstanding which Mr. Short related to me. Early last year, when the Project had just begun operation, I discussed a number of issues with Ms. Peterson; and at that time I indicated the likelihood that the Project would be conducting

some kind of inquiry into the jury selection process. Ms. Peterson, as always, graciously offered her cooperation. In October, 1992, Dr. DeWitt began the observations which form the basis of the study, and personnel in the Court Administrator's office asked him what he was doing. I know that he identified himself as conducting a study for the Project, because Ms. Peterson called me to confirm that he was working with me. I confirmed that he was conducting a study for the jury selection procedures and I thanked Ms. Peterson for her willingness to discuss that issue with Dr. DeWitt. I am quite certain that I never suggested that the jury study was being conducted for the Supreme Court.

I am aware that Dr. DeWitt is also conducting a study of the Alternative Dispute Resolution system for the Supreme Court, and he sometimes divides his time in Clark County between the Supreme Court's study and the jury study; and I suppose some confusion may have arisen from his dual role. I have always made it clear, however, that the jury composition study was commissioned by the Project to identify possible constitutional issues in the jury selection system. I believe that giving the report to Mr. Short for his review before it is made public is an indication that the Project is approaching this sensitive issue in a straightforward and responsible manner.

Please excuse the length of this letter, but I believe that it is necessary to be as clear as possible with all concerned parties when the Project is dealing with these difficult issues.

Yours truly,

Michael Pescetta
Executive Director

MP/ef

cc: Mr. Charles Short

NEVADA APPELLATE AND POSTCONVICTION PROJECT

330 SOUTH THIRD STREET, SUITE 701
LAS VEGAS, NEVADA 89101
702-384-6010
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A NON-PROFIT CORPORATION

August 25, 1993

Hand Delivered

Mr. Charles J. Short
Acting Court Administrator
Eighth Judicial District Court
200 South Third Street
Las Vegas, Nevada 89155

Re: Jury Composition Study

Dear Mr. Short:

I want to express my thanks to you and your office for the cooperation you extended to us in connection with our preliminary study of the jury composition situation in Clark County. The help your office provided was important to completing the preliminary study in an economical and expeditious manner.

I enclose a copy of the preliminary report. I would like to give you an opportunity to review it and correct any factual inaccuracies you may detect in it before it is released to attorneys who may be contemplating raising jury composition issues, or to the public. I expect that the report will be distributed in the first week of September. If you have any corrections to suggest, I would appreciate it if you would let me know by August 31.

Again, many thanks for your assistance.

Yours truly,

Michael Pescetta
Executive Director

MP/ef

enclosure: as noted

LITIGATION TECHNOLOGIES, INC.
Trial Consultants
P.O. Box 2901
Reno, Nevada 89505
(702) 324-3456
FAX (702) 829-7241

REPORT OF FINDINGS

CONFIDENTIAL

JURY COMPOSITION: A PRELIMINARY STUDY

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

Prepared for:
Nevada Appellate and Postconviction Project

Prepared by:
John B. DeWitt, Ph.D.

AUGUST, 1993

TABLE OF CONTENTS

INTRODUCTION

Research Objective

In August, 1992 Litigation Technologies, Inc. was commissioned by the Nevada Appellate and Postconviction Project to conduct a preliminary jury composition study in the Eighth Judicial District, Clark County, Nevada. The Nevada Appellate and Postconviction Project had received information suggesting that there is a probable basis for a composition challenge as a result of under-representation of racial minorities on jury venires. This preliminary study was designed to collect data to determine whether it is likely that racial minorities are under-represented, and to try to identify the stages in the jury selection process where the under-representation, if any, might be occurring.

Methodology

The study was comprised of two parts. The first part involved investigating how the jury selection system works in the Eighth Judicial District. This entailed obtaining applicable statutes and regulations concerning the process, and interviewing officials to obtain answers to specific questions about the jury selection system. In the second part of the study, we collected data to help identify potential sources of disparity in composition at various levels of the selection process.

EXECUTIVE SUMMARY OF FINDINGS

The study revealed a significant disparity between the proportion of members of racial minorities in the adult population and the proportion ultimately assigned to jury venires. Specifically, Blacks and other racial minorities, including Hispanics, are under-represented on jury venires for Eighth Judicial District courts. Observation of potential jurors in September, 1992 and May and July, 1993 indicated that African-Americans were under-represented by over one-third (36.8 percent) while other racial minorities were under-represented by 28.3 percent. The likelihood that these findings are a result of chance alone rather than other factors is less than 1 in 1,000 for African-Americans and less than 1 in 100 for other minorities.

An analysis of the selection procedures employed in the Eighth Judicial District indicates that the disparity in representation of racial minorities probably arises from procedures at three distinct phases of the selection process. First, the jury pool is comprised of names obtained from just one source - a Nevada Department of Motor Vehicles list of licensees and ID cardholders. This list includes only about 90 percent of the jury eligible population, which probably is less inclusive and less representative than is feasible.

Second, the disparity probably occurs, in large part, at the summoning stage of the selection process. About one-quarter of the summonses mailed out are returned as undeliverable, while more than twenty percent fail to generate any response from the individuals summoned. The Jury Commissioner's office does not make any attempt to ascertain correct addresses for summonses which are undeliverable, and does not re-summon those who fail to respond for other reasons.

The third stage of the selection process in which practices might result in disparity is in the granting of excuses from jury duty by the Jury Commissioner's office. Although the stated policy of the Court Administer is to employ very conservative criteria when considering requests for excusal, about 67 percent of those who do respond to a summons are either disqualified from jury duty or are excused, temporarily or permanently, from serving. These individuals never reach the stage of being assigned to a venire.

APPLICABLE STATUTES AND RULES

NEVADA REVISED STATUTES

QUALIFICATIONS AND EXEMPTIONS OF JURORS

6.010 Persons qualified to act as jurors.

Every qualified elector of the state, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides.

6.020 Exemptions from service.

1. Upon satisfactory proof, made by affidavit or otherwise, the following named persons, and no others except as provided in subsection 2, are exempt from service as grand or trial jurors:
   (a) Any federal or state officer.
   (b) Any judge, justice of the peace or attorney at law.
   (c) Any county clerk, recorder, assessor, sheriff, deputy sheriff, constable or police officer.
   (d) Any locomotive engineer, locomotive fireman, conductor, brakeman, switchman or engine foreman.
   (e) Any officer or correctional officer employed by the department of prisons.
   (f) Any employee of the legislature or the legislative counsel bureau while the legislature is in session.
   (g) Any physician, optometrist or dentist who is licensed to practice in this state.
2. All persons of the age of 65 years or over are exempt from serving as grand or trial jurors. Whenever it appears to the satisfaction of the court, by affidavit or otherwise, that a juror is over the age of 65 years, the court shall order the juror excused from all service as a grand or trial juror, if the juror so desires.

6.030 Grounds for excusing jurors.

1. The court may at any time temporarily excuse any juror on account of:

   (a) Sickness or physical disability.
   (b) Serious illness or death of a member of his immediate family.
   (c) Undue hardship or extreme inconvenience.
   (d) Public necessity.

A person temporarily excused shall appear for jury service as the court may direct.

2. The court shall permanently excuse any person from service as a juror if he is incapable, by reason of a permanent physical or mental disability, of rendering satisfactory service as a juror. The court may require the prospective juror to submit a physician's certificate concerning the nature and extent of the disability and the certifying physician may be required to testify concerning the disability when the court so directs.

6.040 Penalty for failing to attend and serve as a juror.

Any person summoned as provided in this chapter to serve as a juror, who fails to attend and serve as a juror, shall, unless excused by the court, be ordered by the court to appear and show cause for his failure to attend and serve as a juror. If he fails to show cause, he is in contempt and shall be fined not more than $500.

SELECTION OF TRIAL JURORS BY JURY COMMISSIONER

6.045 Designation by rule of district court; administrative duties; selection of trial jurors.

1. The district court may by rule of court designate the clerk of the court, one of his deputies or another person as a jury commissioner, and may assign to the jury commissioner such administrative duties in connection with trial juries and jurors as the court finds desirable for efficient administration.

2. If a jury commissioner is so selected, he shall from time to time estimate the number of trial jurors which will be required for attendance on the district court and shall select that number from the qualified electors of the county not exempt by law from jury duty, whether registered as voters or not. The jurors may be selected by computer whenever procedures to assure random selection from computerized lists are established by the jury commissioner. He shall keep a record of the name, occupation and address of each person selected.

PART VI. JURY COMMISSIONER

Rule 6.01 Designation of Jury Commissioner.

Pursuant to the provisions of NRS 6.045, the court must designate a jury commissioner. The jury commissioner is directly responsible to the district court through the district court administrator.

Rule 6.10 Jury Sources.

In locating qualified jurors within Clark County as required by NRS 6.045, the jury commissioner must utilize the list of licensed drivers as provided by the State of Nevada Department of Motor Vehicles and Public Safety and such other lists as may be authorized by the chief judge.

Rule 6.30 Notice to Court Administrator of Prospective Juror's Failure to Appear.

If any prospective juror summoned fails to appear, the jury commissioner must immediately notify the court administrator of that person's failure to appear and the department to which they were assigned.

Rule 6.32 Trial Juror's Period of Service.

Each person lawfully summoned as a trial juror must serve for a period established by the court.

Rule 6.40 **Duty of Jury Commissioner on Appearance of Prospective Jurors.**

When prospective jurors appear before the jury commissioner pursuant to summons, he must assign such number of prospective jurors to each department of the court as the jury commissioner and the court administrator deem necessary.

Rule 6.42 **Reassignment of Prospective Jurors.**

Prospective jurors, assigned for service in a department of the court, whose services subsequently are not required must return to the jury commissioner for possible further assignment on that day.

Rule 6.44 **Completion of Trial Juror's Duties.**

When a trial juror has completed his jury duties in the department to which he was assigned, the district judge must direct him to return to the jury commissioner.

Rule 6.50 **Court Administrator May Excuse Jurors.**

A person summoned for jury service may be excused by the court administrator because of major continuing health problems, full-time student status, child care problems or severe economic hardship.

Rule 6.70 **Limitation, Construction of Part VI.**

Part VI must be limited to trial juries and jurors, and must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice.

OBSERVATION OF JURY VENIRES

In order to determine the percentage of minorities in venires for trials in Eighth Judicial District courts, prospective jurors were observed and counted on a total of six occasions: three in September, 1992; one in May, 1993; and two in July 1993. On these six occasions a total of 1,137 prospective jurors were observed in the juror orientation room at the Clark County Courthouse[1].

On five occasions, the counts were conducted as individuals lined up at the front desk in the juror orientation room to receive their paychecks and badges. On one occasion, they were observed as they waited in a separate room. For the most part, jurors were called up to the desk in groups of thirty, and lined up in single file. This facilitated the counting procedure considerably.

The objective of the observation was to count the total number of prospective jurors, and the number of females, males, African-Americans, whites, and "other" racial minorities (including Asian, Latino, Native American, etc.) Because the methodology involved observing jurors and making an on-the-spot determination about whether to categorize each individual as White, African-American, or Other we include no separate classification for people of Hispanic origin, which generally indicates a Spanish-speaking person of Latin American origin, of any race. The results of the observations are summarized below:

(0))

	OBSERVATION DATE							
Juror Type	9-14-92	9-21-92	9-28-92	5-24-93	7-12-93	7-19-93	Total	%
White	170	182	174	77	170	221	994	87.4
African-Amer.	11	17	9		10	16	68	6.0
"Other"	12	13	7		13	18	75	6.6
TOTAL	193	212	190	94	193	255	1,137	100.0

((0))

To summarize, the racial composition of the jury venires observed at Clark County Courthouse was as follows:

Race	Number	Percent
White	994	87.4
African-American	68	6.0
Other	75	6.6
Total	1,137	100.0

ASSESSMENT OF DISPARITY BETWEEN COMPOSITION OF VENIRES AND COMPOSITION OF THE ADULT POPULATION

In order to determine whether there is any significant disparity between the percentage of racial minorities in the general population and the jury venires, we first had to collect census data about the racial composition of the general population.

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Preliminary 1990 U.S. Census data for Clark County[2] indicate that the racial composition is as follows:

Race	Number	Percent	All Ages
White	602,658	81.3	75.1
African-Amer.	70,738	9.5	9.3
Other	68,063	9.2	11.2 6.1
Total	741,459	100.0	

In the past the U.S. Bureau of the Census has acknowledged that the census undercounts the population and has released estimates of the undercount for each state. Estimates of the undercounts for the 1990 census have not been released yet, but in 1980 the Nevada undercount was estimated to be 3.46 percent, which was the second highest among the 50 states. [redacted]

believe that racial minorities are more likely to be undercounted, it is probably fair to assume that the percentage of racial minorities in Clark County's population is actually higher than reported above. As a result, the disparities discussed below are probably marginally smaller than they would be if the census were accurate.

A comparison of the racial composition of Clark County's population with the racial composition of the jury venires observed at the Clark County Courthouse yields the following table:

Race	Observed at Courthouse	General Population
White	87.4	81.3
African-Amer.	6.0	9.5
Other	6.6	9.2
Total	100.0	100.0

Absolute disparity

When assessing whether a particular cognizable group is under-represented in the venire, there are two commonly accepted ways to proceed. In the first, and less useful approach, one looks at the disparity between the group's proportion in the general population and its proportion in the venire. This is known as the "absolute disparity." For example, if a racial minority constitutes 10 percent of the population and just 5 percent of the venire, then the absolute disparity for that group is 5 percent - the difference between the two percentages.

In this study, the absolute disparity between the population and the venire for African-American and other racial minorities can easily be calculated by computing the difference between the two percentages, as summarized in the following table:

Race	Jury Venire	=	General Population	=	Absolute Disparity
White	87.4%		81.3%		+ 6.1%
African-Amer.	6.0%		9.5%		- 3.5%
Other	6.6%		9.2%		- 2.6%

Thus, in terms of absolute disparity, whites are over-represented by 6.1 percent, while African-Americans are under-represented by 3.5 percent and other races are under-represented by 2.6 percent.

Comparative disparity

However, the absolute disparity does not reveal anything about the magnitude of the disparity in relationship to the group's relative proportion of the population. In order to do that, one must use a quantitative index which expresses absolute disparity as a percentage of the cognizable group's relative size in the general population. This is accomplished by means of the comparative disparity index, or CDI[3]. If, for example, the absolute disparity between representation in the population and representation in the venire is 5 percent for a particular racial minority, as in the example above, the comparative disparity is arrived at by computing the absolute disparity, then dividing the absolute value of that difference by the group's percentage of the population, and multiplying that result by 100 in order to express the result as a percentage (.05 - .10 x 100 = 50%.)

In this study, the comparative disparity between representation in the population and representation on venires is calculated as follows:

Race	Absolute Disparity		Percent of Population		Comparative Disparity
White	6.1%	-	81.3%	x 100 =	+ 7.5%
African-Amer.	3.5%	-	9.5%	x 100 =	- 36.8%
Other	2.6%	-	9.2%	x 100 =	- 28.3%

In other words, according to the comparative disparity index, African-Americans are substantially under-represented by more than one-third (36.8%), and other minorities are under-represented by over one-quarter (28.3%). There were 36.8 percent fewer African-Americans on the observed venires than one would expect based on the proportion of African-Americans in the population. Likewise, there were 28.3 percent fewer Asians, Latinos, Native Americans, and other racial minorities (in aggregate) than one would expect.

One consequence of this is a greatly reduced chance that an African-American or a member of one of the other racial minorities will be on a venue sent to a particular courtroom for a jury trial, and thus a greatly reduced chance that an African-American or a member of another racial minority will be selected to serve on a jury for a criminal or civil case in the Eighth Judicial District.

Statistical Significance Test

The statistical significance test is a means of determining the probability that the disparity has occurred by chance alone. If the probability is very low, chance is rejected as the source of the disparity, and it may be concluded that some other factor or factors, such as systematic bias or discrimination in the selection process, produces the disparity.

Using a statistical significance test described in several authoritative sources[4], we are able to calculate probabilities that under-representation of African-Americans and other racial minorities (or over-representation of whites) discussed above did not occur by chance alone. The results of the test are summarized in the following table:

Race	Number of Standard Deviations	Probability of Chance
White	5.27	p<.0001
African-American	4.02	p<.001
Other	3.03	p<.01

The table indicates that for African-Americans the likelihood that the disparity occurred due to chance rather than other factors is less than 1 in 1,000. For other minorities the likelihood that it occurred due to chance alone is less than 1 in 100. In other words, the disparities are highly significant, statistically. Several Supreme Court opinions[5] have cited the statistical significance standard as a measure of the significance of disparities, and in Castaneda v. Partida[6] the Court set out a statistical significance cutoff of "two or three standard deviations" as one method of distinguishing unconstitutional from allowable disparities. By that standard, the leval of under-representation observed in the sample indicates an unconstitutional disparity for African-Americans and other racial minorities.

Hispanics

Our observation of potential jurors did not entail a count of Hispanics as a separate category. Some of the individuals classified as Other were clearly Hispanic, just as some were clearly Asian. But such distinctions, based only on a quick observation of physical characteristics, were in several cases difficult to make, and we felt that it might be misleading or inaccurate to record or report such distinctions.

It is likely, however, that most if not all of the Hispanics in the groups observed were actually classified as Other in our count. Thus, we can reasonably suggest that the number of Hispanics was probably some fraction of the total number of individuals classified as Other (5.4 percent were classified as Other.) Census data indicate that 11.2 percent of the population of Clark County is Hispanic[7], and thus it is likely that Hispanics are in fact substantially under-represented on jury venires. At the least, there is an explicit indication that further study of the potential under-representation of Hispanics is warranted.

SELECTION PROCEDURES USED IN EIGHTH JUDICIAL DISTRICT COURT

In order to learn how the selection process works, a face-to-face interview was held with the Eighth Judicial District Court's Court Administrator and the Jury Commissioner on September 28, 1992. The purpose of the interview was to learn about the process by which the general population is reduced to petit jury venires. In addition to learning about the various steps in the process, we wanted to learn who performs each step, and what criteria are used in the qualification and excusal processes. Salient information gathered in that interview is presented in the following section:

> According to the Court Administrator and the Jury Commissioner[8] potential jurors for trials in the Eighth Judicial District Court are drawn from only one source - a registration list provided by the Nevada Department of Motor Vehicles. The list, containing over 600,000 names, includes information about motor vehicle licensees and DMV ID card holders 18 years of age or older who are residents of Clark County. The list is on a computer tape which the DMV furnishes to Clark County's Computer Information Systems Department. The Information Systems Department unloads the data from the tape into the county's mainframe computer. The list is updated every six months by means of a new tape from the DMV.
>
> In the past, the jury pool was composed of names from voter registration lists as well as the DMV list. However, studies showed that 97 percent of the registered voters were also on the DMV list, so in 1983 a decision was made to use only the DMV list.
>
> Each week the county provides the Jury Commissioner's office with a list of about 3,000 names randomly selected, from all zip code areas in the county. (Note that as of January 1, 1993, the Jury Commissioner's office began selecting 2,500 names per week, rather than 3,000.) The Court Administrator feels that the process is more objective if the county pulls the names and the Jury Commissioner's office isn't involved. The county uses a comprehensive jury selection software program, which has been in use since about 1983. This selection process has been challenged three times and found valid each time, according to the Court Administrator. However, specific information about how the computer randomizes and selects names would have to be obtained from the Clark County Computer Information Systems Department personnel who run the program in order to evaluate whether procedures being used are appropriate.

Summonses are then sent to those 3,000 individuals. About 25 percent are returned because of bad addresses (mostly expired forwarding addresses), while just under one quarter who are summoned do not respond, and about 1,600 respond by telephone as instructed. The court has no enforcement staff and does not send out a second summons to people who don't respond to the first one. Also, they do not make an attempt to ascertain addresses of people whose summonses are returned as undeliverable.

The 1,600 or so individuals who call the Jury Commissioner's office in response to the summonses are asked several questions to determine eligibility, and to provide information to the judge and attorneys for use in voir dire. In addition to data affecting eligibility, data is collected about the person's occupation, education, spouse's occupation, and prior jury service. If eligible, individuals are then randomly assigned a "badge number" and told to report for jury duty on a specific date. They are also instructed to call before coming in, so they won't have to come in if the case settles. If a person doesn't show up for jury duty after being assigned a badge number (and thus in department), the process for following up varies. Sometimes the judge will ask the Jury Commissioner's office to call the person and tell them to come in, and sometimes the judge will simply tell them to send out an order to show cause for not appearing. [redacted] of the 1,600 who respond to the summons actually qualify and report for jury duty.

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Jurors are paid $9.00 for reporting to the courthouse if they are not selected for jury duty. If they survive voir dire and are selected to serve on a jury, they are paid $15.00 for each of the first [redacted] days, and $30.00 for every day thereafter. They are also paid mileage. The court uses a "one day/one trial" system, in which people who come to court but are not selected for a trial, as well as those who are selected to serve, are exempted from further jury duty for a period of at least three years. This system eases the burden on people, so that they aren't called back on multiple occasions if they are not selected, or if they serve on a jury.

A staff of 3 full-time and 2 or 3 part-time people handles the telephone calls that come in response to the summonses. This staff is responsible for determining eligibility. To be eligible, a person must be a citizen of the United States, a resident of Clark County, not a convicted felon (unless rights have been restored), and be able to [redacted] and understand English. By statute, those over 65 who request excuses, and those with permanent disabilities are exempted. [redacted] are given to full-time students, people claiming medical excuses, people whose income is based strictly on commission, and people in positions exempted by law.

Those not exempted or ascertained to be ineligible are told to report for jury duty and to let the judge deal with their excuses, if any, in the courtroom. The Jury Commissioner's office tries to maintain a personal touch, by speaking with each potential juror individually on the telephone. The staff is instructed to be very careful not to excuse jurors except for the reasons stated above. The policy is to let the judges decide on all other requests for exemption.

When jurors arrive at the courthouse they are directed to a room where they are given a badge, a handbook about the jury system, and their check for thefirst day's service. They are also shown an orientation film and given an opportunity to ask questions, after which they are assigned to petit jury venires for various departments, based on groupings of badge numbers.

The procedures used by the Eighth District Court have been reviewed over a period of several years by a consultant, Dr. Thomas Munsterman, who is associated with the National Center for State Courts. He last visited in mid-1992. The Court Administrator has set a goal of reaching all the standards set by the National Center for State Courts, but recognizes that the Eighth Judicial District has not yet reached that goal with respect to some of the standards.

DISCUSSION AND CONCLUSIONS

There are four potential sources of disparity in the process leading to the selection of jurors for venires in the Eighth Judicial District Court. These four sources are:

* The source list
* The sampling process
* Procedures for dealing with non-response to summonses
* Standards for excusing

The source list

The American Bar Association's Standards Relating to Juror Use and Management states that "The jury source list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible." At least some of the disparity ascertained in this study might result from the use of a single source list provided by the Nevada Department of Motor Vehicles, rather than using multiple sources.

As a single source, the list does appear to be reasonably inclusive. Population projections for Clark County for 1992 indicate a population of 677,865 for residents 18 years of age or older[9]. Figures provided by the Nevada DMV show that as of July, 1992 there were a total of 616,406 licensees and ID card holders over the age of seventeen in Clark County[10]. Thus, the DMV list includes 90.1 percent of the adult population of the county.

But a list which excludes 10 percent of the jury eligible population may very well contribute to the under-representation of racial minorities on jury venires in Clark County. A list which is not fully inclusive could easily be skewed against racial minorities because of economic and other factors which might serve as barriers to obtaining driver's licenses or DMV ID cards. However, the DMV does not keep records on the race of licensees and ID cardholders, so it is not possible to say with any degree of certainty whether the source list is as representative of the adult population as is feasible.

Nevertheless, augmenting the single source list with other lists is a method used in a number of other states to improve inclusiveness in this initial stage of the jury selection process. Augmenting the present list with just one other source, a list of registered voters, would increase inclusiveness by several percentage points, and use of one or more other lists, such as city directories, welfare recipients, naturalized citizens, or utility customers to name just a few could ensure that the master jury pool is as inclusive as possible.

The sampling process

Random sampling is an important part of the jury selection process at two stages. First, the names of those chosen to be summoned each week should be selected randomly. The Court Administrator states that this selection process is done by staff at Clark County's Computer Information Systems Department, and that the process has been challenged three times and found sound each time. But until specific information is available about the actual selection procedures used by Clark County it is not possible to say with any degree of certainty that selection at this stage is random.

Potential jurors should also be randomly assigned to panels for specific trials. Apparently this is done by assigning badge numbers to individuals as they call the jury commissioner's office in response to summonses. These badge numbers are grouped sequentially to form panels which are then assigned to the various departments. But if it is the case that badge numbers are assigned sequentially as calls are received, then the randomness of the assignment process is called into question.

Further study is needed to determine whether the selection process conducted by Clark County is actually random, but clearly some of the disparity we have found might be attributable to procedures used at this stage of the selection process.

Procedures for dealing with non-response to summonses

According to information provided by the Court Administrator, it appears that failure to follow up on non-responses to summonses might be a major factor contributing to under-representation of racial minorities on jury venires in the Eighth Judicial District.

Only about 1,600 (53.3%) of the 3,000 summonses mailed out each week generate responses. About 25% are returned as undeliverable, while the remainder, about 22%, fail to generate responses for reasons that have not been determined.

Because the court does not make any attempt to ascertain correct addresses for summonses which are undeliverable (mostly as a result of expired forwarding addresses), and does not resummon those who don't respond, nearly one-half of the total available jury pool is effectively eliminated from consideration at this rather early stage of the selection process. While we cannot say for certain that this is the major cause of under-representation of racial minorities on jury venires in the county, that conclusion appears to be warranted. If minorities are more transient and tend to move more often than others, then they are less likely to receive a summons sent to them. If they are less likely to respond to a

summons for any of a variety of reasons, from lack of understanding of the judicial process to anticipation of exclusion from the system, then they are more likely to be under-represented in the pool of potential jurors.

Standards for excusing potential jurors

The Court Administrator's stated policy is to excuse potential jurors using conservative criteria, telling most of those who present excuses based on hardship, inconvenience, or biases of various sorts to report for jury duty and let the judge decide whether or not to excuse them. [redacted] are not kept (or at least not compiled) concerning the number excused for various reasons, so it is not possible here to determine whether inordinate numbers of excuses are being given. Likewise, figures were not available concerning the numbers deemed ineligible for various reasons. But if it is actually the case that only about 600 (37.5%) of the 1,600 who respond to their summonses qualify and are not excused, then this is potentially another stage of the selection process that might account for the under-representation of racial minorities on venires.

If, for example, minorities who respond to a summons are more likely than others to present excuses which are readily accepted by staff in the Jury Commissioner's office, then minorities are going to be under-represented on jury venires. Racial minorities and low income people might be more likely to mention financial hardship and be granted excuses by the Jury Commissioner's staff. Also, the practice of [redacted] to people who say they derive their entire income from commissions might tend to exclude racial minorities and others who have higher rates of unemployment or who are less likely to be employed in traditional wage earning jobs.

Conclusions

The study shows that racial minorities are under-represented on jury venires for Eighth Judicial District Courts. The disparity is statistically significant, and with respect to African-Americans there is less than 1 chance in 1,000 that the observed disparity occurred by chance rather than as a result of other factors. With respect to other minorities, there is less than 1 chance in 100 that it occurred by chance alone.

An analysis of the selection process indicates that disparities arise as a result of procedures followed in three distinct areas. First, a single source list is used to generate names of adults in Clark County. This list, provided by the Nevada DMV, only includes about 90 percent of the adult population. Second, about one-quarter of those summoned do not receive the summons because it is

returned to the Jury Commissioner's office as undeliverable, and no attempt is made to ascertain correct addresses for those individuals. In addition, nearly one-quarter of the summonses are not returned, for a variety of reasons, and those individuals are not re-summoned. Finally, among those who do respond to the summons, over 60 percent are either disqualified from jury duty or are temporarily or permanently excused from serving by the Jury Commissioner's office.

The net effect of these procedures is that out of every 100 adult members of Clark County's population, only about 18 ever reach the stage of being assigned to a jury venire, while 82 do not. The disparity between the percentage of racial minorities in the adult population and the number observed in jury venires is directly attributable to one or more of the factors discussed above, and the disparity could be reduced or eliminated if some or all of the following measures were implemented:

* Use of multiple source lists to ensure that the jury pool is as inclusive and as representative as possible.

* Implementation of measures to ascertain correct, deliverable addresses for those individuals whose summonses are returned as undeliverable.

* Re-summoning of those who don't respond to their initial summons.

* Strict adherence to statutes and rules governing disqualification and excusal of potential jurors.

NOTES

1. Observations were conducted by John S. DeWitt, Ph.D., President of Litigation Technologies, Inc. He was accompanied on two occasions by Mia B. Sanderson, a partner in the firm. On two other occasions, he was accompanied by Nancy Downey, M.A., of Downey Research Associates, a Las Vegas research and consulting firm.

2. See Nevada Population Information, prepared by the State Demographer's Office; Nevada Small Business Development Center, Bureau of Business and Economic Research; College of Business Administration, University of Nevada, Reno.

3. See Kairys, Kadane and Lehoczsky, Jury Representativeness: A Mandate for Multiple Source Lists. 65 Cal. L. Rev. 776 (1977).

   Also see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases. 80 Harv. L. Rev. 338 (1966).

4. National Jury Project, Jurywork: Systematic Techniques, Release #8, (1989); D. Baldno & J. Cole, Statistical Proof of Discrimination (Shepard's McGraw-Hill 1980); Finkelstein, Note 3.

5. Castaneda v. Partida, 430 U.S. at 496 n.17; Alexander v. Louisiana, 405 U.S. at 630 n.9; Whitus v. Georgia, 385 U.S. at 552 n.2.

6. Castaneda v. Partida, Note 5.

7. United States Department of Commerce, U.S. Census, 1990.

8. The Court Administrator is Anna Peterson. The Jury Commissioner is Shirley Blake.

9. See Nevada Population Information cited in Note 2. This estimates Clark County's 1992 population to be 897,570. Preliminary 1990 Census data estimates 24.5 percent to be under 18 years of age. Thus, approximately 677,665 are 18 years of age or older.

10. See report provided by State of Nevada Dept. of Motor Vehicles, run date 7/27/92.

EXHIBIT 176

EXHIBIT 176

NEVADA STATE PUBLIC DEFENDER

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September 23, 1996

Marlo Thomas, #50682
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070

Re: State of Nevada vs. Marlo Thomas

Dear Mr. Thomas:

Please be advised that you have two trial deputies working on your case; myself and Peter R. La Porta. Also, we have 3-1/2 months to prepare for trial and our investigator, Jerome Dyer, is currently working on your case. We anticipate visiting you soon at SDCC.

Very truly yours,

Jordan Savage

JORDAN S. SAVAGE
Deputy State Public Defender

JSS:rlc

EXHIBIT 177

EXHIBIT 177

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DONALD SHERMAN, Petitioner, vs. RENE BAKER, *et al.*, Respondents.	Case No. 2:02-cv-1349-LRH-LRL **OPPOSITION TO RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY** **(Death Penalty)**

Respondents, by and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, oppose Donald Sherman's (Sherman) renewed motion for leave to conduct discovery. Docket #158. This opposition is based upon the following points and authorities, together with all other pleadings, documents, and exhibits on file herein.

POINTS AND AUTHORITIES[1]

I.

STATEMENT OF THE CASE

On February 5, 1997, a jury convicted Sherman of Count I, burglary; Count II, robbery; and Count III, first-degree murder. Exhibit 71.[2] Sherman was sentenced to death. Exhibits 77, 80.

. . .

[1] Respondents deny all factual allegations in the petition save and except for those expressly found by a Nevada court of competent jurisdiction.

[2] All exhibit references to Respondents' index filed in support of Respondents' motion to dismiss, Docket #125-145, unless otherwise noted.

The Nevada Supreme Court affirmed the conviction on October 27, 1998. Exhibit 98. The United States Supreme Court denied the petition for certiorari on May 24, 1999. Exhibit 104.

Sherman filed the first state habeas petition on June 7, 1999. Exhibits 107, 116. The state district court denied the petitions on December 12, 2000. Exhibit 124. The Nevada Supreme Court affirmed the denials on July 9, 2002. Exhibit 139. Remittitur filed on August 5, 2002. Exhibit 140.

Sherman filed the original federal petition on September 11, 2002. Docket #1.

Sherman filed the first motion for leave to conduct discovery on November 13, 2003. Docket #19. On August 30, 2004, this Court granted Sherman's motion in part. Docket #34. Sherman moved for reconsideration. Docket #35. On January 31, 2005, the Court granted Sherman's motion for reconsideration in part. Docket #43. The Court permitted Sherman to serve subpoenas to obtain records from his former attorneys; his defense expert, Dr. Stephen Pittel; and his own medical records. *Id*.

On November 7, 2005, Sherman filed an amended federal petition. Docket #52. This Court ultimately stayed this action. Docket #79.

While the amended federal petition was pending, Sherman filed a second state habeas petition in the state district court on December 12, 2005. Exhibit 141. The state district court denied the second state habeas petition for technical errors. Exhibit 147. The Nevada Supreme Court reversed and remanded the lower court's technical ruling. Exhibit 168.

Sherman filed an addendum to the state habeas petition. Exhibit 171. The state district court filed the findings of fact, conclusions of law and order denying the petition. Exhibit 188. On May 17, 2010, the Nevada Supreme Court affirmed the denial of the second state habeas petition. Exhibit 205. Remittitur issued on August 16, 2010. Exhibit 208.

This Court vacated the motion for stay on October 8, 2010. Docket #102.

Sherman filed a second-amended federal petition on November 18, 2010.

Respondents moved to dismiss the petition as the claims are untimely, unexhausted, procedurally barred and/or not cognizable. Docket #124. Sherman opposed the motion. Docket #155. Respondents replied on January 23, 2012. Docket #170.

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Sherman also filed a motion for evidentiary hearing (Docket #157) and renewed motion for leave to conduct discovery (Docket #158). Respondents respond to the motion for evidentiary hearing separately.

II.

ARGUMENT

Sherman seeks to conduct discovery relating to several claims in the second-amended federal petition. Docket #158. Sherman seeks to serve subpoenas duces tecum on various departments of the Las Vegas Metropolitan Police Department (LVMPD), the Clark County District Attorney's Office (CCDA), Trude I. McMahan, Esq., Washington Department of Health and Human Services, Clark County Detention Center (CCDC), Idaho Department of Corrections, Idaho Board of Pardons and Parole, Washington Department of Corrections, Longview Police Department, Federal Bureau of Investigation, Nevada Department of Corrections; and to take the depositions of Larry Wages, Gail Stinton, James "Greg" Cox, Robert Bruce Bannister, D.O., Gregory Smith, and persons most knowledgeable at the Nevada Department of Corrections, Nevada Department of Health and Human Services and the Nevada Department of Public Works. Docket #159.

Respondents argue in the motion to dismiss and reply that Sherman has failed to fully exhaust the claims for which he now seeks discovery, and that those claims are likewise procedurally barred. *See* Docket ##124, 170. Sherman's renewed motion for leave to conduct discovery is therefore premature and should be denied. *See* Docket #43. Until this Court rules on the motion to dismiss and finds that the claims in the second-amended federal petition are in fact exhausted, timely and not procedurally barred, this Court cannot rule on the renewed motion for leave to conduct discovery. Should this Court rule that the claims are untimely or procedurally barred, only then should this Court consider the discovery in this action as discussed by Sherman regarding overcoming the procedural defenses. This Court should not rule on this motion for leave to conduct discovery regarding the merits of Sherman's claims until this Court fully rules upon the motion to dismiss.

Despite Sherman's lack of success on the first motion for leave to conduct discovery, Sherman has obtained and provided to this Court a large amount of documents in support of his claims. At this

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point, Sherman provides nothing more than speculation that more documents exist and seeks nothing more than to conduct a fishing expedition.

A. Standard for Discovery

Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. In upholding denial of discovery, the Ninth Circuit has held:

> A habeas petitioner does not enjoy the presumptive entitlement to discovery of a traditional civil litigant. *Bracy v. Gramley,* 520 U.S. 899, 903-905, 117 S.Ct. 1793, 1796-97, 138 L.Ed.2d (1997). Rather, discovery is available only in the discretion of the court and for good cause shown. *See* Rules Governing Section 2254 Cases, Rule 6(a) 28 U.S.C. foll. § 2254. This is consistent with our caselaw that there is no general right to discovery in habeas proceedings. *See Campbell v. Blodgett,* 982 F.2d 1356, 1358 (9th Cir. 1993).

Rich v. Calderon, 187 F.3d 1064, 1067-1068 (9th Cir. 1999).

Therefore, there must be evidence in support of the claims before discovery can be authorized. *Id*. at 1067. Habeas corpus is not a fishing expedition for petitioners to explore a case in search of its existence. *Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011); *Calderon v. Dist. Ct.* (*Nicolaus*), 98 F.3d 1102, 1106 (9th Cir. 1996), *cert. denied sub. nom Nicolaus v. Dist. Ct.,* 520 U.S. 1233 (1997); *Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000) (allegations must be specific as opposed to merely speculative or conclusory). Mere speculation that some exculpatory evidence may have been withheld does not establish good cause for a discovery request. *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

Further, federal habeas review under 28 U.S.C. § 2254(d) does not permit consideration of exhibits or new "evidence" not previously provided to the state courts. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

Good cause can only be considered in a petition containing only exhausted claims and including factual allegations supporting the claim. *McDaniel v. United States District Court*, 127 F.3d 886, 888 (9th Cir. 1997).

To determine if the petitioner has demonstrated "good cause," the court considers *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). In *Bracy*, the court found a number of specific factors established

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"good cause" to conduct discovery: (1) petitioner's request was grounded in specific and demonstrable facts; (2) the discovery request established a logical and direct nexus between the discovery sought and the pending claims; (3) there was real and factual evidence to which the petitioner could point in order to establish that the claims had a factual basis and were not merely speculative; and (4) the discovery request was narrowly tailored to obtain specific, identifiable things.

Thus, discovery is inappropriate when the discovery sought 1) relates to conclusory allegations, 2) relates to an unexhausted claim, 3) relates to a procedurally barred claim, 4) relates to a claim which the petitioner failed to seek discovery in state habeas corpus proceedings or otherwise failed to develop the factual basis of his claim and now seeks to remedy that deficiency in federal court, 5) relates to a claim in which the allegations, if established, would not entitle the petitioner to relief, 6) relates to a claim where the state court trier of fact has reliably found the relevant facts, 7) relates to a fishing expedition by the petitioner in an effort to explore his case in search of its existence, 8) is a fishing expedition to investigate mere speculation, 9) relates to a claim where the petitioner has made generalized statements about the possible existence of material and has failed to produce specific evidence that supports his claim that the requested material exists. The fact that the instant matter involves the death penalty is not a basis for this court to grant discovery contrary to the law as explicated above.

B. Sherman Fails to Demonstrate Good Cause to Grant His Discovery Request for Prosecution and Law Enforcement Files.

Sherman alleges violations of *Brady v. Maryland*, 373 U.S. 83 (1963), because the State failed to disclose material and exculpatory evidence. Docket #158 at 7. Sherman argues "[d]iscovery is necessary not only to show the merits of these claims," but also to demonstrate (1) equitable tolling, (2) timeliness under 28 U.S.C. § 2244(d)(1)(D), and (3) cause to overcome the state procedural bars. *Id.*[3]

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[3] Sherman does not argue discovery is necessary to show the requisite prejudice necessary to overcome the state procedural bars. Docket #1158 at 7. Cause and prejudice are two separate components and both must be proven.

1. Sherman fails to demonstrate good cause to obtain discovery from the Clark County District Attorney's Office or the Las Vegas Metropolitan Police Department.

Sherman seeks to serve subpoenas to obtain evidence regarding alleged undisclosed benefits provided to witnesses Michael Placencia, Christine Kalter and Stacey Maher. Docket #158 at 7-8, *citing* Docket #159 at Exhibits 1-7.

Sherman argues he set forth specific factual allegations demonstrating informant Placencia received benefits in exchange for his testimony. Docket #158 at 8-9. He argues the evidence "available" to him demonstrates Placencia "received a plethora of other benefits" including disposition of charges, credit for time served, and an OR release. *Id*.

First, Placencia did not testify at Sherman's trial. Exhibit 1 (Docket #125-2 at 17-18); Exhibits 63, 65, 66, 68, 72,-75. It is therefore unclear how any of the undisclosed evidence was exculpatory or impeachment material when he did not testify.

Even if this Court finds such information relevant, Sherman provides little more than speculation and hypothesis that the State provided Placencia with undisclosed benefits. That a detective left a message for the justice court, and the justice court wanted to find out the district attorney's intention as to the case before ruling on a release, does not demonstrate an undisclosed benefit. This is particularly true when the notes are not dated and there is no connection established between that case and Sherman's trial. Docket #114-5 at Exhibit 5.38. Sherman provides nothing more than speculation that any undisclosed benefits exists or that the State failed to correct false testimony.

As to Kalter, Sherman alleges the State failed to disclose that she was previously an informant for LVMPD or the conditions placed on Kalter at the time of her release. Docket #158 at 9-10. In the documents provided by Sherman, Kalter's former trial counsel states she learned that Kalter was previously an informant, and that she suspected Kalter continued to be an informant after her release on February 23, 1996. Docket #114-9 at 5.62, 5.66 at 1-2. Sherman provides no evidence that Kalter testified in exchange for undisclosed benefits or that the State failed to disclose exculpatory or impeachment evidence other than speculation by Kalter's previous counsel, who was also one of Sherman's defense counsel.

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Regarding Maher, Sherman argues the State failed to disclose information regarding the disposition of criminal charges against her and the sealing of her records. Docket #158 at 10. Sherman provides nothing more than speculation that the information regarding Maher regarding disposition of charges and sealing of records were in any way tied to her testimony against Sherman. In fact, the information provided by Sherman deals with traffic violations or misdemeanors which could not be used to impeach Maher, or criminal infractions that occurred after Sherman's trial. *See* Docket #114-9 at Exhibit 5.68. Further, Sherman's trial counsel cross-examined Maher regarding any benefits she might have received during trial. Exhibit 63 at 125-26.

Sherman fails to demonstrate the witnesses received benefits beyond what was acknowledged, admitted or testified to.

Sherman argues he requires evidence from LVMPD, Public Records and Homicide divisions, and the Criminal Division of the CCDA, to show trial counsel failed to investigate evidence and observations in Oregon and Washington directly prior to the offense. Docket #158 at 9-10, *citing* Docket #159 at Exhibits 1, 3, 5. However, Sherman provides no factual basis for this argument in his motion. His motion, rather, focuses on the benefits allegedly received and the allegedly false testimony of witnesses at trial, not the investigation of evidence in Oregon and Washington. Sherman fails to demonstrate good cause for discovery.

Likewise, Sherman seeks to serve subpoenas on the Federal Bureau of Investigations (FBI) regarding Dianne Bauer's testimony that she called the FBI and warned them that her father's life was in danger. Docket #158 at 10, *citing* Docket #159 at Exhibit 18-19. Sherman fails to demonstrate his claims are not speculative. Sherman provides no evidence that the FBI had anything to do with the investigation into Dr. Bauer's murder or of Sherman's involvement in the murder. Moreover, the only justification Sherman provides for the FBI records is that Dianne Bauer did not call the FBI to warn them that her father was in danger. Sherman essentially seeks to justify discovery of documents that he himself states do not exist.

LVMPD, Public Records Section (Docket #159 at Exhibit 1). Sherman seeks any and all documents held by the LVMPD Public Records Section, including but not limited to material concerning the murder for which Sherman was convicted, for other criminal cases that he does not

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identify the crime or bases, and documents "not" limited to the murder in this matter. *Id*. at Attachment A, p. 1-2. Sherman fails to limit the discovery request to specific, identifiable things that have a demonstrable nexus to his claims and are not speculative. Sherman fails to show good cause for his discovery request.

Sherman further seeks any and all documents regarding Michael Placencia, Christine Kalter, Lester Bauer, Dianne Bauer, Stacey Bauer, Gayland Hammack, and Judge Deborah Lippis. Sherman fails to demonstrate good cause, as discussed above, for this evidence. He fails to demonstrate a nexus between the extensive request and the claims presented. Sherman further fails to limit the discovery request as to time and date, without specific, identifiable request. *Id*. at p. 2.

Sherman fails to limit the remaining requests to the crimes for which the second-amended federal habeas petition addresses. *Id*. at 2-3. Sherman again fails to narrowly tailor the subpoena to demonstrate a nexus between the very broad request and the claims before this Court, and to raise specific factual claims and not merely speculation.

LVMPD, Organized Crime and Intelligence Unit (Docket #159 at Exhibit 2). Sherman fails to demonstrate the Organized Crime and Intelligence Unit has any evidence related to the claims before this Court.

Sherman also seeks unlimited discovery for Sherman, Placencia, Kalter, and Maher. Sherman is not entitled to unlimited discovery in this matter. He must demonstrate good cause for each discovery request, which he fails to do. Sherman provides no time or date restrictions, nor does he provide a nexus between the claims and the broad discovery request. He further fails to limit the discovery to specific, identifiable things. Beyond Sherman's allegation of benefits and false testimony, Sherman makes no arguments regarding the remaining records sought. Sherman fails to demonstrate good cause for discovery.

CCDA, Criminal Division (Docket #159 at Exhibit 3). Sherman seeks once again unlimited discovery regarding Sherman, Dr. Bauer, Dianne Bauer, Placencia, Kalter and Maher. He fails to develop a nexus between the requested discovery and claims, anything beyond speculation of his claims, or specific, identifiable things.

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LVMPD, Secret Witness Program (Docket #159 at Exhibit 4). Sherman seeks documents regarding Sherman, Placencia, Kalter and Maher. Sherman fails to provide any real or factual evidence in order to establish that the claims have a factual basis regarding these individuals rather than mere speculation. Sherman further fails to limit the discovery to date constraints.

LVMPD, Homicide Division (Docket #159 at Exhibit 5). Once again, Sherman seeks documents regarding Sherman, Placencia, Kalter and Maher. Sherman does not limit the request to the claims presented in this action or to the murder and crimes for which Sherman was convicted. Rather, Sherman requests all possible documents ever generated by the Homicide Division. Sherman fails to demonstrate anything beyond speculation, in very broad terms, for a nexus for unlimited discovery to the claims raised, or specific, identifiable things. Sherman fails to demonstrate good cause for discovery.

LVMPD, Evidence Vault (Docket #159 at Exhibit 6). Sherman's arguments in the motion center on alleged benefits and false testimony. Docket #158. Sherman provides no argument as to good cause for a subpoena to the LVMPD Evidence Vault.

LVMPD, Confidential Informant Program (Docket #159 at Exhibit 7). Sherman seeks evidence from the confidential informant program from 1994 to present. Sherman fails to justify any basis for evidence beyond the trial in this matter. He certainly fails to demonstrate any basis for records spanning fourteen years. Sherman's discovery request goes well beyond the claims presented in the second-amended federal habeas petition. In fact, to the extent Sherman seeks such evidence, the evidence would render Sherman's claims unexhausted as he seeks to extend indefinitely his claims.

Federal Bureau of Investigation (Docket #159 at Exhibits 18 and 19). The only justification Sherman provides for the FBI records is to demonstrate that Dianne Bauer did not call the FBI to warn them that her father was in danger. Sherman fails to tailor the subpoenas to specific, identifiable things, especially when Sherman seeks evidence that he himself alleges does not exist. Further, Sherman only speculates that there is evidence that no such records exist, and provides no nexus between the discovery of the lack of such evidence, however that may be completed, and his claims.

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2. Sherman fails to demonstrate good cause to obtain discovery from the Longview (Washington) Police Department.

Sherman seeks to serve a subpoena on the Longview (Washington) Police Department (LWPD) regarding the instant offense. Docket #158 at 7-8, *citing* Docket #159 at Exhibit 17. Sherman argues the State failed to disclose evidence from the LWPD. Docket #158 at 10-11.

However, Sherman himself provided both the state courts and this Court the records from the LWPD, including a copy "of Longview Police Department file re: Donald Sherman; correspondence, handwritten notes, memos, name searches, event details, incident reports & phone messages." Docket #110-7 at Exhibit 2.53. Sherman also provides the Court with other incident reports filed with the LWPD regarding violence by Sherman against Dianne Bauer. *See id*. at Exhibits 2.19, 2.40, 2.41.

As with the FBI, Sherman seeks to demonstrate that the LWPD does not have documents regarding Dianne Bauer's telephone call to warn them her father was in danger. Sherman fails to justify discovery of documents which he alleges does not exist.

Sherman alleges claims regarding the police report and allegedly exculpatory statements, but fails to state what evidence he seeks through discovery that he has not already provided to this Court. Sherman cannot use discovery for a fishing expedition of his claim. Sherman fails to demonstrate a nexus between the subpoena and the claims in the petition, or that his claims are more than speculative.

LWPD (Docket #159 at Exhibit 17). Once again, Sherman seeks unlimited discovery from LWPD regarding Sherman. Sherman does not limit his discovery to the murder of Dr. Bauer. Sherman's request goes well beyond his justification for good cause. Sherman further fails to request specific, limited discovery that is applicable to his claims.

3. Sherman fails to demonstrate good cause to depose Detective Larry Wages.

Sherman further seeks to depose Detective Larry Wages who investigate Sherman's involvement in the Idaho murder conviction. Docket #158 at 8, *citing* Docket #159 at Exhibit 8.

Sherman argues the State failed to disclose material exculpatory and impeachment evidence in the possession of the Sandpoint Idaho Police Department (SIPD). Docket #158 at 11-12. Sherman seeks to raise questions regarding Sherman's prior murder conviction. Essentially, Sherman seeks to

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re-prosecute the Idaho murder conviction. Sherman provides no evidence that he was not the shooter in the Idaho murder, and that he shot the victim three times.

Sherman fails to demonstrate anything but speculation regarding the evidence sought from Detective Wages. Sherman provides no evidence that Sherman was not in fact the gunman in the prior Idaho murder conviction, or that he was not convicted of the Idaho murder. The jury found two aggravators in relation to the Idaho murder:

> The murder was committed by a person under sentence of imprisonment, to-wit: First Degree Murder in the First Judicial District Court of the State of Idaho in and for the County of Bonner in 1982 in Case No. 42745.
>
> The murder was committed by a person who was previously convicted of another Murder in the First Judicial District Court of the State of Idaho in and for the County of Bonner in 1982 in Case No. 42745.

Exhibit 77 at 3. Sherman essentially seeks to re-prosecute the Idaho murder. Sherman fails to demonstrate good cause for the deposition of Detective Wages. There is no logical or direct nexus between the discovery sought and the claims pending before this Court. Sherman cannot simply seek to relitigate the prior prosecution from Idaho.

Larry Wages (Docket #159 at Exhibit 8). Sherman seeks to take the deposition of Detective Larry Wages, who allegedly investigated Sherman's involvement in the Idaho murder conviction. Docket #158 at 8. Sherman provides no argument in support of the deposition of Mr. Wages in the motion. Even if this Court were to permit such deposition, which Respondents' oppose, Sherman's subpoena for deposition is far too broad. Sherman seeks every document related to the Idaho prosecution. However, Sherman fails to demonstrate a nexus between the claims and the broad discovery regarding the Idaho documents. Sherman fails to demonstrate his claims are anything but speculative, and fails to limit the subpoena to specific and identifiable claims. Sherman fails to demonstrate good cause to conduct discovery.

4. Sherman fails to demonstrate good cause to conduct discovery regarding law enforcement.

Sherman argues this Court previously found that Sherman's arguments "appear tailored to justify his discovery." Docket #158 at 12, *citing Sherman v. McDaniel*, 333 F.Supp.2d 960 (D. Nev. 2004) (Docket #34 at 21). However, the full quote from the Court provides:

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> The claims that petitioner formulates appear tailored to justify his discovery. For the most part, at the heart of these claims, petitioner essentially asserts that his trial counsel unreasonably failed to seek the discovery that petitioner seeks now. If no more than that were required for a showing of good cause under *Bracy*, habeas petitioners would have a free pass to conduct any discovery remotely related to their case.

Docket #34 at 21-22. While this Court made this statement as to Sherman's request for law enforcement and prosecution materials, when read in context, the Court actually found that the request was too remotely related to the case and too broad.

Sherman argues he has not received a single page of discovery from the Clark County District Attorney's Office. Docket #158 at 12. First, this Court denied Sherman's first request for discovery. Docket ##34, 43. Therefore, the CCDA violated no order from this Court for formal discovery. Second, during the hearing before the state district court on the second state habeas petition, the State represented they had turned over everything in their file to the defense counsel at the time of trial, who gave the file to appellate counsel and purportedly to Sherman's current counsel. Exhibit 181 at 32-33. Sherman fails to demonstrate this statement was false, and provides no basis for CCDA to provide of its own volition records that it provided, in full, to Sherman's defense counsel.

Sherman further seeks the "notes" prosecutor David Roger reviewed to determine the extent of the benefits received by the State's witnesses. Docket #158 at 12. Sherman is not entitled to such "notes," as the notes are attorney work product. Sherman further seeks discovery of material which is not and would not be included in whatever the definition of "open file" as agreed between his trial counsel and the prosecutor. Notably, the prosecutor's notes and work product is not within what was contemplated by an "open file." Finally, Sherman fails to demonstrate such "notes" exist.

Sherman argues the CCDA's "historical practice" of failing to comply with disclosure obligations gives Sherman reason to "assume that this evidence is only the 'tip of the iceberg.'" Docket #158 at 12-13, *citing United States v. Blanco*, 392 F.3d 382, 394 (9th Cir. 2004). Regardless of the court's findings in the other cases cited by Sherman, Sherman fails to demonstrate such practice occurred in this case. Sherman fails to demonstrate that more exculpatory and impeachment evidence is located in the CCDA's files. His demonstration has been nothing more than speculative as to the existence of benefits by the CCDA or law enforcement.

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Sherman further argues development of this claim would support Sherman's cause and prejudice argument. Docket #158 at 13. Sherman argues under *Cooper v. Neven*, 641 F.3d 322, 332-33 (9th Cir. 2011), the Ninth Circuit recognized the Nevada Supreme Court's cause and prejudice analysis under *Brady* paralleled the second and third elements of *Brady*, rendering the state procedural bars of Nev. Rev. Stat. 34.810 and Nev. Rev. Stat. 34.726 inadequate. *Id*. However, *Cooper* is limited to the specific facts of that case in which the Nevada Supreme Court explicitly found the cause and prejudice and the *Brady* standard in that case paralleled. The Nevada Supreme Court did no such thing here. Exhibit 205. *See* Docket #170 at 48-49.

Sherman argues he has obtained compelling evidence that the State made false representations to Sherman's trial counsel and presented false testimony through numerous witnesses, establishing *Brady* materiality and a violation of *Napue*. Docket #158 at 14.

Sherman further argues the prejudice under *Brady* is also directly related to Claims One, Two, Three, Eight, and Seventeen. Docket #158 at 14. *See* Respondents' reply in support of the motion to dismiss, Docket #170 at 44-49, 51, 55-56.

Sherman further argues the evidence would demonstrate timeliness of the petition pursuant to 28 U.S.C. § 2244(d)(1)(D) because the statute of limitations should not have started until one year from the discovery of the factual predicate of the claims which were not reasonably available to him. Docket #158 at 14. He also argues the discovery would demonstrate equitable tolling to establish extraordinary circumstances and his diligence. Docket #158 at 14-15. However, as Respondents argue in the reply in support of the motion to dismiss, Sherman raised the factual allegations of his *Brady* and *Napue* allegations in the original motion for leave to conduct discovery. Docket #170 at 19-23; Docket #19. Therefore, Sherman had the basis of the original claims under *Brady* several years before filing the amended federal habeas petition.

Sherman fails to demonstrate a nexus between the discovery sought and the cause and prejudice or timeliness arguments presented regarding the alleged *Brady* and *Napue* claims, when Sherman had the factual allegations of those claims prior to filing the amended federal petition.

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C. Sherman Fails to Demonstrate Good Cause to Support Discovery to Obtain Records Pertaining to Dianne and Lester Bauer.

Sherman seeks to subpoena records pertaining to Lester Bauer's trust files and the Washington State Department of Social and Health Services regarding Lester Bauer, Dianne Bauer, Rodney Miller (Dianne Bauer's ex-husband), and Jessica Miller (Dianne Bauer's daughter). Docket #158 at 15, citing Docket #159 at Exhibits 9, 10. Sherman argues the discovery supports (1) his ineffective assistance of counsel claim; (2) timeliness of the petition under 28 U.S.C. § 2244(d)(1)(B) and (D); and (3) cause and prejudice to overcome the state procedural bars. Docket #158 at 15.

Respondents address Sherman's untimely filing arguments in the reply in support of the motion to dismiss. Docket #170 at 18-23.

Sherman further argues the evidence would go to demonstrate cause and prejudice by demonstrating (1) the trial court withheld relevant evidence and (2) ineffective assistance of post-conviction counsel. Docket #158 at 17. As Respondents argue in the reply in support of the motion to dismiss, Sherman fails to demonstrate cause based upon the trial court's *in camera* review sufficient to overcome the state procedural bars because Sherman had notice of the court's review and that there were documents withheld from the defense, yet made no attempt to obtain those documents on direct appeal or on post-conviction. Docket #170 at 45.

As to the second point, as Respondents again argue in the reply, Sherman was not constitutionally entitled to effective assistance of post-conviction counsel, and therefore counsel's actions cannot serve as cause to overcome the state procedural bars. *Id*. at 46-47, 50, 58.

Sherman further fails to demonstrate how obtaining this evidence would demonstrate the requisite prejudice required to overcome the state procedural bars.

Trudy McMahan, Esq. (Docket #159 at Exhibit 9). Sherman previously attempted to obtain a subpoena for Trudy McMahan, Dr. Bauer's attorney. This Court denied the request to serve Attorney McMahan because Sherman's proposed subpoena "ranges beyond the claim that petitioner claims justifies it" and therefore he failed to show good cause. Docket #43 at 9. Sherman again seeks "all records related to Lester Bauer." Docket #159 at Exhibit 9; Docket #158 at 17. The request goes well beyond Sherman's claim that Dr. Bauer sought to change his will shortly before his death, thus giving

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Dianne Bauer financial motive to murder her father. The documents Sherman seeks are further protected by the attorney-client privilege. *See Wharton v. Calderon*, 127 F.3d 1201, 1205 (9th Cir. 1997) ("attorney-client privilege, like most other privileges, is an *evidentiary* privilege – it protects against the compelled disclosure in court, or in court-sanctioned discovery, of privileged communications.") (emphasis in original); *see generally Pac. Fisheries Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) (explaining that the attorney work-product privilege "shields both opinion and factual work product from discovery. Therefore, if a document is covered by the attorney work-product privilege, the government need not segregate and disclose its factual contents.") (internal citations omitted).

Moreover, Dianne Bauer was never a defendant in this case. The question is whether Sherman murdered Dr. Bauer and Sherman's own knowledge. The trust files do not have any nexus between the discovery sought and the pending claims.

Washington State Department of Social and Health Services (Docket #159 at Exhibit 10). Sherman seeks to obtain records related to Dr. Bauer, Dianne Bauer, Rodney Miller and Jessica Miller. Docket #158 at 17. The subpoena is directed to the Washington State Department of Social and Health Services requesting information pertaining to Rodney Miller and/or Jessica Miller. Docket #159 at Exhibit 10. While Sherman asks for information pertaining to only these two individuals, he goes on to ask for documents concerning the two individuals, plus Dr. Bauer and Dianne Bauer. However, Sherman's argument does not go to Mr. Miller's testimony, but allegations of sexual abuse on Jessica Miller. Sherman fails to demonstrate good cause to grant discovery of such personal information. Rodney Miller testified at the penalty phase of trial. Exhibit 72.

Sherman fails to develop the nexus between the discovery sought and the pending claims. Moreover, Sherman's request for discovery is nothing more than speculative. Sherman seeks evidence that Dianne Bauer manufactured allegations of sexual abuse regarding Jessica Miller. In other words, he seeks to obtain evidence that he alleges does not even exist. This cannot demonstrate good cause.

Finally, Sherman's request is not narrowly tailored to obtain specific, identifiable things pertaining to the claim presented to this Court. Sherman fails to justify the overreaching subpoena . . .

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duces tecum and the broad range of documents he seeks to obtain. Again, the question before this Court is Sherman's knowledge and belief regarding Dianne Bauer's alleged sexual abuse.

D. Sherman Fails to Demonstrate Good Cause to Obtain Discovery Relating to Himself and His Family.

Sherman seeks evidence relating to his complete health records; jail, prison, probation and parole records; investigative records detailing his culpability in the charged offense and prior conviction; and a deposition of Sherman's mother, Gail Stinton. Docket #158 at 17-18, *citing* Docket #159 at Exhibits 11, 12-16, 1, 3, 5, 17-19, and 20. Sherman argues this evidence is necessary to support his claims of (1) ineffective assistance of trial counsel regarding Sherman's dysfunctional family and childhood, expert testimony, mitigation evidence, and prior criminal acts; and (2) cause and prejudice based upon ineffective assistance of post-conviction counsel.[4] Docket #158 at 17-19.

Respondents address the allegation of cause based upon post-conviction counsel above. *Supra* at Section II(C); Docket #170 at 46-47, 50, 58. Any alleged actions by state post-conviction counsel cannot show cause for failure to comply with the state procedural bars.

Clark County Detention Center (CCDC), Medical Records Section (Docket #159 at Exhibit 11). Sherman argues counsel was ineffective for not providing corroborating information to the penalty phase defense expert, Dr. Pittel, regarding a diagnosis of Sherman's mental state. Docket #158 at 18. First, Sherman fails to develop a nexus between his claims and the requested discovery. Sherman fails to delineate which claims of ineffective assistance of counsel pertain to Dr. Pittel. Docket #158.

At Claim Two (S), Sherman alleges counsel was ineffective for failing to provide Dr. Pittel information from Daryl Jenkins, a mental health counselor in Washington. Docket #103 at 161-62. In Claim Two (V), Sherman alleges counsel was ineffective for selecting Dr. Pittel as an expert. *Id*. at 166. He further argues in Claim Two (V) that counsel failed to furnish Dr. Pittel various documentary evidence, including Sherman's performance while on parole from 1992 to 1994 and "adequate mitigation information" regarding Sherman's childhood and family background. *Id*. at 167. Sherman alleges in Claim Two (W) that counsel failed to provide Dr. Pittel with evidence regarding

[4] Sherman does not raise an independent claim of ineffective assistance of post-conviction counsel in the second-amended federal habeas petition. Docket #103.

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Sherman's parents, Ronald and Gail Stinton, criminal records of members of Sherman's family, parole information from Longview Parole and Probation Office, Sherman's juvenile criminal record, various information from individual declarations and depositions, and various information regarding Dianne Bauer. *Id*. at 167-72. However, there is no claim that counsel failed to furnish Dr. Pittel with medical records while Sherman was detained in CCDC.

Further, the subpoena is not specific as to a time or date for the requested records or limited to records for a mental health diagnosis. Sherman's allegations are nothing more than speculative.

CCDC, Inmate Records Section and Classification Section (Docket #159 at Exhibits 12[5] and Exhibit 13). Sherman's allegations deal with evidence of ineffective assistance of counsel regarding Sherman's dysfunctional family and childhood, expert testimony by Dr. Pittel, and mitigation evidence, including prior criminal acts used in aggravation. Again, Sherman fails to explain which claims in the lengthy petition this discovery pertains to. Further, Sherman fails to demonstrate any nexus between his claims and the records held by the CCDC. The records in the CCDC do not deal with Sherman's family or childhood, testimony by Dr. Pittel, or specific mitigation evidence. The prior criminal act used in aggravation was a murder out of Idaho, not in the CCDC.

Moreover, the subpoenas are far too broad and, to the extent Sherman might raise a federal habeas claim regarding such evidence, the subpoenas are not at all tailored to obtain specific, identifiable things which relate to such claims. Sherman fails to justify good cause for the requested records.

Idaho Department of Corrections (IDOC) (Docket #159 at Exhibit 14). Sherman seeks to obtain a broad range of documents from the IDOC regarding Sherman. First, there is no time or date framework on the request. Sherman fails to justify the breadth of records requested. Records such as culinary, classification, scheduling records, movement logs, unit and shift reports, gatehouse and visitation logs, education logs, chapel and canteen, accounting logs, mailroom, grievances, cell searches, drug testing, law library, unit rosters are irrelevant to the claims presented in the second-amended petition. Sherman's request for any and all condition, care, confinement and custody

[5] The actual subpoena duces tecum is directed to the CCDS Medical Records Section, not the Inmate Records Section. Docket #159 at Exhibit 12 p. 1; compare Attachment A.

records for "individuals identified above" is further irrelevant and has nothing to do whatsoever to Sherman, his claims, or this Court's consideration of the claims. Sherman fails to demonstrate the significance of records generated by law enforcement authorities to and/or from the IDOC regarding Sherman's trial for murder in Nevada. Sherman fails to either limit or justify his request for electronic media, including voice mail messages, e-mail, data files, program files, archival tapes, temporary files, system history, web site information, etc. What data is this limited to, does this have to do with Sherman, what does this have to do with Sherman's murder of Lester Bauer or Sherman's claims in the second-amended federal habeas petition?

Moreover, there is no nexus between the discovery sought and the pending claims. Sherman was incarcerated for an Idaho murder. However, Sherman fails to demonstrate how the records from IDOC pertain to his ineffective assistance of counsel claim. Sherman's fails to show good cause for the subpoena.

Idaho State Commissions for Pardons and Parole (ICPP) (Docket #159 at Exhibit 15). Again, Sherman fails to note which claims such records pertain. However, as Respondents note above, Sherman argues in Claims Two (V) and (W) that counsel failed to furnish Dr. Pittel various documentary evidence, including Sherman's performance while on parole from 1992 to 1994. Docket #103 at 167, 170.

Once again the claim before the Court is counsel's failure to provide Dr. Pittel with evidence of Sherman's monthly progress on parole and regarding the allegedly inadequate supervision of Sherman while on parole. *Id*. at 170. Sherman provides no nexus between the claims in the second-amended petition and the large array of documents he now seeks from the ICPP, only speculation. Sherman fails to narrowly tailor the subpoena to specific, identifiable things that relate to the claims presented in the second-amended federal habeas petition.

Washington State Department of Corrections (WDOC) (Docket #159 at Exhibit 16). Sherman seeks evidence from the WDOC pertaining to a civil action filed against the WDOC. Sherman fails to provide any nexus between the records held by the WDOC regarding this lawsuit and the case before this Court. Further, Sherman requests documents that would be protected by the attorney-client privilege. *See Wharton*, 127 F.3d at 1205; *see generally Pac. Fisheries Inc.*, 539 F.3d at 1148.

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Longview (Washington) Police Department (LWPD) (Docket #159 at Exhibit 17). Sherman again seeks any and all information in the hands of the LWPD. This information goes well beyond the justification provided by Sherman. Rather, the information Sherman seeks includes, but is not limited to, material concerning the murder for which he was convicted and any and all criminal cases involving Sherman. Sherman does not demonstrate good cause for the request to LWPD.

Sherman also includes in his subpoena "District attorney's material." *Id*. Sherman fails to explain the nexus between such material to his claims, and why the LWPD would be the repository of such materials. Finally, Sherman's arguments as to the Idaho murder fail to demonstrate good cause for discovery. *See* Docket #170 at 48.

Gail Stinton (Docket #159 at Exhibit 8.). Sherman alleges Ms. Stinton's deposition should be conducted at the "earliest possible date" because she "is 76 years old and frail." Docket #158 at 18 n. 8, *citing* Fed. R. Civ. P. 27(a). However, aside from that single statement, Sherman fails to demonstrate Ms. Stinton is unwell or that time is of the essence to take her deposition.

Sherman fails to provide any explanation of what information he would obtain from a deposition of Ms. Stinton. In the second-amended federal habeas petition Sherman outlines in great length the psychiatric history of Ms. Stinton. Docket #103 at 167-70. Ms. Stinton also testified at both the guilt and penalty phases of trial. Exhibits 66 and 73. Ms. Stinton has also signed two declarations, not signed before a notary public, regarding her health and her background (from 2005). Docket #115-2 at Exhibits 7.6 and 7.7.[6]

Sherman fails to establish a nexus between this deposition and his claims other than speculation that he may obtain some information that he has not previously obtained from Ms. Stinton and provided to this Court. Sherman does not establish what evidence he seeks from Ms. Stinton during the deposition.

E. Sherman Fails to Establish Good Cause for Discovery Regarding the Lethal Injection Protocols.

Sherman seeks leave to serve subpoenas regarding discovery and testimony from representatives of the Nevada Department of Corrections (NDOC), Nevada Department of Health and Human Services

[6] Respondents do not concede the substance of these declarations.

(NDHHS), and Public Works Division of the State of Nevada (NPWD). Docket #158 at 20, *citing* Docket #159 at Exhibits 21-26. He seeks this information to demonstrate that lethal injection in Nevada is cruel and unusual punishment and to overcome the procedural defenses.

Respondents argue in the reply in support of the motion to dismiss that Claim Eighteen, regarding lethal injection, is not ripe for review by this Court, as conceded by Sherman, because he is not scheduled for execution. Docket #170 at 57.

Sherman seeks information as to the imminent closure of Nevada State Prison, which houses the execution chamber, including the chamber's present upkeep to show that an execution cannot be performed at that location. Docket #158 at 20-21. This is not a claim in Sherman's second-amended federal habeas petition. *See* Docket #103 at 307. Moreover, such claim is not ripe as Sherman is not currently scheduled for execution, and therefore the current condition of the Nevada State Prison and execution chamber are not properly before this Court. Sherman provides no nexus between his claim and this request for discovery, and raises nothing but speculation as the basis for this discovery request.

Sherman outlines the lethal injection protocols, including the review of those protocols by an expert witness. Docket #158 at 21-22. Sherman then alleges numerous questions not covered by the manual. *Id*. at 22. Sherman fails to demonstrate, again, why these questions are ripe at this time as Sherman is not currently scheduled for execution. Moreover, as Respondents argue in the motion to dismiss and reply, this claim is itself unexhausted, untimely and procedurally barred. Docket #124, 170. While Sherman seeks discovery to demonstrate the merits of his claim and a basis to overcome the procedural bars and timeliness, he fails to demonstrate he is entitled to discovery on a claim that remains unexhausted. *See* Docket #34.

The information Sherman seeks is confidential. That confidentiality is not contrary to federal or state law. Further, Sherman seeks to challenge the actual lethal injection, not the actions leading up to such injection. The information Sherman seeks has no nexus with his claims and is purely speculative. For instance, what does the Americans with Disabilities Act compliance at the Nevada State Prison have to do with Sherman's claim? *See* Docket #159 at Exhibits 21, 23. Sherman does not raise this allegation within his petition, and this question has nothing to do with his claims.

. . .

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Claim Eighteen is not properly before this Court at this time. Even if this Court determines Claim Eighteen is exhausted, it is not ripe. Even if this Court determines Claim Eighteen is ripe, conducting the requested discovery at this time is fruitless. The time and date of Sherman's execution is not scheduled. The protocols utilized by the NDOC, the individuals responsible, even the location of the execution could change before Sherman's execution is scheduled, let alone carried out. Sherman's claims are speculative at best.

III.

CONCLUSION

This Court should deny Sherman's renewed motion for leave to conduct discovery.

RESPECTFULLY SUBMITTED this 26th day of January, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Heather D. Procter
HEATHER D. PROCTER
Deputy Attorney General

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 26th day of January, 2012, I served a copy of the foregoing OPPOSITION TO RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY, by U.S. District Court CM/ECF electronic filing to:

DAVID ANTHONY
Assistant Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101

/s/ Lisbet M. Sherwood

EXHIBIT 178

EXHIBIT 178

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CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ANTOINE LIDDELL WILLIAMS, Defendant.	CASE NO. C124422 DEPT. NO. XXIII

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

WEDNESDAY, MAY 8, 2013

RECORDER'S TRANSCRIPT OF PROCEEDINGS RE:

CALENDAR CALL

APPEARANCES:

For the State: MARC DiGIACOMO, ESQ.
Chief Deputy District Attorney

For the Defendant: NORMAN J. REED, ESQ.
DANNY A. SILVERSTEIN, ESQ.
Deputy Public Defenders

RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

WEDNESDAY, MAY 8, 2013, 9:41 A.M.

THE MARSHAL: Bottom of page 6, C124422, Williams.

MR. REED: Good morning, Your Honor, Norm Reed and Dan Silverstein for Mr. Williams. I'd ask the Court to waive his presence; he's in Ely.

THE COURT: Hi.

MR. DiGIACOMO: Marc DiGiacomo for the State. Good morning, Your Honor.

THE COURT: Good morning. Okay, so this is a motion to declare Nevada's method of execution a violation of the eighth amendment and the State's opposition thereto.

MR. REED: Judge, I'll be brief. I mean, the real issue that we're trying to focus on in this case is the injection protocols. My understanding, and I've spoken to the Attorney General's office, they actually represent the prison, the prison is the one who adopts these procedures. There we have an actual copy of the execution manual that existed before *Baze*. What we're looking to find out is, is there a new one in place that satisfies the current United States Supreme Court mandates? And I think the State's position is primarily dealing with whether it's admissible or not.

I think there's a huge difference between discoverability and admissibility. And I can inform the Court that in a case that ended up negotiating shortly before going to trial, which the death penalty was waived, we were in front of Judge Villani, and the Attorney General's office had indicated to us that at that time, this is approximately 6 months ago, there were no injection protocols in place.

So what I'm going to ask the Court to do is to -- since that is truly, I believe, the party's attorney that would have standing to fight whether or not it's

discoverable. I'd ask the Court to see if we can have the Attorney General's office come in and make representations to the Court about whether or not this current procedure even exists and what the status of it is. And then we can proceed from there, because if there is no actual lethal injection protocols in place, it's going to be a very short answer to our position on this motion. If there is, then we can proceed accordingly from there. So that's basically our position.

And I certainly appreciate that the State is saying we may or may not be able to admit this into evidence, but I do believe we're entitled to at least have an understanding of what the current injection process is. Mr. Williams is not under a lethal injection status. He has not been found the death penalty, but that was previously found by a three-judge panel. So we believe it's very important for us to at least have this information available to us to take appropriate steps to challenge it under the eighth amendment.

THE COURT: Okay. And so you basically want it in the record in case he does receive the death penalty following his penalty phase, then you do have it in the record for future appeals, right?

MR. REED: That's correct, Your Honor. And additionally, in terms of the actual substance of the motion itself, we're going to ask the Court to stay its decision on that motion because obviously the injection protocols and whether they exist and to what extent they're in compliance with Nevada law and United State's Supreme Court law is very relevant to the disposition of that motion.

THE COURT: Okay.

MR. DiGIACOMO: I'm not sure which opposition Mr. Reed read, but I didn't discuss admissibility at all. The Court lacks jurisdiction, with all due respect, on this subject matter. Until such time as he's sentenced to death, he cannot attack the

statute. Once he's sentenced to death, he can't even attack it on appeal; he can't attack it on post-conviction. But the Nevada Supreme Court has said you have to file a 1983 action. He claims that the Court somehow has jurisdiction over a non-party, the Department of Corrections, to order discovery to an issue that is irrelevant to the trial that's proceeding in front of this Court. The Nevada Supreme Court has said it, the U.S. Supreme Court has said it, there is simply absolutely no authority whatsoever for an order from a trial court to the Department of Corrections saying turn over what your protocols are today, because as the Nevada Supreme Court says, the Department of Corrections is always in the discretion to change the protocols.

And so there is no statute that you can find unconstitutional, because the only statute says that it shall be carried out by lethal injection. And the Supreme Court even says that this a federal 1983 action, which is the basis for objecting to the nature of the protocol. And as such, Judge, my objection is this is totally irrelevant to this trial proceeding.

THE COURT: Okay. Anything else?

MR. DiGIACOMO: No.

THE COURT: Let me just think about it. I tend to -- I'll be frank with you. I tend to agree with the State as far as this is not the time or the place to raise this issue. But let me think it through a little bit more since you kind of came out at it a little bit differently than you did in your motion.

MR. REED: Right. And, Judge, I did that primarily because I anticipated that the State would take this absolute position. I disagree entirely that we can't challenge this in any way, shape, or fashion at this point. But more importantly, the Attorney General's office has indicated to us that the representations are already

made exist. So if we subpoena them, and we certainly have subpoena power under the statute, that we don't believe that exceeds the scope of the subpoena authority from this Court. And so, therefore, what is the harm? And possibly bring the Attorney General in to indicate their position on this. It would seem like it would be the most prudent thing to do, since they are, they meaning the State trying to execute Mr. Williams.

THE COURT: Okay. Let me think about your position a little bit more. Again, I still am leaning toward the State's position of not the appropriate time or place, but let me think about it a little bit more.

MR. REED: Thank you, Judge.

THE COURT: Thanks.

MR. DiGIACOMO: Thank you, Your Honor.

THE COURT: And then it looks like we're doing the penalty hearing in July. Does that still look right?

MR. DiGIACOMO: The State anticipates being ready, Judge.

THE COURT: That's an old, old case.

MR. REED: Well, we're working on that, Judge. I have other pressing matters. I can't tell the Court now that we're going to be ready in July.

THE COURT: It looks like his verdict was in 1996.

MR. REED: That's correct, Judge.

THE COURT: It's been a long time. All right.

MR. DiGIACOMO: It's been reversed for 5, 6 years.

THE COURT: I remember this one. Wasn't this case David Roger's case originally?

MR. DiGIACOMO: It was.

THE COURT: Cause he was originally going to try this. I remember, but it was way before me. Okay, I will think about it and I will get a decision out. Thank you.

MR. DiGIACOMO: Thank you, Your Honor.

MR. SILVERSTEIN: Thank you, Your Honor.

PROCEEDINGS CONCLUDED AT 9:47 A.M.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Maria L. Garibay

MARIA L. GARIBAY
Court Recorder/Transcriber

EXHIBIT 179

EXHIBIT 179

- in meeting, jail conflict explained & Judge agrees
  - Judge also w/ minutes from Becker 10-2 hearing

- Both judges w/ reservations re: P.La Porta representing Δ on such complex/serious cases

10-9 All files turned over to State PD
- hand-carried by DTW & # Π. Roth & P.La Porta re: case
- original memo file kept by DTW
  - the copies given to State PD
- Suarez Montoya memo & diagram not turned over

EXHIBIT 180

EXHIBIT 180

THOMAS F. KINSORA, PH.D.
Specializing in Neuropsychology
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(702) 382-1960 FAX (702) 382-4993

NEUROPSYCHOLOGICAL ASSESSMENT

Patient Name: Thomas, Mario
Date of Examination: 12-10-96, 12-16-96, 12-18-96, 6-07-97, and 6-09-97
Place of Examination: Clark County Detention Center
Examiner: Thomas F. Kinsora, Ph.D.
Referral Source: Peter R. La Porta

HISTORY AND OBSERVATION

Circumstances of Referral

Mr. Thomas was referred by Mr. La Porta. Mr. La Porta is Mr. Thomas' defense attorney, and is the chief trial deputy at the Nevada State Public Defenders Office. A neuropsychological and personality assessment was ordered to assess current levels and patterns of functioning.

History of Presenting Problem

Mr. Thomas is a 24 year old (DOB 11-6-72) African-American male who is awaiting trial for his alleged connection to the robbery of a Lone Star restaurant and the murder of two employees at that restaurant. The date of the alleged offense was April 15, 1996.

Social History

Mr. Thomas was born in Las Vegas, Nevada on November 6, 1972. He has three brothers, aged 29, 28 and 16. He reports that his older brothers were his primary caretakers, and described them as strict authoritarians who "kept me out of little neighborhood trouble and stuff". His mother typically worked late afternoons as a custodian in schools. He reports that he lived in lower-middle income neighborhoods, and moved about Las Vegas fairly frequently. He reports that his household was typically well stocked with food, and believed that his mother provided well for her children. He was not raised at any point in his life by his father, although he does know of him. His father has apparently been in prison for the last 17 years for murder. He reported that his family received medical attention when needed, and that his mother was instrumental in seeking help for Mr. Thomas' behavior when he was a child. He believes that

the emotional support and nurturing provided by his mother and brothers was "very good". The discipline techniques that were typically used included restriction and occasional spankings. He denied any physical or sexual abuse.

According to Mr. Thomas, he has had difficulties with his temper and has been in trouble for fighting since his early childhood. At age 10 his behavior became such a problem that he was referred to Children's Behavioral Services and was placed in Miley Elementary School. While there, he was placed on a strict behavioral program and apparently continued to have significant difficulties. On multiple occasions he confronted staff members physically. When he did so he was reported to the police and sent to Juvenile Hall. According to Mr. Thomas, his most vivid memory of the year spent at Miley Elementary consisted of time spent in time-out in which he was required to touch his nose to the corner until the time-out period was over. He reported that after repeated time-outs he began to rebel both verbally and physically. Because of his inability to control his behavior, he was apparently in time-out much of the time during each day. He attended Miley Elementary School for the 6th and 7th grade.

When he was 13 years of age he was found guilty of a felony battery charge and was sent to Elko, Nevada for six months. The battery charge was related to the beating of an adult with a pool stick. Mr. Thomas claims that he was aiding a friend who was being beaten by the adult. During his juvenile years he was picked up for over ten incidences involving battery, two incidences regarding 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 the above incidents were dismissed. He did, however, serve time when he was 16 years old in Elko, Nevada for the stolen vehicle, and spent six years in the Nevada State Penitentiary in Carson City, Nevada for attempted robbery.

Education/Work History

Mr. Thomas has 11 ½ years of education. Review of educational history revealed that Mr. Thomas attended many schools throughout his life. In fact, by the 4th grade he had already moved from one school to another nine times. His records reflect that he attended the Children's Behavioral Services center from 2-28-84 until 11-6-84. He entered the Miley Achievement Center Elementary School on 9-9-85, and appears to have attended this school until at least 11-10-86. A portion of his 10th grade was received from Elko, Nevada while he was serving time. Mr. Thomas acknowledges persistent problems through his life with reading, spelling and arithmetic. His grades ranged from C to D's. Psychological reports from as early as 11-12-81 suggest the presence of significant problems in these areas, and the presence of pathognomonic signs of dyslexia, including letter reversals and poor letter-sound association skills. Intellectual assessments of 11-12-81 and 3-26-87 placed his verbal IQ at 85 and 81 respectively, his performance IQ at 86 and 92 respectively, and his full scale IQ at 84 and 85 respectively. His reading, spelling and arithmetic scores have all fallen well below his grade level and age level across assessments.

Mr. Thomas was employed by the Lone Star Restaurant for several months prior to his arrest. Prior to that he had held several jobs at McDonalds, and made money doing other odd jobs occasionally.

Social History according to Georgia Thomas, Marlo's mother:

Mr. Thomas' mother, Georgia Thomas was interviewed on 6-05-97. She reported that during her pregnancy with Marlo she drank MD 20/20, Strawberry Hill wine, or Vodka every day until she was extremely intoxicated. In addition, she was frquently physically abused by Marlo's father and was both

punched and kicked in the stomach when she was pregnant with Marlo. She was unable to recall whether or not Marlo's delivery was difficult. She stated that Marlo was a quiet baby and rarely cried. She had difficulty teaching him to use the toilet and reported that he was bladder incontinent nearly every other day until age 12. As a child he was hyper active and had great difficulty with anger control. Various medications were tried, although she was unable to recall what specific medications they were. He accepted affection as a child and liked to be hugged. He tended to sympathize with others and defend those who could not fight for themselves. He liked animals and often took stray animals home. He was never observed to be cruel to animals. Mrs. Thomas was unaware of any fire starting behavior.

Despite his more positive qualities, Marlo was viewed by his mother as temperamental, argumentative, and unable to get along with authority. He was picked on incessantly at school due to his reluctance to shower and from smelling of urine from his bladder control problems. His peers called him "Stinky". Thus, his mother explained, his early peer relations were poor and fraught with negative experiences. He failed a grade according to his mother, but she was unsure which grade it was. By early adolescence he was hanging around other kids who were similarly rejected by peers. Many of them got into trouble with the law and Marlo was apparently all too often willing to go along with the excitement of the moment, whether it be experimenting with drugs or driving around in a stolen vehicle. He ran away on two occasions in elementary school but always returned home.

His mother admitted to "beating him up" and frequently "whipping his behind" when he misbehaved. She stated that Marlo always seemed to think that others were out to hurt him, that no one loved him, and believed that his mother loved the other children better because of his difficulties. She stated that during the same month that he was put in jail for the incident at the Long Horn restaurant, he had arrived home drunk and "drugged up" and tried to beat everyone up at his mothers home. She felt that Marlo did not appear to be himself during that month and attributed his changes to drug abuse. She was however, unable to be more specific with regard to what type of drug he might have been using.

Neuromedical History

Currently he is prescribed no medications. His past medical history is negative for any significant illnesses or ongoing medical problems. Developmental milestones occurred on time. He reports a long history of intervention from Children's Behavioral Services, as well as services within the various juvenile facilities and prison facilities that he has been in. Apparently, Children's Behavioral Services worked intensely with Mr. Thomas to help reduce his proneness to losing his temper, becoming physically violent, and with his overall disregard for authority. He has also had multiple psychological assessments performed. He was diagnosed with a "hyperactive" disorder according to his mother and was placed on a variety of medications for a short period of time. She was, however, unsure of the name of the medications, or how long he was on them. Mr. Thomas did not remember what medications he was placed on. Inquiry regarding alcohol and other drug use revealed that Mr. Thomas enjoyed smoking marijuana and occasional alcohol. No significant neuromedical conditions, early childhood illnesses, or head injuries were reported by Mr. Thomas. He is unaware of ever being exposed to neuro-toxic substances. He described himself early on as an overactive child with a poor temper control.

Behavioral Observations

Mr. Thomas was seen at the Clark County Detention Center for the assessment. The assessment and interview lasted approximately 10 hours and was conducted over 5 face to face testing sessions. Physically he presented as a casually dressed, African American male of medium to stout stature. He appeared

approximately his stated age. His dress and grooming were neat. Overall, he appeared to be a good historian who neither overstated his accomplishments nor overcriticized himself for his failures or weaknesses. In discussing his past convictions and run-ins with the law, Mr. Thomas seemed to provide a rationale for each of his actions, and in most cases felt that he had been unjustly treated or falsely accused. He was excessively talkative at times. Mechanical aspects of speech were unremarkable.

In general, social and emotional aspects of behavior were normal. His facial expressions appeared congruent with speech content and stated mood. Eye contact was good. There was normal spontaneity in his speech. He established an adequate rapport with this examiner. No delusions or psychopathology were noted. Suicidal ideation was not elicited.

Mr. Thomas's test taking behavior was conductive to obtaining a valid sample of current strengths and weaknesses. He had no difficulty understanding test instructions. Impulsivity was not a problem. In response to difficult problems he appeared to put forth greater effort. Carelessness was not noted. Visual and auditory acuity were adequate for testing purposes.

TESTS ADMINISTERED

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

TEST RESULTS

Neuropsychological measures are instruments possessing a high degree of reliability and validity in detecting brain dysfunction. Nevertheless, they should only be used to suggest the presence or

absence of brain injury. In most cases each attained score is compared to normative data derived from others of similar age, and whenever possible, of similar age, sex, and education. Test performance can be affected by emotional functioning, motivation, fatigue, natural variability in human performance, and other known and unknown sources. The neuropsychologist must interpret the results of each test in light of these influencing factors.

MOTIVATION AND COGNITIVE SYMPTOM MANUFACTURE

Upon the initiation of testing Mr. Thomas was told that his cooperation with the testing procedure was imperative.

The neuropsychological battery administered to Mr. Thomas contained a variety of indicators of malingering or symptom exaggeration. On none of the measures did he demonstrate performance which is consistent with an individual who is exaggerating the extent of his cognitive or personality problems. In fact, he performed well within the average range on the majority of the neuropsychological measures. The validity indicators on the Minnesota Multiphasic Personality Inventory-II suggest that Mr. Thomas was relatively honest and forthright in his responses to the personal statements contained in the questionnaire.

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

INTELLECTUAL TESTING

Grossly, intellectual functioning is in the borderline range of intellectual functioning (WAIS-R Full Scale IQ = 79, just 10 point away from being considered mentally retarded). Overall, his capacity to retrieve learned knowledge and his ability to solve complex and novel problems is currently better than only 8% of his same aged peers.

Various components of intellect were examined to determine if significant variability exists in his intellectual skills. Problem solving which requires both verbal reasoning and the retrieval of stored knowledge was determined to be in the low average to borderline range (WAIS-R Verbal IQ = 82; which is at the 12 percentile compared to others his age). Problem solving which requires both spatial analysis and the ability to solve novel problems under the duress of time were found to be in the borderline range (WAIS-R Performance IQ = 78; which is at the 7 percentile compared to others his age). The 4 point discrepancy is not considered significant. His overall performance is lower, but consistent with his previous intellectual assessment results.

ACADEMIC ACHIEVEMENT

As measured by the WRAT-R, Mr. Thomas could sound out or flash read single stimulus words at the 4 percentile compared to others his age. He was able to spell words dictated to him at the 1 percentile compared to others his age.

Timed arithmetic problem solving was found to be at the 1 percentile compared to others his age.

Analysis of his spelling errors suggests that he has great difficulty translating auditory information into correct sound units in written language. Likewise, his reading problems appear to also come from an inability to decode the sounds of written information. His academic problems appear to be due to

legitimate learning disabilities, limited intellectual capacity, poor education, and an impoverished environment.

ATTENTION, CONCENTRATION, MENTAL SPEED

This section reports on auditory and visual attention span, the ability to continuously track internal and external stimuli without distraction, mental speed, mental tracking skills, and the ability shift attentional focus.

Status:
Mr. Thomas was alert and oriented. Auditory attention span was found to be within normal limits, as he was able to repeat up to 6 numbers immediately after being presented by the examiner. More effortful concentration was found to be in the mildly impaired range, as he could recall no more than 4 numbers inconsistently in reverse order. His poor performance is, however, consistent with his learning disorder as several transpositional errors were noted, common among dyslexics.

On a connect the dots type test, Mr. Thomas performed within the average range (31 seconds), yet demonstrated significant problems on a test conceptual tracking involving the rapid alternation between numbers and letters in order (trails B time = 113). On a timed test involving visual-motor and general mental processing speed Mr. Thomas demonstrated borderline to mildly impaired speed compared to others his age (Digit Symbol, WAIS-R; t=41). On a measure of mental tracking and concentration involving arithmetic story problems, Mr. Thomas demonstrated significant problems and was over one and one half deviations below the mean for his age and education. His poor performance on this task was likely due in part to his poor arithmetic skills, however.

Sustained mental tracking skills were measured using a task which required Mr. Thomas to add numbers presented to him while retaining a previously presented number for future use (PASAT). There are four series of presentations with fifty numbers presented in each series. Each series is presented in a slightly more rapid manner than it's immediately preceding series. On this task he demonstrated severely impaired performance on the first trial and moderately impaired performance on the second, more rapidly presented trial. .

Functional Implications:
Overall, Mr. Thomas demonstrates attention, concentration, and mental processing speed that are significantly below average when compared to others 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 disfunction.

LANGUAGE SKILLS

This category of findings resulted from measurements designed to assess the ability to understand, repeat, and produce the symbols of language.

Status:
Upon gross screening, 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.

Functional Implications:
Overall, language skills are intact but reflect an impoverished background with limited academic and intellectual resources.

SPATIAL-CONSTRUCTIONAL ABILITIES

The ability to perceive, process, and motorically translate visual stimuli was assessed at increasing levels of complexity. These skills can be effected by such factors as visual field inattention and self-regulatory skill deficits.

Status:
When asked to copy a complex geometric figure (Rey Complex Figure), Mr. Thomas exhibited an organized approach to the drawing, and a relatively accurate final product. Overall, his accuracy score was within the average range (34 pts.). His ability to replicate geometric designs using colored cubes was in the mildly impaired range (Block Design subtest, WAIS-R; t=37). On a less structured test of constructional skills involving puzzle construction, Mr. Thomas demonstrated low average to borderline impaired performance (Object Assembly subtest, WAIS-R; t=42).

Functional Implications:
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 requires him to analyze spatial details, differentiate subtle features, or put complex objects or products together.

MEMORY

Memory processing is a complex orchestration of many brain areas which allow for the encoding, storage, and retrieval of information. Memory processes are reliant on several cognitive skills that are not part of the theoretical memory neuro-mechanisms. These include attention, concentration, and the ability to initially process the information. In addition, memory functioning can be affected by such factors as motivation, anxiety, and emotional functioning.

Status:
Spatio-temporal orientation was clearly intact. Immediate and delayed retrieval of logical and linearly organized information exceeding immediate attention span was assessed with the Logical Memory subtests from the Wechsler Memory Scale-Revised. The exam involves the presentation of two short stories. Examination of immediate recall revealed borderline retrieval (19/50 bits of information which is at the 17th percentile). His 30 minute delayed recall of the complex figure discussed in the section above was in the average range.

His retrieval performance on a challenging list learning task was assessed using the Rey Auditory Verbal Learning Test. On this task, he was presented 15 unrelated words over a series of five presentations. He was able to retrieve an average number of words on the first trial (7 words) and exhibited average overall learning across trials (59 words total). By the fifth trial he was able to recall 15 words, performance which is in the average range. He recalled 7, 11, 11, 15, and 15 words on the first through fifth trial respectively, suggesting a positive and strong learning curve. After a second word list was presented to distract him, he demonstrated no difficulty returning to the original word list, retrieving 12 words. Six intrusion errors were noted, which is slightly higher than expected. After a 30 minute activity filled delay he recalled 12 words, performance in the average range. His ability to recognize the target words among a larger body of words was found to be in the average range as he recognized 14 of the 15 original words.

Functional Implications:
Overall, 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

This category of findings reflect the ability to orchestrate internal searches, alternate attentional focus, generate and test hypotheses, sustain and self monitor behavior, and to inhibit impulses.

Status:
Mr. Thomas was administered a measure of problem solving skills (TOPS). The measure involved the presentation 13 stories and hypothetical problems for which Mr. Thomas was required to demonstrate the ability recognized the issues surrounding a problem, the ability to generate solutions to those hypothetical problems, and the ability to provide good rationale for his solutions. On this measure he performed rather poorly and his performance was within the range normally seen among 14 year olds (38 pts.; 14-4 year range).

Mr. Thomas demonstrated average verbal fluency on a lexical word generation task (producing words beginning with a given letter) in the presence of mildly reduced performance on a measure of semantic fluency (generating words belonging to a particular semantic category).

Mental set shifting skills were examined through the use of a measure which required rapid alternation between numbers and letters in order (Trails B time = 113 seconds). On this test he displayed performance that was over one and one half standard deviations from the norm, placing him in the mildly impaired range. His ability to shift mental sets, generate hypotheses, and utilize verbal feedback to alter his response set was measured using a conceptual card sorting test (Wisconsin Card Sorting Test). On this test he was able reason out a card sorting strategy six out of six times, with an average number of errors. He displayed no significant tendency to perseverate, and utilized feedback provided adequately to shift his response pattern. Mr. Thomas was administered a concept formation that involves the development and application of problem solving strategies though the use of response feedback (Short Category Test). On this measure he was required to determine which number (1, 2, 3, or 4) was symbolized by the stimuli presented to him. Among other skills, this measure requires concept formation skills, problem solving skills, the ability to use response feedback (correct or incorrect), and the ability to maintain a response set once the correct answer is found. On this measure he demonstrated low average performance. Abstraction skills appear to be in the low average range.

Functional Implications:
Overall, Mr. Thomas possesses significantly impaired skills related to social judgement and social problem solving. He may fail to understand social situations 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

Status:
Overall both fine motor speed and fine motor dexterity are bilaterally intact.

SOCIAL/EMOTIONAL FUNCTIONING

MMPI-2

The MMPI-2 is the most widely used, well respected, and well researched personality assessment tools available. It involves the analysis of 567 true and false statements. The resulting profile contains ten main profile scales and many subscales to aid the examiner in painting an accurate picture of a patient's personality functioning. The profiles generated by the patient's performance can be compared to known populations of personality types and various personality disorders. The measure also contains multiple scales of validity to assess whether, and to what degree a patient is minimizing or exaggerating psychopathology, and can detect carelessness and inconsistent responding.

Mr. Thomas completed the MMPI-2 in my presence during one two hour session. He was able to read all of the items and subjectively felt as if he had understood each statement. The validity scales indicated that he did not attempt to exaggerate his symptoms (F-K=-1, Sub-Obv=115, |F(9)-Fb(6)|=3, VRIN=10, TRIN=8, etc.). Analysis of the consistency of his responding suggested that he did not take a haphazard or inconsistent approach to the inventory. Likewise, he did not appear to be overly guarded, and he did not endorse items which were obviously untrue. Thus, the profile appeared to be a valid indicator of current personality functioning.

The clinical profile was remarkable for multiple significant clinical scale elevations (Welsh Code 9"7864' - 20/13:5# FL-/:K#). His 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 is 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

The PCL-R was developed through research on many thousands of inmates and forensic patients. It is likely the most widely respected and empirically driven measure of sociopathic and antisocial personalities. The interrater reliability is high ranging from .83 to .86 and from .91 to .93 when two independent ratings of a single individual are averaged. Statistical analysis of the measure suggests that two factors together characterize the antisocial personality. The first, and most important is Factor 1 related to callousness and remorseless use of others (see table 1 below). Factor 2 is related to chronically unstable and antisocial lifestyle (see table 2 below).

Table 1
FACTOR 1
Glibness/Superficial Charm
Grandiose Sense of Self Worth
Pathological Lying
Conning/Manipulative
Lack of Remorse or Guilt
Shallow Affect
Callous/Lack of Empathy
Failure to Accept Responsibility

Table 2
FACTOR 2
Need for Stimulation/Proneness to Boredom
Parasitic Lifestyle
Poor Behavior Controls
Early Behavior Problems
Lack of Realistic Long Term Goals
Impulsivity
Irresponsibility
Juvinile Delinquency
Revocation of Conditional Release

Mr. Thomas was rated on the Hare Psychopathy Checklist - Revised (PCL-R). Factor 1 was scored a 7 while factor 2 was scored at 16. His total adjusted score of 24.2 is consistent with the score obtained by about 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

Mr. Thomas is a 24 year old (DOB 11-6-72) African-American male who is awaiting trial for his alleged connection to the robbery of a Lone Star restaurant and the murder of two employees at that restaurant. The date of the alleged offense was April 15, 1996.

The neuropsychological assessment appears to accurately portray his current neuropsychological functioning. There was no indication of purposeful or unconscious malingering or suboptimal effort. The following pattern of performance emerged from the assessment:

1. Intellectual functioning is in the borderline range at 79. Verbal reasoning and visual/perceptual reasoning are equally poor.
2. Academic skills testing suggest the clear presence of a learning disability for reading writing and arithmetic.
3. Attention, concentration and mental processing speed are significantly below average. More complex forms of concentration are rather severely impaired.
4. Basic language skills related to word finding and comprehension are adequate although his vocabulary level 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 when under the duress of time or stress.
8. Motor skills are grossly intact with regard to speed and dexterity.
9. Personality assessment revealed a highly suspicious young man with persistent feelings of betrayal, impulse control problems and difficulties with authority.

Together, there are multiple indicators of mild but significant levels of neurocognitive dysfunction. While he is not considered mentally deficient or retarded, his performance was certainly severe enough to present major obstacles in social and emotional functioning.

Overall, several conclusions can be made when all factors are considered (his neuropsychological assessment and personality assessment, together with clinical observations and background history):

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 others 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 ethics that, while unique and not always appropriate for this society, are nonetheless suggestive of a strong moral code. In this sense he is capable of showing remorse and has the ability to care deeply for others. Such qualities are lacking in the 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 forth decade of life for most of these individuals, at which time they typically become law abiding citizens despite their violent, crime ridden early life. Mr. 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.

ICD-9 DIAGNOSTIC IMPRESSIONS

Antisocial Personality Disorder

Thank you for this most interesting referral.

Respectfully Submitted,

Thomas F. Kinsora, Ph.D.
Clinical Neuropsychologist
License PY265

THOMAS F. KINSORA, PH.D.
Specializing in Clinical Neuropsychology
1111 Shadow Lane Las Vegas, Nevada 89102
(702) 382-1960 FAX (702) 382-4993

ADDENDUM

Patient: Thomas, Marlo
Date of Addendum: June 20, 1997

A more comprehensive diagnosis of Mr. Thomas would include:

Axis I:

314.01 Attention Deficit/Hyperactivity Disorder, Predominantly Hyperactive-Impulsive Type (probable)

315.00 Reading Disorder
315.1 Mathematics Disorder
315.2 Disorder of Written Expression
315.9 Learning Disorder NOS
Borderline Intellectual Functioning

310.7 Antisocial Personality Disorder
312.34 Intermittent Explosive Disorder
312.30 Impulse Control Disorder NOS

Sincerely,

T. F. K. - PhD

Thomas F. Kinsora, Ph.D.
Clinical Neuropsychologist
License PY265

EXHIBIT 181

EXHIBIT 181

Amy B. Nguyen
Owner – Capital Maps, LLC
145 Kilmichael Dr.
Coppell, TX 75019
Tel: 972-939-7085

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARLO THOMAS	)	**CASE NO. 2:17-cv-00475**
v.	)	
TIMOTHY FILSON, et al.	)	

DECLARATION OF AMY B. NGUYEN

I, Amy B. Nguyen, of Coppell, Texas, declare:

1. I am the owner of Capital Maps, LLC.

2. I am a Geographic Information Systems (GIS) Analyst who specializes in Capital Sentencing Mitigation Mapping.

3. GIS is the integration of data with software and hardware that allows the user to capture, analyze and display geographically referenced data.

4. I hold Masters Level Certification in GIS from the University of Texas at Dallas, and a Bachelor's Degree in Physical Science from University of Houston – Clear Lake.

5. I have particular expertise in census tract data and a subspecialty in crime data.

6. I have contributed capital sentencing mitigation maps in fifty (50) state death penalty trials and sixteen (16) Federal death penalty trials.

7. The type of maps I produce provide a persuasive means for presenting complex, community risk factors for criminal violence as defined by the Department of Justice such as poverty, exposure to violence, lead exposure, community disorganization, gang activity, lack of role models and substandard education.

8. I was retained to identify community risk factors for Mr. Thomas and produce maps showing those risk factors.

9. Making the maps for Mr. Thomas' case involved numerous steps. A base map layer was obtained – from U.S. Census TIGER files and Clark County GIS. Other layers included a city boundary, hydrography, streets, parks, local landmarks, etc. These files were loaded into ArcGIS mapping software, from this a base-map was created.

10. The Thomas family addresses and Mr. Thomas' schools were provided to me by defense counsel and were coded into the base-map.

11. The demographic data files for the 1970, 1980, and 1990 Census were obtained via data download from the US Census website and formatted for compatibility with the ArcGIS mapping database. Those files were then imported to the database and tied to the census tract layer file via a common identifier that was contained in both files, from this an analysis could be made. An example of how this was done is as follows:

    (# Single Mother Families/Total # of Families) x 100 = Percentage of Single Mother Families

12. I reviewed Clark County, Nevada census data associated with Mr. Thomas' juvenile history against that of the Office of Juvenile Justice and Delinquency (OJJD) study regarding community risk factors in committing an act of violence and produced thirty-one (31) maps regarding risk factors found in the childhood neighborhoods of Mr. Thomas. The risk factors identified included single mother families, lack of education attainment, community disorganization, poverty, and frequent moves and school transitions.

13. In the 1970s Mr. Thomas lived at four addresses in Las Vegas and North Las Vegas – Gerson Avenue, King Avenue, Duchess Avenue, and West Adams Avenue. The Gerson and West Adams Avenue addresses were in the same census tract, number 3.02. The King Avenue and Duchess Avenue addresses were in the same tract, number 37.

14. Female headed households in the Gerson and West Adams census tract made up 34.48% of households in the tract in the 1970 census. This was 254% higher than the Clark County average of 9.17%.

15. In this same tract adults age twenty-five and up with less than a ninth-grade education made up 32.38% of all adults, this was 110% higher than the Clark County average. The King and Duchess tract at 19.03% was 24% higher than the county average.

16. Adults twenty-five and up with no diploma or GED made up 31.29% of tract 3.02, this was 46% higher than the county average. In the King and Duchess tract the average was 32.27%, which was 51% higher than the county average (21.44%).

17. Poverty was a significant issue in both home tracts. Families living at or below poverty in Clark County in 1970 made up 9.18% of all families. The Gerson and West Adams tract had an average

135% higher at 21.53%. The King and Duchess tract at 17.27% was 88% higher than the county average.

18. Families receiving public assistance in 1970 Clark County averaged a low 0.98%, however the Gerson and West Adams tract average was 5.28%, which represented a 439% increase over the county average. The King and Duchess tract, at 2.03%, was 107% higher than the county average.

19. Unemployment, an example of both community disorganization and an explanation of poverty was a serious problem as well. The census indicated the unemployment rate for Clark County in 1970 was 5.08%. In the Gerson and West Adams tract the average was 8.77%, which was 73% higher than the county average.

20. Median family income in Clark County in 1970 was $11,618. The Gerson and West Adams tract the average was $7,837. This amounted to $3,781 less a year to live on, or $315 less a month to live on than the county average. The King and Duchess tract was slightly better at $8,669, still $2,949 less a year, or $246 less a month to live on than average.

21. During the 1980s Mr. Thomas lived at five addresses in North Las Vegas; 2036 Hassell Avenue, Yale Street, West Cartier Avenue, Salt Lake, and Spear Streets, and in the following Las Vegas locations; Adams Avenue, North J Street, 833 Hassell Avenue, and Hart Ave.

22. Only three of the addresses were in tracts where African Americans were not the majority; Salt Lake and Spear, which were in the same tract, and Yale St near Interstate 15.

23. Single mother families in 1980 Clark County made up 7.13% of all families, however the tract of the Cartier and 2036 Hassell addresses had an average that was 215% higher than the county average at 22.44%. The Yale Street tract average was 18.10% which was 154% higher than Clark County. The J Street and Adams tract average was 465% higher than average. The Salt Lake and Spear tract had an average of 19.80% which was 178% higher than the county average. The 833 Hassell Avenue and the Hart Avenue addresses, both in tract 35, was the worst with an average of 44.86% of all households headed by a single mother. This average was 529% higher than the county average.

24. Adults age twenty-five and up with less than a ninth-grade education in 1980 Clark County made up 11.36% of all adults age 25 and up. The Cartier and 2036 Hassell tract had an average that was 65% higher at 18.71%. The Yale Street tract average was 144% higher at 27.76%. The J Street and Adams tract average was 147% higher than average at 28.07%. The Salt Lake and Spear tract had an average of 15.27% which was 34% higher than the county average. The 833 Hassell Avenue and the Hart Avenue tract averaged 32.67%, 188% higher than the county average.

25. By the 1980s we could analyze African American education rates as well. African American adults age twenty-five and up with less than a ninth-grade education in 1980 Clark County made up 8.22% of all adults age 25 and up. The Cartier and 2036 Hassell tract, at 23.17% was 182% higher than the county average. The Yale Street tract average was 218% higher at 26.18%. The J

Street and Adams tract average was 234% higher than average at 27.47%. The Salt Lake and Spear tract had an average of 10.11% which was 23% higher than the county average. The 833 Hassell Avenue and the Hart Avenue tract averaged 31.49%, the worst of all the addresses, at 283% higher than the county average.

26. Adults age twenty-five and up with no diploma or GED in 1980 Clark County made up 16.79% of all adults age 25 and up. The Cartier and 2036 Hassell tract had an average that was 54% higher at 25.83%. The Yale Street tract average was 43% higher at 24.01%. The J Street and Adams tract average was 78% higher than average at 29.91%. The Salt Lake and Spear tract had an average of 23.85% which was 42% higher than the county average. The 833 Hassell Avenue and the Hart Avenue tract averaged 30.51%, 82% higher than the county average.

27. African American adults age twenty-five and up with no diploma or GED in 1980 Clark County made up 16.79% of all African American adults age 25 and up. The Cartier and 2036 Hassell tract, at 29.01% was 126% higher than the county average. The Yale Street tract average was 115% higher at 27.56%. The J Street and Adams tract average was 135% higher than average at 30.16%. The Salt Lake and Spear tract had an average of 26.90% which was 110% higher than the county average. The 833 Hassell Avenue and the Hart Avenue tract averaged 31.87%, the worst of all the address, at 149% higher than the county average.

28. Poverty continued to be a problem in the areas where Mr. Thomas lived in the 1980s. The poverty rate for Clark County in 1980 was 9.89%. All the tracts Mr. Thomas lived in were significantly higher than the county average. The Cartier and 2036 Hassell tract, at 18.52% was 87% higher than the county average. The Yale Street tract, at 34.40% was 249% higher than the county average. The J Street and Adams tract average was the worst of all, with an average of 39.24% living at or below poverty, which was 297% higher than the county average. The Hassell Avenue and the Hart Avenue tract averaged 29.18%, which was 195% higher than the county average.

29. African American poverty was also available for analysis in 1980. The poverty rate for African Americans in Clark County was 11.88%. Once again, all the tracts Mr. Thomas lived in were higher than normal. The Cartier and 2036 Hassell tract, at 21.99% was 85% higher than the county average. The Yale Street tract, at 36.42% was 207% higher than the county average. The J Street and Adams tract average was the worst of all, with an average of 39.62% living at or below poverty, which was 233% higher than the county average. The Hassell Avenue and Hart Avenue tract averaged 29.86%, which was 151% higher than the county average.

30. Vacant homes are another example of community disorganization. They invite crime and can be a haven for drug users. In 1980, Clark County had a vacant home rate of 7.81%. The Cartier and 2036 Hassell tract, at 16.27% was 108% higher than the county average. The Yale Street tract, at 11.48% was 47% higher than the county average.

31. High unemployment continued to be a problem in Mr. Thomas' 1980s neighborhoods. The unemployment rate for Clark County was 4.47% in 1980. The Cartier and 2036 Hassell tract averaged 8.20%, which was 83% higher than the county average. The Yale Street tract, at 6.61%

was 48% higher than the county average. The J Street and Adams tract average was 32% higher than average at 5.89%. The Salt Lake and Spear tract had an average of 7.65% which was 71% higher than the county average. The 833 Hassell Avenue and Hart Avenue tract averaged 8.55%, the worst of all the address, at 91% higher than the county average.

32. Median family income had risen to $19,793 in Clark County by 1980. In the Cartier and 2036 Hassell tract the average was $18,095. This amounted to $1,698 less a year to live on, or $141 less a month to live on than the county average. The Yale Street tract was lower at $11,182, which was $8,611 less a year or $718 less a month to live on. The J Street and Adams tract average was the worst at $9,239, which was $10,554 less a year to live on, or $879 less a month. The Hassell Avenue and Hart Avenue tract averaged $10,944, which was $8,849 less a year, or $737 less a month to live on.

33. Mr. Thomas lived at three addresses in the 1990s. The first was in North Las Vegas on Spear Street, then Montebello Avenue in Las Vegas, and finally on Raymond Street in North Las Vegas.

34. Single mother households in Clark County made up 11.64% of all households in 1990. The Spear Street address was 124% higher at 26.04%. The Raymond Street address was far worse at 50.56% which was 344% higher than the county average.

35. Adults age twenty-five and up with less than a 9th grade education had dropped by 1990 in Clark County to a 7.44%. The Spear Street tract was considerably higher at 16.99%, which was 128% higher than the county average. The Raymond tract was 61% higher at 11.99%.

36. African American adults age twenty-five and up with less than a 9th grade education averaged 5.83% in Clark County by 1990. The Spear Street tract was higher at 11.30%, which was 94% higher than the county average. The Raymond tract was 109% higher at 12.16%.

37. In 1990, adults age twenty-five and up with no diploma or GED averaged 17.71% in 1990 Clark County. The Spear tract was 80% higher at 31.82%. The Raymond tract was even worse, with an average of 35.07%, which was 98% higher than the county average.

38. African Americans twenty-five and up with no diploma or GED averaged 17.12% in 1990. The Spear tract was 94% higher at 33.20%. The Raymond tract was even worse, with an average of 34.51%, which was 102% higher than the county average.

39. Poverty in Clark County by 1990 had only increased 1.78 points to 11.67%. The Spear tract was 85% higher at 21.74%. The Raymond tract was 247% higher at 40.79%.

40. African American Poverty in Clark County had risen to 16.55% by 1990. The Spear tract was 64.11% higher at 27.11% and the Raymond tract was higher still at 39.68% which was 140% higher than the county average.

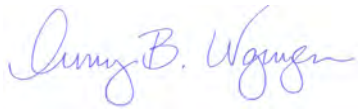
41. Unemployment continued to plague North Las Vegas. While the Clark County average was 7.46%, the Spear tract was 10.30% which was 38% higher than average. The Raymond tract was considerable worse at 21.62%, 190% higher than the county average.

42. Median family income by 1990 in Clark County had increased to $34,442. The Spear tract was lower by $8,755, which was $730 less a month to live on. The Raymond tract was less than half the county average, at $17,305. This amounted to $17,137 less a year, or $1,428 less a month to live on.

43. The base of the animated map showing Mr. Thomas' moves was also created using ArcGIS software and the animation was completed using a drawing tool in Microsoft PowerPoint software.

44. Mr. Thomas changed addresses at least fourteen (14) times and changed schools at least twenty-six (26) times. Frequent moves and school changes are defined as a school risk factor according to the Department of Justice.

45. Mr. Thomas' childhood was marked by frequent moves and school changes often associated with an unstable home life and a lack of opportunity to bond with teachers and make friends, in additional to facing the added weight of poverty, lack of education and opportunities in his neighborhoods.



7/27/2017