(1) Figures from fiscal year 2000-01 or projections based on those figures. Combines jury fees and mileage fees reflected individually in Tables 1 and 2.
(2) Combined Jury and Mileage Fees paid during fiscal year 2000-01 (See: Tables 1 and 2).
(3) Projected Jury and Mileage Fees combined, had Commission recommendations been in place to increase jury fees to $40 per day while eliminating appearance fees for two days and eliminating mileage fees for citizens traveling less than 65 miles while increasing the mileage rate to 36.5 cents per mile from the statutory rate of 20 cents per mile.
(4) Projected total savings to the indicated counties that would have resulted had Commission recommendations been in place.
(5) Projected costs to the indicated counties that would have resulted had Commission recommendations been in place.
(6) No trials were held in the county during fiscal year 2000-01.
(7) Total fees paid in fiscal year 2000-01 minus projected fees.

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MILEAGE FEES

Currently, jurors receive mileage compensation at a rate of 20 cents per mile.[36]

Since jury service is a duty of citizenship which necessarily imposes a burden upon citizens, the Commission recommends that those summoned should not be compensated for mileage unless long distance travel is involved. The Commission recommends mileage compensation when a citizen summoned must travel more than 65 miles one way. This kind of extended travel is often necessary in rural counties where the population is spread out over a vast area.

Provision for mileage compensation also ought to be made, without regard to the distance involved, when the individuals summoned and selected are disadvantaged persons for whom the financial burden of transportation would constitute an undue hardship.

The Commission also believes that when mileage is paid, the rate should be the same as is paid to state employees: 36.5 cents per mile in 2002. This proposed mileage fee increase would likely be more than offset by the elimination of mileage fees for travel of less than 65 miles one way.

[36] NRS 6.150(3). Carson City does not pay mileage expenses to jurors.

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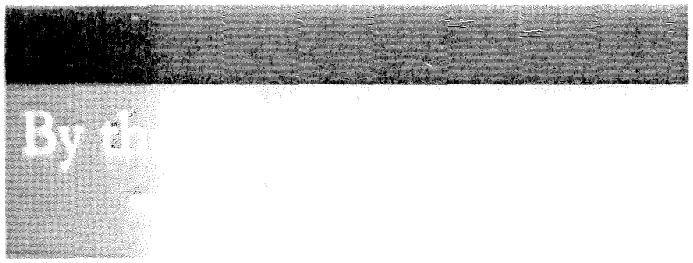

Juror Compensation

RECOMMENDATIONS

1. NRS 6.150(1) should be amended to abolish the $9 per day appearance fee for those summoned but not selected.

2. NRS 6.150(2) should be amended to establish a rate of $40 per day for each sworn juror for every day of service and for any prospective juror after the second day of jury selection.

3. NRS 6.150(3) should be amended to abolish mileage fees except for travel over 65 miles one way.

4. NRS 6.150(3) should be amended to pay jurors at the state employee compensation rate (currently 36.5 cents per mile).

5. Employers are encouraged to continue paying their employees while they are serving on jury duty.

6. Unions are encouraged to bargain for wage compensation for their members during the time they are serving as jurors.

FREQUENCY OF JURY SERVICE

The length of time which passes between completion of jury service and eligibility to again be summoned can vary widely because of the varying need for jurors in the districts and the law of the State of Nevada. No legal limit is stated in Nevada law for again summoning jurors selected by jury commissioners, but there is a one-year limit on county commissioners again summoning jurors, unless there are not enough suitable jurors available to serve.[37] In the Second and Eighth Judicial Districts, jury commissioners summon jurors, while this is done by the county commissioners in districts with smaller populations.

NRS 6.070, enacted in 1885 and amended in 1919[38], restricts the county commissioners from summoning jurors more than once in the space of a year, unless there are not enough other suitable jurors available; then and only then may a citizen be summoned more than once in a single year.[39] In contrast, NRS 6.045, which was enacted in 1963, provides for a jury commissioner to select jurors in counties with over one hundred thousand people.[40] NRS 6.090(3) provides that where a jury commissioner is selecting potential jurors, the district judge may direct the selection of more jurors when the district judge deems it necessary[41], but is silent as to the length of time that must pass before a person who has served is again eligible for jury service.

Actual re-summons periods within Nevada's judicial districts vary depending on population size and the number of jury cases tried. In sparsely populated counties, citizens are usually summoned for specific trials and may be immediately summoned again if they are not seated as jurors.[42] The Second and Eighth Judicial Districts currently do not re-summon citizens for one and two years, respectively.

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[37] "The board of commissioners shall not select the name of any person whose name was selected the previous year ...." NRS 6.070.
[38] NRS 6.045, 6.070. Id.
[39] NRS 6.070.
[40] NRS 6.045.
[41] NRS 6.090(3).
[42] NRS 6.070 states that one may not be selected for service if they were selected the previous year, "unless there be not enough other suitable jurors in the country to do the required jury duty."

Jury service can cause significant personal and financial hardships for jurors.[43] In those rural jurisdictions where jury cases are tried frequently yet the population of those qualified to serve is small, the hardships associated with service are suffered more frequently. To minimize these hardships, the Commission believes that citizens should not be summoned to perform jury service more frequently than once every two years unless there are absolutely no other persons available to summons. Additionally, state courts should honor a juror's service on a federal jury by treating those persons in the same way that it exempts persons who have served on a state jury.

To the extent possible, the Commission also recommends that jury panels be reduced to the minimum number necessary for the selection of a jury. While this can be difficult to predict, doing so wherever possible would reduce the number of potential jurors summoned and assist in reducing the frequency of summonses.

One-Day/One-Trial

A common trend throughout the country is the one-day/one-trial system whereby citizens summoned to court serve for one day or, if seated as a juror or still eligible to be seated, serve only for the duration of one trial.[44] While every district in Nevada professes to use this system, the Commission was informed this is not always true in the Eighth Judicial District.

One-day/one-trial systems have a number of advantages. Among these are decreased hardships for jurors because of the shortened terms of service, and the ability to permit a far greater number of citizens from a broader cross-section of the jurisdiction's population to participate in the jury process.[45] A significant disadvantage is that because more citizens are cycled through the jury selection process, more administrative expense is engendered.[46]

It is important in that process that the minimum number of prospective jurors be summoned to address a court's requirements and that the courts strive for complete utilization of those summoned. Different jurisdictions and organizations have different

[43] What Should Jurors be Paid?, supra note 35.
[44] See Jury Trial Innovations, supra note 20.
[45] G. Thomas Munsterman, Jury System Management 72 (1996).
[46] Id. at 71.

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definitions of jury utilization. The Commission defines juror utilization as a juror participating in the voir dire process, even if that is simply sitting in a courtroom with other prospective jurors during the selection process. The Commission strongly believes that a prospective juror's time should be respected.

The Commission believes the one-day/one-trial system should remain the practice to the extent it is possible. Concurrently, Nevada District Courts should establish a stated goal that all citizens summoned should have the opportunity to participate in voir dire and the judicial process.

Frequency of Jury Service

RECOMMENDATIONS

1. **Nevada citizens ideally should not be summoned for jury duty more frequently than once every two years.**

2. **Citizens who have served on a federal jury within the preceding 12 months should be excused from jury duty in state court for the same period they would have been had they served on a state court jury.**

3. **Jury panels should be comprised of the minimum number of citizens necessary for the selection of a jury.**

4. **The one-day/one-trial system of jury management should be the practice in every district to the extent it is possible.**

5. **NRS 6.045 should be amended to harmonize with NRS 6.070 so that districts which utilize a jury commissioner are subject to the same one year restriction on re-summonsing jurors as exists in other districts.**

CITIZENS WHO ARE SUMMONED FOR JURY DUTY, BUT DO NOT RESPOND

Jury service is a task that citizens are both obligated and privileged to perform. If a jury is to be truly representative of the population, a jury of peers, persons of all economic backgrounds and professions must serve. Nevada law permits the release of jurors for undue hardship when truly difficult circumstances exist. Ordinary inconvenience because of missed work should not be a factor when considering whether to release potential jurors for undue hardship. Jury commissioners are inundated with requests from citizens who have been summoned asking to be excused from jury duty. Problems are described ranging from scheduled vacations, or the desire not to miss a day of work to great hardships such as being the sole caregiver for an ill dependent or having a young child and no available childcare.

Jurors should be instructed during the pre-voir dire presentation that only extreme hardship issues, not typical employment concerns, will be considered by the court. This might prevent the avalanche of courtroom requests for release from jury based upon work excuses. Judges should be consistent among themselves about the standards that should be applied in determining who should receive hardship releases.

Unfortunately, in addition to those who appear but attempt to avoid selection by complaining about the personal inconvenience of jury duty, many others ignore the summons for jury duty altogether. The rate of non-response is particularly high in the Second Judicial District and appears to be on the rise.[47] Potential jurors who fail to appear, assuming they can avoid selection by failing to appear, should be promptly informed that their behavior is in violation of Nevada law. A fair and consistent method should be in place to deal with those who fail to appear in response to the jury summons to ensure that all citizens are treated equally.

[47] Washoe County Jury Commissioner's Office. The Jury Commissioner found that up to 21.83% of people summoned in 2000 did not respond, which is over double the amount of non-respondents reported for 1995.

Unforeseen circumstances, such as a misplaced summons or a miscalendared appearance date, will occur and should be addressed non-punitively in any procedure. The first instance of non-appearance may require nothing more than a postcard with an instruction to call and reschedule the appearance date. However, courts should deal appropriately with those summoned who fail to appear on more than one occasion. Failure to appear is contempt of court and punishable by a fine of up to $500.[48]

The Commission advocates a measure of justice for those citizens who routinely fail to respond when summoned. Citizens who willfully fail to appear could be fined or assigned jury duty for a date certain, or both. Community service might also be considered as a way to educate miscreants about the importance of responding to a summons which is an order to appear. In the Second Judicial District, some who failed to appear pursuant to a summons have been required sit in court for the duration of a jury trial. This punishment is not routine in the Second Judicial District, but reflects the response chosen by a few of the judges in that district. Such a punishment is a commendable response to a failure to appear, as it communicates to the public the importance of the jury's role in our judicial system. It is the responsibility of the court or the chief judge to see that penalties for failing to appear are uniformly and consistently imposed. The Commission suggests that any fines imposed for failing to appear be used to pay for improvements to juror amenities.

A contempt proceeding for failure to respond to a summons begins with an order for the wayward citizen to appear in court for a show cause hearing. The order to appear and show cause must be signed by the judge and accompanied by an affidavit from the jury commissioner or clerk and a notice stating the time and place set for the contempt hearing. The citizen must be served with these documents by the method deemed most efficient for each district, the civil division of the Sheriff's Office, or by certified mail. The Commission recommends consistent application of this process.

The rate of non-appearances to jury summonses can be decreased through public education. Programs designed to teach the importance of jury duty should be introduced to children beginning in elementary school. Other techniques, such as a court-sponsored "Juror Appreciation Day" and radio and television public service announcements, can be used to target adults.[49] New York has effectively used a publicity

[48] NRS 6.040.

[49] See generally Jury Trial Innovations, supra note 20, at 25-28.

campaign including interviews and profiles of "celebrity jurors," including Barbara Walters and then-New York City Mayor Rudy Giuliani. Such campaigns demonstrate that even the famous and influential do their part for the jury system and do not always "get out of it."[50]

Citizens Who Are Summoned for Jury Duty, But Do Not Respond

RECOMMENDATIONS

1. **The courts should vigorously confront the problem of citizens failing to respond to jury summons. The first approach should be to educate them on the necessity of jury duty through a postcard re-notification.**

2. **Citizens who habitually fail to respond should be subjected to contempt proceedings and if held in contempt of court, a measure of justice should be imposed.**

3. **A computerized jury management system, discussed in the** Use of Technology **section, would assist in identifying non-respondents and automatically sending follow-up notices.**

4. **Fines imposed for failing to appear in response to a jury summons should be used to pay for improvements to juror amenities.** (See following section)

[50] See Continuing Jury Reform in New York State, supra note 12, at 31.

FACILITIES FOR JURORS

Often the only contact citizens have with the judicial system is as jurors. Jury duty can be an intimidating, daunting, tedious and boring experience. Jury facilities contribute to the impressions that a citizen forms of the judicial system and the trial process. Furthermore, adequate facilities are a fundamental requirement to lessen the stress and discomfort and set the tone for a positive and rewarding experience. Those summoned and those who are selected for jury service should be as comfortable as possible while they perform their vital public service.

Jurors should have no unexpected or inappropriate contact with attorneys, litigants, parties and witnesses. Facilities to accommodate jurors – **jury assembly rooms, juror lounges, deliberation rooms and restrooms** – should be located near one another to eliminate unwanted interactions between jurors by unauthorized persons. It is preferable to have separate assembly rooms and lounges, although limitations in existing courthouses may make this unfeasible.

When jurors arrive for their first day of service, the check-in counter or a sign indicating the location of check-in should be immediately visible to jurors. Clear signage should also be available to indicate the location of the jury assembly room or the location where jurors should be seated to await juror orientation and assignment to a courtroom.

JURY ASSEMBLY ROOM

Those summoned should be made as comfortable as possible while they await assignment or re-assignment to a courtroom. An area for viewing television should be available, with a screen visible to a large audience. A separate room or area should be available with current reading materials for those who prefer to read. Donations of books are accepted in many districts, and jurors should be allowed to keep the books they may have started to read. Courts have noted that jurors will often bring the book back and donate additional books of their own. Signs explaining the book policy should be posted. Games and puzzles are ideal items for the assembly room. A work area is also helpful for jurors who may use laptops or need the space to do any work they have brought with them.[51] Beverages should be readily available. Vending machines, a coffee maker and a microwave oven are also desirable amenities.

[51] See generally Jury Trial Innovations, supra note 20, at 48-49.

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JUROR LOUNGE

A separate, smaller lounge adjacent to the assembly room is useful for jurors who are already assigned to a case. The lounge provides an area away from participants in the trials for jurors to congregate during breaks and lunchtime. This area should be furnished with comfortable seating, reading materials and tables for games and puzzles. Beverages and vending machines should be readily available.

Telephones in a location with some privacy should be available so that jurors may address personal matters that might arise during jury service.

DELIBERATION ROOMS

It is imperative to provide jurors with the appropriate space for making the important decisions required of them. Private and secure rooms are needed when it is time for jurors to deliberate and reach a verdict. The jury deliberation rooms should be specifically assigned for this function, and should be large enough so jurors do not feel crowded. They should be adequately ventilated, have beverages available and a small refrigerator to accommodate jurors with special dietary requirements. A dry-erase board mounted on the wall with writing implements should be provided. Restrooms should also be located in or near the deliberation rooms. For security and privacy reasons, the deliberation rooms should not have windows.

RURAL FACILITIES

Many of Nevada's rural courthouses, constructed in the late 1800s and early 1900s, are woefully inadequate for the demands of today's trials.[52] Separate jury assembly rooms and juror lounges are necessary to prevent improper contact between jurors and parties, witnesses and attorneys. But in most of these rural courts, those "rooms" or "lounges" often consist of the hallway outside the courtroom. There simply is inadequate space in these older buildings to adequately segregate the jurors during a trial. In these aging courthouses, restroom facilities are usually very small, few in number and likely to be shared by jurors and the public, trial participants and court employees. An inability to keep the trial participants separated from the jury increases the possibility of improper contact and the chances for a mistrial.

[52] See Ronald M. James, Temples of Justice: County Courthouses of Nevada (1994).

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Inadequate jury deliberation rooms are also a problem. During a recent jury trial in Pioche, the county commission chambers were designated as the deliberation room. When the jury arrived, they found the chambers occupied by a justice of the peace holding traffic court. The jury had to wait until traffic court was concluded to begin their deliberations.

Security issues also abound in these older facilities. For example, at the White Pine County Courthouse, court sessions frequently involve maximum-security inmates from Ely State Prison. Inadequate facilities to house and safely route prisoners to the courtroom means law enforcement officers toting shotguns or rifles must guard them in semi-public areas. Some rural courthouses lack any prisoner holding facilities or even metal detectors. Security for jurors and litigants must be a priority to provide basic safety for everyone and ensure the fair and orderly administration of justice.

In much of rural Nevada, the complexity and stress of juror work is compounded by poor facilities and other conditions jurors are forced to endure. Yet cases to be resolved by juries in rural Nevada are as important as cases heard in the urban areas of Nevada. Rural juries deserve safe, comfortable and friendly environments to perform their difficult tasks. The issue of inadequate court facilities in rural Nevada is of paramount importance and should be studied and addressed in a statewide effort to provide adequate facilities for all jurors in the state.

Facilities for Jurors

RECOMMENDATIONS

1. **Adequate facilities for those called to jury duty must become a priority for Nevada's courts and counties.**

2. **When the opportunity arises to construct a new courthouse, it must be planned with adequate facilities for jurors as a priority. Older courthouses should be remodeled to provide adequate facilities for jurors.**
3. **Accommodations should be made in every county courthouse to separate prospective jurors and jurors from participants in the trials, even if it requires relocation of existing staff or implementation of construction projects.**

4. **Security in all courthouses and particularly in rural courthouses must become a priority. It is unconscionable to summon citizens to jury duty and not provide safe and secure environments in which they will serve.**

BAILIFFS – THE COURT'S LINK TO THE JURY

A court bailiff's function is generally threefold: maintain a safe and secure courtroom, provide liaison services between jurors and the court, and aid in ensuring the courthouse itself is secure. Individuals reporting for jury service encounter a variety of new experiences, some of which tend to be intimidating and confusing. Citizens look to the bailiffs for direction and support.

While most jurors find their interaction with the bailiffs a positive experience, anecdotal information brought before the Commission indicated that problems exist in some districts. There have been reports of negative attitudes and demeanor on the part of some bailiffs in districts where the sheriff assigns officers to the courtroom duty. The problems appear to be directly related to an administrative structure that does not include the judicial system directly in the hiring, training, supervision and assignment of bailiffs.

The bailiff is typically the first court representative a juror encounters and the primary avenue of communication between the judge and the jury. A juror's first impression of the judicial system and the jury experience is formed, in great part, through that initial contact with the bailiff. A negative courtroom experience with a bailiff can affect the trust and confidence a juror has in the court system as a whole and that impression can affect others the juror communicates with after the trial's conclusion.

It is clear from the testimony received by the Commission that the vast majority of Nevada's bailiffs are exceptional professionals who treat the public with great respect and courtesy. Where this is not the case, the root causes of the problem appear to be a lack of formalized training and, in some situations, a court's inability to exercise adequate supervisory authority over the bailiffs.

Nevada's Peace Officer's Standards and Training (POST) Committee establishes minimum training standards for peace officers, including bailiffs.[53] While this training provides an excellent foundation for new peace officers, the training is not bailiff-specific. Most bailiff training occurs "in-house," without a statewide standardization of procedures and protocols.

This lack of standardization is exacerbated in the Second Judicial District where bailiffs are employed by and provided by the sheriff and are rotated on a biannual basis. The rotation has even occurred mid-trial. Jurors who look to bailiffs for direction can suddenly find themselves dealing with a bailiff with whom they have no rapport and who has little or no knowledge of courtroom procedures. Also, any benefits of on-the-job training are lost as experienced bailiffs return to the sheriff's department for further assignment. Similar situations occur in many rural jurisdictions, where trials and court hearings are less frequent and law enforcement officers are provided as bailiffs only when needed.

The Commission believes bailiffs should be court employees. Judicial supervision of bailiffs has been difficult to enforce in the Second Judicial District, because bailiffs are not court employees. At the same time, there must be a structure within each district that utilizes a bailiff's time to the fullest.

In the Eighth Judicial District, where bailiffs are court employees and members of a judge's individual staff, there is a history of supervisory lapses and underutilization of bailiffs. When daily court activities have concluded, some judges release their bailiffs from any meaningful responsibilities. Some bailiffs conduct their own personal affairs and some simply leave the courthouse. Morale problems occur when some bailiffs are reassigned to other duties in the courthouse, while others are not.

Some judges utilize their bailiffs for nontraditional duties, such as clerical work. A few judges in Clark County permit their bailiffs to be utilized by court administrators for general courthouse security. The Commission believes that this should be the preferred utilization of a bailiff's time when court is not in session. With a new, larger courthouse under construction in Clark County, it is imperative that all bailiffs be available to secure the courthouse for the protection of the jurors and general public.

[53] NRS 289.470 (defining judicial bailiffs as category II peace officers).

BAILIFFS – The Court's Link to the Jury

RECOMMENDATIONS

1. Standardized bailiff training should be implemented throughout the District Courts in Nevada to enhance the jury duty experience by ensuring citizens are treated with the respect and courtesy they are due. Ideally this training would be part of the requirements set forth in POST standards. If this is not possible, then a state-wide standardized "in-house" training program should be developed and implemented throughout the district courts. Training should include specific requirements and protocols for interacting with jurors and emphasize the importance of jurors to our legal system. Bailiffs should be required to complete annual training after the completion of the initial training.

2. No peace officer should be permitted to work as a bailiff in the court system without the successful completion of formalized bailiff training.

3. A bailiff manual – outlining procedures, protocols, and responsibilities – should be developed by the Administrative Office of the Courts for use by each district court in the training and utilization of bailiffs.

4. To ensure qualified bailiffs, District Court administrators, with the concurrence of the District Court judges, should hire, train, assign and discipline all judicial bailiffs. Bailiffs not performing duties directed by the judges to whom they are assigned should be assigned to court administration for appropriate training or reassignment.

5. Standardized hiring procedures should be adopted. Minimum qualifications should be set by the judiciary to ensure the quality of new bailiffs. Preference should be given to applicants who have POST certification since this would provide the most experienced individuals.

6. To attract the most qualified bailiffs and to ensure the continued professionalism and high morale of bailiffs, a salary comparable to the salaries of other state and local law enforcement officers should be paid.

Suggested Training for Bailiffs

1. Interaction with a Jury
    a. Acceptable conversations with a jury
    b. Movement of a jury
    c. Responsibilities During Jury Deliberations
2. Security/Media
    a. Handling of defendants who are in custody
    b. Courtroom security
    c. Interaction with the news media
    d. Extra measures in high profile/high security trials
3. Protection of Evidence
4. Courtroom Demeanor
    a. Professional conduct during trial
    b. Demeanor towards the defendant
    c. Limiting inappropriate contact with defendants in custody
    d. Keeping the public in the appropriate areas
5. Courthouse Safety
    a. Securing of weapons
    b. Judicial protection and threat management
    c. Gang threats
    d. Judicial protection

Suggested Minimum Qualifications for Bailiffs

1. All bailiffs should be minimally qualified as Category I or II peace officers (certification per NR 289.550)
2. Bailiffs assigned to a jury duty should have basic jury training
3. Bailiffs should be qualified to carry a weapon
4. Bailiffs must pass pre-employment drug testing
5. Bailiffs must be capable of performing minimum physical requirements, those expected of law enforcement officers

JUROR PROTECTION

National studies have indicated that jurors have varying degrees of concern for their safety and privacy. Predominately, those concerns arise with juries hearing criminal cases, although similar issues may arise during the course of high profile civil litigation.[54]

These legitimate juror concerns must be balanced against the principle that trials are open and public proceedings – a hallmark of our judicial system since colonial times. The use of anonymous juries invites suspicion that jurors have been specially selected for certain cases, thereby detracting from the appearance of fairness that is essential to public confidence in the system. The United States Supreme Court stated that there is a "community therapeutic value" served by open trials when offenders are called to account for their criminal conduct by a jury of their peers, fairly and openly selected.[55] Any procedure that implies secrecy can frustrate this broad public interest.

The Commission therefore reaffirms the importance of an open process of jury selection and rejects the concept of blanket anonymity for jurors. Nevertheless, judges must not be denied the ability to adequately safeguard jurors in extraordinary cases. Jurors should not be expected to forfeit all rights of privacy by virtue of performing their civic duty.

The Commission believes that judges should have discretion to empanel anonymous juries *only in extraordinary cases* when there is substantial reason to believe that jurors require protection. For example, in the first trial of Siaosi Vanisi on charges he brutally murdered a University of Nevada-Reno police officer, jurors were addressed only by numbers in open court. The trial judge believed that this system would help the jurors feel more at ease in light of the shocking nature of the case and the publicity that surrounded it. The jurors were thankful for the privacy and security that the numbers provided.

[54] See, e.g., Mark Curriden, The Death of the Peremptory Challenge, 80 A.B.A. J. 62, 65 (1994) (discussing a poll in the Atlanta Constitution finding that two-thirds of prospective jurors thought that questions during voir dire were too personal); Jan M. Spaeth, Swearing With Crossed Fingers, 37 Ariz. Att'y 38 (Jan. 2001) (describing various studies of juror candor when answering voir dire questions).

[55] Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980).

Judges are encouraged to continue the common practice of instructing jurors to notify the bailiff or the Court immediately if they receive any improper contacts or intimidation during the trial or acts of retaliation thereafter. Jurors should be provided with cards listing phone numbers of appropriate court personnel to notify in the event of inappropriate contact. Judges should instruct jurors that they may speak, or decline to speak, about the case to third parties after the jury is released from service. In the extraordinary case where there is a demonstrated need to protect a jury, the trial judge may permit identification of jurors in open court only by badge number and may order withholding information that would permit the location of a juror outside the courtroom, such as address, phone number, and employer information.

In cases where juror questionnaires are employed by order of the court, the judge should decide any questions of distribution or redaction when faced with an extraordinary case. The Second Judicial District Court issues an order to counsel with every jury list, restricting dissemination of private juror information listed on questionnaires. The questionnaires are made available to counsel for the parties and their litigation teams, but not directly to criminal defendants, or to third parties. Violation of the order subjects the violator to contempt sanctions.

The Commission believes that these safeguards should maintain the hallmark of open, public trials, while providing protection in those extraordinary cases where there is a genuine risk to jurors' safety.

Juror Protection

RECOMMENDATIONS

1. Nevada's courts must recognize the well-established principle that trials should be open and public and that using anonymous juries invites suspicion and detracts from the appearance of fairness that is essential to public confidence in the jury system.

2. Judges should have the discretion to empanel anonymous juries only in extraordinary cases to preserve the safety of the jurors and their families.

3. Anonymous juries should not be empanelled unless there is a reasonable showing of evidence that the safety of jurors is at risk. The mere fact that a trial may involve a notorious defendant or garner high publicity should not be grounds to empanel an anonymous jury.

4. Judges should have the discretion in extraordinary cases to prevent the identities of jurors or potential jurors from becoming public or being provided to individuals who may use the information improperly.

5. Judicial training should be required to ensure judges apply the appropriate standards when considering whether to empanel anonymous juries or limit access to juror information.

EMPOWERING THE JURY

MINI-OPENING STATEMENTS and JURY TUTORIALS

Members of the Commission have observed that often a jury panel will include individuals who actively try to avoid being selected. Generally, all jury panel members experience some confusion as to why they have been summoned and how the jury will be selected. Unfortunately, the negativity of one or two vocal panel members can infect the attitude of others on the panel, reducing the number of potential jurors expressing a willingness to serve.

Between the confusion inherent in the way jury selection generally proceeds in Nevada and the reluctance of some panel members to cooperate in the process, the entire jury selection phase of a case can be chaotic and difficult. Often, once a panel understands something about the factual nature of the controversy, enthusiasm for participation grows. In cases which are particularly technical or complicated by contested scientific issues, a panel's understanding of the factual controversy may alleviate its confusion and frustration and resulting negativity towards jury service.

To address the confusion that jury panels experience at the commencement of jury selection, the Commission recommends that the trial courts adopt two innovative practices designed to improve the jury panel's early understanding of the case and the issues the selected jurors will decide. The goal is to eliminate jury panelists' confusion and reluctance to serve by providing enough pertinent information and guidance at the very outset of the jury selection phase of the case. If jury panel members understand the nature of the controversy and if they are given a few basic tools to aid their understanding of the issues in the case, their comfort level with the process and their interest in the case and in serving on it will be enhanced.

The first proposal is to permit counsel to make a "mini-opening statement" before any questioning of the panel commences.[56] Mini-opening statements should be employed in every jury trial to briefly introduce prospective jurors to the nature of the case (whether it is civil or criminal), the claims and disputed factual issues involved, as

[56] See Jury Trial Innovations, supra note 20, at 154-55.

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well as the major theories of the plaintiff (or state) and the defense. The judge should discuss the mini-opening statements with counsel prior to the trial and clarify the limitations of brevity and non-argumentative provision of information. A time limit for each party would be helpful to prevent abuses, varying according to the complexity of each case.[57] Mini-opening statements by counsel are expected to produce more meaningful juror responses in voir dire, and reduce the number of jurors seeking to be excused from the case.[58]

The second proposal is to utilize "jury tutorials." This device is meant to provide information to juries at the beginning of trials involving particularly technical or complicated issues.[59] A jury tutorial is educational in nature and is likely not necessary in all cases. For example, a tutorial may consist of a glossary of technical terms and definitions, or a video presentation depicting a geographical location. A tutorial may be appropriate in cases in which the likelihood of confusion on the part of the jury is enhanced by the predicted length of the proceedings, coupled with anticipated disputes concerning highly technical or scientific evidence which is complicated or difficult to comprehend.

During the pretrial hearing in civil cases prior to the motion to confirm trial, or calendar call in criminal cases, counsel for the parties should discuss with the judge the likely length of trial and whether complicated or highly technical evidence will be presented. The judge should consider the use of a tutorial at the request of one or both of the parties. The judge has discretion to approve a tutorial, even over the objection of one or all of the parties. However, a clear record of the request and reasons for granting it should be made part of the pretrial record. Prior to calling the jury, the court and counsel will have determined the content of the tutorial and the manner of presentation.

The tutorial would commonly precede the presentation of evidence, although in some circumstances it might precede jury selection. The judge would be expected to instruct the jury or the panel at the time the tutorial is presented, and again when the jury is given instructions at the close of the evidence, that the tutorial is not evidence in the case, just as juries are instructed that arguments of counsel are not evidence.

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[57] See Jurors: The Power of 12: Report of the Arizona Supreme Court Comm. on Effective Use of Jurors Recommendations 18 (Nov. 1994), available at http://www.supreme.state.az.us/nav2/jury.htm.
[58] See Jury Innovation Pilot Study: Los Angeles Superior Court Innovation Comm. 2 (Nov. 1999).
[59] See Jury Trial Innovations, supra note 20, at 105-06.

In appropriate cases, with the concurrence of counsel and consent of the judge, the tutorial may be presented immediately preceding the technical evidence.

Mini-opening statements and tutorials, properly utilized, will reduce juror frustration and confusion. A jury that understands from the beginning of the case what the case involves, and what the jury is being asked to decide, will have much less difficulty following the evidence as it is presented. In technical or complicated cases, a jury which understands terminology or which has some appreciation for the physical attributes of a disputed location (be it an intersection or the layout of a construction site) should be better able to understand the evidence as it is presented. A comfortable, alert and informed jury should produce a carefully considered and reliable decision.

Mini-Opening Statements and Jury Tutorials

RECOMMENDATIONS

1. **Mini-opening statements should be presented before voir dire begins in every jury trial.**

2. **Jury tutorials should be utilized in appropriate jury trials, particularly those involving technical or complicated issues.**

INSTRUCTING JURORS ON RELEVANT LAW AT THE BEGINNING OF TRIAL

A common complaint from former jurors was that they did not know at the outset of a trial what rules, laws and standards they would be asked to apply in deliberation. During public hearings, former jurors said that they had no way of knowing what evidence was important and should be the focus of their attention and what evidence was incidental. A former juror complained that he noted certain testimony only to learn when jury instructions were presented at the end of the trial that the evidence had

been superfluous. He said that had he been told at the outset of the trial what was required to prove the elements of the crime charged, he could have carefully focused on the critical witnesses and evidence. He likened it to playing a game and not knowing the rules until the end.

Based on his statements and similar complaints from other former jurors, attorneys and judges, the Commission believes that jurors should be given instructions on the law relevant to the case prior to opening statements in a trial. The instructions should include definitions of legal and technical terms and the burdens of proof. To render just and reliable verdicts, jurors must not only hear all the evidence, but know the applicable legal standards.

Instructing on relevant law at the beginning of trial would give jurors the context of what must be proven so they can better understand the evidence as it is presented. Legal issues change with the ebb and flow of testimony at a trial and the instructions provided at the beginning of a trial will not be sufficient at the end. At the end of a trial, the jury instructions provided at the beginning would be replaced with a revised series of instructions that addresses all the legal issues and evidence that arose during the trial. Some instructions likely would be similar or identical to the early instructions, but others would be new and case-specific.

Standard "stock" instructions should be given in addition to "special" instructions drafted and agreed to by the parties and reviewed by the court prior to jury selection. Caution is appropriate in determining which "special" instructions should be given at the beginning of a case because the applicability of those instructions is frequently dependent upon the evidence presented at trial.

It is not always necessary to provide the preliminary instructions in writing, but if individual trial notebooks are provided to jurors (See Jury Notebooks section in this report) the early instructions should be included in the notebooks. As with the trial notebooks, if individual instructions are provided in writing, they should be returned and maintained by the Court at the conclusion of each day's proceedings.

Instructing Jurors on Relevant Law At the Beginning of Trial

RECOMMENDATIONS

1. Instructions on relevant law should be provided to jurors before opening statements in trials.

2. In addition to instructions on trial procedure, the following instructions should be given in every case:
    a. Explanation of what constitutes evidence and definitions of direct and circumstantial evidence
    b. The role of expert witnesses

3. In criminal cases, instruction should include:
    a. Definition of reasonable doubt
    b. Any statutory definitions relevant to the trial
    c. Presumption of innocence
    d. Any other "stock" instructions relevant to the trial.

4. In civil cases, instruction should include:
    a. Definition of preponderance of evidence or other applicable burden of proof
    b. Use of testimony from deposition
    c. Any statutory definitions relevant to the trial
    d. Any other "stock" instructions relevant to the trial.

5. Instructions that are given prior to the opening statements should be revised if necessary and also given at the conclusion of the evidence as part of the current instruction process.

JURY NOTEBOOKS

The jury notebook is a device not commonly employed by the Nevada trial courts. It is an innovation which the Commission believes will aid the jury in understanding, following and processing complex information and exhibits during trial. It may not be economically feasible in every case to provide every juror with a three-ring binder containing exhibits, photographs, admitted documentary evidence and legal instructions. It is, however, essential that, in every case, every juror be provided with suitable materials with which to take notes if the juror so wishes.

Detailed notebooks should be prepared and distributed to each juror in appropriate cases where the judge, in the exercise of sound discretion, deems the use of a notebook warranted by virtue of the case's anticipated length, complexity and technical difficulty.

Nationally and in Nevada as well, the practice of providing jurors in complex cases with notebooks has proliferated in the last decade. Juror comprehension studies by the American Bar Association during the 1980s revealed that "complex cases present inherently difficult problems to the lay juror and challenge the ability of modern juries to fulfill their traditional role in complex litigation."[60] Many scholars and jurists agree that, "to expect six or twelve individuals sitting on a jury to absorb weeks or months of testimony on an unfamiliar subject, retrieve it from memory, analyze it, and somehow reach the correct decision is to adopt a method of decision-making fraught with unreliability."[61]

The notebook is one tool that can help jurors navigate through the confusion of complex or technical litigation.

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[60] Keith Broyles, Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases, 64 Geo. Wash. L. Rev. 714, 723 (1996) (recognizing that tools such as notetaking and following along with written materials are essential to the classroom learning process and should be incorporated into the jury trial).

[61] Robert M. Parker, Streamlining Complex Cases, 10 Rev. Litig. 547, 550 (1991); accord Broyles, supra note 68, at 732 (jurors generally lack the same fact finding tools that are at the disposal of the court in a complex case, a problem which supports the argument that jurors are less competent fact finders than judges).

Having notebooks and the ability to take notes may enhance a juror's memory and recall in a complex case, aiding the fact-finding function.[62]

> [T]he notebook is a tool for enabling jurors to better understand the case and the trial process. By giving jurors this information at the beginning of the trial and collecting it in one source, which they can refer back to as necessary, courts may help jurors to feel less intimidated by their solemn surroundings, the expertise of the judge and lawyers, and their inexperience as jurors. Even low-tech juror notebooks would give jurors greater familiarity with their task, which should in turn lead to greater juror confidence, and perhaps even assertiveness.[63]

The judge exercises discretion as to what would be included in the jurors' notebook and so its contents will vary with each case. Desirable content includes a listing of the parties, lawyers and witnesses, photographs (often photographs of the witnesses), relevant documents, a glossary of technical terms, the jury instructions, a seating chart for the courtroom that identifies the trial participants, definitions of legal terms that are likely to be used in the case and a trial schedule (particularly if the judge and lawyers already know of prior commitments that will shape the trial schedule).

Additionally,

> The contents of the jury notebook could change during trial depending on the rulings of the court or the progression of the case. It is a simple matter to call changes to the jury's attention and even to exchange pages. If jurors had notebooks, counsel could ask them during trial to refer to an instruction or definition on a certain page or could direct a witness' attention to similar instructions. Focusing the jury's attention

[62] Broyles, supra note 64, at 732-33; see also Ariz. R. Crim. P. 18.6 & comment to 1995 amendment (noting that, "[I]n trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. At a minimum, notebooks should contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions").

[63] Nancy S. Marder, Juries and Technology: Equipping Jurors for the Twenty First Century, 66 Brook. L. Rev. 1279 (2001); accord Jury Trial Innovations, supra note 20, at 110 (noting that juror notebooks assist jurors to organize, understand and recall large amounts of information during lengthy and complex trials).

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on such rules over a long period of time reinforces the probability that those rules will be followed during deliberation.[64]

In 1998, the American Bar Association adopted the Civil Trial Practice Standards "to standardize and promote the use of innovative trial techniques to enhance juror comprehension."[65] One standard adopted by the ABA outlines the rules for use of juror notebooks. The standard dictates:

1. Use & Contents.
   In cases of appropriate complexity, the court should distribute, or permit the parties to distribute, to each juror identical notebooks, which may include copies of:
   A. The courts preliminary instructions
   B. Selected exhibits that have been ruled admissible (or excerpts thereof)
   C. Stipulations of the parties
   D. Other material not subject to genuine dispute, which may include:
      a. Photographs of parties, witnesses, or exhibits
      b. Curricula vitae of experts
      c. Lists or seating charts identifying attorneys and their respective clients
      d. A short statement of the parties' claims and defenses
      e. Lists or indices of admitted exhibits
      f. Glossaries
      g. Chronologies or timelines
      h. The court's final instructions.

The notebooks should include paper for the jurors' use in taking notes.

[64] Parker, supra note 65, at 550.
[65] A.B.A. Civil Trial Prac. Standards, SG007 ALI-ABA 409, 418-20 (1998).

2. Procedure.
    A. The court should require counsel to confer on the contents of the notebooks before trial begins.
    B. If counsel cannot agree, each party should be afforded the opportunity to submit its proposal and to comment upon any proposal submitted by another party.
    C. Use at Trial.
        a. At the time of distribution, the court should instruct the jurors concerning the purpose and use of the notebooks.
        b. During the course of trial, the court may permit the parties to supplement the materials contained in the notebooks with additional documents as they become relevant and after they have been ruled admissible or otherwise approved by the judge for inclusion.
        c. The court should require the jurors to sign their notebooks and should collect them at the end of each trial day until the jury retires to deliberate. The notebooks should be available to the jurors during deliberations.[66]

The comment section of the Standard further suggests that::

> [I]f notebooks are to be provided, they should be distributed at or near the outset of trial for convenience of reference throughout the proceedings. Alternatively, the court may determine that distribution should follow the introduction of some or all of the exhibits or salient testimony. In either event, the court may permit the parties to supplement the notebooks with additional materials that the court rules admissible or includable (e.g. instructions) later in the trial. Materials that have not been specifically approved by the judge may not be included in jury notebooks. The court may suggest, or in appropriate cases, direct the parties to prepare notebooks for jurors. This should ordinarily be resolved prior to trial.[67]

[66] Id.
[67] Id at 421.

Other states have also adopted similar protocols. For example, Arizona's Rules of Civil Procedure allow the court to authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.[68] Jurors may also access their notebooks during recesses, discussions, and deliberations.[69]

Courts are only now beginning to recognize the numerous advantages engendered by the use of jury notebooks. Nevada should join this movement.

Jury Notebooks

RECOMMENDATIONS

1. **Nevada should adopt the ABA Civil Trial Practice Standard for Jury Notebooks and encourage their use for all trials regardless of length or complexity.**

2. **Jury Notebooks should be distributed to the jurors immediately prior to the commencement of the trial and that counsel should be allowed to update the Jury Notebooks with new and additional material throughout the course of the trial.**

3. **Jury Notebooks and any supplementation thereto should be distributed to the Jurors through the Bailiff.**

[68] Ariz. R. Civ. P. 47(g).
[69] Ariz. R. Civ. P. 39(d). See also Mo. R. Crim. P. 27.08.; N.H. Sup. Ct. R. 64-A.

CLUSTERING SCIENTIFIC AND TECHNICAL EVIDENCE and PERMITTING MINI-CLOSING ARGUMENTS FOLLOWING THE PRESENTATIONS

Jurors often face the difficult challenge of determining the importance and credibility of expert testimony when technical or scientific evidence is presented at trial. Testimony is presented to assist jurors in understanding specific concepts and issues. Jurors generally have limited knowledge of such matters, but expert testimony can be difficult to comprehend because of its intricate detail.

The traditional adversarial format exacerbates the situation because the plaintiff's case is presented in its entirety before the defense even has an opportunity to call its witnesses. As a result, it can be days or even weeks between the testimony from the plaintiff's expert and the defense's expert witness taking the stand to contradict the testimony. It may be difficult for jurors to recall the plaintiff's expert testimony in detail by the time the defense witness testifies. It also can be difficult for jurors to give appropriate weight to the testimony of one expert without hearing the opposing view within a helpfully short timeframe.

The Commission believes that if jurors cannot easily understand scientific, technical or medical evidence that often is at the heart of a case, they cannot render an informed verdict and justice will not be served.

The district courts should have the discretion at trial to consolidate the technical and scientific presentations of both plaintiff and defense expert witnesses. Testimony from plaintiff's experts should be followed immediately by testimony from the defense's experts on the same issue. This should assist the jury in better understanding complex issues. When evidence is presented in this manner, jurors are not required to learn new concepts or comprehend new ideas for a second time.

Additionally, the district courts should permit mini-closing arguments, immediately following the presentation of this evidence to the jury. Such arguments should be limited to the technical or scientific issues addressed by the expert testimony and should only inform jurors of the relevance and importance of the evidence. Once these arguments are completed, the trial should resume in its normal format. Clustering the presentation of scientific, technical or medical testimony should help the jury better understand the contested issues the competing evidence is designed to illuminate.

Clustering complicated evidence should be considered in both complex civil and criminal cases. While clustering expert testimony in criminal cases may be more difficult, or even impossible, because of the presumption of innocence and a defendant's right to reserve his presentation of evidence until the state rests, the Commission believes that clustering of evidence could be very beneficial in appropriate criminal cases.

Scientific and technical evidence need not be clustered if the trial is expected to be of such short duration that the time gap between the plaintiff and defense expert testimony is very brief. Nor does the testimony need to be clustered if it does not represent the heart of the dispute, such as when the scientific or technical aspects of the case are not primarily in dispute.

Judges should make determinations about these matters not based upon the desires of the trial attorneys, but rather on a determination of what would best assist jurors understand the evidence and issues.

Clustering Technical Evidence

RECOMMENDATIONS

1. **Judges should have the discretion at trial to consolidate scientific, technical or medical expert testimony from plaintiff and defense experts at one point in a trial to assist jurors in understanding the issues.**

2. **Clustering expert testimony and evidence should be considered in both civil and criminal cases, although recognizing that a defendant's constitutional rights may restrict its use in criminal cases.**

3. **Immediately following the presentation of clustered expert testimony, attorneys should be permitted to make mini-closing arguments on the issues addressed by the expert testimony before the normal trial format is resumed.**

JURORS ASKING QUESTIONS

[NOTE: This was the only section that resulted in a minority report being filed. The minority report follows the Commission's recommendations]

"Many courts have permitted the practice for years without fanfare or objection from counsel."[70] In a November 1999 study by the Los Angeles Superior Court, it was observed that for over 15 years some courts have allowed jurors to ask questions.[71] Among the advantages of this procedure are alerting attorneys to areas of confusion, helping jurors clarify and retain information, and increasing juror satisfaction with service. Asking questions during the trial also provides an opportunity for lawyers to timely respond.

In the Los Angeles Superior Court study, 92 percent of the responding jurors were very positive about being allowed to ask questions; 4 percent felt the procedure was awkward and they had mixed feelings; 1 percent had negative responses and the remaining 3 percent of jurors were neutral.[72]

This Commission received comments from numerous attorneys at the Commission's public hearings in Las Vegas and Reno. Many of those attorneys expressed concern that jurors would disrupt proceedings by (1) asking too many questions, (2) asking

[70] Jury Innovation Pilot Study, supra note 62, 14 (Nov. 1999).
[71] Id.
[72] Id.; Jurors: The Power of 12, supra note 61, at 18.

questions the lawyers tactically want to avoid or, (3) becoming advocates for one party or the other. A few judges indicated they are not in favor of the process because they fear the questions would impede trial progress or that the process would be too cumbersome.

Allowing jurors to ask questions, however, does not seem to produce the negative effects that opponents often fear.[73] Studies of various trial courts nationwide conclude that jurors generally do not ask inappropriate questions.[74] The studies also found that jurors do not become angry or embarrassed if their questions are not asked, nor do they tend to advocate for one side or the other.[75]

The risk of inappropriate questions is further avoided by requiring that questions be directed at factual issues already raised by counsel. Critics in Nevada also expressed concern about improper juror questions, but under the directives of Flores v. State,[76] such questions should not be allowed. If jurors cannot communicate their concerns through questions, attorneys run the risk that the issues will be resolved without clarification helpful to the jury. The availability of questions alerts the trial attorneys to confusion on the part of jurors and permits the attorneys to devise a strategy to respond. The history of juror questions in Nevada and Arizona has demonstrated that the proposed concerns and fears of counsel have not materialized.

In the national studies, attorneys who participated in trials with juror questions reported that the questions did not interfere with their trial strategies or cause them to lose command of the case.[77] Attorneys also felt that juror questions did not prejudice their clients, and a review of jury verdicts and other data suggests that indeed no prejudice occurred.[78]

Proponents of the system who have experienced juror questions first hand in trials said the process enhanced the trials and sometimes alerted lawyers to jurors' concerns or the issues they deemed important.

[73] Larry Heuer & Steven, Increasing Juror Participation in Trials Through Note Taking and Question Asking, 79 Judicature 256, 258 (1996) [hereinafter Juror Participation].
[74] Id. at 260.
[75] Id.
[76] 114 Nev. 910, 912-13, 965 P.2d 901, 902-03 (1998).
[77] Juror Participation, supra note 77, at 261; Larry Heuer & Steven Penrod, Juror Note Taking and Question Asking: a Field Experiment, 18 Law & Hum. Behav. 121, 147 (1994) [hereinafter Field Experiment].
[78] Juror Participation, supra note 77, at 261.

By the People

As Arizona civil attorney Philip H. Grant wrote in a 1999 article:

> Three years after Arizona jurors began asking questions, the lawyers practicing in the state have found the process to be worthwhile and rewarding. The jurors expressed their pleasure with the personal involvement and the minor practical difficulties engendered have been far outweighed with the satisfaction of those called to serve. I do not believe that any of us would speak in favor of reversing our progress and going back to the 'good ole days' of keeping the jurors out of the lawyers' business. The sky has not fallen.[79]

Commission member Don Campbell, a veteran trial attorney, explained how he had been an opponent of juror questions and was apprehensive at learning a recent trial would be held before a judge who routinely let jurors ask questions. Mr. Campbell, however, said the experience changed his mind and has made him an advocate of juror questions.

Following a criminal trial in summer 2002 in Las Vegas, during which jurors were allowed to ask questions, the defense attorney wrote to the Commission to endorse the process. The attorney stated in part:

> I found this procedure to have some very positive effects on the course of the trial. First, the jury seemed to pay close attention to each witness and their answers since they would have an opportunity to add their own questions. Second, any issues missed by the attorneys and, honestly areas the lawyers might be afraid to ask, can be inquired into by the jurors, so they are not left hanging or wondering about any particular issue. Third, with their involvement raised to this level, there is likely to be fewer circumstances for read-backs of testimony. Lastly, the jurors tend to ask good questions that will help attorneys understand how the jury is feeling about the importance of some of the issues.
> I believe that juror's questions often get to the heart of the truth.

The Commission made a presentation to the State Bar of Nevada at the State Bar Convention in June 2002. At the request of a district judge who opposes jurors asking questions, an informal poll was conducted of all the attorneys in attendance

[79] Philip H. Grant, An Irreverent View of Participatory Juries, Voir Dire vol. 6 at 10 (Spring 1999).

about their preference on the issue of jurors asking questions. Nevada attorneys in attendance overwhelmingly supported the use of juror questions.

District judges in Nevada who allow jurors to ask questions said they believe this procedure lets jurors become more involved in the trial. Research demonstrates that jurors pay greater attention to the evidence as it is presented, and are more likely to remember it if they are allowed to ask questions.[80] Some juries ask more questions than others, but the average number of juror questions is only about five per trial.[81] However, even jurors who ask few or no questions are very happy to have the opportunity to do so.[82]

Jurors who asked questions did not attach any extra significance to the questions they posed.[83] Jurors reported feeling more informed and better able to reach a responsible verdict when questions were asked.[84] Furthermore, allowing juries to ask questions can speed the deliberation process without introducing significant delays at trial.[85]

Procedurally, the Commission suggests that during opening comments the court advise the jurors that they will be given the opportunity to submit written questions of any witness called to testify in the case. The jurors should further be instructed that they are not encouraged to ask many questions because that is the primary responsibility of counsel.[86] The jurors should also be informed that they may ask questions only after both lawyers have finished questioning a witness. Finally, the jurors should be advised that all questions from jurors must be factual in nature and designed to clarify information already presented. Jurors must not place undue weight on the responses to their questions.

If any juror has a question, it should be written and given to the bailiff, who will give it to the judge. The judge and the attorneys should discuss the question at the

[80] Juror Participation, supra note 77, at 261.
[81] Id. at 259.
[82] Id. at 260; Jury Innovation Pilot Study, supra note 62, at 14.
[83] Id.
[84] Field Experiment, supra note 81, at 142, 147-48.
[85] See With Respect to the Jury: A Proposal for Jury Reform: Report of the Colorado Supreme Court Comm. on the Effective and Efficient Use of Juries 38 (Feb. 1997) available at http://www.courts.state.co.us/supct/committees/juryref/juryref.htm.
[86] For a sample jury instruction, see Juror Participation, supra note 77, at 258.

bench or outside the presence of the jury to determine if there is any objection. The court reporter/recorder should report any objection and the judge should rule upon it outside the presence of the jury, applying the same legal standards as if an attorney asked the question. Arizona has successfully used a similar procedure since 1993.[87]

Jurors can better perform their duty in rendering a just and accurate verdict if they are permitted to ask questions. A juror does not need to know the rules of evidence to ask a question. The judge determines the admissibility of the evidence the question seeks outside the presence of the jury. With procedural safeguards in place, the Commission believes that allowing jurors to ask questions will greatly improve juror comprehension and involvement, without disrupting the proceedings or prejudicing either party.

Jurors Asking Questions

RECOMMENDATIONS

1. The Nevada Supreme Court should amend the District Court Rules to require that all district judges allow jurors to ask questions of witnesses in all civil and criminal trials in accordance with the guidelines specified by the Nevada Supreme Court in the case of Flores v. State, 114 Nev. 910, 965 P.2d 901 (1998).

2. The Nevada Supreme Court should create proposed District Court Rule 26 to read as follows:

The court shall instruct jurors of their right to ask questions of all witnesses in criminal and civil cases as follows:

A. All questions must be factual in nature and designed to clarify information already presented
B. All questions asked must be submitted in writing
C. The court will determine the admissibility of the questions outside the presence of the jury

[87] Jurors: The Power of 12, supra note 61, at 18.

D. **Counsel will have the opportunity to object to each question outside the presence of the jury**
E. **The court will instruct the jury that only questions that are admissible in evidence will be permissible**
F. **Counsel will be permitted to ask follow-up questions**
G. **Jurors will be admonished to not place any undue weight on the answers to their questions**
H. **There shall be no questions by jurors of a criminal defendant during the penalty phase following a murder conviction**

MINORITY REPORT

OPPOSITION
to
JURORS ASKING QUESTIONS

[NOTE: The Jury Improvement Commission adopted rules allowing a minority report if 4 of the 15 commissioners dissented on an issue. This is the only issue that resulted in a minority report.]

Jurors should not question witnesses during trials.

The United States uses an adversary system in its trials. Attorneys are the combatants, advocates for the parties. Judges decide issues of law and enforce the rules of the cases. Jurors weigh the facts and evidence and determine who wins.

All counsel involved in a trial must be licensed by the State Bar, after attending at least three years of law school and passing a rigorous bar examination. That education includes courses on evidence, civil and criminal procedure and Constitutional law. All the training is necessary to properly prepare to act as counsel and question witnesses during a trial.

Because trials impact litigants' property or freedom – and sometimes involve questions of life and death – the adversary system was tailored to enhance the search for truth. When both sides of a dispute are given equal access to the facts of the case and an equal opportunity to make presentations to a jury, justice results.

Judges are not supposed to take sides and neither are jurors. Potential jurors are questioned before trial and selected for their impartiality. Those who are biased are not selected.

Permitting jurors to ask questions undermines the fundamental protections that have been in place in our system for decades. It encourages jurors to express opinions, which may indicate early in a case that one party is favored over the other by the juror. The questions may disclose that jurors have begun deciding the case, before both sides in the case have had the opportunity to present evidence. It also permits jurors to communicate with the attorneys – through their questions – and let one side know what evidence it is missing.

There are countries that do not use an adversary system in their courts. Many use inquisitorial systems, where the prosecution accuses a person, conducts a full investigation, and the person must prove his or her innocence. Our Founding Fathers declined to impose such a system in the United States, believing that the State was the more powerful party in criminal courts, and therefore should be forced to prove guilt.

The Commission does not recommend moving away from the adversary system, but the authors of this minority report believe that by allowing jurors to ask questions the result would be the same.

During public hearings, many attorneys argued vociferously against allowing jurors to ask questions, citing many of the concerns in this minority report. One attorney told the Commission he came to the public hearing to support the concept, but changed his mind after hearing the arguments of fellow lawyers.

In the same way that we do not let the hometown fans make the calls in baseball, basketball or football games – with an obviously biased perspective – we should not let the jurors become advocates in our courtrooms. That is the job of the lawyers. Allowing jurors to ask questions during trials would permit them to become advocates.

Our judicial system ensures that all litigants get their day in court, with a level playing field to present their strongest cases. Citizens must be confident the decisions at the end were fairly obtained.

Trials are far more complicated than baseball, basketball or football games. No jury could have the training and experience of the attorneys to know which questions are allowed, and which were not. Attorneys ask questions – or don't ask questions – for informational, legal or tactical purposes the jurors could not know. Evidence is presented in a particular fashion to tell a story and educate the jurors about the relevant facts and issues. Jurors should not assume that role, and allowing them to ask questions would be to let them do just that.

About half the states permit some questions to be presented by jurors. In the past four years courts that have considered permitting jurors to question witnesses have tended to preclude or restrict such questioning. Nevada is one of the only States that wants to expand the practice.

Jury questions have the potential to present litigants with additional opportunities to fight on appeal. This is likely to make cases more expensive and time-consuming. During a recent case in Massachusetts jurors asked nearly one hundred questions. Clearly that case would have been completed more quickly without those questions. Ohio recently decided not to permit questions. Texas has decided not to permit questions in criminal cases.

Of course, not every case in which jurors ask questions will be longer, more expensive or present additional appeal opportunities. Attorneys who have won cases in which jurors have asked questions obviously like the idea. There are attorneys who believe the questioning by jurors helped their cases. These generally are private attorneys who get to pick their cases, passing on those that are the weakest. That luxury is not available to attorneys who are appointed to represent people who cannot pay their own attorney. Our system is not intended to, and should not, penalize the indigent.

By the People

Trials are searches for the truth, within the rules. A confession from a suspect who was beaten is not admissible, and has not been for many years in the United States. Evidence obtained as the result of unauthorized searches is also not admissible at a trial.

The Bill of Rights grants more protections to litigants in criminal courts than any other single group of people - the right to remain silent in the face of accusations, the right to speedy and public trial, the right to appear and defend, the right to the assistance of counsel, the right to be free from unreasonable search and seizure, the right to due process of law, the right to equal protection, and the right to be free from cruel and unusual punishments upon conviction. It was precisely because George Washington, Benjamin Franklin, Thomas Jefferson, James Madison and the others involved in drafting our Constitution and Bill of Rights had lived under a regime in which these rights were not given to the citizens that they made sure the rights were written into our Constitution and Bill of Rights.

It is the attorneys' job to ask the questions of the witnesses to educate the jury.

Even if jurors would enjoy trials more, and they might, if given the chance to participate, that is not sufficient reason to risk weakening the rights that have made this Nation a two-century-old testament to Democracy.

Other Issues

PROPOSED
JURORS' BILL OF RIGHTS

By the People

Nevada jurors are regularly asked to temporarily leave their safe, secure and routine lives and make the toughest decisions any individuals could be asked to make. In murder cases they are often asked not only if the defendant is guilty or innocent, but whether that person should live or be executed for the crime. A juror's decision often determines whether a criminal defendant walks free or spends years behind bars. In civil cases, a juror's decision involves thousands or millions of dollars in money or property, altering for good or bad the lives of the litigants and their families or companies.

These are no small matters and the state and the courts realize that citizens who serve on juries are summoned involuntarily and serve for marginal compensation and at a personal sacrifice. Our system of justice simply would not exist without jurors, yet jurors often believe their time is not respected and their sacrifice is not appreciated fully. The primary complaint of former jurors who testified to the Jury Improvement Commission or completed the Commission's questionnaire was that much of their time was wasted as they waited to be sent for jury selection or, once selected, for trials to begin each day.

The Commission knows that more sacrifices and more involvement by citizens will be sought as the courts get busier and busier.

The Commission also believes that those called to jury duty have certain rights that should be respected. Therefore, the Commission recommends that a Jurors' Bill of Rights be adopted by the Nevada Supreme Court to recognize the rights that those involved in the court system – whether as administrators, attorneys, judges or court staff – are expected to honor.

On the following pages is the recommended ...

Jurors' Bill of Rights

Jurors' Bill of Rights

1. A juror's time is precious. Delays in jury selection and the progress of the trial should be avoided whenever possible and when delays are unavoidable, they should be minimized.

2. Jurors have a right to be treated with courtesy and respect due officers of the court, to be free from harassment and to be informed of their right to individually choose whether to discuss a verdict with trial counsel or the media.

3. Jurors have the right to receive sincere attention to their physical comfort and convenience as well as the ability to receive safe passage to and from the courthouse.

4. Jurors should be reasonably compensated for their service.

5. Jurors should have the opportunity to reasonably provide information about their previously scheduled commitments after the court issues the summons for jury duty, but before the panel is expected to report, and the courts should make every effort to accommodate the jurors' and prospective jurors' needs.

6. Jurors have the right to be randomly selected from the broadest possible compiled list of qualified citizens. No one should be excluded from jury service on the basis of race, sex, religion, physical disability, profession or country of origin.

7. Jurors have the right to be instructed on the law in plain and understandable language.

8. Jurors have the right to a venue to express their concerns, air complaints and make recommendations regarding their experience and treatment as jurors. For this purpose, judges are encouraged either to meet with the jury after the trial has been concluded, if circumstances permit, or to correspond with jurors and survey them regarding their satisfaction with the process and their suggestions for improvement.

9. Jurors have the right to ask questions of witnesses in trials pursuant to limitations of the law.

10. Jurors have the right to take notes in both civil and criminal trials.

RURAL ISSUES

While most of the issues considered by the Commission address concerns common to all courts and jury systems across Nevada, regardless of locale, the implementation of some recommendations will necessarily be affected by the trial venue.

Nevada's nine judicial districts are widely diverse. Two districts, the Second and the Eighth, encompass large urban populations. Both, however, include sparsely populated rural communities. The First, because it includes Carson City, receives a disproportionately larger share of public interest lawsuits against or on behalf of the state. In the Seventh Judicial District, the judges hear a great deal of prisoner litigation because the maximum security prison is situated in White Pine County. Douglas County, seat of the Ninth Judicial District, despite great population increases in the Minden-Gardnerville area, tries relatively few jury trials. When a jury trial goes forward, however, some members of the panel must travel substantial distances to attend.

Many of Nevada's rural counties have, since their beginnings, been dependent upon the mining industry to sustain their economies. The recent decline of the mining industry in these rural counties has resulted in the loss of population in several districts. This, in turn, means a loss of ancillary business and a concomitant, substantial loss in tax base and revenue. Rural economies have been devastated, with local governments struggling to provide even basic governmental services. Humboldt, Lander, Lincoln, Mineral, Nye, Pershing and White Pine counties (and this is not meant to be an exclusive list) have experienced significant declines in their local economies over the past several years.

These economic woes affect funding for the rural courts, in addition to all other aspects of government. Providing basic services for jurors, and the court system itself, presents a significant challenge for many rural communities. Instituting jury improvements is a greater challenge in these communities because of the financial constraints, geographical distances involved and relatively small pool from which jury panels are summoned.

In investigating the unique problems of the rural counties, the Commission informally surveyed the rural judges and court staffs. The Commission also received testimony during public hearings from representatives of rural counties, who explained the adverse impact that statewide implementation of jury reforms could have on their

communities and court systems. The Commission acknowledges and shares these concerns and believes that any recommendations that are implemented on a statewide basis must be tailored to address the special needs of the rural communities to minimize any potential adverse effects on those areas and to advance the cause of justice in all communities in this state.

Some of Nevada's sparsely populated counties face their own special concerns with regard to jury reform. For example, for many citizens in the rural counties, the time between jury service may be shorter than one year. NRS 6.070[88] provides for a statutorily recommended one-year period between times served on a jury. The statute does provide an exception permitting the summonsing of persons who have already served once in the past year if not enough suitable jurors are otherwise available. This frequent call to jury service could be reduced through the elimination of automatic occupational exemptions and constant effort to keep the list of citizens qualified for jury duty as up to date and broad as possible.[89]

Rural Issues

RECOMMENDATIONS

In large part, rural issues revolve around a lack of funding. Rural economies suffer as each mine closes, and populations decline. Critical needs for courts must be identified, and a statewide strategy must be developed to address and fund these needs. The State Judicial Council and the newly formed Commission on Rural Courts should aggressively explore these issues and report their findings and proposals.

[88] NRS 6.070 (stating that a juror selected the prior year may not be selected again "unless there be not enough other suitable jurors").

[89] The resourcefulness of the dedicated public servants of the rural counties is exemplified by DeAnn Siri, Esmeralda County Clerk-Treasurer. An interview with Ms. Siri revealed the following: There are 558 registered voters in the county of 970 residents. To develop a jury pool, Ms. Siri uses the registered voter list, various utility lists, local telephone books and any other sources at her disposal. In addition, if she knows of anyone who is eligible and not on the jury pool list, she will add the name.

ASPIRATIONAL GOALS

The Commission has made many recommendations that can be implemented in the next few years to considerably improve the jury system in the State of Nevada. However, a few other ideas the Commission explored in its study have real merit or may warrant further study, but do not seem feasible to implement at this time. These recommendations are made as long term goals that should be kept in mind for the future.

Day Care

Several judicial systems provide day care services for the children of citizens summoned for jury duty. This permits many people to serve when they could not otherwise. The advantage is not only that a person can participate in the jury process, but it broadens the spectrum of those participating in the jury process. Lack of day care can restrict those prospective jurors who are young and of limited economic means.

In 1996, the California Blue Ribbon Commission on Jury System Improvement recommended that a special child care program be put in place to meet the needs of citizens called to jury duty. In doing this, the Commission observed that: "In some counties, 60% of the hardship excuses involve lack of child care. The Commission believes that reasonable child care options must be made available to jurors."[90]

In early 2002, the Ninth Judicial Circuit Court of Florida announced that it had opened a day care facility for children of jurors. The facility is run by a licensed, non-profit organization and provides its services on-site. "The Judges want jury service to be available to all members of the community," stated Judge Antoinette Plogstedt, who chairs the Jury Innovations Committee. "Now parents (with young children) can exercise their right to serve on a jury."

The Commission well understands that the cost of establishing day care for the children of citizens participating in the jury system is substantial and would require the

[90] Final Report: California Blue Ribbon Commission on Jury System Improvement 26 (1996).

AA7926

acquisition of necessary space in or near Nevada's courthouses. Given the tight financial budgets in the counties and the state at this time, it is extremely doubtful that this service to assist jurors can be implemented in the near future. But we do hope that this proposal will be kept in mind and its implementation considered when funding becomes feasible.

Understandable Jury Instructions

Jury instructions should be in clear, plain, understandable language. A key component of our jury system is the written jury instructions given by the district judge to the jurors at the conclusion of the trial. Virtually every jury study has not only emphasized the importance of the instructions, but has recommended that additional efforts be made to recast them in ordinary English that is understandable to the laymen.

Nevada has made several attempts to revise the standard jury instructions to make them more understandable, and at the present time two committees are rewriting the criminal jury instructions to accomplish this goal.[91] After these efforts are completed, the Nevada Supreme Court should assess what additional work is necessary to make all civil and criminal jury instructions clear and understandable to the layman and take the necessary action to accomplish this goal.

Public Education

Once the majority of the recommendations are implemented, the Commission recommends that a broad based educational program be initiated throughout Nevada to emphasize the improvements in the system. The educational program, through the media and other avenues, should emphasize specifically that everyone is now participating, that the system is more juror-friendly and that every step has been taken to make sure that a juror's time is not wasted. The media campaign should also state that it is now easier to fulfill a citizen's duty to perform jury duty and the importance of jury service to our democratic system.

[91] The Criminal Jury Instruction Revision Committee in the Eighth Judicial District Court is chaired by District Judge Sally L. Loehrer, and Justice Myron E. Leavitt is the Supreme Court's representative on this committee. The Second Judicial District Court is also revising its criminal jury instructions in an effort headed by District Judge James W. Hardesty. Both reports are expected to be made public in the near future.

AA7927

The Commission has mentioned the educational campaign launched by the New York judiciary in 1996 and that it would be a good example to follow in structuring such a future effort in Nevada. New York instituted a statewide juror appreciation week every November primarily to thank jurors.[92] Pittsburgh, Pennsylvania, and Duluth, Minnesota, also made major efforts to improve citizen education about jury service. These included a Jury Appreciation Month or Week, distributing bumper stickers, free bus passes to jurors, and other creative programs to both inform citizens and show appreciation to jurors.[93]

Mandatory Employer Compensation

In several states, employers are required by law to compensate their employees who are summoned to jury duty.[94]

While requiring employers in Nevada to provide limited compensation to employees called to jury duty is a revolutionary concept, it is something that should be considered by the Legislature at some point. We commend those employers who continue to pay their employees who serve on juries and hope that all employers would adopt the practice in the future. In this way, employers can help ensure that juries are comprised of competent and committed individuals. It can also be argued that this is in the employer's interest since lawsuits and litigation have become an inevitable part of business ownership.

Should this concept ever be adopted, the Commission does not endorse requiring full compensation for an employee whose absence already is likely to have an adverse fiscal impact on the employer. The Commission does not believe it would be an undue burden on an employer with 10 or more employees to provide compensation at the statutory level of $40 per day for the first three days an employee serves on jury duty – a total of $120. That would allow the employers to support their employees, fulfill an element of civic responsibility and ease the burden on the court system. The

[92] Continuing Jury Reform in New York State, supra note 12.
[93] Jury Trial Innovations, supra note 20, at 26-27.
[94] District of Columbia; Employers (with 10+ employees) pay regular salary for 5 days, Colorado; Employers pay statutory $50 per day jury fee for 3 days, Connecticut; Employers pay statutory $50 jury fee for 5 days, Massachusetts; Employers pay statutory $50 jury fee for 3 days,
New York; Employers (with 10+ employees) pay statutory $40 jury fee for 3 days

AA7928

court system would pay the jury fees for the remainder of the time a citizen serves on a jury, and pay jury fees from the beginning for jurors who are unemployed or whose employers would not be required to contribute.

Voir Dire Process

Several jury study reports have commented on the voir dire process, the procedure where the judge and attorneys ask the prospective jurors questions to determine if they are qualified to serve. The Commission has refrained from making an in-depth review of this process because we do not perceive it to be a part of Nevada jury trials where major problems are occurring, and it would have been a major additional analysis that could have detracted from the Commission's remaining inquiries.

Voir dire is done to answer two fundamental questions - can the prospective juror physically and mentally serve as a juror, and does he or she have any prejudices or life experiences which would make that person unable to serve as a fair and impartial juror? Nevada's district judges have held the inquiry to those matters, and the Commission does not see long and protracted voir dire in Nevada as exists in several other states.

But because the voir dire process is vital to the jury process and our justice system, a complete review of it may be warranted in the future. This would be particularly so if the Nevada district judges began permitting long and protracted voir dire examination by attorneys. At the present time, we do not believe the voir dire process in Nevada is in need of any major revision.

CONCLUSION

The Jury Improvement Commission believes the reforms and innovations advocated in this report can significantly improve the experiences of citizens who serve on our juries and positively impact the verdicts that result.

These recommendations, if adopted, would allow the courts to better serve justice. Jurors, drawn from a large and diverse pool, would be better informed, more actively involved in the trial process and more attentive.

The Commission took into consideration the effects its recommendations might have on judges, lawyers, court staffs and county governments that fund the courts. There is no doubt that implementing the recommendations would entail additional effort and time by courtroom professionals and, in some cases, a commitment of more resources by governments.

But the mission of the Commission was to recommend reforms in the jury system that would expand the ways jurors are selected, improve the way they are treated and enhance the ability of jurors to understand the evidence and follow the proceedings. The citizens of the State of Nevada deserve no less.

The Jury Improvement Commission urges the Nevada Supreme Court, the local courts and the Nevada Legislature to enact these recommendations for the benefit of our citizens and justice in Nevada.

COMMENDATIONS

Clark County Jury Management System

The Nevada Supreme Court Jury Improvement Commission commends the Eighth Judicial District Court for its use of technology to improve the jury management system in Clark County – one of the nation's fastest growing areas and home to two-thirds of Nevada's population. By committing the resources for a sophisticated jury management system, Clark County not only improves efficiency in the courts, but also eases the burden on citizens called to jury duty.

Over 230,000 residents are summoned each year for jury duty and calls to the Jury Commissioner at the Eighth Judicial District Court can exceed 1,500 per day. There simply is no way court employees can handle the great volume of calls without keeping citizens waiting for long periods of time. This is neither fair to the citizens nor efficient for the court.

By implementing a state-of-the-art computerized system with integrated voice response, those with questions about jury service or who simply want to confirm or reschedule their jury duty can obtain responses quickly and efficiently. The Eighth Judicial District Court has shown what can be accomplished to best serve the citizens and the courts.

Washoe County Jury Trial Innovations

The Nevada Supreme Court Jury Improvement Commission commends the Second Judicial District Court for taking steps to respect and maximize a juror's time by implementing a meaningful overflow trial system that works because of the dedication and cooperation of the District Court judges.

The Second Judicial District Court initiated a "no bump" trial policy that allows virtually every case to be resolved through settlement or trial by the designated trial date. If a judge has two cases ready to proceed to trial on a particular date, another judge in the district, who has no trials proceeding, voluntarily takes the second trial. The Commission believes such dedication in a large judicial district is worthy of recognition.

Rural County District Courts

District Courts in Nevada's rural counties have few resources to initiate innovative jury reform. The limitations of court facilities often constructed a century ago make jury management alone a difficult task, yet testimony to the Jury Improvement Commission indicated the courts routinely go out of their way to accommodate citizens called to jury duty. Some judges go so far as to utilize their personal chambers to sequester jurors away from attorneys and defendants. Courts also regularly make special accommodations for jurors who have to travel long distances in sometimes difficult weather conditions to perform their civic duty. The Jury Improvement Commission commends the rural county District Courts for their dedication and sacrifice.

By the People

Special Thanks To ...

Kathleen Swain, Nevada Supreme Court
Jeannette Miller, Nevada Supreme Court
Ron Titus, State Court Administrator
State Bar of Nevada
Gonzalez and Associates
Campbell & Williams, Attorneys at Law
Jones Vargas
Lionel, Sawyer & Collins/Harvey Whittemore
Harrison, Kemp & Jones, LLP
Clark County Bar Association
The Judicial District Courts of Nevada
The Court Clerks and County Clerks of Nevada
Brian Gilmore, Eighth Judicial District Court
Judy Rowland, Clark County Jury Commissioner
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Robin Sweet, Administrative Office of the Courts


SUPREME COURT OF NEVADA
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EXHIBIT 255

EXHIBIT 255

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Location : District Court Civil/Criminal Help

Register of Actions

Case No. 96C136862-1

The State of Nevada vs Marlo Thomas

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**07/02/1996**
Location:	**Department 23**
Cross-Reference Case Number:	**C136862**
Defendant's Scope ID #:	**1060797**
Lower Court Case # Root:	**96F07190**
Lower Court Case Number:	**96F07190A**
Supreme Court No.:	**65916**

Related Case Information

Related Cases
96C136862-2 (Multi-Defendant Case)

Party Information

Defendant	**Thomas, Marlo *Also Known As* Thomas , Marlow D**	**Lead Attorneys** **Bret O. Whipple** *Retained* 702-731-0000(W)
Plaintiff	**State of Nevada**	**Steven B Wolfson** 702-671-2700(W)

Charge Information

Charges: Thomas, Marlo	**Statute**	**Level**	**Date**
1. CONSPIRACY TO COMMIT MURDER.	C200.010	Felony	01/01/1900
1. CONSPIRACY TO COMMIT DEGREES OF MURDER	C200.030	Felony	01/01/1900
1. CONSPIRE TO AID AND ABET A ROBBERY	C200.380	Felony	01/01/1900
2. MURDER WITH A DEADLY WEAPON	200.010*165	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
3. MURDER WITH A DEADLY WEAPON	200.010*165	Felony	01/01/1900
3. DEGREES OF MURDER	200.030	Felony	01/01/1900
4. ROBBERY WITH A DEADLY WEAPON	200.380*165	Felony	01/01/1900
5. BURGLARY.	205.060	Felony	01/01/1900
6. KIDNAPPING IN FIRST DEGREE WITH A DEADLY WEAPON	200.320*165	Felony	01/01/1900

Events & Orders of the Court

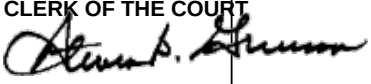
01/07/2009 **Motion for Confirmation of Counsel** (9:00 AM) ()
CONFIRMATION OF COUNSEL Heard By: Stefany Miley

Minutes
01/07/2009 9:00 AM
- Ms. Dustin advised she was formerly Counsel of Record, but previously told Judge Loehrer she would remain involved for a smooth transition of the file. Mr. Brett Whipple advised he would accept the appointment as Counsel for Defendant Thomas. Mr. Whipple stated for the record that he spoke with Mr. Christensen with the Special Public Defenders Office, and there should be no conflict. Mr. Owens expressed concern about the length of time that has passed, and there being no Supplemental Brief filed, noting a year has passed. Mr. Whipple stated it was a death penalty case, and he would need six months. Upon Mr. Owens inquiry, Mr. Whipple agreed to get the case right back on Calendar, if it was determined that there is a conflict. COURT ORDERED, Mr. Whipple is CONFIRMED as Attorney of Record, and matter SET for a Status Check regarding the filing of a

Supplemental Brief. 7/6/09 9:30 AM STATUS CHECK: FILING OF BRIEF

Parties Present
Return to Register of Actions

Electronically Filed
6/8/2018 10:39 AM
Steven D. Grierson
CLERK OF THE COURT



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Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

Death Penalty Habeas Corpus Case

MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY

Date of Hearing: July 25, 2018
Time of Hearing: ~~11:00~~ a.m.
9:30

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Respondent

PLEASE TAKE NOTICE that the MOTION FOR LEAVE TO CONDUCT DISCOVERY filed in this Court on June 8, 2018, will come on for hearing before this Court in Department No. XXIII on the 25th day of July, 2018 at the hour of ~~11~~ 9:30 AM o'clock located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

Respectfully submitted this 8th day of June, 2018.

RENE L. VALLADARES
Federal Public Defender

By: */s/ Joanne L. Diamond*
JOANNE L. DIAMOND
Assistant Federal Public Defender
Attorney for Petitioner

POINTS AND AUTHORITIES

I. Thomas is entitled to discovery.

Thomas is entitled to discovery and an evidentiary hearing on his claims that the State violated its discovery obligations at trial and that his trial and initial post-conviction counsel were ineffective, to demonstrate cause to overcome the procedural default bars raised by the State. *See*, *e.g.*, *Crump v. Warden*, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997); *Pellegrini v. State*, 117 Nev. 860, 883-87, 34 P.3d 519, 535-37 (2001). Under NRS 34.780, a party may conduct discovery in post-conviction "to the extent that the judge or justice for good cause shown grants leave to do so." There are no reported Nevada cases defining good cause or what circumstances constitute "good cause." This Court should look to the federal system in which Thomas has to make an identical showing to be permitted to conduct discovery.

Rule 6(a) of the Rules Governing Section 2254 Cases is the parallel to the "good cause" provision of NRS 34.780(2).[1] "Denial of an opportunity for discovery is

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[1] Rule 6(a) provides in full:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. Section 3006A(g).

NRS 34.780(2) provides:

> After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.

an abuse of discretion when the discovery is necessary to fully develop the facts of a claim." *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (quoting *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995)); *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) ("Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the Court to provide the necessary facilities and procedures for an adequate inquiry."); *see generally Jefferson v. Upton*, 560 U.S. 284, 290 (2010) (per curiam).

The importance of permitting discovery to allow for the development of material facts is greatly heightened when a life is at stake. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (discussing heightened need for reliability and fairness in death penalty cases). Courts have encouraged a liberal use of discovery mechanisms in capital habeas proceedings. *See McFarland v. Scott*, 512 U.S. 849, 859 (1994) (heavy burden that current statutes place on capital habeas litigants to raise all claims in same proceeding creates need for procedural devices sufficient to allow petitioners to meet that burden); *Herrera v. Collins*, 506 U.S. 390, 444 (1993) (Blackmun, J., dissenting) (Rule 6 warrants discovery in capital cases "when it would help the court make a reliable determination with respect to the prisoner's claim"); *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1992) (similar); *McKenzie v. Risley*, 915 F.2d 1396, 1398 (9th Cir. 1990) (similar).

A unanimous Supreme Court reaffirmed these principles in *Bracy v. Gramley*, 520 U.S. 899, 905 (1997). Under *Bracy*, discovery in capital habeas proceedings requires only that a petitioner allege a constitutional claim and articulate a "theory" that the evidence sought to be obtained could support the claim. *Id*; *see also Wellons v. Hall*, 558 U.S. 220, 222-23 (2010) (per curiam). This Court should exercise its discretion and grant Thomas leave to conduct discovery

because the information requested is necessary for him to overcome the procedural bars alleged and fully and fairly litigate the constitutional claims in his Petition.

A. Thomas can demonstrate good cause to conduct discovery on his claim that the State violated its discovery obligations.

Thomas has recently obtained a declaration from codefendant Kenya Hall which directly implicates multiple *Brady* violations. *See* Petition Exhibit 246. The United States District Court for Nevada has found "good cause" for discovery because of the failure of members of the Clark County District Attorney's Office (CCDA) to provide *Brady* material despite its avowed "open file" policy. *See*, *e.g.*, *Doyle v. McDaniel*, No. CV-N-00-101-HDM(RAM), Ex. S at 7-15 (Order Regarding Remaining Discovery Issues, Sep. 24, 2002) ("all of the *Brady*, *Giglio*, or *Kyles* material ought to reside in the 'open file,' according to petitioner, and trial counsel ought to have been able to rely on the completeness of that file. That reliance may have been misplaced.").

In *Homick v. McDaniel*, Case No. CV-N-99-0299, the district court issued a discovery order, crediting evidence that the "'open file' policy of the CCDA may have been neither 'open' nor complete, much to [Homick's] detriment." *See* Ex. T at 7-9 & n.1. In *McNelton v. McDaniel*, No. 2:00-cv-00284-RCJ- CWH, Judge Hunt noted that the "right hand does not know what the left hand is doing," when it comes to the CCDA's obligation to assure the prompt and proper disclosure of *Brady*, *Giglio*, and *Kyles* material. As Judge McKibben noted in *Doyle*, "[a]n 'open file' which does not contain all of the material it is supposed to have is not only misleading, it may also violate the requirements of *Kyles* and its progeny." Ex. S at 10. *See also Paine v. McDaniel*, No. CV-S-00-1082-KJD(PAL), Ex. X at 11 (Order Regarding Discovery, Sep. 27, 2002); *Riley v. McDaniel*, No. CV-N-01-0096-DWH(VPC), Ex. Y at 5-6

(Order Regarding Discovery, Sep. 30, 2002); *McNelton v. McDaniel*, No. CV-S-00-284-LRH(LRL), Ex. Z at 8 (Order Regarding Discovery, Sep. 30, 2002).

1. The CCDA had a culture of violating its disclosure obligations.

The *Brady* violation in Thomas's case is symptomatic of the culture of the CCDA, as demonstrated by the failure of senior prosecutors to disclose evidence in a number of capital cases and self-proclaimed ignorance of their disclosure obligations. In *Jimenez v. State*, 112 Nev. 610, 620-21, 918 P.2d 687, 693-94 (1996), the Nevada Supreme Court reversed a capital conviction because the CCDA had not disclosed material evidence relating to other suspects. During the 1993 evidentiary hearing, defense counsel asked Chief Deputy District Attorney Melvyn Harmon—the prosecutor who represented the State at Thomas's preliminary hearing—if he understood what *Brady* required in terms of disclosure. Harmon said it required the disclosure of evidence which is clearly exculpatory. When asked if he understood what *Giglio* required he responded, "No. You'll have to educate me." Ex. U at 25. In *State v. Rippo*, Clark County Case No.C106784, Harmon testified that the disclosure standard making the prosecution accountable for knowing what its law enforcement agents know is "a legal fiction." Ex. W at 131.

In *Lay v. State*, 116 Nev. 1185, 14 P.3d 1256 (2000), the Nevada Supreme Court reversed a denial of habeas relief, finding a failure to disclose evidence. The Court commented on the apparent failure of the CCDA prosecutor to understand the scope of the State's constitutional disclosure obligation, based on the asserted theory that the evidence was not disclosed because the prosecutor thought it unreliable. *Lay*, 116 Nev. at 1194-99, 14 P.3d at 1262-65.

During a hearing in *State v. Bailey*, Case No. C129217, defense counsel moved for a mistrial after the State's witness testified that the CCDA prosecutor

offered to write a letter to the parole board in exchange for his testimony; neither the letter nor the offer had been disclosed. The prosecutor testified, "First of all, let me say this: The term *Giglio* material means nothing to me. I have never heard of the case." Ex. V at 125. The prosecutor then invited defense counsel to go to the CCDA offices and ask everybody if they knew what *Giglio* material is. "Most of them, I anticipate, will say no. I have asked a team chief this afternoon . . . if he knew what *Giglio* material was. He'd never heard of it. I don't know what that is." *Id.* at 125-26.

2. Discovery requested

a. Records relating to the instant offense and Thomas's criminal history.

Thomas seeks to serve subpoenas duces tecum, Exs. A, B, C, D, E, F, G, H, I, K, M, and N, to obtain the complete files regarding the instant case from the CCDA,[2] the LVMPD,[3] the Clark County Coroner's Office, and the FBI, as well as his records from the Clark County Detention Center. *See Fulford v. Maggio*, 692 F.2d 354, 358 n.2 (5th Cir. 1982) ("The State's duty of disclosure is imposed not only upon its prosecutor, but also on the state as a whole, including its investigative agencies"), *reversed on other grounds*, 462 U.S. 111 (1983); *Pina v. Henderson*, 752 F.2d 47, 50 (2nd Cir. 1985) (duty to disclose evidence in possession of law enforcement agencies acting as "arm of the prosecution"). Thomas has been unable to obtain this information through informal means. *See* Ex. Q at ¶¶3-8, 12, 14, 15.

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[2] Thomas's subpoena is not aimed at discovering the District Attorney's "trial strategy" against him. Courts routinely recognize that the work product privilege must yield when a party seeks the disclosure of *Brady* material. *See*, *e.g.*, *In re Lindsey*, 148 F.3d 1100, 1109 n.4 (D.C. Cir. 1998); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997); *Harris v. United States*, No. 97 Civ.1904(CSH), 1998 WL 26187, at *1-2 (S.D.N.Y. 1998).

[3] Because the various divisions of Metro do not necessarily communicate with one another, Thomas's subpoenas are directed to all known divisions. *See* Ex. Q at ¶¶3-8, 14.

Thomas cannot prove the State violated its duty of disclosure—which, under state law, if the State represents that it has an "open file" policy, includes all "relevant" evidence—without having copies of what was, or should have been, provided to trial counsel. *McKee v. State*, 112 Nev. 642, 646-48, 917 P.2d 940, 943-44 (1996) (representation of "open file" requires State to disclose all relevant evidence as a matter of due process).

Similarly, this information is necessary to prove that trial counsel were ineffective for failing to conduct adequate discovery litigation and independent investigation. *See Banks v. Reynolds*, 54 F.3d 1508, 1515-16 (10th Cir. 1995) (finding counsel ineffective for failing to litigate claim under *Brady*); *In re Cordero*, 756 P.2d 1370, 1383-84 (Cal. 1988) (ineffective assistance not to investigate and use information contained in police reports in counsel's possession regarding defendant's intoxication and mental state).

B. Thomas can demonstrate good cause to conduct discovery on his claims that trial counsel were ineffective.

Thomas has alleged numerous claims of ineffective assistance of trial counsel, based on counsel's failure to obtain social history records concerning him and his family which, if true, would entitle him to relief. *See Bracy*, 520 U.S. at 899; *Strickland v. Washington*, 466 U.S. 668, 669-700 (1984). The requested discovery will reveal that trial and initial post-conviction counsel failed to perform effectively by not adequately investigating or seeking to discover all reasonably available mitigation evidence, which could have persuaded the jury to find Thomas not guilty of first degree murder, or would have influenced at least one juror to vote for life.

1. Discovery related to Thomas and his family

Records relating to Thomas and his family are paramount to a constitutionally adequate mitigation investigation. *See*, *e.g.*, *Wiggins v. Smith*, 539

U.S. 510, 516-18 (2003). It is necessary for current counsel to obtain sufficient information to create a complete social history, which must underlie any adequate case in mitigation, and which trial and post-conviction counsel did not create. Thomas must be granted access to these records to show what competent counsel would have found.

a. Nevada Department of Corrections records

Thomas requested NDOC records pertaining for his father, Bobby Lewis. Given that Lewis was either incarcerated, on probation, or on parole for the majority of Thomas's life, much of the information about Lewis that is relevant to Thomas's case in mitigation will be contained in Lewis's incarceration, parole, and probation records. In order to prove the prejudice component of *Strickland*, Thomas must obtain the social history and institutional records that prior counsel did not. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Guideline 10.7, Commentary ("A multi-generational investigation . . . frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment."); *see also Rompilla v. Beard*, 545 U.S. 374, 382-83 (2005) (counsel "were deficient in failing to examine the court file on Rompilla's prior conviction" as well as failing to consult school, jail, and prison records where counsel could have looked for evidence of Rompilla's mental condition and history of alcohol dependence).

Thomas sent a request to the Nevada Department of Corrections in Carson City but was told that no records would be released without a subpoena. *See* Ex. Q at ¶13. Thomas respectfully requests that this Court authorize the issuance of the attached subpoena duces tecum, Ex. L.

2. Miscellaneous discovery

a. Nevada Board of Continuing Legal Education

To prove his claims that prior state counsel were ineffective, it is important for Thomas to establish the standards of practice for trial, appellate, and post-conviction counsel at the relevant time. A component of this is understanding what prior state counsel were actually being taught at Continuing Legal Education classes they attended. Records of attendance are held by the Nevada Board of Continuing Legal Education.

Thomas sent a request to the Nevada Board of Continuing Legal Education and was informed that the records requested would be released in response to a subpoena. *See* Ex. Q at ¶17. Thomas respectfully requests that this Court authorize the issuance of the attached subpoena duces tecum, Ex. P.

b. Clark County Jury Commissioner

Thomas has alleged that his death sentences are unconstitutional because he was sentenced to death by a jury not drawn from a fair cross-section of the community. Thomas sent a request to the Clark County Jury Commissioner for records relating to the selection of Thomas's penalty retrial jury but received no response. *See* Ex. Q at ¶14. Thomas respectfully requests that this Court authorize the issuance of the attached subpoena duces tecum, Ex. O.

c. Clark County Finance Department, Comptroller

In order to ascertain exactly what prior state counsel did and did not do in the course of representing Thomas, Thomas sent a request to the Clark County Finance Department, Comptroller, for their billing records but received no response. *See* Ex. Q at ¶15. Thomas respectfully requests that this Court authorize the issuance of the attached subpoena duces tecum, Ex. R.

C. Thomas can demonstrate good cause to conduct discovery on his claim that the State violated *Batson v. Kentucky.*

Good cause exists for the issuance of a subpoena duces tecum to be served on the CCDA to establish that the petit jury in Thomas's case was chosen in a racially discriminatory manner.

Thomas respectfully requests authorization to issue the attached subpoena duces tecum, Ex. A, for all notes, memoranda, and other written materials prepared by or on behalf of prosecuting attorneys David Schwartz and David Roger concerning the selection and elimination of potential jurors at Thomas's first trial, and a complete list of all capital and non-capital criminal jury trials in which those individual prosecutors have participated in jury selection, including any materials relied on or consulted in those cases, to allow for review of them for racially discriminatory use of peremptory challenges. *Id.*

The problem of racial discrimination in jury selection appears to be endemic to Clark County. Long time Nevada Supreme Court Justice Michael A. Cherry, who had years of trial experience in the Clark County courts, has observed that CCDA prosecutors "knocked off African Americans consistently" in jury selection. *See* Oral Argument at 36:56, *State v. Keck*, Case No. 61675, 2015 WL 1880587 (Nev. Apr. 21, 2015), available at http://tinyurl.com/hfeoz92; *see also McCarty v. State*, 132 Nev. __, 371 P.3d 1002, 1010 (2016) (Nevada Supreme Court granting relief in a capital case on a *Batson* claim arising out of Clark County).[4]

Another Nevada district attorney's office has provided its deputies with training instructions that include stereotypical "proper" responses to an objection to

---

[4] The Nevada Supreme Court denied relief in *Keck* because trial counsel failed to preserve the issue. Thomas has preserved the issue here.

the use of peremptory challenges, in order to assist them in evading a successful *Batson* challenge. Ex. AA.[5] The material advises:

> 4. Argue that you have made your challenge only in response to certain psychological responses or body language of the jurors. Be ready to explain.
>
> 5. Fully voir dire even those jurors that you intend to excuse.
>
> 6. Use some challenges on others than the members of the purported group.
>
> 7. Make it clear to the defense attorney that since the mistrial or jury dismissal has been made at his request, jeopardy has not attached and the case will be retried. The next jury panel might be even worse for him. [Citations omitted].
>
> 8. Accuse the defense attorney of being the one who is practicing group bias and ask for a hearing.

Such materials provide a script to allow prosecutors to evade the prohibition of *Batson* by giving them pat responses which are unconnected to the actual bases for the challenges at issue in the particular case, which is the focus of the *Batson* inquiry.

The existence of such training materials in one Nevada prosecution office gives rise to an inference that they have been made available to, and used by, the CCDA as well. Indeed, in a 2005 deposition in another Clark County capital case, former CCDA prosecutor Gary Guymon testified that there was in-house training on how to pick juries, "and I definitely recall getting manuals on it. The manuals were not necessarily published or issued by the Clark County District Attorney's office, but rather manuals, prosecution manuals, on picking a jury that I know I received." Ex. J at 12; *see id.* at 14 ("I do recall receiving . . . a handout, if you will,

---

[5] This information was obtained in discovery from the Washoe County District Attorney in another capital habeas case. *See* Ex. AA.

where [*Batson*] was discussed."). Thomas is seeking the CCDA policy and training manuals, memoranda, and other materials (if any) regarding how jurors are selected and struck in capital cases. For comparison purposes, he is also requesting the CCDA policy and training manuals, memoranda, and other materials related to selection and striking of jurors in non-death cases.

The Supreme Court has "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). In *Foster v. Chatman*, 136 S. Ct. 1737, 1743-45 (2016), evidence demonstrating the prosecutor's purposeful discrimination in violation of *Batson* was only obtained through post-conviction discovery of the type requested by Thomas herein. The Court relied on the evidence obtained in discovery in finding a *Batson* violation: "The contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." 136 U.S. at 1755.

Thomas is entitled to the discovery requested in order to establish that the prosecutor's purported reasons for his peremptory challenge were pretextual, thus guilt-trial, first direct appeal, and initial post-conviction counsel were ineffective in failing to litigate the issue adequately by seeking to discover and present evidence of the prosecutor's history and practices in removing minority jurors. *See United States v. Hughes*, 864 F.2d 78, 79-80 (8th Cir. 1988) (history of excluding African Americans by exercise of peremptory challenges in criminal cases), adhered to on rehearing, 880 F.2d 101, 101 (8th Cir. 1989) (emphasizing that trial court must consider "all relevant circumstances" in conducting *Batson* inquiry).

II. CONCLUSION

For the foregoing reasons, Thomas respectfully requests that this Court grant him discovery to show cause and prejudice to overcome the procedural default rules asserted by the State, and to prove the merits of his claims.

DATED this 8th day of June, 2018.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Joanne L. Diamond
JOANNE L. DIAMOND
Assistant Federal Public Defender

/s/ Jose A. German
JOSE A. GERMAN
Assistant Federal Public Defender

CERTIFICATE OF MAILING

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 8, 2018, a true and accurate copy of the foregoing MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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

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

Electronically Filed
6/8/2018 10:39 AM
Steven D. Grierson
CLERK OF THE COURT

EXHS

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Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

Death Penalty Habeas Corpus Case

EXHIBITS IN SUPPORT OF MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY

Date of Hearing: July 25, 2018
Time of Hearing: 11:00 a.m.

Exhibit No.	Description
A.	Proposed Subpoena Duces Tecum to the Clark County District Attorney
B.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Homicide
C.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Criminalistics Bureau
D.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Patrol
E.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Technical Services Division
F.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Confidential Informant
G.	Las Vegas Metropolitan Police Department, Technical Services Division, Proposed Subpoena Duces Tecum to the Fingerprint Bureau
H.	Proposed Subpoena Duces Tecum to the Clark County Detention Center-Business Accounts
I.	Proposed Subpoena Duces Tecum to the Clark County Detention Center-Classification
J.	Deposition of Former Clark County District Attorney Gary Guymon, *Witter v. E.K. McDaniel*, United States District Court Case No. CV-S-01-1034, February 11, 2005
K.	Proposed Subpoena Duces Tecum to the Federal Bureau of Investigation, Record Information/Dissemination Section
L.	Proposed Subpoena Duces Tecum to the Nevada Department of Corrections regarding Bobby L. Lewis (deceased)
M.	Proposed Subpoena Duces Tecum to the Las Vegas Metropolitan Police Department, Criminal History
N.	Proposed Subpoena Duces Tecum to the Clark County Coroner-Medical Examiner

O. Proposed Subpoena Duces Tecum to the Jury Commissioner, Eighth Judicial District Court

P. Proposed Subpoena Duces Tecum to the Nevada Board of Continuing Legal Education

Q. Declaration of Katrina Davidson, June 7, 2018

R. Proposed Subpoena Duces Tecum to the Clark County Comptroller

S. Order Regarding Remaining Discovery Issues, *Doyle v. McDaniel*, U.S.D.C., Case No. CV-N-00-101-HDM(RAM), September 24, 2002

T. *Homick v. McDaniel*, U.S. District Court Case No. CV-N-99-0299, Order Regarding Remaining Discovery Issues, September 1, 2004

U. *State v. Jimenez*, Case No. C77955, Eighth Judicial District Court, Recorder's Transcript re: Evidentiary Hearing (excerpt), April 19, 1993

V. *State v. Bailey*, Case No. C129217, Eighth Judicial District Court, Reporter's Transcript of Proceedings, July 30, 1996

W. *State v. Rippo*, Case No. C106784, Eighth Judicial District Court, Reporter's Transcript of Proceedings, February 8, 1996

X. Order Regarding Discovery, *Paine v. McDaniel*, No. CV-S-00-1082-KJD(PAL), September 27, 2002

Y. Order Regarding Discovery, *Riley v. McDaniel*, No. CV-N-01-0096-DWH(VPC), September 30, 2002

Z. Order Regarding Discovery, *McNelton v. McDaniel*, No. CV-S-00-284-LRH(LRL), September 30, 2002

AA. Washoe County, excerpt of discovery provided in *Williams v. McDaniel*, Case No. CV-S-98-56PMP(LRL)

1. Declaration of Becky L. Hansen dated August 19, 2002

2. Jury selection, discovery obtained from the Office of the Washoe County District Attorney in response to Federal Subpoena Duces Tecum on April 23, 1999 in *Williams V. McDaniel*, Case No. CV-S-98-56PMP(LRL), Bates No. 1619

3. Letter from Gary H. Hatlestad, Chief Appellate Deputy, Office of the Washoe County District Attorney to Assistant Federal Public Defender Rebecca Blaskey, dated May 13, 1999

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 8, 2018, a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF MOTION AND NOTICE OF MOTION FOR LEAVE TO CONDUCT DISCOVERY was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

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

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

EXHIBIT A

EXHIBIT A

CC03
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Nevada Bar No. 11479
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

MARLO THOMAS, Petitioner, v. TIMOTHY FILSON, et. al. Respondents.	Case No. 96C136862-1 Dept. No. XXIII **SUBPOENA DUCES TECUM-CIVIL** (For Personal Appearance at Trial or Hearing)

THE STATE OF NEVADA TO

Name: Clark County Office of the District Attorney

Address: 200 Lewis Avenue
Las Vegas, Nevada 89101

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend on the _____ day of ____, at the hour of ____ in Department No. 23, of the District Court, Clark County, Nevada, *UNLESS you make an agreement with the*

attorney or party submitting this Subpoena. The address where you are required to appear is the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada. Your attendance is required to give testimony and/or to produce and permit inspection and copying of designated books, documents, or tangible things in your possession, custody or control, or to permit inspection of premises. You are required to bring with you at the time of your appearance any items set forth in the list below. Please see Exhibit "1" Attached hereto for information regarding the rights of the person subject to this Subpoena.

(This Subpoena must be signed by the Clerk of the Court or an attorney.)
Lynn Goya, CLERK OF COURT

By:_____ *(Signature)*
Deputy Clerk Date:

Or

By:_____ *(Signature)*
Attorney Name: JOANNE L. DIAMOND
Attorney Bar Number: 14139C

Submitted by:
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (FAX)
Joanne_diamond@fd.org

_____ *(Signature)*
(Insert Name, Bar Number, Address, Phone, Fax and E-mail of Attorney or Party Submitting Subpoena)

Attorney for Petitioner

AFFIDAVIT/DECLARATION OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, *(insert name of person making service)* _____, being duly sworn, or under penalty of perjury, state that at all times herein I was and am over 18 years of age and not a party to or interested in the proceedings in which this Affidavit/Declaration is made; that I received a copy of the **SUBPOENA** on *(insert date person making service received Subpoena)* _____; and that I served the same on *(insert date person making service served Subpoena)* _____, by delivering and leaving a copy with *(insert name of witness)* _____ *(insert address where witness was served)* at _____ _____.

Executed on: _____ _____
(Date) *(Signature of Person Making Service)*

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for the
County of _____, State of _____.

OR ONE OF THE FOLLOWING: Per NRS 53.045

(a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

(b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

ITEMS TO BE PRODUCED

TO: **CLARK COUNTY OFFICE OF THE DISTRICT ATTORNEY**
200 Lewis Avenue
Las Vegas, Nevada 89101

OR: PERSON(S) MOST KNOWLEDGEABLE with regard to records, documents and materials storage, retention, nature of and content of files of the ***Clark County Office of the District Attorney,*** pertaining to:

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a "Certificate of Custodian of Records", in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Information requested on the following individual:

Marlo D. Thomas
DOB: 11/06/1972
SSN: 530-68-5216

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, and/or tangible things including, but not limited to, the following un-redacted items:

1. The complete files of the Clark County District Attorney pertaining to Marlo D. Thomas as it relates to his capital conviction in case number C136862-1;
2. The complete files of the Clark County District Attorney for Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
3. The complete file of the Victim Witness Assistance Center of the Clark County District Attorney's Office for the subject investigations;
4. All non-trial disposition and/or internal memoranda regarding communications with the defendant, witnesses, suspects, informants and snitches including, but not limited to, the above-listed individual;

5. Major Violator's Unit (M.V.U.) court files regarding the defendant, co-defendants, witnesses, suspects, informants and snitches including, but not limited to, the above-listed individual;
6. All polygraph results, including pre-test interviews and notes, regarding any individuals who were given polygraph examinations in the subject investigation;
7. All communications and notes in any form with polygraph examiner relating to the above-referenced individual and the subject investigation;
8. All communications and notes in any form with district attorney investigators relating to the subject investigation and defendant, co-defendants, witnesses, suspects, informants and snitches including, but not limited to, the above-listed individual;
9. Investigation and/or prosecution files and notes;
10. Case reports and notes;
11. Memoranda and notes prepared by law enforcement and/or prosecutors during the course of the investigation and prosecution;
12. Internal memoranda;
13. Notes;
14. Classification files;
15. Interrogation reports and notes;
16. Transmittal of evidence to crime labs;
17. Results or reports of crime lab work;
18. Information with regard to other suspects or potential suspects in the subject investigations;
19. Information with regard to all prosecution witnesses;
20. Notes of detectives, investigators, or other district attorney office personnel;
21. Any and all physical or documentary evidence and notes;
22. Photographs and other information pertaining to identity and background of all suspects and potential suspects in the subject investigations including, but not limited to the above-listed individual;
23. Log sheets or other records which reflect the physical location and or movements of the above-named individual;
24. Any and all video recordings, audio recordings and transcribed statements made by the defendant, co-defendants, witnesses, suspects, informants and snitches including, but not limited to, the above-named individual;
25. Any and all video recordings, audio recordings and transcribed statements made by persons other than those identified in request No. 24;
26. Any and all plea documentation, notes, sentencing files, and/or charging files;
27. Arrest and booking records and notes;
28. Crime reports and notes;
29. Crime scene investigation reports and notes;
30. Follow up investigation reports and notes;
31. Autopsy photographs, reports and notes;
32. Toxicology reports and notes;
33. Coroner investigation reports and bench notes;
34. Victim information reports and notes;
35. Evidence impound reports and notes;

36. Criminalistics bureau reports and bench notes;
37. Affidavits of arrest;
38. Criminal complaint requests and notes;
39. District attorney's further investigation reports and notes;
40. Correspondence;
41. Search warrants;
42. Consent to search forms and notes;
43. Vehicle impound reports and notes;
44. Newspaper clippings, articles and press reports;
45. Secret witness information;
46. Any materials on related crimes with regard to the defendant, co-defendants, witnesses, suspects, informants and snitches including, but not limited to, the above-named individual;
47. Identification specialist work requests and notes;
48. Telephone logs and notes;
49. Grand jury subpoenas;
50. Crime scene photographs and notes;
51. Warrants of arrest;
52. Warrants of extradition;
53. Any and all extradition documents relating to Marlo Thomas;
54. Polygraph examinations of the defendant, co-defendants, witnesses, suspects, informants and snitches including, but not limited to, the above-named individual;
55. Any and all FBI investigative reports, notes, correspondence and/or memoranda;
56. The identification arrays and/or photographic lineups for the above-named individual;
57. Jail records;
58. Incarceration records;
59. Pre-sentence reports;
60. Testing results and notes;
61. Evaluations, evaluation reports, including psychiatric evaluation;
62. All reports of medical treatment administered or provided to the above-named individual;
63. Disciplinary reports;
64. Punishment records;
65. Any and all correspondence and notes authored by any of the above-named individuals including, but not limited to, correspondence to each other, to other inmates, to any witnesses, and/or to outside persons;
66. Any records, forms and/or agreements regarding assistance provided to the Clark County District Attorney's Office and/or Las Vegas Metropolitan Police Department including, but not limited to, cooperating individual agreements, special consent forms, waiver of liability forms for all witnesses, suspects, co-defendants, informants and snitches including, but not limited to, the above-named individual;

67. Any other documents relating to the condition, care, confinement, custody, incarceration, investigation and/or prosecution of any of the above-named individuals generated by, received from and/or forwarded to or from the Clark County District Attorney's office and/or any other law enforcement agencies;

68. The entire file(s) wherein the District Attorney and/or law enforcement officials negotiated a plea agreement, entered into any agreement and/or deal to reduce charges and/or not file charges, regardless of whether formal charges were filed for any crime suspected and/or committed with regard to the above-named individual;

69. All requests for prosecution and/or filing of formal charges from any law enforcement agencies for any crime;

70. All denials for prosecution and/or filing of formal charges for any crime;

71. All documents reflecting recommendations and/or requests for reductions in charges;

72. All records from the Clark County District Attorney's office pertaining to immunity for any of the above-listed individuals;

73. C-Track printout for any cases relating to the above-named individual;

74. Printout of contents of any database maintained by any individual district attorney or district attorney staff member relating to the above-named individual;

75. Copies of certificates of destruction relating to materials relating or referring to the above-named individual;

76. A list of any documents purged, destroyed, deleted, or transferred to storage;

77. Any and all microfilm, microfiche documents; Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "'deleted' electronic data." This list is not exhaustive.

78. The complete files prepared by or on behalf of Deputy District Attorneys Melvyn Harmon, David Schwartz, David Roger, and Chris Owens of the Clark County District Attorney's Office, including all notes, memoranda, documents, and other written materials, concerning the selection and elimination of potential jurors in *State v. Thomas*;

79. All formal and/or informal policies, practices, guidelines, manuals procedures, criteria, notes, memoranda, or any other records or documents relied on in the selection and elimination of potential jurors in *State v. Thomas*;

80. All formal and/or informal policies, practices, guidelines, manuals, procedures, criteria, notes, memoranda, or any other records or documents relied on in the selection and elimination of all potential jurors in all capital and non-capital criminal jury trials in which Deputy District Attorneys David Schwartz and David Roger have participated in jury selection;

81. A complete list of all capital and non-capital criminal jury trials in which Deputy District Attorneys David Schwartz and David Roger have participated in jury selection;

82. All formal and/or informal policies, practices, guidelines, training manuals, procedures, criteria, and any other records, and the title, date, place, agenda, and any materials or handouts or CD-ROMS received from or through internal and external conferences, seminars, or training sessions with respect to advising prosecutors, and/or the internal procedures utilized, in the selection and elimination of jurors in capital cases, at which Deputy District Attorneys David Schwartz and David Roger were present as participants or presenters, or that was otherwise presented or attended by members of the Clark County District Attorney's Office;

83. All formal and/or informal policies, practices, guidelines, training manuals, procedures, criteria, and any other records, and the title, date, place, agenda, and any materials or handouts or CD-ROMS received from or through internal and external conferences, seminars, or training sessions with respect to advising prosecutors, and/or the internal procedures utilized, in the selection and elimination of jurors in non-capital criminal cases, at which Deputy District Attorneys David Schwartz and David Roger were present as participants or presenters, or that was otherwise presented or attended by members of the Clark County District Attorney's Office.

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of "Certificate of Destruction," evidencing what was destroyed and the date, as set forth in your local rules and/or statutory codes.

EXHIBIT "1"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) ***Protection of persons subject to subpoena.***

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waive applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) ***Duties in responding to subpoena.***

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT B

EXHIBIT B

CC03

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
Joanne_Diamond@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
Jose_German@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

MARLO THOMAS, Petitioner, v. TIMOTHY FILSON, et. al. Respondents.	Case No. 96C136862-1 Dept. No. XXIII **SUBPOENA DUCES TECUM-CIVIL** (For Personal Appearance at Trial or Hearing)

THE STATE OF NEVADA TO

Name: Custodian of Records
Homicide Division
Las Vegas Metropolitan Police Department
Address: 400 S. Martin L. King Dr., Las Vegas, Nevada

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend on the _____ day of ____, at the hour of ____ in Department No. 23, of the District Court, Clark County, Nevada, *UNLESS you make an agreement with the attorney or party submitting this Subpoena*. The address where you are required to appear is the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada. Your attendance is

required to give testimony and/or to produce and permit inspection and copying of designated books, documents, or tangible things in your possession, custody or control, or to permit inspection of premises. You are required to bring with you at the time of your appearance any items set forth in the list below. Please see Exhibit "1" Attached hereto for information regarding the rights of the person subject to this Subpoena.

(This Subpoena must be signed by the Clerk of the Court or an attorney.)
Lynn Goya, CLERK OF COURT

By:_____ *(Signature)*
Deputy Clerk Date:

Or

By:_____ *(Signature)*
Attorney Name: JOANNE L. DIAMOND
Attorney Bar Number: 14139C

Submitted by:
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (FAX)
Joanne_diamond@fd.org

_____ *(Signature)*
(Insert Name, Bar Number, Address, Phone, Fax and E-mail of Attorney or Party Submitting Subpoena)

Attorney for Petitioner

AFFIDAVIT/DECLARATION OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, *(insert name of person making service)* _____, being duly sworn, or under penalty of perjury, state that at all times herein I was and am over 18 years of age and not a party to or interested in the proceedings in which this Affidavit/Declaration is made; that I received a copy of the **SUBPOENA** on *(insert date person making service received Subpoena)* _____; and that I served the same on *(insert date person making service served Subpoena)* _____, by delivering and leaving a copy with *(insert name of witness)* _____ *(insert address where witness was served)* at _____ _____.

Executed on: _____ _____
(Date) *(Signature of Person Making Service)*

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for the
County of _____, State of _____.

OR ONE OF THE FOLLOWING: Per NRS 53.045

(a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

(b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

ITEMS TO BE PRODUCED

TO: CUSTODIAN OF RECORDS
ROBBERY/HOMICIDE BUREAU
INVESTIGATIVE SERVICES DIVISION
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
400 S. Martin L. King Blvd, Las Vegas, NV 89106

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a "Certificate of Custodian of Records", in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Information requested on the following individual:

Marlo D. Thomas
DOB: 11/06/1972
SSN: 530-68-5216

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, and/or tangible things including, but not limited to, the following un-redacted items:

1. Homicide notebook a.k.a. “Murder Books”;
2. Evidence impound reports, notes and test results;
3. Property impound reports, notes and test results;
4. Arrest records and SCOPE sheets on the above-named individual;
5. All Las Vegas Metropolitan Police Department records related to the above-named individuals including, but not limited to, DR Nos. 84-06040624; 87-65834; 88-83051; 84-76992; 960415-04886.
6. Event number documents;
7. Booking records from and any all jurisdictions;
8. Arrest records from any and all jurisdictions;
9. Charging documents from any and all jurisdictions;
10. Lineups including, but not limited to, all black & white and color photographs and mug shots;
11. Affidavits of arrest from any and all jurisdictions;
12. Arrest warrants and search warrants from any and all jurisdictions;

13. Consent to search forms;
14. Criminal complaint requests;
15. All investigation requests, notes, and reports from any and all jurisdictions;
16. Grand jury subpoenas, information, indictment;
17. Warrants of extradition and any other extradition documents or proceedings from any and all jurisdictions;
18. Any and all incident reports;
19. Any and all statements of defendant, co-defendant, witnesses, suspects, snitches, informants including, but not limited to, those individuals identified above;
20. Any and all audio, video, surveillance tapes, logs, body wires and electronic recording devices of any kind including, but not limited to, raw data and transcription products arising from these devices;
21. Any and all Las Vegas Metropolitan Police Department Officer's reports, including but not limited to:
    a. Follow-up reports;
    b. Continuation reports;
    c. Field notes;
    d. Initial arrest/incident reports;
    e. Temporary custody reports;
    f. Voluntary statements or other statements;
    g. Crime Scene Reports;
    h. Property Reports;
22. Newspaper clippings, press releases, press reports;
23. Any and all property release disposition reports and notes;
24. Any and all handwritten notes;
25. Any and all autopsy reports, photographs and notes;
26. Any and all coroner's reports, investigation, photographs and bench notes;
27. Toxicology reports, test results and notes;
28. Forensic laboratory reports, test results and notes;
29. Victim information reports and notes;
30. Identification specialists work requests, reports and notes;
31. Field identification section documents and notes;
32. Latent fingerprint section documents and notes;
33. Photographic laboratory section documents and notes;
34. All laboratory testing reports, results and notes;
35. All evidence testing reports, results and notes;
36. All physical, tangible evidence and notes;
37. All polygraph examinations, notes and results of any witnesses, suspects, defendants, or other individuals including, but not limited to, the above-named individuals;
38. Any and all other documents regarding the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
39. A list of any purged, destroyed, deleted documents, or documents transferred to storage;
40. Any and all microfilm, microfiche documents;

41. Any documents, forms and/or agreements regarding assistance provided to the Las Vegas Metropolitan Police Department including, but not limited to, cooperating individual agreements, special consent forms, waiver of liability forms for all witnesses, suspects, co-defendants, informants or any other individuals including, but not limited to, the above-named individuals;
42. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "deleted" electronic data. This list is not exhaustive.
43. All files, documents, notes and records including, but not limited to, detectives' personal files pertaining to other suspects in the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
44. Any and all mug shots including, but not limited to, Marlo D. Thomas;
45. Handwritten notes, memos, field notes, correspondence and/or investigative reports by Detectives relating to their investigation in Lone Star Steak House 3131 N. Rainbow Blvd., 2505 Raymond, including, but not limited to, the search warrants and the extradition proceedings in 2505 Raymond;
46. Any and all information related to Marlo D. Thomas.

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of "Certificate of Destruction," evidencing what was destroyed and the date, as set forth in your local rules and/or statutory codes.

EXHIBIT "1"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) ***Protection of persons subject to subpoena.***

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waive applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) ***Duties in responding to subpoena.***

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT C

EXHIBIT C

CC03
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
Joanne_Diamond@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
Jose_German@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

MARLO THOMAS, Petitioner, v. TIMOTHY FILSON, et. al. Respondents.	Case No. 96C136862-1 Dept. No. XXIII **SUBPOENA DUCES TECUM-CIVIL** (For Personal Appearance at Trial or Hearing)

THE STATE OF NEVADA TO

Name: Custodian of Records
Criminalistics Bureau; Field Services Section; Forensic Lab Section
Investigative Services Division
Las Vegas Metropolitan Police Department
Address: 5555 Badura Ave., Suite 180, Las Vegas, Nevada

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend on the _____ day of ____, at the hour of ____ in Department No. 23, of the District Court, Clark County, Nevada, *UNLESS you make an agreement with the attorney or party submitting this Subpoena*. The address where you are required to appear

is the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada. Your attendance is required to give testimony and/or to produce and permit inspection and copying of designated books, documents, or tangible things in your possession, custody or control, or to permit inspection of premises. You are required to bring with you at the time of your appearance any items set forth in the list below. Please see Exhibit "1" Attached hereto for information regarding the rights of the person subject to this Subpoena.

(This Subpoena must be signed by the Clerk of the Court or an attorney.)
Lynn Goya, CLERK OF COURT

By:_____ *(Signature)*
Deputy Clerk Date:

Or

By:_____ *(Signature)*
Attorney Name: JOANNE L. DIAMOND
Attorney Bar Number: 14139C

Submitted by:
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (FAX)
Joanne_diamond@fd.org

_____ *(Signature)*
(Insert Name, Bar Number, Address, Phone, Fax and E-mail of Attorney or Party Submitting Subpoena)

Attorney for Petitioner

AFFIDAVIT/DECLARATION OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, *(insert name of person making service)* _____, being duly sworn, or under penalty of perjury, state that at all times herein I was and am over 18 years of age and not a party to or interested in the proceedings in which this Affidavit/Declaration is made; that I received a copy of the **SUBPOENA** on *(insert date person making service received Subpoena)* _____; and that I served the same on *(insert date person making service served Subpoena)* _____, by delivering and leaving a copy with *(insert name of witness)* _____ *(insert address where witness was served)* at _____ _____.

Executed on: _____ _____
(Date) *(Signature of Person Making Service)*

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for the
County of _____, State of _____.

OR ONE OF THE FOLLOWING: Per NRS 53.045

(a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

(b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

ITEMS TO BE PRODUCED

TO: CUSTODIAN OF RECORDS
CRIMINALISTICS BUREAU
FIELD SERVICES SECTION; FORENSIC LAB SECTION
INVESTIGATIVE SERVICES DIVISION
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
5555 Badura Ave., Suite 180, Las Vegas, NV 89118

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a "Certificate of Custodian of Records", in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Information requested on the following individual:

Marlo D. Thomas
DOB: 11/06/1972
SSN: 530-68-5216

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, and/or tangible things including, but not limited to, the following un-redacted items:

1. Evidence impound reports, notes and test results;
2. Property impound reports, notes and test results;
3. Crime Scene Reports and notes;
4. All Las Vegas Metropolitan Police Department records related to the above-named individual including, but not limited to, (DR) including, but not limited to DR Nos. 84-06040624; 87-65834; 88-83051; 84-76992; 960415-0488;
5. Photographs, notes, testing data, analysis and results regarding Lone Star Steak House, 3131 N. Rainbow Blvd., Las Vegas, NV
6. Sketches and notes;
7. Diagrams and notes;
8. Blood samples and notes;
9. Swab samples and notes;
10. Saliva samples and notes;
11. Hair samples and notes;

12. Toxicology reports, notes and test results;
13. Forensic laboratory reports, notes and test results;
14. Firearm comparison test protocols, notes, reports and test results;
15. Blood spatter interpretation, notes, test protocols, reports and test results;
16. Lab notes;
17. Bench notes;
18. Protocols employed for all tests and/or examinations;
19. Victim information reports and notes;
20. Identification specialists' work requests, notes and reports;
21. Newspaper articles, press reports, press releases;
22. Field identification section documents and notes;
23. Latent fingerprint section documents and notes;
24. Photographic laboratory section documents and notes;
25. Photographic lineup documents and notes;
26. All laboratory testing reports, notes and results;
27. All evidence testing reports, notes and results;
28. All physical evidence and notes;
29. All curriculum vitae, resumes, and any other documentation reflecting the qualifications, licensing, education, experience, training, and professional memberships or associations for all examiners involved in the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
30. Any and all other files, records and documents regarding the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
31. A list of any documents purged, destroyed, deleted, and/or transferred to storage;
32. Any and all microfilm, microfiche documents;
33. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "deleted" electronic data. This list is not exhaustive.

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of "Certificate of Destruction," evidencing what was destroyed and the date, as set forth in your local rules and/or statutory codes.

EXHIBIT "1"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) ***Protection of persons subject to subpoena.***

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waive applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) ***Duties in responding to subpoena.***

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT D

EXHIBIT D

CC03
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
Joanne_Diamond@fd.org
JOSE A. GERMAN
Assistant Federal Public Defender
Nevada Bar No. 14676C
Jose_German@fd.org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

MARLO THOMAS, Petitioner, v. TIMOTHY FILSON, et. al. Respondents.	Case No. 96C136862-1 Dept. No. XXIII **SUBPOENA DUCES TECUM-CIVIL** (For Personal Appearance at Trial or Hearing)

THE STATE OF NEVADA TO

Name: Custodian of Records
Patrol Division
Las Vegas Metropolitan Police Department
Address: 400 S. Martin L. King Dr., Las Vegas, Nevada

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend on the _____ day of ____, at the hour of ____ in Department No. 23, of the District Court, Clark County, Nevada, *UNLESS you make an agreement with the attorney or party submitting this Subpoena*. The address where you are required to appear is the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada. Your attendance is

required to give testimony and/or to produce and permit inspection and copying of designated books, documents, or tangible things in your possession, custody or control, or to permit inspection of premises. You are required to bring with you at the time of your appearance any items set forth in the list below. Please see Exhibit "1" Attached hereto for information regarding the rights of the person subject to this Subpoena.

(This Subpoena must be signed by the Clerk of the Court or an attorney.)
Lynn Goya, CLERK OF COURT

By:_____ *(Signature)*
Deputy Clerk Date:

Or

By:_____ *(Signature)*
Attorney Name: JOANNE L. DIAMOND
Attorney Bar Number: 14139C

Submitted by:
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (FAX)
Joanne_diamond@fd.org

_____ *(Signature)*
(Insert Name, Bar Number, Address, Phone, Fax and E-mail of Attorney or Party Submitting Subpoena)

Attorney for Petitioner

AFFIDAVIT/DECLARATION OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, *(insert name of person making service)* _____, being duly sworn, or under penalty of perjury, state that at all times herein I was and am over 18 years of age and not a party to or interested in the proceedings in which this Affidavit/Declaration is made; that I received a copy of the **SUBPOENA** on *(insert date person making service received Subpoena)* _____; and that I served the same on *(insert date person making service served Subpoena)* _____, by delivering and leaving a copy with *(insert name of witness)* _____ *(insert address where witness was served)* at _____ _____.

Executed on: _____ _____
(Date) *(Signature of Person Making Service)*

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for the
County of _____, State of _____.

OR ONE OF THE FOLLOWING: Per NRS 53.045

(a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

(b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

ITEMS TO BE PRODUCED

TO: CUSTODIAN OF RECORDS
PATROL DIVISION
400 S. Martin L. King Dr.
Las Vegas, NV 89106

YOU ARE COMMANDED to produce and permit inspection and copying of the following designated books, documents or tangible things as (a) kept in the usual course of business, or (2) organized and labeled to correspond with the categories as set forth below. Nev. R. Civ. Pro. 45.

If any of the books, documents, records or tangible things listed below are not being produced by you based on a claim of privilege or any other reason, please expressly state the basis or privilege claimed and describe the nature of the documents, communications or other things sufficient to enable a contest of the claim. Nev. R. Civ. Pro. 45(d).

Please complete a "Certificate of Custodian of Records", in the form set forth in N.R.S. 52.260. Please produce or permit inspection and copying all sealed, unsealed, official and/or non official memoranda, correspondence, materials, files, tests, and/or documents of the following items and things concerning:

Information requested on the following individual:

Marlo D. Thomas
DOB: 11/06/1972
SSN: 530-68-5216

Please produce or permit inspection and copying of all sealed and/or unsealed, official and/or non official files, records, documents, investigative materials, microfiched logbooks, handwritten logbooks, and/or tangible things including, but not limited to, the following un-redacted items:

1. All files, records and documents regarding the investigations into the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
2. All Las Vegas Metropolitan Police Department records related to the above-named individuals including, but not limited to, DR Nos. 84-06040624; 87-65834; 88-83051; 84-76992; 960415-04886;
3. Evidence impound, release, disposition, notes and/or test result reports;
4. Property impound, release, disposition, notes and/or test result reports;
5. Identification files on the above-named individuals;
6. All Las Vegas Metropolitan Police Department records related to the above-named individuals including, but not limited to Event/Incident reports listed above;
7. Booking records from any and all jurisdictions;

8. Affidavits of arrest, arrest warrants, arrest records, and consent to search warrants from any and all jurisdictions;
9. Criminal complaint requests;
10. Any and all recorded statements and transcriptions thereof, and written statements;
11. Any and all videotapes, surveillance tapes, audio tapes and transcriptions thereof;
12. Identification specialists work requests and reports;
13. Field identification section documents

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of "Certificate of Destruction," evidencing what was destroyed and the date, as set forth in your local rules and/or statutory codes.

EXHIBIT "1"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) ***Protection of persons subject to subpoena.***

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waive applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) ***Duties in responding to subpoena.***

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT E

EXHIBIT E

CC03
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
Joanne_Diamond@fd.org
JOSE A. GERMAN
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411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

MARLO THOMAS, Petitioner, v. TIMOTHY FILSON, et. al. Respondents.	Case No. 96C136862-1 Dept. No. XXIII **SUBPOENA DUCES TECUM-CIVIL** (For Personal Appearance at Trial or Hearing)

THE STATE OF NEVADA TO

Name: Custodian of Records
Records Bureau
Technical Services Division
Las Vegas Metropolitan Police Department
Address: 400 S. Martin L. King Dr., Las Vegas, Nevada

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend on the _____ day of ____, at the hour of ____ in Department No. 23, of the District Court, Clark County, Nevada, *UNLESS you make an agreement with the attorney or party submitting this Subpoena*. The address where you are required to appear

is the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada. Your attendance is required to give testimony and/or to produce and permit inspection and copying of designated books, documents, or tangible things in your possession, custody or control, or to permit inspection of premises. You are required to bring with you at the time of your appearance any items set forth in the list below. Please see Exhibit "1" Attached hereto for information regarding the rights of the person subject to this Subpoena.

(This Subpoena must be signed by the Clerk of the Court or an attorney.)
Lynn Goya, CLERK OF COURT

By:_____ *(Signature)*
Deputy Clerk Date:

Or

By:_____ *(Signature)*
Attorney Name: JOANNE L. DIAMOND
Attorney Bar Number: 14139C

Submitted by:
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (FAX)
Joanne_diamond@fd.org

_____ *(Signature)*
(Insert Name, Bar Number, Address, Phone, Fax and E-mail of Attorney or Party Submitting Subpoena)

Attorney for Petitioner

AFFIDAVIT/DECLARATION OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, *(insert name of person making service)* _____, being duly sworn, or under penalty of perjury, state that at all times herein I was and am over 18 years of age and not a party to or interested in the proceedings in which this Affidavit/Declaration is made; that I received a copy of the **SUBPOENA** on *(insert date person making service received Subpoena)* _____; and that I served the same on *(insert date person making service served Subpoena)* _____, by delivering and leaving a copy with *(insert name of witness)* _____ *(insert address where witness was served)* at _____ _____.

Executed on: _____ _____
(Date) *(Signature of Person Making Service)*

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 20_____.

_____
NOTARY PUBLIC in and for the
County of _____, State of _____.

OR ONE OF THE FOLLOWING: Per NRS 53.045

(a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

(b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

Executed on: _____
(Date) *(Signature of Person Making Service)*

ITEMS TO BE PRODUCED

TO: CUSTODIAN OF RECORDS
RECORDS BUREAU
TECHNICAL SERVICES DIVISION
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
400 S. Martin L. King Blvd
Las Vegas, NV 89101

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Information requested on the following individual:

Marlo D. Thomas
DOB: 11/06/1972
SSN: 530-68-5216

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1. All files, records and documents regarding the investigations into the Murder with Use of a Deadly Weapon (Open Murder) of Carl Dixon and Matthew Gianakis, Conspiracy to Commit Murder and/or Robbery, Robbery with Use of a Deadly Weapon, Burglary while in Possession of a Firearm, First Degree Kidnapping with use of a Deadly Weapon on or between April 14, 1996 and April 15, 1996;
2. Scope printouts for the above-named individual(s);
3. Declarations of arrest;
4. Work cards;
5. Incident crime report (ICR) and notes;
6. Regular investigative reports (TSD 26) and notes;
7. Evidence impound reports, notes and test results;
8. Property impound reports, notes and test results;
9. Identifications documents and notes;

10. All Las Vegas Metropolitan Police Department records related to the above-named individuals including, but not limited to, DR Nos. 84-06040624; 87-65834; 88-83051; 84-76992; 960415-04886;
11. Event number documents;
12. Incident reports and notes;
13. Booking records and notes from and any all jurisdictions;
14. Arrest records and notes from any and all jurisdictions;
15. Charging documents and notes from any and all jurisdictions;
16. Affidavits of arrest from any and all jurisdictions;
17. Arrest warrants and search warrants from any and all jurisdictions;
18. Consent to search forms and notes;
19. Criminal complaint requests and notes;
20. Crime scene investigation reports and notes;
21. Further investigation requests, notes and reports;
22. Grand jury subpoenas, information, indictment;
23. Warrants of extradition and any other extradition documents, including notes, relating to proceedings from any and all jurisdictions;
24. Any and all statements of defendant, co-defendants, witnesses, suspects, snitches and informants including, but not limited to, the above-named individuals;
25. Any and all Las Vegas Metropolitan Police Department reports, including but not limited to:
    a. Follow-up reports;
    b. Continuation reports;
    c. Field notes;
    d. Initial arrest/incident reports;
    e. Temporary custody reports;
    f. Voluntary statements or other statements;
    g. Crime Scene Reports;
    h. Property Reports;
    i. Witness statements;
26. Newspaper clippings, press releases, press reports;
27. Any and all property release disposition reports and notes;
28. Any and all handwritten notes;
29. Any and all autopsy reports, photographs and notes;
30. Any and all coroner's reports, investigation, photographs, and bench notes;
31. Toxicology reports, test results and notes;
32. Forensic laboratory reports, test results and notes;
33. Victim information reports and notes;
33. Suspect information reports and notes;
34. Identification specialists work requests, reports and notes;
35. Field identification section documents and notes;
36. Latent fingerprint section documents and notes;
37. Photographic laboratory section documents and notes;
38. Photographic lineup documents and notes;
39. All laboratory testing reports, results and notes;
40. All evidence testing reports, results and notes;

41. All requests for testing and notes;
42. All polygraph examinations, results and notes;
43. Correspondence;
44. Documents received from any other law enforcement agencies including, without limitation, the Federal Bureau of Investigation;
45. A list of any purged, destroyed, deleted documents, or documents transferred to storage;
46. Any and all microfilm, microfiche documents;
47. Electronic data regarding all above to include: voice mail messages and files; back-up voice mail files; e-mail messages and files; back-up e-mail files; deleted e-mails; data files; program files; backup and archival tapes; temporary files; system history files; web site information stored in textual, graphical or audio format; web site log files; cache files; cookies; and other electronically recorded information. The disclosing party shall take reasonable steps to ensure that it discloses any back-up copies of files or archival tapes that will provide information about any "deleted" electronic data. This list is not exhaustive.
48. All juvenile arrests records for the above-named individuals.

If you are claiming that any of the documents described above have been destroyed or purged, please provide a copy of "Certificate of Destruction," evidencing what was destroyed and the date, as set forth in your local rules and/or statutory codes.

EXHIBIT "1"
NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) ***Protection of persons subject to subpoena.***

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(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waive applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) ***Duties in responding to subpoena.***

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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.

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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.

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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 eye-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:

SAMPLE

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Juror Type	OBSERVATION DATE 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	9	193	255	1,137	100.0

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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	8.3
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 [illegible]. 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.

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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:

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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.

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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 [redacted] 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 [illegible] department), the process for following up varies. [illegible] times 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.

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.

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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,[illegible] 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 [redacted] 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 [redacted] the jury commissioner's office in response to summonses. These badge numbers are grouped sequentially to form panels [redacted]. But if it is the case that badge numbers are assigned sequentially as calls are received, then the [redacted] 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 [redacted] about 600 (37.5%) of the 1,600 who respond to their summons 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 represented 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:

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* 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 254

EXHIBIT 254

"Justice by the people"

REPORT of the SUPREME COURT of NEVADA

Jury Improvement Commission

October 2002

"The right of trial by Jury shall be secured to all and remain inviolate forever . . ."
— Nevada Constitution

Report of the Supreme Court of Nevada

JURY IMPROVEMENT COMMISSION

October 2002

Supreme Court of Nevada

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Cliff Young, Vice Chief Justice
Robert E. Rose, Justice
Miriam Shearing, Justice
Deborah A. Agosti, Justice
Myron E. Leavitt, Justice
Nancy A. Becker, Justice

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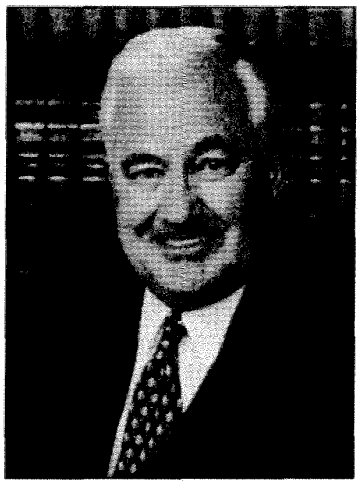
A MESSAGE FROM THE

Justice Bob Rose

There is nothing more basic, more fundamental in our justice system than the right to have our disputes decided by a jury of our peers. The jury system is essential to our system of government. It is a bulwark of our democracy and a cornerstone of our freedoms.

Concern about the future of the nation's jury systems prompted the National Center for State Courts to organize the 2001 Jury Summit in New York City, co-sponsored by the New York State judiciary. The purpose was to bring together representatives of state judiciaries to examine every aspect of the states' jury systems and explore possible ways to update and reform the system that has served democracy so well. I attended the 2001 Jury Summit as part of Nevada's delegation that included Second Judicial District Court Judge Janet J. Berry and Clark County Assistant District Court Administrator Rick Loop.

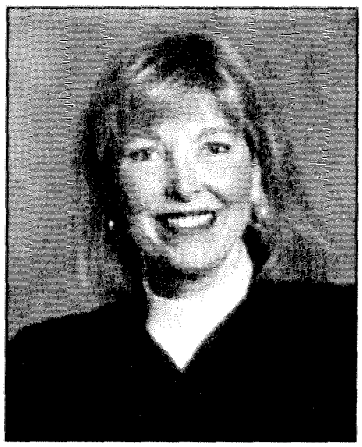


The wealth of information obtained at the Summit prompted me to recommend that the time was ripe for a study of the Nevada jury system. The other justices agreed and established the **Jury Improvement Commission** in mid-2001. Justice Deborah A. Agosti was named as co-chair and by September 2001, thirteen additional Commission members were appointed.

No aspect of the justice system has more of an impact on the average citizen than jury duty. Because of that, the Jury Improvement Commission has become one of the most important commissions ever established by the Nevada Supreme Court.

CO-CHAIRS

Justice Deborah A. Agosti



Jury duty is an obligation of citizenship and a unique experience. Private persons are asked to take time from their personal and professional endeavors, sit and listen for hours and days, deliberate with people they barely know and make decisions that will deeply affect others. At no other time is a citizen asked to participate in government in such a personal, detailed and important way. As a juror, a citizen is literally required to pass binding and lasting judgment upon the conduct of one or more within our society. This is an awesome responsibility, indeed.

There is no question that a strong and reliable jury system is an essential component of this country's judicial branch of government and crucial to the public's trust and confidence in the courts. During my tenure as a trial judge, I have seen that jurors form lasting conclusions about the judicial branch as a whole. Jurors judge our judicial system based upon their perceptions of its fairness, efficiency and understandability. Every recommendation within this report is meant in one way or another to strengthen our jury system and inspire the public's trust and confidence in the system we so cherish.

I believe strongly in the process of trial by jury. I also believe Nevada's jury system is sound, effective and reliable. Nevertheless, it is worthwhile to review any system from time to time in order to identify weaknesses and effectively plan improvements. It has been my privilege to work with the dedicated members of the Commission in the systematic review of our practices relating to the treatment of jurors and the conduct of jury trials. I particularly acknowledge Justice Bob Rose for his conceptualization of the commission and for his leadership in its progress. I hope that our efforts will contribute to improving the overall quality of this venerable and indispensable institution: **The Trial by Jury.**

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INTRODUCTION

Nothing is more fundamental to our justice system than the right to have our disputes decided by a jury of our peers. Trial by jury is a bulwark of our democracy, a cornerstone of our freedom, and is guaranteed by the Bill of Rights.[1] The Nevada Constitution states:

> "The right of trial by jury
> shall be secured to all
> and remain inviolate forever." [2]

The jury system is a fundamental right that links the citizens to the justice system and gives them ultimate authority over the outcome of trials. Jurors pass judgment not only on criminal defendants and civil litigants, but on the jury system itself. Those involved in the jury system know that jurors are not shy about expressing their concerns when they feel the need.

There has been criticism over the past few decades that the jury system is either too slow and cumbersome for our modern society or that jury verdicts are influenced more by the quality of the lawyers or showmanship than the facts and law. In response to these and other criticisms of the modern judicial system, the National Center for State Courts' Civil Justice Reform Initiative in 2000 explored the erosion of the public's opinion about the courts. The initiative hoped to identify key factors contributing to the deteriorating perceptions and to develop strategies and actions to restore public trust and confidence.

In his book, *In the Hands of the People*, United States District Court Judge William Dwyer readily acknowledges the threats to the jury system in the first chapter entitled *The Endangered Jury.* Judge Dwyer opines that the troubles "arise not from the jury but from the way we manage adversarial justice."[3] He warns that the "looming danger is that we will lose [the jury system] if we move too slowly or incompetently to improve the system that surrounds it."[4]

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[1] U.S. Const. amend. XI.
[2] Nev. Const. art. 1, § 3.
[3] William L. Dwyer, In the Hands of the People 5 (2002).
[4] Id.

By the People

State judiciaries have begun to examine their jury systems and devise improvements. In 1993, the Arizona judiciary became the first to establish a commission, followed by a number of other states, including New York, Florida and Colorado.

Concerns about the future of the nation's jury systems prompted the National Center for State Courts to organize the 2001 Jury Summit in New York City, co-sponsored by the New York State judiciary. The Summit's purpose was to examine the current state of the jury system and explore potential improvements and reforms. Nevada's delegates to the 2001 Jury Summit were Nevada Supreme Court Justice Bob Rose, Second Judicial District Court Judge Janet J. Berry, and Eighth Judicial District Assistant District Court Administrator Rick Loop. The information obtained at the Summit prompted Justice Rose to recommend that a study be conducted of the Nevada jury system. The Nevada Supreme Court agreed and established the Jury Improvement Commission, which Justice Rose and Justice Deborah A. Agosti co-chair.

The Nevada Supreme Court's Jury Improvement Commission was so named because the Court believed the Nevada jury system is basically a sound and productive system that is not in need of an extensive overhaul. The Court agreed there could be room for improvement in a system that has not seen much change over the last century. The Commission's mandate was to study the jury system in Nevada and recommend changes to improve efficiency, make the process more user friendly for citizens and lawyers and ensure that verdicts are fair and reliable.

The Jury Improvement Commission is an independent commission of the Supreme Court of Nevada.

Its findings, conclusions and recommendations are those of the members and do not necessarily reflect the opinion of the Supreme Court of Nevada, its justices or staff.

The Commission examined the way cases are processed by the courts and how citizens are called to jury duty and treated when they report. The Commission tried to determine whether jurors have access to all the information and evidence needed to make the best possible decisions. The goal was to recommend ways to improve the quality of justice in Nevada jury trials while making jury duty as trouble-free as possible for citizens who serve. To emphasize this, the Commission calls its study Justice by the People.

The Commission held public hearings in Las Vegas, Reno, and Carson City and listened to judges, attorneys, court administrators, former jurors and the general public. Also, questionnaires were distributed to hundreds of former jurors surveying their opinions of the jury experience. Two of the nation's leading experts in the field, G. Thomas Munsterman and Michael Dann of the National Center for State Courts, met with the Commission to help guide the process. Mr. Munsterman, Director of the Center for Jury Studies at the National Center for State Courts, and Mr. Dann, a former Arizona Superior Court judge who headed that state's first jury study, contributed their knowledge and helped ensure that the Commission's product is complete and meaningful. The Commission also reviewed the reports generated by other states that had examined their jury system practices, as well as leading texts in the field, such as the resource book *Jury Trial Innovations* by Mr. Munsterman.

The Commission believes it has obtained an accurate picture of the way the jury system functions in Nevada and the concerns of all involved.

The Commission realized that to be effective, the jury system must balance the needs of the trial judges, the attorneys, and the court system against the burden on citizens called to jury duty. The Commission could not make recommendations to improve one aspect without rightfully considering the other. The focus of the jury system must always be on achieving just resolutions in legal disputes. To best achieve justice, the legal system must strive to provide all the necessary information to jurors in an intelligible way, while preserving the rights of those who rely on the courts for dispute resolution. With the aim of achieving this end, many of the Commission's recommendations involve the way evidence is presented to jurors.

Other recommendations focus on the way citizens are summoned to jury duty and treated while they perform this vital public service. It is necessary for citizens to understand that jury duty is not just a responsibility, but a right as well. Nevadans should be willing to serve and proud of their service, and Nevada's courts must work to treat jurors with the respect they are due. If citizens and the courts embrace their roles, our jury system, the hallmark of our democracy, will not only survive, but flourish.

By the People

Summary of Recommendations

Case Processing With Efficiency

The first series of recommendations focuses on the management of cases prior to trial, which prepares the cases for trial or facilitates the settlement process that resolves the vast majority of both civil and criminal cases. Settlements and plea bargains reduce the number of disputes that are tried and the corresponding need to summon citizens to jury duty. The Commission strongly believes that the courts should not infringe on the lives of citizens by summoning them to jury duty unnecessarily, nor encumber public funds that could be used for other governmental needs. The Commission was particularly interested in ways of promoting settlement well prior to the day prospective jurors are scheduled to report for jury duty.

The Commission also believes that effective case management by the courts simplifies and facilitates earlier decisions on the legal issues in the cases that go to jury trial, thus reducing the length of cases and the time citizens must spend in jury service.

These recommendations are as follows:

1. **Early Mandatory Case Conferences in Civil Cases** – Within 10 days after the answer to the complaint is filed, the judge should notify all counsel to appear for an early case conference to be held within the next sixty days. The judge, rather than a commissioner, should conduct the conference.

2. **Formalized Settlement Conferences in Civil Cases** – Meaningful settlement conferences should be conducted by a judge or mediator in all cases except those few where the district court judge determines such efforts would be futile.

3. **Meaningful Pretrial Conferences in All Cases** – While pretrial conferences are already required in civil cases, they often are not conducted in any effective way. The Commission believes meaningful pre-trial conferences are extremely helpful in both civil and criminal cases.

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4. **Workloads of District Court Judges Should be Equalized** – The actual workloads of all district court judges should be equal regardless of what type of cases they handle. Judges should perform their routine work at the courthouse during working hours, demonstrating their commitment to the job they were elected to perform and instilling public confidence in the justice system. Judges' availability at the courthouse also promotes effective case management, insuring a workforce to address case processing issues, such as settlement conferences.

5. **Adopt a "No Bump" Jury Trial Policy** – Every case ought to be resolved by the trial date or go to trial at the designated time. To accomplish this, it is necessary to have all judges present in the courthouse, and a meaningful overflow system in place, enforced by a strong chief judge.

6. **The Jury Should Not Be Kept Waiting** – Delay was the most frequent complaint made by former jurors to the Commission. Jury trials should be a court's top priority. Judges should be sensitive to the impact of delay on jurors. Trials should start at the designated time. Judges should require that all pre-trial matters be submitted and decided prior to the time jurors are required to appear and, whenever possible, address legal issues affecting the case after the jurors have been dismissed for the day.

Selecting Citizens For Nevada Juries

The following recommendations involve the statutes and court rules that establish who is eligible for jury service and how prospective jurors are selected, treated and compensated. The responsibility of jury duty should belong to all citizens. Basic fairness and diversity issues demand that prospective jurors be called from all segments of the community. To that end, the Commission believes that the jury pool should include as many citizens from as many walks of life as is possible. No one should be automatically exempt from jury duty, except legislators and their staffs while they are in session. Jury duty requires a certain amount of commitment and sacrifice. Once seated, jurors should be reasonably compensated for their service. Those who serve should not be summoned anew to jury duty for a reasonable period of time. The Commission makes the following recommendations:

7. **Attempt to Use Three or More Source Lists in Selecting Prospective Jurors** – The prevailing current practice is to use Department of Motor Vehicles and registered voters' lists. The Commission believes adding utility users' names should broaden the pool of prospective jurors and consequently reduce the frequency with which citizens are recalled to jury duty.

8. **Eliminate All Statutory Exemptions From Jury Duty** – All jury exemptions listed in NRS 6.020(1) should be eliminated, except for legislators and their staffs while they are in session. There should be no occupations or classes of individuals excused from performing the same public service the average citizen is required to perform.

9. **Increase Juror Pay** – While jurors should be adequately compensated for their service, it is the Commission's view that jury duty is a public service that requires a certain amount of sacrifice. Current jury compensation ($9 appearance fee for responding but not being selected, $15 per day for the first five days of service, and $30 per day for every day of jury service thereafter) is inadequate. The Commission believes the $9 appearance fee is so little as to be inconsequential; many prospective jurors are surprised to receive any such compensation. The Commission recommends that the appearance fee be eliminated for the first two days a citizen appears pursuant to a jury summons, but is not selected. Jurors who are selected to serve on a jury should receive $40 per day, as should any prospective juror who must come to the courthouse for more than two days for jury selection. Eliminating the appearance fee would help offset the added expenses of the increased jury fees.

10. **Eliminate Mileage Allowances for Travel of Less than 65 Miles One Way** – Most jurors travel relatively short distances for jury duty yet receive compensation for each mile traveled. This often results in wasteful expenditure of administrative resources to issue mileage allowance checks for very small amounts. The Commission believes normal travel to the courthouse should be an uncompensated part of jury duty. When a citizen must travel more than 65 miles in one direction, however, compensation should be provided. Mileage allowance in such cases should be increased to the state rate of 36.5 cents per mile.

11. **Adopt a One-Day/One-Trial Policy** – All District Courts should adopt a one-day/one-trial policy in which jurors conclude their obligations in one day unless selected to serve on a jury or involved in ongoing jury selection.

12. **Excuse Jurors from being Called Again for a Period of Time** – Those who have served on a jury should be excused for a reasonable period of time before again being summoned. The Commission believes the period should be at least a year, but understands that it can vary from county to county depending on the local needs and the size of the available jury pool. Wherever possible, those who have served on federal juries should be excused from further jury duty in state courts for the same amount of time as is afforded those who served on a state jury.

Empowering The Jury

Perhaps the most innovative and revolutionary recommendations involve the methods of presenting evidence to jurors. The Commission believes that jurors should have the best information in an intelligible form to aid them in reaching a just verdict. Jurors are generally unfamiliar with the intricacies of the law and trial procedures. Former jurors complained at public hearings that they were not aware of what was expected of them until they received the instructions on the law just before final arguments. They complained the trials were sometimes confusing and nearly all advocated allowing jurors to ask questions of witnesses to clarify issues. The Commission understands that attorneys would lose a small measure of control over trial strategy and may be required to alter the way they present evidence as a result of some recommendations. The Commission nevertheless concludes that problems for counsel like the infusion of some uncertainty in trial strategy as a result of jurors; questions to witnesses is warranted. On balance, it is more important for jurors to have the opportunity, through more active participation in the trial, to fully understand all the evidence as it is presented. The Commission makes the following recommendations:

13. Juror Notebooks – In every case, jurors should be provided with paper and pencils to take notes. In appropriate cases, jurors should be provided with individual notebooks to hold copies of instructions and exhibits, their personal notes and photos of witnesses.

14. Instructions on the Law at the Beginning of Trial – Jurors should be instructed on the critical law in the case before the trial begins, and be provided with copies of those instructions, so they can focus appropriately on the testimony and evidence.

15. Permit Jurors to Ask Questions in All Cases – Jurors should be permitted to ask clarifying questions of each witness at the conclusion of a witness's testimony. The juror's written question is submitted to the judge, who, after consulting with counsel, rules on the evidence the question is designed to elicit.

16. Mini-Opening Statements – Before beginning jury selection, attorneys should make brief statements to inform prospective jurors generally as to the nature of the case. The prospective jurors may become interested in the case from the outset, minimizing the number who seek to be excused from jury service.

17. **Clustering Evidence on Complex Issues** – The District Court should have the discretion to cluster presentations of all technical, medical or scientific evidence at one time during trial, whether it comes from the plaintiff/prosecution, or defense. Hearing all the evidence on complex issues at one point in the trial should help jurors intelligently weigh the technical evidence. Attorneys should also be permitted to make mini-closing arguments solely on the technical issues immediately after the evidence has been presented.

18. **Increased Bailiff Training and Court Control** – Bailiffs are the communication link between juries and the courts. They assist and protect the jurors. Bailiff are critical to the proper functioning of a jury trial so they need to be properly trained. The district court should also have sufficient authority over their job performance.

19. **Protection of Jurors** – A hallmark of our justice system is that all jury trials are open and public, and the identities of the jurors are known. On rare and extraordinary occasions, however, when there may be a substantial threat to the safety of the jurors, the identities of the jurors should not be publicly disclosed. The decision to protect jurors' identities should always be handled in a manner which preserves a defendant's right to a fair trial.

Issues Considered And Rejected

The following issues were fully considered by the Commission, and addressed in the public hearings. The Commission believes that enacting these proposals would not further justice in the jury system.

Reduction of Peremptory Challenges From 8 to 4 in Capital Cases, and From 4 to 2 in All Other Cases – This was considered as a way to enhance the diversity of juries and to shorten the time it takes to select juries. The Commission believes that the present system has worked well and has produced sufficiently diverse juries.

Permit Jurors to Discuss Testimony and Evidence Mid-Trial, Before Deliberations – While this proposal was explored to determine if it would help jurors better understand evidence, the Commission concluded that it could cause more new problems than it might remedy. A large majority of the former jurors who testified were opposed to the idea.

Justice

Recommendations

CASE PROCESSING WITH EFFICIENCY

Minimizing Delays Through Pretrial Procedures

Pretrial planning is essential to ensure that trials are orderly and fairly presented. Ideally, a jury trial should begin and proceed to verdict with only normal interruptions. Ideally, judges presiding over a jury trial should devote six or seven hours a day in court to the trial. The ideal is often not attainable because of evidentiary issues, scheduling or other problems with witnesses or jurors, or emergencies in other cases. This seems to be the norm in most districts.

In the Eighth Judicial District, however, a jury trial is subject to additional interruptions and significant delays. Current practices in that district as well as its enormous volume of cases contribute to the problem. For example, since most civil motions are orally argued, a judge's law and motion calendar usually consumes valuable time that would otherwise be spent trying the jury case.

Additionally, the current system for assigning cases has resulted in an inequitable workload between the judges who specialize in civil and those who hear only criminal cases, with the judges who handle only civil cases bearing far heavier caseloads. One civil judge has resorted to beginning trials at 8:30 a.m. and ending at 1:30 p.m. each day, and doing the remainder of his work thereafter.

Another judge told the Commission that he handled routine court matters throughout the morning and then went to a temporary courtroom rented by Clark County in an adjoining building to preside over construction defect jury trials in the afternoon. One attorney told the Commission during a public hearing that he was involved in a jury trial being tried every other week. The trial would be conducted for a week and then the district court judge would use the next week to catch up before resuming the trial the following week.

These sorts of schedules place an unfair burden on the citizens serving as jurors and hamper their abilities to remember the evidence. An Eighth Judicial District Court judge complained: "Conducting jury trials in this district is like a M.A.S.H. unit operation."

The citizens of Nevada deserve better than a M.A.S.H. approach to jury trials. Jury trials should be a judge's most important business. Once a jury is empanelled, trials should be conducted six or seven hours a day, every day, until concluded.

Although the Eighth Judicial District's caseload is very high and the Commission agrees that additional judges are needed, there are a number of innovations the district could implement to process jury trials more efficiently and less expensively.

The Commission urges adoption of the following recommendations designed to eliminate the problems and delays that have become routine in some Nevada courts.

Judicial Workloads

Judicial workloads should be equally divided among all district court judges. In districts where some judges hear only civil cases and others hear only criminal cases, an inequity may exist. Judges in the Eighth Judicial District with civil calendars have heavy and time-consuming caseloads, while judges with criminal calendars have lighter workloads.[5]

Each judge should be required to be at the courthouse during working hours unless ill, on vacation or away on court related projects or for continuing education.

The chief judges in the Second and Eighth Judicial Districts have authority to assign overflow trials to judges who have no trials scheduled. This authority should be exercised more fully to eliminate needless continuances and help equalize workloads.

A system should be devised whereby a judge who is not in trial hears the law and motion calendar for a judge presiding over a jury trial. A visiting judge or a senior judge also could do this. Reassigning a judge's law and motion calendar would free valuable time for jury trials. Alternatively, district courts may want to consider the eliminating oral arguments on motions and instead require attorneys to submit motions on the briefs. The courts could then promptly decide motions. The Commission notes that the Second Judicial District successfully decides motions by submission. Another option for the Eighth Judicial District would be to move to a four-day jury trial work-week, reserving law and motion calendars and non-jury trials for the fifth day.

[5] The Nevada statewide trial court caseload for the 2000-01 fiscal year included 11,782 criminal cases and 23,123 civil cases. Nevada Supreme Court, Annual Report of the Nevada Judiciary, Fiscal Year 2000-01, tb. 1.

"No Bump" Policy

To ensure that litigants will proceed to trial on their scheduled day, the Commission recommends all district courts adopt a "no bump" policy. This policy would promote resolution of both civil and criminal cases by requiring trials to start on the designated date. The Commission urges that all courts give priority to jury trials over all other matters. The Commission proposes the following case management policy:

1. Death penalty cases take priority over all other settings;
2. Civil trials or trials which are the most time-intensive or complicated should remain in the docketed department;
3. In the event of a case overflow situation, the "in custody" criminal trials or least time-consuming or complex cases should be reassigned to another department;

The procedure for re-assigning cases should be as follows: A judge's administrative assistant should first try to find a department that is willing to accept transfer of an overflow case. The assistant should provide the overflow department with the case caption, attorneys, charges (or causes of action) and the projected number of days for trial. If no department is available by noon on the Thursday preceding trial, the assistant should contact the Chief Judge for reassignment of the case. The Chief Judge should review the cases and make assignments or calendar adjustments as necessary. In the event a case settles, the judge who requested transfer of an overflow case should take back the overflow case. Judges may set trials on a trailing calendar. Counsel should be prepared to commence trial on any day during the week the trial was originally scheduled. Counsel should presume their trial will be heard in one of the district's departments. Counsel will be notified of their department assignment by the Friday preceding trial. Counsel should not be permitted to exercise a peremptory challenge against the department assigned to hear an overflow case.

A "no-bump" policy has been in effect in the Second Judicial District Court for the past three years. During that time, only two trials have been "bumped" as a result of judicial unavailability. The "no bump" policy forces the parties to prepare for trial and schedule expert witnesses with certainty. The policy has resulted in significant settlement of civil cases and entry of pleas in criminal cases.

Judicial Case Management

Testimony received by the Commission has illustrated that direct judicial involvement in the management of civil cases significantly helps litigation move swiftly through the court process and substantially aids in the settlement of cases.

In the Second and Eighth Judicial Districts, a civil case is initially placed under the supervision of the Discovery Commissioner and a schedule is set for discovery and pretrial motions. In the Second Judicial District, judges have implemented a system that directly involves the judge at an early stage in each civil case filed. Approximately 90 days after a civil case is filed, the judge and attorneys hold an early case conference to consider that case's specific requirements. On most occasions, this results in a recommendation for a settlement conference before another judge, as well as the setting of firm dates for the completion of discovery.

Several Second Judicial District court judges have indicated that their personal involvement in every civil case at an early stage in the litigation process expedited the case and increased the possibility of early settlement.

The Commission believes this is a valuable procedure and recommends the following Early Mandatory Case Conference policy be adopted to expedite settlement or other appropriate disposition of the case:

1. A Pretrial Scheduling Order shall be issued no later than 10 days after the filing of the Answer to the Complaint or motion filed under Nevada Rule of Civil Procedure 12. Counsel for the parties shall set a mandatory pretrial conference with the court to be held within 60 days of the filing of the Pretrial Scheduling Order.
2. Counsel and parties must be prepared to discuss the following:
    a. Status of NRAP 16.1 settlement discussions and an assessment of possible court assistance
    b. Alternative dispute resolution techniques appropriate to the case
    c. Simplification of issues
    d. The nature and timing of all discovery
    e. Any special case management procedures appropriate to the case

f. Trial setting
g. Other matters that may aid in the prompt disposition of the action

3. Trial or lead counsel for all parties and the parties (if the party is an entity, an authorized representative) must attend the conference
4. A representative with negotiating and settlement authority of any insurer insuring any risk pertaining to the case must attend
5. Upon request and/or stipulation of counsel, and at the discretion of the court, a party or parties may appear telephonically.

Meaningful Pretrial Conferences

District courts should embrace all forms of pretrial dispute resolution. The Commission recommends the use of pretrial conferences with the district judge's full involvement to decide issues prior to trial and streamline the case as much as possible for jury presentation. One attorney contrasted the practices of two district court judges in his district – one conducts a pretrial conference and decides all possible issues prior to trial while the other conducts no pretrial conferences. The attorney said that the two different judicial approaches produce two distinctly different results. When one or more formal pretrial conferences are held with the judge actively participating, many legal issues are decided before trial and delays are reduced. When no pretrial conference is held, all of the legal issues that arise are necessarily determined during trial, wasting valuable court time, causing jurors and witnesses to sit and wait, impacting witness's schedules and unnecessarily increasing the trial costs.

The Commission believes district court judges should actively engage in pretrial case management.

Formalized Settlement Conferences

The expeditious settlement of cases in litigation achieves many desired results. The parties agreement to a settlement, eliminates the stress, uncertainty, and cost of litigation. The settled case is removed from the court's case inventory, freeing up judicial resources for the remaining civil and criminal cases.

When courts institute a civil settlement program, the results are impressive.

Nevada's Federal District Court instituted a mandatory settlement program for a defined type of civil case, calling it Early Neutral Evaluation.[6] U.S. Magistrates, who would not try the case, conduct the early neutral evaluation. This program has achieved an 82% settlement rate.[7] Nevada's state district judges hold many settlement conferences, most of which result in settlement. The Commission commends those district judges who conduct settlement conferences in cases that are not on their own calendar.

The Nevada Supreme Court's mandatory civil settlement program is in its fourth year and consistently settles more than half of the civil cases appealed.[8] This result is achieved even though there is a declared winner and loser before the case is appealed. The Commission is convinced that most litigated civil cases could be settled by an effectively conducted settlement conference. The incorporation of such conferences into a meaningful case management system would result in a significant reduction of civil cases requiring a jury trial.

The Commission recommends that all judicial districts establish meaningful pretrial settlement conferences for cases where the parties or the district judge believe there is a reasonable opportunity for settlement. The ultimate time saving benefits from a well run, organized settlement program ought to outweigh any initial increased burden on the court. It should reduce judges' civil calendars, with fewer civil cases going to trial.

The Commission recommends that all district court judges be provided with mediation/settlement training at the National Judicial College. To maintain the integrity of the litigation process, the judge assigned to conduct the trial should be different from the judge conducting the settlement conference. Such a policy would enhance the litigants' confidence, in the event the case is not settled, that the trial judge is untainted by the candor necessarily expressed at the settlement conference. The actual and perceived integrity of the judicial branch hinges upon the judges' collective dedication to swift, efficient, reliable justice. Innovation in the pretrial case management arena will only enhance the quality of justice in Nevada.

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[6] Early Neutral Evaluation in the District of Nevada: An Evaluation of the District of Nevada's ENE Program (Aug. 2000).

[7] Id. at 6.

[8] NRAP 16. Since the beginning of the program in March 1997, 55% of the cases appealed have been settled. (1463 cases of the 2909 cases appealed have been settled since March 1997). Information provided by the Nevada Supreme Court Clerk of Court, May 2002.

Minimizing Delays Through Pretrial Procedures

RECOMMENDATIONS

1. The jury should not be kept waiting. Delay was the most frequent complaint made by the former jurors to the Commission. Jury trials should be a court's top priority. Judges should be sensitive to the impact of delays on jurors. Trial should start at the designated time. Judges should require that all pretrial matters be submitted and decided prior to the time jurors are required to appear, and whenever possible, address legal issues affecting the case after the jurors have been dismissed for the day.

2. Early Mandatory Case Conferences—Within 10 days after the answer to a complaint is filed, the judge should notify all counsel to appear for an early case conference to be held within the next 60 days. The judge, rather than a commissioner, should conduct the conference.

3. Formalized settlement conferences should be held in civil cases. Meaningful settlement conferences should be conducted by judges or mediators in all cases except those few where the district court judge determines such efforts would be futile.

4. Meaningful pretrial conferences should be held in all cases. While pretrial conferences are already required in civil cases, they often are not conducted in any effective way. The Commission believes meaningful pretrial conferences are extremely helpful in both civil and criminal cases.

5. Workloads of District Court judges should be equalized. The actual workloads of all District Court judges should be equal regardless of what type of cases they handle. Judges should perform their routine work at the courthouse during working hours, demonstrating their commitment to the job they were elected to perform and instilling public confidence in the justice system. Judges' availability at the courthouse also promotes effective case management, ensuring a workforce to address case processing issues, such as settlement conferences.

6. **A "No Bump" jury trial policy should be adopted. Every case ought to be resolved by the trial date or go to trial at the designated time. To accomplish this, it is necessary to have all judges present in the courthouse, and a meaningful overflow system in place, enforced by a strong chief judge.**

Using Technology In Jury Management

Most Nevadans have limited contact with the justice system. When they do, it is usually because they are summoned to jury duty. Nevada has experienced phenomenal growth in recent decades, and is ranked as the fastest growing state in the union. Since 1986, Nevada's population has increased 108 percent. Between 1996 and 2000, nearly 400,000 people migrated to the state.[9] This population boom, which is expected to continue for at least the next decade, has placed a substantial burden on Nevada courts to meet ever-increasing demands for jury trials. The ability to efficiently process the panels summoned for jury duty has become essential.

Throughout the country, the addition of new or improved jury management technology is the top reform implemented in state and federal courts.[10]

There are two principal elements that must be addressed when automating the jury management process. The first is a comprehensive jury management system that can manage the needs of both the courts and the citizens summoned. An effective system must encompass all aspects of jury management from issuing summonses for jury duty to facilitating final payment of jury compensation. Additionally, an automated jury management process must be capable of tracking and providing the timely and accurate analysis of jury utilization.

The second element involves the way prospective jurors and jurors access and

[9] Nevada State Demographer's Office, Nevada County Population Estimates July 1, 1986 to July 1, 2000 (2000), available at http://www.nsbdc.org/demographer/pubs/images/2000_estimates.pdf.
[10] Robert G. Boatright, Improving Citizen Response to Jury Summons: A Report with Recommendations 43 (American Judicature Society) (1998).

interact with the jury management system. Because of the great disparity in population in Nevada's counties, the jury management needs of those courts vary considerably. The rural counties all together summon only a few thousand citizens to jury duty each year. Traditional phone systems are typically adequate to handle the needs of these jurors and courts. In contrast, the Eighth Judicial District Court summons as many as 230,000 residents each year. The number of telephone calls to the Eighth Judicial District Court's jury commission from those summoned can exceed 1,500 per day. A traditional telephone bank cannot meet the needs of Clark County without a substantial expenditure of personnel, equipment and facilities resources.

To handle the telephone volume expeditiously and efficiently, the Eighth Judicial District Court recently installed a computerized call management system. The system combines integrated voice response and automatic call distribution capabilities, thus allowing the jury commission to handle double the number of calls while saving 20 percent in full-time personnel costs. Although the impact would not be as significant in smaller counties, computerized call management systems would prove to be a benefit wherever they are installed.

The Commission believes that automated jury service systems are essential to meeting the ever-increasing demand for juries throughout Nevada and continuing the high level of support provided to those called to jury duty. Automation has the potential to improve customer service, reduce manpower costs and provide the district courts with a superior management tool.

The Commission recommends that computerized jury and call management systems meet the following criteria:

JURY MANAGEMENT SYSTEMS – An effective jury management system must provide end-to-end capabilities. Non-computerized jury management systems tend to be labor-intensive and are often unable to keep pace with growth and the administrative needs of the district courts and the statistical requirements from the Administrative Office of the Courts of the Supreme Court of Nevada.

A jury management system should:

1. Randomly select a pool of prospective jurors from the source database
2. Automate summons processing

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3. Expedite the juror check-in process
4. Randomly select associated voir dire panel members
5. Permit and facilitate maximum flexibility in constituting and reconstituting panels
6. Generate all essential documents (i.e., summons, payment vouchers or checks, failure to appear letters, and attendance verification documentation, audit-compliant payroll reports)
7. Create trial records and juror utilization reports
8. Provide statistical ad hoc reports in support of internal and external requirements
9. Improve the courts' ability to manage juror utilization
10. Provide easy access and use for both jurors and staff

INTEGRATED VOICE RESPONSE – As part of a jury management system, a computerized phone system enhances the customer service provided to prospective jurors while reducing the manpower associated with jury departments. A computerized system ought to assist jury services personnel with the pre-screening of prospective jurors and compilation of qualification data. It also should permit juror rescheduling without staff input.

The Commission considers the following capabilities to be the minimum requirements for an automated call system:

1. Be fully compatible with the selected jury management system or software
2. Permit automatic scheduling, confirmation and response to frequently asked questions
3. Utilize "screen pop" technology (a new technology that permits data retention when transferring calls from the automated system to an operator)
4. Be sufficiently expandable to handle projected growth

Other states have reaped many benefits from installing automated jury management systems. For example, New York's automated system handles calls from jurors who need to determine when they are scheduled to appear, and permits them to

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reschedule jury service for a more convenient time. It is estimated that it saves $270,000 annually in juror fees alone.[11] Additionally, New York has implemented a juror hotline that helps the courts respond quickly to problems ranging from inadequate air conditioning in deliberation rooms to threatening contact from litigants.[12]

In light of the benefits realized from the automated systems in New York State and Clark County, the Commission recommends that Nevada implement such systems statewide and update existing systems to best serve the citizens when they are called to jury duty.

Using Technology in Jury Management

RECOMMENDATIONS

1. **Automated jury management systems, like those implemented in New York State and Clark County, Nevada, should be utilized statewide in Nevada to improve the abilities of counties to summon and process citizens for jury duty. Such interactive systems permit citizens to communicate more efficiently with the counties and the courts.**

2. **Existing technology systems should be updated when necessary to best serve citizens called to jury duty.**

3. **In rural counties where fiscal constraints prevent full service technology systems from being feasible, the counties should begin implementing technology with available funding and seek additional funding outside the county structure to finance the needed technology.**

[11] Continuing Jury Reform in New York State 19 (Jan. 2001), available at http://www.courts.state.ny.us/jury/reform.pdf.
[12] Id. at 25-27.

SELECTING CITIZENS FOR NEVADA JURIES

Who is Summoned to Jury Duty And What Source Lists Are Used

> The American system of trial by jury is unique. No other nation relies so heavily on ordinary citizens to make its most important decisions about law, business practices, and personal liberty – even death. Ideally, Americans take their participation seriously lest they someday stand before their peers seeking justice.[13]

Trial by jury is the right of every person in the United States. This is guaranteed by the United States Constitution and the Nevada Constitution, which both state, "the right of trial by Jury shall be secured to all and remain inviolate forever."[14] Jury service not only provides the chance to participate directly in the trial process, but it may be one of the most important acts undertaken by American citizens. It is every citizen's right, privilege, and responsibility.

The Commission recommends guidelines for Nevada courts relating to who is summoned for jury duty. It is not the Commission's intent to reinvent what has been accomplished in jury management prior to the Commission's study. In keeping with this objective, the Commission's recommendations parallel the standards already set forth by the American Bar Association regarding jury management. The ABA recommends that jury service not be denied or limited by discrimination on the basis of any cognizable group, including identification by race, economic background, occupation, or religion.[15] The ABA also recommends drawing jurors from regularly maintained lists of residents that are representative of the adult population.[16]

The Commission's goal is to ensure that all eligible persons have the opportu-

[13] Stephen J. Adler, The Jury: Trial and Error in the American Courtroom, (1994) (quoting from hard-cover jacket).
[14] U.S. Const. amend. XI; Nev. Const. art. 1, §3.
[15] Standards Relating to Juror Use and Management, 1993 A.B.A. Judicial Admin. Div. Comm. on Jury Standards 3.
[16] Id. at 10.

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nity to serve as jurors and that jury pools represent a broad spectrum of the eligible populace. Reaching 80% of the qualified population is a reasonable goal.[17]

The best source lists must be readily available, practical to obtain and, most importantly, represent a fair cross section of the adult population in each county.[18] The Commission recommends that master lists comprised of three sources and no less than two sources be maintained.

There are many list sources to consider when compiling master lists. Examples include lists of newly naturalized citizens, real estate tax rolls, utility companies' customer lists, welfare rolls, lists of individuals with children enrolled in public schools and lists of persons issued hunting and fishing licenses.[19] Many of these lists have been collectively used with success in rural counties. For example, Seventh Judicial District Judge Dan Papez of Ely has reached an agreement with the local power company to obtain a list of its customers for the jury pool. This customer list is kept confidential by the court.

Selecting source lists and combining them presents a myriad of potential problems, such as availability, duplication, bias and cost. Male gender bias is a factor when considering hunting and fishing licenses, real estate tax rolls and many utility lists. Names on real estate tax rolls and utility lists may be second home owners, landlords or individuals who do not reside in that judicial district.

The two optimum source lists are Voter Registration and Department of Motor Vehicles records. Exclusive use of Voter Registration records, however, will prevent the counties from reaching many potential jurors. Non-white and younger members of the population and those in lower economic classes register to vote at substantially lower rates than other groups.[20] The DMV records seem to offer the best representation of persons eligible to serve. Some jurisdictions, like Clark County, use DMV records exclusively.

[17] Id. at 12. The ABA states that a list covering 80% of the adult population in a jurisdiction is a reasonable goal. However, many jurisdictions combine source list and are 90% inclusive.
[18] See Taylor v. Louisiana, 419 U.S. 522 (1975). Relying on a House and Senate Committee Report, the Court stated that "the requirements of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." Id. at 530, relying on S. Rep. No. 891, at 9 (1967).
[19] Jury Trial Innovations 35-36 (G. Thomas Munsterman et al. eds., 1997).
[20] In 2000, 52.3% of the Nevada voting age population was registered to vote. U.S. Bureau of Census, U.S. Dep't of Commerce, Statistical Abstract of the U.S. tb. 402 (2001).

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Who is Summoned to Jury Duty And What Source Lists are Used

RECOMMENDATIONS

1. **Three source lists should be utilized by every county or, at a minimum, counties combine Voter Registration and DMV records into single master lists of potential jurors.**

2. **Other lists noted in this section should be used to supplement the Voter Registration/DMV lists, but should not be the primary sources to reach potential jurors.**

3. **In rural counties with limited numbers of individuals in the jury pools, as many lists as possible should be used to ensure that all eligible citizens are available for jury duty.**

Exemptions From Jury Service

> What gives you the right to sit there and judge someone else? The Constitution does. When you're called to serve, exercise that right.[21]

In states such as New York, innovative advertising campaigns such as this one, taken from the side of a city bus in New York City, coupled with the elimination of automatic occupational exemptions has created a resurgence in the responsiveness to jury summons and increased the desire of jurors to serve. The elimination of automatic occupational exemptions for jury service has placed such notables as Rudolph Giuliani, Dan Rather, Ed Bradley, Marisa Tomei and Dr. Ruth Westheimer in the jury box. Allie Sherman, former coach of the New York Giants, said, "Jury duty should become part

[21] Continuing Jury Reform in New York State, supra note 12.

of everyone's game plan."[22] The elimination of automatic exemptions gives everyone the opportunity to fulfill their constitutional right, "to sit there and judge someone else."[23]

Twenty-five states and the District of Columbia have no automatic occupational exemptions[24] and three states have only a single exemption.[25] Eliminating exemptions based on profession is supported by every state or national study committee that has ever studied the jury system.[26]

New York has been extremely progressive in its elimination of automatic occupational exemptions. Chief Judge Judith Kaye of the Court of Appeals of the State of New York initiated the jury reform program, which in 1995 abolished all exemptions from jury duty. This has increased the jury pool enormously and also created a more diverse and more inclusive jury pool. Chief Judge Kaye herself was called to jury duty in August 1999.[27] Kaye's service and the service of other notables reflect the spirit that jurors be selected from a diverse and truly random pool. As our legal system is founded on trial by jury, the Commission believes that increasing the pool of available jurors is a critical first step in jury reform.

In an effort to broaden the jury pool in our own courts, the Commission believes that the automatic exemptions from jury service based on occupation should be eliminated. Currently NRS 6.020(1) allows exemptions for doctors, lawyers, dentists, judges, employees of the legislature, county clerks, recorders, assessors, police officers, prison officials and railroad workers.[28] Many of these exemptions are antiquated and make little sense.

Strong policy reasons exist for this proposed change. Broad citizen participation in jury service should be encouraged. Civil litigants and those accused of crimes are entitled to have their case decided by juries. Blanket exemptions exclude well-

[22] VIP's Pay Tribute to Jury Service, New York State Jury Pool News 2 (Winter 1998).
[23] Continuing Jury Reform in New York State, supra note 20 at 31.
[24] Bureau of Justice Statistics, U.S. Dep't of Justice, State Court Organization tb. 40, 269.
[25] Id. (Georgia provides exemptions for people who are permanently mentally or physically disabled while Maryland and Pennsylvania provide exemptions for active military service only).
[26] Jury Trial Innovations 35-36 (G. Thomas Munsterman et al. eds., 1997).
[27] Paula Span, Giuliani Has His Day in Court, as a Juror, Washington Post, September 1, 1999, at C2.
[28] NRS 6.020 (Exemptions from jury service).

informed citizens from juries and prevent broad citizen participation on juries. Without these exemptions, the perception of bias, prejudice, or favoritism in the system is eliminated.

Eliminating exemptions ought not cause unnecessary hardships for those previously exempted or for those who depend upon them. Physicians, for example, may not have the ability to appear upon the date named in the summons without first rescheduling patients who rely upon them for their health. The Commission envisions each district offering flexible scheduling for those citizens whose call to jury duty will necessarily impose upon their professional obligations.

Eliminating exemptions would also have other beneficial effects, such as giving those who work within the justice system, such as lawyers and judges, an inside view and consequential increased sensitivity to jurors' perceptions and needs. The Commission recommends that the qualifications and exemptions of jurors be limited to persons over the age of 70, persons over the age of 65 who live 65 miles or more from the court, and legislators and their staffs while the Legislature is in session. The Commission notes that attempts to eliminate occupational exemptions have failed in the past. In light of the success experienced by other states, the Commission urges the Legislature to eliminate the existing occupational exemptions.

Problems caused by automatic occupational exemptions are particularly acute in rural Nevada. In sparsely populated counties, many citizens find themselves on jury panels year after year, and occasionally more than once during the same year. Other citizens, however, never serve because they are employed in occupations that are statutorily exempt. For example, the elimination of exemptions for correctional officers — as many states have done — would increase the jury pool by approximately 300 citizens in White Pine County, where the Ely State Prison is located. Because of White Pine County's otherwise small juror pool, the availability of the additional 300 citizens would be significant. Moreover, while an argument might exist to exempt that occupation from criminal cases, no argument exists to justify the automatic exemption from civil cases. The judge, during the jury selection process, would be in the best position to respond to any suggestion that a particular correctional officer's absence from his or her duties at a given time would create an unwarranted security risk for the prison.

The Commission heard testimony from some rural county representatives that if certain occupations are not exempted, such as doctors who are in short supply in the

rural areas, significant problems for the communities affected could result. If the lone doctor were summoned to jury duty, there would be no one to respond to a medical emergency.

The Commission recognizes these concerns. Judges in rural counties, however, are able to effectively address these very legitimate concerns using courtesy exemptions and temporary exemptions as provided by NRS 6.030.[29] This procedure provides judges with great flexibility to evaluate a request to be excused from jury duty. Exemptions should be based on undue hardship rather than inconvenience. Deferred service of short duration should be the preferred alternative to outright and permanent release from jury service.

Each district should continue to use the categories of discretionary exemptions that they currently employ. For instance, in Washoe County, the judges have discretion to exempt students, nursing mothers and parents who home-school children.

Eliminating automatic exemptions means that more first time jurors will serve. Obviously, new faces and occupations in jury rooms mean a broader cross section of jurors who are more representative of the community. Larger jury pools reduce the frequency and duration of service by all and spread the benefits and burdens of jury service more fairly.

Exemptions from Jury Service

RECOMMENDATIONS

1. **NRS 6.020(1) should be amended by the 2003 legislative session to eliminate all automatic occupational exemptions from jury service except for legislators and their staffs while the Legislature is in session.**

2. **The county clerk or jury commissioner should be flexible and accommodating in scheduling jurors. Elimination of automatic occupational exemptions is not meant to impose an undue burden on people, but to broaden the pool of potential jurors.**

[29] NRS 6.030 (Grounds for excusing a juror).

JUROR COMPENSATION

Since 1993, citizens in Nevada have been paid $9 per day for appearing in response to a jury summons.[30] If selected, a juror is paid $15 for the first five days of service and $30 per day thereafter.[31] If a citizen is seated as a juror on the first day, he or she receives $15, rather than $9.

Some businesses continue to pay their employees' salaries during jury service either voluntarily or pursuant to a collective bargaining agreement. The Commission applauds those employers and encourages others to do the same. Unfortunately, many summoned for jury duty lose all or most of their wages while they serve. While this responsibility of citizenship necessarily involves sacrifice and inconvenience, a reasonable level of compensation is necessary to soften the financial impact of service.

One man testified that when he served during a lengthy trial he used his vacation and sick leave days to maintain his income level, but still had to serve several days with his only compensation being the jury fees. He emphasized that despite the hardship, he would do it again if he were summoned. While this commendable dedication is common among former jurors, the Commission believes that such sacrifices should be minimized.

The Commission recognizes that the present jury fee structure and level of compensation is not adequate, especially for jury service that lasts more than two or three days. On the other hand, the Commission is mindful that county governments pay the jury fees in criminal cases, and a large increase could adversely impact their budgets.

The Commission believes the $9 appearance fee provides neither meaningful compensation nor even minimal motivation to appear. The jury commissioners and clerks who were resources for this report stated that many prospective jurors are surprised to receive any compensation at all for their initial appearances.

The $15 fee paid the first five days of service is also insignificant and insufficient to either address the impact of lost wages or to pay child care expenses for parents

[30] NRS 6.150(1).
[31] NRS 6.150(2).

responsible for the care of small children. The $30 fee paid after five days of jury duty, while more substantial, is still inadequate.

Although many states compensate jurors at a poor rate, those states that have reviewed their jury compensation levels have recommended substantial increases. Leading the increases are New York at $40 a day, and Colorado, Connecticut and Massachusetts at $50 per day.[32] New Mexico pays the minimum wage of $5.15 per hour, making that jury fee schedule one of the highest if jurors serve eight-hour days.[33]

The Commission believes that $40 per day is the minimum amount for jury service and the minimum amount that should be paid to a person sitting on a jury in Nevada.

To reduce the fiscal impact on the counties, payment should not begin until a juror has begun hearing the case or until after a prospective juror has spent two days at the courthouse without being selected, whichever occurs first. Jurors who are selected to serve on a jury should receive $40 per day, as should any prospective juror who must come to the courthouse for more than two days for jury selection.

Because the $9 appearance compensation is inconsequential and the administrative costs to disburse these checks are high, the Commission recommends that appearance compensation be abolished.

This proposal's financial impact on most counties is charted on the following page.

Whatever rate of jury compensation the Legislature sets, it would be wise to periodically review and adjust it. Any new legislation affecting juror compensation ought to include a provision for regularly scheduled legislative review.

[32] G. Thomas Munsterman, What Should Jurors be Paid?, 16 The Court Manager 2, 12.
[33] Id.

TABLE 1

JURY FEES: Statistics and Projected Impact (1)

County	Trials	Total Jury Fees Paid	Appearance Fees Paid	Fees Paid to Selected Jurors	Projected Fees at $40 (2)	Projected Savings (3)	Projected Costs (4)
Clark	254	$482,695	$385,640	$97,055	$259,136	$223,559	
Washoe	97	$102,339	$49,338	$53,001	$141,512		$39,173
Carson City	9	$7,956	$2,961	$4,995	$13,336		$5,380
Churchill	3	$2,061	$1,710	$351	$937	$1,124	
Douglas	5	$11,307	$8,172	$3,135	$8,370	$2,937	
Elko	19	$34,703	$9,750	$16,293	$43,502		$8,799
Esmeralda	1	$1,022	$695	$327	$873	$149	
Eureka	0						
Humboldt	4	$3,006	$1,233	$1,773	$4,733		$1,727
Lander	0						
Lincoln	1	$993	$603	$390	$1,041		$48
Lyon	6	$11,073	$7,117	$3,955	$10,559	$514	
Mineral	1	$627	$432	$195	$520	$107	
Nye	13	$7,963	$4,453	$3,510	$9,371		$1,408
Pershing	1	$1,787	$1,319	$466	$1,244	$543	
Storey	2	$1,954	$768	$1,039	$2,774		$820
White Pine	10	$7,705	$4,340	$3,364	$8,981		$1,276
TOTALS	426	$677,191	$478,531	$189,849	$506,889	$228,933	$58,631

TOTAL ESTIMATED SAVINGS - $170,302 (5)

(1) All figures from fiscal year 2000-01, provided by court/county clerks

(2) Calculated by multiplying the "Fees Paid to Selected Jurors" by 2.67 to establish the difference between the $15 per day currently paid and the $40 per day fee recommended by the Jury Improvement Commission. The Commission also recommends abolishing appearance fees (currently $9 per day until a summoned citizen is seated on a jury or dismissed and sent home) for two days of the jury selection process. While jurors are paid $30 per day after serving five days, the $15 level was used to demonstrate the most adverse impact the proposed change might have.

(3) The counties that are projected to realize savings in jury fees and the amounts saved if the recommended increase in jury fees to $40 per day and abolition of appearance fees for two days had been in effect.

(4) The counties that are projected to face additional costs in jury fees and the amounts if the recommended increase in jury fees to $40 per day and abolition of appearance fees for two days had been in effect.

(5) Total jury fees paid minus projected jury fees at $40

STATISTICS ARE FOR BROAD COMPARISONS ONLY

The projected figures reflect what the cost and impact on counties would have been had the Commission's recommendations been in place during fiscal year 2000-01. They are calculated at the highest level possible to ensure there is no likelihood of underestimating the impact. Specifically, the projection assumes all jurors in that fiscal year were paid at the $15 per day rate when, in reality, a portion of the jurors were compensated at the $30 per day rate because they served more than five days. All jury fees are reflected, even though jurors' compensation in civil trials is the responsibility of the parties.

The figures in the statistical evaluation are offered for broad comparisons only since there are many variables in the system, such as the number and length of trials, number of alternate jurors, last minute settlements that result in summoned citizens being sent home, number of jurors summoned and whether the trials are civil or criminal.[34] The greatest variable involves the number of jury trials held in rural judicial districts. Although the number of trials in Clark and Washoe counties remained relatively constant, the number of trials (and consequently the number of citizens summoned to jury duty) can and do increase or decrease dramatically from year to year.

Despite these variables and the projection of fiscal impact at the highest rate, it is clear that adopting the Commission's recommendations would have a minor negative impact on about half the counties and cause a fiscal savings in the other half. While it would have cost Washoe County a few thousand dollars had the recommended jury fee reforms had been enacted, Clark County would have saved nearly a quarter of a million dollars.[35]

[34] Civil Trials have eight jurors plus alternates, if any, while criminal trials have 12 jurors plus alternates, if any.
[35] See Table 3: Jury and Mileage Fees: Projected Impact.

TABLE 2

MILEAGE FEES: Statistics and Projected Impact

County	Mileage Fees Paid (1)	% of Jurors From Beyond 65 Miles (2)	% and Costs For 65-mile Jurors (3)	Projected Mileage Fees (4)	Projected Savings (5)	Projected Costs (6)
Clark	$181,710	3.4%	7% or $12,500	$22,812	$158,898	
Washoe (7)	$24,458	-0-	-0-	-0-	$24,458	
Carson City (8)	-0-	-0-	-0-	-0-	-0-	
Churchill (7)	$352	-0-	-0-	-0-	$352	
Douglas (7)	$3,127	-0-	-0-	-0-	$3,127	
Elko	$8,432	9%	62% or $4,835	$8,823		$391
Esmeralda	$180	39%	47% or $84	$153	$27	
Eureka (9)	-0-	-0-	-0-	-0-	-0-	
Humboldt	$520	2.5%	25% or $130	$237	$283	
Lander (9)	-0-	-0-	-0-	-0-	-0-	
Lincoln	$689	14%	58% or $402	$733		$44
Lyon	$3,018	2.5%	8% or $241	$440	$2,578	
Mineral (7)	$198	-0-	-0-	-0-	$198	
Nye	$1,426	10%	91% or $1,297	$2,367		$941
Pershing	$509	19.5%	83% or $422	$770		$261
Storey	$577	3%	2% or $11	$21	$556	
White Pine	$369	7%	20% or $74	$135	$234	
TOTALS	$225,565	11% (10)	40%(10) or $19,996	$36,491	$190,711	$1,637

TOTAL ESTIMATED SAVINGS - $189,074

(1) The actual mileage fees paid in fiscal year 2000-01.
(2) Estimated percentage of those persons called to jury duty who must travel more than 65 miles one way.
(3) Estimates by county officials of the percentages of mileage fees and corresponding dollar amounts paid to citizens who traveled more than 65 miles one way in response to jury summons.
(4) Estimates of the amounts that would have been paid had the Commission recommendations been in place limiting mileage fees to citizens who must travel more than 65 miles one way in response to jury summons; raising the rate to 36.5 cents per mile rather than the current statutory rate of 20 cents per mile.
(5) The estimated amount it would have saved had the recommendations been in place. This does not include the administrative savings from not having to create and process mileage checks or vouchers for citizens traveling less than 65 miles one way.
(6) The estimated amount it would have cost had the recommendations been in place. This does not reflect the administrative savings from not having to create and process mileage checks or vouchers for citizens traveling less than 65 miles one way.
(7) No jurors summoned from beyond 65 miles.
(8) Carson City pays no mileage fees to citizens summoned to jury duty.
(9) No jury trials were held in the county during fiscal year 2000-01.
(10) Average among counties that summon jurors from beyond 65 miles.
(11) Total fees paid in fiscal year 2000-01 minus projected fees.

TABLE 3

JURY AND MILEAGE FEES: Projected Impact (1)

COMBINED TOTALS

County	Total Fees Paid (2)	Projected Fees (3)	Projected Savings (4)	Projected Costs (5)
Clark	$664,405	$281,948	$382,457	
Washoe	$126,797	$141,512		$14,715
Carson City	$7,956	$13,336		$5,380
Churchill	$2,413	$937	$1,476	
Douglas	$14,434	$8,370	$6,064	
Elko	$43,135	$52,325		$9,190
Esmeralda	$1,202	$1,026	$176	
Eureka (6)	-0-	-0-		
Humboldt	$3,526	$4,970		$1,444
Lander (6)	-0-	-0-		
Lincoln	$1,682	$1,774		$92
Lyon	$14,091	$10,999	$3,092	
Mineral	$825	$520	$305	
Nye	$9,389	$11,738		$2,349
Pershing	$2,296	$2,014	$282	
Storey	$2,531	$2,795		$264
White Pine	$8,074	$9,116		$1,042
TOTALS	$902,756	$543,380	$393,852 (7 counties)	$34,476 (8 counties)

TOTAL ESTIMATED SAVINGS - $359,376 (7)

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

Electronically Filed
Jun 14 2019 03:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

APPELLANT'S APPENDIX

Volume 32 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
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Nevada Bar No. 14139C
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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

****
** THIS IS CONFIDENTIAL INFORMATION **
** IT IS NOT TO BE DUPLICATED OR RELEASED TO ANY OTHER PERSON OR AGENCY **
****

PREVIOUS RECORD

PREVIOUS RECORD FOR: THOMAS MARLO DEMITRIUS ID#: 78620304

PROGRAM & TREATMENT STATUS

REFERRAL NUMBERS	--- WARDSHIP --- S/DATE	T/DATE	FACILITY	PRGM/TREAT	- DT PGRM/TREAT - STARTED	ENDED
	09/02/87		THIRD COTTAGE	COMM 3RD COTT	09/02/87	10/29/87
			NYTC	NO PROG RPTD	10/29/87	06/21/88
0-			LEGAL RESIDENCE	NYIC PAROLED	06/21/88	
03 02	01/02/85	01/23/86	LEGAL RESIDENCE	HMP	10/23/84	11/08/84
			LEGAL RESIDENCE	FORMAL PROB	01/02/85	01/23/86

AA7751

9998-500561 CLARK COUNTY SCHOOL DISTRICT CCF-561
SPECIAL STUDENT SERVICES 6/80

PSYCHOLOGICAL REPORT

FOR RESTRICTED USE ONLY
Information contained in this report is confidential.
It is intended for professional staff, to be utilized in working with the child.

NAME THOMAS, Marlo D. #300128 B.D. 11-06-72 Age 14-4
Primary Language Spoken
SCHOOL (Garside JHS) Miley A.C. GRADE 8 Other than English

INITIAL EVALUATION X REEVALUATION
Present Handicapping Condition S.E.H. (64)

Reason for referral Reevaluation

Dates(s) tested 03-24-87, 03-26-87 Instruments used WISC-R, Kaufman Test of Educational Achievement (K-TEA), Test of Written Language (TOWL), Incomplete Sentence Blank, Brigance, Differential Sorter, Parent Information Questionnaire.

WECHSLER INTELLIGENCE SCALES

	Scaled Score	IQ
Verbal	35	81
Performance	45	92
Full Scale Score	80	85

Verbal Tests	Scaled Score	Performance Tests	Scaled Score
Information	6	Picture Completion	7
Similarities	9	Picture Arrangement	12
Arithmetic	6	Block Design	7
Vocabulary	7	Object Assembly	8
Comprehension	7	Coding	11
(Digit Span)	(5)	(Mazes)	
	35		45

OTHER INTELLIGENCE TESTS

Name of Test	M.A.	I.Q.

K-TEA

Reading	Grade 3.1	SS 66	%ile 01
Spelling	Grade 1.8	SS 55	%ile .1
Arithmetic	Grade 4.4	SS 68	%ile 02

OTHER ACHIEVEMENT TESTS

Name of Test	Grade	SS	%ile
Math			
Reading Recog.			
Reading Comp.			
Spelling			

OTHER DIAGNOSTIC INSTRUMENTS AND RESULTS

Brigance
Reading - approx. level - 3rd grade

TOWL (Paragraph Writing Section)
Very poor paragraph development
Poor spelling, word usage and thematic maturity.

DISTRIBUTION
Original - Office File
Canary - Student's Confidential Folder

James A. Treanor, School Psychologist
Examiner/Title 05-05-87 sjo disk 227

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AA7752

BACKGROUND AND REFERRAL INFORMATION:

Marlo was referred for a three year Special Education evaluation. He was seen by the School Nurse with no apparent physical, visual or hearing impairment reported.

Marlo was originally referred to Special Student Services in November, 1981. He was evaluated and placed as a Learning Disabled student in the Resource Room program at Decker Elementary. In February, 1984 he was referred to a school multidisciplinary team and found eligible as an Educationally Handicapped student. He was then referred to the Special Programs committee and sent to the CBS - SEH program in March, 1984. Marlo's mother requested he be removed from CBS in October, 1984 and returned to a regular campus. He attended the Bracken SEH program with poor results and he returned to CBS in September, 1985. Again in September, 1986, Marlo was returned to a regular campus SEH program, Garside J.H.S., on a transitional basis. In November, 1986 he returned to Miley Center (previously CBS) due to his inability to meet the criteria of the transitional placement. Marlo's behavior has improved throughout the remainder of the 1986-87 school year and he has been projected for another trial placement at Garside JHS for the last nine weeks of the school year.

Marlo has been involved with the Juvenile Court system because of various incident involving physical aggressive behaviors.

OBSERVATIONS:

This evaluator has observed Marlo in many settings and over an extended period of time. His behaviors could be characterized by a DSM-III category of Conduct Disordered-Socialized. He has social attachments and often exhibits leadership characteristics. He doesn't seem to feel remorse or guilt over his acts and he has a pattern of conduct in which the basic rights of other or rules are violated. Marlo's behavior has been observed as inconsistent. He can choose to accept consequences and he can make decisions about his own behavior. Marlo has many characteristics of a learning disabled student and he can become easily frustrated if given material too difficult for him to handly. At that point acting out or aggressive behaviors can be exhibited. Marlo has a tendency to give non-verbal facials that cue an observer to his feelings.

In the formal testing environment Marlo was very cooperative and friendly. He related his desire to leave Miley and attend a regular campus so he could play football next year. He did experience frustration and he handled it well with a simple explanation that the test was designed for older aged children. Marlo did seem to like the successes he had on the intelligence test and he worked well with simple praise and encouragement. Two years ago he gave up easily on tasks and now he was able to work for two minutes on frustrating block design tasks.

This evaluator has seen personal growth in Marlo over the past two years. He can control his behaviors but he needs a very consistent consequential environment to enable him to make appropriate decisions.

TEST RESULTS AND INTERPRETATIONS:

WISC-R:

Marlo scored in the Low Average range on both the Verbal and Full Scale scores of this instrument. His Performance score fell just above the Low Average range. There was not a significant discrepancy between the scores although the Performance score was eleven points higher. This score was similar to this last WISC-R score in 1981, and a Slosson Test score from 1984. This evaluator would consider this test as a valid estimate of the areas evaluated when compared to others his age. Marlo was quick on the Performance Tasks but had to use a trial and error method on the manipulative block design and object assembly tasks. His learning expectancy level would approximate a late sixth grade to early seventh grade level.

TEST RESULTS AND INTERPRETATIONS: CONT'D

Kaufman Test of Educational Achievement:

This achievement test looked at the math, reading and spelling areas. Marlo was significantly low in all three areas when compared to other children his age. Marlo's spelling scores were at an ending first grade level. He had trouble with choosing the correct vowel in his attempts at spelling the word. He was easily frustrated in this area. Marlo's reading score was slightly higher, a beginning third grade level with a sight word approach most evident in his decoding process. He had trouble utilizing contextual clues to derive meaning from sentences. Marlo's interpersonal strength areas was mathematical computations. His grade equivalent score approximated a fourth grade level with adequate basic operations skill development. Marlo still made simple errors in regrouping and he was very slow at multiplication and division problem solving. Marlo had difficulty deciding which operation to use on story problems presented to him.

Test of Written Language - (TOWL):

Marlo reluctantly attempted the paragraph writing section of this test. His paragraph was short and had many spelling and sentence development mistakes. He would need much improvement in this area prior to attempting to pass the Nevada Competency Test.

Brigance:

The classroom teacher gave this instrument to Marlo. The results indicated approximate beginning third grade level skills in reading, second grade skills in spelling and third grade skills in arithmetic computations. He had trouble with borrowing in subtraction and with multidigit by multidigit multiplication problems.

Incomplete Sentences Blank:

Marlo's feeling level responses were typical teenager responses. He stated he liked sports and football in particular. He did not like school and he has a worry about returning to "Juvy". No significant emotional problems were evident in this projective instrument.

Differential Problem Sorter and Parent Information Questionnaire:

These two instruments were given to Marlo in an SEH study conducted by the CCSD and Dr. Kelly from UNLV. The results should be looked at diagnostically as the instruments are not validated or normed at this time. Basically, Marlo came out as a conduct disordered type student with no emotional indicators evident to a degree of significance. This would concur with the Miley observations of Marlo.

SUMMARY AND RECOMMENDATIONS:

Marlo Thomas is a fourteen year old eighth grade student at Miley Achievement Center. He has been in Special Education as a learning disabled or emotionally handicapped student since 1981. Marlo continues to exhibit both learning and emotionally/behavioral problems that indicate a need for Special Education Services. Marlo is about to be transitioned to the Garside SEH program because his behaviors have been appropriate for an extended period of time. Marlo exhibits conduct disordered-socialized aggressive type behaviors that need continual monitoring in a consistent environment. Based on the observations, teacher input and the formal/informal testing this evaluator would recommend:

1. Marlo be staffed by the Miley MDT to determine eligibility for Special Education.

SUMMARY AND RECOMMENDATIONS: CONT'D

2. At this time Marlo primary handicapping condition would seem to fall in the emotional area followed closely by his learning problems.

3. The Miley staff closely monitor and work with the Garside staff.

4. Marlo be taught at his appropriate grade level of achievement.

5. Natural consequences for physical aggression should be followed (juvenile authorities should be notified if appropriate.

James A. Treanor, School Psychologist
Examiner/Title 05-05-87 sjo disk 227

CONFIDENTIAL PSYCHOLOGICAL EVALUATION:

NAME: MARLO THOMAS

AGE: 14

DATE OF BIRTH: November 6, 1972

SCHOOL: Miley Achievement Center

GRADE: 8th

REFERRED BY: Mary Resendez

EXAMINED: July 22, 1987

EXAMINERS: Tracey Quinn, Psychology Intern
Samuel Butler, Ph.D., Juvenile Court Psychologist

PSYCHOLOGICAL TESTS ADMINISTERED:

Carlson Psychological Survey (CPS)
Junior-Senior High School Personality Questionnaire (HSPQ)

PSYCHOMETRIC RESULTS:

Carlson Psychological Survey (CPS):

This test provides an indication of the level of chemical abuse, degree of thought disturbance, assessment of antisocial tendencies and character of the self-image experienced by the adolescent. Of the 18 possible personality/behavioral types identified by this particular test, the subject minor is classified as a "Type 3".

Adolescents of this type are usually described as immature and rebellious, but not decidedly antisocial. They commonly look for support from their peers and get into trouble while looking for this approval if they think some antisocial act will be looked upon with favor. That is, their offenses are generally unplanned, impulsive reactions to situations with little financial gain.

They are restless and, although they may start a project with great enthusiasm, their interest quickly fades and they are unable to complete a task. At that time, they may consider themselves confused and in need of assistance, but within a few days, they are involved in a new project. Generally, their motivation for change is crisis-limited.

This type of adolescent is usually a follower and his institutional adjustment will depend largely on the attitude of his fellow residents. They are seldom the cause of serious problems, but their immaturity makes it difficult for them to cope with structure and they may rebel, especially if encouraged by others. They appear to function best in minimum security settings.

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School District

LETTERS

Junior-Senior High School Personality Questionnaire (HSPQ):

The Junior-Senior High School Personality Questionnaire is a standardized test which measures fourteen distinct traits of personality.

FACTOR		SCALE		STEN SCORE *
A	Introversion	vs.	Extroversion:	7
B	Concrete thinking	vs.	Abstract thinking:	5
C	Emotionally unstable	vs.	Emotionally stable:	5
D	Inactive	vs.	Overactive:	3
E	Accommodating	vs.	Assertive:	4
F	Sober	vs.	Enthusiatisc:	5
G	Expedient	vs.	Conscientious:	7
H	Shy	vs.	Adventurous:	7
I	Tough-minded	vs.	Tender-minded:	8
J	Impulsive	vs.	Reflective:	4
O	Secure	vs.	Apprehensive:	5
Q2	Group-dependent	vs.	Self-sufficient:	6
Q3	Disregards social rules	vs.	Socially precise:	4
Q4	Relaxed	vs.	Tense:	4

* Sten scores are standard scores such that a 5 or 6 is "average" while scores of 1 and 2 or 9 and 10 represent extremes of a given dimension.

Test results indicate that at times, complacency, inactivity and a reluctance to act quickly characterize Marlo. He may prefer a more deliberate and careful approach, and may have difficulty in completing tasks.

In terms of interpersonal relationships, he will tend to be obedient and easily led by others. He will also likely be somewhat dependent and conforming.

Present scores suggest that Marlo is likely to be somewhat adventurous and socially bold. He likes meeting people, is responsive, friendly and carefree.

Test scores suggest a general orientation toward the tender-minded, sensitive and somewhat overptotected end of the dimension. He is likely to be somewhat insecure, dependent and clinging, and may have tendencies toward imaginative, artistic expression.

A tendency toward group participation and group approval characterize Marlo. He is likely to go along with group pressure and may quickly conform to group standards.

Marlo's poor self-integration tends to produce behaviors that would be described as socially uncontrolled or careless of social protocol. He may not function well in group settings.

Marlo appears to be extremely field-dependent. He may tend to make poor judgements, lack care in his work and generally be less aggressive. He will likely have difficulty in complying with demands of exactness and precision.

The likelihood of Marlo becoming involved in activities related to juvenile delinquency appears at this time to be only moderate. His scores indicate that his personality pattern is only moderately related to delinquency proneness.

His leadership potential appears to be unpredictable and about average. He may take initiative in group settings only on certain occasions, and may assume responsibilities in some situations, but not others.

In terms of neuroticism, Marlo appears to be somewhat above average. His scores indicate that he may be expected to display some neurotic-type symptoms such as fearfulness, frustration and depression.

The likelihood of his responding favorably to a treatment program appears to be about average. His scores suggest moderate probability of success of a behavioral change program.

SUMMARY AND RECOMMENDATIONS:

Marlo is a 14-year-old male adolescent currently detained due to charges of Grand Larceny and Battery With a Deadly Weapon. He has been involved with Juvenile Court Services several times in the past three years for a series of similar and escalating offenses. There are also indications of repeated behavioral and social problems at Children's Behavioral Services and at each of the subject minor's schools. A review of Marlo's Clark County School District psychological evaluation suggests a "Learning Disabled" classification for which he receives specialized educational designation and programming.

Test results indicate that Marlo is particularly prone to manipulation by his peers. He is excessively dependent upon their approval, and may behave inappropriately in order to gain their social acceptance. Faulty judgement and inadequate impulse control also seem indicative of this adolescent.

He is assessed as being behaviorally disordered with no substantial intrusion of emotional disturbance that contributes to his escalating behavioral excesses. Clinically, he was diagnosed as 'Conduct Disordered, Undersocialized, Aggressive' (312.00 = DSM III classification) by a previous Juvenile Court Psychological Report dated November 13, 1984 (see copy attached). During the period between that and this present report, Marlo has continued in irresponsible, delinquent patterns of behavior albeit in concert with, and under the impetus of, negative peers.

This Unit can support a recommendation for institutional commitment as the subject minor's behavioral history indicates that he is better able to maintain in a structured, supervised environment. Neither does he make the connection between the character of -- and the natural or logical consequences of -- his behaviors. He is in need of behavioral disciplining, additional coping skills, impulse control and social orientation to make him compatible with behavioral norms. It is felt that an institutional commitment will initiate behavioral remediation in those areas.

If you have any questions or comments regarding this report, please contact the Psychological Services Unit on extension 5230.

TRACEY QUINN
PSYCHOLOGY INTERN

SAMUEL F. BUTLER, Ph.D.
JUVENILE COURT PSYCHOLOGIST

dw

TEST DIAGNOSIS OF NONMASTERY

NAME: THOMAS, MARLO DEMETRIUS TEST LEVEL: 15

READING:
Level Vocabulary:
4.7 (✓) same meanings (✓) opposite meanings (✓) multimeanings

Comprehension:
Literal:
(✓) recall of facts

Interpretative:
(✓) inferred meanings (✓) character analysis
(✓) figurative language

Critical:
(✓) author attitude/position ( ) techniques of persuasion

SPELLING:
Level (✓) consonant phoenemes/graphemes (✓) morphemic units
5.2 (✓) vowel phonemes/graphemes

LANGUAGE:
Level Capitalizations:
4.1 (✓) I/proper nouns/adjectives (✓) beginning words/titles

Punctuations:
(✓) end marks (✓) quotations (✓) comma ( ) colon/semicolon
( ) period/exclamation/question

Usage:
(✓) pronouns (✓) adjectives (✓) verbs

Sentence Structure:
( ) subject/verbs ( ) verbosity/repetition
(✓) modifying/transitional words
( ) misplaced modifiers/nonparallel
(✓) complete/incomplete/run-on

Paragraph Organization:
(✓) sequence/topic ( ) concluding sentences

MATHEMATICS:
Level Computations:
4.7 (✓) addition (✓) subtraction (✓) multiplication (✓) division

Concepts & Applications:
(✓) numeration (✓) measurements (✓) number properties
(✓) number theory (✓) graph (✓) story problems
(✓) number sentences ( ) functions (✓) geometry
(✓) common scales

Reviewed and Submitted By: Jerry Herring
Jerry Herring, School Counselor
Date: March 25, 1988

AA7761

TEST DIAGNOSIS OF NONMASTERY

NAME: THOMAS, MARLO DEMETRIUS TEST LEVEL: 15

READING:

Level 4:7

Vocabulary:
(X) same meanings (X) opposite meanings (X) multimeanings

Comprehension:
Literal:
(X) recall of facts

Interpretative:
(X) inferred meanings (X) character analysis
(X) figurative language

Critical:
(X) author attitude/position ( ) techniques of persuasion

SPELLING:

Level 5.2

(X) consonant phoenemes/graphemes (X) morphemic units
(X) vowel phonemes/graphemes.

LANGUAGE:

Level 4.1

Capitalizations:
(X) I/proper nouns/adjectives (X) beginning words/titles

Punctuations:
(X) end marks (X) quotations (X) comma ( ) colon/semicolon
( ) period/exclamation/question

Usage:
(X) pronouns (X) adjectives (X) verbs

Sentence Structure:
( ) subject/verbs ( ) verbosity/repetition
(X) modifying/transitional words
( ) misplaced modifiers/nonparallel
(X) complete/incomplete/run-on

Paragraph Organization:
(X) sequence/topic ( ) concluding sentences

MATHEMATICS:

Level 4.7

Computations:
(X) addition (X) subtraction (X) multiplication (X) division

Concepts & Applications:
(X) numeration (X) measurements (X) number properties
(X) number theory (X) graph (X) story problems
(X) number sentences ( ) functions (X) geometry.
(X) common scales.

Reviewed and Submitted By: Jerry Herring
Jerry Herring, School Counselor

Date: 12/14/88

AA7762

AN AFFIRMATIVE ACTION
EQUAL OPPORTUNITY EMPLOY

CLARK COUNTY SCHOOL DISTRICT

2832 EAST FLAMINGO ROAD LAS VEGAS, NEVADA 89121 TELEPHONE (702) 736-5011

BOARD OF SCHOOL TRUSTEES
Mrs. Lucille Lusk, President
Mr. Dan Goldfarb, Vice President
Mrs. Patricia A. Bendorf, Clerk
Mrs. Virginia Brooks Brewster, Mem
Mr. Donald R. Fallis, Member
Mr. Robert Forbuss, Member
Mrs. Shirley Hoist, Member
Robert E. Wentz, Superintendent

November 5, 1984

Mrs. Thomas:

The Clark County School District staff members who are familiar with Marlo Thomas feel that the appropriate program placement for identified IEP goals and objectives to be carried out is the SEH program housed at Children's Behavioral Services.

Since you have requested that Marlo be placed in a less restrictive setting, we would like to remind you of Clark County School District Student Regulations and Procedures that will be followed should Marlo violate them. Attached please find copies of pertinent regulations.

If Marlo cannot be adequately and safely maintained in the lesser restrictive setting, a CBS placement will again be recommended.

AN AFFIRMATIVE ACTION
EQUAL OPPORTUNITY EMPLOYER

CLARK COUNTY SCHOOL DISTRICT

2832 EAST FLAMINGO ROAD LAS VEGAS, NEVADA 89121 TELEPHONE (702) 736-5011

BOARD OF SCHOOL TRUSTEES
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Mrs. Patricia A. Bendorf, Clerk
Mrs. Virginia Brooks Brewster, Member
Mr. Donald R. Faiss, Member
Mr. Robert Forbuss, Member
Mrs. Shirley Holst, Member
Robert E. Wentz, Superintendent

December 6, 1984

To: Juvenile Court Services
Ted Schumacher, Probation Officer

From: Beth Sylvester, Special Education Zone Consultant

Re: Marlo Thomas

Dear Mr. Schumacher:

In response to your request for information regarding Marlo Thomas I have briefly summarized the most recent status on his placement changes.

In February 1984 Marlo Thomas' case was presented to the Elementary Special Programs Review Committee of the Clark County School District. At that time it was the committee's recommendation that Marlo be placed in the Specialized Emotionally Handicapped (SEH) Program at Children's Behavioral Services (CBS). A "less restrictive" SEH placement on a regular school campus was considered to be inappropriate at that time due to the severity of Marlo's acting-out behaviors.

Once placed in the CBS/SEH Program Marlo demonstrated behaviors that were indicative of needing the more specialized setting. He was agitated and disruptive in the classroom and was verbally and physically aggressive with peers and adults. In one particular instance he physically kicked a classroom aide. It was at this time that he was picked up by Metropolitan Police and charged with battery.

Following this incident Mrs. Thomas asked that Marlo be removed from the CBS/SEH Program. She voiced concerns that she did not want her son to be placed in Juvenile Detention. Arangements were made for Marlo to begin in the SEH Program housed at Walter Bracken Elementary School. Attached please find two letters that were shared with Mrs. Thomas regarding the placement changes of Marlo.

Marlo continues to demonstrate aggressive acting-out behaviors in the Bracken SEH Program. He is making matter-of-fact choices in his behavior and has had to be restrained for threatening other classroom students. He has left the classroom on several occasions and has been suspended for purposeful actions against others and continued, persistent refusal to follow directions without physical restraint.

It is the feeling of those Special Educators (approximately 6-8) involved with

Marlo's case that Marlo does need a more restrictive placement. The Oasis program at CBS has been investigated by his mother. Should the Juvenile Court System agree that a more consistent and structured environment be warranted for this student, we would ask that careful consideration also be given to placing him back in a more restrictive setting for schooling.

If I can be of further assistance in clarifying any information, please contact me at 385-2270.

Sincerely,

Beth Sylvester

Beth Sylvester

BS/sd

ENC: 2

TO WHOM IT MAY CONCERN:

I understand that my son, Marlo Thomas, has been recommended for placement in the Specialized Emotionally Handicapped (S.E.H.) class at CBS/MH and an I.E.P. has been developed for this program.

Although the Individualized Education Program Committee recommends that the S.E.H. placement at CBS/MH would be the most appropriate educational setting and best serve the needs of my son, I no longer wish him to continue in this placement.

It is my wish that Marlo be placed in an S.E.H. program on a regular school campus. I understand that this placement is contingent upon Marlo maintaining acceptable behavior for adequately working in an S.E.H. program placed upon a regular school campus.

(Signature/Date)

(Witnessed/Date)

EXHIBIT 251

EXHIBIT 251

45

TRAN

ORIGINAL

FILED
JAN 19 2010
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MARLO THOMAS,

Defendant.

CASE NO. C136862

DEPT. NO. XXIII

BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 6, 2010

RECORDER'S TRANSCRIPT RE:
STATUS CHECK: DEFENDANT'S REQUEST FOR INVESTIGATIVE ASSISTANCE - STATE'S BRIEF/OPPOSITION

APPEARANCES:

For the State: STEVE S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: STEPHANIE B. KICE, ESQ.

RECORDED BY: DALYNE EASLEY, COURT RECORDER

RECEIVED
JAN 19 2010
CLERK OF THE COURT

WEDNESDAY, JANUARY 6, 2010, 9:37 A.M.

* * * * *

MS. KICE: Good morning, Your Honor, Stephanie Kice for Mr. Thomas.

MR. OWENS: Steve Owens for the State.

COURT: Counsel, are you guys ready on the motion today?

MS. KICE: Yes, Your Honor, this is our motion. We had a written argument, State's responded and we've replied. I think that we have laid out for the Court factual information calling into question the reliability of the IQ tests and the IQ score that Mr. Thomas currently has.

I can't stand here today and tell you with any certainty that Mr. Thomas would meet the standards under Atkins to be declared mentally retarded.

THE COURT: That he would what?

MS. KICE: I can't tell you with any certainty that he would meet those standards.

THE COURT: Wasn't -- I mean, he was tested previously and I don't see where they ever disputed the results of that test. The case has been up to the Supreme Court.

MS. KICE: There's a well established concept and IQ testing called the Flynn Effect that after a test has been in place for a certain number of years there's a score created because people get smarter over time. And that is the issue that we're trying to establish is whether or not he falls within the score range that would put him in the mentally retarded range. I don't believe that that issue has ever been litigated before, Your Honor.

THE COURT: Okay, and what about the other ones, the fetal alcohol claim?

MS. KICE: All those go to Mr. Thomas' low intellectual functioning, and any

adaptive deficits that we would need to prove in order to show that he would meet the standards of mental retardation not only under Atkins but under the statute in the State of Nevada, he has to show adaptive deficits prior to the age of 18; and in order to prove those, in order to satisfy our responsibilities under Strickland and Crump, we have to fully investigate this case in order to prepare the writ for Mr. Thomas.

THE COURT: But really your motion was void of any allegations that the prior attorneys were -- fell below their standard of care in not investigating this issue in the earlier trial.

MS. KICE: But I think --

THE COURT: There's really nothing in your motion other than this allegation thrown out there he could have fetal alcohol syndrome.

MS. KICE: I don't think that those -- those are two discreet issues, Your Honor. I think that we're trying to determine whether or not he satisfies the standard for mental retardation under Atkins. That's our responsibility as counsel now. What counsel did prior is not necessarily what we're talking about at this point in time. We have to investigate it at this point in time.

THE COURT: Okay. Anything else?

MS. KICE: There was a matter with the State's response and I had asked that a portion of it be stricken as irrelevant related to my former association with the Federal Public Defender's Office.

THE COURT: I think that they corrected it. They thought you worked there and now you're no longer there.

MS. KICE: That's correct, Your Honor, but there were more allegations in that then just me working there, and I would ask that anything included in that section has absolutely no bearing on Mr. Thomas' case at this time and that it be stricken.

THE COURT: Meaning anything that would reference you doing the leg work for the Federal Public Defender you --

MS. KICE: Anything that references the Federal Public Defender at all needs to be -- I would ask that it be stricken from the -- from the motion.

THE COURT: Okay. Counsel?

MR. OWENS: Judge, previously when Ms. Kice was in court I recognized her from her prior employment with the Federal Public Defender's Office. I was unaware that that was terminated what -- I'm being told about a year ago.

MS. KICE: No. It was -- just for clarification it was six months ago.

MR. OWENS: Six months ago and so I'm certainly not opposed to her working with Bret Whipple and appearing on this case. I was under the impression she was still with the Federal Public Defenders Office which does create a substantial problem for us in a number of our capital cases, in particular in this case there was a very unusual order signed by Judge Loehrer inviting the Federal Public Defender to come in and assist first post-conviction counsel. That creates a real problem. That currently does not exist in this case and so that's why I filed the errata. But I don't think there's authority to strike in it's entirety that argument that I had in the brief, it may yet become relevant again; right now it is not but if the Federal Public Defenders head rises in this case then I will be raising that anew.

As for --

THE COURT: Okay, it's been raised. Let's talk about the neuropsych evaluation and the fetal alcohol claim.

MR. OWENS: My position on both of those is that we need a supplemental petition on file, and as pointed out in my opposition there's the Court in a vacuum can't just say well, yeah, that's reasonably necessary without knowing what went on

before. It's not post-conviction counsel's responsibility to create a defense anew for the Defendant, they go in and look at what prior counsel did and did not do. I think they need to lay that out for the Court before they can come to the Court and then say alright, prior counsel didn't do this, they did hire Kinsora but they didn't do this and this, and now we want to go do that. They don't get to start over like this is a fresh, new penalty hearing and investigate everything from scratch or, you know, we'll be here for years and we'll spend a lot of money. So they need to file a supplemental petition first, get claims on file then the court can assess the merits of it and see whether there is a reasonable necessity to go outside of the record and get experts on board.

I think mental retardation is a real long shot. What his IQ score is now is not nearly as relevant as what it was prior to age 18, and from the school records in the case we know it was 84 and 85. It's declining as one would expect when one is housed on death row and oftentimes there is drug use so that as an adult their IQ level continues to go down but that does not equate with mental retardation. That's a developmental dysfunction of the brain. And so unless they can show something more about how we got 84 85 as a child and now they want to expend ten, twenty thousand dollars for additional testing to try to show that IQ is really down to 70. If that's the state of the science that's pretty wishy-washy to base any kind of judgment on if we can just play with the numbers like that.

THE COURT: Your response?

MS. KICE: Well, I mean I think that the IQ testing that was done by the Clark County School District is not nearly as sophisticated or as extensive as was done by Dr. Kinsora. That testing was done prior to Mr. Thomas' incarceration on death row so his -- the length of time he's been on death row when Kinsora took the test is not

really relevant to the argument.

THE COURT: Kinsora did testify.

MS. KICE: Pardon me?

THE COURT: Kinsora did previously testify.

MS. KICE: But Mr. Owens categorized it as such that it was done after Mr. Thomas had been on death row for a number of years and that's not the case. He had been arrested in the crime and I believe he was tested in 1997. So that's the clarification I was making for Your Honor.

THE COURT: Okay. At this point I'm going to deny the Defendant's request. The Court notes that no supplemental petition has been filed although counsel has been -- not necessarily you but there has been counsel appointed for a considerable period of time, rather it appears that all requests and defendant's motion seek to begin the investigation anew rather than looking into whether or not the Defendant's representation at time of trial actually fell below the standard of care.

The Court notes that there was a neuropsychological evaluation performed back in 1996. A lot of the documents that the Defendant attached in support of having another one were, in fact, previously considered by the doctor back in 96, at least from what I can tell from what's been provided to this Court.

As far as the fetal alcohol claim, again, there's not been anything raised and maybe it'll be raised in supplemental petition how the prior counsel may have fell below his obligations in not investigating this case -- that claim either at all or fully. So it's denied at this time.

And I think we already have dates for the supplemental petition, don't we?

MS. KICE: I don't believe that we do.

MR. OWENS: I don't' think we do.

THE COURT: We don't? This case has been limping along for years. How long do you think until you get the supplemental petition --

MS. KICE: Mr. Whipple wasn't -- I mean I appreciate the Court's --

THE COURT: I recognize it's not all Mr. Whipple's fault.

MS. KICE: Right, so the -- as it stands right now we don't have an end date for this to be filed, is that your understanding too?

MR. OWENS: I don't think we have a current briefing scheduled. Instead of filing supplemental they filed the request for funds.

MS. KICE: That's correct, Your Honor.

THE COURT: Well, can we get some dates because, I mean, this has been what, almost -- has it been over a year?

MR. OWENS: Mr. Whipple's had the case for a year. Cynthia Dustin had it before then. The pro per petition was filed two years ago.

THE COURT: Okay so do you have an idea, six months, how long?

MS. KICE: Six months would be fine, Your Honor.

THE COURT: For Defendant to file their supplemental petition.

THE CLERK: July 7th, 9:30.

THE COURT: And could you ballpark how much the State's going to need to respond? Three months?

MR. OWENS: Depending on the length I would usually try to get it done within 30 or 60 days, so 60 would be safe.

THE COURT: Okay.

THE CLERK: September 8th, 9:30.

THE COURT: And you want to say 30 days thereafter for a hearing?

THE CLERK: October 6th, 9:30.

MR. OWENS: So the dates of July 7th and September 8th are just for submission of the briefs, not for an appearance in court.

THE COURT: Correct, and October 6th would be the appearance in court.

MR. OWENS: Right. Okay.

THE COURT: Hopefully that will keep everyone's feet to the fire.

MS. KICE: Thank you Your Honor.

MR. OWENS: Thank you, Judge.

PROCEEDING CONCLUDED AT 9:47 A.M.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case to the best of my ability.

Dalyne Easley

DALYNE EASLEY
Court Recorder/Transcriber

EXHIBIT 252

EXHIBIT 252

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ORIGINAL

FILED

DEC 2 8 2009

CLERK OF COURT

RPLY
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STEPHANIE B. KICE
Nevada Bar No. 10105
THE KICE LAW GROUP, LLC
4532 W. Charleston Blvd.
Las Vegas, NV 89102
(702) 401-9115
Attorneys for Defendant
MARLO THOMAS

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MARLO THOMAS, Defendant.	CASE NO.: C136862C DEPT NO.: XXIII

REPLY TO THE RESPONSE TO THE REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE

COMES NOW, the Defendant, MARLO THOMAS, by and through his attorney, BRET O. WHIPPLE, and hereby submits the attached Points and Authorities in Reply to the State's Response to the Request for Funds for Investigative Assistance.

This reply is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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RECEIVED

DEC 2 8 2009

CLERK OF THE COURT

POINTS AND AUTHORITIES

In its original response to the request for investigative funds, the State mistakenly made material misrepresentations of fact in the first section of its Points and Authorities in a section entitled: Statement with Regard to Participation of Federal Public Defender. Once the State became aware of the mistake, the State filed an *errata*. This errata did clarify for the court that although Ms. Kice was once employed by the Federal Public Defender's office, for over a year Ms. Kice has not been employed by the Federal Public Defender's office. Lastly, the Request for Funds for Investigative Assistance listed Ms. Kice as counsel and included her bar number in the caption.

Also included in the Statement with Regard to Participation of Federal Public Defender section are accusations about the alleged involvement by the Federal Public Defender's office in other State post-conviction proceedings. Mr. Thomas' counsel are of the opinion that these accusations have absolutely no bearing on the matter at hand and should be stricken by this court as irrelevant.

I. MENTAL RETARDATION

Mr. Thomas' counsel is not ready to make a claim that Mr. Thomas is mentally retarded. What does exist are lingering doubt as to the reliability of the IQ scores received by Mr. Thomas at the time of trial. As such, it would be premature for counsel to make a motion under N.R.S. 175.554(5) as the state suggests. However, if and when such a claim becomes viable, such a motion will be made.

What counsel is asking for is a current and accurate neuropsychological examination. The social science involved with IQ testing has evolved in the intervening years since Mr. Thomas' original trial. The "Flynn Effect" has been recognized as an actual phenomena that occurs in I.Q. testing. The Flynn Effect is the principle that after an IQ test has been normed, people's scores start to creep upward over time. For the general population, the score creep is accepted at 0.33 points per year. For the mentally retarded population, the score creep is closer to 0.45 points per year.

In 1997, Dr. Kinsora administered the WAISS-R IQ test which was last normed in 1974. As

such, Mr. Thomas full scale IQ could be off anywhere from seven[1] (7) to over ten[2] (10) points **lower** than the score of 79 Dr. Kinsora calculated.[3] As such, Mr. Thomas' full scale IQ could actually be anywhere from 69-72. As that State concedes in their Response, the United States Supreme Court has recognized that individuals who fall at the 70 and below range are considered mentally retarded for purposes of ineligibility for the death penalty. Atkins v. Virginia, 536 U.S. 304 (2002).

The State attempts to rely upon testing done by school officials to bolster their contention that Mr. Thomas is not mentally retarded. They claim that records from the Clark County public schools put Mr. Thomas' IQ in the mid-80's. It is Mr. Thomas' position that the individuals administering these tests were not as skilled as was Dr. Kinsora. Also, there were significant cultural pressures on school administrators and personnel to refrain from identifying an individual as mentally retarded due to the social stigma associated with such a label. Learning disabled became the catch all term for these individuals.

In order to fully litigate all of Mr. Thomas' potential claims for relief at the state post-conviction level and provide effective assistance of post-conviction counsel as is mandated by the Nevada Supreme Court, counsel again requests a more reliable neuropsychological be conducted. See Crump v. Warden, 113 Nev. 293 (1997) (relying upon N.R.S. 34.820(1)(a)), see also Strickland v. Washington, 466 U.S. 668 (1984) In order to accomplish this, Mr. Thomas would need to be examined by a qualified neuropsychologist for a minimum of two days at Ely State Prison.

II. FETAL ALCOHOL SPECTRUM DISORDER (FASD)

Post-conviction counsel has a reasonable belief that Mr. Thomas suffers from Fetal Alcohol Spectrum Disorder (FASD). As such, it is incumbent upon counsel to fully investigate this potential claim for inclusion in the state post-conviction writ. It is true that there is no one test that can definitively declare that Mr. Thomas has FASD; however, by reconstructing his social history and performing neurocognitive tests, a diagnosis of FASD can be hypothesized.

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[1] 7.26 points exactly using 22 years. 7.59 using 23 years.

[2] 9.90 points exactly. 10.35 years using 23 years.

[3] The proper Flynn Effect calculation would be 23 (years) multiplied by 0.33 and 0.45 respectively.

As was pointed out in Mr. Thomas' original request, Mr. Thomas' mother admitted that during the time she was pregnant with him, she drank wine or vodka every day until she was extremely drunk throughout the entire time she was pregnant. Counsel requests the necessary funds to do a comprehensive and adequate investigation into Mr. Thomas social history to determine whether or not he suffers from FASD. Without this investigation, counsel cannot prepare a defense for Mr. Thomas that satisfies the demands of the Constitution. Mr. Thomas has a right to have this generally mitigating information presented to a finder of fact. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel would be per se ineffective for making any strategic decisions about Mr. Thomas' case in the absence of a comprehensive investigation into his social history.

The State attempts to characterize this potential claim as a fishing expedition that would not have made a difference in the case. It is not the State's purview to determine what information would or would not have made a difference to the jury.

III. INVESTIGATIVE EXPENSES

Again, Mr. Thomas has a right to have generally mitigating information presented to a finder of fact. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel would be per se ineffective for making any strategic decisions about Mr. Thomas' case in the absence of a comprehensive investigation into his social history. Such an investigation could reveal information previously unknown to counsel and could provide the basis for viable Constitutionally sound claims.

IV. PRIOR COUNSEL

The State makes mention of the amount billed by prior counsel twice in its Response. This has no bearing on this request since, to the best of current counsel's knowledge, none of the $7,031.25 went to secure accurate neuropsychological testing or a comprehensive investigation into the potentially meritorious claims outlined *supra*. Here, the necessary and additional expenses associated with capital litigation remain.

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CONCLUSION

In order for counsel to perform up to the standards demanded by the Sixth Amendment, the United State Supreme Court, and the Supreme Court of Nevada counsel requests an additional $20,000.00 to hire the necessary experts and conduct the necessary investigation to prepare Mr. Thomas' State post-conviction writ of habeas corpus.

12/28/09

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Attorneys for Defendant
MARLO THOMAS

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MARLO THOMAS, Defendant.	CASE NO.: C136862C DEPT NO.: XXIII

RECEIPT OF COPY

RECEIPT of the above named defendant's REPLY TO THE RESPONSE TO THE REQUEST FOR FUNDS FOR INVESTIGATIVE ASSISTANCE is hereby acknowledged this 18 day of December, 2009.

By: Kasondra Hilton
CLARK COUNTY DISTRICT ATTORNEY

EXHIBIT 253

EXHIBIT 253

LITIGATION TECHNOLOGIES, INC.
P.O. Box 71386, Reno, Nevada 89570
Telephone: (702) 826-3456
Fax: (702) 829-0468

JURY COMPOSITION PRELIMINARY STUDY

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

Prepared for:
Nevada Appellate and Postconviction Project

Prepared by:
John S. DeWitt, Ph.D.

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.

The limitations of this preliminary study must be stated explicitly. The purpose of this study is to determine if preliminary inquiry would corroborate or contradict anecdotal evidence that minorities are under-represented in Clark County venires. Physical observations of the jury venires are time-consuming and expensive, and the Project's resources which were available for the study required that the number of observations be limited. Cost considerations also prevented inquiry into the County's computerized program for the initial selection of prospective venire members from the source list, or into the Jury Commissioner's uncompiled data on prospective venire members who are excused over the telephone. These issues, and the identification of the particular stages at which the observed disparities arise, must be addressed in a more complete study, which will most likely have to be undertaken and funded in the context of litigation. The purpose of this study, however, is solely to determine if prima facie evidence of under-representation exists sufficient to justify further inquiry[1].

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.

No data on the race of individuals are kept by the Department of Motor Vehicles, from which the jury source list is taken, nor by the Jury Commissioner's office. As a result, no initial evaluation of the possible existence of systematic disparities can be conducted except by visual observation of the venire members when they come to court.

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[1]A preliminary draft of this study was submitted to the court administrator for review. The comments of the court administrator and the internal audit department of Clark County were valuable, and this final version of the report, to the extent possible, reflects the concerns expressed by them.

EXECUTIVE SUMMARY OF FINDINGS

The study revealed a statistically significant disparity between the proportion of members of racial minorities in the adult population and the proportion appearing in jury venires. Specifically, African-Americans 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-quarter (27.7 percent) while other racial minorities were under-represented by 21.4 percent. The likelihood that these findings are a result of chance alone rather than other factors is less than 3 in 1,000 for African-Americans and approximately 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 possibly arises from procedures at three 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 may be less inclusive and less representative than is feasible.

Second, the disparity may arise at the summoning stage of the selection process. About one-quarter of the summonses mailed out are returned as undeliverable, and more than twenty percent of the summonses mailed out fail to generate any response from the individuals summoned. The Jury Commissioner's office does not attempt to ascertain correct addresses for summonses which are undeliverable, and does not re-summon those who fail to respond.

The third stage of the selection process in which practices may result in disparity is in the granting of excuses from jury duty by the Jury Commissioner's office. The stated policy of the Court Administrator is to employ very conservative criteria when considering requests for excusal. About 67 percent of those who do respond to a summons, however, are either disqualified from jury duty or are excused, temporarily or permanently, from serving. These individuals do not reach the stage of appearing for assignment 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.

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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[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.

Juror Type	OBSERVATION DATE							
	2-14-92	2-21-92	2-28-92	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

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[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[3] 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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[3]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[16].

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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[16]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[19].

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[19]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.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY COURTHOUSE
200 SOUTH THIRD STREET
COURT ADMINISTRATION LAS VEGAS, NEVADA 89155-0001
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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

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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

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A NON-PROFIT CORPORATION

September 8, 1993

RECEIVED
SEP 8 1993
COURT ADMINISTRATOR

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

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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

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RECEIVED
AUG 25 1993
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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

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REPORT OF FINDINGS

CONFIDENTIAL

JURY COMPOSITION PRELIMINARY STUDY

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

Prepared for:
Nevada Appellate and Postconviction Project

Prepared by:
John S. DeWitt, Ph.D.

AUGUST, 1993

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CONFIDENTIAL

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.

[redacted], 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.