

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MARLO THOMAS,

Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents.

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Elizabeth A. Brown
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No. 77345

District Court Case No.
96C136862-1

(Death Penalty Case)

APPELLANT'S APPENDIX

Volume 4 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

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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

1 hearing, McMahon testified to her understanding that Lewis had been incarcerated
2 for murder from the time Thomas was born. 1/22/02 TT at 20-22, 48-49. In fact, Lewis
3 was in and out of Thomas's life until he was eleven years old. At that time, Lewis was
4 arrested for the kidnap and rape of a former girlfriend and sentenced to life in prison.
5 See Exs. 55, 57, 147. Lewis was released after being found eligible for parole in
6 October 1997. See Ex. 55 at 315. Effective trial counsel would have obtained Lewis's
7 criminal court file. See Rompilla v. Beard, 545 U.S. 374, 383-86 (2005). Once they
8 learned Lewis was in Thomas's life for over a decade and the nature of Lewis's
9 offenses, effective trial counsel would have followed up with additional investigation.
10 See id. at 392-93.

32. McMahon prepared the one defense penalty-phase expert witness,
11 neuropsychologist Dr. Thomas Kinsora. 1/22/02 TT at 16. McMahon testified about
12 her preparation of Kinsora at the January 22, 2002, state post-conviction evidentiary
13 hearing:

14 Q. Did you present him with as much information as
15 you had and you thought you could gather?

16 A. Yes, all of it. And that is the typical way of
17 proceeding, give them all the data, you give them
18 discovery, you give them reports, school records,
19 prison records.

20 1/22/02 TT at 50. Kinsora also interviewed Thomas's mother, Georgia. 6/25/97 TT at
21 II-14.

22 33. McMahon may have given Kinsora all she had, but what she had barely
23 scratched the surface of what was readily available. There was a wealth of available
social history information that was not provided to Kinsora because trial counsel's
deficient investigation failed to discover it. See Claim Fourteen (B), below. Kinsora
stated:

On July 25, 2017, I reviewed Dr. Richard Dudley's analysis
of Mr. Thomas's trauma history, which reaches back to his
early childhood. The full picture of Mr. Thomas's history

1 was unknown to me until I read Dr. Dudley's declaration;
2 none of Mr. Thomas's prior lawyers had provided me with
3 most of the information contained in it.

4 Ex. 205 at ¶9; see Ex. 183 (Declaration of Dr. Richard G. Dudley, Jr., M.D.).

5 34. The failure of Thomas's counsel to properly prepare Kinsora and provide
6 him with adequate social history information rendered his testimony at Thomas's
7 penalty phase not only unpersuasive, but actively damaging. If Kinsora had been
8 properly prepared, however, effective trial counsel would have presented his
9 testimony at both phases of Thomas's trial. See below.

10 35. In the absence of direction from McMahon to the contrary, Kinsora
11 administered the Minnesota Multiphasic Personality Inventory (MMPI) II to
12 Thomas, as well as the Hare Psychopathy Checklist, and diagnosed him with
13 Antisocial Personality Disorder (ASPD) and Intermittent Explosive Disorder. Ex. 180
14 at 12. Kinsora then went on to tell the jury all about those diagnoses. 6/25/97 TT at
15 II-27-34, 36-38.

16 36. It was well-known by the time of Thomas's trial in 1997 that a diagnosis
17 of ASPD was regarded by jurors as more aggravating than mitigating. See Ex. 186 at
18 8 ("Whether evidence of this type would be considered mitigating by a jury is highly
19 doubtful.") (quoting Guinan v. Armontrout, 909 F.2d 1224, 1230 (8th Cir. 1990)). But
20 Kinsora was new to working on capital cases and unaware of the aggravating nature
21 of an ASPD diagnosis. See Ex. 205 at ¶6 ("From my subsequent years of experience,
22 I have learned that ASPD causes jurors to pass a judgment on the defendant that
23 they are not equipped to form. They blind themselves to everything except that
diagnosis."). Competent capital defense counsel would have educated their expert
about this issue, however LaPorta and McMahon failed to do so.

37. Kinsora explained:

When I first started out in my forensic criminal practice, it
was automatic for me to give a diagnosis to the defendant
because this is what I always did in my clinical practice. I

1 do not remember the content of my conversations with Mr.
2 LaPorta or Ms. McMahon, however if one of them had
3 directed me not to diagnose Mr. Thomas, but instead to
4 identify his impairments and describe their impact on his
5 functioning, I would have done so.

6 In my forensic practice today, I rarely give a clinical
7 diagnosis to the defendants I evaluate. I only do so if
8 specifically asked for a diagnosis by the referring attorney.
9 In my opinion, diagnosis is not pertinent to my role as a
10 forensic neuropsychologist in a criminal case. The
11 individual's pattern of cognitive deficiencies, real world
12 problems, and childhood experiences are the things that
13 are important for juries to hear about, not a label that gets
14 pinned to the defendant.

15 Ex. 205 at ¶¶7-8.

16 38. One of the most frequent reasons for an ASPD misdiagnosis is a failure
17 to understand the individual's history of trauma. See Ex. 186.

18 A thorough life history investigation is [] important to an
19 accurate mental health assessment and differential
20 diagnosis because behavior does not qualify for a
21 personality disorder (or ASPD) diagnosis if it is "part of a
22 protective survival strategy." For example, a child at risk
23 of violence in the home may run away, become truant from
school, habitually lie, or engage in other behavior to evade
severe maltreatment. Children in impoverished
environments may steal food simply to have enough to eat.

Ex. 186 at 55.

39. That is exactly what happened here. As psychiatrist Dr. Richard Dudley
explained:

Being [] totally surrounded by and repeatedly exposed to
violence, especially in the absence of the type of parenting
that might have helped mitigate its effects on his
development, had multiple effects on Marlo. More
specifically, it made it all the more difficult for him to
develop a positive sense of himself and regulate his mood
and this also resulted in the development of trauma-
related symptoms such as hypervigilance and over-
reactivity to situations perceived as threatening.

Ex. 183 at ¶65.

1 40. If competent trial counsel had provided Dr. Kinsora with Thomas's
2 complete social history, he would have used it to contextualize Thomas's behavior:

3 This information would have been of great value to my
4 analysis in 1996 and 1997. Had I been provided this
5 additional social history information, I would have
6 explained the "creation" of Mr. Thomas as a broken
individual, which I diagnosed as ASPD, through the prism
of his terrible formative experiences: factors including his
borderline intellectual functioning, his impulse and mood
regulation disorders, as well as his horrible family and
social environment as a child.

7 Ex. 205 at ¶9.

8 41. Instead, Kinsora's testimony about ASPD overshadowed the helpful
9 things he identified for the jury, most notably Thomas's neurocognitive deficits,
10 learning disabilities, and borderline intellectual functioning. See Ex. 180 at 12;
11 6/25/97 TT at 17-27, 35; see also Ex. 206 (Declaration of Dr. Joan W. Mayfield, Ph.D.).
12 This conclusion is compelled by the jury's finding on the special verdict forms for
13 mitigating circumstances. Evidence of impaired intellectual functioning is inherently
14 mitigating. Tennard v. Dretke, 542 U.S. 274, 287 (2004) (citing Atkins v. Virginia,
15 536 U.S. 304, 316 (2002)). Yet, although the mitigating circumstances submitted to
16 the jurors included Thomas's low IQ and learning disabilities, they failed to find any
17 of these as mitigation. See Ex. 136 at 8JDC04893-96.

18 42. McMahon's ineffective preparation of Kinsora, and the glaring holes in
19 the social history investigation underlying the information provided to him, also left
20 him vulnerable to the prosecutor's cross-examination, most notably about Thomas's
21 history of violence. 6/25/97 TT at II-40-57. Daniel Albregts, who represented Thomas
22 at his penalty retrial, stated:
23

 My best guess is we decided not to use [Kinsora at the
penalty retrial] because he did not hold up well under
cross-examination. I have used Dr. Kinsora in other cases
and he can be an effective witness. Based on my knowledge
of Marlo's first trial attorneys, Peter LaPorta and Lee
McMahon, my assumption is that they did not adequately
prepare Dr. Kinsora for the cross-examination.

1 Ex. 164 at ¶6. Indeed, when Kinsora submitted his bill for services, he asked if
2 LaPorta “would be willing to sit down with me in the near future[.] I would be curious
3 to discuss the Thomas case and would encourage your suggestions with regard to
4 answering some of the questions thrown at me by the prosecuting attorney.” Ex. 148.

5 43. “[D]efense counsel d[oes] not fulfill his responsibility to [his client] on
6 the issue of investigating and presenting mental health testimony simply by
7 retaining [a psychologist.]” Doe v. Ayers, 782 F.3d 425, 442 (9th Cir. 2015) (internal
8 quotations omitted). “To perform effectively in the penalty phase of a capital case,
9 counsel must conduct sufficient investigation and engage in sufficient preparation to
10 be able to ‘present[] and explain[] the significance of all the available [mitigating]
11 evidence.’” Mayfield v. Woodford, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (quoting
Williams v. Taylor, 529 U.S. 362, 393, 399 (2000)) (alterations in original).

12 44. Trial counsel’s failure to conduct a constitutionally adequate
13 investigation to support competent and persuasive expert testimony fell below
14 objective standards of reasonableness. See Hovey v. Ayers, 458 F.3d 892, 925 (9th
15 Cir. 2006) (“Regardless of whether a defense expert requests specific information
16 relevant to a defendant’s background, it is defense counsel’s ‘duty to seek out such
17 evidence and bring it to the attention of the experts.’”) (quoting Wallace v. Stewart,
18 184 F. 3d 1112, 1116 (9th Cir. 1999)); Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir.
19 2002) (“We have also held that counsel has an affirmative duty to provide mental
20 health experts with information needed to develop an accurate profile of the
21 defendant’s mental health.”).

22 45. Had trial counsel performed effectively, there is a reasonable probability
23 the jury would have found Thomas not guilty of first-degree murder. Thomas is
entitled to a new trial.

1 **B. Trial Counsel Were Ineffective for Failing to Present Any Evidence in**
2 **Support of a State-Of-Mind Defense and a Case for Lesser Culpability**

3 46. The only substantive defense that Thomas's counsel even suggested at
4 the guilt phase was a passing indication that there was no premeditation beyond a
5 reasonable doubt and that the appropriate verdict was for second-degree murder. The
6 only theory suggested, in other words, was not a denial of guilt; it was an assertion
7 of lessened culpability based on intent: a state-of-mind defense. In light of the
8 evidence available for a case in mitigation—that is, the evidence available had
9 defense counsel actually performed any investigation of mitigation—it was deficient
and prejudicial under Strickland for counsel to present no evidence in support of a
case for second-degree murder.

10 47. It was also deficient and prejudicial under Strickland to wait until
11 closing argument to introduce the concept of lesser culpability and lack of intent to
12 the jury, to mention state-of-mind as a defense only fleetingly, and to omit from
13 closing argument any discussion of the legal definition of second-degree murder in
14 connection with the evidence. Simply put, Thomas's counsel mentioned their state-
15 of-mind defense in passing, once, at the end of the trial—but they never actually
presented a case for it.

16 48. When the prosecution finished its opening argument at the guilt phase
17 of Thomas's trial in 1997, the judge asked Thomas's lawyers if they wanted to make
18 "[a]ny opening on behalf of the defense?" 6/16/97 TT at II-15. LaPorta responded, in
19 front of the jury, that "we'll . . . reserve our opening for our case-in-chief." Id. But, as
20 it turned out, there was no case-in-chief. This was deficient performance. Opening
21 statements afford an opportunity at the outset of the trial to draw the jury's attention
22 to evidence that the parties expect to be introduced, as well as to gaps in the evidence.
By reserving opening statement, trial counsel allowed the State's evidence to be

1 viewed without direction from defense counsel and without benefit of a forecast of the
2 defense's theory of the case.

3 49. After the State had finished its presentation of evidence and testimony
4 and rested its case, LaPorta informed the judge that, unless Thomas had changed his
5 initial decision not to testify, "the defense will have no witnesses to present." 6/18/97
6 TT at IV-2. Thomas confirmed that he would not take the stand. Id. at IV-2-3. With
7 that, the defense also rested, but without presenting any argument, evidence or
8 testimony. In so doing, it left unfulfilled its representation to the court and the jury
9 that it would make an opening statement at the beginning of its case-in-chief. This
10 was deficient performance. Trial counsel's failure to keep their promise to the jury
11 impaired their credibility and prejudiced Thomas.

12 50. From there, the court proceeded to review the proposed jury instructions
13 with the parties. Id. at IV-3. Thomas's counsel said it did not want an instruction
14 informing the jurors that they could not draw an inference "of any kind" from
15 Thomas's decision not to testify. Id. They further stated that they wanted an
16 instruction on second-degree murder. Id. There was no objection from the State, and
17 the court gave the second-degree murder instructions to the jury. See Ex. 71 at 32-33
18 (Instructions 29-30).

19 51. Defense counsel's closing argument to the jury covers four-and-a-half
20 pages of the trial transcript. 6/18/97 TT at IV-61-65. At the beginning, McMahon
21 conceded that she could not "deny our client's responsibility for the deaths of these
22 two young men." Id. at IV-61. That concession left Thomas's state of mind as the only
23 articulable defense against a finding of first-degree murder and a possible death
sentence. Indeed McMahon made that argument, for the first and only time in the
entire trial, in her brief closing statement:

[G]oing back to the jury instruction that I quoted to you,
ladies and gentlemen, about using your common sense, I
think when you review in your discussions and recall the

1 testimony of Marlo Thomas during that taped confession,
2 that he gave freely and voluntarily and without legal
3 counsel, that what he was saying, whether his judgment
4 was bad, whether his perception was bad, whether he
underestimated the impact of his acts, that was not
premeditated, it was not intentional, it was not a design to
kill the two young men that he had worked with and that
he obviously liked.

5 Id. at IV-64.³⁵ The instruction to which counsel referred here is not an instruction on
6 second-degree murder or any other lesser culpability in a homicide. Defense counsel
7 never drew the jury's attention to that part of the instructions, leaving the jurors to
8 question for themselves what, if anything, second-degree murder might have to do
9 with the evidence and testimony they had just heard.

10 52. At the post-conviction evidentiary hearing in state court in 2002, the
11 court asked Thomas's post-conviction counsel, David Schieck, "[H]ow do you prepare
12 to defend a case where your client gives a non-suppressible videotaped confession to
13 the offense to the police department? . . . What kind of rabbits are there in hats to
14 pull out to counter that type of State's evidence?" 1/22/02 TT at 12. Prompted by that
15 pointed question and Schieck's direct examination, McMahon explained, "I think that
16 Marlo genuinely believed that what he did was self-defense[.]" Id. at 13. But no one
17 argued or presented self-defense as a theory of defense at trial. Counsel mentioned
18 only in passing, at closing, that Thomas never premeditated the killings.

19 53. McMahon essentially conceded there was no serious strategy for
20 presenting an effective defense at the guilt phase. She said, "I felt that the State's
21 case for guilt was overwhelming," that she did not "feel that [self-defense] was going

21 ³⁵ It bears noting that the instruction to which counsel refers here is not an
22 instruction on second-degree murder or any other lesser culpability in a homicide.
23 Defense counsel never drew the jury's attention to that part of the instructions,
leaving the jurors to question for themselves what, if anything, second-degree murder
might have to do with the evidence and testimony they had just heard.

1 to fly with the jury,” and that “I think our general feeling was that, given the
2 videotape, that it was not unreasonable to try to have the goal of avoiding the death
3 penalty, of getting Mr. Thomas something less than death.” Id. at 14, 42 and 47.
4 Indeed that is always the goal, but the 1989 ABA Guidelines, Guideline 11.4.1.B
5 states that, contrary to the state post-conviction court’s sharp suggestion that any
6 guilt-phase defense in this case was futile in the face of Thomas’s videotaped
7 statements to police, “investigation for preparation of the guilt/innocence phase of the
8 trial should be conducted regardless of any admission or statement by the client
9 concerning facts constituting guilt.” Ex. 66; see also Guideline 11.7.1.A (requiring
10 counsel to come up with a theory of defense).

11 54. The comment to Guideline 11.7.1 adds that “[f]ormulation of and
12 adherence to a defense theory are vital in any criminal case. In the bifurcated
13 proceedings of a capital trial, the defense theory is especially important.” Id.
14 Thomas’s trial counsel violated these prevailing professional norms: their half-
15 hearted guilt-phase representation evinced an effective surrender to the videotaped
16 confession, manifesting in a non-tactical and constitutionally deficient performance
17 of no opening statement communicating any theory of the case, zero presentation of
18 evidence, and less than five pages of a rambling closing argument.

19 **1. Trial counsel were ineffective for failing to pursue or present any**
20 **evidence in support of their argument that the killings were not**
21 **premeditated**

22 55. In Bloom v. Calderon, 132 F.3d 1267, 1278 (9th Cir.1997), a capital
23 murder case, “[c]ounsel’s theory of defense rested, at least in part, on a psychiatric
defense.” “[C]ounsel put in issue [the defendant’s] mental capacity to premeditate, to
intend to kill, and to act with malice.” Id. However, there was a “complete lack of
effort to obtain a psychiatric expert until days before trial,” id. at 1277, and defense
counsel called his expert witness to testify unprepared to talk about the defendant’s
psychological state in mitigating terms. The defendant was convicted and sentenced

1 to death. Later, in post-conviction proceedings, the same expert, armed with a full
2 psycho-social history of the defendant, opined that “due to his mental impairments
3 and dissociative disorder,” the defendant could not have formed the state of mind
4 necessary to be guilty of first-degree murder. Id. at 1276. The Ninth Circuit found
5 that trial counsel’s failure to assemble and put on available psychiatric evidence was
6 deficient under Strickland and prejudiced the defendant in the guilt phase. Id. at
7 1278. See also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998) (finding Strickland
8 prejudice because, in light of unpursued evidence of the effect of defendant’s
9 “psychological history of multiple trauma . . . it is reasonably probable that the
10 outcome of [the] trial would have been different had counsel conducted a minimal
11 investigation into [the defendant’s] apparent psychiatric impairment. [I]f a defense
12 of mental illness had been presented, the jury would not have found the existence of
13 malice . . . [I]f counsel had introduced [the expert’s] evaluation at trial . . . along with
14 other evidence in the record of [defendant’s] mental illness, the jury in all likelihood
15 would have returned a verdict of manslaughter”).

16 56. In this case, pursuing and presenting psychological expert opinion of the
17 sort obtained by federal habeas counsel would have enabled trial counsel to evoke
18 some measure of sympathy, and to assign lesser culpability to Thomas’s struggle to
19 control his impulsive, violent reactions in situations of acute stress. The jury would
20 have heard from credible experts that Thomas is impaired by emotional and
21 behavioral deficits caused by his mother’s use of alcohol during pregnancy and his
22 traumatic childhood background.

23 57. Dr. Dudley, who was asked to “identify significant influences on Marlo’s
development and functioning throughout his life . . . and neurocognitive, psychiatric,
and psychological factors and symptoms” opined that:

[a]s Marlo described the . . . events surrounding the
killings, it was clear that he felt he was being attacked by
two young men who were comparable to him in age, size,

1 and strength, and that he was unsuccessfully attempting
2 to defend himself against both of them. It is the opinion of
3 this psychiatrist that these events triggered an
4 exacerbation of the symptoms that had resulted from
5 Marlo's . . . trauma history; therefore, he felt he was at risk
6 of serious harm; and therefore, when he saw he had the
7 opportunity to grab the knife, he impulsively did so. This
8 opinion is further supported by the fact that Marlo's
9 descriptions of the stabbings had a dissociative-like
10 quality, in that he had no sense of how much time had
11 elapsed, he had no sense of how many times he had stabbed
12 them, where he had stabbed them and how deeply he had
13 stabbed them, and he had no sense of the damage that had
14 been done.

15 Exhibit 183 at ¶¶ 6, 98.

16 58. Likewise, a neuropsychiatrist like Dr. Joan Mayfield would have told
17 the jury that Thomas suffers from a form of fetal alcohol spectrum disorder (FASD)
18 known as alcohol-related neurodevelopmental disorder (ARND). See Ex. 206 at 1, 6-
19 7. That diagnosis, in tandem with the trauma-focused analysis provided by someone
20 like Dr. Dudley, would have presented a non-biased jury with a basis for finding a
21 lesser degree of culpability. An expert like Dr. Mayfield would have opined, as she
22 did to Thomas's federal habeas counsel, that people on the fetal alcohol spectrum
23 experience "deficits [in] . . . a broad array of neurocognitive functions," including
impaired impulse control, inhibition, and emotional and behavioral control. Id. at 5.
An expert like Dr. Mayfield would have further explained how the interaction
between ARND's negative cognitive effects (i.e., borderline intellectual disability) and
a traumatic upbringing – both of which are wholly out of an individual's control –
often manifest in "secondary disabilities." Id. at 7. Secondary disabilities, according
to Dr. Mayfield include "mental health problems, inappropriate sexual behaviors,
disrupted school experiences, substance abuse problems, criminal behavior,
confinement, poor work history, and problems living independently as an adult." Id.
A constitutionally effective defense team would have utilized an expert like Dr.

1 Mayfield to show the jury that Thomas experienced most or all of those secondary
2 disabilities as a result of his social and neuropsychological profile.

3 59. The reports and opinions of Drs. Dudley and Mayfield represent the kind
4 of expert testimony that a constitutionally effective defense team would have
5 obtained and presented to Thomas's guilt-phase jury. That kind of testimony, which
6 trial counsel neither pursued nor presented, would have provided compelling
7 evidence of the psychological defense that Thomas never premeditated or intended to
8 kill anybody. Without any expert evidence to support it, the jury heard that defense
9 exactly as it was presented in the trial: as an afterthought. A lack-of-premeditation
10 defense had no chance of receiving serious consideration in the jury room.

11 60. Trial counsel's failure to meet this constitutionally mandated level of
12 effectiveness was deficient under the Sixth Amendment. Moreover, their failure
13 prejudiced his case for avoiding the death penalty. The jury's verdict forms simply
14 state that, as to both victims, Thomas was guilty of first-degree murder with the use
15 of a deadly weapon. See Ex. 134. They do not specify whether the jury found him
16 guilty of felony murder or premeditated murder. It is reasonably probable that, in
17 light of the mostly unrebutted evidence the State presented, they convicted him of
18 the latter – a conviction that a Strickland-worthy use of psychological expertise in the
19 guilt phase of trial would have avoided.³⁶

20 **2. Trial counsel were ineffective in failing to present their penalty-**
21 **phase expert during the guilt phase**

22 61. Thomas's trial counsel consulted with a neuropsychologist, but they
23 made the non-tactical decision to save his testimony for the penalty phase. Generally
speaking, there is no constitutionally permissible reason to wait to present

³⁶ Indeed, years later, at the second penalty hearing in 2005, the trial judge refused to include as a mitigator Thomas's contention that the homicides "occurred during a confrontation and as such there was no premeditated intention to cause death." 11/2/05 TT at 216.

1 psychological evidence until the penalty phase when it is available and appropriate
2 to the guilt phase. To the contrary, 1989 ABA Guideline 11.4.1.D.7 states counsel
3 should “secure the assistance of experts where it is necessary or appropriate for
4 preparation of the defense [or] rebuttal of any portion of the prosecution’s case at the
5 guilt/innocence phase.” Ex. 66 (emphasis added). In this case, rebuttal evidence for
6 the guilt phase was not only available, it was in hand. Dr. Kinsora had already
7 reported the following neuropsychological findings to defense counsel:

8 Mr. Thomas has a great deal of difficulty managing his
9 impulses in society. He has limited intellectual skills and
10 when faced with problems, he is unable to properly arrive
11 at solutions. His routine difficulty is anger and physical
12 threats. His anger has and will likely continue to get him
13 into trouble in society for some time to come. His sense of
14 being persecuted and perpetually wronged by others stems
15 from his childhood and his unique manner of interpreting
16 his world.

17 Ex. 180.

18 62. McMahon said she “spent a great deal of time with Dr. [Kinsora].”
19 1/22/02 TT at 18. There is no evidence that she discussed with him the possibility of
20 testifying at the guilt phase to support a case for second-degree murder or to lay the
21 groundwork by frontloading mitigation for a possible penalty phase. Her testimony
22 in the state post-conviction hearing shows McMahon contemplated the benefits of Dr.
23 Kinsora’s testimony as applying only in the penalty phase. 1/22/02 TT at 15, 18, and
24 49-51. She gave no reason why she and LaPorta did not present the psychologist’s
25 report and testimony at the guilt phase, when all they had left to argue, by
26 McMahon’s own concession, was the psychological defense that Thomas did not
27 intend to kill anybody.

28 63. Trial counsel’s failure to marshal or present any expert testimony
29 appropriate to support their defense that Thomas did not premeditate the homicides
30 was ineffective and prejudicial under Strickland. See 1989 ABA Guideline 11.4.1.D.7
31 (counsel should “secure the assistance of experts where it is necessary or appropriate

1 for preparation of the defense [or] rebuttal of any portion of the prosecution's case at
2 the guilt/innocence phase"). There is a reasonable probability that had available
3 expert testimony been presented, the outcome of the guilt phase would have been
4 different. Thomas was prejudiced by his counsel's ineffectiveness in this regard: a
5 constitutionally adequate presentation of the debilitating psychological effects of
6 severe childhood trauma, alcohol related neurodevelopmental disorder and
7 borderline cognitive deficits, among other factors, would have had the reasonably
8 probable outcome of a second-degree murder conviction. Because of trial counsel's
9 ineffectiveness, the Court should vacate Thomas's convictions and sentences.

10 **3. Trial counsel were ineffective for failing to investigate and present**
11 **evidence to support an instruction on voluntary intoxication**

12 64. Trial counsel were ineffective in failing to investigate and present
13 evidence in support of an instruction on voluntary intoxication. Thomas's aunt, Eliza
14 Bosley, testified at his penalty retrial that she saw Thomas the night before the
15 incident at the Lone Star Steakhouse. 11/02/05 TT at 125. Thomas was at Bosley's
16 home for around two and a half hours. Id. at 126. Bosley recalled that Thomas "sat
17 there like he was really like in a daze or something like he wasn't in his right mind."

18 Id.

19 Q. Did it look like he was under the influence of drugs
20 or alcohol?

21 A. Yes.

22 Q. Why do you say that?

23 A. Because his pupils are all glazed and everything.

11/02/05 TT at 126-27.

65. On trial counsel's motion, the trial court submitted the following
mitigating factor for the jury's consideration:

One, the murder was committed while Marlow [sic]
Thomas was under the influence of extreme mental or
emotional disturbance or influence of drugs.

1 11/4/05 TT at 235. If trial counsel had interviewed Bosley and called her as a witness
2 in the guilt phase, they could have used her testimony to support a motion for an
3 instruction on voluntary intoxication.

4 66. If trial counsel had interviewed Thomas's cousin, Charles Nash, Jr., they
5 would have learned that he saw Thomas, codefendant Kenya Hall, and Angela Love
6 smoking crack cocaine the night before the offenses. Ex. 36 at ¶9. Effective trial
7 counsel would have called Nash as a guilt-phase witness and utilized his testimony
8 in support of a motion for an instruction on voluntary intoxication.

9 67. If trial counsel had performed effectively, there is a reasonable
10 probability that Thomas would not have been found guilty of first degree murder.
11 Thomas is entitled to relief.

12 **C. Trial Counsel Were Ineffective During Voir Dire**

13 68. Juror Sharyn Brown disclosed during voir dire that she had been the
14 victim of a home invasion robbery five years previously, and had been at home when
15 the intruder entered. 6/16/97 TT at I-84. Trial counsel asked no questions of Juror
16 Brown and passed her for cause. Id. at I-88. This was deficient performance that
17 prejudiced Thomas. If effective trial counsel had asked juror Brown about her
18 experiences as a crime victim, they would have challenged her for cause, and the trial
19 court would have granted this challenge. See Claim Twenty-Eight (B), below. Without
20 juror Brown, there is a reasonable probability that Thomas would not have been
21 found guilty of first degree murder.

22 69. Juror Joseph Hannigan revealed that he owned a business in Boston in
23 1960 and "we were held up." Id. at I-31. The perpetrator(s) were never caught. Id.
Trial counsel asked juror Hannigan no questions about the robbery of his business or
its impact on his ability to be fair in a trial where Thomas was charged with murder
during the robbery of a business. Id. at I-34-37. Trial counsel were deficient for failing

1 to investigate, learn of, and present evidence that juror Hannigan was biased. Had
2 counsel performed effectively, there is a reasonable probability that Thomas would
3 not have been found guilty of first degree murder. See Claim Twenty-Eight (A), below.

4 70. Juror Sandra Lane had been the victim of a crime where she “had
5 someone in my house that tried to attack me.” Id. at I-207. The perpetrator was never
6 caught. Id.

7 71. All of these individuals were seated as jurors at Thomas’s trial. See 1997
8 Jury List. Trial counsel failed to object to these jurors serving on Thomas’s trial. This
9 was deficient performance.

10 72. The presence of a biased juror is structural error and Thomas is entitled
11 to relief. Alternatively, the error was not harmless beyond a reasonable doubt.

12 73. If trial counsel had performed effectively, there is a reasonable
13 probability that Thomas would not have been found guilty of first degree murder.
14 Thomas is entitled to relief.

15 **D. Trial Counsel Were Ineffective in Failing to Object to the Admission of a**
16 **Diagram of Carl Dixon’s Body That was Cumulative of Evidence Already**
17 **Presented**

18 74. At the end of Deputy Medical Examiner Dr. Robert Jordan’s testimony,
19 the State introduced Exhibit 84, a diagram he prepared during the autopsy
20 purporting to indicate where on Carl Dixon’s body he observed stabbing and cutting
21 wounds. 6/17/97 TT at III-167. Trial counsel failed to object to the admission of
22 Exhibit 84, even though Jordan had already testified sufficiently about the injuries
23 to Dixon’s body and introduced a number of photographs to illustrate his testimony.
See id. at 154-67. This cumulative presentation of Dixon’s injuries was unduly
prejudicial.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MARLO THOMAS,

Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents.

No. 77345

District Court Case No.
96C136862-1

(Death Penalty Case)

APPELLANT'S APPENDIX

Volume 4 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

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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

1 75. If trial counsel had performed effectively, there is a reasonable
2 probability that Thomas would not have been found guilty of first degree murder.
3 Thomas is entitled to relief.

4 **E. Trial Counsel Were Ineffective in Failing to Object to the Prosecutor's**
5 **Leading Questions to Witness Michael Bryant**

6 76. Throughout the State's direct examination of Detective Michael Bryant,
7 the prosecutor repeatedly led the witness with questions that assumed facts
8 damaging to the defense. 6/17/97 TT at III-203-210 (E.g., "Did Emma Nash provide
9 you with a firearm which she indicated was in the defendant's possession earlier that
10 day?")

11 77. Failure to object to the State's leading of Detective Bryant during his
12 testimony was ineffective under Strickland. If trial counsel had performed effectively,
13 there is a reasonable probability that Thomas would not have been found guilty of
14 first degree murder. Thomas is entitled to relief.

15 **F. Trial Counsel Were Ineffective in Failing to Adequately Prepare to Cross-**
16 **Examine Codefendant Kenya Hall**

17 78. An example of counsel's lack of preparation is reflected in Thomas's
18 preliminary hearing. During the redirect examination of Kenya Hall, the following
19 discussion occurred:

20 Mr. LaPorta: Well, your Honor, just for some
21 housekeeping purposes, I have many
22 things from Mineral County and law
23 enforcement agencies in that area, but
 I do not have a copy of this [Hall's
 statement transcript]. If I could review
 this for a moment before I recross, and
 then if the D.A.'s office will provide me
 with a copy.

 Mr. Harmon: We certainly will, your Honor. I
 thought that he had it.

 Mr. LaPorta: I've gone through everything else, but I
 just don't have this.

1 11/27/96 TT at 137. The failure of trial counsel to prepare for Hall's testimony was
2 especially damaging because Hall refused to testify at trial and therefore was never
3 the subject of competent cross-examination. Such cross-examination would have
4 revealed that Hall had been threatened and coerced into testifying and was not telling
5 the truth. After the preliminary hearing, Hall wrote to Thomas and admitted that he
6 had not told the truth during the preliminary hearing. See Ex. 11 at 74. These letters
7 were not used at trial.

8 79. Thomas attempted to bring counsel's lack of diligence to the trial court's
9 attention and to have new counsel appointed. Thomas filed a motion complaining that
10 counsel had not investigated Thomas's case, was not communicating with Thomas
11 enough, had not discussed any defenses with Thomas, and had not filed any pretrial
12 motions. The court denied this motion. 10/21/96 TT at 4.

13 80. Thomas's concerns were borne out in the trial. Despite Thomas's
14 complaints that no pretrial motions were filed, counsel ultimately filed only two
15 pretrial motions: motion to allow jury questionnaire and motion to prevent Hall from
16 testifying. Trial counsel had done virtually nothing to prepare for Thomas's trial. This
17 was deficient; had counsel adequately prepared for and investigated Thomas's case,
18 the result of his proceedings would have been different.

19 **G. The Cumulative Effect of Counsel's Deficient Performance Was**
20 **Prejudicial**

21 81. If individually the deficiencies of counsel are insufficient, the cumulative
22 effect of counsel's deficient performance requires habeas relief. In the aggregate,
23 counsel's errors create a reasonable probability that, but for these errors, the result
of Thomas's guilt phase proceeding would have been different.

1 **CLAIM FOURTEEN: INEFFECTIVE ASSISTANCE OF COUNSEL AT THE**
2 **PENALTY RETRIAL**

3 Thomas's death sentences are invalid under the federal constitutional
4 guarantees of the right to due process, confrontation, effective counsel, equal
5 protection, trial before an impartial jury, freedom from cruel and unusual
6 punishment, and a reliable sentence due to the ineffective assistance of trial counsel
7 at the penalty retrial. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§
8 1, 6, 8, and art. 4 § 21.

9 **SUPPORTING FACTS**

10 1. Thomas suffered ineffective assistance of counsel because trial counsel
11 at the penalty retrial failed to raise all substantial and cognizable issues, arguments,
12 and objections, including but not limited to those claims raised in this petition that
13 were cognizable at the time of trial, without any reasonable tactical or strategic
14 justification. The failure by penalty retrial counsel amounted to deficient
15 performance which prejudiced Thomas's case.

16 **A. Trial Counsel Were Ineffective in Failing to Object to Thomas and Some**
17 **of His Witnesses Appearing Shackled In Front of the Jury**

18 2. Trial counsel were ineffective in failing to object to Thomas being
19 shackled at the ankles in front of the jury where the trial court had failed to establish
20 a manifest need to impose the restraints, and where there were serious questions
21 whether the ankle chains were visible to jurors. See Claim Two, above.

22 3. Trial counsel were ineffective in failing to object to the shackling of
23 Thomas's selection-phase witnesses, and their appearance in prison clothing. See
Claim Two, above.

4. Trial counsel were ineffective in failing to object to the overwhelming
presence of uniformed correctional officers in the courtroom. See Claim Two, above.

1 5. If trial counsel had performed effectively, there is a reasonable
2 probability that Thomas would not have been sentenced to death. Thomas is entitled
3 to relief.

4 **B. Trial Counsel's Mitigation Investigation and Presentation Were Deficient**

5 6. Thomas was represented at his 2005 penalty retrial by David Schieck,
6 then the Clark County Special Public Defender, and private practitioner Daniel
7 Albregts. The Office of the Clark County Special Public Defender (CCSPD) was the
8 new iteration of the Las Vegas office of the Nevada State Public Defender that
9 represented Thomas at his first trial. See Claim Thirteen (A), above. By the time of
10 the retrial, Schieck had been representing Thomas for several years. As a private
11 practitioner, Schieck was appointed to represent Thomas in his state post-conviction
12 proceeding and remained counsel for his appeal from the denial of the state post-
13 conviction petition. Ex. 172 at 15, 24.

14 7. After the Nevada Supreme Court invalidated Thomas's sentences, on
15 March, 29, 2004, Schieck, still in private practice, was appointed to represent Thomas
16 at his penalty retrial. Ex. 172 at 24. One of the reasons for Schieck's appointment was
17 Thomas's lack of faith in the CCSPD based on its affiliation with the since-defunct
18 Las Vegas office of the State Public Defender and his experiences there with LaPorta
19 and McMahon. McMahon was now employed by CCSPD. Ex. 172 at 25. Nevertheless,
20 the court appointed the CCSPD as second chair. Ex. 172 at 24. On April 12, 2004,
21 Schieck wrote to Thomas, stating "I will be filing a Motion to Disqualify the Special
22 Public Defender this week." Ex. 194.

23 8. On June 30, 2004, Schieck, who in the interim had been appointed head
of the CCSPD, appeared on behalf of Thomas. Ex. 172 at 25. Schieck informed the
court that, when he told Thomas he was now with the CCSPD, Thomas "did not know
what to think" and "he has not heard from [Thomas] in a couple of weeks." Ex. 172 at
25. No mention was made of moving to disqualify the CCSPD. Schieck remained lead

1 counsel and Albregts was appointed as second chair. Ex. 172 at 25. Albregts appeared
2 in front of the court frequently and the court wanted him to become death-qualified
3 under Supreme Court Rule 250. He had worked on three prior death-eligible cases
4 but none had gone to a penalty phase; as a penalty retrial, Thomas's case was
guaranteed to give Albregts his death qualification. See Ex. 164 at ¶2.

5 9. Although Schieck and Albregts were appointed to represent Thomas on
6 June 30, 2004, they did not secure the services of an investigator until eight months
7 later. See Ex. 167 at ¶2. This delay was contrary to the prevailing professional norms
8 of constitutionally adequate capital defense representation. See Ex. 67 at 88 (2003
9 ABA Guidelines, Guideline 10.4.C.) (lead counsel should assemble a defense team
"[a]s soon as possible").

10 10. Maribel Yanez began working on Thomas's case shortly after being hired
11 by the CCSPD in March 2005. Ex. 167 at ¶¶2, 6. Although Yanez was hired as a
12 "mitigation investigator," she had no prior experience as a mitigation specialist or
13 investigator; she had no prior capital experience and had never worked in the field of
14 criminal defense. Ex. 167 at ¶¶2-3. Yanez was the first individual to hold the position
15 of "mitigation investigator" at CCSPD. Ex. 167 at ¶4. It was Schieck's responsibility
16 to train her, in addition to managing his responsibilities as head of the office and lead
17 counsel on Thomas's case, as well as his heavy caseload of other capital cases. Ex. 167
18 at ¶5; see Ex. 172 at 28 (discussing Schieck's commitments in other capital cases in
the months leading up to Thomas's trial).

19 11. Despite her utter lack of relevant experience, Yanez was the only
20 investigator assigned to Thomas's case. Ex. 167 at ¶5. This was contrary to the
21 prevailing professional norms of constitutionally adequate capital defense
22 representation. See Ex. 67 at 46-47 (2003 ABA Guidelines, Guideline 4.1.A.2.,
23 Commentary) ("The assistance of an investigator who has received specialized
training is indispensable to discovering and developing the facts that must be

1 unearthed at trial”; “Mitigation specialists possess clinical and information-
2 gathering skills and training that most lawyers simply do not have.”). Yanez took no
3 initiative in independently following investigative leads. Instead, she “took one
4 hundred percent of [her] direction from the attorneys,” primarily from Schieck. Ex.
167 at ¶6.

5 12. Thus, in addition to all of his other responsibilities, Schieck was de facto
6 responsible for Thomas’s mitigation investigation. Yanez recalled: “The only times I
7 visited Marlo were at David’s direction. If Marlo gave me the name of a potential
8 witness, I passed it on to David. I did not contact any witnesses unless David
9 instructed me to do so.” Ex. 167 at ¶6. As a result of trial counsel’s ineffectiveness in
10 failing to assign a competent and experienced investigator to Thomas’s case, the
mitigation investigation was constitutionally deficient.

11 13. For example, Yanez stated: “David did not direct me to investigate the
12 neighborhood where Marlo grew up or the people outside his family he grew up with,
13 so I did not investigate those things.” Ex. 167 at ¶8. On this point alone, a
14 constitutionally adequate mitigation investigation would have revealed that Thomas
15 was raised in environments replete with community risk factors for criminal violence
16 as defined by the United States Department of Justice, including poverty, exposure
17 to violence, community disorganization, gang activity, lack of role models, and
18 substandard education. See Ex. 181 at 1, ¶7 (Declaration of Geographic Information
Systems Analyst Amy B. Nguyen).

19 14. Thomas was raised on the west side of Las Vegas. See Ex. 245 at ¶3.
20 Like Thomas’s parents, many families that settled in the Westside, migrated from
21 Tallulah, Louisiana. Claytee White, the inaugural Director of the Oral History
22 Research Center at the University of Nevada, Las Vegas, Libraries, explained the
history of this migration:

1 In the 1940s and 1950s [] cotton picking was becoming
2 mechanized. This change had a particularly hard impact
3 on communities like Tallulah, Louisiana, which were
4 predominantly African American and depended heavily on
5 the cotton industry for employment. African Americans
6 began to leave those communities in search of better
7 employment prospects.

8 At around the same time, there were many employment
9 opportunities in Southern Nevada and a shortage of
10 workers. . . . As African Americans from Tallulah and other
11 communities began migrating to Las Vegas, word of mouth
12 spread until friends and family were encouraging each
13 other to come.

14 Ex. 239 at ¶¶3-4.

15 15. But, as White explained further, “During this time, segregation was
16 alive and well in Las Vegas” and African Americans were allowed to live only in the
17 Westside. Ex. 239 at ¶5. “African Americans experienced much of the same poverty
18 and racism that had plagued their lives in the South; Las Vegas was nicknamed ‘The
19 Mississippi of the West.’ There were no laws requiring segregation, but segregation
20 existed in housing, employment, and public accommodations.” Ex. 239 at ¶6. The
21 situation came to a head shortly before Thomas’s birth. White explained:

22 By 1969, the tensions caused by segregation and police
23 brutality had erupted into riots spanning several days. Two
hundred Las Vegas police officers, sheriff’s deputies, and
tanks from Nellis Air Force Base came and blocked off the
Westside; many people were not allowed to go in or out
because of the blockade. A 7:00 p.m. curfew was imposed.

Ex. 239 at ¶7.

16. The riots led to change and, according to White, the 1970s, when Thomas
was a child, was an era where gains were being made. See Ex. 239 at ¶9. Around
1972-73, following harsh demonstrations, school integration took place. See Ex. 239
at ¶11. But integration was a double-edged sword for Westside residents. White
explained:

Integration during the 1970s also meant housing
integration. The wealthier African Americans were now
free to move to more desirable neighborhoods. This had a

1 destabilizing effect on the Westside. Particularly, this
2 meant the middle class began moving out, and they took
their dollars with them. As a result, businesses began
closing and/or leaving also.

3 . . .

4 The flight out of the community meant that, for those of
lower economic status, there were fewer job opportunities
because the businesses were leaving. . . .

5 By the 1980s, drugs began to have a devastating effect on
6 the community and the Westside began looking a lot like it
does today.

7 Ex. 239 at ¶¶12, 14-15. This was the Westside of Thomas's childhood.

8 17. Childhood friend Andrew Williams recalled: "Segregation was horrible
9 back then and couldn't be escaped even if you stayed where you were supposed to.
Whites drove through the neighborhood yelling 'monkey' and 'nigger.'" Ex. 34 at ¶3.
10 Children were even called "nigger" and "coon" by their teachers. See Ex. 36 at ¶6.

11 18. The number of families living at or below the poverty level in the area
12 around Gerson Park where Thomas was born and lived as an infant was 135% higher
13 than the Clark County average. See Ex. 181 at 2-3, ¶17. Families receiving public
14 assistance in that area represented a 439% increase over the county average. See id.
15 at ¶18. As a young child, Thomas lived in neighborhoods with poverty rates up to
16 297% higher than the county average. See id. at ¶28. As an adolescent, the number
17 of adults in his neighborhoods with less than a ninth grade education exceeded the
county average by up to 109%. See id. at ¶36.

18 19. Thomas's wife, Angela Thomas, described the Westside when she and
19 Thomas were growing up:

20 There were no banks, fast food, family sit down
restaurants, or clothing stores on the west side. The only
21 place to eat was Carey Mini Mart. It sold chicken, hot dogs,
fries, etc. People mostly drank 40 oz. beer because it was
22 available at Carey minimart in the Crip/ Gerson territory.
The only liquor store, 7 seas, was located in Blood territory.
It sold food also but Crips didn't cross Blood territory
23 without turmoil.

1 Super 8 grocery store was the only available place to
2 purchase groceries until it was burned down during the
3 rioting period. People who could afford it traveled by bus or
4 car to grocery shop. It caused many people to go without
5 food. . . .

6 Ex. 245 at ¶¶4-5.

7 20. The neighborhoods where Thomas grew up were extremely violent and
8 he lost many friends to violence. See Ex. 35 at ¶¶5-6; Ex. 40 at ¶¶2-3, 5; Ex. 62 at
9 ¶¶10-11; Ex. 34 at ¶9; Ex. 36 at ¶7; Ex. 45 at ¶6; Ex. 59 at ¶2; Ex. 37 at ¶21; Ex. 53
10 at 3; Ex. 227 at ¶4. Gang activity was rampant. See Ex. 34 at ¶¶10-12; Ex. 44 at ¶7;
11 Ex. 35 at ¶5; Ex. 36 at ¶7; Ex. 45 at ¶6; Ex. 59 at ¶¶3-4; Ex. 37 at ¶21; Ex. 153 at ¶3.

12 Retired police sergeant, Bobby Gronauer, recalled:

13 When I started working as a training officer in the early
14 1980s, the Gerson Park area was really bad. Gun violence
15 was at an all-time high. Shootings happened all th[r]ough
16 the night and mother[s] laid their children to sleep in
17 bathtubs for their safety. Police were shot at regularly.
18 Domino's Pizza would not deliver and the fire department
19 would not answer a call without police escort. The
20 community was drug infested. People were dying daily.
21 Kids didn't play outside and families were afraid to leave
22 their homes. It was a terrible place to live.

23 Ex. 59 at ¶2.

24 21. Thomas's older brother, Darrell, described how "Mom taught us to get
25 down on the floor when we heard gunshots. We could be watching TV and the sound
26 of 'pow, pow, pow,' rang through the house, so everyone ducked down where they
27 were." Ex. 37 at ¶21. Darrell was twelve or thirteen the first time he saw someone
28 shot. See Ex. 37 at ¶21. Childhood friend Ty-yivri Glover summarized the
29 neighborhood as follows: "You woke up, put on your clothes, and prayed to get where
30 you were going." Ex. 45 at ¶6.

31 22. Thomas's aunts and cousins lived in different gang territories and he
32 had to cross those lines to visit them. See Ex. 35 at ¶5; see also Ex. 227 at ¶4. As a
33 child, Thomas was chased by gang members when visiting family. See id. These

1 experiences continued into Thomas's adulthood. His brother-in-law, Kenya Hall,
2 recalled: "When Marlo and I visited his family members who lived in different gang
3 territories, it was common for us to have guns drawn on us. It happened to me a lot;
4 it was everyday life for Marlo." Ex. 246 at ¶3.

5 23. As a teenager, Thomas was caught in the midst of a drive-by shooting
6 by the Donna Street Crips. He was shot at and a good friend of his killed. See Ex. 62
7 at ¶11. When Thomas was eleven, he witnessed the aftermath of the murder of a
8 neighbor, known to the local kids as the Candy Lady. See Ex. 40 at ¶3. Childhood
9 friend Kareem Hunt, who stood with Thomas at the crime scene discussing how the
10 victim had been hog tied and killed, recalled it "really messed me up." Ex. 40 at ¶3.

11 24. Angela Thomas recalled:

12 There were no opportunities unless you traveled outside
13 the west side. People wanted to move away and talked
14 about it, but never left because it was all they knew. They
15 were in their comfort zone and didn't realize another world
16 was out there. The west wide was like its' own country. A
17 country within a country. It was third world because
18 everything was condemned. It seemed every other house
19 was a drug house. . . .

20 . . .

21 Marlo was comfortable on the west side because it was the
22 only life he knew. He carried a weapon most of the time.
23 When I didn't see Marlo's weapon I asked if he had it or
reminded him to carry it. Carrying a weapon is like
carrying ID. Even today, most males carry weapons, not
just drug dealers. Until you live on the west side you don't
know life as it is.

Ex. 245 at ¶¶6, 9.

24 25. As part of their mitigation investigation, Schieck and Yanez mailed a
25 document to Thomas entitled "Mitigation Factors Preliminary Checklist." Ex. 121 at
26 3-5; see Ex. 167 at ¶7. This document, which Thomas was instructed to complete and
27 mail back, asked numerous questions about his social history, including whether he
suffered from certain neurological impairments; if he experienced certain

1 psychological syndromes; and if he was ever physically or sexually abused. Ex. 121 at
2 3-5. This method of seeking social history information from Thomas was wholly
3 inappropriate:

4 Counsel should bear in mind that much of the information
5 that must be elicited for the sentencing phase investigation
6 is very personal and may be extremely difficult for the
7 client to discuss. . . . Obtaining such information typically
8 requires overcoming considerable barriers, such as shame,
9 denial, and repression, as well as other mental or
10 emotional impairments from which the client may suffer.

11 Ex. 67 at 111-12 (2003 ABA Guidelines, Guideline 10.7., Commentary).

12 26. Thomas's answers to the "mitigation checklist" nevertheless provided a
13 wealth of leads for further investigation. For example, Thomas answered that he
14 sometimes suffered from learning disabilities. Ex. 121 at 3. He experienced mood
15 disorders and adjustment disorders. Id. His parents were divorced. Id. His father
16 committed crimes; was an alcoholic; and was absent from Thomas's life. Ex. 121 at 4.
17 Thomas's family was constantly moving. Id. Someone he loved had died. Id. Thomas
18 had run away from home. Id. He had used alcohol, marijuana, hallucinogens, and
19 PCP. Id. He had lived in poverty. Id. But Yanez conducted no follow up investigation
20 whatsoever.

21 I do not recall conducting any follow up with Marlo about
22 the things he identified on the checklist. I would only have
23 followed up with Marlo if David had instructed me to do so.
I do not recall conducting any substantive mitigation
interviews with Marlo about his background or childhood
experiences.

Ex. 167 at ¶7.

24 27. If Yanez had investigated these leads, and conducted a constitutionally
25 adequate mitigation investigation, she would have learned the following. Thomas's
26 parents were raised in poverty in racially segregated Tallulah, Louisiana. See Ex. 44
27 at ¶¶2, 5; Ex. 58 at ¶2; Ex. 54 at 1; Ex. 154 at ¶2. Thomas's father, Bobby Lewis, was
28 the youngest of ten children: four by his mother and six by his father's first wife. See

1 Ex. 209 at ¶¶3-4. School census records indicate Lewis's parents were dependent on
2 welfare and both were illiterate. See Ex. 233. Lewis's sister, Annie Stringer, recalled:

3 We bought food at the first of the month and it had to last
4 until the first of next month. The last week of each month
5 was hard because food was scarce. For clothing, my mother
6 took flour sack bags and made dresses for the girls. . . . We
7 washed our clothes over the weekend and wore them again
8 each week. My mother bought us new clothes at Christmas.
9 Our shoes were purchased twice a year.

10 Ex. 209 at ¶8.

11 28. Lewis was affected by the racial tension of the time. When he was
12 seventeen years old, he was arrested for throwing bottles at passing cars driven by
13 whites. See Ex. 234 at 1, 4-5, 7; Ex. 235. A witness to the incident described seeing "a
14 white boy pass in a [] white car and had a rifle sticking out the window." Ex. 234 at
15 9.

16 29. Lewis was a violent youth. Stringer stated: "Growing up, he fought a lot
17 at school and in the neighborhood. He spent about two years in prison in Tallulah for
18 fighting." Ex. 209 at ¶11. Instead of curbing this violence, Lewis's father apparently
19 encouraged it, as evidenced by the following account by Stringer:

20 Sometimes in the summer, my family traveled to Yazoo
21 City, Mississippi, to visit my half siblings. It was during
22 one of these trips, when Bobby was nine, that my father
23 introduced him to bear fighting/wrestling. Bear fighting
was a big thing in Mississippi at the time. It was a weekend
outdoor event where spectators stood around a square
wooden box and watched people wrestle bear cubs. . . . He
got tussled around but no scratches. . . . Bobby engaged in
the bear fights until he was about twelve or thirteen.
Eventually, it became dangerous for the family to travel to
Mississippi because of the racial tension in the South at
that time.

24 Ex. 209 at ¶10. Psychiatrist Dr. Richard G. Dudley, Jr., concluded: "All of this would
25 suggest that early in his life Bobby was taught some very troublesome things about
26 violence and about being a father, all of which ultimately impacted his son, Marlo."

27 Ex. 183 at ¶12.

1 30. Thomas's mother, Georgia Thomas, was the sixth of thirteen children.
2 See Ex. 44 at ¶2. Georgia's father, TJ, beat her mother, Jesse, "with anything he got
3 his hands on and whenever he wanted to." Ex. 58 at ¶3. By the time she was eight
4 years old, Georgia's mother had abandoned her and her siblings, to escape TJ's
5 violence. See Ex. 58 at ¶4; see also Ex. 41 at ¶2; Ex. 44 at ¶2; Ex. 154 at ¶2. Shortly
6 after, TJ left Tallulah for Las Vegas, leaving Georgia's twelve-year-old sister Annie
7 to care for the eight other children then living in the home. See Ex. 58 at ¶4; Ex. 154
8 at ¶2. The children survived by foraging for food in trash cans behind stores. See Ex.
9 58 at ¶5. Eventually, TJ and his new wife, Shirley Beatrice, collected the children
10 and brought them to Las Vegas. See Ex. 154 at ¶2. Shirley Beatrice was the same age
11 as TJ's eldest daughters. See Ex. 41 at ¶4. TJ was abusive to Shirley Beatrice as he
12 had been to Jesse. See Ex. 229 at ¶¶3-4. TJ also beat his children. Thomas's aunt,
13 Rebecca Thomas, stated: "He whipped us with belts and switches. His whippings were
14 really beat downs, designed to hurt us and leave bruises." Ex. 154 at ¶3.

15 31. As young girls, Georgia and her sisters were raped by their father. See
16 Ex. 38 at ¶10; Ex. 41 at ¶¶3-4; Ex. 42 at ¶12; Ex. 44 at ¶¶10-12; Ex. 58 at ¶4; Ex. 63
17 at ¶13; Ex. 62 at ¶12; Ex. 37 at ¶24; Ex. 154 at ¶3; Ex. 153 at ¶21; Ex. 229 at ¶¶6-7.
18 Thomas's aunt, Rebecca, was around fourteen when TJ first molested her. Ex. 154 at
19 ¶3. TJ fathered children by several of his daughters. See Ex. 41 at ¶3; Ex. 44 at ¶¶10-
20 12; see also Ex. 229 at ¶¶6-7. Thomas's aunt, Shirley Nash, became pregnant by TJ
21 for the first time in tenth grade. She has two children by him. See Ex. 44 at ¶10.
22 Thomas's aunt, Linda McGilbra, has a daughter by TJ; he impregnated her before
23 she was thirteen years old. See Ex. 41 at ¶¶3, 5. TJ also fathered children by Thomas's
aunts Betty Lee Diggs, Annie Outland, and Emma Nash. See Ex. 44 at ¶10; Ex. 224
at 7. Annie was nine years old when TJ started molesting her. See Ex. 58 at ¶4. The
older Thomas girls collected money so their youngest sister, Eliza Bosley, could abort

1 TJ's baby. See Ex. 44 at ¶11; Ex. 224 at 9-10; see also Ex. 229 at ¶7.



8 Shirley Rebecca Georgia Jonnie
9 Annie Linda Emma Eliza

T.J. Thomas

10 See Ex. 21; Ex. 54; Ex. 224 at 10, 12.

11 32. TJ always took his daughters away from the house to molest them. He
12 assaulted them in the car, at the dump, and in the bushes. See Ex. 44 at ¶13. Shirley
13 Beatrice Thomas recalled TJ was “always taking them somewhere. I was suspicious
14 about TJ’s relationships with his daughters. The older girls acted possessive of their
15 dad and were too close to him. I was concerned that there might be something sexual
16 between TJ and his children but they never said anything to me about it.” Ex. 229 at
17 ¶5. Shirley Beatrice became concerned about the safety of her own daughters and ran
18 away with them to Kansas City, but TJ followed her. See Ex. 229 at ¶6; Ex. 153 at
19 ¶20. Paul Hardwick, Sr., the father of Thomas’s youngest brother, heard that
20 Thomas’s oldest brother, Larry, was fathered by TJ: “The story in the family is that
21 when Georgia was in high school, her sisters Jonnie and Rebecca walked her through
22 the desert where they held her down and allowed their father to rape her and she
23 became pregnant with Larry.” Ex. 42 at ¶20. Shirley Beatrice acknowledged TJ “may
have taken [his children] out into the desert.” Ex. 229 at ¶5.

1 33. Incidents of sexual assault occurred throughout Thomas's family. See
2 Ex. 63 at ¶¶2, 13-19; Ex. 114; Ex. 62 at ¶¶13-14, 16; Ex. 42 at ¶12; Ex. 44 at ¶13.
3 Thomas's great uncle, JT Thomas, the twin of his grandfather TJ, was known to
4 sexually abuse his daughters. See Ex. 226 at ¶9. JT's son, Michael Thomas, sexually
5 abused Thomas's cousins Johnny Hudson and Barbara Nash. See Ex. 62 at ¶13.
6 Johnny and Barbara were also molested by Ike Young, the father of their younger
7 brother Matthew, and Barbara was molested by their stepfather, Robert Nash. See
8 Ex. 62 at ¶13; Ex 63 at ¶2. Johnny eventually went on to molest young girls in the
9 neighborhood. See Ex. 63 at ¶19. When Matthew was ten years old, Barbara began
10 to allow her friends to molest him. This continued until he was twelve or thirteen.
11 See Ex. 63 at ¶¶14-15. At the age of twenty, Matthew impregnated a fifteen year old
12 neighbor, whom he later married. He subsequently impregnated another fifteen year
13 old and spent time in prison. See Ex. 63 at ¶¶16-17. When Thomas was seven years
14 old, Victoria Hudson, the older sister of Johnny, Barbara, and Matthew, tried to kiss
15 him inappropriately. Victoria had herself been molested by her uncle John Thomas,
16 TJ's son. See Ex. 224 at 13-14. By the time Thomas was sixteen years old, Victoria
17 had raped him. See Ex. 245 at ¶22.

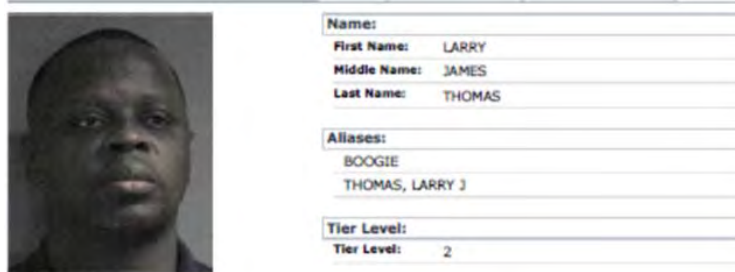
18 34. Julia Ann Williams, the wife of Thomas's uncle, Tony Thomas' Jr.,
19 described the following incident:

20 I once allowed my son, Mario, to attend a Thomas family
21 July Fourth cookout with his dad. When I arrived to pick
22 Mario up a few hours later, I noticed he came to the car
23 wearing a different set of clothing. I asked him what had
happened and he told me some of his male cousins had
wanted to look at his private parts. Mario refused and
started running from them. As he ran, they grabbed at him,
snatching his clothes off.

Ex. 152 at ¶5.

35. Thomas's aunt Shirley Nash caught her son, John, messing around
sexually with his sister Sabrina. See Ex. 62 at ¶16. John also molested the daughter

1 of a neighbor and was sent to juvenile detention. See Ex. 63 at ¶13; Ex. 152 at ¶6.
2 Thomas's older brothers, Larry and Darrell, have convictions for sexual offenses
3 committed against young girls. See Exs. 56, 60, 145.



8 Larry Thomas sex offender registry mugshot

9 See Ex. 145.

10 36. Georgia became pregnant with Larry when she was sixteen years old.
11 When TJ discovered Georgia was pregnant, he sent her back to Tallulah to stay with
12 her mother. See Ex. 54 at 2; Ex. 103 at 2. Her younger brother, Tony Thomas, Jr.,
13 recalled: "Dad grabbed her and . . . packed two bags for Georgia, cussed her out, and
14 slapped her across the face before taking her to the bus station." Ex. 153 at ¶19. In
15 Tallulah, Georgia met Thomas's father, Bobby Lewis. See Ex. 44 at ¶5. Lewis was
16 violent to her from the beginning. See Ex. 44 at ¶5; Ex. 53 at 1. Georgia gave birth to
17 her second son, Darrell, when she was seventeen; Lewis was the father. See Ex. 44 at
18 ¶5. When she was twenty-one, Georgia became pregnant with Thomas. She admitted
19 to drinking hard alcohol every chance she got during the pregnancy. See Ex. 54 at 2.
20 She drank almost every day, to escape the emotional pain of living with Lewis. See
21 id. Alcohol was not the only toxin Thomas was exposed to in utero. Georgia worked
22 at an industrial laundry, where the chemicals caused her to suffer from nausea,
23 headaches, and vomiting. See Ex. 54 at 2; Ex. 232; see also Ex. 154 at ¶4. She also
continued to receive beatings from Lewis. See Ex. 53 at 1.

1 37. Lewis was extremely violent towards Thomas from the day Georgia
2 brought him home as a newborn. See Ex. 54 at 3; Ex. 36 at ¶¶2-5; Ex. 62 at ¶6. Lewis's
3 beatings went far beyond the realm of "discipline." He hit Thomas in the back of the
4 head with a tire lug wrench, causing the child to experience breathing difficulties. Ex.
5 36 at ¶4. When Thomas was around eight, Lewis threw him into a wall so hard it left
6 an imprint where the sheetrock busted. See Ex. 62 at ¶6. Thomas also experienced
7 lifelong violence from Georgia. See Ex. 38 at ¶¶6-7; Ex. 155 at ¶¶5-7; Ex. 53 at 2; Ex.
8 63 at ¶6; Ex. 37 at ¶¶7-10; Ex. 153 at ¶4; see also Ex. 34 at ¶8; Ex. 42 at ¶7; Ex. 246
9 at ¶4. According to his cousin, Johnny Hudson, "Marlo didn't get whippings from
10 Georgia, he took beatings." Ex. 38 at ¶7. Thomas's cousin, Matthew Young, stated,
11 "Out of all Georgia's boys, Marlo was beaten the most. Georgia grabbed him and
12 punched him, her fist landing on his chest, face, anywhere." Ex. 63 at 6.



Marlo Thomas as a child

13
14
15
16
17
18
19 See Ex. 113.

20 38. Thomas's younger brother, Paul Hardwick, Jr., recalled:

21 My mom beat the mess out of Marlo. She beat him with
22 anything: extension cords, wooden kitchen spoons, pots,
23 pans, and iron skillet. I saw her throw fold up kitchen
 chairs at him. She didn't throw the chairs to get Marlo's
 attention, she was trying to make contact and hurt him. . .

1 . I saw bruises and marks on Marlo's body after these
2 beatings. There were welts on his back from being beaten
with an extension cord.

3 Ex. 155 at ¶5. According to her brother, Tony Thomas, Jr., "The way Georgia
4 disciplined her boys is the same way our father disciplined us. . . . If Georgia had a
5 belt, she really put it on the boys, just like our dad." Ex. 153 at ¶4. The beatings from
6 his parents left bruises and welts so painful that Thomas refused to bathe. See Ex.
7 36 at ¶3; Ex. 37 at ¶19. This earned him the moniker "stinky." See Ex. 53 at 3.

8 39. Thomas also experienced the violence between his parents. According to
9 Johnny Hudson, Lewis and Georgia "beat the crap" out of each other. See Ex. 38 at
¶7. When Hudson was ten years old:

10 I walked into Georgia's house and she was beating the crap
11 out of Bobby with a metal broomstick. She beat him silly.
12 Later that day Georgia had a black eye. Georgia yelled,
screamed, and threw bottles, ashtrays, and perfume bottles
at Bobby. Sometimes they fought in front of the kids,
including Marlo; they saw and heard it.

13 Ex. 38 at ¶7. Lewis once smashed all the windows of Georgia's apartment because
14 she would not let him in the home. Ex. 37 at ¶5. Georgia told her youngest son, Paul
15 Hardwick, Jr., that Bobby "choked her and beat her like a man with his fist.
16 Sometimes she was beaten so bad she couldn't go to work." Ex. 155 at ¶8.

17 40. Like the legacy of sexual assault, the legacy of domestic abuse passed
18 from one generation to the next. Thomas's maternal uncle, John Thomas, abused his
19 wife, Everlyn. See Ex. 199 at ¶12; Ex. 201. Cynthia Thomas, the ex-wife of Thomas's
20 older brother, Darrell, described the violence she experienced in their marriage:

21 Darrell choked, scratched, slapped, and restrained me; he
22 threw objects at me and whipped me with belt buckles.
Darrell always went for my neck to restrain me and press
me against the floor.

23 . . .
Darrell treated me like Georgia had treated him. Georgia
knew that Darrell abused me. She told me to give Darrell

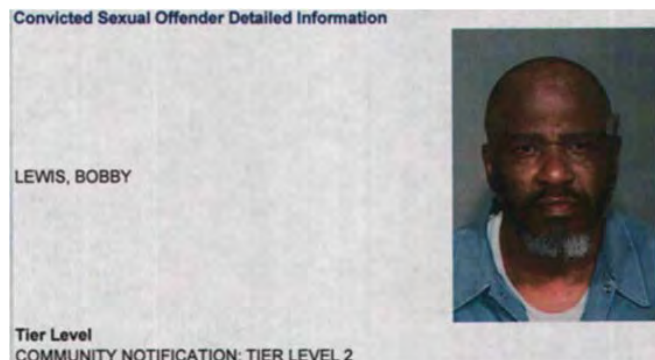
1 a break because he used to see his daddy, Bobby Lewis,
2 beat her.

3 Ex. 226 at ¶¶4-5.

4 41. When Thomas was eleven years old, Lewis was arrested for the kidnap
5 and rape of a former girlfriend and sentenced to life in prison. See Ex. 46 at ¶¶2, 6,
10; Ex. 55; Ex. 57. Johnny Hudson recalled:

6 The whole family saw Bobby get arrested for his last
7 charge. . . . [P]olice stormed the house. They had guns
8 drawn at the front and back door waiting on Bobby to
9 surrender. Marlo cried as they put Bobby in the [c]ar.
10 When Bobby went to prison, it had a deep impact on Marlo.

11 Ex. 38 at ¶8.



15 Bobby Lewis sex offender registry mugshot

16 See Ex. 147. When Thomas was a teenager, Georgia took him to visit Lewis in prison
17 but the relationship was strained. See Ex. 183 at ¶58. Lewis and Thomas ultimately
18 reunited when they were both incarcerated in the Nevada State Prison system. See
19 Ex. 62 at ¶¶5, 9; Ex. 65 at 17-18; Ex. 183 at ¶¶80-81.

20 42. With no support from Lewis, Georgia struggled financially. See Ex. 42
21 at ¶¶2, 5; Ex. 37 at ¶¶12, 14-15; Ex. 153 at ¶3; Ex. 63 at ¶3; Ex. 155 at ¶2; Ex. 232.
22 Darrell Thomas explained:

23 Mom was lazy; she did not pay her bills and she did not
take care of meals, grocery shopping, or the laundry. She
did not take care of us, and it felt like an emotional

1 abandonment. Mom did not help us with homework and did
2 not make any effort to ensure we were in school. When I
3 got suspended, Mom did not take the steps necessary to get
me re-enrolled. I sometimes phoned the Dean and
pretended to be my mom or dad in order to get myself back
in school.

...

4 Mom wasn't good at managing her money. Our water and
5 power services were turned off many times due to
nonpayment. Our aunts helped us out and gave us hand
6 me down school clothes. Larry, Marlo, and I also
participated in the School Bell Program that assisted
students with clothing. . . .

7 There were days when we didn't have enough food;
8 sometimes we didn't have lunch money.

9 Ex. 37 at ¶¶12, 14-15; see Ex. 50.

10 43. Georgia and her sisters stayed down the street from each other and
11 helped each other out. See Ex. 37 at ¶15. If one didn't have food, the others shared
12 what they had. A lot of times there was nothing. See Ex. 38 at ¶2. Thomas's cousin,
13 David Hudson, recalls shooting ducks in the park for meat and eating tar from roofs
14 and pavements. Ex. 38 at ¶3. Thomas and his brothers ate cornflakes with water
15 because there was no milk. Ex. 38 at ¶5. When there was milk, Thomas's cousin,
16 Matthew Young, remembers the brothers added water to the milk to make it go
17 further. "When the first person finished their bowl of cereal, the second person used
18 the same bowl so as not to waste the left over [sic] milk, and so no one had to eat dry
19 cereal. The bowl was passed from person to person." Ex. 63 at ¶4. They ate bread with
mayonnaise and sugar, ketchup sandwiches, and syrup sandwiches. See Ex. 62 at ¶3;
Ex. 155 at ¶4. At least twice a month, Andrew Williams took family-size packs of
meat from his mother's freezer and gave it to the Thomas boys. See Ex. 34 at ¶5.

20 44. Nevertheless, Thomas and his brothers often went hungry. See Ex. 34
21 at ¶5; Ex. 38 at ¶¶2-5; Ex. 63 at ¶4; Ex. 62 at ¶2; Ex. 37 at ¶15; Ex. 155 at ¶4; see
22 also Ex. 153 at ¶3. When Georgia was interviewed by police after Thomas was
23 arrested for robbery as a teen, she was asked if she had found any money in her house.

1 She answered that her youngest son, Paul Hardwick, Jr., had found a one hundred
2 dollar bill under Thomas's mattress. See Ex. 151 at 5-6. The officer then asked
3 Georgia if she still had the money: "No, I spent it. I'm being honest, matter of fact I
4 just did it, I paid the water bill. When [Paul, Jr.] gave it to me I was asleep and he
5 woke me up and he say [sic], 'Mama, we can go to the store now and buy something
6 to eat.'" Ex. 151 at 6.

6 45. Tony Thomas, Jr., recalled:

7 Georgia moved around a lot, trying to get away from gang
8 infested neighborhoods. Whenever she moved somewhere
9 decent, she couldn't afford the rent and returned to the
Gerson Park area. There was never much food in the home
and I often took groceries to her. The home was always
dirty. Roaches crawled on the wall, in the dirty dishes that
were piled high, and across the floor.

10 Ex. 153 at ¶3. According to Darrell Thomas, "It seemed like we were on the run,
11 sneaking out of one apartment to move to the next one." Ex. 37 at ¶16. Sometimes,
12 the family stayed with Georgia's sisters. See Ex. 42 at ¶5; Ex. 54 at 3; Ex. 153 at ¶3;
13 Ex. 44 at ¶8; Ex. 63 at ¶5; Ex. 62 at ¶2. During those times, Thomas was subjected to
14 violence from his aunts and uncles, in addition to Georgia and his older brothers. See
15 Ex. 62 at ¶4; Ex. 44 at ¶9; Ex. 37 at ¶10.

16 46. Thomas was described by family and friends as developmentally
17 delayed. See Ex. 44 at ¶9; Ex. 45 at ¶4; Ex. 37 at ¶¶18-19; Ex. 155 at ¶3; Ex. 53 at
18 ¶3; Ex. 153 at 12; see also Ex. 245 at ¶¶11-12. Childhood friend, Ty-yivri Glover,
19 recalled: "[w]hen Marlo was around twelve or thirteen, neighborhood friends laughed
20 at him when he told them how he and his classmates went to the window when it
21 rained and sang 'rain, rain go away, come again another day.'" Ex. 45 at ¶4.

22 47. In school, Thomas was identified as having severe learning problems, as
23 well as severe emotional and behavioral problems. See Ex. 39 at ¶¶3-4; Ex. 196 at ¶4;
Ex. 49. He was sent to Miley Achievement Center, the most specialized facility in the

1 State of Nevada. See Ex. 39 at ¶8. The program fell under the Children’s Health Unit
2 of the Clark County School District, and Miley’s classrooms were located in the county
3 mental health center. See Ex. 157 at ¶2. Some students lived on site at the psychiatric
4 hospital and were under psychiatric care. Others, like Thomas, were bussed from
5 various schools in district. See Ex. 196 at ¶2. According to Roy Shupe, a former lead
6 teacher and administrator at Miley, “The students who were bussed to Miley were
7 those who could not succeed in regular classrooms or even resource rooms at regular
8 schools.” Ex. 196 at ¶3. The impairments that landed Thomas at Miley are so
9 profound, one of his teachers, James Treanor, has stated his belief that “an individual
10 with Marlo’s intellectual and emotional handicaps . . . should not be on death row.”
11 Ex. 39 at ¶9.

12 48. Miley followed Clark County’s basic curriculum, but the program’s main
13 focus was behavior. See Ex. 157 at ¶6. The policy at Miley was to treat every instance
14 of assaultive behavior as a serious event: the police were called even if the “offense”
15 was a child kicking a teacher. See Ex. 196 at ¶5. This policy contributed to Thomas’s
16 extensive contacts with the juvenile justice system. See Ex. 196 at ¶5; see also Claim
17 Three A, above.

18 49. Georgia was frustrated with Thomas’s behavior but lack the skills and
19 emotional investment to try and change it. See Ex. 183 at ¶72; Ex. 53 at 2. When
20 Thomas was around thirteen, Georgia kicked him out of the house and sent him to
21 live with her brother, Tony Thomas, Jr. See Ex. 153 at ¶¶5-6. When he learned that
22 Georgia had asked Tony to keep him, “Marlo started to cry and asked ‘My momma
23 don’t want me?’” Ex. 153 at ¶6. Thomas lived with Tony and his wife for
approximately two years. *Id.* at ¶5. Thomas thrived in their loving, stable, two-parent
household. *Id.* at ¶¶14-15. Ann Williams described Thomas as “a joy to have in our
home.” Ex. 152 at ¶9.



Marlo Thomas as an adolescent

See Ex. 112.

50. Tony recalled “Marlo arrived at our home in filthy clothes, which smelled of urine and body odor.” Ex. 153 at ¶8.

When Marlo joined our home, we were living in a very nice neighborhood in North Las Vegas The boys became members of the North Las Vegas Rec Center. It was a positive, controlled environment for them. In the summer, they went on field trips. We introduced Marlo to many new things, including fishing and trips to Disney Land, Magic Mountain, Mount Charleston, Lake Mead Park, Tulle Springs, and Knox Berry Farm.

...

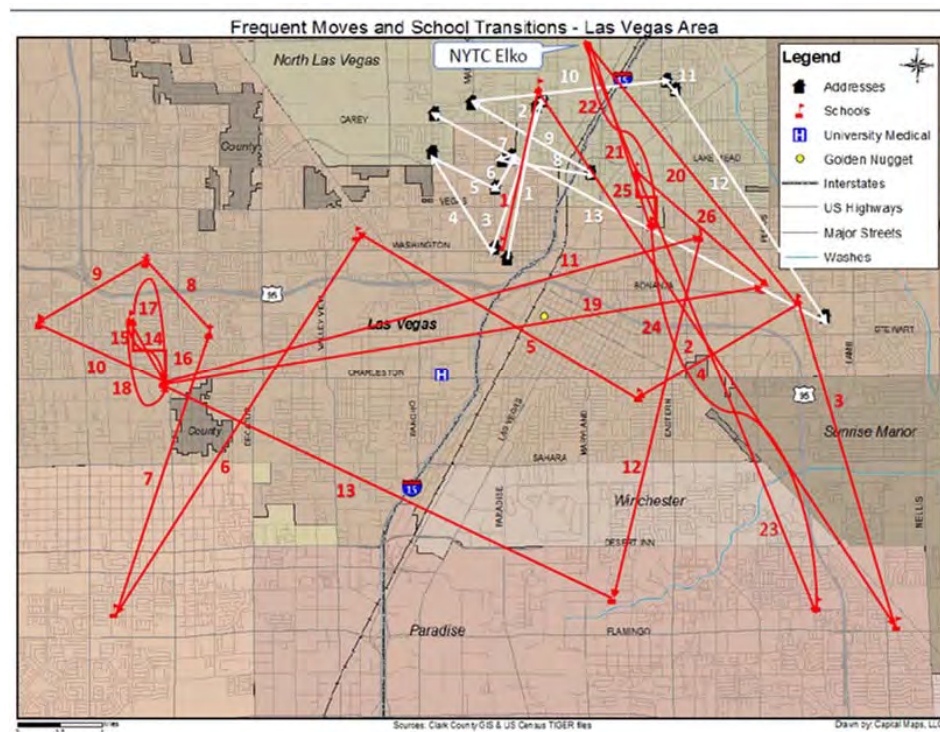
Leaving a single parent home going to a two parent home made a big difference in Marlo’s life. Ann and I paid more attention to him. Georgia, Larry, and Darrell yelled at Marlo a lot. We talked to him in an age appropriate way, we didn’t scream at him like he was a two year old. Georgia whipped Marlo but I disciplined him by speaking.

Ex. 153 at ¶¶10, 14.

51. In his Uncle Tony, Thomas found the father figure Lewis had never been. “Marlo and I had many father-son moments. After watching a UCLA football

1 game, Marlo shared his aspiration to become a running back in the NFL after
2 completing school and attending college at UCLA.” Ex. 153 at ¶14. Thomas’s mother
3 and brothers noticed the difference in him under Tony’s influence. “He was much
4 more respectful and answered [Georgia] with ‘yes, momma’ and ‘yes ma’am.’” Ex. 153
5 at ¶15. When Georgia saw his progress, she insisted Thomas come home, despite
6 Tony’s plea to keep him through high school and Thomas’s desire to stay with his
7 uncle. *Id.* at ¶16. Tony recalled, “When Georgia took Marlo, he cried worse than ever.”
8 Ex. 153 at ¶16. As Dudley concluded, “. . . Marlo was returned to the same
9 environment that had harmed him, without any of the type of parental nurture and
10 support that might have helped him, and the gains that he had begun to make were
11 quickly lost.” Ex. 183 at ¶48.

12 52. The utter chaos in Thomas’s childhood can be appreciated when one
13 considers the number of times Thomas moved between residences, schools, and state-
14 and county-run facilities:



1 Ex. 181 at 37; see Ex. 181 at 6, ¶45 (“Thomas changed addresses at least fourteen
2 (14) times and changed schools at least (26) twenty-six times. Frequent moves and
3 school changes are defined as a school risk factor according to the Department of
4 Justice.”).

5 53. Shortly after his release from prison, where Thomas had spent almost
6 five years for a crime he committed as a juvenile, see Claim Three (A), above, a mutual
7 friend introduced him to Angela Love. See Ex. 45 at ¶7. Angela was a drug addict.
8 See Ex. 245 at ¶3; see also Exs. 80-81. Thomas’s family disliked her and believed she
9 had a negative influence on him. See Ex. 36 at ¶10. Angela and Georgia had a very
10 bad relationship. See Ex. 245 at ¶¶18-21. Nevertheless, a few months after they met,
Angela and Thomas were married. See Ex. 245 at ¶1.

11 54. Angela admitted that, “I brought a lot of baggage into my marriage with
12 Marlo.” Ex. 245 at ¶23. She explained, “I was raped by age five and a drug addict by
13 age twelve. I was raped by over ten men and one woman. I have been diagnosed with
14 a personality disorder, post-traumatic stress disorder, paranoid schizophrenia, and
15 severe depression. I also attempted suicide.” Ex. 245 at ¶23; see Ex. 227 at ¶9; Ex.
243. Kenya Hall described his sister’s challenges:

16 Angela isn’t an easy person to get along with. She is
17 complicated, troubled and disturbed. Angela had a rough
childhood and her past has destroyed her. . . .

18 Angela has multiple personalities and she doesn’t make
19 good choices. I love Angela because she is my sister, but I
don’t like her due to her issues. I do as much as possible to
20 protect my children from Angela. There is good in Angela
but you can’t count on her to make the right humanitarian
choices.

21 Ex. 236 at ¶¶5-6.
22
23

1 55. Of Angela's relationship with Thomas, Hall recalled, "Although Marlo
2 and Angela were troubled people, they were best friends and cared about each other."

3 Ex. 246 at ¶5. Angela explained:

4 Marlo loved and believed in me despite my shortcomings.
5 He never left me and tried all he could to help regardless
6 of what his friends said about me. Although Marlo was
7 damaged and couldn't help himself, he married me in an
8 effort to help me. I needed Marlo and I needed drugs; when
9 I wasn't able to choose between them, he never gave up on
10 me. I believe all of my baggage deeply affected Marlo. I
11 destroyed Marlo's life with my baggage.

12 Ex. 245 at ¶26.

13 56. Thomas and Angela stayed for a while with her aunt, Dora Mae Love,
14 who lived two houses down from Thomas's mother, Georgia. See Ex. 245 at ¶¶2, 14;
15 Ex. 227 at ¶5. Dora Mae got them jobs at McDonalds, but Thomas was only able to
16 hold down the job for around four months. See Ex. 245 at ¶14-15; Ex. 104. Angela
17 explained:

18 Transportation was difficult for Marlo. The public transit
19 schedules were limited and sometimes the bus driver
20 hurried through the west side to get out. The bus rides to
21 work were sometimes longer than the hours Marlo worked.
22 Many times, Marlo wanted to work but didn't have the bus
23 fare. Marlo had no family support system in place. When
he asked for help or bus money for work from his mom,
Georgia[] nastily replied, "No I don't have it."

Ex. 245 at ¶15.

17 57. Thomas tried to provide for Angela. Because working at McDonald's was
18 not paying the bills, he took a second job at the Lone Star Steakhouse. See Ex. 183 at
19 ¶87; Ex. 104. He also began selling drugs for the first time since leaving prison. See
20 Ex. 245 at ¶27; Ex. 183 at ¶88. But Angela undermined his efforts. "Sometimes I stole
21 his drugs and replaced them with shaved soap. I once stole all of them and ran away
22 to San Bernardino, California. I called Marlo when I was stranded. He got money
23

1 together for a bus ticket and sent it for me to come home.” Ex. 245 at ¶27. Angela
2 explained:

3 Marlo tried to save my life so many times from drug use.
4 Once he tried to keep me in the house to dry out from drugs
5 but I ran off to Los Angeles and he came out to rescue me.
6 He moved us from Georgia’s home on the west side across
town to a weekly motel in an attempt to help me get away
from drug use. After his dismissal from Lone Star, he
relocated us to my hometown, Hawthorne, in hopes of
helping me kick my drug addiction in a drug free
environment.

7 Ex. 245 at ¶29.

8 58. Angela admitted she was the reason Thomas lost his job at Lone Star:

9 I went to a drug house in our neighborhood and sold my
10 wedding ring for drugs. I told Marlo it was stolen by the
11 people in the drug house when I left it on the sink after
washing my hands. Marlo went to confront them and the
situation escalated. The police came looking for him and,
when Marlo came home, I called them. I was scared he
would find out I lied about the ring. Marlo went to jail and
lost his job.

12 Ex. 245 at ¶31; see Ex. 183 at ¶¶89-90. And it was Angela who pushed him to try to
13 get it back:

14 When we were living in Hawthorne, I pressured Marlo to
15 return to Las Vegas and demanded he get back his job at
Lone Star. I promised him I would get clean and remain
16 clean if we returned to Las Vegas and he got his job back.
Marlo wanted me free from drugs and would have done
17 anything for that to happen. Marlo didn’t know my goal
was to return to Vegas for its drug availability. I strongly
believe my actions caused Marlo to break.

18 Ex. 245 at ¶32.

19 59. By 2005, “the use of mitigation specialists ha[d] become ‘part of the
20 existing “standard of care” in capital cases, ensuring ‘high quality investigation and
21 preparation of the penalty phase.” Ex. 67 at 48 (2003 ABA Guidelines, Guideline
22 4.1.A.2., Commentary). An appropriately qualified mitigation specialist or mitigation
23 investigator:

1 . . . compiles a comprehensive and well-documented psycho-
2 social history of the client based on an exhaustive
3 investigation; analyzes the significance of the information
4 in terms of impact on development, including effect on
5 personality and behavior

6 Ex. 67 at 47 (2003 ABA Guidelines, Guideline 4.1.A.2., Commentary. This “life history
7 chronology, which contains brief references to all significant documented events in
8 the life of the client and his family, going back at least three generations,” then
9 becomes the backbone of the mitigation case. Ex. 122 at 5 (Richard G. Dudley, Jr. and
10 Pamela Blume Leonard, Getting it Right: Life History Investigation as the
11 Foundation for a Reliable Mental Health Assessment); see Ex. 224. Yanez, however,
12 “did not prepare a social history report in this case because David did not ask me to
13 prepare one.” Ex. 167 at ¶8.

14 **1. Trial counsel were ineffective in failing to investigate and present
15 mental health evidence**

16 60. “In capital litigation, an accurate and reliable life history investigation
17 is the foundation for developing and presenting pivotal mental health issues.” Ex. 122
18 at 13.

19 When there are signs of mental health issues the
20 investigation must reach back at least three generations to
21 document genetic history, patterns and effects of familial
22 medical conditions, and vulnerability to mental illness as
23 well as exposure to substance abuse, poverty,
environmental toxins and other factors that may have
negatively influenced the health of the defendant and his
family.

Mitigation specialists must be familiar with the signs and
symptoms of various mental illnesses, they must be
vigilant in identifying specific signs and symptoms of
mental illness(es) in a particular client, and they must
bring this information to the attention of counsel in order
to identify problems that need further exploration by a
mental health expert.

1 Ex. 122 at 5. “Competent mitigation specialists are versed in various specialties of
2 mental health, and they assist attorneys in identifying the area(s) of mental health
3 expertise needed in a particular case as well as advise counsel regarding the
4 suitability of a specific mental health expert.” Ex. 122 at 14; see also Ex. 67 at 50
5 (2003 ABA Guidelines, Guideline 4.1.A.2.) (“The defense team should contain at least
6 one member qualified by training and experience to screen individuals for the
7 presence of mental or psychological disorders or impairments.”). Clearly Yanez was
8 not equipped to fulfill this role.

9 61. Nevertheless, Schieck was on notice of potential issues with Thomas’s
10 mental health that required further exploration. He was in possession of
11 neuropsychologist Dr. Thomas Kinsora’s report and testimony from Thomas’s 1997
12 trial which identified Thomas as suffering from neurocognitive deficits, learning
13 disabilities, and borderline intellectual functioning. See Ex. 180 at 12; 6/25/97 TT at
14 17-27, 35. Indeed, at a March 29, 2004, hearing on the Defendant’s Motion to Place
15 on Calendar, Schieck stated: “I will tell the Court there is going to be a mental health
16 issue on whether or not [Thomas] even qualifies for the death penalty given his IQ.
17 There’s going to be mental health testing done before we even know that we need to
18 set a penalty hearing.” 3/29/04 TT at 6. The Court gave Schieck ninety days to “get
19 him examined and do all the testing and all the psycho stuff . . .” Id.

20 62. One week later, on April 5, 2004, Schieck wrote to Kinsora, stating: “We
21 would like to again utilize your services as well as explore presenting additional
22 information. . . . If you could determine whether you have retained your records on
23 Mr. Thomas we could set up a meeting to discuss possible avenues of defending
against the death penalty. . . .” Ex. 211. On April 7, 2004, Schieck spent ninety
minutes, “Research[ing] fetal alcohol syndrome.” Ex. 231 at 8; see Ex. 173 (4/7/04

1 research on FASD). On April 17, 2004, Schieck spent seventy-five minutes,
2 “Research[ing] NV cases re: FAS.” Ex. 231 at 8. On April 19, 2004, Schieck had a
3 twenty minute telephone call with Dr. Kinsora. Ex. 231 at 8.

4 63. Kinsora has provided a declaration to Thomas’s current counsel stating
5 that, if Schieck had asked him to do so, Kinsora would have provided him with a road
6 map to investigating and presenting mental health evidence in Thomas’s case.

7 If Mr. Schieck had asked me for my thoughts on the case, I
8 would have reviewed my file, asked Mr. Schieck if there
9 was anything new that had not been provided to me in
10 1996-1997, and given him my opinion on what would be
11 helpful for the jury to hear.

12 I would have told Mr. Schieck that since Mr. Thomas’s first
13 trial, the psychological profession had grown to give more
14 credence to the prevalence and effects of fetal alcohol
15 spectrum disorder (FASD). In light of Mr. Thomas’s
16 mother’s admission to me that she drank heavily during
17 her pregnancy, I would have recommended that he retain
18 an expert in FASD and obtain a full evaluation and
19 diagnosis in that field.

20 Ex. 205 at ¶¶11-12.

21 64. Almost one year later, on April 6, 2005, Albregts “Beg[a]n research into
22 fetal alcohol syndrome for potential use at sentencing hearing.” Ex. 230 at 9. On April
23 13, 2005, Albregts spent a further ninety minutes, “Review[ing] treatise regarding
fetal alcohol syndrome for information regarding whether we might be able to use it
in the penalty phase.” Ex. 230 at 9. Ultimately, trial counsel never retained a mental
health expert to evaluate Thomas and no mental health testimony was presented at
Thomas’s penalty retrial.

65. If trial counsel had retained an expert in FASD and obtained a full
evaluation, they would have had evidence and testimony to show the jury Thomas’s
mother’s drinking during pregnancy indeed resulted in him suffering from alcohol
related neurodevelopmental disorder (ARND). As Dr. Joan Mayfield, a
neuropsychologist who has diagnosed Thomas with ARND, has explained, people

1 with any manifestation of FASD, including ARND, are born with it. “There is no
2 cure.” Ex. 206 at 5. A diagnosis of ARND would have been an important piece of
3 explaining how Thomas’s immutably impaired cognitive abilities, such as his
4 borderline intellectual functioning,³⁷ had, as Dr. Mayfield put it, “significantly
impacted Mr. Thomas’s life.” Id. at 1.

5 66. An expert like Dr. Mayfield would have explained that people on the
6 fetal alcohol spectrum experience “deficits [in] . . . a broad array of neurocognitive
7 functions,” including impaired impulse control, inhibition, and emotional and
8 behavioral control. Id. at 5. An expert like Dr. Mayfield would have further explained
9 how the interaction between ARND’s negative cognitive effects (i.e., borderline
10 intellectual disability) and a traumatic upbringing—both of which are wholly out of
11 an individual’s control—often manifest in “secondary disabilities.” Id. at 7. Secondary
12 disabilities, according to Dr. Mayfield, include “mental health problems,
13 inappropriate sexual behaviors, disrupted school experiences, substance abuse
14 problems, criminal behavior, confinement, poor work history, and problems living
independently as an adult.” Id.

15 67. A neuropsychologist would have provided the crucial clinical
16 information that ARND means Thomas suffers from congenital “injuries” to the
17 brain. Id. at 1. These permanent impairments explain, in tandem with the
18 exacerbating impact of a traumatic upbringing, Thomas’s history of behavioral
19 problems going back to childhood. The prosecution introduced that history as a reason
20 to kill Thomas; a neuropsychologist would have been instrumental in re-casting that
21 history in a narrative for showing mercy. Indeed ARND is of a piece with Thomas’s

22 ³⁷ After a two-day evaluation in June 2017, Dr. Mayfield scored Mr. Thomas
23 with a 78 IQ, which places him in the “borderline intellectual functioning” category.
Ex. 206 at 3.

1 story of alcohol and abuse throughout his childhood. Effective defense counsel would
2 have presented the neuropsychological aspects of that story.

3 68. In addition to their failure to explain Thomas's neuropsychological
4 deficits to the jury, Schieck and Albregts failed to present expert testimony about the
5 impact of the intergenerational trauma in Thomas's background that a
6 constitutionally adequate mitigation investigation would have revealed, outlined
above. Kinsora stated:

7 If Mr. Schieck had made me aware of the social history
8 information contained in Dr. Dudley's declaration, I would
9 have advised him that an appropriately qualified
10 mitigation specialist or mental health expert should testify
to Mr. Thomas's childhood history. . . . I would have
recommended that Mr. Schieck obtain and present to the
jury a new psychiatric evaluation that directly addressed
the effects of Mr. Thomas's social history, especially his
traumatic upbringing.

11 Ex. 205 at ¶¶11-12.

12 69. An appropriately qualified mental health expert, such as Dr. Dudley,
13 would have explained the relevance to Thomas of his parents' own childhood
14 experiences. Thomas's parents were raised in poverty in the pre-civil rights era
South. Dudley explained:

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

21 Ex. 183 at ¶15.
22
23

1 70. Thomas's mother, Georgia, witnessed her father beat her mother and
2 was herself the victim of his violence. She experienced repeated abandonments by
3 both of her parents at a very young age. Dudley explained how this impacted her
4 ability to adequately parent Thomas:

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

22 Ex. 183 at ¶17.

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

Ex. 183 at ¶19.

71. As children, Georgia and her sisters were raped by their father,
Thomas's grandfather. Dudley explained:

Women who were sexually abused when they were children
often evidence various types of difficulties, including
difficulties specifically related to their sexual behavior and
an even broader range of difficulties related to their sense
of self, their ability to regulate their mood, and/or their
capacity for intimate adult relationships. The impact of the
sexual abuse that Georgia endured was made all the more
severe due to multiple factors. These multiple factors
include the fact that the sexual abuse was at the hands of
her father; the fact that at the time, Georgia, like each of

1 her sisters, believed that she was the only one who was
2 being sexually abused by her father; the fact that neither
3 her mother nor her step-mother protected her from the
4 abuse; and the fact that the sexual abuse was
superimposed upon all of the other above-noted childhood
difficulties she had endured. Therefore . . . it is not at all
surprising that Georgia came to evidence a full range of the
problems seen in women who were sexually abused when
they were children.

5 Ex. 183 at ¶22. Dudley concluded:

6 . . . Georgia's inability to attach to her children, which was
7 a product of her own extremely difficult childhood, was
8 profoundly felt by Marlo and thereby had a significant
9 impact on his development. A positive attachment to a
parent is step one in the eventual development of a positive
sense of the self and the capacity to attach to others, as well
as critical to the eventual development of other
psychological functions, such as mood regulation and
impulse control.

10 Ex. 183 at ¶34.

11 72. In addition to the incest between his grandfather and mother, sexual
12 abuse was rampant throughout Thomas's family, and Thomas himself was a victim.

13 Dudley explained that:

14 [I]t is clearly acknowledged by Marlo that he experienced
15 some of the manifestations of this family history in that
16 during his early childhood years he was inappropriately
17 exposed to sexual activity and he was more generally
18 raised in an environment where there was a lack of
appropriate sexual boundaries. It is also clear that these
experiences, beginning in his early childhood years,
impacted on his sexual development and resultant sexual
behaviors, including the inappropriate sexual behaviors he
evidenced while incarcerated.

19 Ex. 183 at ¶27.

20 73. Dudley also explained why the attempts of the Clark County School
21 District to place Thomas in a structured environment had little hope of success. See
22 Exs. 157, 208.

23 Unfortunately, the structured behavioral program at Miley
was not designed to meet Marlo's mental health needs. His
problematic behavior was the result of the combination of

1 his long-standing, repeated exposure to violence, both in
2 and outside of his home, the almost complete absence of
3 parental protection, nurture and support, and otherwise
4 having been raised in a chaotic and unstable environment
5 where there was also rampant substance abuse, a lack of
6 sexual boundaries, and the modeling of other negative
7 behaviors. Simply punishing him for the behaviors that
8 had resulted from all of those childhood difficulties,
9 without helping him to identify and address those
10 difficulties, was not an appropriate therapeutic
11 intervention. Instead, such a program placed the blame for
12 his mental health difficulties totally on him, which
13 ultimately only further contributed to his self-loathing,
14 mood dysregulation, behavioral difficulties and other
15 mental health difficulties.

16 Ex. 183 at ¶74.

17 74. Dudley described how, when Thomas was released from prison at the
18 age of twenty-two, he was ready to turn his life around, but his relationship with
19 Angela made that impossible. See Ex. 183 at ¶¶84-93. Dudley stated: “Marlo’s need
20 for real attachment in his life was so strong that it blinded him to what were very
21 likely early clues that Angela was not right for him.” Ex. 183 at ¶92. This blindness
22 was reflected when Thomas met with Dudley:

23 [Thomas] made it sound[] like, until the ring incident,
everything was wonderful with Angela. He was totally in
love with her and thought she was “the one.” They met at
a time when Marlo was trying to get his life together and
Angela was supportive of that. The ring incident seemed to
come from nowhere. Prior to that, Marlo had no sense that
anything was wrong with the relationship, other than the
constant conflict between Angela and Georgia.

Ex. 183 at ¶91.

75. And Dudley explained how all of Thomas’s deficits, childhood
experiences, and adult stressors combined in the period leading up to the offenses at
the Lone Star:

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

1 and Georgia kicked Angela out of the house. In sum, he was
2 facing a mounting series of pressures in the months
preceding the offenses. Everything was falling apart.

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

7 Ex. 183 at ¶¶93-94.

8 76. Trial counsel had no strategic reason for their failure to investigate and
9 present expert mental health evidence. Schieck explained:

10 I have reviewed Dr. Kinsora's testimony from the penalty
11 phase of Marlo's first trial. I believe the decision not to call
12 Dr. Kinsora at Marlo's penalty retrial was based on his
opinion that Marlo had a violent and explosive personality.
13 However, we should have found another expert to explain
away Dr. Kinsora's previous testimony and opinion. I did
not have a tactical justification for not conducting further
14 investigation to determine whether another mental health
expert could provide such information.

15 Ex. 210 at ¶2. Albrechts explained:

16 I have no recollection of why we did not use a different
17 mental health expert for Marlo's penalty retrial. I do not
18 recall any discussions David and I may have had about this
19 issue. I do not recall conducting further investigation on
20 this issue and do not recall having a tactical justification
for not doing this.

21 Ex. 164 at ¶7. For her part, Yanez stated: "I do not recall any discussions with David
22 or Dan about consulting with a mental health expert in Marlo's case. I am not aware
23 of any strategic reason why they decided not to investigate and present mental health
evidence." Ex. 164 at ¶9.

77. It was firmly established by 2005 that "mental health experts are
essential to defending capital cases." 2003 ABA Guidelines, Guideline 4.1.A.2.,
Commentary. Ex. 67 at 44. "Research has shown repeatedly that well-documented

1 and effectively presented mental health evidence has a positive impact on capital
2 jurors.” Ex. 122 at 13-14. Evidence of impaired intellectual functioning, for example,
3 is so compelling that the Supreme Court has deemed it “inherently mitigating.”
4 Tennard v. Dretke, 542 U.S. 274, 287 (2004) (citing Atkins v. Virginia, 536 U.S. 304,
5 316 (2002)). But in closing arguments at the end of the selection phase in Thomas’s
6 case, Albregts pooh-poohed the notion of mental health evidence, telling the jurors:
7 “We can play arm chair psychiatrist all we want and say it was the family, it was the
8 search for love. I’m not here to tell you any of that. I don’t know.” 11/4/05 TT at 127.
9 Albregts “d[id]n’t know” because of the trial team’s complete failure to investigate
10 Thomas’s mental health.

11 78. “When the fruits of an accurate and reliable life history investigation
12 are married with the knowledge and skill of competent mental health experts,
13 defense counsel is equipped to present an effective case in mitigation and defend it
14 against attacks from the prosecution.” Ex. 122 at 26. In contrast, the combined effect
15 of trial counsel’s failure to secure an appropriately qualified mitigation investigator
16 and their failure to consult with a mental health expert rendered their performance
17 constitutionally deficient. Counsel’s deficient performance prejudiced Thomas and his
18 death sentences must be set aside.

19 **C. Trial Counsel Were Ineffective in Failing to Object and Move for a**
20 **Mistrial After the Prosecutor Displayed Highly Inflammatory Prejudicial**
21 **Images to the Jury**

22 79. During the rebuttal closing argument at the end of the selection phase,
23 the prosecutor showed a PowerPoint presentation to the jury. Early in the
presentation, side by side images of the two victims in either their high school prom
outfits or senior class pictures were displayed. The pictures then morphed into
photographs of their corpses at the coroner’s office. See Ex. 164 at ¶4. Trial counsel

1 unreasonably failed to object to the display and move for a mistrial. See id. This
2 failure constituted deficient performance and prejudiced Thomas.

3 **D. Trial Counsel Were Ineffective in Failing to Make an Opening Statement**
4 **at the Start of the Selection Phase**

5 80. Trial counsel agreed with the State that they would not give opening
6 statements at the start of the selection phase. See 11/3/05 TT at 8-10. This was
7 deficient performance. The jury had already deliberated, found the mitigating factors
8 did not outweigh the aggravating factors, and delivered their verdict that Thomas
9 was eligible for the death penalty. See 11/2/05 TT at 279-84. By electing not to present
10 an opening statement, trial counsel allowed the State's extensive presentation of
11 Thomas's "bad acts" to be viewed without direction from defense counsel and without
12 benefit of a forecast of the defense case in rebuttal. Trial counsel also lost a critical
13 opportunity to prepare the jury that Thomas's selection-phase witnesses would be
14 appearing before them in prison outfits and shackles, and to explain why they should
15 not hold that against Thomas. See Claims Two and Fourteen (A), above. If trial
16 counsel had performed effectively, there is a reasonable probability that at least one
17 juror might not have sentenced Thomas to death. Thomas is entitled to relief.

18 **E. Cumulative Error**

19 81. If individually the deficiencies of counsel are insufficient, the cumulative
20 effect of counsel's deficient performance requires habeas relief. In the aggregate,
21 counsel's errors create a reasonable probability that, but for these errors, the result
22 of Thomas's penalty phase proceeding would have been different.
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1 **CLAIM FIFTEEN: TRIAL COURT ERROR AT THE GUILT PHASE**

2 Thomas’s convictions are invalid under the federal constitutional guarantees
3 of due process and a fair trial because of errors by the trial court. U.S. Const. amends.
4 V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

5 **SUPPORTING FACTS**

6 1. The trial court made improper rulings on evidentiary issues. These
7 rulings violated Thomas’s constitutional rights because they rendered his trial unfair.
8 Insofar as trial or appellate counsel failed to raise these objections or claims in prior
9 proceedings, they were ineffective.

10 **A. The Trial Court Failed to Declare a Mistrial After a Witness Testified**
11 **That Thomas Had Previously Been In Jail**

12 2. NRS 48.045(2) provides, in relevant part: “Evidence of other crimes,
13 wrongs or acts is not admissible to prove the character of a person in order to show
14 that he acted in conformity therewith.” Here, a witness revealed to the jury that
15 Thomas had previously been in jail: “Then I turned—then I asked—I said to him,
16 ‘Marlo, have you did something that would put you back in jail?’” 6/17/97 TT at I-116.
17 Trial counsel asked to approach the bench and the jury was excused. Id. The trial
18 court denied trial counsel’s motion for a mistrial. Id. at I-117-121. No admonishment
19 to disregard the statement was given to the jury before it was excused, id. at I-116,
20 and trial counsel declined the court’s offer to provide a curative instruction when it
21 reconvened, id. at I-121.

22 3. This error was not harmless beyond a reasonable doubt. Thomas is
23 entitled to relief.

1 **B. The Trial Court Erroneously Admitted Certain Gruesome Photographs**

2 4. At trial, the State moved to admit various gruesome photographs. Trial
3 counsel objected to their introduction as prejudicial, inflammatory, and/or duplicative
4 of other photographs. See, e.g., 6/17/97 TT at 54-59. The trial court erred in overruling
5 counsel's objection.

6 5. This error was not harmless beyond a reasonable doubt. Thomas is
7 entitled to relief.

8 **C. The Trial Court Erred in Admitting a Diagram of Carl Dixon's Body That**
9 **Was Cumulative of Evidence Already Presented**

10 6. At the end of Deputy Medical Examiner Dr. Robert Jordan's testimony,
11 the State introduced Exhibit 84, a diagram he prepared during the autopsy
12 purporting to indicate where on Carl Dixon's body he observed stabbing and cutting
13 wounds. 6/17/97 TT at III-167. The trial court erred in admitting Exhibit 84 where
14 Jordan had already testified sufficiently about the injuries to Dixon's body and
15 introduced a number of photographs to illustrate his testimony. See id. at 154-67.
16 This cumulative presentation of Dixon's injuries was unduly prejudicial.

17 7. This error was not harmless beyond a reasonable doubt. Thomas is
18 entitled to relief.

19 **D. The Trial Court Improperly Signaled Its Approval of a State Witness's**
20 **Testimony**

21 8. The trial judge improperly inserted his opinion of the testimony of a
22 witness for the State, Terry L. Cook, a criminalist with the Las Vegas Metropolitan
23 Police Department.

1 9. At the end of Cook's testimony on serology and the blood evidence
2 presented against the defendant, the trial court thanked Cook and added, "It was
3 very enlightening." 6/17/97 TT at III-234. This comment evinced an implicit bias in
4 the trial judge toward the prosecution, bolstered the witness's credibility, and
5 invaded the province of the jurors to decide for themselves the believability and
6 importance of the witness's testimony. As such the judge's comment denied Thomas
7 his rights to a trial by jury, in violation of the Sixth Amendment, and to a fair trial
8 and due process under the Fourteenth Amendment. This error was not harmless
9 beyond a reasonable doubt. Thomas is entitled to relief.

1 **CLAIM SIXTEEN: TRIAL COURT ERROR AT THE PENALTY RETRIAL**

2 Thomas's death sentences are invalid under the federal constitutional
3 guarantees of due process, equal protection, and a fair trial because of error by the
4 trial court. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and
5 art. 4 § 21.

6 **A. The Trial Court Improperly Limited the Defense Theory Regarding**
7 **Angela Love's Involvement and the State's Decision Not to Charge Her as**
8 **an Accessory**

9 1. During the remanded penalty phase, defense counsel asked Detective
10 Mesinar a series of questions about his decision to arrest Angela Love, Thomas's
11 girlfriend, and charge her as an accessory to Thomas's crimes – a recommendation
12 the district attorney did not accept. 11/1/05 TT at 224-226. During re-direct, the trial
13 court responded to defense counsel's objection that the prosecutor was leading the
14 State's witness by obliterating the mitigating effect of defense counsel's cross-
15 examination a few minutes before:

16 Whether or not – the instructions are whether or not the
17 State charges one, all, half of them is a decision for the
18 prosecuting attorney. It's not something for this jury to
19 worry or be concerned about. [Angela Love] is not on trial
20 here now.

21 And why the district attorney didn't decide to prosecute her
22 is not a defense in the case because we're not here to defend
23 the case. It's not even mitigation. So I don't know why you
brought it up.

18 Id. at 234.

19 2. This was an entirely inappropriate and unconstitutionally limiting
20 comment on mitigation evidence in the middle of a penalty hearing. Again, "the
21 Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded
22 from considering, as a mitigating factor, any aspect of a defendant's character or
23 record and any of the circumstances of the offense that the defendant proffers as a

1 basis for a sentence less than death.” Lockett, 438 U.S. at 604 (latter emphasis
2 added). Detective Mesinar testified that he believed he had probable cause to arrest
3 Love as an accessory, and that he did so. That qualifies as a “circumstance of the
4 offense” that the defense was proffering through the detective’s testimony. The trial
5 judge’s unprovoked comment on the supposed irrelevance of Angela Love’s
6 involvement—the objection was to the prosecutor’s leading the witness—and the
7 inferences reasonably drawn from the district attorney’s decision not to charge her
8 was a prejudicial and implicitly biased act of judicial misconduct. See NRS 3.230
9 (judge not permitted to comment on evidence). It prejudiced the jury against the
10 defense’s presentation of evidence and theories of mitigation and deprived Thomas of
11 his rights to due process and a reliable and individualized sentencing decision. This
12 error was not harmless beyond a reasonable doubt.
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1 **CLAIM SEVENTEEN: PROSECUTORIAL MISCONDUCT AT THE GUILT**
2 **PHASE**

3 Thomas's convictions and death sentences are invalid under the federal
4 constitutional guarantees of due process, equal protection, a fair trial, freedom from
5 cruel and unusual punishment, and a reliable sentence because of pervasive
6 prosecutorial misconduct. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1,
7 §§ 1, 6, 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Prosecutors may not engage in improper argument. See Berger v.
10 United States, 295 U.S. 78, 85-86 (1935). Here, the State's arguments, singly and
11 cumulatively, so infected the trial with unfairness as to make the resulting conviction
12 a denial of due process. Insofar as trial or appellate counsel failed to object or raise
13 any of these claims, they were ineffective.

14 **A. Prosecutors Engaged in Misconduct During the Guilt-Phase Opening**
15 **Arguments**

16 2. During their opening arguments, the prosecutors made repeated
17 reference to the youth of the victims. 6/16/97 TT at II-8 ("Carl Dixon, twenty-three
18 years of age, Matthew Gianakes [sic], age twenty-two"); id. ("these two young men");
19 id. at II-12 ("young Carl Dixon"); id. at II-14 ("healthy young male, Carl Dixon"); id.
20 at II-13 ("two young men"). These comments were calculated to inflame the fears,
21 passions, and prejudices of the jury, and thus were improper.

22 **B. Prosecutors Engaged in Misconduct During the Guilt-Phase Closing**
23 **Arguments**

24 3. During their closing arguments the State engaged in improper
25 argument. For example, twice the State emphasized that there could have been four
26 homicides instead of two. 6/18/97 TT at IV-32-33. This was improper because it
27 inflamed the passions of the jury and accused Thomas of crimes he neither committed

1 nor was accused of. The State also improperly argued, “Little did these two young
2 men know that something evil was lurking out in the parking lot, this evil person
3 who is the defendant, Marlo Thomas.” Id. at IV-8. The State also used inflammatory
4 language to describe Thomas and the crimes, referring to his “wrath,” and the
5 “brutal” and “horrific” offenses. Id. at IV-33. The State argued the situation “paints a
6 mural of sheer terror and horror” and then accused Thomas of being “the artist who’s
7 responsible for that picture, or the mural.” Id. at IV-33-34. These arguments
improperly prejudiced the jury and were improper.

8 4. Additionally, the State made improper arguments about willful,
premeditated, and deliberate murder, by arguing:

9 If at this very moment I decide to grab that knife and kill
10 somebody right here and now, this very moment, I’m guilty
[of] first degree murder, premeditated killing because I
11 made a conscious decision to take a weapon and stab it into
the flesh of a living human being. That’s first degree
12 murder, that’s premeditated murder. It doesn’t matter how
quickly you decide to kill somebody as long as you made
that conscious decision to take a life and you take that life,
13 that’s first degree murder under the premeditation theory.

14 Id. at IV-52. This argument reduces the mens rea requirement to simple intent,
15 rendering the distinction between first and second degree murder non-existent. Thus,
16 this argument was improper because it was an erroneous statement of law.

17 5. The State also argued facts not presented or supported in evidence:

18 But the defendant was intending on more than just ending
Carl Dixon’s life, ladies and gentleman. I submit to you
19 that not only was he intending to kill Carl Dixon when he
stabbed him over thirty times, but he was intending to
punish him. That killing was personal, for whatever
reason.

20 Id. at IV-53. Nothing admitted in evidence supported this theory other than the
21 State’s pure conjecture. This argument was improper.

1 6. Finally, the State made improper argument by conflating “doing justice”
2 with “finding Thomas guilty” when the State argued: “You the jury are the barrier
3 between justice and injustice. The State of Nevada requests that you do justice to this
4 case.” Id. at IV-59. By conflating justice with Thomas’s guilt, the State improperly
5 invited the jury to find Thomas guilty based on improper considerations.
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1 **CLAIM EIGHTEEN: PROSECUTORIAL MISCONDUCT AT THE PENALTY**
2 **RETRIAL**

3 Thomas's death sentences are invalid under the federal constitutional
4 guarantees of due process, equal protection, a fair trial, freedom from cruel and
5 unusual punishment, and a reliable sentence because of pervasive prosecutorial
6 misconduct. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and
7 art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Prosecutors may not engage in improper argument. See Berger v.
10 United States, 295 U.S. 78, 85-86 (1935). Here, the State's arguments, singly and
11 cumulatively, so infected the trial with unfairness as to make the resulting conviction
12 a denial of due process. Insofar as trial or appellate counsel failed to object or raise
13 any of these claims, they were ineffective. Insofar as the trial court failed to sua
14 sponte correct any error, the court erred.

15 **A. The State Intentionally Injected Character Evidence Into the Eligibility**
16 **Phase, In Violation of the Bifurcation Order**

17 2. By eliciting testimony from Thomas's mother while she was on the
18 witness stand in the eligibility phase, the prosecution introduced character evidence
19 outside the bounds of its case in aggravation. This knowing infraction violated
20 Thomas's right to a fair and reliable eligibility phase limited to adjudication of the
21 two statutory elements of death eligibility.

22 3. Upon remand, the trial court ordered that the new penalty hearing
23 would be bifurcated, with the eligibility phase strictly limited to evidence of
aggravating and mitigating circumstances, while the selection phase would be open
for, as the trial court put it, "[t]he other bad acts, the garbage, the kitchen-sink
information[.]" 9/14/05 TT at 12. The order occurred after extensive argument back

1 and forth, ending with a very clear statement from the court that nothing but
2 evidence of aggravators and mitigators would be tolerated in the eligibility phase. Id.
3 at 11-20.

4 4. The State willfully ignored and violated that order by using leading
5 questions posed to Thomas's mother, Georgia Thomas, with the effect of informing
6 the jury about Thomas's past misdeeds that were irrelevant to its case in aggravation.
7 See 11/2/05 TT at 209-11. Indeed the State used this tactic as a prelude to the
8 procession of juvenile criminal records and other character evidence that it would
9 unfurl during the selection phase. The State's introduction of this information folded
10 the selection phase into the eligibility phase and was unduly prejudicial to Thomas's
11 right to have a jury determine his eligibility strictly on the statutory elements
12 required under NRS 175.554(3). Breaking the boundaries of that statute and the trial
13 court's thoughtfully crafted bifurcation order violated Thomas's rights to due process
14 and to a fair and reliable sentencing hearing under the Sixth, Eighth, and Fourteenth
15 Amendments.

16 **B. The Prosecutor Made Improper Closing arguments**

17 5. Prosecutors may not engage in improper argument. See Berger v.
18 United States, 295 U.S. 78, 85-86 (1935). Here, the State's arguments, singly and
19 cumulatively, so infected the trial with unfairness as to make the resulting conviction
20 a denial of due process.

21 1. **The prosecutor committed misconduct by misleading the jury on the
22 relevance of Thomas's life history to Thomas's case in mitigation**

23 6. The prosecutor's misrepresentation of the law on mitigating evidence
constituted prosecutorial misconduct and restricted the jury's broad license to
consider that evidence. It violated Thomas's rights to due process and a reliable and
individualized sentencing decision.

1 7. During closing argument of the selection stage, the prosecutor told the
2 jury that, with respect to “sad” facts of Thomas’s life history that his defense counsel
3 had presented in mitigation, “there has to be some causation, connection between
4 that fact and the thing that the person did before it becomes a mitigator.” 11/2/05 TT
5 at 267. In making this misrepresentation of the law to the jury, the prosecutor misled
6 the jurors about the scope of their responsibility and their license to decide the
7 relevance and weight of mitigating evidence for themselves. See e.g., Tennard v.
8 Dretke, 542 U.S. 274, 285-89 (2004). Such a misrepresentation violates the Eighth
9 Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985). When a prosecutor’s
10 statements effectively “foreclose the jury’s consideration of . . . mitigating evidence,”
11 the jury cannot make the fair and individualized decision demanded by the Eighth
and Fourteenth Amendments. See Buchanan v. Angelone, 522 U.S. 269, 276-77
(1998). That is what happened here.

12 8. The jury decides the relevance of proffered mitigation evidence, and its
13 discretion to do so is virtually absolute in the selection phase of a penalty hearing. Id.
14 at 276 (stating that “our decisions suggest that complete jury discretion [at the
15 selection stage] is constitutionally permissible”). A prosecutor who tells the jury that
16 there must be a causal connection between a particular fact in the defendant’s life
17 history and the capital offense for which he is being tried inserts himself into the
18 jury’s province as the final referee between life and death. It is particularly egregious
19 to tell the jury, as this prosecutor did, that without a causal connection, a particular
20 fact of the defendant’s life history cannot even “becom[e] a mitigator.” That level of
misrepresentation violates the defendant’s rights to due process and a reliable and
individualized sentencing decision.

21 **2. Other improper closing arguments**

22 9. During closing arguments at the selection phase of Thomas’s penalty
23 retrial, the State made inappropriate arguments. For example, the State asked the

1 jurors, “what kind of trial did [the victims] receive from the defendant in that kitchen,
2 in that bathroom, in that blood with that knife going up and down and up and down
3 How did they plead their case as that knife was coming up and down?” 11/4/05
4 TT at 91. This was improper because it inflamed the passions and prejudices of the
5 jury. The State also improperly inflamed the passions of the jury by asking, “What
6 were Carl’s last thoughts as he laid there on the floor bleeding out? He knew he was
7 dying. He was in pain. Was he thinking of his family? Was he thinking of his mother?
8 Was he thinking of the people that he loved?” Id. at 95.

9 10. The State also improperly commented on the authenticity of Thomas’s
10 allocution, arguing it was mere “lip service.” Id. at 113. This improper argument was
11 taken further when the State argued, “Criminals don’t think that way. They don’t
12 feel natural remorse, they don’t feel sorry, they don’t worry about consequences. They
13 just worry about what they want. They are selfish to the extreme. It’s me, me, me,
14 me world.” Id. at 116. These arguments were also improper and rendered Thomas’s
15 trial unfair.

16 **C. The Trial Court Erred in Failing to Sua Sponte Order a Mistrial or**
17 **Admonish the Jury After the Prosecutor Displayed Highly Inflammatory**
18 **Prejudicial Images During Closing Arguments**

19 11. During the rebuttal closing argument at the end of the selection phase,
20 the prosecutor showed a PowerPoint presentation to the jury. Early in the
21 presentation, side by side images of the two victims in either their high school prom
22 outfits or senior class pictures were displayed. The pictures then morphed into
23 photographs of their corpses at the coroner’s office. See Ex. 164 at ¶4. Trial counsel
failed to object to the display and move for a mistrial. See Claim Fourteen (C), above.
The trial court erred in failing to sua sponte order a mistrial or admonish jury.

1 **CLAIM NINETEEN: INEFFECTIVE ASSISTANCE OF FIRST DIRECT**
2 **APPEAL COUNSEL**

3 Thomas's convictions and death sentences are invalid under the federal
4 constitutional guarantees of due process, equal protection, effective assistance of
5 counsel, freedom from cruel and unusual punishment, and a reliable sentence due to
6 the ineffective assistance of appellate counsel for the first direct appeal. U. S. Const.
7 amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Thomas suffered ineffective assistance of counsel because first appellate
10 counsel failed to raise all substantial and cognizable issues and arguments, including
11 but not limited to those claims raised in this petition that were cognizable on direct
12 appeal. The failure by first direct appeal counsel amounted to deficient performance
13 which prejudiced Thomas's case.

14 **A. Appellate Counsel Was Ineffective For Failing to File the Entire Record**

15 2. The record on Thomas's first direct appeal did not contain a complete
16 record of the proceedings below, and appellate counsel failed to supplement the record
17 or otherwise ensure that all the transcripts had been prepared and filed by the Clerk
18 of the Court with the Nevada Supreme Court. The absent transcripts would have
19 substantiated Thomas's claims.

20 3. Appellate counsel was deficient in failing to provide the entire record to
21 the Nevada Supreme Court. Thomas's proceedings would have been different but for
22 counsel's deficient performance.

23 **B. Appellate Counsel Were Ineffective For Failing to Raise Meritorious
Claims**

4. Appellate counsel has an obligation to raise meritorious claims on behalf
of their clients. See Evitts v. Lucey, 469 U.S. 387, 396 (1985); see also Smith v.

1 Robbins, 528 U.S. 259, 285 (2000) (appellate counsel ineffective where “counsel
2 unreasonably failed to discover nonfrivolous issues and to file a merits brief raising
3 them.”). Here appellate counsel from Thomas’s first trial failed to raise numerous
4 meritorious claims: Appellate counsel failed to challenge the prosecutorial
5 misconduct that occurred during the guilt phase. See Claim Seventeen. Appellate
6 counsel failed to challenge the inadequate appellate review and the use of elected
7 judges. See Claim Twenty-Two. Counsel failed to challenge unconstitutional jury
8 instructions, and failed to raise every constitutional basis for challenging other
9 instructions. See Claim Four. In failing to raise these claims, counsel’s performance
10 was deficient. Counsel’s deficiency was prejudicial because, had counsel raised the
11 claim, an impartial appellate court would have reversed Thomas’s convictions.

12 5. Appellate counsel was also ineffective for failing to raise all theories for
13 relief in claims that counsel did raise, or failing to present relevant evidence to
14 support claims. See Claims One, Four, Six, Eleven, Twelve, and Fifteen. This was
15 deficient. If appellate counsel had presented these theories, the result of Thomas’s
16 proceedings would have been different.
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1 **CLAIM TWENTY: INEFFECTIVE ASSISTANCE OF SECOND DIRECT**
2 **APPEAL COUNSEL**

3 Thomas's death sentences are invalid under the federal constitutional
4 guarantees of due process, equal protection, effective assistance of counsel, freedom
5 from cruel and unusual punishment, and a reliable sentence due to the ineffective
6 assistance of appellate counsel for the second direct appeal. U. S. Const. amends. V,
7 VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Thomas suffered ineffective assistance of counsel because second
10 appellate counsel failed to raise all substantial and cognizable issues and arguments,
11 including but not limited to those claims raised in this petition that were cognizable
12 on direct appeal. The failure by second direct appeal counsel amounted to deficient
13 performance which prejudiced Thomas's case.

14 2. Here appellate counsel failed to raise numerous meritorious claims.
15 Appellate counsel failed to challenge: Thomas's shackling, the use of his juvenile acts
16 during the penalty phase, erroneous penalty phase instructions, lack of notice of
17 aggravating evidence, the avoid lawful arrest aggravating circumstance, the lack of
18 a fair cross-section in the venire, death qualification of the jurors, improper
19 evidentiary rulings, cumulative error, the use of elected judges, violations of
20 international law, the prior violent crime aggravating circumstance, juror claims, and
21 Thomas's eligibility for the death penalty. See Claims Two, Three, Five, Seven, Nine,
22 Ten, Eleven, Twenty-One, Twenty-Two, Twenty-Four, Twenty-Five, Twenty-Six, and
23 Twenty-Seven. In failing to raise these claims, counsel's performance was deficient.
Counsel's deficiency was prejudicial because, had counsel raised the claim, an
impartial appellate court would have reversed Thomas's conviction.

1 3. Appellate counsel was also ineffective for failing to raise all theories for
2 relief in claims that counsel did raise, or failing to present relevant evidence to
3 support claims. See Claims Five, Six, Eight, Sixteen, Eighteen, Twenty-Two, and
4 Twenty-Three. This was deficient. If appellate counsel had presented these theories,
5 the result of Thomas's proceedings would have been different.
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1 **CLAIM TWENTY-ONE: CUMULATIVE ERROR**

2 Thomas's convictions and death sentences are invalid under the federal
3 constitutional guarantees of due process, equal protection, effective assistance of
4 counsel, fair tribunal, impartial jury, reliable sentence, and freedom from cruel and
5 unusual punishment because of the cumulative effect of the errors in this case. U.S.
6 Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

7 **SUPPORTING FACTS**

8 1. "The Supreme Court has clearly established that the combined effect of
9 multiple trial court errors violates due process where it renders the resulting criminal
10 trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing
11 Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (emphasis added)); see also
12 Jackson v. Brown, 513 F.3d 1057, 1085 (9th Cir. 2008). The basis for relief on a
13 cumulative error claim is grounded in the Due Process Clause of the Fourteenth
14 Amendment to the federal constitution. Chambers, 410 U.S. at 302-03. As explained
15 in Parle, the "cumulative effect of multiple errors can violate due process even where
16 no single error rises to the level of constitutional violation or would independently
17 warrant reversal." Parle, 505 F.3d at 927 (citing Chambers, 410 U.S. at 290 n.3); see
18 also Montana v. Egelhoff, 518 U.S. 37, 53 (1996); Taylor v. Kentucky, 436 U.S. 478,
19 487 n.15 (1978); Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995).

20 2. Each of the errors discussed in this petition independently mandates
21 relief. Even if that is not the case, however, when considered cumulatively, the
22 aggregate effect of those violations rendered the trial fundamentally unfair and a
23 violation of due process, such that habeas relief is warranted. See Parle, 505 F.3d at
927; Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992) (cumulative effect of counsel's
ineffectiveness and erroneous exclusion of evidence at penalty phase of capital trial
required grant of habeas corpus relief with regard to death sentence); Conde v. Henry,

1 198 F.3d 734, 741-42 (9th Cir. 1999) (combination of trial court errors in precluding
2 defense closing argument on theory of case, refusing to instruct jury on defense theory
3 of case, and giving instructions that reduced prosecution's burden of proof resulted in
4 per se prejudice).

5 3. Fundamentally, the errors in Thomas's case prevented him from having
6 a fair trial. In light of these substantial problems, it is impossible to conclude that the
7 jury actually found Thomas guilty under a valid theory. The cumulative effect of the
8 errors in this case was not harmless beyond a reasonable doubt. Thus, Thomas is
9 entitled to relief.

10 4. Trial and appellate counsel were ineffective for failing to raise this
11 claim.
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1 **CLAIM TWENTY-TWO: ELECTED JUDGES AND FAIR APPELLATE REVIEW**

2 Thomas's convictions and death sentences are invalid under the federal
3 constitutional guarantees of due process of the law, equal protection of the law, a
4 reliable sentence, and international law, because Thomas's capital trial, sentencing,
5 and review on direct appeal were conducted before state judicial officers whose tenure
6 in office was not dependent on good behavior but rather was dependent on popular
7 election and who failed to conduct fair and adequate appellate review. U.S. Const.
8 art. VI, amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21;
9 International Covenant on Civil and Political Rights, art. XIV.

10 **SUPPORTING FACTS**

11 **A. The Nevada Supreme Court's Review of Thomas's Sentences Was**
12 **Unconstitutional**

13 1. The Nevada Revised Statutes require the Nevada Supreme Court to
14 review each death sentence to determine whether the evidence supports the finding
15 of aggravating circumstances and whether the sentence was imposed under the
16 influence of passion and prejudice. NRS 177.055(2). The Eighth Amendment
17 requirement of reliability likewise mandates such a review. U.S. Const. amend. VIII;
18 see Gregg v. Georgia, 428 U.S. 153, 195 (1976). The Nevada Supreme Court has never
19 enunciated the standards it applies in conducting its review under this statute. The
20 complete absence of standards renders the purported review unconstitutional under
21 state and federal due process standards. This lack of standards is particularly
22 troublesome because the justices of the Nevada Supreme Court are elected; thus their
23 rulings are colored by the need to be re-elected.

 2. Due to the complete absence of any standards that could rationally
direct the conduct of the litigation or control the outcome, Thomas could not litigate

1 the issue of the excessiveness of his sentence, or whether his sentence was imposed
2 under the influence of passion or prejudice. In fact Thomas's case is no more egregious
3 than other cases in which Nevada juries did not impose the death penalty, the State
4 did not seek the death penalty, or the State agreed to negotiate it away. Compare
5 Evans v. State, 117 Nev. 609, 28 P.3d 498 (Nev. 2001) (four murders where original
6 jury found three aggravating factors, including torture or mutilation, and sentenced
7 Evans to death) with State v. Evans, Clark County Case No. C-116071, Sentencing
8 Agreement, Feb. 4, 2004 (State's agreement to sentences of life without possibility of
9 parole for four murders following reversal of the death sentence for new penalty
10 hearing), Ex. 115; and State v. Powell, Clark County Case no. C-148936, Verdicts,
11 November 15, 2000 (jury verdicts for life without possibility of parole for same four
12 murders as in Evans case, with three aggravating circumstances as to each murder
13 and no mitigating factors), Ex. 30; State v. Strohmeyer, No. C-144577, Court Minutes,
14 September 8, 1998 (minutes of change of plea to guilty in return for withdrawal of
15 notice of intent to seek death sentence and imposition of four consecutive sentences
16 of life without possibility of parole, in case involving kidnapping, sexual assault, and
17 strangulation murder of seven-year-old girl), Ex. 31; State v. Rodriguez, Clark County
18 Case No. C-130763, Verdicts, May 7, 1996 (jury verdicts of life without possibility of
19 parole for two murders, each with four aggravating circumstances where the only
20 mitigating factor cited by the jury was "mercy"), Ex. 32; Ducksworth v. State, 113
21 Nev. 780, 942 P.2d 157 (Nev. 1997) (jury verdicts of life without possibility of parole
22 for two defendants, based on two murders with total of thirteen aggravating
23 circumstances, including robbery, sexual assault, and torture or mutilation); Ex. 120;
State v. Daniels, Clark County Case No. C126201, Verdicts, November 1, 1995 (jury
verdicts of life without possibility of parole for two murders, each with four
aggravating circumstances), Ex. 33. Because Nevada judges are elected, they cannot
conduct a fair proceeding in capital cases, as required by the Due Process Clause and

1 the Eighth Amendment of the Constitution, nor can they provide constitutionally
2 adequate appellate review.

3 3. This is structural error. In the alternative, this error was not harmless
4 beyond a reasonable doubt. Insofar as trial or appellate counsel failed to object or
5 raise this claim in prior proceedings, they were ineffective.

6 **B. Because Nevada Judges Are Elected, They Cannot Conduct a Fair
7 Proceeding in Capital Cases, As Required By the Due Process Clause of
8 the Constitution**

9 4. Judges and justices in Nevada’s court system are popularly elected and
10 thereby face the possibility of removal if they make a controversial or unpopular
11 decision. This situation renders the Nevada judiciary insufficiently impartial to
12 preside over a capital case under the state and federal Due Process Clauses. This
13 impartiality is compounded by the inadequacy of the Nevada Supreme Court’s review.
14 At the time of the adoption of the Constitution, which is the benchmark for the
15 protection afforded by the Due Process Clause, see, e.g., Medina v. California, 505
16 U.S. 437, 445-56 (1992), English judges qualified to preside in capital cases had
17 tenure during good behavior.

18 5. Almost a hundred years prior to the adoption of the Constitution, in
19 1700, a provision requiring that “Judges’ Commissions be made quamdiu se bene
20 gesserint”³⁸ was considered sufficiently important to be included in the Act of
21 Settlement, see W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute
22 ensured judges’ tenure despite the death of the sovereign, which had formerly voided
23 their commissions. See W. Holdsworth, History of English Law, 196 (7th ed., A.
Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of King George III,
in urging the adoption of this statute, that the independent tenure of the judges was
“essential to the impartial administration of justice; as one of the best securities of

³⁸ “quamdiu se bene gesserint” translates to “during good behavior.”

1 the rights and liberties of his subjects; and as most conducive to the honor of the
2 crown.” See W. Blackstone, Commentaries on the Laws of England *258 (1765). The
3 Framers of the Constitution, who included the protection of tenure during good
4 behavior of federal judges under Article III of the Constitution, would not likely have
5 taken a looser view of the importance of this due process requirement than King
6 George III. In fact, the Framers used the grievance that the king had made the
7 colonial “judges dependent on his will alone, for the tenure of their offices” to partly
8 justify the Revolution. The Declaration of Independence para. 11 (U.S. 1776); See
9 Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa. L. Rev. 1104,
10 1112-52 (1976). At the time of the Constitution’s adoption, none of the states
11 permitted judicial elections. Smith, supra, at 1153-54.

12 6. The absence of any such protection for Nevada judges results in a denial
13 of federal due process in capital cases because the possibilities of removal, and, at
14 minimum, of a financially draining campaign, are threats that “offer a possible
15 temptation to the average [person] as a judge . . . not to hold the balance nice, clear,
16 and true between the state and the [capitally] accused.” Tumey v. Ohio, 273 U.S. 510,
17 532 (1927); See Legislative Comm’n Subcomm. to Study the Death Penalty and
18 Related DNA Testing Tr., Feb. 21, 2002 (Justice Rose noting that the lesson of
19 election campaign, involving allegation that justice of Supreme Court “wanted to give
20 relief to a murderer and rapist,” was “not lost on the judges in the State of Nevada,
21 and I have often heard it said by judges, ‘a judge never lost his job by being tough on
22 crime.’”); Beets v. State, 107 Nev. 957, 974-78, 821 P.2d 1044, 1056-58 (Nev. 1991)
23 (Young, J., dissenting) (“Nevada has a system of elected judges. If recent campaigns
are an indication, any laxity toward a defendant in a homicide case would be serious,
if not fatal, campaign liability.”).

7. The 2006 removal of a Nevada Supreme Court Justice for participating
in an unpopular decision establishes the incentive elected judges have to avoid

1 unpopular decisions if they want to get re-elected. Voters Like the R-J's Ideas—Guess
2 Who Hates That?, Las Vegas Rev. J., Nov. 12, 2006; Editorial, Brian Greenspun on
3 Tuesday's Victories Amid a Judicial Warning, Las Vegas Sun, Nov. 9, 2006; Carri
4 Geer Thevenot, Supreme Court's Becker Falls to Saitta—Douglas Retains Seat—
5 Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003, Las
6 Vegas Rev. J., Nov. 8, 2006; Editorial, Nancy Becker Must be Removed—Supreme
7 Court Justice Backed Guinn v. Legislature Travesty, Las Vegas Rev. J., Nov. 5, 2006;
8 Editorial, Nancy Becker has the Right—State Supreme Court Justice has Faithfully
9 and Honestly Interpreted the Constitution, Las Vegas Sun, Oct. 22, 2006; Jeff
10 German, Far Right Targets Justice Becker—Supreme Court Vote on Tax Increase
11 was Right Thing to Do, She Says, Las Vegas Sun, Oct. 15, 2006; Jon Ralston,
12 Campaign Ad Reality Check, Las Vegas Sun, Oct. 15, 2006; Jon Ralston, Jon Ralston
13 is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians, Las Vegas
14 Sun, Sept. 22, 2006; Michael J. Mishnak, Libertarian Lawyer has More Issues Up His
15 Sleeve—Waters' Next Targets: Campaign Funds, Real Estate Tax, Las Vegas Sun,
16 Sept. 16, 2006; Sam Skolnik, Who Owns Whom is Supreme Theme—Becker, Saitta
17 Race is Rife with Accusations, Las Vegas Sun, Aug. 27, 2006. State lower court judges
18 have the same fate. In legislative hearings on a measure to eliminate judicial
19 elections, one opponent stated “we do not want the judiciary to be independent of the
20 people,” and another referred to a specific court which had “replaced a judge two years
21 ago . . . who functioned very well as a judge, but did not reflect the values of the
22 community.” Nev. Legislature, 75th Sess., Senate Committee on Judiciary, Minutes
23 at 12-13 (Feb. 23, 2009) (SJR 2).

8. Elected judges cannot, consistent with Constitution, preside over capital cases. This is structural error and Thomas is entitled to relief; alternatively, this error was not harmless beyond a reasonable doubt. Insofar as trial or appellate counsel failed to object or raise this claim in prior proceedings, they were ineffective.

1 **C. Justice Becker Had a Conflict Of Interest at the Time She Participated**
2 **In the 2006 Decision In This Case**

3 9. On November 7, 2006, Justice Becker lost her bid for re-election to the
4 Nevada Supreme Court.³⁹ Shortly after, Justice Becker began negotiating for a high-
5 ranking, high-paying job with the Clark County District Attorney's office, the
6 prosecuting office in Thomas's case. See Ex. 197 ("District Attorney David Roger said
7 Becker first called him later that month [November] or in early December to discuss
8 possibly working for his office."). On December 28, 2006, the Nevada Supreme Court
9 issued its decision in the appeal from Thomas's second direct appeal. See Thomas v.
10 State, 122 Nev. 1361, 148 P.3d 727 (Nev. 2006). By January 5, 2007, The Las Vegas
11 Review-Journal was reporting that Justice Becker was considering employment with
12 the Clark County District Attorney's office. Ex. 198 ("Former Supreme Court Justice
13 Nancy Becker is considering accepting a newly created position as an appellate
14 attorney in the district attorney's office. Before she can accept the job, however,
15 District Attorney David Roger will have to analyze his budget to find the necessary
16 funds to pay Becker's salary."). Eventually the Clark County District Attorney and
17 Justice Becker agreed that she should receive an exemption from Clark County to
18 earn a salary close to what she received as a Nevada Supreme Court Justice. Ex. 197.
19 Justice Becker eventually received this exemption and the county agreed she would
20 earn \$120,000 annually. Id.

21 10. The Due Process Clause of the Fourteenth Amendment requires a trial
22 before a judge with no actual bias against the defendant or interest in the outcome of
23 the case. Bracy v. Gramley, 520 U.S. 899, 904-05 (1997). The right to an unbiased
judge includes the right to an appellate court free from any biased judge. See Williams
v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016); see also Aetna Life Ins. Co v. Lavoie,

³⁹ See, e.g., Ex. 197

1 475 U.S. 813, 827-28 (1986). In determining whether a judge’s failure to recuse is a
2 constitutional question, “[t]he inquiry is an objective one. The Court asks not whether
3 the judge is actually subjectively biased, but whether the average judge in his position
4 is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”
5 Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 881 (2009); see also Rippo v.
Baker, 137 S. Ct. 905, 907 (2017) (per curiam).

6 11. Here, the financial incentive created by Justice Becker’s negotiation of
7 a salary with a party appearing before the court creates an unconstitutional potential
8 for bias. An average judge in this position is not “likely” to be neutral. This error is
9 structural, thus Thomas is entitled to relief. Alternatively, this error was not
10 harmless beyond a reasonable doubt.

1 **CLAIM TWENTY-THREE: DEATH PENALTY IS UNCONSTITUTIONAL**

2 Thomas's convictions and death sentences are invalid under the federal
3 constitutional guarantees of the right due process, confrontation, effective counsel,
4 equal protection, trial before an impartial jury, freedom from cruel and unusual
5 punishment, and a reliable sentence because Nevada's death penalty is
6 unconstitutional. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6,
7 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 **A. Lethal Injection, is Unconstitutional In All Circumstances**

10 1. Nevada law requires that execution be inflicted by an injection of a legal
11 drug. See NRS 176.355(1).

12 2. Thomas alleges that execution by lethal injection is unconstitutional in
13 all circumstances, where "evolving standards of decency that mark the progress of a
14 maturing society," and an ever-expanding list of botched executions, compels the
15 conclusion that lethal injection as a means of execution can never satisfy the demands
16 of the Eighth Amendment. See Trop v. Dulles, 356 U.S. 86, 101 (1958). He
17 acknowledges Supreme Court authority to the contrary, see, e.g., Glossip v. Gross,
18 135 S. Ct. 2726, 2739 (2015); Baze v. Rees, 553 U.S. 35 (2008), while noting that those
19 cases resulted in sharply divided opinions, and were decided without the benefit of
20 factual development by the district court regarding the numerous executions in
21 recent years, using various drug combinations, that resulted in prolonged pain and
22 suffering of the condemned inmates.

23 3. Those instances of botched lethal injections include the following:

- 1 • Charles Brooks, Jr. (December 7, 1982, Texas): The executioner had a difficult
2 time finding a suitable vein. The injection took seven minutes to kill. Witnesses
3 stated that Brooks “had not died easily.” See Deborah W. Denno, Getting to
4 Death: Are Executions Unconstitutional?, 82 Iowa L. Rev. 319, 428-29 (1997)
5 [hereinafter “Denno II”]; Denno I, supra, at 139.
- 6 • James Autry (March 14, 1984, Texas): Autry took ten minutes to die,
7 complaining of pain throughout. Officials suggested that faulty equipment or
8 inexperienced personnel were to blame. See Denno II, supra, at 429; Denno I,
9 supra, at 139.
- 10 • Thomas Barefoot (October 30, 1984, Texas): A witness stated that after
11 emitting a “terrible gasp,” Barefoot’s heart was still beating after the prison
12 medical examiner had declared him dead. See Denno II, supra, at 430; Denno
13 I, supra, at 139.
- 14 • Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for
15 technicians to find a suitable vein, while they punctured him repeatedly, and
16 another eleven minutes for him to die. See Denno II, supra, at 430; Denno I,
17 supra, at 139; Michael L. Radelet, Post-Furman Botched Executions, Death
18 Penalty Information Center [hereinafter “Radelet”], available at
19 <http://www.deathpenaltyinfo.org>.
- 20 • Randy Wools (August 20, 1986, Texas): Wools had to assist execution
21 technicians in finding an adequate vein for insertion. He died seventeen
22 minutes after technicians inserted the needle. See Denno II, supra, at 431;
23 Denno I, supra, at 139; Radelet, supra; Killer Lends a Hand to Find a Vein for
Execution, L.A. Times, Aug. 20, 1986, at 2.⁴⁰
- Elliot Johnson (June 24, 1987, Texas): Johnson’s execution was plagued by
repetitive needle punctures and took executioners thirty-five minutes to find a
vein. See Denno II, supra, at 431; Denno I, supra, at 139; Radelet, supra; Addict
Is Executed in Texas for Slaying of 2 in Robbery, N.Y. Times, June 25, 1987,
at A24.⁴¹
- Raymond Landry (December 13, 1988, Texas): Executioners “repeatedly
probed” his veins with syringes for forty minutes. Then, two minutes after the
injection process began, the syringe came out of Landry’s vein, “spewing deadly
chemicals toward startled witnesses.” A plastic curtain was pulled so that
witnesses could not see the execution team reinsert the catheter into Landry’s

⁴⁰ Available at <http://tinyurl.com/z7nylnm>.

⁴¹ Available at <http://tinyurl.com/jkjlslj>.

1 vein. "After 14 minutes, and after witnesses heard the sound of doors opening
2 and closing, murmurs and at least one groan, the curtain was opened and
3 Landry appeared motionless and unconscious." Landry was pronounced dead
twenty-four minutes after the drugs were initially injected. See Denno II,
supra, at 431-32; Denno I, supra, at 139; Radelet, supra.

- 4 • Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs,
5 McCoy "choked and heaved" during his execution. A reporter witnessing the
6 scene fainted. See Denno II, supra, at 432; Denno I, supra, at 139; Radelet,
supra.
- 7 • George Mercer (January 6, 1990, Missouri): A medical doctor was required to
8 perform a surgical "cut down" procedure on Mercer's groin. See Denno II,
9 supra, at 432; Denno I, supra, at 139.
- 10 • George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle
11 into Gilmore's arm. See Denno II, supra, at 433; Denno I, supra, at 139.
- 12 • Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty
13 finding a vein, delaying the execution for ten minutes. See Denno II, supra, at
14 433; Denno I, supra, at 139.
- 15 • Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line,
16 and the needle was inserted improperly so that the chemicals flowed toward
his fingertips instead of his heart. As a result, Walker's execution took eleven
minutes rather than the three or four contemplated by the state's protocols,
and the sedative chemical may have worn off too quickly, causing excruciating
pain. When these problems arose, prison officials closed the blinds so that
witnesses could not observe the process. See Denno II, supra, at 431; Denno I,
supra, at 139; Radelet, supra; Niles Group Questions Execution Procedure,
United Press International, Nov. 8, 1992 (Lexis/Nexis file).
- 17 • Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the
18 lethal dosage malfunctioned. See Denno II, supra, at 434; Denno I, supra, at
140.
- 19 • Ricky Rector (January 24, 1992, Arkansas): It took almost an hour for a team
20 of eight to find a suitable vein. Witnesses were separated from the injection
team by a curtain, but could hear repeated, loud moans from Rector. See Denno
21 II, supra, at 434-35; Denno I, supra, at 140; Joe Farmer, Rector's Time Came,
Painfully Late, Ark. Democrat-Gazette, Jan. 26, 1992, at 1B; Marshall Fray,
22 Death in Arkansas, The New Yorker, Feb. 22, 1993, at 105.

- 1 • Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked,
2 spasmed and bucked in his chair after the drugs were administered. A news
reporter witness said his death looked “painful and inhumane.” See Denno II,
3 supra, at 435; Denno I, supra, at 140; Radelet, supra.
- 4 • Billy White (April 23, 1992, Texas): White’s death required forty-seven minutes
because executioners had difficulty finding a vein that was not severely
5 damaged from years of heroin abuse. See Denno II, supra, at 435-36; Denno I,
supra, at 140; Radelet, supra.
- 6 • Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his
restraints during his nine-minute death. See Denno II, supra, at 436; Denno I,
7 supra, at 140; Radelet, supra; Robert Wernsman, Convicted Killer May Dies,
The Huntsville Item, May 7, 1992, at 1; Michael Graczyk, Convicted Killer Gets
8 Lethal Injection, Denison Herald, May 8, 1992.
- 9 • John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified,
blocking the IV tube. The blinds were closed for ten minutes, preventing
10 witnesses from watching, while the execution team replaced the tubing. See
Denno II, supra, at 435; Denno I, supra, at 140; Radelet, supra; Scott Fornek
11 & Alex Rodriguez, Gacy Lawyers Blast Method: Lethal Injections Under Fire
After Equipment Malfunction, Chi. Sun-Times, May 11, 1994, at 5; Lou Ortiz
12 & Scott Fornek, Witnesses Describe Killer’s ‘Macabre’ Final Few Minutes, Chi.
Sun-Times, May 11, 1994, at 5; Rob Karwath & Susan Kuczka, Gacy Execution
13 Delay Blamed on Clogged IV Tube, Chi. Trib., May 11, 1994, at 1.
- 14 • Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal
chemicals began to flow into Foster’s arm, the execution was halted when the
15 chemicals stopped circulating. With Foster gasping and convulsing, blinds
were drawn so witnesses could not view the scene. Death was pronounced
16 thirty minutes after the execution began, and three minutes later the blinds
were reopened so the witnesses could view the corpse. According to the coroner,
17 the problem was caused by the tightness of the leather straps that bound
Foster to the execution gurney. Foster did not die until several minutes after
18 a prison worker finally loosened the straps. See Denno II, supra, at 437; Denno
I, supra, at 140; Radelet, supra; Editorial, Witnesses to a Botched Execution,
19 St. Louis Post-Dispatch, May 8, 1995, at 6B; Tim O’Neil, Too-Tight Strap
Hampered Execution, St. Louis Post-Dispatch, May 5, 1995, at 1B; Jim Salter,
20 Execution Procedure Questioned, Kansas City (Mo.) Star, May 4, 1995, at C8.
- 21 • Ronald Allridge (June 8, 1995, Texas): Allridge’s execution was conducted with
only one needle, rather than the two required by the protocol, because a
22 suitable vein could not be found in his left arm. See Denno II, supra, at 437;
Denno I, supra, at 140.

- 1 • Richard Townes (January 23, 1996, Virginia): It took twenty-two minutes for
2 medical personnel to find a vein. After repeated unsuccessful attempts to insert
3 the needle through the arms, the needle was finally inserted through the top
4 of Townes's right foot. See Denno II, supra, at 437; Denno I, supra, at 140;
5 Radelet, supra.
- 6 • Tommie Smith (July 18, 1996, Indiana): It took one hour and nine minutes for
7 Smith to be pronounced dead after the execution team began sticking needles
8 into his body. For sixteen minutes, the team failed to find adequate veins, and
9 then a physician was called. Smith was given a local anesthetic and the
10 physician twice attempted to insert the tube in Smith's neck. When that failed,
11 an angio-catheter was inserted in Smith's foot. Only then were witnesses
12 permitted to view the process. The lethal drugs were finally injected into Smith
13 forty-nine minutes after the first attempts, and it took another twenty minutes
14 before death was pronounced. See Denno II, supra, at 437; Denno I, supra, at
15 140; Radelet, supra.
- 16 • Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney
17 with the needle in his arm for one hour and ten minutes while his attorneys
18 argued his case. When injected, his head jerked, his face contorted, and his
19 chest and stomach sharply heaved. See Denno II, supra, at 438; Denno I, supra,
20 at 140.
- 21 • Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural
22 sounds, and shook for three minutes following the injection. He was
23 pronounced dead eight minutes later. See Denno I, supra, at 140; Radelet,
supra; Michael Overall & Michael Smith, 22-Year-Old Killer Gets Early
Execution, Tulsa World, May 8, 1997, at A1.
- Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems
had caused Elkins's body to swell, requiring executioners to search almost an
hour – and seek assistance from Elkins – to find a suitable vein. See Denno I,
supra, at 140; Radelet, supra; Killer Helps Officials Find a Vein at His
Execution, Chattanooga Free Press, June 13, 1997, at A7.
- Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the
execution. Cannon's vein collapsed and the needle popped out after the first
injection. He then made a second final statement and was injected a second
time behind a closed curtain. See Denno I, supra, at 141; Radelet, supra; 1st
Try Fails to Execute Texas Death Row Inmate, Orlando Sent., Apr. 23, 1998,
at A16; Michael Graczyk, Texas Executes Man Who Killed San Antonio
Attorney at Age 17, Austin Am.-Statesman, Apr. 23, 1998, at B5.

- 1 • Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed
2 approximately two hours when executioners could not find suitable veins in his
arms. See Denno I, supra, at 141; Radelet, supra.
- 3 • Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty-
4 five minutes to find a vein suitable for the lethal injection. See Denno I, supra,
at 141; Radelet, supra; Sean Whaley, Nevada Executes Killer, L.V. Rev-J., Oct.
5 5, 1998, at 1A.
- 6 • Christina Riggs (May 3, 2000, Arkansas): The execution was delayed for
eighteen minutes when prison staff could not find a vein. See Radelet, supra.
- 7 • Bennie Demps (June 8, 2000, Florida): It took the execution team thirty-three
8 minutes to find suitable veins for the execution. "They butchered me back
9 there," said Demps in his final statement. "I was in a lot of pain. They cut me
10 in the groin; they cut me in the leg. I was bleeding profusely. This is not an
execution, it is murder." The executioners had no unusual problems finding
11 one vein, but because the Florida protocol requires a second alternate
intravenous drip, they continued to work to insert another needle, finally
12 abandoning the effort after their prolonged failures. See Denno I, supra, at 141;
Radelet, supra; Rick Bragg, Florida Inmate Claimed Abuse in Execution, N.Y.
Times, June 9, 2000, at A14;⁴² Phil Long & Steve Brousquet, Execution of
13 Slayer Goes Wrong: Delay, Bitter Tirade Precede His Death, Miami Herald,
June 8, 2000.
- 14 • Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs,
Hunter's body convulsed against his restraints during what one witness called
15 "a violent and agonizing death." See Denno I, supra, at 141; Radelet, supra;
David Scott, Missouri Executes Convicted Killer, Associated Press, June 28,
2000.
- 16 • Claude Jones (December 7, 2000, Texas): Jones's execution was delayed 30
17 minutes while the execution team struggled to insert an IV. One member of
the execution team commented, "They had to stick him about five times. They
18 finally put it in his leg." See Radelet, supra.
- 19 • Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians
20 tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted
a needle in his chest, after a doctor cut an incision there, while they inserted
21 the other needle in one of his hands. High was pronounced dead one hour and
nine minutes after the procedure began. See Denno I, supra, at 141; Radelet,
22 supra.

23 ⁴² Available at <http://tinyurl.com/z9k66yn>.

- 1 • Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty
2 and twenty-five minutes on the execution bed, with the intravenous line
3 inserted, continuously agitated, asserting his innocence, the injustice of
4 executing him, and the injustice of requiring him to sign a habeas corpus
5 petition, and to suffer prolonged delay, in order to have the unconstitutionality
6 of his conviction recognized by the court system. He remained agitated after
7 the execution process began, so the sedative drugs appeared not to take effect
8 and he died while apparently still conscious and shouting about the injustice
9 of his execution.
- 10 • Joseph L. Clark (May 2, 2006, Ohio): It initially took executioners twenty-two
11 minutes to find a suitable vein in Mr. Clark's left arm for insertion of the
12 catheter. As the injection began, the vein collapsed. After an additional thirty
13 minutes, the execution team succeeded in placing a catheter in Mr. Clark's
14 right arm. However, the team again tried to inject the drugs into the left arm,
15 where the vein had already collapsed. These difficulties prompted Mr. Clark to
16 sit up, tell the executioners that "It don't work," and to ask "Can you just give
17 me something by mouth to end this?" Mr. Clark was finally pronounced dead
18 ninety minutes after the execution began. See Radelet, supra; Andrew Welsh-
19 Huggins, Botched Execution Leads to Ohio Review, Associated Press (May 12,
20 2006).
- 21 • Angel Diaz (December 13, 2006, Florida): After the initial injection, Mr. Diaz
22 grimaced, face contorted, gasping for air for at least ten to twelve minutes.
23 Prison officials administered a second injection, and thirty-four minutes
passed before they declared Mr. Diaz dead. Shortly thereafter, Governor Jeb
Bush halted all executions and selected a committee "to consider the humanity
and constitutionality of lethal injections." See Radelet; Terry Aguayo, Florida
Death Row Inmate Dies Only After Second Chemical Dose, N.Y. Times, Dec.
15, 2006; Adam Liptak & Terry Aguayo, After Problem Execution, Governor
Bush Suspends the Death Penalty in Florida, N.Y. Times, Dec. 16, 2006; Ellen
Kreitzberg & David Richter, But Can it be Fixed? A Look at Constitutional
Challenges to Lethal Injection Executions, 47 Santa Clara L. Rev. 445, 445-46
(2007).
- Christopher Newton (May 24, 2007, Ohio): Executioners stuck Mr. Newton at
least ten times before getting the shunts in place and injecting the needles. It
then took over two hours for Mr. Newton to die. Officials blamed the delay on
Newton's weight – 265 pounds. See Radelet; Ohio Lethal Injection Takes 2
Hours, 10 Tries, Associated Press, May 24, 2007.
- John Hightower (June 26, 2007, Georgia): It took prison officials almost an
hour to complete Mr. Hightower's execution, forty minutes of which they spent

1 trying to locate a usable vein. See Radelet; Lateef Mungin, Triple Murderer
2 Executed After 40-Minute Search for Vein, Atlanta J.- Const., June 27, 2007.

- 3 • Curtis Osborne (June 4, 2008, Georgia): Executioners took thirty-five minutes
4 to find a suitable vein. After they administered the drugs, it took an additional
5 fourteen minutes before the in-chamber doctors pronounced Mr. Osborne's
6 death. See Radelet; Rhonda Cook, Executioners Had Trouble Putting Murderer
7 to Death: For 35 Minutes, They Couldn't Find Good Vein for Lethal Injection,
8 Atlanta J.-Const., June 27, 2007.
- 9 • Rommell Broom (Sept. 15, 2009, Ohio): After two hours, executioners
10 terminated their efforts to find a suitable vein in Mr. Broom's arms and legs
11 despite his attempts to assist them in finding a good vein. "Broom said he was
12 stuck with needles at least [eighteen] times, the pain so intense he cried and
13 screamed out." Upon ordering the execution to stop, Governor Ted Strickland
14 announced that he would seek physicians' advice on "how the man could be
15 killed more efficiently." Executioners blamed Mr. Broom's extensive use of
16 intravenous drugs for their difficulties. See Radelet.
- 17 • Brandon Joseph Rhode (Sept. 27, 2010, Georgia): After the Supreme Court
18 rejected his appeals, "[m]edics . . . tried for about 30 minutes to find a vein to
19 inject the three-drug concoction." It then took 14 minutes for the lethal drugs
20 to kill him. Greg Bluestein, Georgia Executes Inmate Who Had Attempted
21 Suicide, Atlanta J.-Constitution, Sept. 27, 2010.
- 22 • Dennis McGuire (January 16, 2014, Ohio): Ohio used a "new, untested cocktail
23 of drugs," midazolam and hydromorphone, in this execution. "A reporter for
the Columbus Dispatch, one of the witnesses at the execution, described Mr.
McGuire as struggling, gasping loudly, snorting and making choking noises for
nearly 10 minutes before falling silent and being declared dead a few minutes
later." Rick Lyman, Ohio Execution Using Untested Drug Cocktail Renews the
Debate Over Lethal Injections, N.Y. Times, January 16, 2014.
- Jose Villegas (April 16, 2014, Texas): After Villegas was denied a stay of his
execution based on mental retardation, he was executed using compounded
phenobarbital. Mr. Villegas was reported to state, "It does kind of burn.
Goodbye." Linda Greenhouse, Still Tinkering, N.Y. Times, May 14, 2014.
- Clayton Lockett (April 30, 2014, Oklahoma): After a doctor in attendance
pronounced Lockett unconscious, "things went visibly wrong." Lockett
twitched, mumbled, attempted to lift his head and shoulders, and appeared to
be in pain. The Warden announced there was a "vein failure" and ordered the
execution aborted. Approximately forty-three minutes after the execution
began, "Mr. Lockett died of a 'massive heart attack.'" Radelet, supra; Erik

1 Eckholm & John Schwartz, Oklahoma Vows Review of Botched Execution,
2 N.Y. Times, April 30, 2014. Following Lockett's execution, a grand jury was
3 convened to study executions in Oklahoma, resulting in a May 2016 report that
4 sharply criticized the state's oversight and implementation of its protocol. See
5 (Interim Report 14, In the Matter of Multicounty Grand Jury, Case No. SCAD-
6 2012-61 (Okla. May 19, 2016), available at <http://tinyurl.com/htk6l2c>).

- 7 • Joseph Wood (July 23, 2014, Arizona): After the chemicals were injected, Mr.
8 Wood repeatedly gasped for one hour and 40 minutes before death was
9 pronounced. Radelet, supra. Senator John McCain of Arizona described Wood's
10 execution as tantamount to "torture." See Ben Brumfield & Mariano Castillo,
11 McCain: Prolonged Execution Was Torture,
12 <http://www.cnn.com/2014/07/25/justice/arizona-execution-controversy/>, Sept.
13 8, 2014.
- 14 • Brian Terrell (Dec. 9, 2015, Georgia). Brian Keith Terrell. "[I]t took an hour for
15 the nurse assigned to the execution to get IVs inserted into both of the
16 condemned man's arms. She eventually had to put one into Terrell's right
17 hand. Terrell winced several times, apparently in pain." See Radelet, supra.
- 18 • Brandon Jones (Feb. 3, 2016, Georgia). Executioners spent twenty-four
19 minutes trying to insert an IV into Jones's left arm, another eight minutes into
20 his right, and tried again, unsuccessfully, to insert it into his left arm. A
21 physician was called to assist, in violation of several codes of medical ethics,
22 and he or she spent another thirteen minutes inserting and stitching the IV
23 near Jones's groin. Six minutes later, Jones's eyes popped open. See Radelet,
24 supra.

25 4. In short, far from providing "a safe, reliable, effective and humane"
26 method of execution consistent with Eighth Amendment, lethal injection, by one
27 comprehensive study, has shown to be far less reliable than methods that preceded
28 it. See Austin Sarat, Gruesome Spectacles: Botched Executions and America's Death
29 Penalty (2014); cf. Wood v. Ryan, 759 F.3d 1076, 1102-03 (9th Cir. 2014) (Kozinski,
30 J., dissenting from the denial of rehearing en banc) (suggesting that, "[i]f a state
31 wishes to continue carrying out executions," it should return to earlier, "more . . .
32 foolproof," methods)

1 **1. Lethal injection in Nevada is unconstitutional**

2 5. Thomas further alleges that lethal injection, as administered in the
3 State of Nevada, violates the Cruel and Unusual Punishment Clause. Thomas does
4 not concede that lethal injection in Nevada can be administered in a constitutional
5 manner. Cf. Hill v. McDonough, 547 U.S. 573, 580 (2006). However, as explained in
6 greater detail below, he is without sufficient information to fully and fairly plead this
7 claim, where the State consistently has refused to disclose its protocols and
8 procedures on the grounds of alleged “privilege” or “confidentiality,” or to even to
9 confirm whether or not it has any such protocols and procedures that are current,
10 final, and able to be carried out by the State.⁴³

11 6. Without this information, it impossible to determine, at this point,
12 whether any protocol that it may have adopted contains protections of the type the
13 Supreme Court found necessary to uphold the protocols at issue in Baze, or to
14 demonstrate that NDOC’s selection of drugs “is sure or very likely to result in
15 needless suffering.” See Glossip, 135 S. Ct. at 2739.

16 7. It also follows that, without a knowledge of the means by which the State
17 intends to execute him, Thomas cannot plead “a known and available alternative
18 method of execution that would entail a significantly less severe risk” of pain over an
19 as-yet-unknown procedure. See Glossip, 135 S. Ct. at 2737.

20 ⁴³ This claim is based on undersigned counsels’ current knowledge of the
21 execution protocol. Ongoing litigation in Scott Dozier’s case could have a bearing on
22 the execution protocol, or the protocol could change while Thomas’s case is pending.
23 See David Ferrara, Judge paves way for convicted killer Scott Dozier’s execution, Las
Vegas Rev. J. (July 18, 2017). Regardless of changes to the protocol, execution by
lethal injection is unconstitutional.

1 8. The State’s refusal to provide Thomas sufficient information regarding
2 the means by which it intends to execute him independently violates his federal
3 constitutional rights, by denying him access to the courts. See, e.g., Lewis v. Casey,
4 518 U.S. 343, 356 (1996) (prisoners must have a “reasonably adequate to opportunity
5 to file nonfrivolous legal claims challenging their convictions or conditions of
6 confinement”).

7 9. The only purportedly final protocol available to Thomas, bearing a
8 revision date of February 2004, was produced by the Nevada Department of
9 Corrections in April 2006. See Ex. 73 ([Redacted] Confidential Execution Manual:
10 Procedures for Executing the Death Penalty, Nevada State Prison (rev. Feb. 2004)).
11 For reasons explained below, there is every reason to believe that this is not the
12 current protocol. Although the Nevada Department of Corrections has released a
13 protocol dated 2015, it is unsigned and there is no indication that it has been adopted
14 by the Director of the Nevada Department of Corrections or approved by the Nevada
15 Board of Prisons Commissioners. It also contains the same substantive defects as the
16 2004 protocol.

17 10. However, it is apparent that this protocol – or any substantially similar
18 protocol or procedures – would violate the Eighth Amendment. The 2004 Protocol
19 specifies that execution by lethal injection will be carried out using five grams of
20 sodium thiopental, a barbiturate typically used by anesthesiologists to induce
21 temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160
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1 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Id.
2 at 10.⁴⁴

3 11. Competent physicians cannot administer the lethal injection because
4 the ethical standards of the American Medical Association prohibit physicians from
5 participating in an execution other than to certify that a death has occurred. See Ex.
6 75. Thus, lethal injection in Nevada is not administered by competent medical
7 personnel.

8 12. Moreover, competent physicians are precluded from administering the
9 drugs sodium thiopental, pancuronium bromide, and potassium chloride in lethal
10 injection procedures because these substances are not approved by the Food and Drug
11 Administration as a safe and effective means for administering executions in human
12 beings. For example, sodium thiopental is not approved in any manner for
13 administration on human beings. Rather, federal law restricts injection of sodium
14 thiopental to anesthetic uses on dogs and cats only “by or on the order of a licensed
15 veterinarian.” See 21 C.F.R. §§ 522.2444a(c)(1), (3), 522.2444b(c)(1), (3). The
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17 ⁴⁴ On or about October 2007, shortly before the scheduled execution of William
18 Castillo, NDOC announced that “it was revising its drug protocol to double the
19 dosages of all three drugs used in the lethal injection.” See Petitioners’ Opening Brief
20 in Support of a Writ of Mandamus at 10, American Civil Liberties Union of Nevada
21 v. Skolnik, Case No. 50354 (Nev. filed Nov. 7, 2007). To date, undersigned counsel
22 has been unable to obtain any lethal injection protocol reflecting this change, whether
23 this change was made in accordance with state law, or information as to how NDOC
concluded this change was likely to result in a lawful execution. On its face, however,
this late disclosure suggests the sort of ad hoc and medically uninformed decision-
making that assumes, wrongly, that more is always better. Cf. Glossip, 135 S. Ct. at
2782-86 (Sotomayor, Ginsburg, Breyer, and Kagan, JJ, dissenting) (explaining the
“ceiling effect”).

1 Department of Corrections' use of these drugs in violation of the Food and Drug Act
2 allows state prison officials to make unapproved use of drugs distributed in interstate
3 commerce.

4 13. Lethal injection conducted by untrained personnel using the three drugs
5 specified by Nevada's protocol creates an unnecessary risk of undue pain and
6 suffering because Nevada's procedures for inducing and maintaining anesthesia fall
7 below the medical standard of care for the use of anesthesia prior to conducting
8 painful procedures. See Ex. 74 at 6-8. The humaneness of execution by lethal injection
9 is dependent upon the proper administration of the anesthetic agent, sodium
10 thiopental. In the surgical arena, general anesthesia can be administered only by
11 physicians trained in anesthesiology or nurses who have completed the necessary
12 training to be Certified Registered Nurse Anesthetists (CRNAs). Id. at 13. Nevada's
13 execution manual does not specify what, if any, training in anesthesiology the
14 person(s) administering the lethal injection must have. If the untrained executioner
15 fails to successfully deliver a quantity of sodium thiopental sufficient to achieve
16 adequate anesthetic depth, the inmate will feel the excruciating pain of the
17 subsequent injections of pancuronium bromide and potassium chloride. Id. at 8.
18 According to Dr. Mark Heath, a board-certified anesthesiologist who reviewed the
19 2004 Protocol:

20 [i]f an inmate does not receive the full dose of sodium
21 thiopental because of errors or problems in administering
22 the drug, the inmate might not be rendered unconscious
and unable to feel pain, or alternatively might, because of
the short-acting nature of sodium thiopental, regain
consciousness during the execution.

23 See id. at 9. Moreover, according to Dr. Heath:

1 [i]f sodium thiopental is not properly administered in a
2 dose sufficient to cause the loss of consciousness for the
3 duration of the execution procedure, then it is my opinion
4 held to a reasonable degree of medical certainty that the
use of pancuronium places the condemned inmate at risk
for consciously experiencing paralysis, suffocation and the
excruciating pain of the intravenous injection of high dose
potassium chloride.

5 Id. at 22.

6 14. The 2004 Protocol is vulnerable to many potential errors in
7 administration that would result in a failure to administer a quantity of sodium
8 thiopental sufficient to induce the necessary anesthetic depth. The risk of error is
9 compounded by Nevada's use of inadequately trained personnel. See id. at 9-13. The
10 potential errors include: errors in preparing the sodium thiopental solution (because
11 sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a
12 powder and must be mixed into a liquid solution prior to the execution), id. at 8-9,
13 errors in labeling the syringes, errors in selecting the syringes during the execution,
14 errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect
15 insertion of the catheter, migration of the catheter, perforation, rupture, or leakage
16 of the vein, excessive pressure on the syringe plunger, errors in securing the catheter,
17 and failure to properly flush the IV line between drugs, id. at 9-13.

18 15. The 2004 Protocol further falls below the standard of care for
19 administering anesthesia because it prevents any type of effective monitoring of the
20 inmate's condition or whether he is anesthetized or unconscious. See id. at 14-15. In
21 Nevada, during the injection of the three drugs, the executioner is in a room separate
22 from the inmate and has no visual surveillance of the inmate.

1 16. Accepted medical practice dictates that trained personnel monitor the
2 lines and the flow of anesthesia into the veins through visual and tactile observation
3 and examination. The lack of any qualified personnel present in the chamber during
4 the execution thwarts the execution personnel from taking the standard and
5 necessary measures to reasonably ensure that the sodium thiopental is properly
6 flowing in to the inmate and that he is properly anesthetized prior to the
7 administration of the pancuronium and potassium. See id. at 14-15. The American
8 Society of Anesthesiologists requires that “[q]ualified anesthesia personnel . . . be
9 present in the room throughout the conduct of all general anesthetics” due to the
10 “rapid changes in patient status during anesthesia.” Id.

11 17. The 2004 Protocol fails to account for the foreseeable circumstance that
12 the executioner(s) will be unable to obtain intravenous access by a needle piercing
13 the skin and entering a superficial vein suitable for the reliable delivery of drugs. See
14 id. at 18. Inability to access a suitable vein is often associated with past intravenous
15 drug use by the inmate. Medical conditions such as diabetes or obesity, individual
16 characteristics such as heavily pigmented skin or muscularity, and the nervousness
17 caused by impending death can impede peripheral IV access. See Deborah W. Denno,
18 When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of
19 Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63,
20 109-10 (2002) [hereinafter “Denno I”]. Typically, when the executioner is unable to
21 find a suitable vein, the executioner resorts to a “cut down,” a surgical procedure used
22 to gain access to a functioning vein. When performed by a non-physician, the risks
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1 are great. When deep incisions are made there is a risk of rupturing large blood
2 vessels causing a hemorrhage, and if the procedure is performed on the neck, there is
3 a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and
4 pneumothorax (which induces the sensation of suffocation). In addition, a cut-down
5 causes severe physical pain and obvious emotional stress. This procedure should take
6 place only in a hospital or other appropriate medical setting and should be performed
7 only by a qualified physician with specialized training in that area. The 2004 protocol
8 recognizes that a “sterile cut-down tray” may be required equipment “if necessary,”
9 see id. at 18, but does not specify who determines when a cut down is necessary, how
10 that determination is made, or the training or qualifications of the personnel who
11 would perform such a cut down.

12 18. If the inmate is not adequately anesthetized by the successful
13 administration of sodium thiopental, he will suffer the pain of the remaining two
14 injections. The choice of “potassium chloride to cause cardiac arrest needlessly
15 increases the risk that a prisoner will experience excruciating pain prior to execution”
16 because the “[i]ntravenous injection of concentrated potassium chloride solution
17 causes excruciating pain.” See id. at 6. The inmate would be consciously aware and
18 feel the pain of the potassium-induced fatal heart attack. Id.

19 19. Pancuronium bromide, the second drug in the lethal injection process,
20 is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of
21 the diaphragm and other respiratory muscles, which causes the inmate to cease
22 breathing. Pancuronium “does not affect sensation, consciousness, cognition, or the
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1 ability to feel pain or suffocation.” See id. at 21. If the inmate is not adequately
2 anesthetized prior to the pancuronium injection, the pancuronium will cause the
3 inmate to consciously experience a “torturous suffocation” lasting “at least several
4 minutes.” Id. at 22.

5 20. Pancuronium is “unnecessary” and “serves no legitimate purpose” in the
6 execution process because both sodium thiopental and potassium chloride, if properly
7 administered in the doses specified in the execution manual, are adequate to cause
8 death. See id. at 22, 24-25. Pancuronium “compounds the risk that an inmate may
9 suffer excruciating pain during his execution” because it masks any physical
10 manifestations of pain that an inadequately anesthetized inmate would feel during
11 pancuronium-induced suffocation and potassium-induced cardiac arrest. Id. at 22-23.
12 “[U]sing barbiturates [such as sodium thiopental] and paralytics [such as
13 pancuronium] to execute human beings poses a serious risk of cruel, protracted
14 death” because “[e]ven a slight error in dosage or administration can leave a prisoner
15 conscious but paralyzed while dying, a sentient witness of his or her own slow,
16 lingering asphyxiation.” Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984)
17 (citing Royal Commission on Capital Punishment 1949-1953 Report (1953)), rev’d on
18 other grounds, 470 U.S. 84 (1985). By paralyzing the inmate and preventing physical
19 manifestations of pain, pancuronium places a “chemical veil” on the lethal injection
20 process that precludes observers from knowing whether the prisoner is experiencing
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1 great pain. See Ex. 271 at 23-24; Adam Liptak, Critics Say Execution Drug May Hide
2 Suffering, N.Y. Times, Oct. 7, 2003, at A18.⁴⁵

3 21. The 2004 Protocol falls below the standard of care for euthanizing
4 animals. The American Veterinary Medical Association (AVMA) allows euthanasia
5 by potassium chloride, but mandates that animals be under a surgical plane of
6 anesthesia prior to the administration of potassium. See Ex. 74 at 35-63 (Attachment
7 B (American Veterinary Medical Association, 2000 Report of the American
8 Veterinary Medical Association Panel on Euthanasia 680-81 (2001))). “It is of utmost
9 importance that personnel performing this technique are trained and knowledgeable
10 in anesthetic techniques, and are competent in assessing anesthetic depth
11 appropriate for administration of potassium chloride intravenously.” Id. at 681. “A
12 combination of pentobarbital [a barbiturate similar to, but longer acting than, sodium
13 thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia
14 agent.” Id. at 680. Nevada is one of at least 30 states that prohibit the use of
15 neuromuscular blocking agents in euthanizing animals, either expressly or by
16 mandating the use of a specific euthanasia agent such as pentobarbital. See Ala. Code
17 § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. &
18 Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code
19 Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat.
20 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat.
21 Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, §

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23 ⁴⁵ Available at <http://tinyurl.com/zljta3f>.

1 151A; Mich. Comp. Laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. §
2 54-2503; NRS. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law
3 § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. §
4 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. §
5 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8;
6 Wyo. Stat. Ann. § 33-30-216. Nevada's lethal injection statute would violate state law
7 if applied to a dog. The consistent trend in professional norms and statutory
8 regulation of animal euthanasia, places the method currently practiced by Nevada
9 outside the bounds of evolving standards of decency.

10 22. The 2004 Protocol is similar to the lethal injection protocol employed in
11 California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D.
12 Cal. 2006), aff'd, 438 F.3d 926 (9th Cir. 2006). See Ex. 271 at 3. The use of sodium
13 thiopental, pancuronium bromide, and potassium chloride without the protections
14 imposed in Morales to ensure adequate administration of anesthesia poses an
15 unreasonable risk of inflicting unnecessary suffering.

16 23. The United States Supreme Court has held that lethal injection
17 protocols which present a substantial risk of serious harm are forbidden by the Eighth
18 Amendment's prohibition on cruel and unusual punishments. Baze v. Rees, 553 U.S.
19 35, 49-50 (2008). Where a state's lethal injection protocols fail to sufficiently sedate
20 an individual prior to execution, the state has engaged in the deliberate infliction of
21 "pain for the sake of pain." Id.; see also Wilkerson v. Utah, 99 U.S. 130, 136 (1879).
22 While Baze upheld the validity of the Kentucky lethal injection protocol, it did so
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1 because of the protections provided by that protocol which ensure that the inmate has
2 been completely anaesthetized before subsequent drugs are injected. Baze, 553 U.S.
3 at 55. The 2004 Protocol does not contain any of those safeguards, and the Nevada
4 protocol thus cannot be upheld under Baze. Here, this Court must prevent the
5 infliction of unnecessary suffering in Thomas's execution by vacating his sentence.

6 24. Aside from the numerous deficiencies in 2004 Protocol, the State of
7 Nevada is also unable to conduct a constitutionally valid execution because of gross
8 deficiencies in the facility in which executions are required to be conducted. By legal
9 and practical necessity, executions in Nevada must occur, if at all, at the execution
10 chamber at the 150-year-old Nevada State Prison (NSP) in Carson City, see NRS
11 176.355(3), a facility that was decommissioned in May 2012. Even at that time, this
12 ancient facility was plagued by a host of various code violations, plumbing problems,
13 and non-working utilities. See, e.g., Ed Vogel, Nevada State Prison Starts Shutting
14 Down, Las Vegas Rev.J., Sept. 3, 2011; Geoff Dornan, The End of an Era: Last
15 Inmates Leave Nevada State Prison, Nev. Appeal, Jan. 10, 2012. Regarding the
16 execution chamber specifically, state officials repeatedly have suggested that the
17 execution chamber at NSP "is unusable and the state could not carry out a death
18 penalty" there. See Cy Ryan, State Official: Nevada Execution Chamber Unusable,
19 Las Vegas Sun, Mar. 8, 2011; see also, e.g., Sean Whaley, Death Chamber Plan
20 Questioned, Las Vegas Rev.-J., Mar. 20, 2013 (acknowledgment by prison director
21 that death chamber could be subject to legal challenge based on condition of facility
22 and non-compliance with the Americans with Disabilities Act). It is highly
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1 improbable that any of the myriad problems associated with the facility generally,
2 and the chamber specifically, will ever be adequately addressed.

3 25. For its part, the Nevada Attorney General has suggested, but does not
4 admit, that the execution chamber at NSP may not be available to conduct executions.
5 Ex. 273 at 21 (“[T]he location of the execution could change before [The defendant’s]
6 execution is scheduled.”).

7 26. Such concerns go beyond any specific lethal injection protocol and
8 demonstrate that the State of Nevada cannot carry out a death sentence at all against
9 Thomas, regardless of the content of any revised protocols in the state’s possession to
10 which Thomas has no access.

11 27. Thomas acknowledges, as he must, the Nevada Supreme Court’s
12 decision in McConnell v. State, 125 Nev. 243, 248-49, 212 P.3d 307, 311 (2009), which
13 held that a challenge to the lethal injection protocol is not cognizable in an action
14 pursuant to NRS Chapter 34. However, Thomas respectfully urges that the
15 McConnell court reached the wrong decision, and notes the issue here to preserve it
16 for appeal.

17 28. Thomas’s averments demonstrate that Nevada’s methods and protocols
18 in conducting lethal injections violates the Eighth and Fourteenth Amendments.
19 Similarly, the DOC’s policy of withholding its manual and materials regarding the
20 implementation of the death penalty violate Thomas’s federal constitutional rights as
21 defined. For the reasons described above, Thomas is entitled to relief from his death
22 sentences.

1 **B. Nevada’s Death Penalty Scheme Does Not Narrow the Class of Persons**
2 **Eligible for the Death Penalty**

3 29. Under contemporary standards of decency, death is not an appropriate
4 punishment for a substantial portion of convicted first-degree murderers. Woodson v.
5 North Carolina, 428 U.S. 280, 296 (1976). A capital sentencing scheme must
6 genuinely narrow the class of persons eligible for the death penalty. Arave v. Creech,
7 507 U.S. 463, 474 (1993); Zant v. Stephens, 462 U.S. 862, 877 (1983); McConnell v.
8 State, 120 Nev. 1043, 1063, 102 P.3d 606, 620-21 (Nev. 2004).

9 30. Despite the Supreme Court’s requirement for restrictive use of the death
10 sentence, Nevada law permits broad imposition of the death penalty for virtually and
11 all first-degree murderers. As a result, in 2001, Nevada had the second most persons
12 on death row per capita in the nation. James S. Liebman, A Broken System: Error
13 Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice
14 Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population
15 Estimates: April 2000 to July 2001.⁴⁶

16 31. Because Nevada’s death penalty scheme does not narrow the class of
17 persons eligible for the death penalty, his sentence of death must be reversed.

18 **C. The Death Penalty Is Cruel and Unusual Punishment**

19 32. Under the federal constitution, the death penalty is cruel and unusual
20 in all circumstances. See Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J.,
21 dissenting); id. at 231 (Marshall, J., dissenting); Kennedy v. Louisiana, 554 U.S. 407,
22 441 (2008) (“[C]apital punishment is excessive when it is grossly out of proportion to

23 ⁴⁶ <http://eire.census.gov/pspest/date/states/tables/ST-eest2002-01.php>

1 the crime or it does not fulfill the two distinct social purposes served by the death
2 penalty: retribution and deterrence of capital crimes.”); see also Glossip v. Gross, 135
3 S. Ct. 2726, 2755-80 (2015) (Breyer, J., dissenting). They are bedrock principles of the
4 Constitution’s promise to not permit the infliction of cruel and unusual punishment
5 by the State.

6 33. The death penalty is also invalid under the Nevada Constitution, which
7 prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6.
8 See Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death
9 penalty may not have been considered "cruel" at the time of the adoption of the
10 constitution in 1864, "the evolving standards of decency that make the progress of a
11 maturing society, Trop v. Dulles, 356 U.S. 86, 101 (1958), have led in the recognition
12 even by the staunchest advocates of its permissibility in the abstract, that killing as
13 a means of punishment is always cruel. See Furman v. Georgia, 408 U.S. 238, 312
14 (White, J., concurring); Walton v. Arizona, 497 U.S. 639, 669-70 (1990) (Scalia, J.,
15 concurring). Accordingly, under the disjunctive language of the Nevada Constitution,
16 the death penalty cannot be upheld.

17 **D. Executive Clemency Unavailable**

18 34. Thomas’s death sentences are invalid because Nevada has no real
19 mechanism to provide for clemency in capital cases. Nevada law provides that
20 prisoners sentenced to death may apply for clemency to the State Board of Pardons
21 Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a
22 state’s decision to deprive an individual of life, as indicated by the fact that ever of
23 the thirty-eight states that has the death penalty also has clemency procedures. Ohio

1 Adult parole Authority v. Woodward, 523 U.S. 272, 282 n.4 (1998) (Stevens, J.,
2 concurring in part, dissenting in part). Having established clemency as a safeguard,
3 these states must also ensure that their clemency proceedings comport with due
4 process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS
5 213.005-213.100, do not ensure that death penalty inmates receive procedural due
6 process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As a practical matter,
7 Nevada does not grant clemency to death penalty inmates.

8 The failure to have a functioning clemency procedure makes Nevada's death penalty
9 scheme unconstitutional, requiring the vacation of Thomas's sentence.

10 35. Insofar as trial or appellate counsel failed to object or raise this claim in
11 prior proceedings, they were ineffective.

1 **CLAIM TWENTY-FOUR: VIOLATION OF INTERNATIONAL LAW**

2 Thomas's convictions and death sentences are invalid under the federal
3 constitutional guarantees of the right to due process, confrontation, effective counsel,
4 equal protection, trial before an impartial jury, freedom from cruel and unusual
5 punishment, and a reliable sentence because the proceedings against Thomas violate
6 international law. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6,
7 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Both the Universal Declaration of Human Rights and the International
10 Covenant on Civil and Political Rights recognize the right to life. Universal
11 Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948)
12 ("UDHR"); International Covenant on Civil and Political Rights, adopted December
13 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) ("ICCPR"). The
14 ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art.
15 6.

16 2. The United States Government and the State of Nevada are required to
17 abide by norms of international law. The Paquet Habana, 20 S. Ct. 290 (1900)
18 ("international law is part of our law and must be ascertained and administered by
19 the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the
20 United States Constitution specifically requires the State of Nevada to honor the
21 United States' treaty obligations. U.S. Const. Art. VI.

22 3. Nevada is bound by the ICCPR because the United States has signed
23 and ratified the treaty. Further, under Article 4 of the ICCPR, no country is permitted
to derogate from Article 6. Nevada is bound by the UDHR because the document is a

1 fundamental part of Customary International Law. Nevada has an obligation not to
2 take life arbitrarily.

3 4. Insofar as trial or appellate counsel failed to object or raise this claim in
4 prior proceedings, they were ineffective.

1 **CLAIM TWENTY-FIVE: PRIOR CRIME AGGRAVATING CIRCUMSTANCE**

2 Thomas's convictions and death sentences are invalid under the federal
3 constitutional guarantees of the right to due process, effective counsel, equal
4 protection, trial before an impartial jury, freedom from cruel and unusual
5 punishment, and a reliable sentence because the State improperly relied on the prior
6 violent felony aggravating circumstance. U.S. Const. amends. V, VI, VIII, & XIV; Nev.
7 Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. One of the aggravating circumstances in this case is that "[t]he murder
10 was committed by a person who was previously convicted of a felony involving the
11 use or threat of violence to the person of another, to-wit: Attempt Robbery, Case No.
12 C96794, Eighth Judicial District Court of the State of Nevada in and for the County
13 of Clark." Ex. 127. The jury found and weighed this aggravating circumstance in
imposing death. Ex. 141. This was unconstitutional.

14 2. Under NRS 200.033(2)(b), first-degree murder is aggravated if the
15 person who committed the murder "is or has been convicted of . . . a felony involving
16 the use or threat of violence to the person of another" The Nevada Supreme Court
17 has held that to prove that this prior felony used or threatened violence, it may only
18 "look to the statutory definition, charging document, written plea agreement,
19 transcript of the plea canvass, and any explicit factual finding by the district court to
20 which [the defendant] assented" Redeker v. Eighth Judicial Dist. Court ex rel.
State, 122 Nev 164, 172, 127 P.3d 520, 526 (Nev. 2006).

21 3. The statutory definition of an attempted offense does not, by itself, show
22 that it is a crime that uses or threatens violence. See NRS 193.330; Burnside v. State,
23 --- Nev. ---, 352 P.3d 627, 645 (Nev. 2015) ("to determine whether a particular attempt

1 offense satisfies NRS 200.033(2)(b), we must look at the overt act and determine
2 whether the State sufficiently proved that the overt act involved the use or threat of
3 violence.”).

4 4. Here, there is insufficient evidence that the “overt act” in Thomas’s
5 attempt robbery to establish that Thomas’s prior conviction involved the use or threat
6 of violence. The State did not provide the charging document, the written plea
7 agreement, the transcript of the plea canvass, or any other source that could
8 constitute an “explicit factual finding by the district court to which [Thomas]
9 assented.” Redeker, 122 Nev. at 172-73, 127 P.3d at 526.⁴⁷ Thus, this aggravating
circumstance is invalid. Moreover, the relevant documents do not show that Thomas
committed an overt act involving the use or threat of violence.

10 5. The use of this aggravating circumstance violated Thomas’s
11 constitutional rights in four ways. First, the use of an improper aggravating
12 circumstance violates Thomas’s right to be free from cruel and unusual punishment.
13 See Tuilaepa v. California, 512 U.S. 967, 972 (1994). Second, Thomas has a state-
14 created, constitutionally protected liberty interest in the fair administration of state
15 procedures governing his trial, see Hewitt v. Helms, 459 U.S. 460, 466 (1983); the
16 failure to properly apply state law in applying this aggravating circumstance violated
17 this liberty interest. Third, allowing this aggravating circumstance to apply to
18 Thomas, where it would not apply to others, violates Thomas’s rights under the equal
19 protection clause. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).
20 Fourth, the use of an improper aggravating circumstance violates Thomas’s right to
21 a reliable sentence under both the Due Process Clause and the Eighth Amendment.
See Beck v. Alabama, 447 U.S. 625, 638 (1980) (Due Process and Eighth Amendment

22 ⁴⁷ The State did provide the Pre-Sentence Report. The record does not indicate,
23 however, that the district court made any explicit factual findings based on it, nor
that Thomas assented to the report or any findings made based on it.

1 require “reliability as to the guilt determination”); Stringer v. Black, 503 U.S. 222,
2 228, 235-36 (1992).

3 6. In a weighing state, like Nevada, it is constitutional error to give weight
4 to an improper aggravating circumstance, even if other aggravating circumstances
5 remain. See McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995). However,
6 because a pre-requisite to death-eligibility is a finding that there are no mitigating
7 circumstances sufficient to outweigh the aggravating circumstances, only a jury may
8 determine if Thomas is still eligible for the death penalty. See Hurst v. Florida, 136
9 S. Ct. 616, 622 (2016).

10 7. Insofar as trial or appellate counsel failed to object or raise this claim in
11 prior proceedings, they were ineffective.
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1 **CLAIM TWENTY-SIX: JUROR MISCONDUCT AND BIAS AT THE PENALTY**
2 **RETRIAL**

3 Thomas's death sentences are invalid under the federal constitutional
4 guarantees of due process, a fair trial, an impartial jury, a reliable sentence, effective
5 assistance of counsel, and freedom from cruel and unusual punishment because
6 several jurors on Thomas's penalty retrial panel were biased and engaged in juror
7 misconduct. U.S. Const. amends. VI, VIII and XIV; Nev. Const. art. 1, §§ 1, 6, 8, and
8 art. 4 § 21.

9 **SUPPORTING FACTS**

10 **A. Seated Jurors Refused to Consider and Give Effect to Thomas's Presented Mitigation**

11 1. The Supreme Court has long settled any debate over a capital
12 defendant's right to present mitigation evidence, types of mitigation evidence
13 permitted, and a juror's duty when hearing mitigation evidence. Lockett v. Ohio, 438
14 U.S. 586, 604-05 (1978); Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Tennard
15 v. Dretke, 542 U.S. 274, 287 (2004). As a matter of law, a juror cannot refuse to
16 consider a defendant's mitigating evidence. Eddings, 455 U.S. at 113-15. A juror has
17 discretion as to how much weight he or she gives mitigating evidence, but a juror
18 cannot refuse to consider mitigation evidence altogether and preemptively give it no
19 weight. Id. Furthermore, it is not enough that a juror merely consider a defendant's
20 mitigation. Id. He or she must give effect to mitigation evidence when determining a
21 penalty. Tennard, 542 U.S. at 248; Boyde v. California, 494 U.S. 370, 377-378. Any
22 deviation from these duties violates a defendant's Sixth, Eighth, and Fourteenth
23 Amendment rights. Lockett, 438 U.S. at 604-05.

2. Seated juror Don McIntosh disclosed during voir dire, upon questioning
by defense counsel, that he felt the upbringing of an individual has nothing to do with

1 his or her adult life. 10/31/05 TT at 103. He stated that he would consider only how
2 Thomas spent his time in prison prior to the retrial. 10/31/05 TT at 103. Juror
3 McIntosh stated in his declaration that he was surprised that he was picked as a juror
4 because he admitted to trial counsel that he was not willing to accept any information
5 about Thomas's childhood as mitigating evidence. See Ex. 187 at ¶4 (Declaration of
6 Juror McIntosh). Years after the second penalty hearing, juror McIntosh confirmed
7 "[n]one of that information mattered to me and I didn't consider it in my deliberations
8 . . . I was only concerned about the defendant's criminal record and behavior while
9 incarcerated." Id. at ¶10.

10 3. Juror Janet Cunningham was also unqualified to sit on Thomas's jury.
11 Juror Cunningham acknowledged in her juror questionnaire that she would not
12 consider the defendant's mitigation evidence at all. Ex. 88 at 9 (Questionnaire of
13 Juror Cunningham). Juror Cunningham stated in her declaration that any evidence
14 regarding Thomas's upbringing had no effect on her and she did not consider it in her
15 decision. See Ex. 165 at ¶ 3 (Declaration of Juror Cunningham).

16 4. Jurors McIntosh and Cunningham were unqualified to sit on Thomas's
17 jury panel. They both refused to consider and give effect to Thomas's presented
18 mitigation evidence. Their refusals constituted juror bias that violated Thomas's
19 rights to a fair trial, impartial jury, and a reliable sentence. These violations were
20 structural error and prejudicial per se.

21 **B. Thomas Suffered Ineffective Assistance of Counsel When Trial Counsel
22 Failed to Challenge Biased Jurors for Cause and Adequately Question
23 Jurors During Voir Dire**

5. Thomas suffered ineffective assistance of counsel at the penalty retrial.
Trial counsel failed to timely challenge juror McIntosh for cause when he disclosed
that he would not consider any of Thomas's mitigation evidence except for his prison
record. 10/31/05 TT at 103. A court must grant a challenge for cause when a juror's
views would "prevent or substantially impair the performance of his duties as a juror

1 in accordance with his instructions and his oath.” Wainwright v. Witt, 469 U.S. 412
2 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980). Juror McIntosh stated to
3 defense counsel his beliefs that a person’s upbringing does not shape who they are
4 and therefore he would not consider those things as mitigation evidence. 10/31/05 TT
5 at 103. Juror McIntosh held a strong view that regardless of the struggles anyone
6 has been through, a person’s prior experiences have no bearing on their actions.
7 10/31/05 TT at 103-04. He further stated to defense counsel that the only evidence
8 he would consider is how Thomas spent his time in prison. 10/31/05 TT at 103. The
9 consequence of this bias was a predetermined decision not to consider any of the
10 defense’s mitigating evidence of Thomas’s poor upbringing or childhood abuse. On the
11 other hand, the prosecution presented evidence of Thomas’s bad behavior during
12 incarceration—a type of evidence the defense knew the State would present. See Ex.
13 213. By McIntosh’s own admission, defense counsel knew he would be biased in favor
14 of the State’s evidence in aggravation and against Thomas’s evidence in mitigation.
15 Indeed McIntosh later expressed surprise that he was chosen as a juror after he told
16 the court he would not give effect to any mitigation evidence. Ex. 187 at ¶4.

17 6. Juror McIntosh’s bias ensured that he could vote only for death. Trial
18 counsel’s failure to exercise a challenge for cause against juror McIntosh amounted
19 to deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Had
20 counsel moved to exclude McIntosh, he would not have been seated. There is a
21 reasonable probability that a non-biased juror would have been seated and Thomas
22 would not have been sentenced to death. Trial counsel’s decision to consent to a juror
23 who would refuse to consider or give effect to the bulk of Thomas’s mitigation was
deficient under the Sixth Amendment and prejudiced Thomas’s right to an unbiased
jury.

 7. Thomas further suffered ineffective assistance of counsel at the penalty
retrial when trial counsel inadequately questioned juror Cunningham during voir

1 dire. Juror Cunningham clearly marked on her questionnaire that she would not
2 consider mitigation evidence at all, a position she has recently confirmed in a sworn
3 declaration. Ex. 88 at 9; See Ex. 165 at ¶3. During voir dire, trial counsel did not ask
4 her any questions regarding her beliefs about mitigation evidence as expressed in her
5 questionnaire. 10/31/05 TT at 61-62. Juror Cunningham stated in her declaration
6 that, had she been asked about those views, she would have confirmed them to the
7 judge and attorneys. See Ex. 165 at ¶3. Effective trial counsel would then have
8 challenged her for cause. Ultimately, trial counsel's failure to question juror
9 Cunningham led to another biased juror being seated. This failure amounts to
10 deficient performance. There is a reasonable probability that Thomas would not have
11 been sentenced to death had trial counsel properly questioned juror Cunningham
12 during voir dire.

13 8. Thomas also suffered ineffective assistance of counsel at the penalty
14 retrial when, during voir dire, trial counsel failed to determine whether several jurors
15 other than McIntosh and Cunningham would be able to consider and give effect to
16 Thomas's mitigation.

17 9. During voir dire, juror Philip Adona admitted to trial counsel that he
18 "might consider" Thomas's background and upbringing as mitigation evidence.
19 10/31/05 TT at 91-92. After this admission, trial counsel did not attempt to challenge
20 juror Adona for cause, nor did they attempt to clarify that the juror's constitutional
21 duty is not that he "might consider" mitigation evidence but that he must "consider
22 and give effect to" mitigation evidence. Trial counsel's failure to exercise either of
23 these remedies resulted in an ineligible juror being seated on Thomas's jury and a
violation of Thomas's right to an impartial jury that would abide by the mitigation
standards set forth in Lockett and Eddings.

10. Juror Janet Jones was asked during voir dire what evidence she would
consider in support of a life sentence over the death penalty. 10/31/05 TT at 92. Juror

1 Jones stated that a person's background or upbringing is not an excuse for
2 committing crimes but that she would consider things such as Thomas's state of mind,
3 exactly what happened in the crime, and whether or not it was an intentional crime.
4 10/31/05 TT at 92-93. She did not state that she would consider and give effect to
5 Thomas's presented mitigation. Jones was seated as a juror at Thomas's penalty
6 retrial. 10/31/05 TT at 187; Ex. 219.

7 11. Juror Christina Shaverdian disclosed in voir dire that, two years earlier,
8 a friend of hers had been killed by a drunk driver. 10/31/05 TT at 139, 179-80. The
9 anniversary of the friend's death was two weeks before the trial. Id. at 179. Juror
10 Shaverdian described her friend's death as a "murder" and stated she had been "too
11 emotional" to attend the perpetrator's trial. Id. at 139, 180. Juror Shaverdian twice
12 stated that this experience made her biased in favor of victims' family members. Id.
13 Ultimately, Shaverdian was seated as a juror at Thomas's penalty retrial. 10/31/05
14 TT at 187; Ex. 219. The presence of this biased juror was structural error and
15 prejudicial per se.

16 12. During voir dire, trial counsel failed to question juror Shaverdian, juror
17 Loretta Gillis, and alternate jurors Tamara Chiangi and Herbert Rice Jr., as to
18 whether they could consider and give effect to Thomas's presented mitigation. Again,
19 counsel's failure to properly inquire into these jurors' opinions about mitigation
20 evidence was deficient under Strickland and prejudiced Thomas's rights to an
21 impartial jury, a reliable sentence, and a fair trial. Thomas is entitled to relief.

22 **C. Seated Jurors Decided Thomas's Punishment with the Knowledge That**
23 **Thomas Had Already Been Sentenced to Death By a Prior Jury**

13. Almost half of the seated jurors on Thomas's penalty retrial sat through
the trial and deliberated with the knowledge that a prior jury had already determined
that Thomas should receive a death sentence. Their knowledge of the previous

1 outcome irreparably tainted their decision and rendered Thomas's sentence
2 unconstitutional.

3 14. The Supreme Court has established that "it is constitutionally
4 impermissible to rest a death sentence on a determination made by a sentencer who
5 has been led to believe that the responsibility for determining appropriateness of the
6 defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29
7 (1985). Additionally, a juror's knowledge of a defendant's prior death sentence will
8 work to minimize his or her sense of responsibility when determining the appropriate
9 penalty. In re Carpenter, 889 P.2d 985, 997-98 (Cal. 1995). Thus, a juror with
10 knowledge that a prior jury has already decided that a defendant deserves death
would have his or her impartiality compromised and thus prejudice the defendant's
right to an impartial jury, a reliable sentence, and a fair trial Id.

11 15. Juror Adele Basye stated in her declaration that after jury selection took
12 place, the entire panel was informed that "[t]he defendant had already been
13 sentenced to death in his 1997 trial." See Ex. 87 at ¶ 4 (Declaration of Juror Basye).
14 Juror Basye further stated that she and the other jurors were told that the defendant
was already on death row at the time of the penalty retrial. Id.

15 16. Juror Adona stated in his declaration that the jury was told "[the
16 defendant] had got the death penalty before, he fought it and won, and we were there
17 doing it again." See Ex. 166 at ¶2.

18 17. Juror McIntosh stated in his declaration that prior to the start of trial,
19 "[t]he jurors were informed that the defendant had been convicted of murder and
20 sentenced to death in his previous trial." See Ex. 187 at ¶2.

21 18. Juror Ceasar Elpidio stated in his declaration that he understood the
22 jury's job was to "decide whether or not to affirm the death sentence that the prior
23 jury had given [Thomas]." See Ex. 200 at ¶3 (Declaration of Juror Elpidio). Juror
Elpidio described the jury's task as "auditing the previous jury's findings of guilt. If

1 we validated the finding of guilt, we were required to affirm the death sentence.” Id.
2 at ¶4. Juror Elpidio went on to say that “I don’t feel responsible for Marlo’s death
3 sentence. As far as I’m concerned, that decision had already been made by the
4 previous jury.” Id. ¶5.

5 19. Juror Conné Kaczmarek, who served as jury foreperson, stated in her
6 declaration that “the jury was given very specific instructions prior to the trial. We
7 were informed that the defendant had been sentenced to death in his previous trial.
8 As jurors, it was our job to reaffirm the defendant’s prior death sentence.” Ex. 165 at
9 ¶6 (Declaration of Juror Kaczmarek).

10 20. In Caldwell, the Supreme Court ruled that the jurors’ knowledge that
11 their penalty decision was automatically reviewable minimized their sense of
12 responsibility and rendered their death sentence unreliable. Caldwell, 472 U.S. at
13 341. Here, there is evidence of a similar effect: juror Elpidio has stated that he does
14 not “feel responsible for Marlo’s death sentence” because “that decision had already
15 been made by the previous jury.” See Ex. 200 at ¶3. Likewise, jury foreperson
16 Kaczmarek recalls that the jury’s role was to “reaffirm” the prior death sentence. See
17 Ex. 165 at ¶6. To recount her role as a juror, Kaczmarek stated, “[w]e knew the
18 defendant had already been found guilty. We were there to decide if the defendant
19 had been properly sentenced in his previous trial,” and “it was not our job as jurors
20 to decide if the defendant should be put to death.” Id. at ¶12.

21 21. The trial transcript does not reflect when or how the jurors found out
22 about Thomas’s prior death sentence. Regardless, almost half of Thomas’s jury panel
23 heard evidence and deliberated knowing from out-of-court sources that Thomas had
already been sentenced to death by another jury. Additionally, even the foreman,
whose job was to guide the other jurors, proceeded on the erroneous understanding
that the jury was just there to “reaffirm” the prior sentence of death. The effect of this
knowledge is best stated by juror Elpidio: “I don’t feel responsible for Marlo’s death

1 sentence. As far as I am concerned, that decision had already been made by the
2 previous jury.” See Ex. 200 at ¶5. Elpidio’s statement exposes the jury’s decision as
3 an unconstitutionally unreliable sentence under Caldwell. This pervasive
4 misunderstanding among jurors of their constitutional responsibility as members of
5 a capital sentencing panel was structural error and prejudiced Thomas’s rights to a
6 fair and impartial jury, to a fair trial, and a reliable sentence. See e.g., Fullwood v.
Lee, 290 F.3d 663, 682-83 (4th Cir. 2002).⁴⁸

7 **D. Juror Cunningham Introduced Extraneous Prejudicial Information and**
8 **Improperly Influenced Other Jurors**

9 22. When questioning the validity of a verdict, this Court is permitted to
10 consider statements made during deliberations if an “extraneous influence” or
11 prejudicial information from outside the trial has affected the jury. Tanner v. United
12 States, 483 U.S. 107, 117 (1987); Warger v. Shauers, 135 S. Ct. 521, 527 (2014); see
13 also Fed. R. Evid. 606(b)(2). A jury may only consider evidence that has been
14 presented at trial. United States v. Navarro-Garcia, 926 F.2d 818, 820 (9th Cir. 1991).
15 Evidence not presented at trial, but still considered by the jury, is deemed extrinsic.
16 Id. If a reasonable possibility exists that even one juror’s reasoning was affected by
17 extrinsic evidence, the defendant is entitled to a new trial. United States v. Vasquez,
18 597 F.2d 192, 193 (9th Cir. 1979).

19 23. Juror Cunningham stated in her declaration that during deliberations
20 she gave the jury her understanding of how the parole system really works. See Ex.
21 165 at ¶6. She told them that, because she had a son who had been to prison, she
22 knew that defendants are released before they serve their entire sentence. Id. Juror
23 Cunningham further informed the other jurors that a punishment of life without

⁴⁸ Trial counsel were ineffective in failing to discover and present to the court evidence that jurors knew of the prior death sentence. Alternatively, if counsel failed to object to the jurors being told about the prior death sentence, counsel were ineffective.

1 parole is misleading and did not really mean Thomas would never get out of prison.
2 Id. Juror Cunningham admitted that this extraneous (and erroneous) belief about
3 how penalties are actually carried out after sentencing directly influenced her vote to
4 give Thomas the death penalty. “Anything less than that,” she said, “and he had a
5 chance of parole.” Id.

6 24. Juror McIntosh stated in his declaration that many jurors believed that
7 the only way to ensure Thomas would not be released from prison was to sentence
8 him to the death penalty.⁴⁹ See Ex. 187 at ¶13.

9 25. Juror Cunningham introduced extraneous prejudicial information that
10 improperly influenced other jurors and constituted an impermissible basis for her
11 own decision. The intricacies of the parole process in Nevada were never discussed
12 during the penalty retrial; therefore, the jury could not consider parole as a factor in
13 its deliberations. Navarro-Garcia, 926 F.2d at 820. Juror Cunningham relied on her
14 own interpretation of parole in Nevada as a fact on which to reject the punishment of
15 life without parole. Her representation that she had experience with the prison
16 system through her son and her statements about it improperly influenced other
17 jurors, leading them to believe that only the death penalty would ensure Thomas’s
18 incarceration for life. By juror Cunningham’s own admission, her prior “knowledge”
19 about parole affected and influenced her decision to impose the death penalty. See
20 Ex. 165 at ¶6. This extraneous, prejudicial misunderstanding about sentencing laws
21 in Nevada pervaded the jury as an improper influence and violated Thomas’s rights
22 to an impartial jury, to a fair trial, and to a reliable sentence.
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⁴⁹ Additionally, juror McIntosh stated that the jury submitted a question to the judge during deliberations. See Ex. 187 at ¶ 12. The jury asked “if the defendant was sentenced to death, how long would it take before he was executed?” Id. The trial court appeared to reference this question when it told the jury, “[N]obody can really answer your questions. There is no answer to them other than you are to assume that the death penalty will be imposed.” 11/4/05 5:12 pm TT at 6.

1 **E. Juror Cunningham was Dishonest on Her Juror Questionnaire**

2 26. When juror Cunningham was asked if she had any family members or
3 close friends who had ever been a victim of crime she listed only her husband. Ex. 88
4 at 6. However, this statement was false. Juror Cunningham failed to disclose that
5 her adopted brother had been a victim of child abuse and that she was intimately
6 acquainted with children from abusive and disadvantaged backgrounds because her
7 parents had run a foster home for many years. See Ex. 165 at ¶3. Defense counsel
8 was denied the opportunity to question juror Cunningham regarding her experiences
9 due to her omission, directly violating Thomas's rights to an impartial jury, a fair
10 trial, and a reliable sentence.

11 **F. Juror Cunningham Refused to Consider All Four Penalties for Which**
12 **Thomas Was Eligible**

13 27. The Witt standard allows a challenge for cause if a prospective juror's
14 views on capital punishment will prevent or substantially impair the performance of
15 his or her duties in compliance with the juror's oath or instructions from the Court.
16 Witt, 469 U.S. at 424.

17 28. Juror Cunningham stated in her declaration that she "would never
18 consider a sentence of life with the possibility of parole for someone convicted of first
19 degree murder. I said this on my questionnaire and would have said the same thing
20 during voir dire if the judge or attorneys had asked me." See Ex. 188 at ¶ 6.

21 29. Although Juror Cunningham was never properly questioned during voir
22 dire regarding whether or not she would consider all of the available penalties, as a
23 seated juror she took an oath to follow the judge's instructions and chose not to. Juror
Cunningham's refusal to consider all of the penalties that Thomas was eligible for
made her a biased juror. As a result, Thomas's rights to an impartial jury, a fair trial,
and a reliable sentence were violated.

1 30. Thomas suffered ineffective assistance of counsel at the penalty retrial
2 when, during voir dire, trial counsel failed to properly question Juror Cunningham
3 regarding her questionnaire and her inability to perform her duties as a juror.

4 31. Thomas also suffered ineffective assistance of counsel at the penalty
5 retrial when trial counsel failed to challenge for cause prospective jurors who
6 indicated during voir dire that they would not consider all four penalties. Prospective
7 juror Norander indicated during voir dire that in her mind she would only consider
8 two of the four penalties that Thomas was eligible for. 10/31/05 TT at 105. Prospective
9 juror Villanueva indicated during voir dire that she could only choose life without
10 parole or the death penalty as punishments for Thomas. 10/31/05 TT at 109.
11 Prospective juror Martinez stated during voir dire that she could only consider two of
12 the four possible punishments. 10/31/05 TT at 111. Prospective juror Thompson
stated he could only consider life without parole and the death penalty as
punishments for Thomas. 10/31/05 TT at 115-16.

13 32. Trial counsel failed to challenge any of these prospective jurors for
14 cause. Although none of these individuals were seated on Thomas's jury, this failure
15 still resulted in ineffective assistance of counsel. Trial counsel wasted peremptory
16 challenges on jurors who could have been removed through a challenge for cause
17 because their views would prevent and substantially impair them from carrying out
the duties of a juror in compliance with the Court's orders and instructions.

18 **G. Seated Jurors Determined Before Deliberations that They Would Vote for
Death**

19 33. Juror McIntosh stated in his declaration that before he entered the
20 deliberation room he had already made up his mind that he would vote for death. See
21 Ex. 187 at ¶12. Juror McIntosh violated the instructions of the court by making a
22 determination about Thomas's punishment before deliberations and thus violated
23 Thomas's rights to an impartial jury, to a fair trial, and a reliable sentence.

1 34. Juror Adona stated in his declaration that after the State presented its
2 case, no evidence could be presented to make him ever consider voting for a life
3 sentence. See Ex. 166 at ¶ 6. Juror Adona violated the instructions of the court by
4 making a determination about Thomas's punishment before the defense presented
5 mitigation and thus, violated Thomas's rights to an impartial jury, to a fair trial, and
6 to a reliable sentence. Thomas is entitled to relief.
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1 **CLAIM TWENTY-SEVEN: THOMAS IS INELIGIBLE FOR EXECUTION**

2 Thomas's death sentences are invalid under the federal constitutional
3 guarantees of the right to due process, effective counsel, equal protection, trial before
4 an impartial jury, freedom from cruel and unusual punishment, and a reliable
5 sentence because Thomas suffers from borderline intellectual functioning and
6 because of his youth at the time of the offense. U.S. Const. amends. V, VI, VIII, &
7 XIV; Nev. Const. art. 1, §§ 1, 6, 8, and art. 4 § 21.

8 **SUPPORTING FACTS**

9 1. Thomas is ineligible for the death penalty under the Eighth Amendment
10 for three reasons: (1) because he has borderline intellectual functioning; (2) because
11 of his youth; and (3) because of the cumulative effect of his borderline intellectual
12 functioning and his youth.

13 2. Thomas has borderline intellectual functioning. See Ex. 206. All the
14 reasons justifying a categorical exemption for someone suffering from intellectual
15 disability justify finding that someone with borderline intellectual functioning should
16 also be categorically exempt from execution. Those who have borderline intellectual
17 functioning are more likely to falsely confess, have a lesser ability to present
18 meaningful mitigation evidence, or assist counsel. Atkins, 536 U.S at 320-21. And,
19 like intellectual disability, borderline intellectual functioning is a two-edged sword in
20 that it could be used by the State as evidence in favor of the death penalty. Id. at 321.
21 Thomas's borderline intellectual functioning renders him ineligible for execution
22 under the Eighth Amendment.

23 3. Moreover, Thomas's youth at the time of the offense also renders him
ineligible for the death penalty. Thomas was only twenty-three years old at the time
of the offense. Compare Ex. 70 (born Nov. 6, 1972) with Ex. 5 (offense occurred on

1 April 15, 1996). His youth, like juveniles, ensures that he cannot reliably “be
2 classified among the worst offenders.” Roper, 543 U.S. at 569. Lesser culpability
3 follows from his youth. Thus, because of his youth, Thomas is ineligible for execution
4 under the Eighth Amendment. See Ex. 183 ¶¶84-95.

5 4. Even if individually his borderline intellectual functioning or his youth
6 do not merit relief, the cumulative effect of both renders him ineligible for the death
7 penalty. The combination of his borderline intellectual functioning and his young age
8 at the time of offense present the same concerns present in both Atkins and Roper:
9 namely that he cannot reliably be classified as the worst of the worst and that his
10 status as young and borderline intellectual functioning mean he has lesser culpability
11 than others. Thus, Thomas is also ineligible for execution under the Eighth
12 Amendment because both he is borderline intellectual functioning and because he
13 was young at the time of the offense.

14 5. These three reasons support Thomas’s ineligibility for the death penalty
15 because the Eighth Amendment requires a reliable and individualized decision.
16 Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart,
17 Powell, Stevens, JJ.) (“[A]n individualized decision is essential in capital cases.”).
18 This individualized decision precludes the introduction of factors that create “the risk
19 that the death penalty will be imposed in spite of factors which may call for a less
20 severe penalty.” Id. Statements that the sentencer must be able to consider all
21 mitigation are legion. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (“By
22 holding that the sentencer in capital cases must be permitted to consider any relevant
23 mitigating factor, the rule in Lockett recognizes that a consistency produced by
ignoring individual differences is a false consistency.”); Skipper v. South Carolina,
476 U.S. 1, 4 (1986) (“the sentencer may not refuse to consider or be precluded from
considering ‘any relevant mitigating evidence.’”).

1 6. This line of precedent “makes clear that it is not enough simply to allow
2 the defendant to present mitigating evidence to the sentence. The sentencer must
3 also be able to consider and give effect to that evidence in imposing a sentence.” Penry
4 v. Lynaugh, 492 U.S. 302, 319 (1989) (emphasis added) overruled on other grounds
5 by Atkins v. Virginia, 536 U.S. 304 (2002). Only by ensuring that the sentencer
6 considers and gives effect to the mitigation evidence can a court ensure the Eighth
7 Amendment’s right to a reliable determination of death. Id.

8 7. Thus, for example, in Atkins, the Supreme Court noted that in the
9 context of the intellectually disabled:

10 The risk “that the death penalty will be imposed in spite of
11 factors which may call for a less severe penalty” is
12 enhanced, not only by the possibility of false confessions,
13 but also by the lesser ability of mentally retarded
14 defendants to make a persuasive showing of mitigation in
15 the face of prosecutorial evidence of one or more
16 aggravating factors. Mentally retarded defendants may be
17 less able to give meaningful assistance to their counsel and
18 are typically poor witnesses, and their demeanor may
19 create an unwarranted impression of lack of remorse for
20 their crimes [R]eliance on mental retardation as a
21 mitigating factor can be a two-edged sword that may
22 enhance the likelihood that the aggravating factor of future
23 dangerousness will be found by a jury. Mentally retarded
defendants in the aggregate face a special risk of wrongful
execution.

536 U.S. at 320-21.

17 8. In Roper v. Simmons, 543 U.S. 551, 569 (2005), the Supreme Court
18 continued this line of thought by noting that juveniles “cannot with reliability be
19 classified among the worst offenders.” And in finding that juveniles were ineligible
20 for execution, the Court noted three facts about juveniles that rendered imposition of
21 the death penalty unreliable: (1) juveniles’ lack of maturity resulted in “impetuous
22 and ill-considered actions and decisions,” (2) juveniles’ vulnerability to negative
23 influences and outside pressures, including peer pressure, and (3) juveniles’ character
is not yet fully formed and so transitory. Id. at 569-70. The Court concluded, “These

1 differences render suspect any conclusion that a juvenile falls among the worst
2 offenders.” Id. at 570. Thus for both intellectual disability and juveniles, the Supreme
3 Court has adopted a categorical exemption from the death penalty because both
4 intellectual disability and status as a juvenile prevent the finder of fact from giving
5 full effect to mitigation evidence. See Roper, 543 U.S. at 570; Atkins, 536 U.S. at 320-
21.

6 9. For both the intellectually disabled and juveniles, the Court has also
7 recognized that neither deterrence nor retribution justify imposition of the death
8 penalty. See id. at 571; see also Atkins, 536 U.S. at 319-20. And, for both, the reason
9 deterrence and retribution cannot justify a death sentence is the “lesser culpability”
10 of someone who suffers from intellectual disability or who is a juvenile. Roper, 543
U.S. at 571; Atkins, 536 U.S. at 319-20.

11 10. Insofar as trial or appellate counsel failed to object or raise this claim in
12 prior proceedings, they were ineffective.

1 **CLAIM TWENTY-EIGHT: JUROR MISCONDUCT AND BIAS AT THE GUILT**
2 **PHASE**

3 Thomas's convictions and death sentences are invalid under the federal
4 constitutional guarantees of due process, a fair trial, an impartial jury, a reliable
5 sentence, effective assistance of counsel, and freedom from cruel and unusual
6 punishment because jurors that voted to convict Thomas were biased and engaged in
7 juror misconduct. U.S. Const. amends. VI, VIII and XIV; Nev. Const. art. 1, §§ 1, 6,
8 8, and art. 4 § 21.

9 **SUPPORTING FACTS**

10 **A. Seated Juror Joseph Hannigan Was Biased Against Thomas**

11 **1. Juror Hannigan was dishonest during voir dire**

12 1. During voir dire, juror Hannigan was asked by the trial court, "Have
13 you ever been the victim of a crime?" 6/16/97 TT at I-31. In response, juror Hannigan
14 disclosed that he "had a business in Boston back in 1960 and we were held up." Id.
15 The trial court subsequently asked juror Hannigan, "Have you or anyone closely
16 associated with you ever been arrested for a crime?" 6/16/97 TT at I-32. Juror
17 Hannigan disclosed that he had been arrested for setting up and promoting a lottery.
18 Id. Juror Hannigan failed to disclose that he had also been a victim of a different
19 crime, and that someone he was closely associated with had been arrested for it.

20 2. Juror Hannigan moved to Las Vegas around 1994. See Ex. 238 at ¶1.
21 Prior to that, Juror Hannigan managed a flower shop in Charlestown, Massachusetts.
22 See Ex. 236 at ¶9. The name of the shop was Kerrigan's. See Ex. 238 at ¶12. In an
23 interview with Federal Public Defender investigator Christopher Milan, juror
Hannigan stated that, as manager of Kerrigan's:

. . . I had actually given convicted felons a chance by
allowing them to work for me after they were released from
prison. The majority of them did fairly well and were able

1 to get a fresh start. However, there was one employee who
2 was a convicted murderer, and he made things very
3 difficult for me. The convicted murderer ended up taking
4 advantage of my kindness, which later led to federal
5 charges being brought against him. He was by far the worst
6 convicted felon I let work for me.

7 Ex. 238 at ¶11.

8 3. Milan subsequently discovered that the convicted murderer in question
9 was either Michael Fitzgerald or John Houlihan, the ringleaders of a twelve-man
10 criminal enterprise that dominated Charlestown at that time. See Ex. 236 at 10, 15;
11 Ex. 238 at ¶12. From 1989 through 1993, Fitzgerald and Houlihan utilized Kerrigan's
12 to facilitate an illegal drug ring. See Ex. 236 at ¶9; Ex. 38 at ¶12. The two men were
13 ultimately arrested, charged, and convicted of multiple crimes in federal court. See
14 Ex. 236 at ¶11; Ex. 238 at ¶11.

15 4. In a second interview with Milan, Juror Hannigan admitted that he
16 deliberately failed to disclose on his jury questionnaire and during voir dire that he
17 had been a victim of the Fitzgerald and Houlihan criminal enterprise, and that
18 someone he was closely associated with—either Fitzgerald or Houlihan—had been
19 arrested for the associated crime(s).⁵⁰ Milan stated: "When I asked Mr. Hannigan why
20 he did not provide this information in his jury questionnaire or during voir dire, he
21 told me he was not trying to think about it." Ex. 236 at ¶16.

22 5. Even at this stage in the proceedings, juror Hannigan has attempted to
23 conceal the details of the Kerrigan's matter and the depth of its impact on him and
his family. When he first met with Milan, juror Hannigan disclosed only the following:

...[H]e once managed a business in Massachusetts prior to
the 1997 trial. While managing this business, he allowed

⁵⁰ Thomas has been unable to review Hannigan's jury questionnaire. The jury questionnaires from the 1997 trial are not in the record on appeal, not located in the files of prior counsel, not located in the evidence vault, and unavailable from the Jury Commissioner's Office. Thomas will be filing a Motion for Leave to Conduct Discovery to attempt to obtain the questionnaires from the Clark County District Attorney's Office.

1 convicted felons to work for him in order to get a fresh start.
2 The majority of the convicted felons did fairly well and
3 moved on to other employment opportunities. However . . .
4 he employed one convicted felon who was extremely
5 detrimental to his business. This particular employee was
6 a convicted murderer. . . . [T]his employee was by far the
7 worst convict to ever work for him. . . . [H]e took advantage
8 of [juror Hannigan's] kindness and was eventually charged
9 with a federal crime.

10 Ex. 236 at ¶7.

11 6. Milan discovered the name of the employee and the nature of the federal
12 crime from court records, and further discovered that juror Hannigan's wife, Frances
13 Hannigan, who was the owner of Kerrigan's, provided information to law enforcement
14 about a murder involving Fitzgerald.

15 However, Mrs. Hannigan did not feel comfortable
16 testifying in court until after she and her husband moved
17 to Las Vegas. Mrs. Hannigan testified in the winter of
18 1994, and the trial ended in the spring of 1995. Mrs.
19 Hannigan's testimony assisted prosecutors in obtaining
20 convictions on the following charges: engaging in a
21 racketeering enterprise, racketeering conspiracy,
22 conspiracy to commit murder in aid of racketeering, and
23 conspiracy to distribute cocaine.

Ex. 236 at ¶11.

7. At the second meeting, Milan pressed juror Hannigan on the subject:

When I asked [juror Hannigan] to confirm that Kerrigan's
was the flower shop he once managed, he lowered his head
and asked why he opened his "big fucking mouth." Mr.
Hannigan told me he had done everything in his power to
try to forget about the incident involving Michael
Fitzgerald and John Houlihan. Mr. Hannigan's business
was practically ruined by its involvement in Fitzgerald and
Houlihan's drug ring. Mr. Hannigan stated he "lost
everything, down to the shirt off my back."

Mr. Hannigan did not want to elaborate on the Kerrigan's
matter. He told me Fitzgerald and Houlihan were
extremely dangerous people. According to Mr. Hannigan,
members of the mafia did not even want to work with
Fitzgerald and Houlihan due to the two men's erratic
behavior. . . .

. . .

1 Mr. Hannigan did not want to elaborate on what exactly
2 took place between Kerrigan's and the drug ring organized
3 by Houlihan and Fitzgerald. Mr. Hannigan did confirm
4 that the convicted murderer that once worked for him was
5 either Houlihan or Fitzgerald, but would not say which.

6 Ex. 236 at ¶¶12-13, 15.

7 8. The reason for juror Hannigan's dishonesty on voir dire is simple: he
8 was afraid of the convicted murderer Houlihan or Fitzgerald. Juror Hannigan has
9 admitted:

10 Fitzgerald and Houlihan were extremely dangerous. My
11 wife and I moved to Las Vegas in order to escape any
12 retaliation after the criminal organization was prosecuted.
13 . . . My wife later testified against the organization, but
14 that was not until we felt safe in our new Las Vegas home.
15 My wife feared my life was potentially in danger. . . .

16 Ex. 238 at ¶12. More than twenty years after moving to Las Vegas, juror Hannigan
17 is still living in fear.

18 9. Juror Hannigan was afraid when Milan attempted to interview him:

19 My first attempt to interview Mr. Hannigan took place
20 during the evening of July 25, 2017. I was able to make
21 contact with Mr. Hannigan and we spoke briefly at the
22 front door of his condominium. I explained my position, the
23 office I work for, and the case to which I had been assigned.
Mr. Hannigan conveyed to me that he was familiar with
the case and remembered serving as a juror.

Mr. Hannigan stated that it was not a good time and he
would be unable to participate in an interview that
evening. I provided Mr. Hannigan with my business card
and asked him to contact me when he became available.
Mr. Hannigan took my card and told me he would call me.

. . .

I returned to Mr. Hannigan's home at approximately 11:00
a.m. on August 22. . . . Mr. Hannigan [] apologized for not
being able to speak with me during my first visit to his
home. He explained to me that with age and everything he
has seen, he has become skeptical about many things. Mr.
Hannigan went on to say that he had to have me checked
out, as in verifying my identity and employment. Mr.
Hannigan told me that he called the front desk of the Office
of the Federal Public Defender, District of Nevada in order

1 to obtain a physical description of Christopher Milan. After
2 obtaining the description, Mr. Hannigan felt comfortable
3 with setting up an interview.

4 Ex. 236 at ¶¶2-3, 6.

5 10. At the second meeting with Milan, juror Hannigan admitted that his
6 fear of the convicted murderer had not dissipated after Houlihan and Fitzgerald's
7 convictions:

8 Mr. Hannigan stated that he received a few phone calls
9 after Houlihan and Fitzgerald were tried and convicted in
10 Federal District Court. The calls involved someone telling
11 Mr. Hannigan that members of Houlihan's and Fitzgerald's
12 old gang wanted to talk to him. Mr. Hannigan told me if
13 they want to come find him in Las Vegas, they are going to
14 have to buy a plane ticket to come all the way out here.

15 ...

16 Mr. Hannigan went on to say that he is going to suffer for
17 providing me with this information. He told me that once
18 his wife finds out, she will be extremely upset with him
19 because they are going to have to worry about the situation
20 all over again.

21 Ex. 236 at ¶¶14, 16.

22 **2. Juror Hannigan Was Biased Against Thomas**

23 11. The Sixth Amendment right to a fair and impartial jury includes the
right to a "jury capable and willing to decide the case solely on the evidence before it,
and a trial judge ever watchful to prevent prejudicial occurrences and to determine
the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217
(1982). "Actual bias is, in essence, "bias in fact"—existence of a state of mind that
leads to an inference that the person will not act with entire impartiality." Estrada
v. Scribner, 512 F.3d 1227, 1240 (9th Cir. 2008) (quoting United States v. Gonzalez,
214 F.3d 1109, 1112 (9th Cir. 2000) (citations omitted)). To show actual bias, a
defendant must demonstrate that a juror "failed to answer honestly a material
question on voir dire, and then further show that a correct response would have

1 provided a valid basis for a challenge for cause.” United States v. Hensley, 238 F.3d
2 1111, 1121 (9th Cir. 2001).

3 12. Juror Hannigan has admitted dishonesty on voir dire. Because of that
4 dishonesty, trial counsel were denied the opportunity to question juror Hannigan
5 regarding his experiences and his ability to act as a fair and impartial juror, directly
6 violating Thomas’s rights to an impartial jury, a fair trial, and a reliable sentence.
7 There can be no question that Thomas was prejudiced by the presence of juror
8 Hannigan on the jury that convicted him. A convicted murderer ruined juror
9 Hannigan’s business, caused him and his wife to flee Massachusetts and relocate to
10 Las Vegas, put his wife through the traumatic experience of testifying in court
11 against members of a criminal enterprise, and left them both in fear for their lives
12 before, during, and for decades after Thomas’s trial. Juror Hannigan’s assertion that
13 this experience, “did not influence my decision [in the Thomas case] in any way” is
14 simply not credible. Ex. 238 at ¶11.

15 13. In the alternative, trial counsel were deficient for failing to investigate,
16 learn of, and present this evidence of juror bias. Had counsel performed effectively,
17 there is a reasonable probability that Thomas would not have been convicted of first
18 degree murder.

19 **B. Seated Juror Sharyn Brown Was Biased Against Thomas**

20 14. During voir dire, the trial court asked juror Brown if she had ever been
21 a victim of crime. 6/16/97 TT at I-84. Juror Brown said she had, and disclosed that
22 she had been the victim of “a number of burglaries, but the major problem was I had
23 a home invasion robbery.” Id. Juror Brown said the home invasion occurred five years
earlier, and she had been home at the time. Id. When the trial court inquired if that
experience was going to affect juror Brown’s deliberation, she responded, “I don’t
think so.” 6/16/97 TT at I-85. Trial counsel McMahon passed juror Brown for cause
without asking her a single question. 6/16/97 TT at I-88.

1 15. Effective trial counsel would have inquired further of juror Brown as to
2 her ability to be fair and impartial in Thomas's case. In a declaration provided to
3 Thomas's current counsel, juror Brown shared the details of the crimes committed
4 against her: "The burglary occurred after someone followed me home and managed
5 to sneak in through the doggy door. The burglar stole many valuable items, including
6 the keys to one of my vehicles. During the robbery, I was held at gunpoint and duct-

7 16. Juror Brown admitted that "being robbed and burglarized were life
8 changing events for me." Ex. 247 at ¶6. Juror Brown stated that, "[a]fter being
9 victimized, I learned that I could easily be targeted. It is because of this that I do not
10 allow myself to do certain things anymore. I do not go home alone at night, and I do
11 not walk around wearing flashy jewelry." Ex. 247 at ¶6. Juror Brown stated she
12 was surprised to be selected as a juror. Ex. 247 at ¶5. She "assumed that once the
13 defense attorneys learned about these prior incidents, they would release me due to
14 potential prejudice." Ex. 247 at ¶5.

15 17. Juror Brown's personal experience as a victim of violent crime was
16 compounded by her feeling that the homicides of which Thomas was accused "hit very
17 close to home for me. I had eaten at this particular Lone Star Steakhouse on multiple
18 occasions." Ex. 247 at ¶2. Juror Brown remembered hearing about the crime at the
19 time it occurred:

20 The news about the crime stuck with me because of the
21 name Marlo Thomas. At first, I was under the impression
22 the late Danny Thomas's daughter, Marlo Thomas, had
23 committed murder. Both Danny and his daughter held
 careers in the film industry. I would later learn it was a
 completely different Marlo Thomas.

Ex. 247 at ¶3. Neither the trial court nor prosecutor asked if juror Brown had
previously heard about the crime or was familiar with the crime scene, and trial
counsel failed to ask a single question of juror Brown.

1 18. If effective trial counsel had asked juror Brown about her experiences as
2 a crime victim, whether she had heard about the crime, and if she was familiar with
3 the crime scene, they would have challenged her for cause, and the trial court would
4 have granted this challenge. A defendant is “entitled to be tried by 12, not 9 or even
5 10, impartial and unprejudiced jurors.” Parker v. Gladden, 385 U.S. 363, 366 (1966).
6 If a biased juror is seated because of error, rather than strategy, Strickland’s
7 prejudice prong has been met and a new trial is warranted. See, e.g., United States
8 v. Martinez-Salazar, 528 U.S. 304, 316-17 (2000); Neder v. United States, 527 U.S. 1,
9 8 (1999) (holding that the presence of a biased decisionmaker is structural error
10 “subject to automatic reversal”).

11 **C. Thomas is Entitled to An Evidentiary Hearing on his Juror Bias Claims**

12 19. The Supreme Court has consistently held “that the remedy for
13 allegations of juror partiality is a hearing in which the defendant has the opportunity
14 to prove actual bias.” Smith, 455 U.S. at 215; see also Remmer v. United States, 347
15 U.S. 227 (230) (1954) (holding that the remedy for allegation of jury bias is a hearing
16 to “determine whether the incident complained of was harmful to the petitioner”).
17 This Court should grant Thomas an evidentiary hearing at which jurors Hannigan
18 and Brown can be called to testify so that he may prove his allegations of bias.
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PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a writ of habeas corpus and vacate Marlo Thomas’s convictions and sentences, and grant him a new trial and sentencing hearing.

DATED this 20th day of October, 2017.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

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

/s/ Randolph M. Fiedler
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VERIFICATION

Under penalty of perjury, the undersigned declare that they are counsel for the petitioner Marlo Thomas named in the foregoing Petition and know the contents thereof; that the pleading is true of their own knowledge except as to those matters stated on information and belief and as to such matters they believe them to be true. Petitioner personally authorized the undersigned counsel to commence this action.

DATED this 20th day of October, 2017.

Respectfully submitted
RENE L. VALLADARES
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Assistant Federal Public Defender

/s/ Randolph M. Fiedler
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1 **CERTIFICATE OF SERVICE**

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

7 Steven S. Owens
8 Chief Deputy District Attorney
9 motions@clarkcountynyda.com
Eileen.davis@clarkcountynyda.com

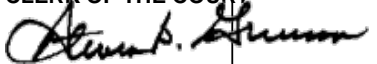
10 In accordance with EDCR 7.26(a)(1), the undersigned hereby certifies that on
11 this October 20, 2017, a true and correct copy of the foregoing EXHIBITS IN
12 SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT was
13 served by United States Mail, postage prepaid, and addressed as follows:

14 Jeffrey M. Conner
15 Assistant Solicitor General
16 Office of the Nevada Attorney General
17 100 North Carson Street
18 Carson City, Nevada 89301

19 Timothy Filson, Warden
20 Ely State Prison
21 P.O. Box 1989
22 Ely, Nevada 89301

23 /s/ Jeremy Kip

An Employee of the
Federal Public Defender,
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22 DISTRICT COURT

23 CLARK COUNTY, NEVADA

* * * * *

24 MARLO THOMAS,

25 Petitioner,

26 v.

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

30 Respondents.

Case No. 96C136862-1

Dept No. XXIII

**EXHIBITS IN SUPPORT OF
PETITION FOR WRIT OF HABEAS
CORPUS**

(EXHIBITS 1-20)

(Death Penalty Habeas Corpus Case)

- 31 1. Judgment of Conviction, State v. Thomas, Case No. C136862, District Court,
32 Clark County (August 27, 1997)

2. Amended Judgment of Conviction, State v. Thomas, Case No. C136862, District Court, Clark County (September 16, 1997)
3. Opening Brief, Thomas v. State, Case No. 31019, In the Supreme Court of the State of Nevada (February 4, 1998)
4. Appellant's Reply Brief, Thomas v. State, Case No. 31019, In the Supreme Court of the State of Nevada (October 7, 1998)
5. Opinion, Thomas v. State, Case No. 31019, In the Supreme Court of the State of Nevada (November 25, 1998)
6. Appellant Marlo Thomas' Petition for Rehearing, Thomas v. State, Case No. 31019, In the Supreme Court of the State of Nevada (December 11, 1998)
7. Order Denying Rehearing, Thomas v. State, Case No. 31019, In the Supreme Court of the State of Nevada (February 4, 1999)
8. Petition for Writ of Certiorari, Thomas v., State, Case No. 98-9250, In the Supreme Court of the United States (May 4, 1999)
9. Opinion, Thomas v., State, Case No. 98-9250, In the Supreme Court of the United States (October 4, 1999)
10. Petition for Writ of Habeas Corpus, Thomas v. State, Case No. C136862, District Court, Clark County (January 6, 2000)
11. Supplemental Petition for Writ of Habeas Corpus (Post Conviction) and Points and Authorities in Support Thereof, Thomas v. State, Case No. C136862, District Court, Clark County (July 16, 2001)
12. Findings of Fact, Conclusions of Law and Order, State v. Thomas, Case No. C136862, District Court, Clark County (September 6, 2002)
13. Opening Brief, Thomas v. State, Case No. 40248, In the Supreme Court of the State of Nevada (April 3, 2003)
14. Reply Brief, Thomas v. State, Case No. 40248, In the Supreme Court of the State of Nevada (September 10, 2003)
15. Opinion, Thomas v. State, Case No. 40248, In the Supreme Court of the State of Nevada (February 10, 2004)

- 1 16. Judgment of Conviction, State v. Thomas, Case No. C136862, District Court,
2 Clark County (November 28, 2005)
- 3 17. Appellant's Opening Brief, Thomas v. State, Case No. 46509, In the Supreme
4 Court of the State of Nevada (June 1, 2006)
- 5 18. Appellant's Reply Brief, Thomas v. State, Case No. 46509, In the Supreme
6 Court of the State of Nevada (October 24, 2006)
- 7 19. Opinion, Thomas v. State, Case No. 46509, In the Supreme Court of the State
8 of Nevada (December 28, 2006)
- 9 20. Petition for Rehearing and Motion to Recuse the Clerk County District
10 Attorney's Office from Further Involvement in the Case, Thomas v. State,
11 Case No. 46509, In the Supreme Court of the State of Nevada (March 27,
12 2007)
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CERTIFICATE OF SERVICE

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

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

Jeffrey M. Conner
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Office of the Nevada Attorney General
100 North Carson Street
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Timothy Filson, Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

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

EXHIBIT 1

EXHIBIT 1

MThomas-8JDC03882

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FILED IN OPEN COURT
AUG 27 1997

19
LORETTA BOWMAN, CLERK
BY *[Signature]* Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

MARLO THOMAS,
aka Marlow Demetrius Thomas,
#1060797

Defendant.

Case No. C136862
Dept. No. VI
Docket B

JUDGMENT OF CONVICTION

WHEREAS, on the 10th day of July, 1996, Defendant, MARLO THOMAS aka Marlow Demetrius Thomas, entered a plea of Not Guilty to the crimes of COUNT I - CONSPIRACY TO COMMIT MURDER AND/OR ROBBERY (Felony); COUNTS II & III - MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT IV - ROBBERY WITH USE OF A DEADLY WEAPON (Felony); COUNT V - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony); and COUNT VI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony), NRS 199.380, 200.010, 200.030, 193.165, 200.380, 193.165, 205.060, 200.310, 200.320, 193.165; and

WHEREAS, the Defendant MARLO THOMAS aka Marlow Demetrius Thomas, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - CONSPIRACY TO COMMIT MURDER AND/OR ROBBERY (Felony); COUNTS II & III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT IV - ROBBERY WITH USE OF A DEADLY WEAPON (Felony); COUNT V - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony); and COUNT VI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

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1 (Felony), in violation of NRS 199.380, 200.010, 200.030, 193.165, 200.380, 193.165, 205.060,
2 200.310, 200.320, 193.165, and the Jury verdict was returned on or about the 18th day of June, 1997.
3 Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the
4 provisions of NRS 175.552 and 175.554, found that there were six (6) aggravating circumstances in
5 connection with the commission of said crime, to-wit:

6 1. The murder was committed by a person who was previously convicted of a felony involving
7 the use or threat of violence to the person of another, to-wit: Attempt Robbery, Case No. C96794,
8 Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

9 2. The murder was committed by a person who was previously convicted of a felony involving
10 the use or threat of violence to the person of another, to-wit: Battery With Substantial Bodily Harm, Case
11 No. C134709, Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

12 3. The murder was committed while the person was engaged in the commission of or an attempt
13 to commit any Burglary.

14 4. The murder was committed while the person was engaged in the commission of or an attempt
15 to commit any Robbery.

16 5. The murder was committed to avoid or prevent a lawful arrest.

17 6. The Defendant has, in the immediate proceeding, been convicted of more than one offense of
18 murder in the first or second degree.

19 That on or about the 25th day of June, 1997, the Jury unanimously found, beyond a reasonable
20 doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance
21 or circumstances, and determined that the Defendant's punishment should be Death as to COUNTS II
22 & III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada
23 State Prison located at or near Carson City, State of Nevada.

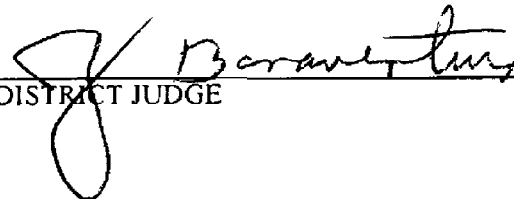
24 WHEREAS, thereafter, on the 25th day of August, 1997, the Defendant being present in court
25 with his counsel, PETE LAPORTA and LEE ELIZABETH MCMAHON, Special Deputy Public
26 Defenders, and DAVID P. SCHWARTZ, Chief Deputy District Attorney, also being present; the above
27 entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced
28 Defendant to:

- 1 COUNT I - a maximum of ONE HUNDRED TWENTY (120) months with parole eligibility at
2 FORTY-EIGHT (48) months in the Nevada Department of Prisons for
3 CONSPIRACY TO COMMIT MURDER;
4 COUNT II - DEATH for MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY
5 WEAPON;
6 COUNT III- DEATH for MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY
7 WEAPON;
8 COUNT IV- a maximum of ONE HUNDRED EIGHTY (180) months with parole eligibility at
9 SEVENTY-TWO (72) months for ROBBERY with an equal and consecutive maximum
10 term of ONE HUNDRED EIGHTY (180) months with parole eligibility at SEVENTY-
11 TWO (72) months for USE OF A DEADLY WEAPON in the Nevada Department of
12 Prisons, to run consecutive to Count I;
13 COUNT V - a maximum of ONE HUNDRED EIGHTY (180) months with parole eligibility at a
14 minimum of SEVENTY-TWO (72) months in the Nevada Department of Prisons for
15 BURGLARY WHILE IN POSSESSION OF A FIREARM to run consecutive to Count
16 IV;
17 COUNT VI- LIFE WITHOUT THE POSSIBILITY OF PAROLE for KIDNAPPING with an equal
18 and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE for USE OF A
19 DEADLY WEAPON in the Nevada Department of Prisons, to run consecutive to
20 Count V.

21 Credit for time served 495 days.

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

24 DATED this 27th day of August, 1997, in the City of Las Vegas, County of Clark, State of
25 Nevada.

26 
DISTRICT JUDGE

27 DA#96-136862A/kjh
28 LVMPD DR#9604150428
1° MURDER W/WPN - F

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MR. SCHWARTZ: Your Honor, may counsel approach?

THE COURT: Yes. He's to be given credit for four hundred and ninety-five (495) days.

MR. SCHWARTZ: Thank you, your Honor.

(Whereupon the proceedings concluded)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above-entitled case.


ROBERT H. MINTUN
Court Recorder

EXHIBIT 2

EXHIBIT 2

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Barbara L. Thomas
CLERK

1 JOC
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3 DISTRICT ATTORNEY
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DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 MARLO THOMAS,
12 aka Marlow Demitrius Thomas,
13 #1060797

14 Defendant.

Case No. C136862
Dept. No. VI
Docket B

15 AMENDED JUDGMENT OF CONVICTION

16 WHEREAS, on the 10th day of July, 1996, Defendant, MARLO THOMAS aka Marlow
17 Demitrius Thomas, entered a plea of Not Guilty to the crimes of COUNT I - CONSPIRACY TO
18 COMMIT MURDER AND/OR ROBBERY (Felony); COUNTS II & III - MURDER WITH USE OF
19 A DEADLY WEAPON (Felony); COUNT IV - ROBBERY WITH USE OF A DEADLY WEAPON
20 (Felony); COUNT V - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony); and COUNT
21 VI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony), NRS 199.380,
22 200.010, 200.030, 193.165, 200.380, 193.165, 205.060, 200.310, 200.320, 193.165; and

23 WHEREAS, the Defendant MARLO THOMAS aka Marlow Demitrius Thomas, was tried before
24 a Jury and the Defendant was found guilty of the crimes of COUNT I - CONSPIRACY TO COMMIT
25 MURDER AND/OR ROBBERY (Felony); COUNTS II & III - MURDER OF THE FIRST DEGREE
26 WITH USE OF A DEADLY WEAPON (Felony); COUNT IV - ROBBERY WITH USE OF A
27 DEADLY WEAPON (Felony); COUNT V - BURGLARY WHILE IN POSSESSION OF A FIREARM
28 (Felony); and COUNT VI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

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1 (Felony), in violation of NRS 199.380, 200.010, 200.030, 193.165, 200.380, 193.165, 205.060,
2 200.310, 200.320, 193.165, and the Jury verdict was returned on or about the 18th day of June, 1997.
3 Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the
4 provisions of NRS 175.552 and 175.554, found that there were six (6) aggravating circumstances in
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8 Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

9 2. The murder was committed by a person who was previously convicted of a felony involving
10 the use or threat of violence to the person of another, to-wit: Battery With Substantial Bodily Harm, Case
11 No. C134709, Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

12 3. The murder was committed while the person was engaged in the commission of or an attempt
13 to commit any Burglary.

14 4. The murder was committed while the person was engaged in the commission of or an attempt
15 to commit any Robbery.

16 5. The murder was committed to avoid or prevent a lawful arrest.

17 6. The Defendant has, in the immediate proceeding, been convicted of more than one offense of
18 murder in the first or second degree.

19 That on or about the 25th day of June, 1997, the Jury unanimously found, beyond a reasonable
20 doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance
21 or circumstances, and determined that the Defendant's punishment should be Death as to COUNTS II
22 & III - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada
23 State Prison located at or near Carson City, State of Nevada.

24 WHEREAS, thereafter, on the 25th day of August, 1997, the Defendant being present in court
25 with his counsel, PETE LAPORTA and LEE ELIZABETH MCMAHON, Special Deputy Public
26 Defenders, and DAVID P. SCHWARTZ, Chief Deputy District Attorney, also being present; the above
27 entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced
28 Defendant to:

1 COUNT I - a maximum of ONE HUNDRED TWENTY (120) months with parole eligibility at
2 FORTY-EIGHT (48) months in the Nevada Department of Prisons for
3 CONSPIRACY TO COMMIT MURDER;

4 COUNT II - DEATH for MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY
5 WEAPON;

6 COUNT III- DEATH for MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY
7 WEAPON;

8 COUNT IV- a maximum of ONE HUNDRED EIGHTY (180) months with parole eligibility at
9 SEVENTY-TWO (72) months for ROBBERY with an equal and consecutive maximum
10 term of ONE HUNDRED EIGHTY (180) months with parole eligibility at SEVENTY-
11 TWO (72) months for USE OF A DEADLY WEAPON in the Nevada Department of
12 Prisons, to run consecutive to Count I;

13 COUNT V - a maximum of ONE HUNDRED EIGHTY (180) months with parole eligibility at a
14 minimum of SEVENTY-TWO (72) months in the Nevada Department of Prisons for
15 BURGLARY WHILE IN POSSESSION OF A FIREARM to run consecutive to Count
16 IV;

17 COUNT VI- LIFE WITHOUT THE POSSIBILITY OF PAROLE for KIDNAPPING with an equal
18 and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE for USE OF A
19 DEADLY WEAPON in the Nevada Department of Prisons, to run consecutive to
20 Count V.

21 Credit for time served 495 days. \$25.00 Administrative Assessment Fee.

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

24 DATED this 15th day of September, 1997, in the City of Las Vegas, County of Clark, State
25 of Nevada.

26 
DISTRICT JUDGE

27 DA#96-136862A/kjh
28 LVMPD DR#9604150488
1° MURDER W/WPN - F

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EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 31019

APPELLANT'S OPENING BRIEF

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NEVADA

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24	U.S. Const., 6th Amend.	8,9,13,15
25	U.S. Const., 8th Amend.	32
26	U.S. Const. 14th Amend	9,37
27		
28		

1	<u>TEXT AND TREATISES</u>	
2	Ellsworth et.al., Juror Attitudes and Conviction-Proneness: The Relationship Between Attitudes	
3	Towards the Death Penalty and Predisposition to Convict. (1979, pre pub. Draft at p.7)(hereinafter, the	
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4	Winrick, Prosecutorial Peremptory Challenge Practice in Capitol Cases: An Empirical Study and a	
5	Constitutional Analysis 91982), 82 Mich.L.Rev. 1,40 fn. 188 and accompanying text.	44,51
6	H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (1968); Goldberg, Towards	
7	Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise	
8	Legal Presumptions (1970), 5 Harv.Civ.Rights--Civ.L.Rev. 53; Bronson, on the Conviction-Proneness	
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	42 U.Colo.L.Rev. 1; Jorow, New Data on the Effect of the "Death Qualified" Jury on the Guilt	
	Determination Process (1971), 84 Harv.L.Rev. 567.	46
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IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 31019

APPELLANT'S OPENING BRIEF

COMES NOW, Appellant, MARLO THOMAS, (hereinafter "Appellant"), by and through his counsel, MICHAEL A. CHERRY, Special Public Defender, and MARK B. BAILUS, Deputy Special Public Defender, and submits his Opening Brief pursuant to NRAP 28(e).

I

STATEMENT OF ISSUES

1. WHETHER THE TRIAL COURT ERRED IN DECLARING CO-DEFENDANT, KENYA HALL, UNAVAILABLE FOR THE PURPOSE OF INTRODUCING PRELIMINARY HEARING TRANSCRIPTS AT TRIAL?
2. WHETHER THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY NOT OFFERING TO GRANT IMMUNITY TO CO-DEFENDANT, KENYA HALL, WHEN HE ASSERTED HE WOULD NOT TESTIFY PURSUANT TO HIS PRIVILEGE AGAINST SELF-INCRIMINATION FOUND IN THE FIFTH AMENDMENT?
3. WHETHER THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY ALLOWING A HEARING OUTSIDE THE PRESENCE OF APPELLANT?
4. WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S PEREMPTORY CHALLENGE OF THE ONLY AFRICAN-AMERICAN JUROR?
5. WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF CERTAIN PREJUDICIAL AUTOPSY PHOTOS?
6. WHETHER THE TRIAL COURT ERRED IN THE ADMISSION OF AN ENLARGED DIAGRAM OF DATA ALREADY IN EVIDENCE?
7. WHETHER THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER A WITNESS TESTIFIED AT TRIAL THAT THE APPELLANT HAD PREVIOUSLY BEEN IN JAIL?

SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

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- 1 8. WHETHER THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS
- 2 INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS?
- 3 9. WHETHER THE TRIAL COURT ERRED IN ALLOWING CUMULATIVE AND
- 4 OTHERWISE INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS DURING THE
- 5 PENALTY PHASE OF APPELLANT'S TRIAL?
- 6 10. WHETHER THE TRIAL COURT ERRED IN ADMITTING CERTAIN HEARSAY
- 7 TESTIMONY INTO EVIDENCE DURING THE PENALTY PHASE?
- 8 11. WHETHER THE STATUTORY SCHEME ADOPTED BY NEVADA FAILS TO
- 9 PROPERLY LIMIT VICTIM IMPACT STATEMENTS?
- 10 12. WHETHER THE PROSECUTOR COMMITTED MISCONDUCT DURING THE
- 11 CLOSING ARGUMENT OF THE PENALTY PHASE OF APPELLANT'S TRIAL BY
- 12 APPEALING TO THE PASSIONS AND PREJUDICE OF THE JURORS AND BY
- 13 DENIGRATING THE PROPER CONSIDERATION OF MITIGATING FACTORS?
- 14 13. WHETHER THE SENTENCE OF DEATH WAS DISPROPORTIONATE TO THE
- 15 EVIDENCE ADDUCED DURING THE TWO PHASES OF APPELLANT'S TRIAL?
- 16 14. WHETHER THE TRIAL COURT ERRED IN ADMITTING A SET OF JURY
- 17 INSTRUCTIONS DURING THE GUILT AND PENALTY PHASES WHICH
- 18 VIOLATED THE DUE PROCESS RIGHTS OF THE APPELLANT?
- 19 15. WHETHER THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN
- 20 ALLOWING THE JURY TO BE DEATH QUALIFIED?
- 21 16. WHETHER THE CUMULATIVE ERROR OF IMPROPER CONDUCT BY THE
- 22 PROSECUTOR, THE RECEPTION OF INADMISSIBLE EVIDENCE, AND
- 23 ERRONEOUS RULINGS OF THE COURT DEPRIVED APPELLANT OF A FAIR
- 24 TRIAL?

II

STATEMENT OF CASE

20 On or about April 23, 1996, Appellant herein, MARLO THOMAS (hereinafter "Appellant"), was
21 charged by way of criminal complaint with Conspiracy to Commit Murder and/or Robbery; Murder with
22 Use of a Deadly Weapon- two (2) counts; Robbery with Use of a Deadly Weapon; Burglary While in
23 Possession of a Firearm; First Degree Kidnaping with Use of a Deadly Weapon in connection with the
24 April 15, 1996, stabbing deaths of Matthew Gianakis and Carl Dixon. (1 ROA 3-7). On or about June
25 27, 1996, a preliminary hearing was held before the Honorable Douglas E. Smith, Justice of the Peace.
26 (1 ROA 1-53); (1 ROA 71-220). At the conclusion of said hearing, Appellant was bound over to
27 Department VI of the Eighth Judicial District Court of Nevada on charges of Conspiracy to Commit
28 Murder and/or Robbery; Murder with Use of a Deadly Weapon- two (2) counts; Robbery with Use of

1 a Deadly Weapon; Burglary While in Possession of a Firearm; First Degree Kidnaping with Use of a
 2 Deadly Weapon. (1 ROA 1-53). On or about July 10, 1996, Appellant entered a not guilty plea to the
 3 charges. Subsequently, on or about June 16, 1997, a jury trial commenced before the Honorable Joseph
 4 T. Bonaventure, District Court Judge. (1 ROA 934-1206); (2 ROA 535-551); (3 ROA 552-878); (4
 5 ROA 1207-1288). At the conclusion of said trial, the jury found Appellant guilty of Count I: Conspiracy
 6 to Commit Murder and/or Robbery; Count II: Murder, of the First Degree with Use of a Deadly Weapon;
 7 Count III: Murder of the First Degree with Use of a Deadly Weapon; Count IV: Robbery with Use of
 8 a Deadly Weapon; Count V: Burglary While in Possession of a Firearm; Count VI: First Degree
 9 Kidnaping with Use of a Deadly Weapon. (1 ROA 934-1206); (2 ROA 535-551); (3 ROA 552-878);
 10 (4 ROA 1207-1288). On or about August 25, 1997, Appellant was sentenced to Count I: a term of one
 11 hundred twenty (120) months maximum with a minimum of forty-eight (48) months; Count II: death;
 12 Count III: death; Count IV: one hundred eighty (180) months maximum with a minimum of seventy-two
 13 (72) months with an equal and consecutive term of one hundred eighty (180) months maximum with a
 14 minimum of seventy-two (72) months for weapon enhancement, consecutive to Count I; Count V: one
 15 hundred eighty (180) months maximum with a minimum of seventy-two (72) months, consecutive to
 16 Count IV; Count VI: life without the possibility of parole with an equal and consecutive life without the
 17 possibility of parole for weapon enhancement consecutive to Count V; credit for time served was 495
 18 days. (5 ROA 928-933); (6 ROA 1311-1312).

19 III

20 STATEMENT OF FACTS

21 In the early morning hours of April 15, 1996, Las Vegas Metropolitan Police Department
 22 (hereinafter "LVMPD") received a dispatch that there was a stabbing victim, Matt Gianakis (hereinafter
 23 "Gianakis") located at the Rebel Station at Cheyenne and Rainbow Roads in Las Vegas, Nevada. (4
 24 ROA 623). Upon arrival at the scene, Officer Edgar Stubbs (hereinafter, "Stubbs") confirmed that
 25 Gianakis had, in fact, been the victim of a stabbing. (4 ROA 624).

26 Bystander Sidney Sontag testified that he was at the Rebel Gas Station when Gianakis arrived
 27 and stated, "I work at Lone Star. I've just been stabbed." (4 ROA 618).

28 Stubbs testified that he was the first to arrive on the scene, briefly interviewed witnesses, and

1 was directed to the nearby Lone Star Steakhouse located at 3131 N. Rainbow Blvd., Las Vegas, Nevada,
2 (hereinafter "Lone Star"), to conduct a further investigation. (4 ROA 624 - 625). Stubbs also testified
3 that he entered and investigated the interior of the Lone Star. (4 ROA 625). Stubbs, however, did not
4 find or retrieve any items or evidence and he did not discover the body of Carl Dixon.

5 Crime Scene Analyst, Dave Ruffino (hereinafter, "Ruffino"), testified that when he entered the
6 premises, he discovered a dead body, identified as Carl Dixon, in the Lone Star mens' bathroom. (4
7 ROA 637).

8 On April 15, 1996, an autopsy was conducted at the Clark County Coroner's Office under the
9 direction of Dr. G. Sheldon Green. Dr. Robert Jordan testified that he also conducted the autopsies with
10 Dr. Green. (4 ROA 707). Dr. Jordan testified that the autopsy revealed that Dixon died of multiple stab
11 wounds to the chest and abdomen. (4 ROA 713). Dixon had over 19 wounds. (4 ROA 710). Dixon also
12 had 15 "defensive" wounds. (4 ROA 711). Dr. Thomas further testified that Gianakis died as a result
13 of one stab wound to the chest and one stab wound to the back. (4 ROA 724).

14 Ruffino also testified that he took blood and fingerprint samples from the scene. (4 ROA 638-
15 640, 643). No fingerprints identified Appellant at the scene of the crime. (4 ROA 788). Apart from
16 witness testimony there was no physical evidence bearing on Appellant's presence at the crime scene.

17 Terry Cook (hereinafter "Cook") testified that he was the crime lab criminalist who analyzed the
18 blood samples collected by the crime scene analysts in this case. (4 ROA 762, 768). Cook testified that
19 based upon a sample of four possible donors (Appellant, Hall, Dixon and Gianakis), he was able to
20 exclude Appellant and Hall's blood types from the Lone Star blood samples, and that blood found in
21 the mens' room was "consistent" with Dixon's. (4 ROA 774-776).

22 Steven Hemmes (hereinafter "Hemmes") testified that he reported to work at the Lone Star on
23 April 15, 1996, at approximately 7:50 a.m. and encountered Appellant, a former Lone Star employee
24 with Appellant's 15-year old cousin, Kenya Hall (hereinafter "Hall"), outside the Lone Star. (4 ROA
25 560). Appellant told Hemmes, and his cousin, Hall, that he was there to get his old job back from the
26 Lone Star. (4 ROA 560-561, 809). Hemmes also testified he did not have the proper footwear for work
27 that day, was sent home, and was not present when the stabbings took place. (4 ROA 562).

28 Lone Star manager Vincent Oddo (hereinafter "Oddo") testified that Appellant and Hall had

1 entered the Lone Star and that one of the two or both had produced a revolver and demanded money.
2 (4 ROA 582). Oddo also testified that one of the individuals was Appellant, his former employee. (4
3 ROA 581). Oddo could not recall if the Appellant made any statement whatsoever at the time of their
4 interaction. (4 ROA 582). Oddo did not hear any conversation between the Appellant and co-defendant,
5 Hall. (4 ROA 583). Oddo further testified that he had left the scene but indicated that he heard Gianakis
6 shouting the words, "No," and "Stop," but he did not witness a stabbing nor see any conflict. (4 ROA
7 587). Oddo testified that he arrived at the Lone Star at 7 a.m. on April 15, 1996 and that there was not
8 a white van nor couriers at the restaurant that morning. (4 ROA 574, 580). Oddo's testimony indicated
9 that apart from Appellant and Hall, Hemmes, Dixon, Gianakis and Oddo were the only persons in the
10 Lone Star that morning.

11 An investigation began which led LVMPD to the house of Appellant's aunt, Emma Nash
12 (hereinafter "Nash"), which was located at 2505 Cartier in North Las Vegas. (4 ROA 855-856). Nash
13 testified that Appellant had been at the 2505 Cartier address at 7:30 a.m. the day of the stabbing with
14 his wife, Angela Love (hereinafter "Love") and Hall. (4 ROA 664). Nash testified that the three had
15 returned to that address before 9:00 a.m. on April 15, 1996. (4 ROA 664). Nash testified that she saw
16 Appellant with her daughter, Barbara Smith, and that they were counting money which appeared to have
17 blood on it. (4 ROA 666). Nash also testified that Appellant gave her a gun to give to her son, Matthew,
18 which she took and instead gave to her son, David. (4 ROA 674-675). Nash further testified that she
19 believed that Appellant, Love and Hall were headed back to Hawthorne, Nevada. (4 ROA 676).

20 Barbara Smith, Appellant's cousin, testified that Appellant had a blue pillowcase containing a
21 large "amount of currency" and gave her \$1000 dollars to give to Appellant's mother. (4 ROA 686).
22 Barbara Smith noted that she believed Appellant's clothing had bloodstains on them. (4 ROA 685). She
23 observed Appellant change his clothes in her bathroom and take his old clothes in a bundle and throw
24 them in the backyard behind 2505 Cartier. (4 ROA 687-688). Barbara Smith also testified that Appellant
25 switched shoes with her son, Patrick. (4 ROA 690).

26 Monte Spoor (hereinafter "Spoor") testified that he is a Senior Crime Analyst with the LVMPD
27 who was dispatched to 2505 Cartier on April 15, 1996. (4 ROA 693). Spoor also testified that he
28 recovered blood-stained denim jean shorts, blood-stained Nike shoes, and a 5 1/2 inch "steak" knife with

1 blood on it in the backyard area behind the same address. (4 ROA 694). Spoor testified he retrieved the
2 gun from Detective Mike Bryant (hereinafter "Bryant"). (4 ROA 695). Bryant testified that he retrieved
3 a gun from Nash's son, David. (4 ROA 757). Crime lab criminalist Cook testified that blood samples
4 from the clothing, based on the four possible donors, Appellant, Hall, Dixon and Gianakis, were
5 consistent with Dixon or Gianakis or both, but excluded Appellant and Hall. (4 ROA 768-771). Cook
6 also testified the blood on the knife found by Spoor was consistent with either Dixon or Gianakis or
7 both. (4 ROA 776). Cook did not testify that any blood found was, in fact, that of Dixon or Gianakis.

8 Appellant, Love, and Hall were detained by the Nevada Highway Patrol (hereinafter "NHP") at
9 Marker M1-46 in Hawthorne, Nevada, on April 15, 1996 at 2 P.M. (4 ROA 736). NHP Trooper David
10 Bailey (hereinafter "Bailey") testified that he was acquainted with Hall from coaching sports in the area.
11 (4 ROA 740). Bailey conducted a two-hour interview with Hall at the Mineral County Sheriff's Office.
12 (4 ROA 741). Bailey testified that four officers were present along with Hall and his mother. (4 ROA
13 743). Hall testified at his preliminary hearing that the number was more like ten (10) officers present.
14 (4 ROA 850).

15 Yolanda McClary (hereinafter "McClary") testified that she is a crime scene analyst for the
16 LVMPD initially dispatched to the Lone Star on April 15, 1996, where she created a crime scene
17 diagram and took latent fingerprint samples. (4 ROA 746). She also testified that she was dispatched to
18 Hawthorne, Nevada on April 16, 1996, where she investigated the vehicle Appellant had earlier been
19 stopped in and retrieved blue pillowcases containing currency approximately totaling \$5, 857.00 (4
20 ROA 750).

21 Detective David Mesinar testified that he read the Appellant his rights pursuant to the Miranda
22 decision and then proceeded to videotape a statement from the Appellant which places him in the Lone
23 Star that morning, and in which he admits to the stabbings. (4 ROA 861-863). He indicates, however,
24 that the stabbings occurred as a result of a struggle with Dixon and Gianakis. (4 ROA 861-863).
25 Appellant does not admit on the videotape that he entered the Lone Star with the intention to commit
26 any of the offenses with which he was charged.

27 At trial and over Appellant's objection, the District Court Judge allowed the Preliminary Hearing
28 transcript of Hall's testimony to be read into the record. (4 ROA 792). Appellant initially objected at

1 a hearing which took place before trial began on June 16, 1997. (7 ROA 1759 - 1764). The preliminary
2 hearing transcript contained the following key testimony from Hall: there was a white van outside the
3 Lone Star when he arrived with Appellant at approximately 8 a.m. on April 15, 1996, with men going
4 in and out of the restaurant (4 ROA 810); he was not aware a robbery was about to occur when he
5 entered the Lone Star that morning with Appellant (4 ROA 817, 835); he was not instructed to shoot the
6 manager, Vince Otto (4 ROA 820); Appellant confessed to him that he had "killed a guy" (4 ROA 828);
7 that Appellant admitted telling Carl Dixon to "come into the bathroom." (4 ROA 849). Hall did not see
8 Appellant stab either Dixon or Gianakis. (4 ROA 837).

9 The instant appeal follows.

10 IV

11 ARGUMENT

12 1. THE TRIAL COURT ERRED IN DECLARING CO-DEFENDANT, KENYA HALL,
13 UNAVAILABLE FOR THE PURPOSE OF INTRODUCING PRELIMINARY HEARING
TRANSCRIPTS.

14 A. Introduction

15 As set forth more fully hereinbelow, the trial court granted the State's Motion to Use Reported
16 Testimony of co-defendant, Kenya Hall. (4 ROA 788-800; 872-873). Accordingly, the State was
17 allowed to introduce the substance of Kenya Hall's testimony offered at the preliminary hearing which
18 took place on June 27, 1996. (1 ROA 71-220). The impetus for the State to seek to use recorded
19 testimony was co-defendant Hall's Motion to Prevent Being Called to Appear and Testify, and to Invoke
20 Fifth Amendment Privilege Against Self-Incrimination. (3 ROA 503-514). Co-Defendant Hall had
21 earlier testified at the preliminary hearing as part of a plea negotiation and agreement to testify (1 ROA
22 9-16; 154-212). Hall also entered a Plea of Guilty to Robbery with Use of a Deadly Weapon. (1 ROA
23 9-16). After the preliminary hearing, but before trial, Hall filed a separate Motion to Withdraw his Guilty
24 Plea (3 ROA 498).¹

25 Appellant raised an objection to the introduction of this evidence at the time of trial. In sum,
26 Appellant offers that the introduction of Hall's prior recorded testimony was error because: (1) the
27

28 ¹ It is of import to note, Hall was not allowed to withdraw his guilty plea and was later sentenced.

1 unique circumstances of this case are insufficient to vitiate the protections afforded a defendant by way
2 of the Confrontation Clause of the Sixth Amendment; (2) Hall had waived his Fifth Amendment
3 protections by entering his plea of guilty, signing the plea agreement, testifying at the preliminary
4 hearing, and having his criminal liability reduced by way of his prior plea and agreement; and (3) the
5 trial court did not sufficiently canvass Hall before accepting that he was "unavailable" and failed to order
6 him to testify as is required by NRS 171.198.

7 B. Violation of the Confrontation Clause of the Sixth Amendment

8 There was no dispute that Hall was *physically* available to testify at Appellant's trial since he
9 appeared in the courtroom that morning (7 ROA 1759-1764). The issue is whether he was "unavailable"
10 because he allegedly asserted a Fifth Amendment right against self-incrimination, and whether the
11 erroneous determination that he was "unavailable" violates Appellant's Sixth Amendment rights.

12 "The primary object of the confrontation clause of the Sixth Amendment was to prevent
13 depositions or ex parte affidavits being used against a prisoner in lieu of personal
14 examination and cross-examination in which the accused has the opportunity to test
15 recollection and sift conscience of the witness and to *compel him to stand face-to-face*
16 *with the jury in order that they may look at him and judge by his demeanor and manner*
17 *in which he gives his testimony, whether or not he is worthy of belief."* *Barber v. Page*,
18 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)(emphasis added).

16 It is clear that there is a Constitutional mandate to compel a witness to be present in court at the
17 time of trial in order for the trier of fact to judge his demeanor and manner as these are paramount to a
18 determination of whether, and to what extent, he should be believed. Thus, to declare a witness
19 unavailable requires close scrutiny.

20 The Nevada Supreme Court has directly addressed this issue on a number of occasions. In *Power*
21 *v. State*, 102 Nev. 381, 724 P.2d 211 (1986), the Court acknowledged the Sixth Amendment
22 implications and held that a defendant has the right to be confronted with the witnesses testifying against
23 him, a right secured by the Confrontation Clause of the Sixth Amendment and made obligatory on the
24 States by the Fourteenth Amendment. *Power* citing *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13
25 L.Ed.2d 923 (1965); *Summers v. State*, 102 Nev. 195, 718 P.2d 676 (1986).

26 The *Power* Court further held that the transcript of a witness' preliminary hearing testimony may
27 be admitted into evidence at a criminal trial only if three preconditions are met. *Id.* First, the defendant
28 must have been represented by counsel at the preliminary hearing. *Id.* Second, the defendant's counsel

1 must have been provided an adequate opportunity to cross-examine the witness at the preliminary
2 hearing. *Id.* Third, the witness must actually be unavailable at the time of trial. *Id.* citing *Ohio v. Roberts*,
3 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

4 The Nevada State legislature codified these requirements in NRS 171.198 (6)(b) in a section
5 entitled Use of Prior Reported Testimony. NRS 171.198(6)(b) states:

6 The testimony so taken may be used by the state if the defendant was represented by
7 counsel or affirmatively waived his right to counsel upon the trial of the cause, and in all
8 proceedings therein, when the witness is sick, out of state, dead, or *persistent in refusing*
9 *to testify despite an order of the judge to do so*, or when his personal attendance cannot
10 be had in court. (emphasis added).

11 The Court recently discussed the issue of use of prior reported testimony when the witness
12 asserts a Fifth Amendment privilege in *Funches v. State* (Two Cases), 113 Nev. Adv. Op. 101 (1997)
13 discussed, *infra*. First, however, it is important to note the Court's previous delineation on this issue
14 prior to the *Funches* decision.

15 In *Anderson v. State*, 109 Nev. 1150, 1152, 865 P.2d 331 (1993) the Court held that the former
16 171.198(6) (which had not yet been amendment to add the language "or persistent in refusing to testify
17 despite an order of the judge to do so") operated in a way which:

18 "...protects an individual's right to confront a witness, as guaranteed by the Sixth
19 Amendment of the United States Constitution. See, *Felix v. State*, 109 Nev. 151, 849
20 P.2d 220 (1993) (Confrontation Clause and Nevada Constitution require unavailability)...
21 NRS 171.198(6) affords this protection by *limiting the admissibility* of prior officially
22 recorded testimony to a *narrow set of circumstances*." *Anderson*, 109 Nev. 1150, 1152
23 (1993) (emphasis added).

24 The Nevada State legislature, however, expanded the narrow set of circumstances by adding the
25 new language regarding a "persistent refusal to testify despite the order of a judge to do so." Appellant
26 asserts that this new condition was an unconstitutional infringement of his right of confrontation both
27 under the Sixth Amendment of the United States Constitution and the Nevada Constitution and in direct
28 conflict with the emphasis on Sixth Amendment protections. Nonetheless, this Court in *Funches*
ostensibly decided to expand the use of prior reported testimony amounting to a further erosion of the
"individual protections" of the Sixth Amendment it embraced just four years prior. Moreover, while
Funches specifically overrules other relevant cases, it chose not to do so with *Anderson*, which at the
onset requires an according of decisions on the part of the Nevada Supreme Court.

1 In *Funches*, Co-Defendants Shafer and Funches were charged with robbery and first-degree
2 murder. At the preliminary hearing, Shafer, who had not yet been charged with any crime, testified
3 against Funches. Before trial, the charges against Shafer were added. Shafer and Funches were tried
4 together in a joint trial, and Shafer asserted his Fifth Amendment privilege not to testify against himself
5 at trial. The *Funches* court held that a trial court must look beyond NRS 171.198(6)(b) in order to find
6 an exception for using prior testimony of an "unavailable" witness who is attempting to invoke the Fifth
7 Amendment. Still, in *Funches*, the Court found that Shafer was unavailable under NRS 50.115(4), which
8 states the "prosecution may not call the accused in a criminal case."

9 In the case, *sub judice*, there are unique, material facts which render the same application of the
10 holdings in *Funches*, inapposite. First, Appellant and Hall were not in a joint trial. In fact, Hall had
11 already entered his plea of guilty to the offense of robbery with use of a deadly weapon and as a part of
12 the negotiations, all other charges were dismissed. Thus, Hall was not exposed to the same liability as
13 Shafer when he attempted to invoke the Fifth Amendment and was not the accused in a criminal case
14 as he was not on trial (he had already plead guilty). Second, Shafer had testified as an uncharged witness
15 at the preliminary hearing and then as a co-defendant at the second hearing. Hall testified only under
16 an agreement to testify and the entering of a guilty plea. Thus, Hall's change of heart to not take the
17 stand, going from (1) a person who entered a plea of guilt to, (2) a person who wanted to rebuke that
18 plea, is much more suspect than a person who, (1) originally testified under no apparent fear of
19 incrimination to (2) a person charged with murder. Third, and most importantly, Hall had specifically
20 waived his Fifth Amendment rights both by way of his guilty plea and the Guilty Plea agreement which
21 was signed and filed on June 27, 1996. (1 ROA 12-15). Shafer had not waived previously, entered a plea
22 of guilty, nor signed a waiver of his Fifth Amendment rights.

23 It was error, therefore, for Hall's testimony to be introduced under the same logic of *Funches*
24 because even with an expanded view of "unavailability" under NRS 171.198(6)(b), Hall was not
25 unavailable.

26 Further, even if this court applies the broadest application of *Funches*, it cannot hold that a
27 witness is "unavailable" simply by claiming the Fifth Amendment privilege against self-incrimination.
28 In fact, the present case exemplifies the scenario where an assertion of the Fifth Amendment is both

1 nugatory and insufficient for purposes of "unavailability."

2 C. Hall Had Already Waived His Fifth Amendment Privilege When He Attempted To Invoke It

3 Fundamentally, the Fifth Amendment privilege against compulsory self-incrimination protects
4 against any disclosures which a witness reasonably believes could be used in a criminal prosecution or
5 which could lead to other evidence which might be so used. *Kastigar v. United States*, 406 US 441, 92
6 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Typically, it is going to be the State which attempts to compel
7 testimony viewed in light of the witness' assertion of not self-incriminating.

8 Of course, the power of government to compel persons to testify in court is firmly established
9 in Anglo-American jurisprudence². *Id.* (string citations omitted). One limitation on that power is the
10 privilege against self-incrimination, however, that privilege is not automatic. See, *United States v.*
11 *Pardo*, 636 F.2d 535, 542 (D.C. Cir. 1980). In fact, if the "criminality" of the exposure of testimony
12 has already been taken away, then it is one way the Amendment ceases to exist. *Ullmann v. United*
13 *States*, 350 U.S. 422, 431, 76 S.Ct. 497, 502, 100 L.Ed. 511 (1956) quoting *Hale v. Henkel*, 201 U.S.
14 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652 (1906). There are, of course, other ways to effectuate a waiver.
15 Most importantly, however, is the rule of law which states:

16 "A defendant who enters a plea of guilty simultaneously waives several constitutional
17 rights, including his privilege against compulsory self-incrimination."

18 *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969).

19 In the case, *sub judice*, not only did Hall enter a written guilty plea, but as part of that plea, he
20 explicitly waived his Fifth Amendment privilege against self-incrimination. (1 ROA 9-16).
21 Exemplifying this waiver, he actually took the stand at the preliminary hearing and no further criminal
22 liability was attached as a result of his testimony. (1 ROA 154-212).

23 When Hall appeared in Court on June 16, 1996, and told the judge at a hearing by way of
24 unsworn statement that he was invoking his Fifth Amendment privilege, there was no Fifth Amendment
25

26 ² A non-party witness cannot be called solely to have him claim his privilege before the jury. See
27 *United States v. Licavoli*, 604 F.2d 613, 624 (9th Cir. 1979). However, in *United States v. Gay*, 567 F.2d
28 916, 920 (9th Cir. 1978), the court said in dictum that a non-party who testifies can be required to invoke
the privilege before the jury. Hall was not a party in this trial, and had already plead guilty to one of the
questions to Hall before the jury.

1 privilege to be had. (7 ROA 1759-1764). Further, the trial court judge accepted this assertion by Hall
 2 at face value and did nothing to canvass Hall as to the nature, extent and scope of his alleged privilege.
 3 Finally, this same judge did not allow Hall to withdraw his guilty plea and Hall was later sentenced.
 4 Therefore, there was no additional exposure to Hall, if he would have, in fact, taken the stand.

5 As a result to these circumstances, Hall could not have properly asserted the Fifth Amendment,
 6 and a finding of unavailability is both error on its face, a violation of Appellant's Sixth Amendment
 7 rights, and an unwarranted expansion of applicable statutory analysis.

8 D. The Trial Court Judge Did Not Follow NRS 171.198(6)(b) or Any Other Relevant Statutory
 9 Scheme in Determining Hall to be Unavailable.

10 NRS 171.198 sets forth that the witness must be *persistent* in his refusal to testify *despite an*
 11 *order of the judge* to do so. (emphasis added).

12 The trial court conducted a very brief canvas of Hall to determine the first prong, to wit, his
 13 *persistent refusal to testify*. The canvas was as follows:

14 "THE COURT: Mr. Hall, it's my understanding the State wanted to call you to be a
 15 witness against Marlo Thomas, which is a trial that will begin today. And they're going
 16 to ask you to take the stand, and swear under oath and tell the truth, tell nothing but the
 17 truth, so help you God, and testify. Are you going to do that?"

18 THE DEFENDANT: No.

19 THE COURT: If you're called, what are you going to do?

20 THE DEFENDANT: Invoke my fifth amendment right.

21 THE COURT: You're going to invoke your fifth amendment right? So this -- even
 22 though-- regardless of who calls you, the State, or Marlo Thomas, or anybody, you're
 23 going to invoke your fifth amendment right. Is that correct?

24 THE DEFENDANT: Yes, I'm not going to testify. I'm going to refuse to testify." (7
 25 ROA 1762-1763)."

26 Shortly thereafter, counsel for the Appellant prompted the court that for the statute to operate,
 27 the court would have to order Hall to testify and he would have to refuse despite the court's order. The
 28 Court responded in no uncertain terms:

"THE COURT: Well, I'm not going to order him to testify." (7 ROA 1763).

Nonetheless, the State concurred that for the statute to be operative, the court would have to order
 him to testify. (7 ROA 1763). The trial court then went on to erroneously grant the State's Motion to Use

1 Reported Testimony. (7 ROA 1764).

2 Once the trial had began, the issue was revisited at the time the State actually prepared to
3 introduce the previously reported testimony of Hall. After listening to the arguments of counsel, and
4 again being instructed on the law that Hall needed to be ordered to testify, the trial court declared:

5 "THE COURT: I did order him last time..." (4 ROA 794).

6 This is plainly a misstatement of the court's actions in the prior hearing and an indication that
7 the trial court admitted Hall's testimony without meeting the requirements of NRS 171.198 or any other
8 statute regarding "unavailability." There was no real persistent refusal to testify and there was clearly
9 no order to do the same. The trial court's error, with regard to the case history, proves that the objection
10 was valid and despite the faulty memory of the judge, no order to compel was made. As a result, it is
11 impossible to know whether Hall would have in fact testified when faced with the threat of contempt
12 and the trial court failed to exercise its proscribed duty before making a ruling. The Sixth Amendment
13 rights of Appellant were clearly violated because of this error.

14 2. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY NOT OFFERING TO
15 GRANT IMMUNITY TO CO-DEFENDANT, KENYA HALL, WHEN HE ASSERTED HE
16 WOULD NOT TESTIFY PURSUANT TO HIS PRIVILEGE AGAINST SELF-
17 INCRIMINATION FOUND IN THE FIFTH AMENDMENT.

18 Immunity statutes which have historical roots deep in Anglo-American jurisprudence are not
19 incompatible with the values of protecting people from the power to compel testimony when there they
20 allege to have a fifth amendment privilege against self-incrimination. *Kastigar v. U.S.*, 406 U.S. 441,
21 92 S.Ct. 1653, 1656 (1972). The existence of these statutes reflects the importance of testimony and the
22 fact that many offenses are of such a character that only persons capable of giving useful testimony are
23 those implicated in the crime. *Id.* Releasing a witness from all liability to be prosecuted or punished is
24 sufficient to compel testimony of the witness over a claim of the privilege. *Id.* at 453. In the case, *sub*
25 *judice*, the prosecution had the option of granting such immunity to Hall pursuant to NRS 178.572, and
26 was prompted to do so by defense counsel. NRS 178.572 states, in relevant part:

27 "In any...trial in any court of record, the court on motion of the state may order that any
28 material witness be released from all liability to be prosecuted or punished on account
of any testimony or other evidence he may be required to produce."
The prosecution did not exercise this right, even though the exercise therewith would have

1 clearly cured any defects with regard to an abuse of the authority to compel testimony. As a result, the
2 State was able to introduce its testimony without having to be concerned about either Hall's alleged Fifth
3 Amendment privilege or Appellant's real Sixth Amendment rights.³ This is a fundamental violation of
4 due process and absent a showing by the State as to the harm in the particular case of offering immunity,
5 it was prosecutorial misconduct to not offer it. As a result, Hall was not compelled to testify at trial and
6 the Appellant was prejudiced.

7 3. THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY
8 ALLOWING A HEARING OUTSIDE THE PRESENCE OF APPELLANT.

9 A careful review of the record reveals that on the Friday prior to trial, June 13, 1997, there was
10 some type of court hearing regarding the paramount issue of Hall's fifth amendment privilege and
11 "unavailability" to testify of which Appellant's counsel received no notice of and were not in attendance
12 at same. Because of such, Appellant was not given an opportunity to be heard and/or give a timely
13 response.

14 "THE COURT: We had another hearing Friday that you weren't present I believe, you or Mr.
15 LaPorta. It was just-- it was a motion to Kenya Hall's attorney to exclude this, and --" (4 ROA
795).

16 Another clue to this "hearing" came from Kenya Hall's counsel, Glenn Stockton, Esq.:

17 "MR. STOCKTON: Your honor, I would ask that the-- that I be allowed-- we discussed this on
18 Friday." (7 ROA 1762).

19 Generally, motions must be in writing with five days notice unless cause is shown." *Sheriff, Nye*
20 *County v. Davis*, 106 Nev. 145, 149, 787 P.2d 1241 (1990) citing NRS 178.478(1), 178.476(1); DCR 14.
21 However, the Motion to Prevent Co-Defendant Kenya Keith Hall From Being Called to Appear and
22 Testify and Allow Counsel for Kenya Keith Hall to Invoke Fifth Amendment Privilege against Self-
23 incrimination on his Client's Behalf and Order Shortening Time, which was filed on June 11, 1997 at
24 4:19 p.m. (3 ROA 503). In essence, this was the Motion Hall filed relating to not wanting to testify at
25

26 ³ In the case *sub judice*, the prosecutor's failure to grant use of immunity to Hall violated, among
27 others, Appellant's due process rights as it deprived him of his right to a fair trial. See, *United States*
28 *v. Garner*, 663 F.2d 834, 839 (9th Cir. 1981), cert. denied, 456 U.S. 905, 102 S.Ct. 750, 72 L.Ed.2d 161
(1982). It is Appellant's position that the district court had power, on Fifth or Sixth Amendment
grounds, to require a grant of immunity if Appellant's constitutional rights were being violated by the
prosecutor's refusal to provide immunity. See, *U.S. v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

1 Appellant's hearing. As such, it cannot be argued that this proceeding, which was filed under the same
2 case number as Appellant's case, C136862, did not substantively affect Appellant. Further, this Motion
3 was set to be heard on June 13, 1997, at 8:45 a.m. by order shortening time signed by the trial court
4 judge (3 ROA 505). The record is barren of any receipt of copy or any other indicia that Appellant was
5 given notice of the hearing or of the hearing itself. Further, there are no court minutes for this hearing.
6 While there is a transcript of the calendar call which was also scheduled for June 13, 1987 at 8:45 a.m.
7 and which is part of this Record on Appeal, that Calendar Call was exclusively a simple, brief
8 appearance where the State and Lee McMahon, Esq. were present. (6 ROA 1321- 1323). Hall's counsel,
9 Glenn Stockton, was not present on that record and there is absolutely no discussion of Hall's testimony
10 or assertion of privilege at that time.

11 A defendant has the right to be present throughout the various stages of his trial. NRS 178.388.
12 It is clear from the record that a substantive discussion occurred involving the Appellant's rights by way
13 of a Motion that the Appellant never received and which was improperly discussed with the trial court
14 judge.

15 4. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE
16 STATE'S PEREMPTORY CHALLENGE OF AFRICAN-AMERICAN JURORS.

17 In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States
18 Supreme Court found that a criminal defendant's Fourteenth Amendment right to equal protection of
19 the law is violated when the government uses peremptory challenges to remove black venire persons
20 from a jury. *Batson* and its progeny set forth a three-step process for evaluating race-based objections
21 to peremptory challenges: First, the opponent of a peremptory challenge must make a prima facie
22 showing of racial discrimination; second, the State must proffer race-neutral explanations for the
23 challenge; third, the trial court must decide whether the opponent of the strike has proved that the
24 proffered race-neutral explanation is merely a pretext for purposeful racial discrimination. See, *Doyle*
25 *v. State*, 112 Nev. Adv. Op. 118, 921 P.2d 901 (1996) citing *Purkett v. Elem*, 541 U.S. 695, 115 S.Ct.
26 1769, 1770-71, 131 L.Ed.2d 834 (1995).

27 A. Prima Facie Showing

28 The *Batson* decision and its progeny prohibit the State from exercising peremptory challenges

1 to exclude blacks from a jury panel. See, *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d
2 905 (1990) and *U.S. v. DeGross*, 960 F.2d 1433 (9th Cir. 1992).

3 It is clear under *Batson*, as reiterated in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113
4 L.Ed.2d 411 (1991) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89
5 (1994), that the establishment of a prima facie *Batson* violation shifts the burden to the prosecutor to
6 explain the challenge with a racially neutral reason. To establish a prima facie case, the defendant first
7 must show that he is a member of a cognizable racial group and that the prosecutor has exercised
8 peremptory challenges to remove from the venire members of the defendant's race. *Doyle v. State*, 112
9 Nev. Adv. Op. 118, 921 P.2d 901 (1996). The trial court must then determine if an examination of all
10 the relevant circumstances raises an inference that the prosecutor excluded venire persons from the petit
11 jury on account of their race. *Id.*

12 It was undisputed that Appellant is of African-American decent, a cognizable racial group.
13 Defense counsel made a record that there were only four potential jurors from the jury pool who were
14 of apparent African-American decent. (3 ROA 539). Willie Luster (5 ROA 1081-1084), Frankie
15 Sheppard (5 ROA 1137-1138) and Kevin Evans (5 ROA 1154 - 1161) were three of the potential jurors.
16 A fourth potential juror, misidentified as "Felton" was also African-American. (3 ROA 539). The State
17 accepted these representations as true and did not contest them when the issue was raised by defense
18 counsel. Neither Luster, Sheppard nor the juror identified as "Felton" were "death-penalty" qualified,
19 that is to say, it was represented that they were individuals who either could not equally consider all
20 three forms of punishment for a person convicted of first-degree murder or they could not consider one
21 entirely. (3 ROA 539). Kevin Evans was the only African-American juror remaining in the juror pool
22 who was qualified to sit on the jury when the State immediately rejected Mr. Evans by way of
23 peremptory challenge. (5 ROA 1154-1167).

24 The Court noted the significance of this action on the part of the State.

25 "THE COURT: We notice that Mr. Evans is an African-American and he's the only
26 African American on the jury and why are you moving to exclude him?" (5 ROA 1162).

27 As evident from the foregoing colloquy, the State, through use of its peremptory challenge, was
28 allowed to exclude the only African-American juror from the jury pool. In other words, one hundred

1 per cent of the African-American jurors were eliminated by the issuance of the State's immediate
2 peremptory challenge. Such is impermissible, and establishes the prima facie case.

3 B. Race Neutral Explanation/Pretext

4 The purportedly "race neutral" reasons for the peremptory challenge against the only African-
5 American juror, Kevin Evans, was articulated by the State in the following way:

6 "MR. ROGER:...Mr. Evans is a twenty-two year old young man who lives at home and certainly
7 has not had to face the very significant decision that he'll have to make in this case, and that's
8 whether or not a person lives or dies. His attitude in the courtroom was one of being cavalier.
9 And he chewed gum during the entire time, his attitude towards my questioning was cavalier and
10 in fact there was at least some hesitation on his part when I asked him if he could actually vote
11 for the death penalty." (5 ROA 1164).

12 The State later added:

13 "MR. ROGER: ...He is the youngest juror that we have up on there, I don't want a person
14 for the first time to have to decide whether or not someone should live or die...Because
15 of all those reasons and not because of the color of his skin, we are exercising that
16 peremptory challenge." (5 ROA 1165).

17 Essentially, the State articulated these suspect "race-neutral" reasons, in sum, the youth of the
18 juror (22), his cavalier attitude (which is not contemporaneously reflected in the record), his chewing
19 of gum (which, again, is not contemporaneously reflected in the record) and an alleged hesitation before
20 answering the question about imposing the death penalty. Later, the State
21 added:

22 "MR. SCHWARTZ: ...I watched him before he was even called; he was sitting in the
23 back, kind of slouching, smirking, chewing gum. Very much like that fellow who sat in
24 this corner that the Court, because of his behavior, I think he was falling asleep, had to
25 leave the courtroom. Mr. Evans wasn't far from that." (3 ROA 541).

26 Again, the State made no contemporaneous record with regard to these allegations. In fact, if true
27 that the State was "watching" Mr. Evans before he was even called, it reveals that the State was keeping
28 special watch on the African-American jurors in a courtroom crowded with potential jurors. All of these
29 factors are improper and insufficient to establish race-neutrality.

30 Moreover, even if these reasons appear to be race-neutral on their face, the State is not relieved
31 of all discriminatory allegations.

32 If the prosecutor offers explanations that are facially neutral, a defendant may
33 nevertheless show purposeful discriminations by proving the explanations pretextual.
34 *Doyle*, supra, at p.6 (cite omitted). If a prosecutor articulates a basis for a peremptory

1 challenge that results in the disproportionate exclusion of members of a certain race, the
2 trial judge may consider that fact as evidence that the prosecutor's stated reason
constitutes a pretext for racial discrimination.

3 *Doyle*, at p.6 citing *Hernandez v. New York*, 500 U.S. 352, 363 (1991).

4 Appellant contends that the reasons offered by the State were nothing but contrived pretext used
5 to eliminate the only African-American juror. Further, twenty-two year olds are eligible for jury duty.
6 To think differently would create an environment where the Court should automatically dismiss all
7 otherwise eligible young people from the jury at the onset. Additionally, the use of hesitation with regard
8 to answering a question on the death penalty is pure pretext. *See, Batson v. Kentucky*, 476 U.S. 79, 106
9 S.Ct. 1712, 90 L.Ed.2d 69 (1986). One would hope that when faced with the difficult possibility of
10 imposing the most severe penalty the law has, that one would, in fact, hesitate. Nonetheless, the
11 exchange between the State and Kevin Evans reveals that the alleged "hesitation" was insignificant:

12 "MR. ROGER: -- to know your true feelings about the death penalty. Do you have some
13 hesitation as to whether or not you can vote for it?

14 PROSPECTIVE JUROR EVANS: No." (5 ROA 1160).

15 With regard to the other allegations of the State concerning an "alleged" cavalier attitude, there
16 is no indication in the State's line of questioning which addressed the issue. The same is true for the
17 alleged "chewing of gum." The State's offered reasons were pretext for ridding the jury of one hundred
18 per cent of the African-American jurors which is improper under *Batson*.

19 5. THE TRIAL COURT ERRED IN THE ADMISSION OF CERTAIN AUTOPSY PHOTOS.

20 At trial, the State moved to admit various autopsy photographs. (4 ROA 605-610); (4 ROA 648-
21 654); (4 ROA 713-717). Appellant objected to the use of these autopsy photos, as well as investigatory
22 pictures which were prejudicial, inflammatory, gruesome and/or duplicative of other photos. (4 ROA
23 605-610).

24 Since the Court has addressed the issue of the admissibility of autopsy photos on numerous
25 occasions, it is not difficult to ascertain that the central issue is probative versus prejudicial value.
26 *Wesley v. State*, 112 Nev. Ad. Op. 71, 916 P.2d 793 (1996); *Sipsas v. State*, 102 Nev. 119, 716 P.2d
27 231 (1986). While there is often lengthy discourse on the subject of the probative value of these photos,
28 there is often only cursory treatment regarding the prejudicial aspect of autopsy photos. In *Wesley v.*

1 State, the Court did note that photographic evidence is admissible unless the photographs are so
2 gruesome as to shock and inflame the jury. 112 Nev. at 800. This, however, is only one aspect of the
3 core of concerns regarding prejudice.

4 The necessity to exclude "prejudicial" evidence stems from a specific enumeration in NRS
5 48.035, which provides, in relevant part:

6 "(1) Although relevant, evidence is not admissible if its probative value is substantially
7 outweighed by the danger of unfair prejudice... (2) Although relevant, evidence may be
8 excluded if its probative value is substantially outweighed by considerations of undue
9 delay, waste of time or needless presentation of cumulative evidence."

9 Appellant submits that by their extremely graphic nature, all autopsy photos are unfairly
10 prejudicial. This position is further supported by a common sense observation that most people, and
11 especially juries, turn their heads in disgust and repulsion at the mere sight of a color photograph of
12 surgically opened skulls or stomachs with the flesh pulled back and varying degrees of blood, bone or
13 stray, coarse hairs poking in and out. These type of photos are introduced by the State by design to
14 physically and emotionally inflame a jury in order to further enhance the live testimony about the crime
15 which was committed against the particular victim.

16 On the other side of the scale is the probative value. Appellant cannot dispute that these type of
17 photos can be relevant with regard to letting the jury know where wounds occurred or some other
18 corroboration of testimony regarding the injuries, but when all maneuvering is set aside, it is simply that,
19 corroborative. There are typically crime scene analysts, detectives and forensic pathologists who testify
20 to the exact same data in great detail.

21 In the case, *sub judice*, there were sufficient witnesses who testified as to the nature and scope
22 of the wounds, to wit: Crime Scene Analyst, Dave Ruffino (4 ROA 637- 640); and Dr. Robert Jordan
23 (4 ROA 707- 712; 723-724). Any alleged probative value is greatly vitiated by the live witness
24 testimony describing the same subject matter in a professional, understandable and non-inflammatory
25 manner. Thus, the probative value in cases where live witness testimony exists is greatly outweighed
26 by the introduction of explicit, color photographs of autopsies and even crime scenes that are inherently
27 gory, gruesome and shocking to the sensibilities of any reasonable person. Further, any relevancy is also
28 outweighed by the cumulative nature of introducing these photos. It was therefore, error, for the court

1 to admit State's Exhibits 44-48 (4 ROA 608-609, 715).

2 Appellant submits that the District Court Judge abused its discretion in admitting into evidence
3 the above-mentioned autopsy and/or crime scene photographs. It is Appellant's position that the color
4 photographs of the deceased were erroneously admitted at trial as their prejudicial effect outweighed any
5 possible probative value. Consequently, the trial court abused its discretion by admitting these
6 photographs into evidence.

7 6. THE TRIAL COURT ERRED IN THE ADMISSION OF AN ENLARGED DIAGRAM OF
8 DATA ALREADY IN EVIDENCE.

9 NRS 48.035(2) provides:

10 "Although relevant, evidence may be excluded if its probative value is substantially
11 outweighed by considerations of undue delay, waste of time or needless presentation of
12 cumulative evidence."

13 During the course of the trial, the State introduced Exhibit 84, which was a diagram prepared
14 by the Medical Examiner purporting to indicate where on Dixon's body he observed stabbing and
15 cutting wounds. No objection was offered, even though there had already been sufficient testimony and
16 photographic evidence previously introduced to the jury. (4 ROA 605-610); (4 ROA 648- 654); (4 ROA
17 707-724). Immediately thereafter, and over the objection of Appellant, the State was then allowed to
18 introduce Exhibit 38. (4 ROA 719).

19 "Q: This would be State's Proposed Exhibit 38. Is that merely an enlargement of
20 State's Exhibit 84?

21 A: It is."

22 (4 ROA 719).

23 Here, the State's use of the word "merely" is operative. It is clear that the enlargement added
24 nothing to the record, and was, in fact, merely, the same exhibit. Further, it was the same information
25 previous provided by numerous prejudicial photographs and testimony already admitted.

26 It has long been held that evidence of a cumulative nature should be excluded. See, *Edwards v.*
27 *State*, 90 Nev. 255, 524 P.2d 328 (1974).

28 Appellant submits that the District Court Judge abused its discretion in admitting into evidence
the above-mentioned diagram. It is Appellant's position that the "mere enlargement" added nothing

1 evidentially new to the trial, and as a result, constitutes erroneously admitted cumulative evidence.
2 Consequently, the trial court abused its discretion by admitting this diagram into evidence.

3 7. THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER A WITNESS
4 TESTIFIED AT TRIAL THAT THE APPELLANT HAD PREVIOUSLY BEEN IN JAIL.

5 The general rules of admissibility address that issue of the type of character evidence which must
6 be excluded because of its inherent unfairness to an accused. NRS 48.045(2) provides that, in relevant
7 part:

8 "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a
9 person in order to show that he acted in conformity therewith."

10 In the case, *sub judice*, a witness revealed to the jury that the Appellant had previously been in
11 jail, to wit:

12 "A. ... Then I turned -- then I asked -- I said to him, "Marlo, have you did something that
13 would put you back in jail?" (4 ROA 667).

14 Defense counsel asked to approach the bench and the jury was excused so that counsel could
15 discuss the comment outside the presence of the jury. (4 ROA 667-668). No admonishment to disregard
16 this statement was given to the jury before they were excused. (4 ROA 667-668).

17 A similar issue arose in *Sterling v. State*, 108 Nev. 391, 834 P.2d 400 (1992). In *Sterling*, a
18 witness made references to other criminal activity of the defendant. *Id.* The Court held that since the
19 judge in that case made an "immediate admonishment to the jury to disregard the statement," the error
20 in its presentation at trial was cured. *Id.*

21 Inasmuch as the jury in the case, *sub judice*, never received an admonishment, there is no limit
22 to the improper inferences which were drawn from being presented this inadmissible evidence. Nevada
23 follows the rule of exclusion concerning evidence of other offenses unless relevant to prove the
24 commission of the crime charged. *Garner v. State*, 78 Nev. 366, 374 P.2d 525 (1962). "It is without
25 question that, absent special conditions of admissibility, reference to past criminal history is reversible
26 error." *Porter v. State*, 94 Nev. 142, 576 P.2d 275 (1978)(string citations omitted).

27 When the witness referred to Appellant's past experience in jail, the only inference is that he was
28 in jail for a serious crime such as the crimes he was presently being charged with. Absent a mistrial or

1 an immediate admonishment by the trial court, error occurs. There is no way to know how long the jury
2 lingered over the knowledge that Appellant was a criminal, nor any guarantee that the jury did not use
3 it to apply conduct in conformity therewith. Consequently, the trial court erred in allowing inadmissible
4 error to be introduced to the jury.

5 8. THE EVIDENCE ADDUCED AT APPELLANT'S TRIAL WAS INSUFFICIENT TO
6 SUPPORT APPELLANT'S CONVICTIONS.

7 Appellant submits that the evidence adduced at his trial was insufficient to support the
8 convictions rendered therein. The recognized standard of proof, in support of a conviction, is whether
9 the evidence is of such certainty that a rational trier of fact will be convinced of the guilt of the accused
10 beyond a reasonable doubt. See, *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560
11 (1979). Furthermore, this Court has held that a conviction cannot be upheld where it is based on
12 evidence from which only uncertain references can be drawn. See, *Woodall v. State*, 97 Nev. 235, 236,
13 627 P.2d 402 (1981).

14 While a number of inferences could probably be drawn from Appellants statements offered to
15 law enforcement personnel which were videotaped and shown to the jury, it is not the end of the
16 analysis. Appellant was charged with multiple crimes all of which contain elements of either intent or
17 knowledge. The intent and knowledge elements are not supported by Appellant's statements and cannot
18 be corroborated by any other evidence adduced at trial. Further, not all the charges were proved beyond
19 a reasonable doubt. Inasmuch as the evidence was insufficient at trial, each offense must be evaluated
20 against the record. The record on appeal reflects that there was insufficient evidence adduced at trial
21 to support any of the offenses.

22 A. Kidnaping with Use of a Deadly Weapon.

23 Nevada Revised Statutes 200.310 defines the crime of kidnaping, in relevant part, as:

24 "A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps
25 or carries away a person by any means whatsoever with the intent to hold or detain...for the
26 purpose of committing sexual assault, extortion or robbery upon or from the person, or for the
purpose of killing the person or inflicting substantial bodily harm upon him..."

27 There is no evidence in the record that Appellant kidnaped Carl Dixon. The quantum leap in evidentiary
28 argument is That Carl Dixon was found dead in the bathroom, and therefore was decoyed or enticed into

1 the bathroom for the purpose of killing him. There were, however, no eyewitness to this argument.
2 There are, in fact, a myriad of reasonable explanations which place Carl Dixon in the bathroom which
3 do not rise to the level of a kidnaping.

4 Further, if Carl Dixon presence in the bathroom was indirectly a result of Appellant's actions,
5 the kidnaping would have been incidental to the other alleged offenses of robbery and/or murder. The
6 State cannot have it both ways. Only if the alleged detaining of Carl Dixon increased the danger to him
7 can Appellant be found guilty of kidnaping, as well as murder. *See, Wright v. State*, 94 Nev. 415, 581
8 P.2d 442 (1978). The State, however, alleged and argued that the robbery was intentional and the
9 murder was deliberate and premeditated. There was no evidence adduced at trial to show that the
10 murder of and/or danger to Carl Dixon became more of a risk after the alleged kidnaping. In fact, at
11 worst the record supports a finding that the murder was completely contemporaneous to any detainment,
12 enticement or decoy into the bathroom. As such, the kidnaping with use of a deadly weapon conviction
13 must be set aside. *Id.*

14 Finally, while the jury was instructed that "when associated with a charge of robbery or murder,
15 kidnaping does not occur if the movement is incidental to the robbery and does not increase the risk of
16 harm over and above that necessarily present in the commission of such offense." (5 ROA 898). This
17 instruction clearly misstates the law in that the jury could only consider conduct incidental to the
18 "robbery" and not the murder with which the Appellant was also charged. Because of this improper
19 instruction, the conviction for kidnaping must also be set aside.

20 B. Robbery With Use of a Deadly Weapon

21 Nevada Revised Statutes 200.380 defines Robbery, in pertinent part, as:

22 "The unlawful taking of personal property from the person of another, or in his presence, against
23 his will, by means of force or violence or fear of injury, immediate or future, to his person or
24 property."

25 At trial, there were two witnesses which established that any taking was "unlawful": Vince Oddo
26 and Co-Defendant, Kenya Hall.

27 Vince Oddo testified that when he opened the door of Lone Star Manager's office that he
28 recognized Appellant as holding a gun. (4 ROA 581-82). Oddo, however, did not recall at time of trial
any statement by the Appellant that would indicate that there was an attempt at robbery. (4 ROA 582).

1 Further, only after a leading question by the State as to a prior statement was there an ambiguous
2 statement that Appellant did in fact say something which "had to do with the safe and money." (4 ROA
3 582). This is not, however, the same as Appellant unlawfully demanding or taking money.

4 The following colloquy between the State and Oddo explains the next sequence of events:

5 "Q: Okay. Did the Defendant remain there in the office with the gun?

6 A: No.

7 Q: Did you notice a second individual?

8 A: Yes, sir." (4 ROA 584).

9 Further, Oddo did not hear any conversation, whatsoever, between these two individuals,
10 therefore, he provides no evidence as to any consort or agreement. Finally, Oddo testified that he gave
11 the money to the second individual. (4 ROA 586-587).

12 Co-Defendant, Hall, did not testify at trial, but instead his preliminary hearing statements were
13 introduced. (See argument, *supra*). The State was permitted to introduce Appellant's testimony from that
14 prior proceeding. At trial the jury was informed that Hall earlier stated that Appellant had not said
15 anything to him about there was going to be a robbery. (4 ROA 817). While Hall testified that Appellant
16 had a gun out and told the manager to "open the safe," Hall admitted that he took the gun from
17 Appellant. (4 ROA 820).

18 Apart from a myriad of self-serving statements which imply the guilt of Appellant, Hall admits
19 that he was the one who actually took the money. (4 ROA 821).

20 As is proper analysis under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476
21 (1967), a defendant's confrontation rights are violated when the state introduces a non-testifying
22 co-defendant's confession or statement incriminating the defendant. *Bruton* at 137, 88 S.Ct. at 1628.
23 Thus, there is a compounded error impinging on Appellant's constitutional right to confrontation in the
24 case, *sub judice*, where Hall was not cross-examined in front of the jury. Nonetheless, once the
25 incriminating statements against Appellant are properly stricken, what remains is insufficient to support
26 the conviction of Appellant for Robbery. At best, the jury could believe that Appellant brandished a
27 weapon and made an ambiguous statement about the safe, but there was no evidence that Appellant
28 was responsible for an "unlawful taking." There were no communications between Appellant and Oddo

1 that indicate a taking, and Appellant did not even remain in the vicinity when the actual "taking" was
2 completed. To be complete, a person accused of robbery must have secured complete control of the
3 property taken. *See, State v. Fouquette*, 67 Nev. 505, 221 P.2d 404 (1950); *Walker v. Sheriff, Clark*
4 *County*, 93 Nev. 298, 565 P.2d 326 (1977).

5 Further, Hall admits that at the time of entry into the Lone Star there was no "plan" of robbery.
6 (4 ROA 817).

7 While the evidence supports a finding that Hall committed the robbery, the same cannot be said
8 for Appellant. The conviction for robbery must be set aside.

9 C. Burglary While In Possession of a Firearm

10 Nevada Revised Statutes 205.060, defines the crime of burglary, in relevant part, as:

11 "A person, who by day or night, enters any...shop, warehouse, store...with the intent to commit
12 grand or petit larceny, assault or battery on any person or any felony, is guilty of burglary."

13 In the charging information, the State proceeded on a theory that the Appellant entered the Lone
14 Star with intent to "commit larceny and/or robbery and/or murder and or some other felony." (1 ROA
15 63). The elements of an offense charged must, however, be set forth in the information with
16 particularity. *Graham v. State*, 86 Nev. 290, 467 P.2d 1016 (1970) *citing* NRS 465.080(2). Further,
17 the State must give the defendant adequate specificity to prepare his defense. *See, Barren v. State*, 99
18 Nev. 661, 669 P.2d 725 (1983). As such, the reference in the information to "some other felony" must
19 be stricken and the State is left with a theory of larceny, robbery and/or murder.

20 Under any of these theories, however, there was insufficient evidence adduced at trial to support
21 a conviction for burglary.

22 The Appellant indicated in his recorded statement that he entered the Lone Star with an intent
23 to get his job back. The fact that he had allegedly had a gun on his person is irrelevant; in and of itself,
24 this fact does not constitute a larceny, robbery and/or murder.

25 All testimony adduced at trial corroborates Appellant's claim that he entered into the Lone Star
26 with the sole intention of regaining his former employment. This is what he told co-defendant Hall. (4
27 ROA 809). Lone Star employee Steve Hemmes also testified that this was Appellant's purpose when
28 he encountered Appellant at the door to the Lone Star:

1 "Q: And what did you say to the defendant, what did he say to you?"

2 A: I just asked him what he's been up to, what he is doing back at the Lone Star. He said
3 he was there trying to get his old job back." (4 ROA 560).

4 There were no other witnesses who testified as to the intent of Appellant upon his entry into the
5 Lone Star. As such, there was insufficient evidence, and the conviction for Burglary must be set aside.

6 D. Murder With Use of A Deadly Weapon

7 Nevada Revised Statute 200.030, defines the crime of first degree, in pertinent part, as murder
8 which is:

9 "(a) Perpetrated by means of poison, lying in wait, torture or child abuse, or by any other kind
10 of willful, deliberate and premeditated killing;

11 (b) Committed in the perpetration or attempted perpetration of sexual assault, kidnaping,
12 arson, robbery, (or) burglary...or

13 (c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to
14 effect the escape of any person from legal custody."

15 In order to support a finding of first degree murder, a jury must have had sufficient evidence at
16 the time of trial. *See, Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981). The record in the present case
17 is devoid of sufficient evidence to support a finding of willful, deliberate and premeditated killing. All
18 three elements being necessary to make a finding of first degree murder.

19 Unlike other cases where evidence was found to be sufficient to support a finding of the *mens*
20 *rea* elements, the present case is lacking in such evidence. No one witnessed the transactions or
21 communications between the Appellant and the victims prior to any contact which resulted in their
22 deaths. No evidence was produced showing that Appellant was even aware that the victims were in the
23 Lone Star when he entered the establishment let alone at any time before he arrived at the Lone Star.

24 At trial the State implied that Appellant willfully, deliberately and premeditatedly committed
25 murder to avoid identification as a robber of the establishment, but the evidence does not support this
26 inference on any count. First, there is no evidence to show that the victims knew that a robbery was
27 occurring in the Lone Star, let alone one involving the Appellant. Second, the Appellant had already
28 presented himself to Lone Star worker Steven Hemmes, so he had been "identified" before he ever
entered the Lone Star. Clearly, if Appellant had desired to avoid identification there would have been

1 an attempt on the life of Steven Hemmes, but there was no evidence of that at trial either. In fact, the
2 opposite is true, Appellant interacted with Hemmes in a way consistent with a person who did not have
3 a plan to commit an illegal act. Finally, there was no other admissible evidence which showed that
4 Appellant's actions were premeditated. Appellant's videotaped statement do not support premeditation,
5 and no other statements adduced at trial could have supported any proposition that the killing of the
6 victims did amount to a statutory first degree killing. As such, the convictions for two counts of first
7 degree murder must be set aside.

8 E. Conspiracy

9 Nevada Revised Statute 199.480 outlines the penalties for conspiracies to commit murder and/or
10 robbery, such as the Appellant was charged in the information. (1 ROA 55). A conspiracy is an
11 agreement between two or more persons for an unlawful purpose. *Doyle v. State* 112 Nev. Adv. Op. 118,
12 921 P.2d 901 (1996) citing *Peterson v. Sheriff*, 95 Nev. 522, 598 P.2d 623 (1979). A person who
13 knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is
14 criminally liable as a conspirator; however, "[m]ere knowledge or approval of, or acquiescence in, the
15 object and purpose of a conspiracy without an agreement to cooperate in achieving such object or
16 purpose does not make one a party to conspiracy." *Id. citing State v. Arredondo*, 155 Ariz. 314, 317, 746
17 P.2d 484, 487 (1987).

18 Ostensibly, the State charged Appellant with unlawfully conspiring with co-defendant Hall to
19 commit murder and robbery. There was, however, no evidence presented at trial which reveals any
20 agreement. Hall testified that at the time of entering into the Lone Star, he had no knowledge that a
21 robbery, or any other crime, was to occur (4 ROA 809). The alleged acquiescence by Hall is legally
22 insignificant to support a finding of a conspiracy. There was no agreement, and any charge to the
23 contrary was superfluous regarding the facts of the case, *sub judice*. As such, there was insufficient
24 evidence to support a conspiracy.

25 F. Use Enhancement

26 Pursuant to Nevada Revised Statute 193.165, Appellant's charges were enhanced with an
27 additional penalty of "use of a deadly weapon." At trial, it was the State's witness that first referred to
28 the murder weapon as a "steak knife." (4 ROA 694). It was further speculated by the State that the knife

1 place of origin of the knife was, in fact, the Lone Star Steak house (6 ROA 1253).

2 In *Hutchins v. State*, 110 Nev. 103, 867 P.2d 1136 (1994) the Nevada Supreme Court held that
3 the test in Nevada as to whether or not an item is a dangerous weapon is whether the item "if used in the
4 ordinary manner contemplated by its design and construction, will or is likely to, cause a life-threatening
5 injury or death." 110 Nev. 103 (1994). A "steak knife" used in a steak house is not an "inherently
6 dangerous weapon." Therefore, the enhanced penalty for use of a deadly weapon cannot be
7 substantiated by the evidence and the penalties must be set aside.

8 9. THE TRIAL COURT ERRED IN ALLOWING CUMULATIVE AND OTHERWISE
9 INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS DURING THE PENALTY PHASE OF
APPELLANT'S TRIAL.

10 Generally, NRS 48.035(2) provides:

11 "Although relevant, evidence may be excluded if its probative value is substantially
12 outweighed by considerations of undue delay, waste of time or needless presentation of
cumulative evidence."

13 This rule is specifically addressed in the context of the penalty phase of a capital case. *Jones v.*
14 *State*, 107 Nev. 632, 817 P.2d 1179 (1991). In *Jones*, the Court held that:

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

18 *Jones* at 636 citing NRS 48.035.

19 In the case, *sub judice*, the State repeatedly and in an overlapping way introduced evidence of
20 what amounted to the entire history of Appellant's contacts with the criminal justice system since the
21 age of 12. This evidence spanned a time frame of approximately 12 years, and continued beyond
22 Appellant's incarceration pending the instant offenses. In sum, the State offered 20 witnesses during the
23 penalty phase of Appellant's trial. (6 ROA 1338 - 1539). Of these 20, only three offered "victim-impact"
24 statements. (6 ROA 1520 -1539). The remaining 17 witnesses related many of the same instances of
25 prior bad acts of the Appellant. Further, there were multiple listing and relisting by the State during
26 closing arguments of these same offenses. (7 ROA 1651-1654); (7 ROA 1658-1660); (7 ROA 1664);
27 (7 ROA 1685-1686); (7 ROA 1689).

28 Officer Charles Hank testified about arresting Appellant for possession of a stolen vehicle in

1 1990. (6 ROA 1358); Officer Alyse Hill with the Division of Family Youth Services testified about
2 Appellant being arrested for a possession of the same stolen vehicle in 1990. (6 ROA 1387). Loletha
3 Jackson testified that Appellant attacked her. (6 ROA 1490); Officer Mike Rodrigues testified that
4 Loletha Jackson told him that Appellant attacked her. (6 ROA 1497). Officer Jeff Carlson testified that
5 in 1984, when the Appellant was twelve-years of age, he got in trouble for battery on a teacher. (6 ROA
6 1339); Parole Officer Michael Compton testified about that same 1984 event. (6 ROA 1504); Officer
7 Michael Holly testified that Appellant was arrested for robbery in 1990. (6 ROA 1359); Parole Officer
8 Michael Compton referenced that same event. (6 ROA 1504). Correctional officer Roger Edwards
9 testified that Appellant allegedly threw urine on a pregnant correctional officer. (6 ROA 1430);
10 Correctional officer Gina Morris was called to testify about the same urine incident. (6 ROA 1453).

11 It would be a gross example of misjustice to say that 17 witness were needed to show that
12 Appellant was of bad character. Scores of conduct in prison were also testified to by these multiple
13 witness. (6 ROA 1368- 1377); (6 ROA 1396-1405); (6 ROA 1415-1434); (6 ROA 1452-1455); (6 ROA
14 1456- 1473); (6 ROA 1275- 1482); (6 ROA 1516-1518). These incidents, most of which were uncharged
15 as criminal acts, ranged from improper, verbal comments to allegedly inciting other prisons, and the
16 aforementioned urine incident. Of particular note, however, is the multitude of witness, many of whom,
17 in their duplicative efforts, were testifying as to events of which they had no personal knowledge over
18 Appellant's hearsay and authenticity objections. (6 ROA 1401); (6 ROA 1422). It is apparent that the
19 State desired to bolster their position that Appellant was deserving of death by placing a parade of law
20 enforcement people with the indicia of authority in front of the jury. Certainly, since the Court allowed
21 unauthenticated, hearsay evidence, the State had the option of limiting the number of witnesses. Instead,
22 and in the unbridled enthusiasm to achieve a conviction of death, the State reached back to Appellant's
23 pre-teen days and hit the jury with a barrage of authority figures who all concurred that Appellant was
24 and will always be a bad person. This was literally -- overkill and it directly contradicts the mandate of
25 the Evidence Code. This type of cumulative and questionably relevant testimony was clearly designed
26 to mislead the jury and beat them into submission to return a sentence of death. In their zeal for death,
27 the State clearly went too far and presented their case in an improper way. As such, the death sentence
28 must be reversed.

10. THE TRIAL COURT ERRED IN ADMITTING CERTAIN HEARSAY TESTIMONY INTO EVIDENCE DURING THE PENALTY PHASE.

While questions of admissibility during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge, there are times when that discretion is tempered. *Richard Allen Walker v. State* (Two Cases) 113 Nev. Adv. Op. 95 (1997), citing *Lane v. State*, 110 Nev. 1156, 1166, 881 P.2d 1358 (1994), cert dismissed, 514 U.S. 1058 (1995); and, cf. *Lord v. State*, 107 Nev. 28, 43-44, 806 P.2d 548 (1991) (admitting a non-testifying co-defendant's confession during the penalty phase of a capital case generally violates the defendant's constitutional right to confrontation).

In the case, *sub judice*, the trial court twice allowed unauthenticated records relating to alleged uncharged bad acts of the Appellant into evidence over objection. (6 ROA 1401); (6 ROA 1422). These records were used in a cumulative way, and ultimately deprived Appellant of his Sixth Amendment due process rights. Even though the testimony at issue might have had some indicia of authentication which allowed the trial court to admit, there were live witnesses who were clearly available and who Appellant would have had a right to cross-examine per the Sixth Amendment to the United States Constitution, Confrontation Clause. Because the "reports" of prior bad conduct were read to the jury from sources without the personal knowledge to be subject to a relevant cross-examination, Appellant's Sixth Amendment right was violated.

Irrespective of the "broad latitude" of hearsay and the like during a penalty portion of a trial, the Sixth Amendment is the basis for the same application found in *Lord*. Similar to *Lord*, this Constitutional violation mandates a vacation of the death sentence.

11. THE STATUTORY SCHEME ADOPTED BY NEVADA FAILS TO PROPERLY LIMIT VICTIM IMPACT STATEMENTS.

At the penalty phase of the trial, the State presented testimony of family members of each of the victims. As to Carl Dixon, his father, Fred Dixon (6 ROA 1529-1536) testified as to the background of and as to the impact of the loss of Carl Dixon and read prepared statements by not only himself, but also Carl Dixon's mother, Phyllis Dixon, who did not testify. As to Matthew Gianakis, his father, Alexander Gianakis (7 ROA 1536-1538) testified as to the impact the loss of his son had on his life.

The U.S. Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 115 L.Ed.2d 720, 111 S.Ct. 2597

1 (1991), has held that the 8th Amendment erects no per se bar to the admission of certain victim impact
2 evidence during the sentencing phase in a capital case. The *Payne* court did not; however, mandate the
3 introduction of victim impact evidence, nor did it suggest that such evidence should be admitted in all
4 capital cases. Justice O'Connor in her concurring opinion clarified "we do not hold today that victim
5 impact evidence must be admitted, or even that it should be admitted." *Id.* at 2612, 115 L.Ed.2d at 739.
6 The *Payne* court simply held that a state may, pursuant to its own statutory scheme, legitimately
7 determine that victim impact evidence is relevant to a capital sentencing proceeding. To that extent that
8 such evidence is not constitutionally prohibited, it is left to the State to determine whether to permit the
9 introduction of victim impact evidence. The court emphasized that:

10 Under our constitutional system the primary responsibility for defining crimes against the state
11 law, fixing punishments for commission of these crimes, and establishing procedures for
12 criminal trials rests with the state. The state laws respecting crimes, punishments, and criminal
13 procedures are of course subject to the overriding provisions of the United States Constitution.
14 Where the state imposes the death penalty for a particular crime, we have held that the Eighth
15 Amendment imposes special limitations upon that process . . . but, as we noted in *California v. Ramos*,
16 463 U.S. 992, 1001, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983), '[b]eyond these limitations
17 . . . the court has deferred to the state's choice of substantive factors relevant to the penalty
18 determination.'

19 Within the Constitutional limitations defined by our cases, the states enjoy the traditional
20 latitude to prescribe the method by which those who commit murder should be
21 punished."

22 *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 103 L.Ed.2d 255, 110 S.Ct. 1078 (1990).
23 'The state remains free, in capital cases, as well as others, to devise new procedures and
24 new remedies to meet its needs. [A] state may legitimately conclude that evidence about
25 the victim and about the impact of the murder on the victim's family is relevant to the
26 jury's decision as to whether or not the death penalty should be imposed. *Id.* at 2607-09,
27 115 L.Ed.2d at 734-36.'

28 Further, the Nevada Supreme Court has found that the *Payne* standard complies with the Nevada
Constitution. See, *Homick v. State*, 108 Nev. 127, 825 P.2d 600 (1992).

The pertinent issue then becomes whether Nevada has established a statutory scheme relating
to the relevance of victim impact testimony. NRS 175.552 (3) states, in pertinent part:

In the hearing, evidence may be presented concerning aggravating and mitigating
circumstances relative to the offense, defendant or victim and on any other matter which
the court deems relevant to the sentence, whether or not the evidence is ordinarily
admissible.

1 It is also important to note NRS 200.033 (k), "circumstances aggravating first degree murder."
 2 The only circumstances by which murder of the first degree may be aggravated are listed under NRS
 3 200.030, et. seq. Nowhere in the twelve categories set forth is there anything relating to victim impact.
 4 NRS 200.035 which sets forth seven circumstances mitigating first degree murder does not apply to
 5 victim impact.

6 It is Appellant's position that the statutory scheme adopted by Nevada fails to properly limit the
 7 matters in which family members may testify to and further, does not properly place limitations on
 8 which family members may testify and because of such, is constitutionally infirm. Accordingly, the
 9 Court allowed an arbitrary presentation of evidence to the jury which prejudiced Appellant. Further, the
 10 admission of a non-testifying family member's "impact statement" compounded the error.

11 12. THE PROSECUTOR COMMITTED MISCONDUCT DURING THE CLOSING ARGUMENT
 12 OF THE PENALTY PHASE OF APPELLANT'S TRIAL BY APPEALING TO THE
 13 PASSIONS AND PREJUDICE OF THE JURORS AND BY DENIGRATING THE PROPER
 14 CONSIDERATION OF MITIGATING FACTORS.

15 In *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985) the Nevada Supreme Court surmised that
 16 prosecutorial remarks at a penalty hearing for first degree murder which sought to promote the
 17 conclusion that a defendant should be put to death because his rehabilitation was improbable, and
 18 because he might kill again while in prison, were highly inappropriate and denied the defendant a fair
 19 penalty hearing. This Court concluded that such comments divert the jury's attention from its proper
 20 purpose, which is a determination of the proper sentence for a defendant based upon his own past
 21 conduct. However, in *Haberstroah v. State*, 105 Nev. 739, 782 P.2d 1343 (1989), the Nevada Supreme
 22 Court distinguished the *Collier* decision opining that a prosecutor may comment on the dangerousness
 23 of a defendant where the defendant's past actions support a reasonable efference that he may kill again.
 24 At a penalty hearing for a defendant convicted of first degree murder, where evidence of the defendant's
 25 past conduct supported a reasonable efference that even incarceration would not deter the defendant from
 26 endangering the lives of others, it was permissible for the prosecutor to argue that the imposition of the
 27 death penalty was the only way to ensure that the defendant would not kill again. Further in *Redmen*
 28 *v. State*, 108 Nev. 227, 235, 828 P.2d 395 (1992), overruled on other grounds in *Alford v. State*, 111
 Nev. 1409, 906 P.2d 714 (1995), the Nevada Supreme Court concluded that under proper circumstances

1 it would "allow prosecutors to argue the future dangerous of a defendant . . . when there is no evidence
2 of violence independent of the murder in question."

3 Nonetheless, there are parameters in which a prosecutor must operate, and at the sentencing
4 phase it is most important that the jury not be influenced by passion, prejudice, or any other arbitrary
5 factor. *Flanagan v. State*, 104 Nev. 105, 107, 754 P.2d 836 (1988) (conviction vacated on other grounds
6 503 U.S. 931, 112 S.Ct. 1464, 117 L.Ed.2d 610 (1992)). Within these boundaries, it additionally proper
7 to evaluate the cumulative impact of that prosecutor's prejudicial remarks. See, *Earl v. State*, 111 Nev.
8 1304, 1311-1312, 904 P.2d 1029 (1995).

9 The following remarks were made by the State during the course of their closing argument:

10 "MR. ROGER: It is terrible when one human being is killed, and killed in the fashion
11 in which this defendant chose to kill. But when you kill two people, you've crossed the
12 line." (7 ROA 1657).

13 "MR. ROGER: And then there are fact-specific, **alleged by the defense**. The murders
14 were committed by a person with an IQ of 79. The murders were committed by a person
15 who had suffered as a child and young adult with learning disabilities. The murders were
16 committed by a person who had bladder incontinent until age 12. I don't mean to belittle
17 these problems. But the fact of the matter is that many people in society come from
18 broken homes, they come from homes where perhaps they have been neglected. They
19 have learning disabilities. **But is that sufficient to mitigate a double murder?**" (7 ROA
20 1661)(emphasis added).

21 "MR. ROGER: By your verdict you will be sending a message to the community." (7
22 ROA 1662).

23 "MR. SCHWARTZ: With regards to mitigating circumstances or mitigating factors that
24 have been alleged by the defense, as you heard about half of those mitigating factors
25 come from our statutes. But the ones that seem to deal with this particular case, like **IQ,**
26 **mercy, bladder control, bladder difficulties,** those were submitted by defense
27 counsel. **They are not statutory mitigating circumstances.**" (7 ROA 1678)(emphasis
28 added).

"MR. SCHWARTZ: His bladder condition, the fact that he may have been teased as a
child, which many of us probably were exposed to growing up, that can serve as **no**
excuse for what he did on April the 15th." (7 ROA 1681)(emphasis added).

"MR. SCHWARTZ: The defendant took the lives of two innocent men in a horrific
manner. Where does he go from there? What does he do for an encore? The shorter the
sentence, the sooner this community will find out." (7 ROA 1690).

"MR. SCHWARTZ: The return of a death sentence is society's way of-- or act of self-
defense. A return of a death verdict is the enforcement of society's right to be free from
murder." (7 ROA 1692).

A careful evaluation of the above-quoted portions of the prosecutors' closing arguments at

1 Appellant's penalty hearing reveals that the comments were nothing more than a calculated attempt to
2 both incite the fears of the jurors as members of society and an improper series of attacks on all of the
3 instructed mitigators which were offered by the Appellant even though they were accepted by the trial
4 court. While any one of these comments is error, taken cumulatively they warrant a vacation of the
5 sentence of death.

6 A. Comments appealing to the passions and/or prejudices of the jurors

7 It is improper for the prosecutor to make emotional appeals to the juror with regard to the
8 decision to seek the death penalty. See, *Jones v. State*, 101 Nev. 573, 707 P.2d 1128 (1985) citing *Mears*
9 *v. State*, 83 Nev. 3 (1967). Further, the Court held in *Flanagan v. State, supra*, that references regarding
10 community standards were improper. 104 Nev. 105 (1988).

11 The above-quoted passages amount to a reference to the juror that releasing Appellant will cause
12 the community to see what he will do for an "encore," contextually meaning something even worse than
13 the double-homicide of which he was convicted. (7 ROA 1690). Further, the State improperly indicates
14 that the juror is charged with the "self-defense" of society in order to inflame their sense of obligation
15 to sentence a person to death lest they fail to protect the community. (7 ROA 1692). Also, the State
16 refers to the "crossing of a line", which makes it appear that there is an objective standard for the
17 imposition of death, and that if a double-homicide occurs, there can be no other consideration of penalty
18 than death. (7 ROA 1657). This also goes denigration of the mitigation instruction discussed, in depth,
19 below.

20 Finally, the State referred to "sending a message to the community." (7 ROA 1662). What the
21 State forgot is that the jury is charged with evaluating this defendant in these circumstances and
22 determining the appropriate sentence. To prompt them to take into consideration what society will think
23 is the exact same error found in *Flanagan*.

24 All these comments are improper, and warrant a reversal of the sentence of death.

25 B. Comments denigrating the proper consideration of mitigating factors

26 A sentencing body may not nullify or neutralize the weight of mitigating evidence by excluding
27 such evidence from its consideration. *Evans v. State*, 112 Nev. Adv. Op. 145, 926 P.2d 265 (1996) citing
28 *Saffle v. Parks*, 494 U.S. 484, 490, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415 (1990). Further, a defendant

1 has the right to offer any relevant mitigating evidence in support of a sentence less than death. *Eddings*
2 *v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982); see also, NRS 200.035(7).
3 While the defendant may have the burden of presenting mitigating evidence during the penalty phase,
4 it does not, however, license a prosecutor to comment in a manner that would not be permitted in the
5 guilt phase of a trial. *Lisle v. State*, 113 Nev. Adv. Op. 75, 941 P.2d 459, 478, Fn. 1 (Nev.
6 1997)(Dissenting opinion). Thus, it was improper for the State to comment on the propriety of
7 mitigating factors offered by the defense. A careful analysis of the above-quoted portions reveals a joint
8 effort by both prosecutors to categorize "real" mitigators as "statutory," and leaving the "fact-specific,
9 alleged by the defense" mitigators as less than worthy of consideration (7 ROA 1661, 1678). The State,
10 in contravention of the law, then proceeded to indicate to the jury that these mitigators are insufficient
11 to excuse the underlying offenses. This type of commentary is both a misstatement of law and an
12 improper method of negating mitigating circumstances which are, by right, proper for consideration by
13 a sentencing body as to the sentence. Placing even the seed of a thought that mitigators are to be
14 evaluated in the context of *excusing* conduct destroys the integrity of the entire capital punishment
15 structure as it exists in Nevada, and is reversible error.

16 Further, the fact that the jury returned a finding of absolutely no mitigators, when many of the
17 mitigators were, as the State pointed out, fact specific to the evidence adduced at trial, proves that the
18 jury succumbed to the State's improper comments. It is one thing for a sentencing body to believe that
19 none of the proven mitigators outweigh any aggravator(s) found, it is entirely different where no
20 mitigators are found despite the evidence.

21 Because the finding and subsequent analysis of aggravating and mitigating circumstances is
22 tantamount to the Nevada capital sentencing scheme, the only conclusion to reach is that the death
23 penalty was imposed against the Appellant in an arbitrary or irrational manner, and a reversal is proper.
24 See, *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991).

25 Individually, any of these factors amount to misconduct by the prosecutor warranting reversal.
26 Further, this argument is only reinforced by the precedent to analyze the prejudice stemming from
27 prosecutorial comments in a cumulative manner. *Earl v. State*, 111 Nev. 1304, 1311-1312, 904 P.2d
28 1029 (1995).

1 13. THE SENTENCE OF DEATH WAS EXCESSIVE CONSIDERING THE EVIDENCE
2 ADDUCED DURING THE TWO PHASES OF APPELLANT'S TRIAL.

3 NRS 177.055 provides, in relevant part, for the review of capital cases for a determination of
4 whether the death sentence is excessive considering both the crime and the defendant. The obligation
5 to review the record to determine excessiveness necessarily and properly includes a comparison of the
6 circumstances of the murder and the defendant in a case, *sub judice*, with the circumstances in other
7 cases in which the court has affirmed the death penalty. *Roger Morris Chambers v. State*, 113 Nev.
8 Adv. Op. 110 (1997).

9 The Nevada Supreme Court noted that:

10 "The United States Supreme Court has observed that 'under contemporary standards of decency,
11 death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree
murderers.'"

12 *Id. citing Haynes v. State*, 103 Nev. 309, 319-320, 739 P.2d 497 (1987) quoting *Woodson v. North*
13 *Carolina*, 428 U.S. 280, 296, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

14 Appellant raises issues on this direct appeal, which cumulatively warrant the vacating of the
15 death sentence imposed as the record. Additionally, when the entire body of Nevada Supreme Court
16 cases where death was affirmed is reviewed, it becomes apparent that only in the most limited
17 circumstances should the sentence stand. Apart from the real Eighth Amendment concerns in a society
18 and the fact that death is even allowed for a narrow class of defendants in a society where whipping is
19 cruel and usual, the case, *sub judice*, is not the "worst of the worst" where death is even permissible.

20 Objective mitigating circumstances were erroneously rejected in the present case, and the
21 aggravating circumstances found cumulatively punished the Appellant for prior offenses. Further, the
22 State engaged in a case of presenting too much evidence during the penalty phase as to the character of
23 the Appellant thus triggering an emotional response in the jury that directed but one response- death.

24 And while true that appellant was found guilty of killing more than one person, this should not
25 have been used as an aggravating circumstance in the present case because the murders happened in a
26 contemporaneous setting. This is not the case where a murder was committed and the defendant had time
27 to reflect, maybe even in prison, and when confronted later with similar circumstances chose to kill
28 again. At worst, this is one murder which involved two victims.

1 In light of other cases where death was affirmed, and other cases where death was not imposed,
2 the facts and circumstances of the Appellant and his trial warrant a conclusion that the sentence of death
3 is excessive. As such, the sentence of death must be set aside.

4 14. THE TRIAL COURT ERRED IN ADMITTING A SET OF JURY INSTRUCTIONS DURING
5 THE GUILT AND PENALTY PHASES WHICH VIOLATED THE DUE PROCESS RIGHTS
6 OF THE APPELLANT.

7 During the Appellant's trial, at least five specific instructions given to the jury misstated the law,
8 and would have been understood by a reasonable juror to allow a finding of guilt and ultimately,
9 imposition of a death sentence in an unconstitutional manner. Appellant further preserved these issues
10 by raising an objection at trial. (6 ROA 1209). Taken individually and as a whole, the set of instruction
11 given at trial are invalid under the Nevada State and U.S. federal constitutions because they violate the
12 Appellant's guarantee to due process, equal protection, trial before an impartial jury and a reliable
13 sentence. The specific defects of individual instructions are discussed below, although it must be noted
14 that the entire set of instructions cumulatively and prejudicially deny Appellant of his constitutional
15 rights.

16 A. The "premeditation and deliberation" instruction,

17 Nevada law provides that a first-degree murder can be established on the theory that the killing
18 was premeditated and deliberated. Nev. Rev. Stat. Sec. 200.030 (1).

19 The jury was given the following instruction on "premeditation and deliberation" (5 ROA 906):

20 Premeditation is a design, a determination to kill, distinctly formed in the mind at any
21 moment before or at the time of the killing.

22 Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous
23 as successive thoughts of the mind. For if the jury believes from the evidence that the act
24 constituting the killing has been preceded by and has been the result of premeditation,
25 no matter how rapidly the premeditation is followed by the act constituting the killing,
26 it is willful, deliberate and premeditated murder.

27 By approving of the concept of "instantaneous" premeditation and deliberation, the giving of this
28 instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first
29 degree murder without any rational basis for distinguishing its verdict from one of second degree
30 murder, and without proof beyond a reasonable doubt of "premeditation and deliberation," which are
31 statutory elements of first degree murder. NRS 200.030(1). The instruction violates the constitutional

1 guarantees to due process and equal protection and results in death sentences that violate the federal
2 constitution's guarantee of a reliable sentence. U.S.C.A. Const. Amend. 14.

3 The vague "premeditation and deliberation" instruction given during Appellant's trial, which
4 does not require any sort of *premeditation* at all, violated the constitutional guarantee of due process of
5 law because it is so bereft of meaning as to the definition of the two elements of the statutory offense
6 of first degree murder as to allow unlimited prosecutorial discretion in charging decisions. This
7 instruction also left the jury without adequate standards by which to assess culpability and made defense
8 against the charges virtually impossible, due to the inability to discern what the state needs to prove to
9 establish the elements of the charged offense. Because the instruction provides a definition of
10 instantaneous premeditation and deliberation that is indistinguishable from the doctrine of express
11 malice aforethought, there is no rational distinction between the offenses of first and second degree
12 murder in Nevada. The absence of such a rational distinction induces an equal protection violation
13 because it prevents even-handed and consistent application of either the first or second-degree murder
14 statutes. By erasing any conceivable, rational distinction between first and second degree murder, the
15 vague instruction also failed to narrow the class of defendants eligible for the death penalty and
16 eliminated a crucial element of the capital punishment scheme.

17 By relieving the State of its burden of proof as to an essential element of the charged offense,
18 the giving of the instruction was *per se* prejudicial, and no showing of specific prejudice is required. In
19 the alternative, the state cannot show, beyond a reasonable doubt, that the unconstitutional instruction
20 of an element of the offense did not affect the verdict, and the instruction had a substantial and injurious
21 effect on the verdict.

22 B. The "felony murder" instruction

23 One of the theories of culpability for first-degree murder relied upon by the State was felony-
24 murder based on the alleged commission of burglary, robbery and kidnapping. In order to establish a
25 felony-murder, the homicide must occur in the course of the commission of the felony and not vice-
26 versa. NRS 200.030; *Payne v. State*, 81 Nev. 503, 406 P.2d 922 (1965). The felony-murder theory is not
27 established if the felonies are incidental to the commission of the homicide. *Id.*

28 The trial court did not adequately instruct the jury on the relationship between the commission

1 of the homicide and the commission of the felony which the prosecution was required to provide beyond
2 a reasonable doubt. A reasonable juror would have understood the court's instructions as allowing a
3 finding of guilt of first-degree murder solely on the ground that a felony had been committed and a
4 murder had been committed, regardless of the non-existence of the required relationship between them.

5 The failure to instruct the jury adequately on an element of first-degree murder is per se
6 prejudicial. In the alternative, the state cannot show, beyond a reasonable doubt, that the failure to
7 instruct the jury adequately on felony murder was harmless, and that failure had a substantial and
8 injurious effect on the verdict.

9 C. The "equal and exact justice" instruction

10 At the guilt phase of the trial, the trial court provided the following instruction to the jury (5
11 ROA 927) (emphasis added):

12 Now you will listen to the arguments of counsel who will endeavor to aid you to reach
13 a proper verdict by refreshing in your minds the evidence and by showing the application
14 thereof to the law; but whatever counsel may say, you will bear in mind that it is your
15 duty to be governed in your deliberation by the evidence as understand it and remember
16 it to be and by the law as given to you in these instructions, with the sole, fixed and
17 steadfast purpose of doing equal and exact justice between the Defendant and the State
18 of Nevada.

19 By informing the jury that it must do "equal and exact justice between the defendant and the
20 State of Nevada," the giving of this instruction created a reasonable likelihood that the jury would not
21 apply the presumption of innocence in favor of Appellant, and would convict and sentence based on a
22 lesser standard of proof than the constitution requires. *See, Phillips v. State*, 86 Nev. 720, 475 P.2d 671
23 (1970).

24 The defect in this instruction is in the final clause: jurors are told to deliberate "with the sole,
25 fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of
26 Nevada." This "equal and exact" language improperly quantifies the proportion of "justice" to be
27 allocated between the defendant and the State. While it would be proper to instruct the jury that it should
28 attempt to do justice between the parties by following the burden of proof instructions, the qualitative
element of justice injected by "equal and exact" language creates a reasonable likelihood that a juror will
ignore the constitutionally mandated imbalance between the burdens placed upon the parties in a
criminal prosecution which requires the state to bear the burden of proof beyond a reasonable doubt and

1 affords the defendant the presumption of innocence, and instead view the parties on "equal" footing, as
2 if this were a civil case. An instruction to do "equal and exact justice" to both parties fundamentally
3 corrupts the sentencing determination and constitutes structural error that is prejudicial *per se*.

4 D. The "Anti-sympathy" instruction.

5 The jury was instructed during Appellant's sentencing hearing that "a verdict may never be
6 influenced by sympathy, prejudice or public opinion. Your judgment should be the product of sincere
7 judgment and sound discretion in accordance with these rules of law." (6 ROA 1307). This is the so-
8 called "anti-sympathy" instruction.

9 By forbidding the sentencer to take sympathy into account, this language in its face precluded
10 the jury from considering evidence concerning Appellant's character and background, and effectively
11 negate the constitutional mandate that all mitigating evidence be considered. *See, California v. Brown*,
12 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987); *Saffle v. Parks*, 494 U.S. 484, 490, 110 S.Ct. 1257-
13 1261, 108 L.Ed.2d 415 (1990). A reasonable likelihood exists that this instruction denied Appellant the
14 individualized sentencing determination that the Constitution requires.

15 Further, the instruction precluded consideration of all sympathy, including any sympathy
16 warranted by the evidence. Because the jury in this case was told not to consider any sympathy, rather
17 than "mere" sympathy, it is reasonably likely that the jury at Appellant's trial understood that when
18 making a moral judgment about his culpability, it was forbidden to take into account any evidence that
19 evoked a sympathetic response. Such evidence would include discussions of Appellant's difficult
20 childhood and incontinence problems which led to his brutal ostracization by his peers (6 ROA 1546)
21 as well as testimony of his low IQ. (7 ROA 1582-1583) Mercy was another mitigating factor listed by
22 the trial court in its penalty instructions not found by the jury.

23 Additionally, these factors were listed as mitigators (6 ROA 1301) but the jury found no
24 mitigators, even when the evidence was subjective such as IQ. The giving of the unconstitutional "anti-
25 sympathy" instruction substantially and injuriously affected the process to such an extent as to render
26 Appellant's sentence fundamentally unfair and unconstitutional. The State cannot show, especially in
27 the context where the jury found each aggravator and no mitigators that this instruction did not affect
28 the sentence.

1 E. The "reasonable doubt" instruction

2 The jury was instructed that :

3 "The Defendant is presumed innocent until the contrary is proved. This presumption places upon
4 the state the burden of proving beyond a reasonable doubt every material element of the crime
charged and that the Defendant is the person who committed the offense.

5 A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as
6 would govern or control a person in the more weighty affairs of life. If the minds of the jurors,
after the entire comparison and consideration and consideration of all the evidence, are in such
7 a condition that they can say they fell an abiding conviction of the truth of the charge, there is
not reasonable doubt. Doubt, to be reasonable must be actual, not mere possibility or speculation.

8 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not
9 guilty."

10 (5 ROA 920).

11 Further, Appellant assigns error to the "reasonable doubt" instruction that was given to the jury
12 in the penalty phase of the trial in Jury Instruction No. 15 (6 ROA 1303).

13 A formulation which essentially equates the standard of reasonable doubt with the standard of
14 proof beyond a reasonable doubt necessarily violates due process by "suggesting a higher degree of
15 doubt than is required for acquittal under the reasonable doubt standard." See, *Cage v. Louisiana*, 498
16 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); cf. *Estelle v. McGuire*, 502 U.S. 62, 72 r.4, 112 S.Ct.
17 475, 116 L.Ed.2d 385 (1991); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991).

18 The language in the "reasonable doubt" instruction given in the case, *sub judice*, imposes an
19 impermissibly high standard for the quantum of doubt required for acquittal. The "govern or control"
20 language especially exceeds the "common sense benchmark" for doubt expounded upon by the United
21 States Supreme Court. See, *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 1250, 127 L.Ed.2d 583
22 (1994).

23 F. The "Unanimous" instruction

24 Additionally, Appellant assigns error to Jury Instruction No. 26 (5 ROA 908).⁴ Appellant

25
26 ⁴ Jury Instruction No. 26 provides:

27 Although your verdict must be unanimous as to the charge, your do not have to agree on the
28 theory of guilt. Therefore, even if you cannot agree on whether the facts establish premeditated
murder, so long as all of you agree that the evidence establishes the Defendant's guilt of murder
in the first degree, your verdict shall be Murder in the First Degree.

1 submits in a capital murder case, as here, the District Court violated Appellant's right to due process of
 2 law in not requiring jury unanimity on each theory of criminality. See, *In re Winship*, 397 U.S. 358, 90
 3 S.Ct. 1968 (1970) cf., *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1995).⁵ Appellant recognizes
 4 that this Court recently ruled otherwise in *Evans v. State*, 113 Nev. Adv. Op. 98 (1997), but would
 5 invite this Court to reconsider the *Evans* decision. Further, it is Appellant's position that the statutory
 6 definition of the crime of first degree murder is unconstitutional under the due process clause. See, NRS
 7 200.010; NRS 200.030. "While the due process clause places no limits on the States capacity to define
 8 different courses of conduct, or states of mind, as merely alternative means of committing a single
 9 offense, thereby permitting a defendant's conviction without jury agreement as to which course of state
 10 actually occurred." *Id.* at p.9. The due process clause requires that a statute not forbid conduct in terms
 11 so vague that people of common intelligence would be relegated to difference guesses about its meaning.
 12 See, *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618 (1939). Accordingly, it is Appellant's
 13 position that the statutory definition of first degree murder is unconstitutional as violative of Appellant's
 14 due process rights.

15 15. THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN ALLOWING THE
 16 JURY TO BE DEATH QUALIFIED

17 A. Culling from the Jury Death Penalty Opponents Resulted in a Jury Which is More Prone to
 18 Convict the Appellant and is Therefore Not Impartial.

19 Nevada's death penalty law provides for a trial bifurcated on the guilt and penalty issue.
 20 Sentencing is, or course, wholly irrelevant to any legitimate concern during guilt determination.
 21 *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1986).

22 In fact, the reason the United States Supreme Court imposed the guilt/penalty bifurcation
 23 requirement was to insulate the jury during the guilt determination phase from irrelevant and prejudicial
 24

25 ⁵ In *U.S. v. Edmonds*, 80 F.3d 810,816 fn. 6 (3rd Cir. 1996) the Court noted:

26 Although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does
 27 not so require in state trials. See, *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d
 28 152 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L.Ed.2d 184 (1972). In *Schad*,
Schad argues that the Sixth, Eighth, and Fourteenth Amendments require a unanimous jury in
 state capital cases. As mentioned, the Court did not reach this question.

1 consideration which arise during the penalty phase. Nevada law has incorporated the letter but not the
2 spirit of this principle. See, NRS 175.552. The failure to separate and insulate the jury results in a
3 violation of the Eighth Amendment's prohibition. *Gregg, supra*.

4 What a potential juror thinks or feels about the death penalty is, from the legal point of view,
5 wholly irrelevant to his qualification to sit during the guilt determination phase of the trial. However,
6 there are numerous psychological and sociological studies indicating a close correlation between an
7 individual's distinctive attitudes about the death penalty and decisional outlook in determining the
8 fundamental issue of guilt or innocence:

9 The uncontradicted evidence presented by the defendant . . . demonstrates that persons
10 opposed to capital punishment have for many years constituted a substantial percentage
11 of our population. Moreover, the narrower class of those whose opposition to the death
12 penalty would prevent their consideration . . . of its imposition has also comprised a
13 substantial minority of the population. The evidence further shows that these persons
14 generally exhibit attitudinal characteristics markedly different from those shared by
15 people who favor the death penalty as an instrument of the criminal law. All of the
16 available data suggest that persons who are strongly opposed to capital punishment tend
17 also to be less authoritarian, more liberal in their political attitudes, less punitive in their
18 legal attitudes, and less likely to endorse 'discrimination against minority groups,
19 restrictions on civil liberties, and violence for achieving social goals' than persons who
20 favor the death penalty.

21 *State v. Avery*, 299 N.C. 126, 143, 144 (1980); 261 S.E. 2d 803, 813-814 (Exum, J.,
22 dissenting, footnotes omitted).

23 In 1968, the *Witherspoon v. Illinois*, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)
24 majority determined that a jury from which all venire-persons with any quantum of conscientious
25 scruples against the death penalty were excluded violated the defendant's right to due process of law.
26 See, *Winrick, Prosecutorial Peremptory Challenge Practice In Capital Cases: An Empirical Study and*
27 *a Constitutional Analysis* (1982), 82 Mich.L.Rev. 1, 40, fn. 118 and accompanying text. The Court
28 specifically considered, but left undecided, petitioner's contention that a death-qualified jury may be
unconstitutionally conviction-prone, citing the paucity of empirical research then available.
Witherspoon, 391 U.S. at 520, fn. 18.

Since that decision, eighteen years of empirical studies have consistently found that death-
qualified juries are more conviction-prone than the raw pool of venire-persons or the population at large.
These studies have been charted and commented upon in *Hovey v. Superior Court of Alameda County*,

1 28 Cal. 3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980). *Hovey, supra*, is the leading State court decision
2 which considers the mandate of *Witherspoon* in light of empirical evidence relative to the conviction-
3 proneness of "death-qualified juries."⁶

4 Expert witnesses testifying for the defense concluded that the empirical evidence, "... indicates
5 that the departure from representativeness created by the process of restricting juries in capital cases to
6 (*Witherspoon*) qualified jurors only may have important negative consequences for defendants in death
7 penalty trials." *Hovey*, 28 Cal.3d at 39, excerpting *Ellsworth et. al., Juror Attitudes and Conviction-*
8 *Proneness: The Relationship Between Attitudes Towards the Death Penalty and Predisposition to*
9 *Convict. (1979, pre pub. draft at p. 7)(hereinafter, the Ellsworth Conviction-Proneness Study)*. One
10 of two expert witnesses called by the State, Dr. Gerald Shure, commented upon the Ellsworth
11 Conviction-Proneness Study: "the evidence presented suggests that in fact a death-qualified juror is
12 likely to be more biased in certain respects" *Hovey*, 28 Cal.3d at 41.

13 The *Ellsworth Conviction-Proneness Study*; however, was eventually dismissed by the *Hovey*
14 court because the study did not contemplate the exclusion of those jurors who would automatically vote
15 for the death penalty in a capital case. This automatic death penalty (i.e., "ADP") group, required by
16 statute to be excluded in *California*, 28 Cal.3d at 63-64, fn. 110, presumably cannot be excluded under
17 the *Witherspoon* rationale. 28 Cal.3d at 63. Since the *Ellsworth Conviction-Proneness Study* took into
18

19 ⁶ A "death-qualified jury" is one where, during voir dire prior to the guilt phase, all jurors with
20 strong conscientious objections to the death penalty are removed for cause. Only jurors who say that
21 they can vote for the death penalty are allowed to sit. The others are excluded under *Witherspoon* (i.e.,
22 *Witherspoon* excludables, or "Wes").

23 A distinction must be made here to avoid confusion. A "*Witherspoon* excludable" juror is a
24 juror who states that he or she could be totally fair and impartial during the guilt phase. The position
25 of the defense is that such jurors should be allowed to sit at the guilt phase of trial - as they do in every
26 other criminal case - and be excluded only if it becomes necessary to move to the penalty stage. It is
27 not the position of the defense that a juror should be allowed to sit who states that their attitudes about
28 the death penalty are such that they could not be fair and impartial during the guilt phase of trial. Such
persons are called "nullifiers" and have always been properly excluded. Nullifiers would not convict;
Witherspoon excludables obviously do convict defendants all the time.

26 They can be impartial fact-finders. Here, as in *Lockart v. McCree*, 476 U.S. 816, 90 L.Ed.2d
27 737, all the defendant asks: "... is the chance to have his guilt or innocence determined by a jury like
28 those that sit in non-capital cases - one whose composition has not been tilted in favor or the State by
the exclusion of a group of prospective jurors uncommonly aware of an accused's constitutional rights
but quite capable of determining his culpability without favor or bias. *Id.* 476 U.S. 816, 90 L.Ed.2d at
155 (Marshall, J., dissenting).

1 consideration the exclusion of *Witherspoon* excludes, but did not also factor in the exclusion of ADPs,
2 the Court would not rely on the conclusions of the Study:

3 Therefore, until further research is done which makes it possible to draw reliable
4 conclusions about the non-neutrality of "California death-qualified" juries in California,
5 this court does not have a sufficient evidentiary basis on which to bottom a constitutional
6 holding under *Witherspoon* and *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55
7 L.Ed.2d 234 (1978) (misdemeanor criminal conviction by five person jury violative of
8 Sixth and Fourteenth Amendments) (emphasis added).

9 *Hovey*, 28 Cal.3d at 68.

10 The "... further research ..." referred to in the *Hovey* opinion has now been conducted. At least
11 one federal court has exhaustively considered this additional research. This evidence was presented in
12 the form of exhibits and expert testimony to the court during an evidentiary hearing on the matter.
13 Based on this evidence, the federal court was compelled to find a constitutional violation in the Arkansas
14 jury selection system. *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983)(hereinafter referred to as
15 *Grigsby, III*).

16 The *Hovey* court was simply continuing the tradition commenced by the U. S. Supreme Court
17 in *Witherspoon* when it noted that future capital defendants might attempt to prove that death-qualified
18 juries were "less than neutral with respect to guilt" (391 U.S. at 518) but required reliable empirical
19 evidence. The habeas corpus petitioners in *Grigsby, III* presented such evidence and proved to the Court
20 that:

21 "... the number of those who would automatically vote for the death penalty in Arkansas
22 and nationwide is negligible when compared to the number of those who would never
23 under any circumstances vote for the death penalty. Therefore to give a defendant the
24 right to challenge and remove ADP's contributes only to the appearance of fairness. In
25 fact, so long as WE's [*Witherspoon* excludable] are excluded from the guilt/innocence
26 phase of the trial, the guilty-proneness of the resulting jury remains, to the great
27 disadvantage of defendants."

28 *Grigsby, III*, 569 F.Supp. at 1308.

It is now an empirically demonstrated fact that culling from the jury all *Witherspoon* excludable
death penalty opponents results in a panel which is prosecution-prone. *H. Zeisel, Some Data on Juror*
Attitudes Toward Capital Punishment (1968); *Goldberg, Towards Expansion of Witherspoon: Capital*
Scruples, Jury Bias, and the Use of Psychological Data to Raise Legal Presumptions (1970),
5 Harv.Civ.Rights--Civ.L.Rev. 53; Bronson, on the Conviction-Proneness and Representativeness of the

1 *Death-Qualified Jury: An Empirical Study of Colorado Venireman* (1970), 42 U.Colo.L.Rev. 1; Jorow,
2 *New Data on the Effect of the "Death Qualified" Jury on the Guilt Determination Process* (1971), 84
3 *Harv.L.Rev.* 567.

4 B. Culling the Panel of Death Penalty Opponents Resulted in a Jury Which is Not Drawn from a
5 Fair Cross-Section of the Community.

6 An accused's constitutional right to have his guilt determined by a jury drawn from a fair and
7 representative cross-section of the community is violated when a group of persons with distinctive
8 attitudes is systematically excluded from the panel. *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct.
9 692, 42 L.Ed.2d 690 (1975). See, also, *Witherspoon*, 391 U.S. at 524 (Douglas, J., dissenting).
10 Persons opposed to the death penalty constitute a distinct and recognizable group in American society.
11 *Witherspoon*, 391 U.S. at 520, fn. 16. The subset of this group who can be excluded from the panel on
12 the basis of *Witherspoon* also constitute a distinct group. *Spinkellink v. Wainwright*, 578 F.2d 582, 597
13 (Fifth Cir. 1978). This group of people exists in the population of potential venire-persons in this
14 community. Death-qualifying the panel results in the systematic exclusion of these persons from the
15 jury ultimately selected. While such exclusion may be justified during the penalty phase of the trial,
16 their exclusion during voir dire, *ipso facto*, results in the under-representation of a distinct group during
17 the guilt determination phase of the trial.

18 It has been held that a *prima facie* violation of the fair cross-section requirement is established
19 when three elements are: (1) The persons excluded from the jury selection process constituted a distinct
20 group in the community. (2) The group under-represented in relation of the number of persons in the
21 community. (3) The under-representation is caused by the systematic exclusion of this group during
22 the jury selection process. See, *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579
23 (1979).

24 Death-qualification of the jury insures that the second and third parts of the *Duren* test are
25 satisfied and a *prima facie* constitutional violation will be present. In addition, it is an empirical fact
26 that death-qualified juries are juries in which women and blacks are disproportionately under-
27 represented. *Grigsby, III*, 569 F.Supp. 1283, 1293; *Hovey*, 28 Cal.3d 54-57.

28 The Court in *Grigsby, III* outlined the consequences of a *prima facie* showing of

1 disproportionality:

2 Once the challenging party establishes a prima facie case under *Duren*, the State must
3 justify the procedure used. As stated in *Duren* the State must show that "a significant
4 state interest . . . [is] manifestly and primarily advanced by those aspects of the jury-
5 selection process . . . that result in the disproportionate exclusion of a distinctive group."
6 439 U.S., at 367-68. And as previously pointed out, once a violation of the fair cross-
7 section requirement has been established, prejudice to the defendant is presumed.
8 (citation omitted)(emphasis added).

9 *Grigsby, III*, 569 F.Supp. 1282.

10 However, the "State's interest" in death-qualifying a guilt phase capital jury must be compelling
11 and the means employed to achieve that interest must be narrowly drawn:

12 The reach of the court's holding in *Taylor* and *Duren* extends to every criminal trial. The
13 State's interests in a capital case undoubtedly places some limitations on a capital
14 defendant's fair cross-section rights. The manner in which any limitations are imposed
15 must be approached from the premise that the capital defendant has a fundamental right
16 to impanel a single set of jurors in a capital case. Since the states do not presently have
17 that right, the courts should accommodate the "State's" legitimate interests in a manner
18 which least restricts the constitutional rights of a capital defendant.

19 This Court should not countenance a constitutional violation when a simple order could have
20 prevented it from occurring. The State should have been required to show a compelling State interest
21 which justified the infringement of Appellant's fair cross-section right during the guilt determination
22 phase of the trial. While the State did not have an interest in a jury that could impose a death penalty,
23 the State should have been required to demonstrate a significant and compelling interest in having
24 exactly the same jurors determine Appellant's guilt.

25 C. Alternative Remedies Were Available to Avoid the Infringement Upon Appellant's
26 Constitutional Rights.

27 The simplest and most obvious order that could have been made in order to prevent error of
28 State, if not Federal, constitutional magnitude would have been to prohibit any and all questions relating
29 to personal feelings about the death penalty.

30 Alternatively, the District Court could have ordered that the guilt and penalty phases be tried by
31 separate juries, with only the penalty jury being death-qualified. This procedure would be the type
32 envisioned by the Supreme Court in *Witherspoon*, wherein it questioned:

33 [W]hether the state's interest in submitting the penalty issue to a jury capable of

1 imposing capital punishment may be vindicated at the expense of the defendant's
2 innocence--given the possibility of accommodating both interests by means of a
bifurcated trial, using one jury to decide guilt and another to fix punishment.

3 *Id.* 391 U.S. 520, fn. 18.

4 The third possible alternative was to empanel a sufficient number of alternates to allow counsel
5 to death-qualify the jury prior to the penalty phase after guilty if that becomes necessary. It is
6 statistically very unlikely that more than six members of the guilt panel would be *Witherspoon*
7 excludable at penalty. Refusing to do the above, constituted error warranting reversal of the appellant's
8 conviction.

9 16. WHETHER THE CUMULATIVE ERROR OF IMPROPER CONDUCT BY THE
10 PROSECUTOR, THE RECEPTION OF INADMISSIBLE EVIDENCE, AND ERRONEOUS
RULINGS OF THE COURT DEPRIVED APPELLANT OF A FAIR TRIAL.

11 "An accused, whether guilty of innocent, is entitled to a fair trial; and it is the duty of the Court
12 and prosecutor to see that he gets is." See, *Garner v. State*, 78 Nev. 366, 373, 374 P.2d 525 (1962).

13 In the case at bar, review of the proceedings demonstrates repeated instances of misconduct and
14 improper rulings. Quantity of error is significant, and accumulation of error prejudiced Appellant's right
15 to a fair trial. See, *Garner* at 375; see also, *State v. Teeter*, 65 Nev. 584, 200 P.2d 657 (1948).

16 The prosecutor presented impermissible evidence of the preliminary hearing transcripts of co-
17 defendant Kenya Hall and then compounded the error by failing to grant him immunity. The prosecutor
18 impermissibly used its peremptory challenge of the only African-American juror. The prosecutor also
19 introduced prejudicial autopsy photos, an enlarged diagram of data already in evidence, elicited
20 testimony from a witness that Appellant had been previously in jail, presented cumulative and otherwise
21 inadmissible evidence of prior bad acts during the penalty phase, and further elicited hearsay testimony
22 during the penalty phase. The prosecutor committed misconduct during the closing argument of the
23 penalty phase of Appellant's trial by improperly appealing to the passions and prejudices of the jurors
24 in by denigrating the proper consideration of mitigating factors.

25 The trial court allowed the foregoing by overruling defense counsel's objections to same.
26 Further, the trial court denied Appellant a fair trial by allowing co-defendant Kenya Hall's preliminary
27 hearing testimony to be read at the time of trial and then not requiring the State to grant him immunity.
28 The trial court also allowed the admission into evidence of prejudicial autopsy photos, an enlarged

1 diagram of data already in evidence, allowed testimony from a witness that Appellant had been
2 previously in jail and failed to declare a mistrial, allowed the presentation cumulative and otherwise
3 inadmissible evidence of prior bad acts during the penalty phase, and further allowed hearsay testimony
4 during the penalty phase. The trial court allowed the prosecutor to commit misconduct during the
5 closing argument of the penalty phase of Appellant's trial by improperly appealing to the passions and
6 prejudices of the jurors in by denigrating the proper consideration of mitigating factors and failed to give
7 a curative instruction. Further, the trial court erred in admitting a set of jury instructions during the guilt
8 and penalty phases which violated the due process rights of the Appellant. The trial court also
9 committed constitutional error in allowing the jury to be death qualified.

10 The misconduct of the prosecutor was so prejudicial and/or the error of the trial court was so
11 extensive, Appellant did not receive a fair trial. See, *McGuire v. State*, 100 Nev. 153, 677 P.2d 1060
12 (1984); see also, *Sipas v. State*, 102 Nev. 119, 716 P.2d 231 (9186). The conviction and sentence of
13 Appellant should be reserved and vacated.

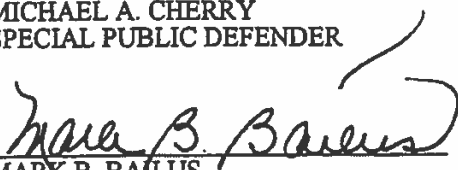
14 V

15 CONCLUSION

16 Based on the foregoing specifications of error, Appellant submits that his convictions should be
17 reversed.

18 DATED this 4th day of February, 1998.

19 MICHAEL A. CHERRY
20 SPECIAL PUBLIC DEFENDER

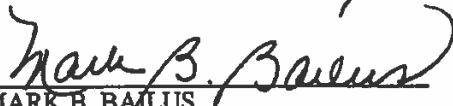
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CERTIFICATE OF COMPLIANCE

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

DATED this 4th day of February, 1998.

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COUNTY OF CLARK) ss:

I, Susan J. Fields, hereby certify that I served the foregoing Appellant's Opening Brief on the 4th day of February, 1998, by placing a true and correct copy thereof in the U.S. mails, postage prepaid, addressed as follows:

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Susan J. Fields
An employee of the Clark County Special
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SUBSCRIBED AND SWORN TO before me
this 4th day of February, 1998.

Patricia S. Flood
NOTARY PUBLIC



PATRICIA S. FLOOD
Notary Public - Nevada
My appt. exp. Sep. 1, 2000
No. 92-3783-1

EXHIBIT 4

EXHIBIT 4

MThomas SPD00357

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 31019

FILED

OCT 07 1998

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BY CHIEF DEPUTY CLERK

APPELLANT'S REPLY BRIEF

OCT 05 1998

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 31019

APPELLANT'S REPLY BRIEF

COMES NOW, Appellant, MARLO THOMAS, (hereinafter "Appellant"), by and through his counsel, MICHAEL A. CHERRY, Special Public Defender, and MARK B. BAILUS, Deputy Special Public Defender, and submits his Reply Brief pursuant to NRAP 29(e).

I

ARGUMENT

1. THE TRIAL COURT ERRED IN DECLARING CO-DEFENDANT, KENYA HALL, UNAVAILABLE FOR THE PURPOSE OF INTRODUCING PRELIMINARY HEARING TRANSCRIPTS AT TRIAL.

On April 22, 1996, Appellant and co-defendant, Kenya Keita Hall (hereinafter "Hall"), were charged with: I) Conspiracy to Commit Murder and/or Robbery; II & III) Murder with Use of a Deadly Weapon (Open Murder); IV) Robbery with Use of a Deadly Weapon; V) Burglary while in Possession of a Firearm; and VI and VII) First Degree Kidnaping with Use of a Deadly Weapon (1 ROA 7).

On June 27, 1996, Hall signed an Agreement to Testify and a Guilty Plea Agreement, wherein he was to plead guilty to Count IV - Robbery with Use of a Deadly Weapon (1 ROA 9-16). In exchange for Hall's cooperation, the State agreed to dismiss the other six (6) counts (1 ROA 10). On July 3, 1996, Hall entered his guilty plea to Robbery with Use of a Deadly Weapon in district court.

On June 11, 1997, Hall filed a Motion to Prevent Being Called to Appear and Testify and to Invoke Fifth Amendment Privilege Against Self-Incrimination (3 ROA 503-514). In response thereto, on June 12, 1997 the State filed a Motion to Use Reported Testimony (3 ROA 515-518).

1 On June 16, 1997, the district court heard Hall's Motion to Invoke his Fifth Amendment Rights
2 at the trial of Appellant. The district court ruled that it would not order Hall to testify. The district
3 court then granted the State's Motion to Use Reported Testimony declaring Hall unavailable pursuant
4 to NRS 171.198 (6)(b) (8 ROA 1759-1764).

5 On September 4, 1997, the district court denied Hall's Motion to Withdraw Guilty Plea. The
6 district court then proceeded to sentence Hall to a maximum of one hundred fifty (150) months in the
7 Nevada State Prison, plus an equal and consecutive maximum of one hundred fifty (150) months in the
8 Nevada State Prison, with a minimum eligibility of sixty (60) months.

9 Initially, Respondent concedes (Resp. Ans. Br. p. 9), that Hall, pursuant to the plea bargain, pled
10 guilty to one (1) count of Robbery With Use of a Deadly Weapon. Close scrutiny of the Guilty Plea
11 Agreement reveals that Hall waived his "constitutional privilege against self-incrimination" (1 ROA
12 13). Notwithstanding, Respondent argues that "Hall's invocation of his Fifth Amendment privilege and
13 refusal to testify against (Appellant) violated the Agreement to Testify with the State and exposed him
14 to criminal culpability on the original charges" (Ans. Br. p. 13). Such is incorrect. The threshold
15 question which must be determined by this Court is whether Hall "validly" invoked the Fifth
16 Amendment privilege against self-incrimination when canvassed by the lower court. As previously
17 discussed, Hall waived his Fifth Amendment privilege against self-incrimination when he pled guilty.
18 Further, on September 4, 1997, the District Court denied Hall's motion to withdraw his guilty plea and
19 sentenced him on the robbery charge to a maximum term of one hundred fifty (150) months with a
20 minimum parole eligibility of sixty (60) months, plus an equal term for use with a deadly weapon. At
21 all relevant times herein, Hall had waived his Fifth Amendment privilege against self-incrimination.
22 Resultingly, on June 13, 1997 and June 16, 1997, when the District Court held a hearing regarding Hall's
23 Motion to Prevent From Being Called to Appear and Testify and to Invoke His Fifth Amendment Rights
24 in Appellant's trial, Hall did not have a valid Fifth Amendment right to invoke.

25 Respondent further argues (Ans. Br. p. 14), "the Agreement (to Testify) with the State was
26 expressly conditioned on Hall's cooperation and became null and void once he refused to testify". In
27 support thereof, Respondent recites to this Court that portion of the Agreement to Testify which states
28 "... if this agreement is declared null and void as a result of violation of the terms and conditions by

1 Kenya Keita Hall . . . the District Attorney is entitled to prosecute Kenya Keita Hall aka Kenya Love
 2 on all charges contained in the criminal complaint . . . " (1 ROA 10). Respondent's argument completely
 3 ignores the preceding sentence in the Agreement to Testify which states: "The parties agree that the trial
 4 court shall determine if KENYA KEITA HALL aka Kenya Love complied with his obligation of
 5 truthfulness for purpose of this agreement" (1 ROA 10). Consequently, it was incumbent upon the State
 6 to take some affirmative action to have the Agreement to Testify declared "null and void" by the trial
 7 court, if the State was of the opinion that Defendant Hall violated said Agreement.

8 In the case *sub judice*, the record is barren of any indication that the State took any affirmative
 9 action to have the above-mentioned Agreement declared "null and void" by the trial court. Absent such,
 10 said Agreement was binding on the parties. See, *United States v. Jureidini*, 846 F.2d 964 (4th Cir. 1988);
 11 see also, *United States v. Baldacchino*, 762 F.2d 170 (1st Cir. 1985)(applying contract principles to plea
 12 bargains).

13 Contrary to Respondent's assertions, Hall was not in jeopardy as to any criminal liability on the
 14 original charges as a result of his failure to testify at Appellant's trial. Rather than seek to have the
 15 above-mentioned agreement rescinded, or even, oppose Hall's motion to prevent him from being called
 16 as a witness at Appellant's trial, the State sought to introduce Hall's preliminary hearing transcripts. By
 17 the State's failure to have the trial court declare the above-mentioned agreement "null and void", and
 18 then proceeding on its chosen course of introducing the preliminary hearing transcripts, Hall was never
 19 exposed to criminal culpability on the original charges. In fact, on September 4, 1998, Hall was
 20 sentenced on the robbery charge pursuant to the plea negotiations. The State should not now be heard
 21 to complain when it chose not to rescind the above-mentioned agreement.

22 In its Answering Brief (p. 15), Respondent argues that at the hearing on June 16, 1997, regarding
 23 the State's motion to use Hall's reported testimony, Appellant's trial counsel argued "that the court did
 24 not have the authority to order Hall to testify, alleging that if Hall was ordered to testify and plead the
 25 Fifth Amendment that the defense would move for a mistrial". Respondent has misinterpreted
 26 Appellant's trial counsel's argument (7 ROA 1762-1763). Specifically, at the hearing on June 16, 1997,
 27 Appellant's trial counsel advised the trial court not to order Hall to testify at this time without immunity
 28 from the State, or, until the trial court ruled upon Hall's motion to withdraw his guilty plea which was

1 set at a later date.

2 Interestingly, in complete contravention of the position it now takes, the State at the hearing on
3 June 13, 1997, advised the trial court that it was necessary to order Hall to testify in order to comply
4 with NRS 171.198 (8 ROA 1770). Then at the hearing on June 16, 1997, the State again advised the
5 trial court that it needed to order Hall to testify (7 ROA 1762). Unlike the position taken on appeal, the
6 prosecution recognized, in the district court, that to comply with NRS 171.198 the trial court had to
7 explicitly order Hall to testify. Notwithstanding, the trial court refused to do so (7 ROA 1763).
8 Accordingly, Appellant's Sixth Amendment rights were clearly violated because of this error.

9 2. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY NOT OFFERING TO
10 GRANT IMMUNITY TO CO-DEFENDANT, KENYA HALL, WHEN HE ASSERTED HE
11 WOULD NOT TESTIFY PURSUANT TO HIS PRIVILEGE AGAINST SELF-
12 INCRIMINATION FOUND IN THE FIFTH AMENDMENT.

13 By way of introduction, Appellant has argued that his due process right to a fair trial was violated
14 by the State's failure, and/or the district court's failure to require the prosecutor, to grant use immunity
15 to its own witness, Kenya Hall.¹

16 Generally, a criminal defendant is not entitled to compel the State to grant immunity to a witness.
17 See, NRS 178.572(1). Contrary to the State's assertions, however, the recognized exception to this rule
18 is where the fact-finding process is intentionally distorted by prosecutorial misconduct, and the
19 defendant is thereby denied a fair trial. See, *U. S. v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

20 A careful review of the record reveals the following colloquy (7 ROA 1762):

21 MR. LaPORTA: Judge, and our position is --

22 THE COURT: Right.

23 MR. LaPORTA: -- that you can't order him to testify, simply because you don't
24 know whether or not you're going to allow him to withdraw his
25 plea. That hearing is set for August. And you don't know if
26 you'll be ordering him to testify against his interests. And, the
27 District Attorney has not granted Mr. Hall any immunity in this

28 ¹ In the case *sub judice*, the prosecutor's failure to grant use of immunity to Hall violated, among
others, Appellant's due process rights as it deprived him of his right to a fair trial. See, *United States*
v. Garner, 663 F.2d 834, 839 (9th Cir. 1981), cert. denied, 456 U.S. 905, 102 S.Ct. 750, 72 L.Ed.2d 161
(1982). It is Appellant's position that the district court had power, on Fifth or Sixth Amendment
grounds, to require a grant of immunity if Appellant's constitutional rights were being violated by the
prosecutor's refusal to provide immunity. See, *U.S. v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

1 case. So --
 2 THE COURT: I can't order him, that's what you're trying to say?
 3 MR. LaPORTA: That's our position, your Honor. You can't order him, because
 4 you don't know what you're going to do in August. And you
 5 could very well be ordering him to testify against his interest,
 6 without immunity from the State.

7 As previously discussed, on June 11, 1997, Hall filed a Motion to Prevent Being Called to
 8 Appear and Testify and To Invoke Fifth Amendment Privilege Against Self-Incrimination (3 ROA 503-
 9 514). Subsequently, Hall filed a pleading with an attached affidavit indicating that he wanted to
 10 withdraw his guilty plea, to exercise his Fifth Amendment right against self-incrimination, and that he
 11 refused to testify at Appellant's trial (3 ROA 503-514). In response thereto, on June 13, 1997 the State
 12 filed a Motion to Use Reported Testimony (3 ROA 515-518). On June 16, 1997, the district court heard
 13 Hall's Motion to Invoke his Fifth Amendment Rights at the trial of Appellant. The district court ruled
 14 that it would not order Hall to testify (7 ROA 1763). The district court then granted the State's Motion
 15 to Use Reported Testimony declaring Hall unavailable pursuant to NRS 171.198 (6)(b) (7 ROA 1759-
 16 1764). Resultingly, Hall's preliminary hearing testimony was introduced at Appellant's trial. However,
 17 it was not until September 4, 1997 that the district court denied Hall's motion to withdraw his guilty
 18 plea. The district court then proceeded to sentence Hall to a maximum of one hundred fifty (150)
 19 months in the Nevada State Prison, plus an equal and consecutive maximum of one hundred fifty (150)
 20 months in the Nevada State Prison, with a minimum eligibility of sixty (60) months.

21 As evident from the foregoing, the State was able to exploit the court system by having its
 22 Motion to Use Reported Testimony heard prior to the hearing on Hall's Motion to Withdraw his Guilty
 23 Plea, which was eventually denied. Thus, at all relevant times, Hall had waived his privilege to self-
 24 incrimination by entering his guilty plea. Clearly, there was a substantial element of unfairness in the
 25 refusal by the State to grant its own witness use immunity and taking advantage of the court system.
 26 Appellant submits that he was denied a fair trial due to prosecutorial misconduct. Accordingly,
 27 Appellant's conviction should be reversed.

28 /////

/////

1 4. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE
2 STATE'S PEREMPTORY CHALLENGE OF THE ONLY AFRICAN-AMERICAN JUROR.
3 In its Answering Brief (p. 21), Respondent argues "[i]n the present case, it is clear that a
4 discriminatory intent was not inherent in the State's explanation for excusing Mr. Evans. Rather, the
5 States excusal of this individual was for reasons completely unrelated to race". Appellant disagrees.
6 One of the supposedly race neutral reasons was the youth of Mr. Evans, *i.e.*, age 22 years old.
7 However, Respondent in its Answering Brief fails to demonstrate how Mr. Evans age disqualified him
8 from being a juror. Appellant submits a persons age, in and of itself, is not a basis for removal from the
9 jury. Mr. Evans age rendered him competent to vote, serve in the armed services, enter into contracts,
10 etc. Further, Mr. Evans appeared to be a very responsible young man, employed at Silver State Disposal
11 Service and resided with his mother, who worked at Nevada Power Company (5 ROA -1155-1156). It
12 is of import to note, due to the fact that he resided with his mother which lessened his financial
13 obligations, Mr. Evans was available and willing to sit on the jury even though his employer had a
14 policy of not paying their employees when on jury duty (7 ROA 1157-1158).
15 Another supposedly race neutral reason was Mr. Evans "cavalier attitude". Initially, it must be
16 observed this alleged cavalier attitude is not contemporaneously reflected in the record. If it was of such
17 concern to Respondent, it would only be logical that Respondent would bring it to the Courts attention
18 at the time it allegedly occurred. However, the record is barren of any indication that Respondent had
19 any concerns regarding Mr. Evans cavalier attitude during the voir dire examination.
20 Finally, Respondent argues (Ans. Br. p. 21) that Mr. Evans was excused because of his
21 "hesitation in responding to whether he could actually vote for the death penalty ". However, close
22 scrutiny of the record rebuts Respondent's argument and reveals that Mr. Evans repeatedly stated that
23 if necessary he could sentence the defendant to death.
24 During voir dire examination, upon questioning by the trial court, Mr. Evans answered as follows
25 (5 ROA 1154-1155):
26 THE COURT: Could you equally consider each of the options, life with
27 the possibility, life without the possibility or parole --
28 PROSPECTIVE JUROR EVANS: Yes.

1 THE COURT: -- and the death penalty?
 2 PROSPECTIVE JUROR EVANS: Yes.
 3 THE COURT: You could equally consider all of those options, hear the
 4 evidence and make a determination, is that correct?
 5 PROSPECTIVE JUROR EVANS: Yes.

6 Later, during the voir dire examination of Mr. Evans, in response to the prosecutors questioning, Mr.
 7 Evans answered as follows (5 ROA 1159-1160):

8 MR. ROGER: You believe in the death penalty?
 9 PROSPECTIVE JUROR EVANS: Yes.
 10 MR. ROGER: Could you vote for the death penalty personally, if the
 11 circumstances were appropriate?
 12 PROSPECTIVE JUROR EVANS: Yeah.
 13 MR. ROGER: There's some hesitation on your part, you understand that
 14 this is very important to both sides --
 15 PROSPECTIVE JUROR EVANS: Yes.
 16 MR. ROGER: -- to know your true feelings about the death penalty. Do
 17 you have some hesitation as to whether or not you could
 18 vote for it?
 19 PROSPECTIVE JUROR EVANS: No.

20 As evident from the foregoing, Mr. Evans stated he could consider all three alternatives (life with
 21 the possibility of parole, life without the possibility of parole, and death), and if appropriate, sentence
 22 the defendant to death. Further, Mr. Evans specifically stated that he had no hesitation in imposing a
 23 sentence of death. Thus, Respondents supposedly race neutral explanations were merely a transparent
 24 effort to exclude Mr. Evans because he was an African-American. Such is impermissible. *See, Batson*
 25 *v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). Accordingly, the District Court erred
 26 in overruling Appellants objection to the States peremptory challenge of Mr. Evans.

27 7. THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER A WITNESS
 28 TESTIFIED AT TRIAL THAT THE APPELLANT HAD PREVIOUSLY BEEN IN JAIL.

At trial, during the States case-in-chief, Emma Nash made reference to Appellant's criminal

1 history in her direct examination, i.e., "Then I turned -- then I asked -- I said to him, 'Marlo, have you
2 did something that would put you back in jail?'" (4 ROA 667). The proper inquiry to be made by this
3 Court for determining whether the above testimony is a reference to Appellant's criminal history is
4 whether the trier of fact could have reasonably inferred from the facts presented that the Appellant had
5 engaged in prior criminal activity. See, *Manning v. Warden*, 99 Nev. 82, 659 P.2d 847 (1983).

6 In *Courtney v. State*, 104 Nev. 267, 268, 756 P.2d 1182 (1988), the defendant was convicted in
7 the district court of cheating at gambling and the defendant appealed. The Nevada Supreme Court held
8 that error which occurred when the jury was given an exhibit indicating that the defendant had been
9 previously charged with cheating at gambling required reversal. In *Courtney*, the Nevada Supreme
10 Court opined:

11 The jury in Courtney's trial was inadvertently exposed to a notation on the back
12 of an exhibit listing Courtney's name, address, and other personal data, and the following
13 "8/12/78, consp. [conspiracy] to cheat at gaming, (2) cheat at gambling, (2)." The
14 exhibit was admitted to show that Courtney had given a false name when he was first
15 detained by casino security personnel. The prosecutor and defense attorney had both
16 examined the exhibit without noticing the notation on the back. The jury discovered the
17 note during its deliberations and asked the court whether it should be considered. The
18 court struck the notation and admonished the jury to disregard it.

19 The note concerned Courtney's prior conviction of cheating at gambling. The
20 court recognized that they jury could consider it as such, and attempted to undo the
21 damage by explaining that the note referred to accusations or charges against Courtney,
22 not convictions.

23 In our view, however, the damage could not be undone. We have previously
24 explained that "[i]t is without question that, absent special conditions or admissibility,
25 reference to past criminal history is reversible error." *Porter v. State*, 94 Nev. 142, 149,
26 576 P.2d 275, 279 (1978) (citing *Walker v. Fogliani*, 83 Nev. 154, 425 P.2d 794 (1967));
27 *Marshall v. United States*, 360 U.S. 310 (1959). The reference need not be explicit, it
28 is enough that "a juror could reasonably infer from the facts presented that the accused
had engaged in prior criminal activity." *Manning v. Warden*, 99 Nev. 82, 86, 659 P.2d
847, 850 (1983) (quoting *Commonwealth v. Allen*, 292 A.2d 373, 375 (Pa. 1972)). NRS
48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to
prove the character of a person in order to show that he acted in conformity therewith."
Even considering the trial court's explanation that the note referred to previous charges,
not convictions, it is impossible to discount an inference by the jurors that Courtney was
a cheat. Such an inference is a violation of due process because it affects the
presumption of innocence. See, *Manning*, 99 Nev. at 87, 659 P.2d at 850.

29 Contrary to Respondent's protestations, a reasonable juror could conclude from the reference at
30 issue, i.e., 'Marlo, have you did something that would put you back in jail?', that Appellant had engaged
31 in prior criminal conduct. In fact, the above-quoted reference is unambiguous, making it clear that

1 Appellant had been in jail previously, leading a reasonable juror to the only rationale conclusion that
2 Appellant was in jail due to prior criminal conduct. Accordingly, the error affected a substantial right
3 warranting a reversal of Appellant's conviction.

4 9. THE TRIAL COURT ERRED IN ALLOWING CUMULATIVE AND OTHERWISE
5 INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS DURING THE PENALTY PHASE OF
6 APPELLANT'S TRIAL.

7 In its Answering Brief (p. 41-42), Respondent argues that "[i]f Defendant would have properly
8 and timely lodged an objection to the testimony he now complains of, the district court could have and
9 indeed, likely would have addressed Defendant's objections. Since this was not done, appellate review
10 should be precluded." Notwithstanding, under the "plain error" doctrine, this Court could still consider
11 Appellant's argument. "Plain error" has been defined as error which either (1) had prejudicial impact
12 on a verdict when viewed in context of trial as a whole, or (2) seriously affects integrity or public
13 reputation of judicial proceedings. See, *Libby v. State*, 109 Nev. 905, 911, 859 P.2d 1050 (1993).
14 Accordingly, Appellant submits that this Court should address the merits of this claim under the "plain
15 error" doctrine.

16 10. THE TRIAL COURT ERRED IN ADMITTING CERTAIN HEARSAY TESTIMONY INTO
17 EVIDENCE DURING THE PENALTY PHASE.

18 Respondent concedes that the correctional officers who testified did not author the reports which
19 are the subject of the controversy herein, but rather, said documents were prepared by a disciplinary
20 committee at the Ely State Prison (Resp. Ans. Br. p 45). Notwithstanding, in its Answering Brief (p.
21 45), Respondent submitted "that the testimony of the correctional officers was properly admitted at trial
22 pursuant to NRS 51.135 and NRS 51.075". Appellant disagrees.

23 Recently, in *Ramirez v. State*, 114 Nev. __ Adv. Op. 62, __ P.2d __ (1998), the defendant argued,
24 *inter alia*, that he was denied his Sixth Amendment right to confront an accusatory witness when the
25 district court allowed the investigating officer to testify as to the ultimate factual conclusions of the
26 examining physicians medical report which was not in evidence, and where the examining physician was
27 not present for cross-examination. In reversing the defendant's convictions, the Nevada Supreme Court
28 surmised:

Because Dr. Finkel was not present to testify and be cross-examined at Ramirez's

1 trial, the only means by which Dr. Finkel's findings could come before the jury was via
2 an established exception to the hearsay rule, which in this case is lacking. While it might
3 appear that Dr. Finkel's findings could be introduced pursuant to NRS 51.115 as a
4 statement made for purposes of medical diagnosis or treatment, we have previously
5 maintained in the child sexual assault context that when examinations at the instigation
6 of law enforcement personnel are investigatory in nature, the results are generally
7 inadmissible for a lack of trustworthiness. *See, Felix v. State*, 109 Nev. 151, 193-94, 849
8 P.2d 220, 249 (1993).

9 Similarly, Dr. Finkel's findings could not be introduced pursuant to the residual
10 exception codified at NRS 51.075 because the United States Supreme Court deemed
11 Idaho's similar residual exception not to be firmly rooted for Confrontation Clause
12 purposes and thus, evidence admitted pursuant to that exception violated a criminal
13 defendant's Confrontation Clause rights where the State failed to rebut the presumption
14 of unreliability and inadmissibility. *See, Idaho v. Wright*, 497 U.S. 805, 817 (1989).

15 What we are left with in this case are patently inadmissible hearsay statements
16 that were used to prove the truth of the matter asserted against a criminal defendant. Our
17 review of the record reveals that the State did not attempt to rebut the constitutional
18 presumption of unreliability and inadmissibility by showing that Dr. Finkel's findings
19 bore particularized guarantees of trustworthiness. Accordingly, our task is to determine
20 whether the introduction of Dr. Finkel's findings, in violation of Ramirez's Sixth
21 Amendment Confrontation Clause rights, requires reversal of his conviction and a new
22 trial. After a thorough examination of the record, we conclude in the affirmative.

23 As evident from the foregoing, NRS 51.075 is not applicable as Appellant's constitutional right
24 to confrontation was violated by the admission of the above-mentioned documents.

25 Further, Respondent relies heavily upon NRS 51.135. Such reliance is misplaced. Close
26 scrutiny of the incident reports at issue reveals that they contain hearsay statements (6 ROA 1404-1405,
27 1426-1430). Irrespective of NRS 51.135, the above-mentioned reports were inadmissible. In *Miranda*
28 *v. State*, 101 Nev. 562, 566, 707 P.2d 1121 (1985), although finding the Appellant was not prejudiced
by the admission of transcribed statements made to the police, the court nevertheless surmised:

At trial and again on appeal, *Miranda* contends that the district court should have
admitted the transcribed statements under the "business records" exception to the hearsay
rule contained in NRS 51.135(1). The business records exception to the hearsay rule
generally permits a party to introduce into evidence reports made during the regularly
conducted course of business. Therefore, the police report itself, which was made when
Fernando gave his statement to police, would have been admissible as substantive
evidence to demonstrate such things as to the date on which the report was made or the
fact that the statement was actually taken. *See, United States v. Smith*, 521 F.2d 957,
964, (F.C. Cir. 1975). Nevertheless, the business records exception does not itself permit
a party to introduce into evidence the actual contents of an out-of-court statement given
to police by a witness to a crime concerning the events of the crime itself. *Id.; see, Frias*
v. Valle, 101 Nev. 219, 698 P.2d 875 (1985). Any Statement given by a witness to a
police officer is itself hearsay and must itself be independently admissible under a
separate and distinct exception to the hearsay rule. *See, United States v. Smith, supra*;
see also, NRS 51.365 (hearsay included within hearsay is not excluded under the hearsay

1 rule if each part of the statement is independently admissible under an exception to the
2 hearsay rule).

3 Assuming *arguendo*, NRS 51.135 allows for the admission of the above-mentioned reports
4 themselves. Notwithstanding, said reports contained hearsay statements which were not independently
5 admissible under a separate and distinct hearsay exception.

6 Accordingly, Appellant submits that NRS 51.075 and NRS 51.135 are not controlling, and thus,
7 the above-mentioned reports were inadmissible hearsay and their admission was a violation of his Sixth
8 Amendment rights.

9 11. THE STATUTORY SCHEME ADOPTED BY NEVADA FAILS TO PROPERLY LIMIT
10 VICTIM IMPACT STATEMENTS.

11 At the penalty phase of the trial, the State presented testimony of family members of each of the
12 victims. As to Carl Dixon, his father, Fred Dixon (6 ROA 1529-1536) testified as to the background
13 of and as to the impact of the loss of Carl Dixon and read prepared statements by not only himself, but
14 also Carl Dixon's mother, Phyllis Dixon, who did not testify. As to Matthew Gianakis, his father,
15 Alexander Gianakis (7 ROA 1536-1538) testified as to the impact the loss of his son had on his life.

16 It is Appellant's position that the statutory scheme adopted by Nevada fails to properly limit the
17 matters in which family members may testify to and further, does not properly place limitations on
18 which family members may testify and because of such, it is constitutionally infirm.² Further, it is
19 fundamentally unfair to allow testifying family members to impart the impact of the loss had on non-
20 testifying family members. This procedure does not allow the Appellant the opportunity to confront
21 and/or cross-examine the non-testifying family members. Consequently, the victim impact testimony
22 regarding non-testifying family members is a violation of Appellant's Sixth Amendment right to
23 confront witnesses. In capital trials, the penalty phase is viewed as an extension of the guilt/innocence
24

25 ² Appellant submits that the Nevada statutory scheme regarding victim impact statements is
26 unconstitutional as written and/or as applied. It is Appellants position that the statutory scheme in
27 Nevada is over broad and/or vague providing no procedural safeguards to evaluate or limit the evidence
28 the State may introduce during the penalty phase. The result is that the jury is left with unguided
discretion in its deliberations enhancing the "risk of a wholly arbitrary and capricious action". *See,*
Gregg v. Georgia, 428 U.S. 153, 189 (1976). Applying the foregoing, Appellant submits his sentence
of death is unconstitutional.

1 phase of the trial providing many of the same protections given to the defendant at the guilt/innocence
 2 phase. The United States Supreme Court has held that due process protections, such as the right to
 3 counsel and/or the right to confront witnesses must be available to the defendant at the penalty phase.
 4 *See, Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

5 Accordingly, the statutory scheme adopted by Nevada allows for an arbitrary presentation of
 6 evidence to the jury by failing to properly limit the matters in which family members may testify to
 7 and/or place limitations on how many or which family members may testify. Such is impermissible.
 8 *See, Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 111 L.Ed.2d 720 (1991).³

9
 10 12. THE PROSECUTOR COMMITTED MISCONDUCT DURING THE CLOSING ARGUMENT
 11 OF THE PENALTY PHASE OF APPELLANT'S TRIAL BY APPEALING TO THE
 12 PASSIONS AND PREJUDICE OF THE JURORS AND BY DENIGRATING THE PROPER
 13 CONSIDERATION OF MITIGATING FACTORS.

14 A prosecutor must not argue to a jury in a way calculated only to appeal to passion or prejudice.
 15 *American Bar Association Standards for Criminal Justice* § 3-5.8(c) (2d ed. 1982). Therefore, inciting
 16 a jury by terming a particular case "a war against crime," and representing to the jury that it is the
 17 protector of public safety, and that the only alternative is "martial law," is reversible prosecutorial
 18 misconduct. *See, Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983).
 19 Similarly, it is reversible misconduct for a prosecutor to suggest to the jury in argument that the
 20 defendant would be a personal threat to the jurors or the jurors' families, witnesses, or others if acquitted
 21 at trial. *See, Campbell v. Kincheloe*, 829 F.2d 1453, 1457-60 (9th Cir. 1987); *see also, United States*
 22 *v. McRae*, 593 F.2d 700, 706 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979); *Jones v. State*, 113 Nev. 454,
 23 937 P.2d 55 (1997). *See, e.g., United States v. Monaghan*, 741 F.2d 1434, 1441-43 (D.C. Cir. 1984);
 24 *see also, United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir.) *cert. denied*, 461 U.S. 928 (1983).
 25 Further, "[r]eferences to the jury acting as the conscience of the community and as having to be angry
 26 unto death with a defendant to qualify as a moral community have been identified as improper

27
 28 ³ It should be noted, the United States Supreme Court, in *Payne*, did not preclude the possibility
 of an Eighth Amendment violation, they simply held that the Eighth Amendment created no *per se* bar
 to the admission of the evidence. It is Appellant's position that his Eighth Amendment rights have been
 violated in that the victim impact evidence permitted under Nevada's statutory scheme created a
 constitutionally unacceptable risk that the jury may have imposed a death penalty in an arbitrary and
 capricious manner. *See, Payne, supra*, at 803.

1 arguments amounting to prosecutorial misconduct." *See, Williams v. State*, 113 Nev. 1008, 945 P.2d 438
2 (1997) (citing *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985), *cert. denied*, 486 U.S. 1036, 108
3 S.Ct. 2025, 100 L.Ed.2d 611 (1988); *see also, Haberstroh v. State*, 105 Nev. 739, 782 P.2d 1343
4 (1989)(prosecutor committed misconduct by referring to the jury as "the conscience of the community");
5 *Flanagan v. State*, 104 Nev. 105, 754 P.2d 836 (1988), vacated on other grounds *sub nom., Flanagan*
6 *v. Nevada*, 503 U.S. 931, 112 S.Ct. 1464, 117 L.Ed.2d 610 (1992)(prosecutor's remark, "[i]f we don't
7 punish, then society is going to laugh at us" found to be improper).

8 In the case *sub judice*, the prosecutors argued, *inter alia*, during the course of their closing
9 argument, as follows:

10 MR. ROGER: By your verdict you will be sending a message to the community
11 (7 ROA 1662).

12 MR. SCHWARTZ: The defendant took the lives of two innocent men in a horrific
13 manner. Where does he go from there? What does he do for an
14 encore? The shorter the sentence, the sooner this community will
15 find out (7 ROA 1690).

16 MR. SCHWARTZ: The return of a death sentence is society's way of-- or act of self-
17 defense. A return of a death verdict is the enforcement of
18 society's right to be free from murder (7 ROA 1692).

19 The above-quoted argument amounts to prosecutorial misconduct. It was reversible misconduct
20 for the prosecutor to suggest to the jury in argument that Appellant would be a threat to the community
21 if he was ever released back into society, *i.e., What does he do for an encore? The shorter the sentence,*
22 *the sooner this community will find out* (7 ROA 1690). Further, argument by the prosecutor such as *By*
23 *your verdict you will be sending a message to the community* (7 ROA 1662) and *The return of a death*
24 *sentence is society's way of-- or act of self-defense. A return of a death verdict is the enforcement of*
25 *society's right to be free from murder* (7 ROA 1692) is tantamount to arguing to the jury to act as the
26 "conscience of the community". Such was improper and a reversal is warranted.

27 13. THE SENTENCE OF DEATH WAS DISPROPORTIONATE TO THE EVIDENCE
28 ADDUCED DURING THE TWO PHASES OF APPELLANT'S TRIAL.

In its Answering Brief (p. 61), Respondent argues that "there is absolutely no evidence in the
record that the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor."
Appellant disagrees.

1 In the case *sub judice*, Appellant presented substantial evidence that he was physically abused
2 as a child, was severely intellectually impaired with an extremely low I.Q. and had severe emotional
3 and/or mental disabilities. Notwithstanding, the jury found no mitigating circumstances (7 ROA 1697).

4 At the penalty phase, Dr. Thomas Kinsora testified in mitigation for Appellant. Regarding
5 Appellants childhood, Dr. Kinsora testified as follows (7 ROA 1574-1578):

6 Q. Can you tell us, if you would, some of the factors in his early development that
7 you learned from your interviews and from reviewing that you felt were of importance?

8 A. Yes. Starting from -- if I can start just at -- before childhood, actually. I was
9 informed by his mother that while she was pregnant with Marlo she drank, she said
10 Strawberry Hill wine, or vodka every day until she was extremely intoxicated. And this
11 apparently went on throughout her childhood, or throughout his -- her pregnancy with
12 him.

13 In addition, she reported that she was frequently physically abused by Marlo's
14 father, and punched and kicked in the stomach many times while she was pregnant with
15 Marlo. That started very early on there.

16 His early childhood was apparently not particularly conducive to good -- to being
17 raised as a -- you know, with normal development. He had his father who was
18 incarcerated when he was rather young, he -- his mother apparently did quite a bit of
19 physical whipping him and things like that. His brother was apparently the main person
20 who raised him, because his mother worked quite a bit. And he was apparently -- he, he
21 was described as a strict authoritarian. But Marlo also attributed him to keeping him out
22 of some of the trouble that he might have gotten in, had he not been there.

23 He was, very early on, seemed to be problemated with a lot of -- with a lot of
24 behavior -- behavioral issues. He was brought to Childrens' Behavioral Services, which
25 is one of the state programs. He was later also placed in Miley Achievement Center,
26 which is an achievement center for severely emotionally disturbed kids. He qualified as
27 a severely emotionally disturbed child very early on.

28 He also qualified as a learning disabled very early on. He was way behind in
school. And these factors were apparently not particularly related to just his social
upbringing, they were -- they were things that seemed to have been just part of Marlo's
neurological functioning as he grew up.

He has persistent problems with bladder control. My understanding was that he
was called -- his mother told me that his peers called him "Stinky," because he frequently
smelled of urine when he was going to school. He apparently had this problem until he
was about 12 years old.

His peer relations were very, very poor. He had a hard time getting along with
anyone that was his age. He was frequently feeling -- he was frequently feeling as if he
was picked on, and probably frequently was picked on.

His mother told me that he always seemed to feel that his -- that she loved the
other brothers more than him. And, you know, as he moved into adolescence he began
getting in more and more physical fights. He has a great deal of difficulty with authority,
and was eventually picked up basically by the juvenile court system in his juvenile year.

- 1 Q. The first factor that you mentioned, and apparently gave importance to was that
2 the mother drank heavily during the pregnancy. Can you tell us, Dr. Kinsora, what
3 literature or what you area of expertise -- what's knows about this? What impact does
4 that have?
- 5 A. Well, there is a syndrome called fetal alcohol syndrome, which -- which is --
6 which has distinct physical characteristics when an individual is born that is clearly fetal
7 alcohol, okay. And that includes, for example, a smaller -- a smaller last finger, the lip
8 is created -- is created a little bit differently, and there are epicanthal folds in the eyelids
9 that would not typically appear in most individuals, unless you are from Asian descent.
10 That's normal for an Asian descent individual.
- 11 But Mr. Thomas does not have those characteristics; however, we know from
12 research that there are a lot of effects that alcohol causes, especially extreme levels of
13 alcohol during pregnancy, that may not show up in physical characteristics, but clearly
14 show up in neurocognitive functioning. There are -- there are no present tests that we
15 can give him to say, yes, you are definitely fetal alcohol syndrome, but he definitely
16 shows neurocognitive deficits that are consistent with that.
- 17 Q. Okay. What is neurocognitive deficit, Dr. Kinsora?
- 18 A. Basically those are deficits in cognition or intellect, or reasoning, or memory, or
19 concentration, or learning, that are caused by neurological functioning, the functioning
20 of the brain, the functioning of the way the brain works in order to produce thought. And
21 that's primarily what a neurocognitive functioning is.
- 22 Q. Now, you mentioned that in your information gathering and conversations with
23 the mother, that she told you that she was physically abusive to Marlo when he was a
24 child?
- 25 A. Yes, when he was very young.
- 26 Q. Can you tell us what is known in your field about how this affects children as
27 they go into adolescence and adulthood?
- 28 A. Well, we know that children who grow up in impoverished environments where
there's a lot of physical abuse, we know that these children tend to be more violent than
other children, they tend to have more aggression, more problems with anger
management and things like that. And I think that that -- in Mr. Thomas's case, I think
that that was a partial -- I think that was a partial factor in what happened. But, again,
I think there's multiple factors going on with Marlo that are at play here.
- 22 To further support Dr. Kinsora's findings, Appellant presented the testimony of Ms. Linda Overby, a
23 school psychologist with the Clark County School District. Ms. Overby testified, in pertinent part, as
24 follows (7 ROA 1634-1637):
- 25 Q. During this time period when you were assigned to CBS and Marlo was there,
26 did you have interaction with Marlo's mother?
- 27 A. I don't believe so. I don't recall, if I did.
- 28 Q. Okay. Does the Clark County School District keep records or reports on the
students that are in these special programs or are at Children's Behavioral Services?

- 1 A. Yes, the Clark County School District keeps psychological information, medical
- 2 information on youngsters. Every three years those records are updated, and they are
- 3 kept for a short period of time after the child's 22nd birthday.
- 4 Q. And after a child reaches 22 they're systematically destroyed?
- 5 A. They are. And I'm not just sure what the time limit is on that.
- 6 Q. So in fact if an individual who as a child had been in the system, or Behavioral
- 7 Services, past the age of 22, those records for the most part are not going to be available,
- 8 is that correct?
- 9 A. That's correct.
- 10 Q. Okay. Given the fact that we don't have reports or documentation from this time
- 11 period, can you advise us, advise the jury, what your recall of Marlo Thomas and his
- 12 behavior was during that time period?
- 13 A. That group at CBS, in that classroom, were the district's most severe youngsters
- 14 for behavior and emotional disturbances. As I remember, Marlo did not learn from
- 15 consequences very well. He -- there was a lot of teaching interactions during that time,
- 16 where the teacher would sit down with youngsters, one or two or three, or a group, and
- 17 they would just work out ways of how we would do things differently, what could you
- 18 do next time, and they would work through those things. And a lot of those youngsters
- 19 learned very well from that, and they were able to apply that at a later time; or if they had
- 20 a consequence, they were able to say, I'm not going to do that again because this will
- 21 happen.
- 22 As I remember with Marlo, he didn't really remember those things. He just was
- 23 very impulsive, he just acted, and then he would have to go through the consequences
- 24 all over again; and then the next time it didn't make a difference again.
- 25 Q. So there -- in your recall, there was no learning, just repeated behavior?
- 26 A. Right.
- 27 Q. If you were going to choose an emotional category to describe Marlo or his
- 28 behavior, what would you think that emotion was?
- A. As a category, Marlo fits very poorly in any of the categories that I know about
- for special education. I did not -- and, you know, I didn't see him being emotionally
- disturbed, which would be things like depression, anxiety, psychiatric disorders, and I
- didn't see that.
- We also have youngsters who are conduct-disordered, and now they do not
- qualify for special ed in Clark County. But I didn't see Marlo really being conduct-
- disordered either, because conduct-disordered youngsters pattern their behavior over
- what -- they don't want to get caught, so they don't do certain things; they learn from
- experience, generally speaking.
- With Marlo, it was more of -- I would place him more in a category now that's
- considered a medical diagnosis with the Clark County School District. He would qualify
- more under "other health-impaired," which is hyperactivity, attention deficit disorder,
- impulsivity; just very poor ability to learn.

1 He fits youngsters who are prenatally drug or alcohol involved. At the time that
2 Marlo was growing up we didn't have those kind of categories and attention deficit was
3 not the big buzz that it is now, so I don't recall whether he ever carried a diagnosis like
4 that or if he ever received medication for that, but I suppose not.

5 Q. We now have a category of fetal alcohol syndrome, you're familiar with that?

6 A. Mm-hmm.

7 Q. And you've worked with children who have the behavior patterns. Would it
8 seem reasonable to you to assume that some of the behavior patterns that Marlo had
9 when you look back at it are comparable to those children who have fetal alcohol
10 syndrome or problems as a result of alcohol or controlled substance use by the mother
11 during pregnancy?

12 A. Yes. More so attention deficit. And attention deficit isn't always related to fetal
13 alcohol, but it certainly is a component of fetal alcohol. I would say that the pattern of
14 behavior is very similar.

15 Dr. Kinsora diagnosed Appellant as having (1) attention deficit hyperactivity disorder, (2) reading
16 disorder, i.e., dyslexia, (3) mathematics disorder, (4) learning disorder related to borderline intellectual
17 functioning, (5) anti-social personality disorder ⁴ (7 ROA 1594-1597). Dr. Kinsora opined that
18 Appellant would do much better in a prison setting than in society (7 ROA 1597). Specifically, Dr.
19 Kinsora testified as follows (7 ROA 1597-1598):

20 Q. One of the reasons that you're of that opinion is that there's a reduction in the social
21 interaction where in fact he has problems processing information?

22 A. You mean in the prison system, or?

23 Q. Outside of the prison system.

24 A. Yeah. Well, outside of the prison system there's fewer -- let me think of --
25 there's fewer controls over his behavior and there's -- and there's -- there's fewer people
26 that are impinging on him to behave appropriately. In a prison situation there are the
27 guards, obviously, that are there, and in addition there's also other inmates, there's a lot
28 of peer pressure by the other inmates to fall in line in certain respects; and there's also
forces that pull away from that. But there -- there's -- there's a more immediate response
in a prison system, whereas out in free society you can commit a crime and may never
get caught. It's less likely in a prison system than out in society.

⁴ It is of import to note, Dr. Kinsora testified that individuals with anti-social personality disorders tend to "burn out". Dr. Kinsora explained that what "burn out" essentially means is that the problems which are associated with the anti-social behavior tend to diminish greatly when the person reaches his forties (7 ROA 1596).

1 As evident from the foregoing, Appellant introduced substantial evidence in mitigation. Incredibly, the
 2 jury totally disregarded the mitigation evidence finding no mitigating factors existed in the case *sub*
 3 *judice*⁵. When presented with substantial evidence of mitigation, it defies logic that the jury would not
 4 find a single mitigating circumstance. It is this complete failure on the part of the jury, of not finding
 5 even a single mitigating circumstance, which would lead a reasonable person to conclude that the
 6 imposition of sentence was influenced by passion, prejudice or some other arbitrary factor. Such is
 7 impermissible.

8 At the penalty phase of Appellant's trial, the prosecutors made the following improper comments
 9 regarding the mitigating factors presented by Appellant:

10 "MR ROGER: And then there are fact-specific, alleged by the defense. The murders
 11 were committed by a person with an IQ of 79. The murders were committed by a person

12 ⁵ As to the mitigating factors, the jury was instructed as follows (6 ROA 1301):

13 Murder of the first degree may be mitigated by any of the following circumstances, even though
 14 the mitigating circumstances is not sufficient a defense or reduce the degree of the crime:

- 15 (1) The defendant has no significant history of prior criminal activity.
- 16 (2) The murder was committed while the defendant was under the influence of extreme
 mental or emotional disturbance.
- 17 (3) The victim was a participant in the defendant's criminal conduct or consented to the act.
- 18 (4) The defendant was an accomplice in a murder committed by another person and his
 19 participation in the murder was relatively minor.
- 20 (5) The defendant acted under duress or under the domination of another person.
- 21 (6) The youth of the defendant at the time of the crime.
- 22 (7) The murders were committed by a person with an I.Q. of 79.
- 23 (8) The murders were committed by a person who had suffered as a child and young adult
 learning disabilities.
- 24 (9) The murders were committed by a person who had suffered as a child and young adult
 25 emotional disabilities.
- 26 (10) The murders were committed by a person who was bladder incontinent until age 12.
- 27 (11) Mercy.
- 28 (12) Any other mitigating circumstances.

1 who had suffered as a child and young adult with learning disabilities. The murders were
2 committed by a person who had bladder incontinent until age 12. I don't mean to belittle
3 these problems. But the fact of the matter is that many people in society come from
4 broken homes, they come from homes where perhaps they have been neglected. They
5 have learning disabilities. But is that sufficient to mitigate a double murder?" (7 ROA
6 1661).

7 "MR. SCHWARTZ: With regards to mitigating circumstances or mitigating factors that
8 have been alleged by the defense, as you heard about half of those mitigating factors
9 come from our statutes. But the ones that seem to deal with this particular case, like IQ,
10 mercy, bladder control, bladder difficulties, those were submitted by defense counsel.
11 They are not statutory mitigating circumstances." (7 ROA 1678).

12 "MR. SCHWARTZ: His bladder condition, the fact that he may have been teased as a
13 child, which many of us probably were exposed to growing up, that can serve as no
14 excuse for what he did on April the 15th." (7 ROA 1681).

15 As discussed in the Opening Brief (p. 35-36), it was improper for the prosecution to comment on the
16 propriety of mitigating factors offered by Appellant. Close scrutiny of the above-quoted argument
17 reveals that the prosecutors made a distinction to the jury between "statutory" mitigators and ones which
18 were *fact-specific, alleged by the defense*. The implication being that the "statutory" mitigators have
19 more validity than the "fact-specific" mitigators, and thus, the latter are less worthy of consideration (7
20 ROA 1661, 1678). This type of commentary is both a misstatement of law and an improper method of
21 negating mitigating circumstances which are, by right, proper for consideration by a sentencing body
22 as to the sentence. Placing even the seed of a thought that mitigators are to be evaluated in the context
23 of *excusing* conduct destroys the integrity of the entire capital punishment structure as it exists in
24 Nevada, and is reversible error.

25 Further, the fact that the jury returned a finding of absolutely no mitigators, when many of the
26 mitigators were, as the State pointed out, fact specific to the evidence adduced at trial, proves that the
27 jury succumbed to the State's improper comments. It is one thing for a sentencing body to believe that
28 none of the proven mitigators outweigh any aggravators found, it is entirely different where no
mitigators are found despite the evidence. Because the finding and subsequent analysis of aggravating
and mitigating circumstances is tantamount to the Nevada capital sentencing scheme, the only
conclusion to reach is that the death penalty was imposed against the Appellant in an arbitrary or
irrational manner, and a reversal is proper. See, *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731,
739, 112 L.Ed.2d 812 (1991).

1 Further, in his Opening Brief (p. 41), Appellant argued that at the penalty phase the jury was
 2 improperly instructed, *i.e.*, the "anti-sympathy" instruction. ⁶ The "anti-sympathy" instruction in effect
 3 advised the jury not to take sympathy into account, said instruction precluded the jury from considering
 4 evidence concerning Appellant's character and background, and effectively negated the constitutional
 5 mandate that all mitigating evidence be considered. *See, California v. Brown*, 479 U.S. 538, 107 S.Ct.
 6 837, 93 L.Ed.2d 934 (1987); *Saffle v. Parks*, 494 U.S. 484, 490, 110 S.Ct. 1257-1261, 108 L.Ed.2d 415
 7 (1990).

8 Further, the "anti-sympathy" instruction precluded consideration of all sympathy, including any
 9 sympathy warranted by the evidence. Because the jury in this case was told not to consider any
 10 sympathy, rather than "mere" sympathy, it is reasonably likely that the jury at Appellant's trial
 11 understood that when making a moral judgment about his culpability, it was forbidden to take into
 12 account any evidence that evoked a sympathetic response. Such evidence would include discussions of
 13 Appellant's difficult childhood and incontinence problems which led to his brutal ostracization by his
 14 peers (6 ROA 1546) as well as testimony of his low I.Q. (7 ROA 1582-1583) Mercy was another
 15 mitigating factor listed by the trial court in its penalty instructions not found by the jury. The "anti-
 16 sympathy" instruction is inconsistent with the notion of mercy, *i.e.*, kind and compassionate treatment
 17 or a disposition to be forgiving and kind.

18 Accordingly, for a jury to accomplish its constitutionally mandated purpose, a jury must be
 19 properly instructed as to the relevant law. There should be no quarrel that for a jury determination of
 20 death to withstand constitutional scrutiny, the jury's discretion must be "suitably directed and limited
 21 so as to minimize the risk of wholly arbitrary and capricious action". *See, Godfrey v. Georgia*, 446 U.S.
 22 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). It is Appellant's position that the "anti-
 23 sympathy" instruction was an incorrect statement of the law, and thus, nullified the mitigation evidence
 24 presented by Appellant.

25 Finally, Appellant argued in his Opening Brief (p. 29-30), that the State employed a scorched-
 26

27 ⁶ The jury was instructed during the penalty phase, that "a verdict may never be influenced by
 28 sympathy, prejudice or public opinion. Your judgment should be the product of sincere judgment and
 sound discretion in accordance with these rules of law." (6 ROA 1307). This is the so-called "anti-
 sympathy" instruction.

1 earth approach by presenting cumulative testimony, *i.e.*, seventeen (17) witnesses regarding Appellant's
2 prior history with the criminal justice system, the introduction of unauthenticated documents and other
3 inadmissible evidence, *i.e.*, hearsay.

4 Resultingly, the foregoing influenced the jury to such an extent that a sentence of death was
5 rendered based on "passion, prejudice, or any arbitrary factor," and impermissibly nullified Appellant's
6 mitigation evidence. Appellant submits that the sentence of death was excessive and thus, must be set
7 aside.

8 15. THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN ALLOWING THE
9 JURY TO BE DEATH QUALIFIED.

10 In reviewing the Answering Brief (p. 70), it is apparent that Respondent has misconstrued the
11 purpose for which Appellant cited *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983) to this Court.
12 Contrary to Respondents assertions (p.70), Appellant does not rely upon the "decision" in the *Grigsby*
13 case. Rather, *Grigsby* was cited to this Court solely to bolster the argument that it has been an
14 empirically demonstrated fact that culling from the jury all *Witherspoon* excludable death penalty
15 opponents results in a panel which is prosecution prone. A careful reading of the *Grigsby* case reveals
16 that the empirical studies relied upon by Appellant, in support of his arguments, are extensively
17 referenced and analyzed in *Grigsby*. *Id.* at 1292-1305. Thus, Appellant did not rely upon the "decision",
18 but rather, the empirical studies contained in *Grigsby*.

19 In *McKenna v. State*, 101 Nev. 338, 705 P.2d 614 (1985), *cert. denied*, 106 S. Ct. 868 (1986),
20 this Court held that under *Witherspoon v. Illinois*, 391 U.S. 510, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776
21 (1968) this Court is not required to presume that a "death qualified" jury is biased in favor of the
22 prosecution. The accused has the burden of establishing the non neutrality of the jury. *Id.*, 101 Nev.
23 at 344.

24 In *Williams v. State*, 103 Nev. 227, 737 P.2d 508 (1987), *Williams* contended that the "death
25 qualification" of the jury produced a conviction-prone jury which denied him the right to a fair and
26 impartial trial in violation of the Sixth Amendment. In rejecting *Williams* claim, this Court concluded
27 "no showing has been made that death qualified juries are not impartial. *Williams* offered no evidence,
28 either at the evidentiary hearing or in his briefs, to support his contention". *Id.* at 231.

1 In order to carry his burden as set forth in *McKenna* and *Williams*, Appellant in his Opening
 2 Brief (p. 17-20), cited the *Grigsby* case, and the earlier case of *Hovey v. Superior Court of Alameda*
 3 *County*, 28 Ca.3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980), and made reference to the empirical
 4 studies contained in the above-mentioned cases.⁷ Thus, Appellant's reliance upon *Grigsby* was justified
 5 in light of the limited purpose for which it was cited. *But see, Aesoph v. State*, 102 Nev. 316, 721 P.2d
 6 379 (1986).⁸

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23 ⁷ Appellant recognizes that in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758 (1986), the
 24 United States Supreme Court expressed skepticism regarding the reliability of the studies cited to by the
 25 defendant. *Id.* at 171. Nevertheless, the United States Supreme Court assumed, for purposes of its
 26 opinion, that the studies were true. *Id.* at 173. Notwithstanding, the United States Supreme Court in
 27 *Lockhart* held that the fair cross section requirement does not extend to the petit jury itself, as opposed
 28 to jury panels or venires and further, even if this requirement did extend to petit jurors, "death-
 qualifications" would not violate the requirement.

⁸ It should be noted, in *Aesoph v. State*, *supra.*, citing *Lockhart v. McCree*, 106 S.Ct. 1758
 (1986), the Nevada Supreme Court determined that "death qualification" did not violate the fair cross-
 section requirement.

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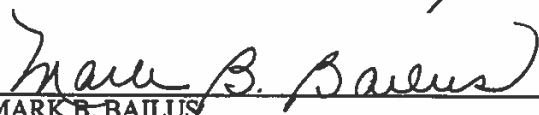
II

CONCLUSION

Appellant submits that the above errors, either individually or cumulatively, denied him a fair trial and mandate a reversal of his convictions. *See, Aesoph v. State, supra*, (cumulative effect on prosecutor's injection of personal beliefs into argument, combined with comments on post-arrest silence, mandated reversal of conviction of first degree murder); *see also, Big Pond v. State*, 101 Nev. 1, 692 P.2d 1288 (1985)(because the evidence was not overwhelming, cumulative effect of errors which were not egregious standing alone warranted reversal of sexual assault conviction). Accordingly, it is Appellant's position that the evidence of guilt in this case was not overwhelming and that in light of the seriousness of the crimes, the above-mentioned errors, individually or cumulatively, warrants reversal of Appellant's convictions and/or sentence.

DATED this 2nd day of October, 1998.

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SPECIAL PUBLIC
DEFENDER

CLARK COUNTY

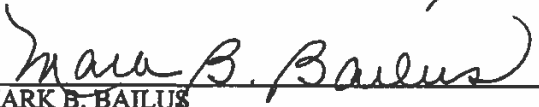
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CERTIFICATE OF COMPLIANCE

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

DATED this 2nd day of October, 1998.

MICHAEL A. CHERRY
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AFFIDAVIT OF SERVICE

STATE OF NEVADA)
COUNTY OF CLARK) ss:

I, Susan J. Fields, hereby certify that I served the foregoing Appellant's Reply Brief on the 2nd day of October, 1998, by placing a true and correct copy thereof in the U.S. mails, postage prepaid, addressed as follows:

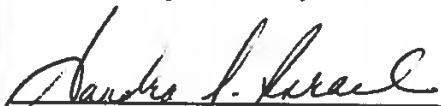
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Nevada Supreme Court
Clerk of the Court
201 South Carson Street - Suite 201
Carson City, Nevada 89701


An Employee of the Clark County Special
Public Defenders Office

SUBSCRIBED and SWORN to before
me this 2nd day of October, 1998.


NOTARY PUBLIC



SPECIAL PUBLIC
DEFENDER

CLARK COUNTY
NEVADA

SPD00385

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MTThomas

SPD00386

Office of the Special Public Defender



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October 2, 1998

Ms. Janette Bloom
Nevada State Supreme Court
201 South Carson Street, Ste. 201
Carson City, Nevada 89701

RE: Marlo Thomas
Case No. 31019

Dear Ms. Bloom:

Enclosed please find an original and four (4) copies of the Appellant's Reply Brief as well as a self-addressed, stamped return envelope. Please file the Reply Brief and return a file-stamped copy to my office in the enclosed envelope provided.

Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Mark B. Bailus".

MARK B. BAILUS
Deputy Special Public Defender

MBB:sjf
Enclosure

SPD00386

AA990

EXHIBIT 5

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLO THOMAS,

No. 31019

Appellant,

FILED

vs.

THE STATE OF NEVADA,

NOV 25 1998

Respondent.

JANETIE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of first degree murder with use of a deadly weapon, one count of robbery with use of a deadly weapon, one count of first degree kidnapping with use of a deadly weapon, one count of conspiracy to commit murder and/or robbery, and one count of burglary while in possession of a firearm, and from two sentences of death. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Affirmed.

Michael A. Cherry, Special Public Defender, Lee-Elizabeth McMahon and Mark B. Bailus, Deputy Special Public Defenders, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, and Peggy Leen, Deputy District Attorney, Clark County, for Respondent.

O P I N I O N

PER CURIAM:

On April 15, 1996, appellant Marlo Thomas entered the Lone Star Steakhouse, his former place of employment, robbed the manager, and killed two employees. Thomas was convicted of two counts of first degree murder with use of a deadly weapon, one count of robbery with use of a deadly weapon, one count of first degree kidnapping with use of a deadly weapon, one count of conspiracy to commit murder and/or

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robbery, and one count of burglary while in possession of a firearm, and received two death sentences for the murders. On direct appeal, Thomas raises many contentions, none of which warrant reversal.

FACTS

In March 1996, Thomas worked at the Lone Star Steakhouse in Las Vegas as a dishwasher until he was laid off from his job. Apparently Thomas had trouble showing up for work because he lived some distance away in Hawthorne with his wife, Angela Love Thomas.

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

The two went to the back door where employees usually enter. Stephen Hemmes, a Lone Star employee, was leaving temporarily because he did not have work-appropriate shoes. Thomas and Hemmes spoke for a few minutes, and Thomas

inquired as to who was acting as manager that morning. Hemmes replied that the manager was Vincent Oddo, and Thomas stated that he did not like Oddo. Thomas further asked when Hemmes would return; Hemmes answered that he would return in approximately twenty minutes, and he left. Thomas then knocked on the back door, and another employee, Matthew Gianakis, opened the door for them to enter.

Thomas and Hall walked through the kitchen toward the manager's office. Thomas knocked on the office door, and Oddo, who was on the phone, let them in. In Thomas' videotaped confession,¹ Thomas stated that he and Oddo discussed Thomas' job, which led to an argument, and that Thomas left the office. Thomas further stated that he had no intent to commit robbery; however, he admitted that he returned to the office with Hall a minute later and pulled out his .32-caliber revolver. Thomas stated that Oddo became frightened and told Thomas and Hall to take whatever money they wanted. Despite the fact that Thomas admitted pointing the gun directly at Oddo, Thomas claimed that Oddo initiated the robbery by giving them money.

Both Hall and Oddo testified that upon Thomas' arrival at the manager's office, Thomas immediately snatched the phone from Oddo's hand, hung it up, and pulled out his .32-caliber revolver. Thomas pointed it directly at Oddo's face and demanded that Oddo open the safe and give them the money. Oddo complied, and Thomas handed the gun to Hall and requested that Hall retrieve the money from Oddo. It is disputed whether Thomas told Hall to shoot Oddo. Although

¹Thomas validly waived his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and admission of this videotape is not in dispute.

frightened and confused, Hall took the gun from Thomas, remained in the office with Oddo, took two or three bank bags of money from Oddo, allowed Oddo to run out of the building, and left to return to the car.

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

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

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

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

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

Thomas, Hall, and Angela returned to Nash and Smith's house. Thomas told both Nash and Smith that if anyone asked, they should state that they had not seen him. Smith noticed that Thomas' clothes and shoes were bloody. The blood on the clothes and shoes was later determined to be consistent with Dixon's blood. Thomas gave Smith the money-filled pillowcase, and she started counting the contents. Thomas told her that "I did it" and that he had to take care of something and get rid of two people. He also stated to Nash that one of the two men got away (referring to Gianakis) and Thomas hoped that he (Gianakis) died. Thomas gave \$1,000.00

to Smith to give to his mother, and he gave the .32-caliber revolver to Nash to give to her son. Thomas then changed his attire and took his bloody clothes and shoes, the knife used in the Lone Star bathroom, and the 9-millimeter gun into the desert beyond the house's backyard. The police recovered all the items except for the 9-millimeter gun, which was never found.

Thomas, Hall, and Angela packed the pillowcase containing the rest of the money into the car trunk and drove back to Hawthorne, where they were arrested. On April 22, 1996, Thomas and Hall were each charged with two counts of murder with use of a deadly weapon, and one count each of robbery with use of a deadly weapon, first degree kidnapping with use of a deadly weapon, conspiracy to commit murder and/or robbery, and burglary while in possession of a firearm. On June 27, 1996, Hall pleaded guilty to robbery with use of a deadly weapon and agreed to testify against Thomas at all necessary proceedings. In exchange, the state dropped the remaining charges and agreed to argue for no more prison time than a two-to-fifteen-year prison term for robbery and a consecutive like term for the weapon enhancement. The agreements stated that if Hall violated the agreements, they would become null and void, and the state would be entitled to prosecute Hall on all the charges.

On June 27, 1996, Hall testified at Thomas' preliminary hearing. Thomas was bound over for trial on all the charges, and the state filed the information on July 2, 1996. The next day, the state filed its notice of intent to seek the death penalty against Thomas.

On February 20, 1997, Hall filed a proper person motion to withdraw his guilty plea. On June 11, 1997, Hall's

attorney filed a motion to prevent Hall from being called to testify against Thomas at trial, invoking Hall's Fifth Amendment right against self-incrimination. Because of Hall's motion and intention not to testify at Thomas' trial, on June 12, 1997, the state filed a motion to use Hall's preliminary hearing testimony at Thomas' trial. On June 13, 1997, without Thomas' or his attorneys' presence, the district court conducted a hearing on Hall's and the state's motions in order to determine whether Hall intended to renege on his agreement to testify. The court, however, specifically made no ruling because neither Thomas nor his attorneys were present.

Thomas' trial began on June 16, 1997. Outside the jury's presence and after arguments by counsel, the district court granted both Hall's motion not to testify and the state's motion to use Hall's preliminary hearing testimony. On the second day of trial, Thomas moved for reconsideration of the court's order. After more arguments, the court denied Thomas' motion. Accordingly, Hall did not testify, and his preliminary hearing testimony was read into the record.

The jury found Thomas guilty on all charges and, after the penalty phase, returned two sentences of death, expressly finding that no mitigating factors existed and finding six aggravating circumstances for each murder: (1) the murder was committed by a person who had been previously convicted of a felony involving the use or threat of violence: a December 6, 1990 judgment of conviction for attempted robbery; (2) the murder was committed by a person who had been previously convicted of a felony involving the use or threat of violence: a July 12, 1996 judgment of conviction for battery causing substantial bodily harm; (3) the murder was committed during the commission of a burglary; (4) the murder

was committed during the commission of a robbery; (5) the murder was committed to avoid or prevent a lawful arrest; and (6) the defendant had, in the immediate proceeding, been convicted of more than one offense of murder. See NRS 200.033(2)(b), (4), (5), (12). Thomas was further sentenced to serve 72 to 180 months plus a consecutive 72-to-180-month term for robbery and the deadly weapon enhancement, two terms of life without the possibility of parole for kidnapping and the deadly weapon enhancement, 48 to 120 months for conspiracy, and 72 to 180 months for burglary. All terms were to run consecutively. The amended judgment of conviction was filed on September 16, 1997, and the notice of appeal was timely filed on September 9, 1997.

DISCUSSION

Guilt Phase Issues

1. The district court did not err by permitting the state to use a peremptory challenge on an African-American male venire person.

During jury selection, four African-American potential jurors were excused from the venire panel for cause because they were not "death-qualified"; one African-American male, Kevin Evans, remained on the panel. When the state used a peremptory challenge to excuse Evans, the district court questioned the state's motive and elicited a defense objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor explained that he wanted to excuse Evans because Evans was young and inexperienced as a juror, he had a cavalier attitude and chewed gum in the courtroom, and he hesitated when asked if he could vote for the death penalty. The prosecutor emphasized that Evans' race played no part in his decision to use the peremptory challenge. The district court overruled the Batson objection and permitted the state's

peremptory challenge of Evans. No African-American sat on the jury, and Thomas is African-American.

On appeal, Thomas argues that the district court abused its discretion by permitting the peremptory challenge because, he contends, the state's reasons were a mere pretext for a racially driven motive. Thomas asserts that the record does not reflect Evans' cavalier attitude, gum chewing, or hesitation in stating that he could vote for the death penalty. Thomas further asserts that Evans' young age should not have been a factor as he is old enough to be called for jury duty.

Batson prohibits the state from using a peremptory challenge to exclude a potential juror based on race. Batson, 476 U.S. at 84. The United States Supreme Court in Purkett v. Elem, 514 U.S. 765, 767 (1995), outlined the steps required for a Batson challenge: first, the opponent of a peremptory challenge must demonstrate a prima facie case of racial discrimination; second, the burden shifts to the proponent of the challenge to express a race-neutral explanation; and third, the trial court determines whether that explanation was a mere pretext and the opponent successfully proved racial discrimination.

Here, the state concedes that a prima facie case was shown by its challenge to the only African-American person remaining on the jury panel and the district court's sua sponte inquiry regarding racial motive. The first question is moot because the state offered an explanation for its challenge and the court ruled on the matter. See Doyle v. State, 112 Nev. 879, 888, 921 P.2d 901, 907 (1996) (holding that once steps two and three occur in a Batson analysis, the issue of whether a prima facie case exists is moot).