

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,

Appellant,

v.

WILLIAM GITTERE, Warden,
AARON D. FORD, Attorney General
for the State of Nevada,

Respondents.

Supreme Court Case Nos. 81278,
81279

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Underlying Case Nos. 81C053867;
A-18-780434-W

JOINT APPENDIX

Appeal from Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

VOLUME 1 of 3

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing appendix with the Clerk of the Court for the Nevada Supreme Court by using the electronic filing system on June 24, 2020.

Participants in the case who are registered with the electronic filing system will be provided with automatic email notice that the appendix has been filed and is available on the electronic service system document repository.

I have also emailed the foregoing document to the following:

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SAMUEL HOWARD,

Petitioner,

vs.

WILLIAM GITTERE, Acting Warden,
and ADAM PAUL LAXALT, Attorney
General for the State of Nevada,

Respondents.

Case No. A-18-780434-W
Dept. No. XVII

Date of Hearing: 10-23-18

Time of Hearing: 8:30am

(Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Petitioner Samuel Howard hereby seeks post-conviction and habeas relief pursuant to
NRS 34.720 *et seq.* Mr. Howard alleges that his death sentence violates the Eighth and

1 Fourteenth Amendments of the United States Constitution and Article 1, Sections 6 and 8 of the
2 Nevada Constitution because there are no longer any valid aggravating circumstances.

3 Every part of this petition is incorporated by reference into every other part. *See* NRC
4 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same
5 pleading or in another pleading or in any motion.”); NRS § 34.780(1) (“The Nevada Rules of
6 Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to
7 [post-conviction] proceedings . . .”).

8 **PROCEDURAL ALLEGATIONS**

9 Mr. Howard is currently in the custody of the State of Nevada at the Ely State Prison in
10 Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death.¹ The
11 conviction and sentence were entered on September 16, 1983, in the Eighth Judicial District
12 Court, Clark County, Nevada, by the Honorable John F. Mendoza, Case No. 81C053867. 2
13 ROA 349.² No execution date is scheduled.

14 Respondent William Gittere is the Acting Warden of Ely State Prison. As such, he has
15 custody of Mr. Howard. Respondent Adam Paul Laxalt is the Nevada Attorney General. The
16 Respondents are sued in their official capacities.

17 On May 21, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of
18 robbery with the use of a deadly weapon, and one count of murder in the first degree with use of
19 a deadly weapon. 1 ROA 1–6. Mr. Howard was arrested in California and extradited to Las
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¹ Mr. Howard is currently at High Desert State Prison in Indian Springs, Nevada, for medical
23 treatment, but will be returned to Ely State Prison when that medical treatment is complete.

24 ² References to the record on appeal (“ROA”) are to the ROA in Nevada Supreme Court case
25 number 23386. Using the citation above as an example, “2” signifies the volume number and
26 “349” the page number. Wherever possible, this petition will cite to documents already filed in
27 state court challenges to Mr. Howard’s conviction and sentence. *See* NRS 34.730(3)(a) (“If a
28 petition challenges the validity of a conviction or sentence, it must be . . . [f]iled with the record
of the original proceeding to which it relates”); EDCR 2.27(e) (“Copies of pleadings or
other documents filed in the pending matter . . . shall not be attached as exhibits or made part of
an appendix.”).

Vegas, Nevada in November of 1981. He entered his plea of not guilty on November 30, 1982.
1 ROA 17.

On May 4, 1983, the jury found Mr. Howard guilty of all charges. 2 ROA 293.
Following the penalty hearing on May 2–4, 1983, the jury returned a sentence of death on the
first-degree murder charge. 2 ROA 294. On September 20, 1983, Mr. Howard was sentenced to
fifteen years with a consecutive fifteen years for two counts of robbery with use of a deadly
weapon. 2 ROA 349.

Mr. Howard testified at his trial.

After he appealed from the judgment of conviction and sentence, the Nevada Supreme
Court affirmed both on December 15, 1986. *See Howard v. State*, 729 P.2d 1341 (Nev. 1986).³
On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr.
Howard’s petition for writ of certiorari on October 5, 1987. *See Howard v. Nevada*, 484 U.S.
872 (1987).

On October 28, 1987, Mr. Howard filed a petition for post-conviction relief in Clark
County District Court.⁴ An evidentiary hearing was held on the petition on August 25 and 26,

³ On direct appeal, Mr. Howard raised the following issues:

1. Whether he received effective assistance of counsel at trial;
2. Whether the trial court erred when it refused to sever Count I from Counts II and III of the indictment;
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements Mr. Howard made to law enforcement;
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Whether the trial court erred when it failed to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy.

The lists in this petition of claims raised in previous pleadings do not necessarily track the enumeration in earlier filings. Rather, the lists are intended to simplify and condense the claims for the convenience of the Court and of opposing counsel.

⁴ In the petition, Mr. Howard raised the following ineffective-assistance-of-counsel claims:

1. Failure to present an insanity defense;
2. Failure to refute the State’s evidence of Mr. Howard’s future dangerousness;

1 1988. *See* 3 ROA 491–568. The district court denied the petition on July 5, 1989, and on
2 November 7, 1990, the Nevada Supreme Court affirmed. *Howard v. State*, 800 P.2d 175 (Nev.
3 1990). While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief
4 in the United States District Court for the District of Nevada in case number CV-N-88-264.⁵ On
5 June 23, 1988, the federal case was dismissed without prejudice. No evidentiary hearing was
6 held in the case.

7 On May 2, 1991, Mr. Howard filed another federal habeas corpus petition in the same
8 court in case number CV-N-91-196.⁶ Mr. Howard’s petition contained claims that had been
9 presented in state court as well as claims that had not, and on October 16, 1991, the district court
10 granted Mr. Howard’s request to stay the case so that he could return to state court for exhaustion
11 purposes. *See* 4 ROA 792–94.

12 In accordance with that order, Mr. Howard filed, on December 16, 1991, an amended
13 petition for post-conviction relief in Clark County District Court.⁷ *See* 4 ROA 786–90. Without
14

-
- 15 3. Failure to object to prosecutorial misconduct;
 - 16 4. Failure to argue the foregoing claims on direct appeal.

17 ⁵ In the petition, Mr. Howard raised the following claims:

- 18 1. Ineffective assistance of counsel;
- 19 2. Failure to sever Count I of the indictment from Counts II and III;
- 20 3. Failure to grant an evidentiary hearing on the voluntariness of statements made by
21 Mr. Howard to law enforcement;
- 22 4. Failure to instruct the jury that the testimony of an accomplice ought to be viewed
23 with distrust;
- 24 5. Failure to instruct the jury to consider Dawana Thomas an accomplice as a matter of
25 law;
- 26 6. Failure to prohibit the prosecution from using three aggravating circumstances to
27 which objections were raised;
- 28 7. Failure to instruct the jury on sympathy and mercy;
8. Mr. Howard was legally insane at the time of the offense.

⁶ In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel at trial;
2. Ineffective assistance of counsel on direct appeal;
3. Cumulative error.

⁷ In his final amended petition, Mr. Howard raised the following issues:

1. Prosecutorial misconduct;

1 holding an evidentiary hearing, the court denied the petition on July 7, 1992. *See* 5 ROA 867–
2 71. On March 19, 1993, the Nevada Supreme Court dismissed Mr. Howard’s appeal. The U.S.
3 Supreme Court denied certiorari on October 4, 1993. *See Howard v. Nevada*, 510 U.S. 840
4 (1993).

5 On January 12, 1994, the federal district court docketed a pro se petition for writ of
6 habeas corpus submitted by Mr. Howard in case number CV-S-93-1209. After various
7 procedural motions were adjudicated, Mr. Howard filed a second amended petition for writ of
8 habeas corpus on January 27, 1997. The court entered an order on September 13, 2002, staying
9 the proceeding so that Mr. Howard could exhaust in state court his federal habeas claims.

10 On December 20, 2002, Mr. Howard filed his third state petition for post-conviction
11 relief in Clark County District Court. The court did not hold an evidentiary hearing and
12 dismissed the petition on procedural grounds on October 23, 2003. On December 1, 2004, the
13 Nevada Supreme Court affirmed the lower court’s dismissal. *See Howard v. State*, No. 42593,
14 131 P.3d 609 (Nev. 2004) (per curiam) (table). The federal district court lifted its stay on
15 February 23, 2005, directing the Clerk to file Mr. Howard’s Third Amended Petition for Writ of
16 Habeas Corpus.

17 On October 25, 2007, Mr. Howard filed in Clark County District Court his fourth state
18 petition for post-conviction relief.⁸ In an order dated November 5, 2010, the state trial court
19

-
- 20 2. Ineffective assistance of counsel at trial;
 - 21 3. Speedy trial violation;
 - 22 4. Cumulative error.

23 ⁸ In his final amended petition, Mr. Howard raised the following issues:

- 24 1. The use of the felony-murder aggravator constituted double counting;
- 25 2. The use of the prior-felony aggravator was unlawful because Mr. Howard was never
26 convicted of the earlier offense;
- 27 3. Trial counsel was ineffective;
- 28 4. The premeditation instruction was erroneous;
5. The first-degree murder statute was vague;
6. Unanimity from the jury was required on whether mitigation existed;
7. Prosecutorial misconduct;
8. Direct-appeal counsel was ineffective;
9. Appellate review was inadequate;
10. The Nevada death penalty is arbitrary and capricious;

1 denied the petition without holding an evidentiary hearing. The Nevada Supreme Court affirmed
2 on July 30, 2014, though in so doing it declared void one of Mr. Howard's two aggravating
3 circumstances. *See Howard v. State*, No. 57469, 2014 WL 3784121 (Nev. July 30, 2014) (per
4 curiam). On April 27, 2015, the U.S. Supreme Court declined to take certiorari review. *See*
5 *Howard v. Nevada*, 135 S. Ct. 1898 (2015).

6 On October 5, 2016, Mr. Howard filed in Clark County District Court his fifth state
7 petition for post-conviction relief. He alleged in that proceeding that his death sentence was
8 unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016), because the Nevada Supreme
9 Court engaged in appellate reweighing after striking an aggravator rather than remanding for the
10 jury to do so, and because the jury at his sentencing did not conduct its weighing of aggravation
11 against mitigation under the reasonable-doubt standard. The state trial court denied the petition
12 without an evidentiary hearing on May 15, 2017. An appeal from that ruling is currently pending
13 at the Nevada Supreme Court in case number 73223.

14 In Mr. Howard's federal habeas case, the district court denied relief on December 28,
15 2009. On August 10, 2015, the Ninth Circuit remanded the case to the district court for further
16 proceedings. Litigation in district court is ongoing and no evidentiary hearing has yet been
17 held.⁹ Aside from this petition and the pending state appeal mentioned earlier, the federal
18 district court proceeding is the only action now pending that targets Mr. Howard's conviction
19 and sentence.

20 The ground for relief raised herein has not been previously presented to this or any other
21 court. Mr. Howard did not present the claim earlier because it was not available until recently, as
22 the claim is based on a May 22, 2018 order from a New York court dismissing the robbery case
23
24
25

26 11. Cumulative error.

27 ⁹ Mr. Howard's operative federal habeas petition raises twenty-five claims. *See* Ex. 1. Because
28 of the volume of claims, Mr. Howard will not list each of them here and will instead refer to the
recitation in the federal petition, which is attached as an exhibit, and incorporate that recitation
by reference. *See id.* at 4–51; NRCP 10(c).

1 that formed the predicate for the sole remaining aggravator. *See* Ex. 2.¹⁰ By that date, Mr.
2 Howard’s prior state-court challenges to his conviction and sentence had already been fully
3 disposed of at the trial level. Consequently, the instant petition is the first opportunity that Mr.
4 Howard has had to raise the claim.

5 NRS 34.810(1)(b)(2) provides that a petition should be dismissed if the claim could have
6 been “[r]aised in a direct appeal or a petition for a writ of habeas corpus or post-conviction
7 relief.” For the reasons just stated, this petition could not have been filed until now, as the
8 factual predicate for it just arose. Section 34.810(1)(b)(2) is, by its own terms, inapplicable.

9 So is NRS 34.810(2), which states, in full:

10 A second or successive petition must be dismissed if the judge or justice
11 determines [1] that it fails to allege new or different grounds for relief and
12 that the prior determination was on the merits or, [2] if new and different
13 grounds are alleged, the judge or justice finds that the failure of the
petitioner to assert those grounds constituted an abuse of the writ.

14 Mr. Howard’s claim does not fall within either prong of the provision. It does “allege
15 new or different grounds for relief” and thus is not covered by the first prong. On the second
16 prong, a claim is an abuse of the writ if it “could . . . have been raised earlier.” *Bejarano v. State*,
17 146 P.3d 265, 269 (Nev. 2006).¹¹ Based as it is on the recent New York order, Mr. Howard’s
18 claim could not have been raised earlier. Given the statute’s plain language, Mr. Howard’s
19 petition is not barred by NRS 34.810(2). If the Court disagrees and believes that the provision is
20 triggered, Mr. Howard can show good cause and prejudice to overcome the bar under the same
21 logic surveyed below with respect to the successive rule codified at NRS 34.726. *See infra* at 8–
22 10; *see also Bejarano*, 146 P.3d at 270 (applying the same good-cause-and-prejudice analysis for
23 defaults under NRS 34.726 and 34.810).

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26 ¹⁰ To the extent it is necessary, Mr. Howard respectfully requests that the Court take judicial
27 notice of the New York order. *See* NRS 74.130; *Mack v. Estate of Mack*, 206 P.3d 98, 106 (Nev.
2009) (en banc).

28 ¹¹ In this petition, unless otherwise noted, all internal quotation marks are and citations are
omitted, all alterations are in original, and all emphasis is added.

1 This petition is being filed more than one year after the Nevada Supreme Court affirmed
2 Mr. Howard's conviction and sentence on direct appeal. The delay was caused by the same
3 factor noted above, i.e., the claim raised here relies on the New York decision, which was issued
4 more than thirty years after the Nevada Supreme Court handed down its opinion in Mr.
5 Howard's direct appeal.

6 Typically, a post-conviction petition must be filed within one year from when the Nevada
7 Supreme Court issues its remittitur in the direct appeal. *See* NRS 34.726(1). However, the
8 statute does not defeat merits review where a petitioner can show good cause and prejudice. *See*
9 *State v. Boston*, 363 P.3d 453, 455 (Nev. 2015); *Wilson v. State*, 267 P.3d 58, 60 (Nev. 2011).
10 Mr. Howard can show both.

11 Under Nevada law, there is good cause for missing the one-year deadline codified in
12 NRS 34.726(1) if the claim is raised "within a reasonable time after it became available."
13 *Wilson*, 267 P.3d at 61; *accord Boston*, 363 P.3d at 455. One year is a "reasonable time" within
14 the meaning of NRS 34.726(1). *See Rippo v. State*, 134 Nev. Adv. Op. 53, 2018 WL 3672264, at
15 *7 (Nev. 2018). The claim at issue here only became available when the Queens County
16 Supreme Court rendered its decision in May 2018. Mr. Howard is acting within a year of that
17 order. He therefore has good cause under NRS 34.726(1).

18 Prejudice is also present. "To demonstrate actual prejudice," Mr. Howard "must show
19 error that worked to his actual and substantial disadvantage." *Boston*, 363 P.3d at 455. Here, in
20 the absence of the invalid New York robbery case, there are now no aggravating factors left. *See*
21 *infra* at 11–12. Aggravators are constitutionally and statutorily required for the imposition of a
22 death sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 341–42 (1992); *Lowenfield v. Phelps*, 484
23 U.S. 231, 244 (1988); NRS 200.033. Consequently, once the New York aggravator is removed
24 from the equation, there is nothing to support the death penalty. As a result, Mr. Howard was
25 actually prejudiced.

26 If the Court considers prejudice in more detail, the result remains the same. The
27 aggravation in this case was not particularly strong. Mr. Howard was convicted of murdering
28 one person, an adult male, without subjecting him to any pain and without subjecting the victim

1 to any sexual abuse. At the penalty phase, the prosecution presented only two witnesses, both of
2 whom described a single armed robbery that did not result in any death or physical injury. *See*
3 15 ROA 2491–2518. The death sentence rested on just two aggravators, one for the prior
4 robbery and one because the murder also involved a robbery. Against that limited aggravation
5 were balanced several significant categories of mitigation, including that Mr. Howard’s father
6 murdered his mother when he was a child, that Mr. Howard performed combat duty in Vietnam,
7 and that he had been treated for mental illness. *See* 15 ROA 2538–56.

8 In overview, this was plainly a situation in which a life sentence was possible. *See*
9 *Canape v. State*, No. 62843, 2016 WL 2957130, at *3 (Nev. May 19, 2016) (unpublished
10 disposition) (finding prejudice on a claim of ineffective assistance at a capital penalty phase in
11 part because “the murder, while reprehensible, does not qualify as ‘the worst of the worst’”).
12 Indeed, at least one juror experienced great difficulty with the prospect of a death sentence. *See*
13 15 ROA 2463, 2472, 2473 (reflecting the fact that a juror came to the court, “almost in tears,”
14 because she was “having a hard time dealing with the sentencing” and “a hard time being the one
15 to push the button”). That juror’s statements provide proof that the weighing determination
16 could easily have come out differently. Without the prior-felony aggravator, it would have.

17 That is especially true because the prosecution placed heavy reliance on the aggravator at
18 sentencing. *See Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (vacating a death sentence
19 under similar circumstances and finding the improper use of a prior conviction prejudicial where
20 the “prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of
21 balancing aggravating and mitigating circumstances”). Like in *Johnson*, the prosecution
22 emphasized the prior conviction at sentencing. As noted, the *only* testimony the State presented
23 at the penalty phase went to that conviction. *See* 15 ROA 2491–2519. Furthermore, the
24 prosecution repeatedly and at length referred to the robbery case in its argument to the jury at
25 sentencing. *See* 15 ROA 2490, 2599–2601, 2619, 2622, 2623, 2627. Multiple times, the
26 prosecution also highlighted for the jury the most aggravating features of the robbery charges.
27 *See* 15 ROA 2600 (noting that the robbery was “a tremendous trauma” to the victim and that she
28 continued to “have nightmares about it”); 15 ROA 2600 (“Can you imagine the impact Samuel

Howard has had on the life of a decent human being, Dorothy Weisband?”); 15 ROA 2601 (quoting Mr. Howard as calling the victim a “white bitch”); 15 ROA 2601 (“And perhaps one of the ultimate indignities to a woman, he told her at gunpoint to take off her clothes.”). Given how central the New York case was to the State’s theory at sentencing, its use was plainly prejudicial. *See Haberstroh*, 69 P.3d 676, 682–84 (Nev. 2003).

If the preceding arguments are rejected, Mr. Howard can overcome any potential procedural bar because a ruling to the contrary would generate a fundamental miscarriage of justice. *See Mazzan v. Whitley*, 921 P.2d 920, 922 (Nev. 1996) (acknowledging the availability of a fundamental-miscarriage-of-justice exception to procedural defaults). “A fundamental miscarriage of justice requires a colorable showing that the petitioner is actually innocent of the crime or is ineligible for the death penalty.” *Lisle v. State*, 351 P.3d 725, 730 (Nev. 2015). Under that test, an inmate is not eligible for the death penalty if there are no lawful aggravating circumstances. *See id.* at 730–34. The New York order on which this petition is premised eliminates the final aggravator from Mr. Howard’s case. *See infra* at 11–12. Accordingly, he is ineligible for the death penalty and any otherwise applicable procedural bar is excused under the miscarriage-of-justice doctrine.

In sum, there are no procedural defaults to prevent the Court from reaching the compelling claim advanced in this petition.¹²

At trial, Mr. Howard was represented by Marcus Cooper and George Franzen. In his direct appeal, Mr. Howard was primarily represented by Lizzie R. Hatcher. Ms. Hatcher and John J. Graves both signed a motion to recall the remittitur with the Nevada Supreme Court in

¹² The State has a special burden to assert a laches defense and “[t]he petitioner *must* be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made.” NRS 34.800(2). Mr. Howard therefore reserves the right to engage with a laches theory if such a theory is offered by the State.

Although Mr. Howard has preliminarily addressed certain procedural bars in an abundance of caution, he does not believe that he has an obligation to do so in his petition. *See* NRS 34.735 (requiring that post-conviction petitioners only “list briefly what grounds” for relief were not presented earlier and supply the reasons that they were not presented). Consequently, he also reserves the right to respond in more depth to any procedural defenses propounded by the State.

1 the direct appeal. A motion to extend the stay of the issuance of the remittitur was filed by Mr.
2 Graves and Carmine J. Colucci. Messrs. Graves and Colucci submitted a petition for writ of
3 certiorari to the U.S. Supreme Court in an effort to have that Court review the Nevada Supreme
4 Court's decision in the direct appeal.

5 So far as undersigned counsel are aware, Mr. Howard has no sentences to serve after he
6 completes the sentence imposed by the judgment under attack.

7 **CLAIM ONE:**

8 Both of the aggravators supporting Mr. Howard's death sentence have now been
9 judicially invalidated. As a result, the sentence no longer has any legal basis.

10 More specifically, Mr. Howard's death sentence is invalid under the state and federal
11 constitutional provisions guaranteeing an accused the right not to be subject to cruel and unusual
12 punishment. *See* U.S. Const. amends. VIII & XIV; Nevada Const. art. I, secs. 6 & 8.¹³ Because
13 the New York courts have now dismissed the robbery case that formed one of Mr. Howard's
14 aggravators, his death sentence is unlawful. *See Johnson*, 486 U.S. at 584–89. Furthermore,
15 since the only other aggravator was struck down in 2014 by the Nevada Supreme Court, there are
16 no longer any lawful aggravators to support the death sentence, and it is unconstitutional for that
17 reason as well. *See Sawyer*, 505 U.S. at 341–42; *Lowenfield*, 484 U.S. at 244.

18 Because Mr. Howard has no lawful aggravators in place, he is ineligible for the death
19 penalty, and no further showing of prejudice is necessary. In the alternative, the New York
20 robbery was central to the prosecution's case and its consideration by the jury therefore cannot
21 be proven harmless beyond a reasonable doubt.

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25 ¹³ With respect to any reference to the Nevada Constitution herein, Mr. Howard argues that if the
26 U.S. Constitution is deemed not to protect the asserted right, the parallel provision of the state
27 constitution is broader and still does. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S.
28 283, 293 (1982) (“[A] state court is entirely free to read its own State's constitution more broadly
than [the U.S. Supreme Court] reads the Federal Constitution.”). Mr. Howard respectfully
requests an explicit and specific ruling from the Court on his state constitutional arguments, so as
to ensure those arguments are preserved for appeal.

1 **SUPPORTING FACTS:**

2 The jury that sentenced Mr. Howard to death based its determination on two aggravating
3 circumstances: (1) that Mr. Howard had previously been convicted of a violent felony; and (2)
4 that he committed the murder while robbing the victim. *See* 2 ROA 294. In 2014, on a post-
5 conviction appeal, the Nevada Supreme Court nullified the second aggravating circumstance.
6 *See Howard*, 2014 WL 3784121, at *6. However, the court upheld the remaining aggravator,
7 which alleged a prior violent felony. *See id.* at *5.

8 The prosecution emphasized the prior conviction at sentencing. At the penalty phase, the
9 only testimony the State presented went to that conviction. *See* 15 ROA 2491–2519.
10 Furthermore, the prosecution repeatedly and at length referred to the robbery case in its argument
11 to the jury at sentencing. *See* 15 ROA 2490, 2599–2601, 2619, 2622, 2623, 2627. Multiple
12 times, the prosecution also highlighted for the jury the most aggravating features of the robbery
13 charges. *See* 15 ROA 2600 (noting that the robbery was “a tremendous trauma” to the victim
14 and that she continued to “have nightmares about it”); 15 ROA 2600 (“Can you imagine the
15 impact Samuel Howard has had on the life of a decent human being, Dorothy Weisband?”); 15
16 ROA 2601 (quoting Mr. Howard as calling the victim a “white bitch”); 15 ROA 2601 (“And
17 perhaps one of the ultimate indignities to a woman, he told her at gunpoint to take off her
18 clothes.”).

19 On May 22, 2018, the Queens County Supreme Court vacated the conviction¹⁴ in the
20 New York robbery case underlying Mr. Howard’s prior-violent-felony aggravator and dismissed
21 the indictment. *See* Ex. 2. The time for an appeal passed without any action by the State, *see*
22 Ex. 3; N.Y. Crim. Proc. Law § 460.10(1)(c), making the court’s decision final.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Petitioner Samuel Howard prays that the court issue a writ of habeas
25 corpus and vacate his death sentence.

26 DATED this 31 day of August 2018.

27
28

¹⁴ Mr. Howard does not concede that there was ever a valid New York conviction for purposes of Nevada law.

1 Respectfully submitted,

2
3 GUYMON & HENDRON

4
5 */s/ Lance J. Hendron*

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7 Nevada Bar No. 11151

8 625 S. Eighth Street

9 Las Vegas, Nevada 89101

10 FEDERAL DEFENDER
11 SERVICES OF IDAHO

12 */s/ Jonah J. Horwitz*

13 JONAH J. HORWITZ, ESQ. (*pro hac vice pending*)

14 Idaho Bar No. 10494

15 720 West Idaho Street, Suite 900

16 Boise, Idaho 83702

17 */s/ Deborah A. Czuba*

18 DEBORAH A. CZUBA, ESQ. (*pro hac vice pending*)

19 Idaho Bar No. 9648

20 720 West Idaho Street, Suite 900

21 Boise, Idaho 83702

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VERIFICATION

I, Jonah J. Horwitz, declare as follows:

1. I am an Assistant Federal Public Defender in the Capital Habeas Unit for the Federal Defender Services of Idaho. I represent Samuel Howard in his federal habeas corpus proceeding, *Howard v. Baker*, D. Nev., No. 2:93-cv-1209. On August 20, 2018, Nevada counsel Lance J. Hendron submitted an application for me to appear before this Court *pro hac vice* on behalf of Mr. Howard.
2. Petitioner is confined and restrained of his liberty, ordinarily housed at Ely State Prison in Ely, Nevada. I make this verification on Mr. Howard's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a state different from where my office is located. I have read this Petition and know the contents to be true except as to those matters stated on information and belief and as to such matters I believe them to be true.
3. I verify that Mr. Howard personally authorized me to commence this action.

/s/ Jonah J. Horwitz

Jonah J. Horwitz

Assistant Federal Public Defender

Federal Defender Services of Idaho

1 **CERTIFICATE OF SERVICE BY MAIL**

2 I, L. Hollis Ruggieri, hereby certify, pursuant to EDCR 7.26(a)(1), that on this 31st day of
3 August 2018, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF
4 HABEAS CORPUS addressed to:
5

6 William Gittere
7 Acting Warden, Ely State Prison
8 4569 North State Rt.
9 Ely, Nevada 89301

10 Steve Wolfson
11 Clark County District Attorney
12 200 Lewis Avenue
13 Las Vegas, Nevada 89101

14 Adam Paul Laxalt
15 Nevada Attorney General
16 100 North Carson Street
17 Carson City, Nevada 89701

18 /s/ L. Hollis Ruggieri
19 L. Hollis Ruggieri
20
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Exhibit 2

(Queens County Supreme Court Order Dismissing Indictment)

SUPREME COURT
CRIMINAL TERM - PART K-20 - QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, NY 11415

PRESENT:

HON. RONALD D. HOLLIE,
JUDGE

THE PEOPLE OF THE STATE OF NEW YORK:

-against-

SAMUEL HOWARD,

Defendant

X

The following papers numbered
1 to 5 submitted on this motion

Ind. No. 1227178
Motion To Vacate The
Conviction And To Dismiss
The Indictment Pursuant To
C.P.L. § 380.30(II)
C.P.L. § 330.30(II)
C.P.L. § 440.10(II)

Joel M. Cohen, Esq.
For the Motion

Richard A. Brown, D.A.
By: A.D.A. Edward D. Saslaw, Esq.
Opposed

Notice of Motion, and Affidavits Annexed.....1-2.....
Answering Reply Affidavits..... 3.....
Exhibits.....4.....
Memorandum of Law.....5.....

The defendant's motion is granted. See the annexed decision.

Date: May 22, 2018


RONALD D. HOLLIE, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK : BY: RONALDD. HOLLIE, J.S.C.

- against -

: DATED: May 22, 2018

SAMUEL HOWARD,

: IND. NO.: 1227/78

Defendant. : DECISION

In its Order dated January 31, 2018, this Court granted the defendant's motion to the extent that a hearing was ordered. That hearing was conducted on April 19, 2018 and the parties have no dispute as to the following facts:

- 1) During jury selection, on the above referenced indictment, the defendant failed to appear and a bench warrant was issued on 7/10/79.
- 2) The trial continued on his absence and he was found guilty of Robbery in the First Degree and Aggravated Harassment on 7/13/79.
- 3) The defendant has not been sentenced by the trial court and the bench warrant remains active.
- 4) Since at least 1980, the New York State authorities had actual knowledge that the defendant was arrested and in continued custody by both California and Nevada.
- 5) In now over 37 years, the People have not attempted to extradite the defendant to New York or make any other reasonable effort to produce the defendant for sentencing.

It is the defendant's position that he is entitled to relief afforded by CPLR § 380.30 (1) in that his sentence must be pronounced without reasonable delay. He argues that the 37 year delay was unreasonable given that New York authorities knew where he was incarcerated and they made no effort to produce him for sentence on his New York conviction.

It is the People position that if a Defendant absconds from New York and is arrested and incarcerated on an unrelated matter in another state, People have no obligation to make reasonable efforts to produce the Defendant for sentencing in this state, even if they know where he was incarcerated.

The New York rule assumes the defendant has been prejudiced by unreasonable delay, so the burden is on the State and its agents to show the delay was reasonable (*People v. Drake*, 61 NY2d 359). It is this Court's opinion that once a convicted defendant has absconded from New York, is incarcerated in another jurisdiction and New York is aware of said incarceration, the minimal obligation by the State and its agents is to attempt to produce that defendant for sentence. That attempt would be sufficient to satisfy the State's obligation under CPLR § 380.30 (1), to avoid a finding of unreasonable delay. Legal process does exist to attempt to bring a defendant incarcerated in another jurisdiction back to New York. In this case, The People chose not to attempt to produce the defendant for sentence.

It is therefore this Court's decision and Order that Samuel Howard conviction under indictment #1227778 is vacated and the indictment dismissed under CPLR § 380.30 (1), 330.30 and for 440.10.

May 22, 2018



Ronald D. Hollie, J.S.C.

App. 019

Exhibit 3

(Declaration of Jonah J. Horwitz)

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1. I am an attorney with Federal Defender Services of Idaho.
2. I represent Petitioner Samuel Howard in his federal habeas proceedings, and I have a pending application to represent Mr. Howard pro hac vice in these state post-conviction proceedings.
3. The document attached to the accompanying post-conviction petition as Exhibit 1 is a true and correct copy of the fourth amended petition for writ of habeas corpus, filed in Samuel Howard's federal habeas proceeding on May 24, 2016.
4. The document attached to the accompanying post-conviction petition as Exhibit 2 is a true and correct copy of the order issued by the Queens County Supreme Court in the State of New York on May 22, 2018 in the case denominated Indictment Number 1227/78, which is the case that was used to establish the prior-felony aggravator in Mr. Howard's capital trial in Nevada.
5. The State of New York has not appealed the order referred to in the preceding paragraph.
6. I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

JONAH J. HORWITZ, ESQ. (*pro hac vice*)
Idaho Bar No. 10494
720 West Idaho Street, Suite 900
Boise, Idaho 83702

OPPS

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,)
)
Petitioner,)
)
-vs-)
)
THE STATE OF NEVADA,)
)
Respondent.)

CASE NO: A-18-780434-W /
81C053867
DEPT NO: XVII

OPPOSITION AND MOTION TO DISMISS SIXTH PETITION
FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: November 5, 2019
TIME OF HEARING: 8:30 a.m.

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney,
through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby
submits this Opposition and Motion to Dismiss Sixth Petition for Writ of Habeas Corpus
(Post-Conviction).

This pleading is made and based upon all the papers and documents on file herein, the
attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 This Court summarized the facts of this case in the Findings of Fact, Conclusions of
4 Law and Order denying Petitioner's fifth demand for habeas relief:

5 On March 26, 1980, around noon, a Sears' security officer, Keith
6 Kinsey, observed Howard take a sander from a shelf, remove the packing and
7 then claim a fraudulent refund slip from a cashier. Kinsey approached Howard
8 and asked him to accompany Kinsey to a security office. Kinsey enlisted the
9 aid of two other store employees. Howard was cooperative, alert and indicated
10 there must be some mistake. In the security office, Kinsey observed Howard
11 had a gun under his jacket and attempted to handcuff Howard for safety
12 reasons. A struggle broke out and Howard drew a .357 revolver and pointed it
13 at the three men. Howard had the men lay face down on the floor and took
14 Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard
15 threatened to kill the three men if they followed him and he fled to his car in
16 the parking lot. A yellow gold jewelry ID bracelet was found at the scene and
17 impounded. It was later identified as Howard's. The Sears in question was
18 located at the corner of Desert Inn Road and Maryland Parkway at the
19 Boulevard Mall in Las Vegas, Nevada.

20 Dawana Thomas, Howard's girlfriend, was waiting for him in the car.
21 Howard had told her to wait for him and she was unaware of his intentions to
22 obtain money through a false refund transaction. Fleeing from the robbery,
23 Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York
24 plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-
25 ended a white corvette driven by Stephen Houchin. Houchin followed Howard
26 when Howard left the scene of the accident. Howard pointed the .357 revolver
27 out the window of the Olds and at Houchin's face, telling Houchin to mind his
28 own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South
and parked the car for a few hours. Thomas and Howard walked about and
Howard made some phone calls. Later that evening Howard left for a couple
of hours. When he returned he told Thomas that he had met up with a pimp,
but the pimps' girls were with him so he couldn't rob him. Howard indicated
he had arranged to meet with the "pimp" the next morning and would rob him
then.

Howard and Thomas drove to the Western Six motel located on the
Boulder Highway near the intersection of Desert Inn Road. The couple had
stayed at this motel before and Howard instructed Thomas to register under an
assumed name, Barbara Jackson. The motel registration card under that name
was admitted into evidence and a documents' examiner compared handwriting
on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the
motel and went to breakfast. After breakfast, Thomas dropped Howard off in
the alley behind Dr. George Monahan's office. This was at approximately
7:00 a.m. Thomas went back to the motel room. Approximately an hour later,
Howard returned to the motel. Howard had a CB radio with him that had loose
wires and a gold watch she had never seen before. Howard told Thompson
that he was tired of Las Vegas and to pack up their things as they were leaving
for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road

1 within walking distance of the Boulevard Mall. He was attempting to sell a
2 uniquely painted van and would park the van in the parking lot of the mall, at
3 the Desert Inn and Maryland intersection and near the Sears store, then walk to
4 his office. The van had a sign in it listing Dr. Monahan's home and business
5 phone numbers and the business address.

6 About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery,
7 Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home
8 inquiring about the van. The caller was a male who identified himself as
9 "Keith" and stated he was a security guard at Caesar's Palace. He indicated he
10 was interested in purchasing the van and wanted to know if someone could
11 meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan
12 indicated the caller would have to talk to her husband who was expected home
13 shortly. A second call was made around 4:30 p.m. and Dr. Monahan made
14 arrangements to meet "Keith" at Caesar's later that night.

15 The Monahans and two relatives, Barbara Zemen and Mary Catherine
16 Monahan, met "Keith" that evening at the appointed time and place. Howard
17 was identified as the man who called himself "Keith". Howard was carrying a
18 walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten
19 minutes about purchasing the van and looked inside the van but did not touch
20 the door handle while doing so. Howard arranged to meet Dr. Monahan the
21 next morning to take a test drive. The Monahan's left Caesar's and parked the
22 van at Dr. Monahan's office before returning home in another vehicle.

23 The next day, March 27, 1980, Dr. Monahan left his home at about 6:50
24 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the
25 van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr.
26 Monahan was not there and a patient was waiting for him. Dr. Monahan's
27 truck was in the parking lot to the rear of the office. Dr. Monahan had not
28 entered the office. A black man wearing a radio or walkie-talkie on his belt
came into the office at about 7:00 a.m. that morning looking for Dr. Monahan
and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the
description she gave worked security. After obtaining this information, Mrs.
Monahan called the police to report her husband as a missing person. This
occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of
Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office
and almost across the road from the Western Six motel. Early on the morning
of March 27, 1980, as he approached his business, he observed the Monahan
van backing into the rear of the bar. When he arrived at the Inn, he looked in
the driver's side and saw no one. He asked patrons if they knew anything
about the van and no one spoke up. Marino remained at the business until the
early afternoon. The van was still there and had not been moved. Later that
day, at around 7:00 p.m. he received a call to return to the bar as a dead body
had been found in the van.

In response to television coverage, the police learned the Monahan van
was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was
found in the van under an overturned table and some coverings. He had been
shot once in the head. The bullet went through Dr. Monahan's head and a
projectile was recovered on the floor of the van. The projectile was compared
to Howard's .357 revolver. Because the bullet was so badly damaged; forensic
analysis could not establish an exact match. It was determined that the bullet
could have come from certain makes and models of revolvers, Howard's
included. The van's CB radio and a tape deck had been removed. Dr.
Monahan's watch and wallet were missing. A fingerprint recovered from one
of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred

1 on March 26th. The description of the Sears suspect matched that given by
2 Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based
3 upon that, the use of the name Keith, the walkie-talkie in possession of the
4 suspect, the close proximity of the dental office to the Sears and the fact that
5 the van had been parked in the Sears' parking lot, the police issued a bulletin to
6 state and out-of-state law enforcement agencies describing the suspect and the
7 car used in the Sears' robbery.

8 On March 27, 1980, while the police were searching for Dr. Monahan,
9 Howard and Thompson drove to California. They left the motel between 8:00
10 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard
11 had a brown or black wallet that had credit cards and photos in it. Howard
12 went to the gas station rest room and when he returned he no longer had the
13 wallet.

14 On March 28, 1980, Howard and Thompson went to a Sears in San
15 Bernadino, California. Once again Howard left Thompson in the car while he
16 entered the Sears, picked up merchandize and tried to obtain a refund on it.
17 This time he used the stolen Kinsey Sears security badge in the attempt. The
18 Sears personal were suspicious and left Howard at the register while they
19 called Las Vegas. When they returned Howard had left. Howard had returned
20 to the car and Thompson and Howard ducked down when the people from
21 Sears stepped outside to view the parking lot.

22 On or about April 1, 1980, at around noon, Howard went to the
23 Stonewood Shopping Center in Downey, California. He entered a jewelry
24 store and talked to a security agent, Manny Velasquez. Another agent in the
25 store, Robert Slater, who also worked as a police officer in Downey, saw
26 Howard and noticed the grip of a gun under Howard's jacket. Slater talked to
27 Velasquez and decided to call the Downey Police. Howard left the jewelry
28 store went to the west end of the mall near a Thrifty drugstore. Downey Police
officers observed Howard walking up and down the aisles of the drugstore,
picking items up and replacing them on shelves. Howard was stopped on
suspicion of carrying a concealed weapon. No gun was found on him nor was
he carrying the walkie-talkie. A search of the aisles he had been in revealed a
.357 magnum revolver and the walkie-talkie and Sears' security badge stolen
from Kinsey.

Howard was arrested for carrying a concealed weapon and then
identified and booked for a San Bernadino robbery. Howard was given his
Miranda rights by Downey Police officers. Disputed evidence was presented
regarding his response and whether he invoked his right to silence. Based on
information in the all-points bulletin, the California authorities contacted the
Las Vegas Metropolitan Police Department about Howard. On April 2, 1980,
LVMPD Detective Alfred Leavitt went to California and, after reading
Howard his Miranda rights, which Howard indicated he understood,
interviewed Howard regarding the Sears robbery and Dr. Monahan's murder.
Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department
store but no details about what happened and that he did not remember
anything about March 27, 1980. He stated he could have killed Dr. Monahan
but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5,
1979. When he arrived at work at approximately 9:00 a.m. Howard entered
the agency and was looking at an Oldsmobile car. Howard showed Schwartz a
New York driver's license and checkbook and told Schwartz that he worked
for a security firm in New York. Howard asked if they could take a
demonstration ride and Schwartz drove the car for a few blocks while Howard
was the passenger. Howard asked if he could drive the car and the men
switched seats. After driving for a short time, Howard pulled over and pointed

1 an automatic pistol at Schwartz. Schwartz was told to get down on the floor of
2 the car and remove his shoes and pants. Schwartz complied and Howard took
3 Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to
4 do so and Howard drove off. The car was later found abandoned.¹

5 Howard called witnesses who testified they saw the Monahan van being
6 driven by a black man who did not match Howard's description, in particular
7 the man had a large afro and Howard had short hair. John McBride state that
8 he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is
9 located about five miles from Desert Inn and Boulder Highway. Lora Mallek
10 was employed at a Mobile gas station at the corner of DI and Boulder Highway
11 and she stated serviced the van when it pulled into the station between 3:00
12 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was
13 driving, a black woman who did not match Thomas' description was in the
14 passenger seat and a white man was sitting in the back.

15 Howard testified over the objection of counsel. He indicated he did not
16 recall much about March 26, 1980. He remembered being in Las Vegas in
17 general on and off and that at one point Dwana Thomas' brother, who was
18 about Howard's height, age and weight, and had a large afro, visited them.
19 Howard said he remembers incidents, not dates and Kinsey could have been
20 telling the truth about the Sears store. Howard indicated he wasn't sure
21 because when the Sears people gathered around him, it reminded him of
22 Vietnam and he kind of had a flashback. Howard said he thinks he left Las
23 Vegas immediately after the Sears incident. Howard also stated that he did not
24 meet Dr. Monahan, rob or kill him as he couldn't be that callous.

25 On cross-examination, Howard admitted he left New York in the middle
26 of his robbery trial and was asked about statements he made to Detective
27 Leavitt. Howard also acknowledged he has used a number of aliases including
28 Harold Stanback. Howard indicated he was taking the blame for Dawana and
her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie
had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of
Howard's 1979 New York conviction for robbery. A college nurse who knew
Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint
taking her wallet and car. He forced her into a closet and demanded she
removed her clothes. She refused and he left. After the robbery, Howard
called Weisband trying to get more cash from her in return for her car and
threatened her.

Howard testified regarding his military, family and mental health
histories. Howard discussed his military service and stated he had suffered a
concussion and received a purple heart.² Howard also stated he was on
veteran's disability in New York.³ He said he was in various mental health
facilities in California including being housed in the same facility as Charlie
Manson. He testified he had been diagnosed as a schizophrenic, but that some
of the doctors thought he was malingering. When asked about his childhood,
Howard became upset. He indicated he didn't want to talk about the death of
his mother and sister. Howard indicated he was not mentally ill and knew
what he was doing at all times.

¹ This evidence was admitted to show identity and motive for the Monahan murder.

² The military records attached to the current Fourth Petition do not reflect any such injury or award.

³ Howard's military records do not support this and there is nothing in the record substantiating any admission to a
veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it
required identification and he could not identify himself due to existing warrants for his arrest.

1 (Findings of Fact, Conclusions of Law and Order, filed May 15, 2017, p. 2-8 (footnotes in
2 original)).

3 **STATEMENT OF THE CASE**

4 This Court set forth the procedural history of this case in the Findings of Fact,
5 Conclusions of Law and Order denying Petitioner's fifth habeas petition:

6 On May 20, 1981 Howard was indicted on one count of robbery with
7 use of a deadly weapon involving a Sears security officer named Keith Kinsey
8 on March 26, 1980; one count of robbery with use of a deadly weapon
9 involving Dr. George Monahan and one count of murder with use of a deadly
10 weapon involving Dr. Monahan, both committed on March 27, 1980. With
11 respect to the murder count, the State alleged two theories: willful,
12 premeditated and deliberate murder or murder in the commission of a robbery.

13 Howard was arrested in California where he was serving time for a
14 robbery committed on or about April 1, 1980. He was extradited in November
15 of 1982 and an initial appearance was set for November 23, 1982. At that time
16 the matter was continued for appointment of counsel, the Clark County Public
17 Defender's Office.

18 On November 30, 1982, Terry Jackson of the Public Defender's Office
19 represented to the district court that Howard qualified for the Public
20 Defender's services; however, Mr. Jackson indicated he had a personal conflict
21 as he was a friend of the victim. The district judge determined that the
22 relationship did not create a conflict for the Public Defender's Office, barred
23 Mr. Jackson from involvement with the case and appointed another deputy
24 public defender to Howard's case.

25 Howard's counsel requested a one-week continuance to consult with
26 Howard about the case. Howard objected, insisted on being arraigned and
27 demanded a speedy trial. After discussion, the district court accepted a plea of
28 not guilty and set a trial date of January 10, 1983.

Howard filed a motion in late in December asking for his counsel to be
removed and substitute counsel appointed. Counsel filed a response
addressing issues raised in the motion. After a hearing, the district court
determined there were no grounds for removing the Clark County Public
Defender's Office.

A motion for a psychiatric expert was filed. At a hearing, the district
court inquired if this was for competency and Howard's counsel indicated it
was not, but it was to help evaluate Howard's mental status at the time of the
events. The district court granted the motion and appointed Dr. O'Gorman to
assist the defense.

At a status check on January 4, 1983, defense counsel indicated the
defense could not be ready for the January 10th trial date due to the need to
conduct additional investigation and discovery. In addition, counsel noted
Howard was refusing to cooperate with counsel. Howard objected to any
continuance with knowledge that his attorneys' could not complete the
investigations by that date. Given Howard's objections, the district court
stated the trial would go forward as scheduled.

On the day of trial, defense counsel moved to withdraw stating that Mr.
Jackson's conflict created mistrust in Howard and he therefore refused to
cooperate. This motion was denied. Defense counsel then moved for a
continuance as they did not feel comfortable proceeding to trial in this case,
given the issues involved, with only six weeks to prepare. After extensive

1 argument and a recess so that counsel could discuss the issue with Howard, the
2 district court granted the continuance over Howard's objections.

3 The guilt phase of the trial began on April 11, 1983 and concluded on
4 April 22, 1983. The jury returned a verdict of guilty on all three counts. The
5 penalty phase was set to begin on May 2, 1983. In the interim, one of the
6 jurors tried to contact the trial judge about a scheduling problem. Because the
7 district judge was on vacation, someone referred the juror to the District
8 Attorney's Office. That Office referred the juror to the jury commissioner.
9 Howard moved for a mistrial or elimination of the death penalty as a
10 sentencing option based upon this contact. After conducting an evidentiary
11 hearing, the district court denied Howard's motions.

12 Defense counsel made an oral motion to withdraw indicating they had
13 irreconcilable differences with Howard over the conduct of the penalty phase.
14 Counsel indicated they had documents and witnesses in mitigation, but that
15 Howard had instructed them not to present any mitigation evidence. Howard
16 also instructed them not to argue mitigation and they would not follow that
17 directive, but would argue mitigation. Counsel also indicated that Howard told
18 them he wished to testify, but would not tell them the substance of his
19 testimony. Finally, counsel indicated they had attempted to get military and
20 mental health records but were unsuccessful because the agencies possessing
21 the records would not send copies without a release signed by Howard and
22 Howard refused to sign the releases. The district court canvassed Howard if
23 this was correct and Howard confirmed it was true and that he did not want
24 any mitigation presented. The district court found Howard understood the
25 consequences of his decision and denied the motion to withdraw concluding
26 defense counsel's disagreement with Howard's decision was not a valid basis
27 to withdraw.

28 The penalty phase began on May 2, 1983 and concluded on May 4,
1983. The State originally alleged three aggravating circumstances: 1) the
murder was committed by a person who had previously been convicted of a
felony involving the use of violence - namely robbery with use of a deadly
weapon in California, 2) prior violent felony - a 1978 New York conviction in
absentia for robbery with use of a deadly weapon; and 3) the murder occurred
in the commission of a robbery. Howard moved to strike the California
conviction because the conviction occurred after the Monahan murder and the
New York conviction because it was not supported by a judgment of
conviction. The district court struck the California conviction but denied the
motion as to the New York conviction, noting that the records reflected a jury
had convicted Howard and the lack of a formal judgment was the result of
Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and
Howard took the stand and related information on his background. During a
break in the testimony, Howard suddenly stated he did not understand what
mitigation meant and that he would leave it up to his attorneys to decide what
to do. The district court asked Howard if he was now instructing his attorneys
to present mitigation and he refused to answer the question. Howard did
indicate that he wanted his attorney's to argue mitigation and defense counsel
asked for time to prepare which was granted. The jury found both aggravating
circumstances existed and that no mitigating circumstances outweighed the
aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher
represented Howard on Direct Appeal. Howard raised the following issues on
direct appeal: 1) ineffective assistance of counsel based on actual conflict
arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion
to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary
hearing on a motion to suppress Howard's statements and evidence derived

therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remittitur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there

1 was no evidence to support an insanity defense, therefore counsel were not
2 ineffective in this regard.

3 On the issue of failure to object to prosecutorial misconduct, the district
4 court found that defense counsel did object where appropriate and the
5 arguments that were not objected to did not amount to misconduct and were a
6 fair comment on the evidence. Even if some of the comments were improper,
7 the district court concluded that they would not have succeeded on appeal as
8 they were harmless beyond a reasonable doubt. Formal findings of fact and
9 conclusions of law were filed on July 5, 1989.⁴

10 The Nevada Supreme Court affirmed the district court's denial of
11 Howard's first State petition for post-conviction relief. Howard v. State, 106
12 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck
13 represented Howard in that appeal. On appeal Howard raised ineffective
14 assistance of trial and appellate counsel regarding the prosecutorial misconduct
15 issues. The Supreme Court found three comments to be improper under
16 Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)⁵: 1) a personal opinion
17 that Howard merited the death penalty, 2) a golden rule argument – asking the
18 jury to put themselves in the shoes of a future victims and 3) an argument
19 without support from evidence that Howard might escape. The Court found
20 that counsel were ineffective for failing to object to these arguments but
21 concluded there was no reasonable probability of a contrary result absent these
22 remarks and therefore no prejudice. The Court rejected Howard's other
23 contentions of improper argument.

24 With respect the mitigation evidence issues, the Nevada Supreme Court
25 upheld the district court's findings that this was a result of Howard's own
26 conduct and not ineffective assistance of counsel.⁶

27 Howard proceeded to file a second Federal habeas corpus petition on
28 May 1, 1991. This proceeding was stayed for Howard to exhaust his state
remedies on October 16, 1991. Howard then filed a second State petition for
post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred
Atcheson represented Howard in the second State petition. In that petition,
Howard alleged denial of a fair trial based on prosecutorial misconduct,
namely: 1) jury tampering based on the prosecutor's contact with the juror
between the guilt and penalty phases; 2) expressions of personal belief and a
personal endorsement of the death penalty; 3) reference to the improbability of
rehabilitation, escape, future killings; 3) comparing Howard's life with Dr.
Monahan's and 4) a statement that the community would benefit from
Howard's death. The petition also asserted an ineffective assistance of trial
counsel claim for failing to explain to Howard the nature of mitigating
circumstances and their importance. Finally the petition raised a speedy trial
violation and cumulative error.

The State moved to dismiss the second State petition as procedurally
barred or governed by the law of the case on February 10, 1992. In his reply,
Howard dropped his speedy trial claim as unsubstantiated and indicated if the
other claims were barred, then they had been exhausted and Howard could
proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court

⁴During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

⁵ Collier was decided two years after Howard's trial.

⁶ The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

1 found that the claims of prosecutorial misconduct and ineffective assistance of
2 counsel relating thereto as well as the claims relating to mitigation evidence
3 had been heard and found to be without merit or failed to demonstrate
4 prejudice. Such claims were therefore barred by the law of the case. The
district court further concluded that any claim of cumulative error and any
issues not raised in previous proceedings were procedurally barred. Finally,
the district court found the speedy trial violation was a naked allegation,
frivolous and procedurally barred.

5 Howard appealed the denial of his second State petition to the Nevada
6 Supreme Court, which dismissed his appeal on March 19, 1993. The Order
7 Dismissing Appeal found that Howard's second State petition was so lacking
in merit that briefing and oral argument was not warranted. Howard filed a
petition for Writ of Certiorari challenging the summary affirmance and the
United States Supreme Court denied the request on October 4, 1993.

8 On December 8, 1993, Howard returned to federal court and filed a new
9 pro se habeas petition rather than lifting the stay in the previous petition. After
almost three years, on September 2, 1996, the federal district court dismissed
10 the petition as inadequate and ordered Howard to file a second amended
federal petition that contained more than conclusory allegations. Thereafter
Howard, now represented by Patricia Erickson, filed a Second Amended
11 Petition for Writ of Habeas Corpus on January 27, 1997. After almost five
years, on September 23, 2002, the Second Amended Federal petition was
12 stayed for Howard to again exhaust his federal claims in state court.

13 Howard filed his third State petition for post-conviction relief on
December 20, 2002. Patricia Erickson represented him on this petition. The
14 petition asserted the following claims, phrased generally as denial of a
fundamentally fair trial or assistance of counsel under the Fifth, Sixth and
15 Fourteenth Amendments of the United States Constitution or as cruel and
unusual punishment under the Eighth Amendment: 1) failure to sever Sears
robbery count from Monahan robbery/murder counts; 2) failure to suppress
Howard's statements to LVMPD and physical evidence derived therefrom; 3)
16 speedy trial violation; 4) trial counsel actual conflict of interest – Jackson
issue; 5) failure to give accomplice as a matter of law and accomplice
17 testimony should be viewed with distrust instructions – Dwana Thomas; 6)
improper jury instructions – diluting standard of proof - reasonable doubt,
18 second degree murder as lesser included of first degree murder, premeditation,
intent and malice instructions; 7) improper jury instructions – failure to clearly
19 define first degree murder as specific intent crime requiring malice and
premeditation; 8) improper premeditation instruction blurred distinction
20 between first and second degree murder; 9) improper malice instruction; 10)
improper anti-sympathy instruction; 11) failure to give influence of extreme
21 mental or emotional disturbance mitigator instruction; 12) improper limitation
of mitigation by giving only "any other mitigating circumstance" instruction;
22 13) failure to instruct that mitigating circumstances findings need not be
unanimous; 14) prosecutorial misconduct – jury tampering, stating personal
23 beliefs, personal endorsement of death penalty, improper argument regarding
rehabilitation, escape and future killings; comparing Howard and victim's
24 lives, comparing Howard to notorious murder (Charles Manson) and improper
community benefit argument; 15) use of felony robbery as aggravator and
25 basis for first degree murder; 16) improper reasonable doubt instruction; 17)
ineffective assistance of trial counsel – inadequate contact, conflict of interest,
26 failure to contact California counsel to obtain records, failure to obtain Patton
and Atescadero hospital records, failure to obtain California trial transcripts,
27 failure to review Clark County Detention Center medical records, failure to
challenge competency to stand trial, failure to obtain suppression hearing,
28 failure to present legal insanity, failure to object to reasonable doubt

1 instruction, failure to view visiting records and call witnesses based upon
2 same, failure to call Pinkie Williams and Carol Walker in penalty phase,
3 failure to investigate and call Benjamin Evans in penalty phase, failure to
4 obtain San Bernardino medical records regarding suicide attempt, failure to
5 obtain military records, failure to adequately explain concept of mitigation
6 evidence, failure to object to prosecutorial misconduct in closing arguments,
7 failure to refute future dangerousness argument, failure to object to trial court's
8 limitation of mitigating circumstances and failure to object to instructions
9 which allegedly required unanimous finding of mitigating circumstances; 18)
10 ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12,
11 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction
12 counsel – failure to adequately investigate and develop all trial and appeal
13 claims; 20) cumulative error; 21) Nevada's death penalty is administered in an
14 arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel
15 and unusual punishment and 23) the death penalty violates evolving standards
16 of decency.

17 The State filed a motion to dismiss Howard's third State petition on
18 March 4, 2001. The State argued that the entire petition was procedurally
19 barred under NRS 34.726(1) (one-year limit) and NRS 34.800 (five-year
20 laches) and that Howard had not shown good cause for delay in raising the
21 claims to overcome the procedural bars. The State also analyzed each claim
22 and noted what issues had already been raised and decided adversely to
23 Howard or should have been raised and were waived under NRS 34.810.

24 Howard filed an amended third State petition. The amended petition
25 expanded the factual matters under Claim 17 regarding Howard's family
26 background that Howard asserted should have been presented in mitigation.

27 On August 20, 2003, Howard filed his opposition to the State's motion
28 to dismiss his third State petition. As good cause for delay, Howard alleged
Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently
applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not
controlling. Howard contended NRS 34.726 did not apply because any delay
was the fault of counsel not Howard and NRS 34.726 is unconstitutional and
cannot be applied to successive petitions Pellegrini notwithstanding. Howard
argued the Due process and Equal Protection clauses of the Federal
Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to
Howard. In addition, Howard asserted NRS 34.800 did not apply because the
State had not shown prejudice and the presumption of prejudice was overcome
by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The
district court issued an oral decision on October 2, 2003 dismissing the third
State petition as procedurally barred under NRS 34.726 and finding Howard
had failed to overcome the bar by showing good cause for delay. The district
court also independently dismissed the claims under NRS 34.810. Written
findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which
affirmed the district court's dismissal of the third State petition on December
4, 2004. The High Court addressed Howard's assertions that he had either
overcome the procedural bars or they could not constitutionally be applied to
him and rejected them. Among its conclusions, the Court noted that the record
reflected Howard was aware that all his claims challenging the conviction or
imposition of sentence must be joined in a single petition and that Howard had
no right to post-conviction counsel at the time of the filing of his first and
second State petitions for post-conviction relief and hence ineffectiveness of

1 post-conviction counsel could not be good cause for delay.⁷

2 Howard then returned to Federal district court where he filed his Third
3 Amended Petition for Writ of Habeas Corpus on October 23, 2005.
4 Subsequently, without seeking approval from the Federal Court, the Federal
5 Public Defender's Office filed, on Howard's behalf, the current Fourth State
6 Post-Conviction Petition on October 27, 2007. The State filed a motion to
7 dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay
8 this case for several months while Howard sought permission from the Federal
9 District Court to hold his federal petition for post-conviction habeas corpus in
10 abeyance pending exhaustion of the claims already filed in the Fourth State
11 Petition and of new claims he wished to file in State court as a result of the
12 Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

13 The United States District Court denied Howard's motion for stay and
14 abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the
15 State's original motion to dismiss and an Amended Petition on February 24,
16 2009. The State responded to Howard's opposition to the original motion to
17 dismiss and additionally moved to dismiss the Amended Fourth Petition on
18 October 7, 2009.⁸ Howard filed an Opposition to the Amended Motion to
19 Dismiss on December 18, 2009. Howard filed supplemental authorities on
20 January 5, 2010.

21 Argument on the State's motion to dismiss was heard on February 4,
22 2010. The matter was taken under advisement so the district court could
23 review the extensive record. A Minute Order Decision was issued on May 13,
24 2010, dismissing the Fourth State Petition as procedurally barred. A written
25 Findings of Fact and Conclusions of Law was filed on November 6, 2010.

26 Petitioner challenged this Court's decision before the Nevada Supreme
27 Court. Prior to ruling on this Court's fourth denial of habeas relief, the Nevada
28 Supreme Court issued an opinion in Howard v. State, 128 Nev. 736, 291 P.3d
137 (2012), addressing the sealing of documents. The Federal Public Defender
(FPD) filed a motion in the Supreme Court to substitute counsel that included
information that was potentially embarrassing to one or more current or former
FPD attorneys as well as a prior private attorney who had represented Howard.
Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed
but the FPD failed to file a separate motion to seal the pleading. Id. at 739,
291 P.3d at 139. The Court concluded that the FPD had not properly moved to
seal and that sealing was unjustified. Id. at 748, 291 P.3d at 145. Ultimately,
the Court affirmed this Court's denial of habeas relief. (Order of Affirmance,
filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014).
The United States Supreme Court denied certiorari. Howard v. Nevada, ___
U.S. ___, 135 S.Ct. 1898 (2015).

29 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction)
30 (Fifth Petition) on October 5, 2016. Respondent filed an opposition and
31 motion to dismiss on November 2, 2016. On March 27, 2017, Petitioner filed
32 an opposition to the State's request to dismiss the Fifth Petition. Respondent's
33 reply to Petitioner's opposition was filed on April 4, 2017.

34 On December 1, 2016, Petitioner filed an Amended Fifth Petition. The
35 State moved to strike the Amended Fifth Petition for failing to comply with
36 NRS 34.750(5). Petitioner opposed this request. This Court held a hearing on

37 ⁷ See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

38 ⁸ Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for
some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a
copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010.
Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on
May 11, 2010.

1 March 17, 2017, and after entertaining argument, struck the Amended Fifth
2 Petition pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130
P.3d 650 (2006). An order memorializing this decision was filed on April 7,
2017.

3 On April 6, 2017, Petitioner filed a Motion to Amend or Supplement
4 that requested reconsideration of this Court's decision to strike his Amended
Fifth Petition without requesting leave to do so in advance. Respondent filed
an opposition on April 12, 2017, and Petitioner replied on April 17, 2017.

5 Howard's Fifth Petition and Motion to Amend or Supplement came
6 before this Court on the April 19, 2017, Chamber Calendar. On May 2, 2017,
7 this Court issued a minute order denying the Fifth Petition and the Motion to
8 Amend or Supplement and imposing a \$250.00 sanction upon Howard's
counsel for causing the State to respond to a the Motion to Amend when the
Court had already decided the issue in the context of striking the Amended
Fifth Petition and/or for failing to seek leave of court prior to requesting
reconsideration.

9 (Findings of Fact, Conclusions of Law and Order, filed May 15, 2017, p. 8-20 (footnotes in
10 original)) Notice of Entry of Order was filed on May 23, 2017. (Notice of Entry of Order,
11 filed May 23, 2017).

12 Petitioner filed a Notice of Appeal on June 1, 2017. (Notice of Appeal, filed June 1,
13 2017). Additionally, Petitioner successfully sought extraordinary review of the sanction
14 order. (Armeni v. Dist. Ct., Nevada Supreme Court Case Number 73462, Order Granting
15 Petition in Part and Denying Petition in Part, filed April 25, 2018).

16 On September 4, 2018, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
17 Conviction) (Sixth Petition). (Petition for Writ of Habeas Corpus (Post-Conviction), filed
18 September 4, 2018). The State moved to strike on September 7, 2018. (Motion to Strike
19 Sixth Petition for Writ of Habeas Corpus (Post-Conviction), filed September 7, 2018).
20 Petitioner opposed on September 14, 2018. (Opposition to Motion to Strike, filed September
21 14, 2018). The State replied on September 20, 2018. (Reply to Opposition to Motion to
22 Strike Sixth Petition for Writ of Habeas Corpus (Post-Conviction, filed September 20, 2018).
23 This Court stayed the Sixth Petition pending the outcome on appeal of the denial of the Fifth
24 Petition since both challenged the validity of the sentencing. (Recorder's Transcript of
25 October 23, 2018, Hearing, p. 4-5, filed November 16, 2018).

26 On September 7, 2018, the State moved to transfer the Sixth Petition back to the
27 criminal case. (Motion to Transfer Petition to Criminal Case, filed September 7, 2018).
28 Petitioner opposed on September 12, 2018. (Opposition to Motion to Transfer, filed

1 September 12, 2018). The State replied on September 13, 2018. (Reply to Opposition to
2 Motion to Transfer Petition to Criminal Case, filed September 13, 2018).

3 On September 27, 2019, Petitioner moved to lift the stay on the Sixth Petition because
4 the Nevada Supreme Court issued an Order of Affirmance upholding the denial of the Fifth
5 Petition on September 20, 2019. (Motion to Lift Stay, filed September 27, 2019).

6 ARGUMENT

7 Petitioner's collateral attack on the remaining aggravating circumstance is decades
8 too tardy. Habeas relief at this late date would be overly prejudicial to the State. Ultimately,
9 the mere fact that the conviction underlying the prior violent felony aggravating
10 circumstance was vacated on grounds irrelevant to the facts of that case is insufficient to
11 justify ignoring Petitioner's procedural defaults.

12 I. The Fifth Petition is Procedurally Barred

13 A. Application of Procedural Bars is Mandatory

14 The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118
15 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days
16 late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the
17 district courts have a *duty* to consider whether post-conviction claims are procedurally
18 barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070,
19 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory
20 procedural default rules to post-conviction habeas petitions is mandatory," noting:

21 Habeas corpus petitions that are filed many years after conviction are an
22 unreasonable burden on the criminal justice system. The necessity for a
23 workable system dictates that there must exist a time when a criminal
conviction is final.

24 Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be
25 ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. The Nevada
26 Supreme Court has granted no discretion to the district courts regarding whether to apply the
27 statutory procedural bars.

28 ///

1 B. NRS 34.726(1)

2 NRS 34.726(1) states that “unless there is good cause shown for delay, a petition that
3 challenges the validity of a judgment or sentence must be filed within 1 year after entry of
4 the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year
5 after the Supreme Court issues its remittitur.” The one-year time bar is strictly construed and
6 enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that
7 the “clear and unambiguous” provisions of NRS 34.726(1) demonstrate an “intolerance
8 toward perpetual filing of petitions for relief, which clogs the court system and undermines
9 the finality of convictions.” Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001).
10 For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for
11 filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

12 Remittitur issued from Petitioner’s direct appeal on February 12, 1988. (Findings of
13 Fact, Conclusions of Law and Order, filed May 15, 2017, p. 12). Therefore, Petitioner had
14 until January 1, 1994, to file a timely habeas petition. Petitioner filed the Sixth Petition on
15 September 4, 2018. (Petition for Writ of Habeas Corpus (Post-Conviction), filed September
16 4, 2018). As such, the Sixth Petition is time barred.

17 C. NRS 34.800

18 NRS 34.800 recognizes that a post-conviction petition should be dismissed when
19 delay in presenting issues would prejudice the State in responding to the petition or in retrial.
20 NRS 34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if
21 “[a] period of five years [elapses] between the filing of a judgment of conviction, an order
22 imposing sentence of imprisonment or a decision on direct appeal of a judgment of
23 conviction and the filing of a petition challenging the validity of a judgment of conviction.”
24 See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded
25 by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) (“petitions that
26 are filed many years after conviction are an unreasonable burden on the criminal justice
27 system. The necessity for a workable system dictates that there must exist a time when a
28 criminal conviction is final.”).

1 To invoke the presumption, the statute requires that the State specifically plead
2 presumptive prejudice. NRS 34.800(2). More than five years has passed since remittitur
3 issued from Petitioner's direct appeal on February 12, 1988. (Findings of Fact, Conclusions
4 of Law and Order, filed May 15, 2017, p. 12). Indeed, over thirty years have passed since
5 Petitioner's direct appeal was final. As such, the State pleads statutory laches under NRS
6 34.800(2) and prejudice under NRS 34.800(1) against the Sixth Petition. After such a
7 passage of time, the State is prejudiced in its ability to answer the Sixth Petition and retry the
8 penalty-phase. If Petitioner's sixth go around on state post-conviction review is not
9 dismissed or denied on the procedural bars, the State will be forced to track down witnesses
10 who may have died or retired in order to prove a case that is several decades old. Assuming
11 witnesses are available, their memories have certainly faded and they will not present to a
12 jury the same way they did in 1983.

13 D. NRS 34.810

14 Petitioner's sixth attempt at state habeas relief must be dismissed on waiver grounds
15 and as an abuse of the writ.

16 Claims that could have been raised on direct appeal or in a prior petition are barred
17 under NRS 34.810(1)(b):

18 The court *shall dismiss* a petition if the court determines that:

19 (b) The petitioner's conviction was the result of a trial and the grounds for the
20 petition could have been:

21 (1) Presented to the trial court;

22 (2) *Raised in a direct appeal or a prior petition for a writ of habeas
corpus or post-conviction relief, unless the court finds both cause for
the failure to present the grounds and actual prejudice to the petitioner.*

23 (Emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse
24 of the writ. NRS 34.810(2).

25 Nevada law dictates that all claims appropriate for direct appeal must be pursued on
26 direct appeal or they will be "considered waived in subsequent proceedings." Franklin v.
27 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds,
28 Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has

1 emphasized that: “[a] court *must* dismiss a habeas petition if it presents claims that either
2 were or could have been presented in an earlier proceeding, unless the court finds both cause
3 for failing to present the claims earlier or for raising them again and actual prejudice to the
4 petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis
5 added). Where a claim arises after direct appeal, a petitioner has one year in which to file a
6 petition alleging the claim or it too is barred. Rippo v. State, 134 Nev. 411, 412, 423 P.3d
7 1084, 1090 (2018) (“[A] petition ... has been filed within a reasonable time after the ...
8 claim became available so long as it is filed within one year after entry of the district court’s
9 order disposing of the prior petition or, if a timely appeal was taken from the district court’s
10 order, within one year after this court issues its remittitur.”).

11 Petitioner’s challenge to the prior violent felony aggravating circumstance is barred
12 by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ. Petitioner
13 has been aware for years that he was not sentenced in his New York robbery case. Petitioner
14 should have raised that issue with the New York courts decades ago. To wait decades in
15 order to secure a favorable result in a New York collateral proceeding in order to raise a
16 challenge to his death sentence 30 years after the fact is an abuse of the writ.

17 II. Petitioner Fails to Justify Ignoring the Procedural Bars

18 This Court cannot disregard the procedural bars because Petitioner has failed to prove
19 good cause, prejudice and/or actual innocence.

20 To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for
21 delay in filing his petition or for bringing new claims or repeating claims in a successive
22 petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3).
23 To establish prejudice “a petitioner must show that errors in the proceedings underlying the
24 judgment worked to the petitioner’s actual and substantial disadvantage.” State v. Huebler,
25 128 Nev. ___, ___, 275 P.3d 91, 94-95 (2012), cert. denied, __ U.S. ___, 133 S.Ct. 988 (2013).

26 “To establish good cause, petitioners must show that an impediment external to the
27 defense prevented their compliance with the applicable procedural rule. A qualifying
28 impediment might be shown where the factual or legal basis for a claim was not reasonably

1 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003),
2 rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004);
3 see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) (“In order to
4 demonstrate good cause, a petitioner must show that an impediment external to the defense
5 prevented him or her from complying with the state procedural default rules”); Pellegrini,
6 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician’s
7 declaration in support of a habeas petition were sufficient “good cause” to overcome a
8 procedural default, whereas a finding by Supreme Court that a defendant was suffering from
9 Multiple Personality Disorder was). An external impediment could be “that the factual or
10 legal basis for a claim was not reasonably available to counsel, or that ‘some interference by
11 officials’ made compliance impracticable.” Id. (quoting, Murray v. Carrier, 477 U.S. 478,
12 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904
13 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

14 The Nevada Supreme Court has held that, “appellants cannot attempt to manufacture
15 good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a
16 “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at
17 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded
18 by statute as recognized by, Huebler, 128 Nev. at ___, 275 P.3d at 95, footnote 2). Excuses
19 such as the lack of assistance of counsel when preparing a petition as well as the failure of
20 trial counsel to forward a copy of the file to a petitioner have been found not to constitute
21 good cause. Phelps v. Dir. Nev. Dep’t of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306
22 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d
23 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

24 Even when a petitioner cannot show good cause sufficient to overcome the procedural
25 bars, habeas relief may still be granted if he can demonstrate a fundamental miscarriage of
26 justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. In order to prove a fundamental
27 miscarriage of justice, a petitioner must make “a colorable showing he is actually innocent of
28 the crime or is ineligible for the death penalty.” Id. (citation omitted). Actual innocence

1 means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S.
2 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct.
3 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner “must show
4 that it is more likely than not that no reasonable juror would have convicted him absent a
5 constitutional violation.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537. However, “[w]ithout
6 any new evidence of innocence, even the existence of a concededly meritorious
7 constitutional violation is not itself sufficient to establish a miscarriage of justice that would
8 allow a habeas court to reach the merits of the barred claim.” Schlup v. Delo, 513 U.S. 298,
9 316, 115 S. Ct. 851, 861 (1995) (emphasis added).

10 Actual innocence is a stringent standard designed to be applied only in the most
11 extraordinary situations. Id.; Pellegrini, 117 Nev. at 876, 34 P.3d at 530. The Eighth Circuit
12 Court of Appeals has “rejected free-standing claims of actual innocence as a basis for habeas
13 review stating, ‘[c]laims of actual innocence based on newly discovered evidence have never
14 been held to state a ground for federal habeas relief absent an independent constitutional
15 violation occurring in the underlying state criminal proceeding.’” Meadows v. Delo, 99 F.3d
16 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860
17 (1993)). A defendant claiming actual innocence must demonstrate that it is more likely than
18 not that *no reasonable juror* would have convicted him absent a constitutional violation.
19 Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Once a defendant has made such a showing, he
20 may then use the claim of actual innocence as a “gateway” to present his constitutional
21 challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S.
22 at 315, 115 S. Ct. at 861. Furthermore, the newly discovered evidence suggesting the
23 defendant’s innocence must be “so strong that a court cannot have confidence in the outcome
24 of the trial.” Id. at 316, 115 S.Ct. at 861.

25 “Where the petitioner has argued that the procedural default should be ignored
26 because he is actually ineligible for the death penalty, he must show by clear and convincing
27 evidence that, but for a constitutional error, no reasonable juror would have found him death
28 eligible.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537. To establish innocence of capital

1 punishment sufficient to waive a procedural default, a petitioner must eliminate every
2 aggravating circumstance. Sawyer v. Whitley, 505 U.S. 333, 347, 112 S.Ct. 1514, 2523
3 (1992). In addition, any new evidence regarding mitigating factors is not considered in an
4 “actual innocence” death eligibility determination. Sawyer, 505 U.S. at 345-346, 112 S.Ct.
5 at 2522. Notably, the “actual innocence” requirement focuses exclusively on those elements
6 that render a defendant eligible for the death penalty; any additional mitigating evidence that
7 was not presented at trial – even if it was the result of alleged constitutional errors – is
8 irrelevant and will not be considered in an actual innocence determination. Id. at 347-48, at
9 2523-24.

10 That Petitioner has finally gotten around to challenging his New York conviction after
11 30 years does not amount to good cause to ignore NRS 34.726, NRS 34.800 and NRS
12 34.810. Petitioner’s reliance upon Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981
13 (1988), is misplaced. Johnson does not justify ignoring Petitioner’s procedural defaults. The
14 United States Supreme Court held that it could reach the merits of Johnson’s claim because
15 “we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in
16 this case has been consistently or regularly applied. Consequently, under federal law it is not
17 an adequate and independent state ground[.]” Id. at 588-89, 108 S.Ct. at 1988. Petitioner
18 does not even contend that Nevada’s procedural bars are not consistently applied. His
19 failure to do so is an admission that he cannot make such a showing. See, Polk v. State, 126
20 Nev. ___, ___, 233 P.3d 357, 360-61 (2010). Nor can he, even the Ninth Circuit Court of
21 Appeals admits that Nevada strictly enforces NRS 34.726(1). Loveland v. Hatcher, 231 F.3d
22 640, 642-43 (9th Cir. 2000). Indeed, the Federal District Court for Nevada has ruled in
23 Petitioner’s federal habeas litigation arising from this case that Nevada consistently enforces
24 NRS 34.726(1). Howard v. McDaniel, 2008 U.S. Dist. LEXIS 5191, p. 8-22 (D. Nev. 2008).
25 Regardless, the Nevada Supreme Court steadfastly maintains that it consistently enforces
26 Nevada’s procedural default rules. Riker, 121 Nev. at 235-42, 112 P.3d at 1077-82.

27 Thus, Johnson is irrelevant unless Petitioner can evade NRS 34.726(1), NRS 34.800
28 and NRS 34.810. To ignore the procedural bars Petitioner must establish “that the factual or

1 legal basis for a claim was not reasonably available to counsel, or that ‘some interference by
2 officials’ made compliance impracticable.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537
3 (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)). Petitioner
4 cannot make this showing because he has been aware of the defective nature of his New
5 York conviction for decades and did nothing about it. Petitioner knew from the time of trial
6 that he absconded from New York after his trial had started. (Exhibit A, Reporter’s
7 Transcript of Jury Trial, Thursday, April 21, 1983, 10:00 A.M., filed March 14, 1984, p.
8 1244). Petitioner challenged the prior violent felony aggravating circumstance based on the
9 lack of a sentence in his New York case in 2007 during the litigation of his fourth petition.
10 (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 25, 2007, p. 45-49).
11 This Court found the claim barred pursuant to NRS 34.726(1), NRS 34.800 and NRS 34.810.
12 (Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 19-21). This
13 Court ruled that Petitioner could not justify ignoring his procedural defaults. Id. at 27-33.
14 On appeal from denial of habeas relief, the Nevada Supreme Court agreed that the petition
15 was procedurally barred and that Petitioner could not overcome his defaults. (Order of
16 Affirmance, filed July 30, 2014, p. 2-3, 10-12).

17 Petitioner could have challenged the infirmity of his New York conviction at any time
18 since trial. The very purpose of the procedural bars is to compel habeas petitioners to pursue
19 their claims expeditiously. According to the United States Supreme Court, “the purpose of
20 the fault component of “failed” is to ensure the prisoner undertakes his own diligent search
21 for evidence. Diligence ... depends upon whether the prisoner made a reasonable attempt, in
22 light of the information available at the time, to investigate and pursue claims[.]” Williams
23 v. Taylor, 529 U.S. 420, 434-435, 120 S.Ct. 1479, 1490 (2000). Indeed, the High Court has
24 explicitly stated “that ‘cause’ under the cause and prejudice test must be something *external*
25 to the petitioner, **something that cannot be fairly attributed to him.**” Coleman v.
26 Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546, 2566 (1991) (italics in original, bolding
27 added). Similar to the procedural bars at issue in Williams and Coleman, Nevada also
28 requires a habeas petitioner to demonstrate a lack of fault. NRS 34.726(1)(a) (“good cause

1 for delay exists if the petitioner demonstrates ... [t]hat the delay was not the fault of the
2 petitioner”); NRS 34.800(1)(a) (“A petition may be dismissed ... unless the petitioner shows
3 that the petition is based upon grounds of which the petitioner could not have had knowledge
4 by the exercise of reasonable diligence”). Here, Petitioner did not pursue his claim regarding
5 his New York conviction for three decades. This is an obvious failure of diligence that
6 squarely places fault on Petitioner’s shoulders. Petitioner’s failure to address his lack of
7 diligence amounts to an admission that he cannot establish good cause. Polk, 126 Nev. at
8 ___, 233 P.3d at 360-61.

9 Nor can Petitioner escape the procedural bars by claiming that he is actually innocent
10 of the death penalty. “Where ... a petitioner cannot demonstrate cause and prejudice, the
11 district court may nevertheless excuse a procedural bar if the petitioner demonstrates that
12 failing to consider the merits of any constitutional claim would result in a fundamental
13 miscarriage of justice.” Rippo, 134 Nev. at 444, 423 P.3d at 1112 (citing, Pellegrini, 117
14 Nev. at 887, 34 P.3d at 537). Specifically, where a petitioner alleges ineligibility for the
15 death penalty he must show “by clear and convincing evidence that, but for a constitutional
16 error, no reasonable juror would have found him death eligible.” Pellegrini, 117 Nev. at 887,
17 34 P.3d at 537.

18 Petitioner cannot meet this standard because his jury found the prior violent felony
19 aggravating circumstance based on the testimony of the victim from that prior violent crime
20 and not purely on New York documentation of that conviction. It is important to note that in
21 the only authority proffered by Petitioner, the United States Supreme Court premised its
22 holding upon the fact that:

23 The sole evidence supporting the aggravating circumstance that petitioner had
24 been “previously convicted of a felony involving the use or threat of violence
25 to the person of another” consisted of an authenticated copy of petitioner’s
26 commitment to Elmira Reception Center in 1963 following his conviction in
Monroe County, New York, for the crime of second-degree assault with intent
to commit first-degree rape.

27 Johnson, 486 U.S. at 581, 108 S.Ct. at 1984. Johnson is factually distinguishable from this
28 case because the victim from Petitioner’s prior violent felony testified at the penalty hearing

1 about her victimization by Petitioner. (Exhibit B, Reporter's Transcript of May 2, 1983,
2 Penalty Hearing, p. 1464-81). Additionally, a New York detective testified regarding his
3 investigation of the prior violent felony. Id. at 1481-92.

4 This is significant because the presentation of the underlying facts from those who
5 experienced them allowed the jury to make an independent judgment about whether
6 Petitioner committed a prior violent felony instead of merely relying upon court records.
7 This distinction was key in Gardner v. State, 297 Ark. 541, 764 S.W.2d 416 (Ark. 1989).
8 The Supreme Court of Arkansas faced a habeas petitioner complaining "that the aggravating
9 circumstance found to exist by the jury in the sentencing phase ... has since been invalidated
10 ... because a conviction for a prior violent felony which formed the basis for the jury's
11 finding of an aggravating circumstance ... has since been reversed on appeal." Id. at 542,
12 764 S.W.2d at 417. Just as Petitioner does here, Gardner argued that Johnson required the
13 invalidation of his death sentence. Id. at 543-44, 764 S.W.2d at 418. The Supreme Court of
14 Arkansas rejected this claim:

15 In Johnson, the jury found the existence of three aggravating circumstances,
16 one of which was that Johnson had been previously convicted of a felony
17 involving the use or threat of violence to another person. The sole evidence of
18 the prior felony was a document reflecting a conviction for assault to commit
19 rape. The assault conviction was overturned on appeal after trial, and the
20 United States Supreme Court concluded that since the assault conviction was
21 invalid and the prosecutor had presented no evidence of the conduct
22 underlying it, Johnson was entitled to be resentenced. Johnson is not
23 applicable to petitioner's case because at petitioner's trial the jury heard
24 detailed direct testimony by the victims of the prior violent felony and other
25 evidence which established the nature of petitioner's conduct. In addition to
26 their testimony, there was further evidence of the crimes against them
27 introduced in the sentencing phase of petitioner's trial. The aggravating
28 circumstance was thus proved by evidence adduced at trial of the commission
of violent acts rather than by proof of a conviction, a practice which this court
has upheld. See, Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983).

24 Gardner, 297 Ark. At 544, 764 S.W.2d at 418.

25 Similarly, in Gibbs v. Johnson, 154 F.3d 253, 258 (5th Cir. 1998), cert. denied, 526
26 U.S. 1089, 119 S.Ct. 1501 (1999), the Fifth Circuit Court of Appeals faced a habeas
27 petitioner contending that his death sentence was invalid under Johnson because "the state
28 relied upon inaccurate evidence of a prior offense[.]" Gibbs premised his Johnson claim on

1 an alleged Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), violation. Gibbs, 154
2 F.3d at 255-58. Specifically, the State presented evidence that Gibbs attacked another
3 inmate but failed to disclose a jail report indicating that the incident was dismissed on self-
4 defense grounds. Id. at 256. The Fifth Circuit denied habeas relief:

5 We are not persuaded. In Johnson the invalidated conviction was the sole
6 evidence of the prior conduct. The court in Johnson emphasized that because
7 the prosecutor relied upon a judgment of conviction to prove the prior acts, the
reversal took away the prosecutor's evidence. The evidence of Gibbs's prior
acts was the testimony at trial of the victim.

8 Gibbs, 154 F.3d at 258.

9 The Eleventh Circuit has reached a similar conclusion. In Spivey v. Head, 207 F.3d
10 1263, 1269 (11th Cir. 2000), cert. denied, 531 U.S. 1053, 121 S.Ct. 660 (2000), a habeas
11 petitioner argued that “his prior vacated conviction was relied on in sentencing thus violating
12 his Eighth Amendment rights under Johnson[.]” The Eleventh Circuit recognized that in
13 Johnson “[t]he prosecution introduced no evidence about the conduct underlying the prior
14 conviction, but relied instead on a single authenticated copy of a document indicating the
15 conviction[.]” Id. at 1281. Based on that, the Court rejected the petitioner’s claim because
16 “[i]n contrast to Johnson, here there is extensive evidence of the conduct underlying the Bibb
17 County conviction[.]” Id.

18 Johnson is inapplicable to Petitioner since the jury heard direct evidence of his prior
19 violent crime. At the time of trial, the State argued that the jury needed to make its own
20 independent judgment regarding the existence of the prior violent felony aggravating
21 circumstance:

22 Mr. Seaton: We are going to bring forward eye-witness testimony or
23 testimony of these people who were down in San Bernardino and are familiar
24 with the crime and can tell the jury a little more about the factual
circumstances underlying

25 The reason for that, and I’ll just briefly elude to it here because it is
26 counsel’s argument at this time, but our reason for that is because the statute
175.554 causes the state to have the burden of proving these aggravating
27 circumstances beyond a reasonable doubt. And in addition to that, that
particular aggravating circumstance has to do with the use of force or violence.
28 And the mere recitation of what the conviction was for is not, in the state’s
mind, adequate to comply with that burden of proof.

1 ...

2 Mr. Seaton: The other act that we intend to bring forth has also been put into
3 evidence and again by the Defendant's own admission, and that is the
4 conviction in absente. In view of the robbery with a weapon of a nurse in
5 Queens, New York, in 1978. ...

6 ...

7 Mr. Seaton: We have witnesses. We have the nurse here and the detective
8 who worked the case. We would want to put them on as opposed to any
9 documentation for the same reason, that is to show the jury beyond a
10 reasonable doubt that the use of force and/or violence was used in the
11 commission of that particular robbery.

12 ...

13 And it's important that the State be able to show the jury the facts, and maybe
14 that's the important thing here. The jury isn't deciding as much the fact of the
15 conviction as they are what's the underlying facts of that conviction. What
16 was it that the jury was able to consider in order for that jury to determine that
17 there was a use or threat of violence? And those are the things that we wish to
18 bring before the jury at this particular time.

19 (Exhibit B, Reporter's Transcript of May 2, 1983, Penalty Hearing, p. 1453-54, 1457).

20 Consistent with this position, the State presented testimony from the victim and the
21 police detective who investigated the New York robbery. *Id.* at 1464-92. The State's
22 argument to the jury on the prior violent felony aggravating circumstance was also consistent
23 with this position. The State read out the instruction defining the prior violent felony
24 aggravating circumstance and then extensively discussed the *testimony* related to the New
25 York crime. *Id.* at 1572-74. Indeed, the State never presented the jury with a judgment of
26 conviction in the New York case. Instead, jurors were only given court minutes from the
27 New York case. *Id.* at 1489-90. Furthermore, the mere fact of the adjudication was not at
28 issue since Petitioner admitted the New York conviction. (Exhibit A, Reporter's Transcript
of April 12, 1983, Jury Trial, p. 1243, 1244).

Petitioner has failed to establish good cause or actual innocence. The New York
conviction was invalidated because "[s]ince 1980, the New York State authorities had actual
knowledge that the defendant was arrested and in continued custody by both California and
Nevada" and "[i]n 37 years, the People have not attempted to extradite the defendant to New
York or make any other reasonable effort to produce the defendant for sentencing." (*New*

1 York v. Howard, Queens County Supreme Court Case Number 1227178, dated May 22,
2 2018, p. 2-3, attached as Exhibit 2 to Petition for Writ of Habeas Corpus (Post-Conviction),
3 filed September 4, 2018).⁹ The very words of the New York Court apply equally to
4 Petitioner. Just like New York, Petitioner did nothing to enforce or protect his interests for
5 over 30 years. Just like New York, Petition should not profit from his lack of due diligence.
6 Thus, Petitioner cannot establish good cause. As for actual innocence, Petitioner's jury
7 found the prior violent felony aggravating circumstance because it heard the facts of the New
8 York case. That Petitioner's New York conviction was invalidated on a technicality after
9 more than 30 years does nothing to undermine the factual truth of what he did to the victim
10 in the New York case.

11 CONCLUSION

12 Based on the foregoing, this Court should dismiss and/or deny the Sixth Petition.

13 DATED this 30th day of October, 2019.

14 Respectfully submitted,

15 STEVEN WOLFSON
16 Clark County District Attorney
Nevada Bar #001565

17
18
19 BY /s/ Jonathan E. VanBoskerck
20 JONATHAN E. VANBOSKERCK
21 Chief Deputy District Attorney
Nevada Bar #006528
22 Office of the District Attorney
23

24 ⁹ Notably, Petitioner fails to provide this Court with a file stamped and certified copy of the alleged New York order.
25 This failure should be fatal since Petitioner carries both the burden of proof and persuasion in habeas. Molina v. State,
26 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); Hathaway v.
27 State, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2002);
28 Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). Petitioner attempts to evade his obligation by asking this
Court to take judicial notice of the New York order. (Sixth Petition, p. 7, footnote 10.). However, the Nevada Supreme
Court has rejected such a view of judicial notice. Rippo, 134 Nev. at 429, 423 P.3d at 1102 ("Even if some of the
documents were filed in the federal case while the direct appeal was pending, appellate counsel could not have expanded
the record before this court to include evidence that was not part of the trial record, see, Carson Ready Mix, Inc. v. First
Natl Bank of Nev., 97 Nev. 474, 476-77, 635 P.2d 276, 277-78 (1981)").

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Opposition and Motion to Dismiss Sixth Petition for Writ of Habeas Corpus (Post-Conviction) was made this 30th day of October, 2019, by Electronic Filing to:

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Counsels for Petitioner

/s/ E.Davis

Employee for the District Attorney's Office

JEV//ed

EXHIBIT A

EXHIBIT A

1 CASE NO. C53867

2 DEPARTMENT NO. V

3 DOCKET H

FILED

APR 14 1984

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5
6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF CLARK

8
9 THE STATE OF NEVADA,)
10 PLAINTIFF,)
11 VS.)
12 SAMUEL HOWARD, AKA KEITH,)
13 DEFENDANT.)
14

15 REPORTER'S TRANSCRIPT OF

16 JURY TRIAL

17
18 BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE
19 THURSDAY, APRIL 21, 1983, AT 10:00 A.M.
20

21 APPEARANCES:

22 FOR THE STATE: MELVIN T. HARMON, ESQUIRE
23 DANIEL M. SEATON, ESQUIRE
24 200 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89115
DEPUTY DISTRICT ATTORNEYS

25 FOR THE DEFENDANT: MARCUS D. COOPER, ESQUIRE
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27 309 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89101
DEPUTY PUBLIC DEFENDERS

28
29
30 REPORTED BY: RENEE SILVAGGIO, C.S.R. NO. 122
31

VOLUME VIII

1 LAS VEGAS, NEVADA, THURSDAY, APRIL 21, 1983, AT 10:00 A.M.

2 * * * * *

3 THE COURT: COUNSEL, STIPULATE TO THE PRESENCE OF
4 THE JURY?

5 MR. SEATON: YES, YOUR HONOR.

6 MR. COOPER: YES, YOUR HONOR.

7 MR. FRANZEN: YES, YOUR HONOR.

8 THE COURT: CALL YOUR NEXT WITNESS.

9 MR. HARMON: THANK YOU, YOUR HONOR. MUNSON MOSER.

10 THE CLERK: RAISE YOUR RIGHT HAND.

11

12 WHEREUPON,

13

14 MUNSON EDWIN MOSER,

15

16 CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,
17 EXAMINED AND TESTIFIED AS FOLLOWS:

18

19 THE COURT: PROCEED.

20 MR. HARMON: THANK YOU.

21

22 DIRECT EXAMINATION

23

24 BY MR. HARMON:

25

26 Q STATE YOUR NAME, PLEASE.

27 A MUNSON EDWIN MOSER, M-O-S-E-R.

28 Q MR. MOSER, WHERE ARE YOU EMPLOYED?

29 A I'M EMPLOYED WITH THE LAS VEGAS METROPOLI-
30 TAN POLICE DEPARTMENT, ASSIGNED TO THE CRIMINALISTICS BUREAU.

31 Q WHAT ARE THE NATURE OF YOUR DUTIES WITH THE
32 CRIMINALISTICS BUREAU?

1 A MY PRESENT ASSIGNMENT IS A LATENT PRINT
2 EXAMINER.

3 Q HOW LONG HAVE YOU BEEN A LATENT PRINT
4 EXAMINER WITH THE CRIMINALISTICS BUREAU OF THE LAS VEGAS METRO-
5 POLITAN POLICE DEPARTMENT?

6 A EIGHT YEARS.

7 Q DO YOU HAVE PRIOR EXPERIENCE TO THAT IN THE
8 FIELD OF LATENT PRINT EXAMINATION?

9 A I HAVE.

10 Q WHAT TYPE OF EXPERIENCE DO YOU HAVE?

11 A THAT WAS WITH THE LOS ANGELES POLICE DEPART-
12 MENT IN CALIFORNIA. I SERVED IN THAT CAPACITY THERE FOR 17
13 YEARS.

14 Q IN TOTAL HAVE YOU HAD APPROXIMATELY 25 YEARS
15 OF EXPERIENCE IN THE FIELD OF LATENT PRINT EXAMINATION?

16 A I HAVE.

17 Q WHAT IS YOUR FORMAL TRAINING?

18 A STUDIED FINGERPRINTS IN COLLEGE, SEMINARS,
19 SOME TRAINING BY F.B.I. INSTRUCTED CLASSES, NAMELY THE TRAINING
20 AND EXPERIENCE IN THE FIELD.

21 Q MR. MOSER, OVER THE PERIOD OF 25 YEARS CAN
22 YOU ESTIMATE HOW MANY LATENT PRINT EXAMINATIONS YOU HAVE CON-
23 DUCTED?

24 A IT WOULD BE IMPOSSIBLE. IT WAS A CONTINUING
25 THING ON A DAILY BASIS.

26 Q HAS THAT CONTINUED DURING THE EIGHT YEARS
27 YOU'VE BEEN EMPLOYED WITH THE LAS VEGAS METROPOLITAN POLICE
28 DEPARTMENT?

29 A IT HAS.

30 Q HAVE YOU QUALIFIED AS AN EXPERT IN THE
31 FIELD OF LATENT PRINT EXAMINATION IN COURTS OF LAW?

32 A I HAVE.

1 Q WILL YOU INDICATE WHERE AND ON ABOUT HOW
2 MANY OCCASIONS?

3 A IN THE MUNICIPAL AND SUPERIOR COURTS OF
4 CALIFORNIA, THE JUSTICE AND DISTRICT COURTS OF NEVADA, ALSO IN
5 FRONT OF NEVADA STATE GAMING COMMISSION, AND IN THE CIRCUIT COURT
6 OF SOUTH DAKOTA. AND APPROXIMATELY-- I NO LONGER ENUMERATE THE
7 AMOUNT OF TIMES, BUT AT THE LAST COUNT IT WAS SOMEWHERE IN EXCESS
8 OF 800 TIMES.

9 Q MR. MOSER, WERE YOU EMPLOYED AS A LATENT
10 PRINT EXAMINER FOR THE CRIMINALISTICS BUREAU OF THE LAS VEGAS
11 METROPOLITAN POLICE DEPARTMENT ON APRIL THE 18TH, 1980?

12 A YES, SIR.

13 Q DID YOU, ON THAT DATE, HAVE OCCASION TO
14 CONDUCT A LATENT PRINT EXAMINATION?

15 A I DID.

16 Q WILL YOU STATE WHAT YOU EXAMINED ON APRIL
17 18TH, 1980?

18 A I EXAMINED LATENT PRINTS THAT HAD BEEN
19 COLLECTED BY OTHER PERSONNEL HERE, SOME THAT HAD BEEN COLLECTED
20 OR RECOVERED BY A PERSON IN ANOTHER STATE IN CALIFORNIA, AND
21 COMPARED THOSE WITH AN INKED AND ROLLED EXEMPLAR OF A KNOWN
22 PERSON.

23 MR. HARMON: MAY I HAVE THE COURT'S INDULGENCE.

24 THE COURT: YOU MAY.

25
26 BY MR. HARMON:

27
28 Q MR. MOSER, WHEN YOU ENGAGE IN A LATENT PRINT
29 COMPARISON WHAT IS YOUR PROCEDURE?

30 A A FIVE-POWER MAGNIFYING GLASS IS USED,
31 WHICH WAS MANUFACTURED SPECIFICALLY FOR THAT PURPOSE. THE EXAM-
32 INATION IS STRICTLY VISUAL. IT IS EYE COMPARISON BETWEEN A

1 KNOWN SET OF FINGERPRINTS THAT ARE INKED AND A QUESTIONED FINGER-
2 PRINT THAT WAS DEVELOPED IN SOME MANNER AND RECOVERED FROM SOME
3 SURFACE.

4 THE COMPARISON IS MADE BY COMPARING
5 THE INDIVIDUAL RIDGE CHARACTERISTICS THAT COMPRISE THE PATTERN
6 OF THE FINGERPRINT.

7 Q BASED UPON YOUR TRAINING AND EXPERIENCE,
8 DO YOU HAVE AN OPINION AS TO WHETHER ANY TWO PERSONS HAVE THE
9 SAME RIDGE CHARACTERISTIC ON A FINGERPRINT, IDENTICALLY THE
10 SAME?

11 A AS OF THIS DATE, I HAVE YET TO HEAR OF ANY
12 CASE, WITH ALL OF THE FINGERPRINTS THAT HAVE BEEN COMPARED, ANY
13 TWO DIFFERENT PEOPLE HAVING AN IDENTICAL FINGERPRINT.

14 Q IT IS YOUR OPINION THAT EACH PERSON HAS
15 UNIQUE RIDGE CHARACTERISTICS?

16 A YES, SIR. THAT IS MY OPINION.

17 MR. HARMON: MAY I APPROACH THE WITNESS, YOUR HONOR?
18 THE COURT: YOU MAY.

19
20 BY MR. HARMON:

21
22 Q MR. MOSER, I AM SHOWING YOU NOW STATE'S
23 PROPOSED EXHIBITS 28-A, 29 AND 57. WILL YOU EXAMINE THOSE
24 PROPOSED EXHIBITS AND STATE WHETHER, ON APRIL THE 18TH, 1980,
25 YOU CONDUCTED A LATENT PRINT COMPARISON REGARDING THESE VARIOUS
26 PROPOSED EXHIBITS?

27 A YES, SIR. I DO RECOGNIZE THE EXHIBITS.
28 AND I DID CONDUCT AN EXAMINATION ON THAT DATE, WHICH WAS APRIL
29 THE 18TH, 1980, BETWEEN STATE'S PROPOSED EXHIBIT NUMBER 29 AND
30 STATE'S PROPOSED EXHIBIT NUMBER 57.

31 AND I NOTE THAT -- I NOTED THAT ON
32 STATE'S PROPOSED EXHIBIT 28-A THAT I EXAMINED THAT ON APRIL THE

1 -- APRIL THE 9TH, 1983. BUT THE THREE EXHIBITS WERE ORIGINALLY
2 COMPARED ON APRIL THE 18TH, 1980.

3 Q WILL YOU STATE FOR THE RECORD WHAT PROPOSED
4 EXHIBIT 29 IS?

5 A STATE'S PROPOSED EXHIBIT 29 IS A STANDARD
6 FINGERPRINT CARD BEARING TEN INKED AND ROLLED FINGERPRINTS OF
7 A KNOWN PERSON. THE CARD ATTACHED TO THE BACK OF STATE'S PRO-
8 POSED EXHIBIT 29 IS A RIGHT AND LEFT THUMB PRINT, ALSO INKED.

9 Q IS THE KNOWN PERSON ON PROPOSED EXHIBIT 29
10 IDENTIFIED AS SAMUEL HOWARD, ALSO KNOWN AS GEORGE WILLIAMS?

11 A YES, SIR.

12 Q AND ARE THOSE PRINTS PURPORTEDLY OBTAINED
13 BY SOMEONE NAMED BLOCK IN THE STATE OF CALIFORNIA?

14 A THAT'S CORRECT.

15 Q WERE THOSE THE STANDARD OR EXEMPLAR PRINTS
16 ORIGINALLY USED BY YOU ON APRIL 18, 1980, IN MAKING CERTAIN
17 LATENT PRINT COMPARISONS?

18 A YES, SIR, THEY ARE.

19 Q NOW, SPECIFICALLY REFERRING TO PROPOSED
20 EXHIBIT 57, WHAT DOES THAT PURPORT TO BE?

21 A STATE'S PROPOSED EXHIBIT 57 IS A LATENT
22 PRINT THAT WAS DEVELOPED BY A PERSON HERE EMPLOYED AND LIFTED
23 AND TRANSFERRED TO THIS CARD, WHICH IS PREPARED FOR THAT
24 PURPOSE.

25 Q NOW, WAS THE PERSON WHO LIFTED THAT PARTIC-
26 ULAR PRINT, IS HE IDENTIFICATION SPECIALIST HANK TRUSZKOWSKI?

27 A YES, SIR.

28 Q I DIRECT YOUR ATTENTION NOW TO THE REMAIN-
29 ING PROPOSED EXHIBITS, PROPOSED 28-A. WHAT DID THE LATENT PRINT
30 CARDS PURPORT TO BE, WHICH COMPRISED THAT PROPOSED EXHIBIT?

31 A STATE'S EXHIBIT -- PROPOSED EXHIBIT 28-A
32 IS A SERIES OF LIFTED LATENT PRINTS THAT WERE ALSO DEVELOPED

1 AND LIFTED BY ANOTHER PERSON.

2 Q DOES THAT APPEAR TO BE OFFICER DWIGHT
3 HOOKER OF THE DOWNEY POLICE DEPARTMENT?

4 A YES, SIR, IT DOES.

5 Q DID THESE PURPORT TO BE LATENTS WHICH ARE
6 RECOVERED FROM AN OLDSMOBILE CUTLASS?

7 A YES, SIR.

8 Q MR. MOSER, SPECIFICALLY REGARDING PROPOSED
9 EXHIBIT 29, WHAT PURPORTS TO BE THE EXEMPLAR OR STANDARD PRINTS
10 OF ONE SAM HOWARD, ALSO KNOWN AS GEORGE WILLIAMS, AND STATE'S
11 PROPOSED EXHIBIT 57, THE LATENT PRINT RECOVERED BY IDENTIFICA-
12 TION SPECIALIST MR. TRUSZKOWSKI, WHAT WOULD YOUR PROCEDURE ON
13 APRIL 18, 1980, IN CONDUCTING YOUR LATENT PRINT COMPARISON?

14 A THE PROCEDURE WAS, AS I TOLD YOU BEFORE,
15 THAT OF USING A MAGNIFYING GLASS IN COMPARING THIS LATENT PRINT
16 TO THE FINGERPRINTS ON STATE'S PROPOSED EXHIBIT NUMBER 29 IN
17 AN EFFORT TO MATCH THEM.

18 Q DID YOU, AS A RESULT OF YOUR COMPARISON,
19 FORM AN OPINION ON APRIL THE 18TH, 1980?

20 A I DID.

21 Q HAVE YOU SUBSEQUENTLY TO THAT DATE COMPARED
22 THE LATENT PRINT RECOVERED BY IDENTIFICATION SPECIALIST HANK
23 TRUSZKOWSKI, WHICH IS MARKED AS PROPOSED EXHIBIT 57, AND THE
24 LATENT PRINTS RECOVERED BY DWIGHT HOOKER OF THE DOWNEY POLICE
25 DEPARTMENT FROM AN OLDSMOBILE CUTLASS. THEY ARE MARKED AS
26 PROPOSED EXHIBIT 28, WITH ADDITIONAL EXEMPLAR PRINTS OF SAM
27 HOWARD.

28 A I DID.

29 Q DO YOU RECALL ON WHAT DATE THAT WAS?

30 A ACCORDING TO MY NOTATION HERE, IT WOULD
31 HAVE BEEN MARCH THE 19TH, 1983, APPROXIMATELY.

32 MR. HARMON: MAY I APPROACH THE WITNESS, YOUR HONOR?

1 THE COURT: YES.

2

3 BY MR. HARMON:

4

5 Q MR. MOSER, I AM SHOWING YOU NOW AN ADDITION-
6 AL EXEMPLAR -- A SERIES OF EXEMPLAR PRINT CARDS. THEY ARE
7 MARKED AS PROPOSED EXHIBIT 58. ARE YOU ABLE TO RECOGNIZE THIS
8 PROPOSED EXHIBIT?

9 A YES, I CAN. I PUT A DATE ON THE FACE OF IT
10 AND MY INITIALS AND PERSONNEL NUMBER.

11 Q DID YOU, IN FACT, UTILIZE PROPOSED EXHIBIT
12 58, WHICH PURPORTS TO BE THE KNOWN FINGER AND THUMB PRINT OF
13 DEFENDANT SAM HOWARD RECOVERED BY OFFICER HANK TRUSZKOWSKI IN
14 COMPARING THOSE PRINTS WITH THE OTHER EXHIBITS YOU HAVE, PROPOSED
15 EXHIBITS 29, 57 AND 28-A?

16 A I DID UTILIZE THEM AND MADE A SEPARATE
17 COMPARISON, COMPARING STATE'S PROPOSED EXHIBIT 58 WITH EACH OF
18 THE OTHER THREE EXHIBITS.

19 Q WAS THAT ON MARCH THE 14TH, 1983?

20 A YES, SIR, IT WOULD BE.

21 ALSO I HAVE HERE THE DATE OF MARCH
22 THE 8TH, 1983, ON THE FACE OF THE EXHIBIT. SO THAT WOULD BE
23 THE ORIGINAL DATE THAT I BEGAN. THE 14TH WOULD BE THE DATE THAT
24 I COMPLETED ALL OF MY EXAMINATION AND WROTE THAT ON MY REPORT.

25 Q SPECIFICALLY REGARDING PROPOSED EXHIBIT 58
26 AND PROPOSED EXHIBIT 29, DID YOU MAKE AN EFFORT TO DETERMINE
27 WHETHER THE TWO STANDARD OR EXEMPLAR SERIES OF PALM AND FINGER-
28 PRINTS WERE BY THE SAME INDIVIDUAL?

29 A I DID.

30 Q WHAT IF ANY WAS THE OPINION YOU FORMED?

31 MR. FRANZEN: YOUR HONOR, WE WOULD RESPECTFULLY
32 OBJECT. IF THIS WITNESS IS GOING TO TESTIFY REGARDING EXEMPLARS

1 DONE BY AN OFFICER BLOCK, WE'VE HAD NO TESTIMONY THAT I RECALL
2 FROM AN OFFICER BLOCK.

3 THE COURT: I CAN'T HEAR YOU.

4 MR. FRANZEN: WE'VE HAD NO TESTIMONY FROM AN
5 OFFICER BLOCK, YOUR HONOR, IDENTIFYING FINGERPRINTS OR LATENTS.
6 AND I WOULD RESPECTFULLY OBJECT TO ANY TESTIMONY REGARDING ANY
7 COMPARISONS MADE FROM AN EXHIBIT, PROPOSED EXHIBIT, THAT'S NOT
8 IDENTIFIED THROUGH THE TESTIMONY BY OFFICER BLOCK.

9 MR. HARMON: YOUR HONOR, IT'S ONLY FOR CONTINUITY
10 SAKE. THE EVIDENCE WE HAVE IS THAT DETECTIVE LEAVITT RECEIVED
11 THOSE EXEMPLARS FROM THE DOWNEY POLICE DEPARTMENT. WE'VE
12 ESTABLISHED, WITHOUT GOING INTO WHAT HIS OPINION WAS, THAT ON
13 APRIL THE 18TH, 1980, THOSE EXEMPLARS WERE UTILIZED BY MR.
14 MOSER. AND NOW I'M ASKING HIM TO MAKE SURE OF THE IDENTITY OF
15 THE PERSON WHOSE PRINTS APPEARED ON THAT EXEMPLAR.

16 IF HE COMPARED THE EXEMPLARS IDENTIFIED BY
17 TRUSZKOWSKI IN THIS ROOM AS BEING TAKEN FROM THE DEFENDANT WITH
18 WHAT PURPORTS TO BE MR. BLOCK'S EXEMPLARS, I DON'T THINK, IN
19 VIEW OF THE LIMITED OPINION I'M ASKING, THERE'S ANY FOUNDATION
20 PROBLEM. HE'S BEEN SHOWN TO BE AN EXPERT. HE CAN SAY WHETHER
21 THE TWO STANDARD CARDS WERE TAKEN FROM THE SAME PERSON.

22 THE COURT: YOUR OBJECTION IS OVERRULED.

23 MR. HARMON: THANK YOU.

24
25 BY MR. HARMON:

26
27 Q WHAT IS YOUR OPINION?

28 A IN MY OPINION THE FINGERPRINTS APPEARING
29 ON -- AND THUMB PRINTS APPEARING ON STATE'S PROPOSED EXHIBIT 29
30 AND STATE'S PROPOSED EXHIBIT 58 WERE MADE BY ONE AND THE SAME
31 PERSON.

32 Q I'M SHOWING YOU NOW PROPOSED EXHIBIT 28-A.

1 THESE PURPORT TO BE LATENT PRINT CARDS PREPARED BY OFFICER
2 DWIGHT HOOKER OF THE DOWNEY POLICE DEPARTMENT. THERE HAS,
3 FURTHERMORE, BEEN TESTIMONY THAT HE RECOVERED THOSE FROM A
4 BLACK OLDSMOBILE CUTLASS ON OR ABOUT APRIL THE 1ST OR 2ND, 1980,
5 IN DOWNEY, CALIFORNIA.

6 HAVE YOU HAD OCCASION TO COMPARE THE
7 KNOWN PRINTS OF DEFENDANT SAMUEL HOWARD AS THEY ARE PORTRAYED IN
8 PROPOSED EXHIBIT 58 WITH THE LATENT FINGERPRINTS RECOVERED BY
9 OFFICER DWIGHT HOOKER WHICH ARE IDENTIFIED AS PROPOSED EXHIBIT
10 28-A?

11 A YES, SIR, I DID.

12 Q WHAT WAS THE OPINION THAT YOU FORMED?

13 A OF THE SEVERAL LISTED LATENT PRINT CARDS,
14 I IDENTIFIED A LEFT MIDDLE FINGER AS MATCHING THE CORRESPONDING
15 FINGER ON STATE'S PROPOSED NUMBER 58, A LEFT THUMB --

16 Q AND WHERE WAS THE AREA THAT THAT LATENT
17 WAS PURPORTEDLY LIFTED FROM?

18 A ACCORDING TO THE NOTATION ON THE LIFT CARD,
19 THE INTERIOR PORTION OF THE DRIVER'S WINDOW.

20 Q PROCEED, PLEASE.

21 A ON THE SECOND CARD I IDENTIFIED THE LEFT
22 THUMB AS MATCHING THE CORRESPONDING FINGER ON STATE'S PROPOSED
23 EXHIBIT 58. AND THE NOTATION AS TO ITS LOCATION IS THE EXTERIOR
24 DRIVER'S REAR VIEW MIRROR, THE MIRROR PORTION.

25 ON THE NEXT CARD I IDENTIFIED A
26 PARTIAL LEFT THUMB PRINT AND THE NOTATION OF WHERE THIS LOCATION
27 WAS WAS ON THE FRONT BUMPER DRIVER'S SIDE.

28 MR. FRANZEN: I AM GOING TO HAVE TO INTERCEDE IF
29 HE IS MAKING COMPARISONS AND READING WHAT DETECTIVE BLOCK WROTE
30 ON HIS --

31 MR. HARMON: WELL, WE'LL OFFER THEM, YOUR HONOR.
32 THE FOUNDATION HAS BEEN LAID. WE WILL OFFER PROPOSED EXHIBIT

1 28-A, I BELIEVE THAT'S THE ONE.

2 MR. FRANZEN: THAT IS THE ONE FROM HOOKER OR BLOCK?

3 MR. HARMON: HOOKER.

4 MR. FRANZEN: NO OBJECTION.

5 THE COURT: SAME WILL BE RECEIVED.

6 PROCEED.

7
8 BY MR. HARMON:

9
10 Q CONTINUE, PLEASE.

11 A ON THE REVERSE SIDE OF THE LIFT THAT I
12 JUST IDENTIFIED IS ANOTHER ADDITIONAL LIFTED PARTIALLY PRINT,
13 PALM PRINT, WHICH WAS ALSO IDENTIFIED AS THE LEFT PALM. AND ITS
14 LOCATION WAS NOTED THE FRONT BUMPER, DRIVER'S SIDE.

15 ON THE NEXT CARD, ON THE FACE OF IT,
16 I IDENTIFIED A RIGHT INDEX FINGER. THESE IDENTIFICATIONS
17 CORRESPOND TO THE EXEMPLARS IN STATE'S EXHIBIT 58. I IDENTIFIED
18 A RIGHT INDEX FINGER. AND THE NOTATION THERE WAS FROM AN EMPTY
19 BOTTLE OF SPARKLING CHAMPAGNE ON THE RIGHT REAR FLOORBOARD.

20 AND ON THE REVERSE SIDE OF THE NEXT
21 CARD I IDENTIFIED A LEFT INDEX FINGER. THE NOTATION OF ITS
22 LOCATION IS EXTERIOR DRIVER'S DOOR WINDOW.

23 AND ON THE REMAINING THREE LATENT
24 PRINT LIFTS, I DID NOT IDENTIFY THOSE.

25 Q IN ALL, MR. MOSER, HOW MANY IDENTIFICATIONS
26 DID YOU MAKE FROM PROPOSED -- IS IT PROPOSED EXHIBIT 28-A, THE
27 HOOKER LATENT PRINTS?

28 A IT IS 28-A.

29 Q 28-A.

30 A THAT WOULD BE ONE, TWO -- IN ALL SIX
31 PARTIAL LATENT PRINTS.

32 Q WHICH WERE MATCHED TO EXEMPLAR PRINTS OF

1 THE DEFENDANT SAM HOWARD; IS THAT CORRECT?

2 A THAT IS CORRECT.

3 Q I AM SHOWING YOU NOW PROPOSED EXHIBIT 57.
4 AS WE PREVIOUSLY INDICATED, THIS PURPORTS TO BE A LATENT PRINT
5 LIFTED BY IDENTIFICATIONS SPECIALIST TRUSZKOWSKI FROM A 1977
6 DODGE VAN. DID YOU HAVE OCCASION TO COMPARE THE KNOWN PRINTS
7 OF SAM HOWARD, RECOVERED BY THE SAME HANK TRUSZKOWSKI, WITH
8 PROPOSED EXHIBIT 57?

9 A I DID.

10 Q THE KNOWN PRINTS BEING IDENTIFIED AS
11 PROPOSED EXHIBIT 58?

12 A YES, SIR.

13 Q ON WHAT DATE DID YOU PERFORM THAT COMPARI-
14 SON?

15 A THIS COMPARISON WAS PERFORMED ON THE 8TH
16 OF MARCH, 1983, BETWEEN THE TWO EXHIBITS.

17 Q AND WHAT WAS YOUR PROCEDURE IN CONDUCTING
18 THE COMPARISON?

19 A IT WAS THE SAME AS I EXPLAINED BEFORE,
20 USING A MAGNIFYING GLASS AND COMPARING ALL OF THE VISIBLE RIDGE
21 CHARACTERISTICS ON THE LATENT PRINT WITH THOSE ON EACH EXEMPLAR
22 PRINT.

23 Q DID YOU FORM AN OPINION?

24 A I DID.

25 Q WHAT IS YOUR OPINION?

26 A IN MY OPINION, THE PORTION LATENT PRINT,
27 APPEARING ON STATE'S PROPOSED EXHIBIT NUMBER 57, MATCHES THE
28 SAME PORTION OF THE LEFT THUMB PRINT ON STATE'S PROPOSED 58.

29 Q MR. MOSER, AT THE REQUEST OF REPRESENTA-
30 TIVES OF THE CLARK COUNTY DISTRICT ATTORNEYS OFFICE REGARDING
31 THE LAST LATENT PRINT COMPARISON TO WHICH YOU HAVE REFERRED,
32 HAVE YOU PREPARED AN ENLARGED DISPLAY TO ILLUSTRATE THE BASIS OF

1 YOUR OPINION?

2 A YES, SIR.

3 MR. HARMON: MAY I HAVE THE COURT'S INDULGENCE.

4 MAY I APPROACH THE WITNESS, YOUR HONOR?

5 THE COURT: YOU MAY.

6
7 BY MR. HARMON:

8
9 Q MR. MOSER, I'M SHOWING YOU NOW PROPOSED
10 EXHIBIT 64. ARE YOU ABLE TO IDENTIFY IT?

11 A YES, SIR, I PREPARED THIS MYSELF.

12 Q WHAT EXACTLY IS PROPOSED EXHIBIT 64?

13 A PROPOSED EXHIBIT 64 CONSISTS OF AN ENLARGED
14 PORTION OF THE LEFT THUMB PRINT APPEARING ON THE FACE OF STATE'S
15 PROPOSED EXHIBIT 58. AND AN ENLARGED PHOTOGRAPH OF THE PARTIAL
16 LATENT PRINT APPEARING ON THE FACE OF STATE'S PROPOSED EXHIBIT
17 57.

18 Q HDW DID YDU GO ABOUT MAKING THESE ENLARGE-
19 MENTS?

20 A IT IS A MATTER OF PHOTOGRAPHING THE
21 ORIGINAL FINGERPRINTS, MAKING NEGATIVES, AND THEN PRINTING THE
22 ENLARGED PRINTS FROM THOSE NEGATIVES, THEN CHARTING SEVERAL OF
23 THE RIDGE CHARACTERISTICS THAT I IDENTIFIED.

24 Q WOULD REFERENCE TO PROPOSED EXHIBIT 64 BE
25 HELPFUL TO YOU IN EXPLAINING TO THE COURT AND JURY THE BASIS OF
26 YOUR FINDINGS.

27 A YES, SIR, IT WOULD.

28 Q ARE THE ENLARGEMENTS TRUE AND ACCURATE
29 REPRODUCTIONS OF BOTH THE LATENT PRINTS RECOVERED BY OFFICER
30 TRUSZKOWSKI AND THE KNOWN LEFT THUMB PRINT OF DEFENDANT SAM
31 HOWARD?

32 A YES, SIR.

1 MR. HARMON: YOUR HONOR, AT THIS TIME I OFFER
2 PROPOSED EXHIBITS 57, 58, 29 AND 64.

3 THE COURT: ANY OBJECTION?

4 MR. COOPER: WE'D HAVE NO OBJECTION, YOUR HONOR.

5 THE COURT: SAME MAY BE RECEIVED.

6 MR. HARMON: THANK YOU, YOUR HONOR.

7 WITH THE COURT'S PERMISSION, MAY WE HAVE
8 MR. MOSER STEP DOWN TO THE BOARD?

9 THE COURT: HE MAY. PULL IT OUT.

10 MR. HARMON: THANK YOU, MR. BAILIFF.

11 THE COURT: COUNSEL, CAN YOU CLIP THAT TOP, I
12 BELIEVE.

13
14 BY MR. HARMON:

15
16 Q MR. MOSER, I'D LIKE YOU NOW, BY REFERRING
17 TO STATE'S EXHIBIT 64, AND AS OCCASION MAY ARISE, STATE'S
18 EXHIBITS 57 AND 58, TO EXPLAIN WHAT THE BASIS WAS OF YOUR
19 OPINION THAT THE LATENT PRINT RECOVERED BY OFFICER TRUSZKOWSKI
20 FROM A DOOR KNOB OF A CARGO DOOR ON THE PASSENGER'S SIDE OF THE
21 1977 DODGE VAN IS MATCHED TO THE LEFT THUMB PRINT OF THE
22 DEFENDANT SAM HOWARD.

23 A THE BASIS FOR THE CONCLUSION, TO BEGIN
24 WITH, IS THAT NO TWO DIFFERENT PEOPLE HAVE IDENTICAL FINGER-
25 PRINTS. THAT IS NOT TO SAY THE PATTERN OF THE PRINT, HOWEVER,
26 BECAUSE PEOPLE HAVE SIMILAR PATTERNS. IT IS THESE INDIVIDUAL
27 RIDGE CHARACTERISTICS THAT YOU CAN SEE A LITTLE MORE CLEARLY
28 ON THE INKED IMPRESSION SIDE THAT ARE THE DIFFERENCE IN ANY
29 INDIVIDUAL'S FINGERPRINTS, EVEN THOUGH THE PATTERN MAY BE THE
30 SAME.

31 THE BASIS FOR THE IDENTIFICATION IS
32 THAT THE SAME RIDGE CHARACTERISTICS THAT APPEAR IN THE KNOWN

1 PRINT ALSO APPEAR IN THE QUESTIONED PRINT IN THE SAME NUMBERS AND
2 IN THE SAME LOCATIONS.

3 IN THE CASE OF NUMBER 1, IT IS AN END-
4 ING RIDGE, OR WHEN ONE OF THE FRICTION RIDGES ENDS. AND NUMBER
5 2 IS THE OPPOSITE END OF THE SAME RIDGE, WHICH ENDS IN THE SAME
6 LOCATION.

7 NUMBER 3 IS ALSO AN ENDING RIDGE, END-
8 ING IN A DOWNWARD MANNER.

9 NUMBER 4 AND NUMBER 5 ARE BOTH ENDS OF
10 A SHORT RIDGE THAT APPEARS IN THE SAME PORTION OF THE FINGER-
11 PRINT.

12 NUMBER 6 IS ALSO AN ENDING RIDGE,
13 CONTINUES ON TO THE LEFT.

14 NUMBER 7 IS ALSO AN ENDING RIDGE.

15 NUMBER 8 IS A -- WHAT IS KNOWN AS A
16 "BIFURCATION". THAT IS WHERE A SINGLE RIDGE SEPARATES OR
17 DIVIDES AND BECOMES TWO RIDGES. AT THE POINT WHERE IT DIVIDES,
18 IT IS CALLED A "BIFURCATION".

19 NUMBER 9 IS ALSO A BIFURCATION.

20 NUMBER 10 IS THE SAME CHARACTERISTIC
21 OF A BIFURCATION. THESE ALL APPEAR IN THE SAME LOCATION IN
22 RELATIONSHIP TO ONE ANOTHER AND THERE ARE NO CHARACTERISTICS
23 IN THE LATENT PRINT THAT DO NOT APPEAR IN THE INKED IMPRESSION
24 IN THE SAME LOCATION.

25 Q MR. MOSER, YOU HAVE POINTED OUT TEN SIMILAR
26 CHARACTERISTICS IN TERMS OF THE RIDGE CHARACTERISTICS. DID YOU
27 FIND ADDITIONAL POINTS IN SIMILARITY?

28 A THERE ARE SOME SLIGHTLY MORE VAGUE POINTS,
29 BUT NONETHELESS THERE ARE ONE OR TWO MORE IN THE PRINTS.

30 Q IS THERE ANY DOUBT IN YOUR MIND THAT BOTH
31 PRINTS WHICH APPEAR ON STATE'S EXHIBIT 64 WERE MADE BY THE SAME
32 ...

1 PERSON?

2 A THERE IS NO DOUBT IN MY MIND.

3 Q NOW, ASSUMING FOR A MOMENT THAT THE LATENT
4 PRINT WAS RECOVERED FROM A DOOR KNOB, DID YOU OBSERVE ANY
5 EVIDENCE OF OVERLAY PRINTS OF THAT LATENT AT THE TIME OF YOUR
6 LATENT PRINT COMPARISON?

7 A NO, SIR, I DID NOT.

8 Q ASSUMING THAT IT WAS RECOVERED FROM A DOOR
9 KNOB, WHAT SIGNIFICANCE, IF ANY, CAN YOU ATTACH TO YOUR FINDING
10 THAT THERE WERE NO OVERLAY PRINTS ON IT?

11 A THE SIGNIFICANCE THERE WOULD BE IF THERE
12 WERE AN OVERLAY IT WOULD INDICATE TO ME THAT THE FINGERPRINT
13 THAT HAD BEEN PLACED THERE PRIOR WAS STILL IN FRESH ENOUGH CON-
14 DITION, THAT IS TO SAY THE MOISTURE WAS TRANSFERRED FROM THE
15 FINGER TO THE SURFACE HAD NOT YET DRIED OR EVAPORATED, RENDERING
16 THE FIRST PRINT TO BE ALSO PARTLY DEVELOPED, ALONG WITH THE
17 SECOND PRINT ON TOP OF IT.

18 SO THE FINDING THERE WOULD BE THAT THE
19 -- I DID NOT DETECT ANY PRIOR FRESH FINGERPRINT BENEATH THIS.
20 AND HAD THIS LATENT PRINT HAD A SECOND FINGERPRINT PUT ON TOP
21 OF IT, IT WOULD HAVE OR SHOULD HAVE DEVELOPED IN THE SAME MANNER,
22 INDICATING THE TWO -- THE TWO IMPRESSIONS.

23 Q DID YOU FIND ANY EVIDENCE OF ANY OTHER
24 PRINT BEING PLACED ON TOP OF THE LATENT PRINT, WHICH IS SHOWN
25 ON STATE'S EXHIBIT 64?

26 A NONE.

27 MR. HARMON: THANK YOU.

28 MAY I RETURN TO THE WITNESS CHAIR?

29 THAT CONCLUDES DIRECT, YOUR HONOR.

30 THE COURT: CROSS?

31 MR. COOPER: COURT'S INDULGENCE.

32

1 CROSS EXAMINATION

2
3 BY MR. COOPER:

4
5 Q MR. MOSER, YOU TESTIFIED THAT YOU WERE
6 GIVEN THE ONE LATENT PRINT THAT'S SHOWN ON THE BLOWUP THERE; IS
7 THAT RIGHT?

8 A YES, SIR.

9 Q TO COMPARE WITH A KNOWN PRINT FROM THE
10 DEFENDANT SAMUEL HOWARD?

11 A YES, SIR.

12 Q RIGHT?

13 WERE YOU ALSO GIVEN OTHER LATENT
14 PRINTS TO COMPARE WITH MR. HOWARD'S PRINTS?

15 A NO, SIR. THE PRINTS I WAS REQUESTED TO
16 COMPARE ARE THE ONES THAT ARE IN EVIDENCE.

17 Q I SEE.

18 THOSE BEING THE ONES THAT WERE LIFTED
19 FROM THE 1980 OLDSMOBILE AND THE ONE PRINT THAT WAS PURPORTEDLY
20 LIFTED FROM THE DOOR KNOB OF THE VAN; IS THAT RIGHT?

21 A YES, SIR.

22 Q YOU WEREN'T GIVEN LATENT PRINTS, SOME 15
23 OR SO LATENT PRINTS, THAT WERE PURPORTEDLY LIFTED FROM THE VAN
24 TO COMPARE WITH MR. HOWARD'S KNOWN PRINTS?

25 A I'M SORRY. I'M IN ANOTHER -- THERE WERE
26 SOME ADDITIONAL FINGERPRINTS, YES, FROM THE VAN.

27 Q OKAY. DO YOU RECALL HOW MANY PRINTS FROM
28 THE VAN YOU WERE GIVEN TO COMPARE WITH MR. HOWARD'S PRINTS?

29 A I DO NOT RECALL THE EXACT NUMBER.

30 Q OKAY.

31 A THERE WERE SEVERAL.

32 Q OKAY. COULD IT HAVE BEEN IN EXCESS OF TEN?

1 A IT COULD HAVE BEEN.

2 Q I SEE.

3 OF THOSE OTHER LATENT PRINTS, DID ANY
4 OF THOSE MATCH UP WITH MR. HOWARD'S PRINTS?

5 A I DID NOT MATCH ANY OF THE OTHER PRINTS WITH
6 MR. HOWARD'S PRINTS.

7 Q WERE YOU ABLE TO MATCH THOSE PRINTS WITH
8 ANYONE?

9 A AS I RECALL, I BELIEVE ONE OF THE FINGER-
10 PRINTS WAS IDENTIFIED AS MATCHING THE DECEASED.

11 Q I SEE.

12 AND THE OTHERS YOU WERE UNABLE TO
13 MATCH WITH ANYONE?

14 A THAT'S CORRECT.

15 MR. COOPER: I HAVE NOTHING FURTHER OF THE WITNESS,
16 YOUR HONOR.

17
18 REDIRECT EXAMINATION

19
20 BY MR. HARMON:

21
22 Q MR. MOSER, DO YOU RECALL IF YOU COMPARED
23 THE LATENTS RECOVERED BY OFFICER TRUSZKOWSKI, IN ADDITION TO
24 THE LATENTS SHOWN ON STATE'S 64, THOSE PRINTS, WITH THE KNOWN
25 PRINTS OF THE WIFE MARY LOU MONAHAN --

26 A I BELIEVE --

27 Q (CONTINUING) -- THE WIFE OF THE DECEASED?

28 A I BELIEVE I DID.

29 Q AND DO YOU RECALL IF YOU MATCHED ANY OF HER
30 PRINTS TO LATENTS RECOVERED BY OFFICER TRUSZKOWSKI?

31 A I CAN'T RECALL WITHOUT REFERRING TO MY
32 REPORT.

1 Q DO YOU HAVE YOUR REPORT?
2 A YES, SIR, I DO.
3 Q WILL YOU REFER TO IT, PLEASE.
4 A MY REPORT DOES NOT INDICATE THAT I IDENTI-
5 FIED ANY OF THE PRINTS WITH MRS. MONAHAN.
6 Q BUT YOU DID MAKE COMPARISONS OF THE KNOWN
7 PRINTS OF MRS. MONAHAN?
8 A YES, SIR, I DID.
9 Q WITH LATENT PRINTS?
10 A I DID.
11 Q DID IT NECESSARILY MEAN THAT YOUR FAILURE
12 TO MATCH THE PRINTS OF MARY LOU MONAHAN TO ANY LATENTS RECOVERED
13 FROM THE 1977 DODGE VAN THAT SHE WAS NEVER INSIDE THE VAN?
14 A NO. IT WOULD NOT INDICATE THAT.
15 Q WHY IS THAT?
16 A MOSTLY BECAUSE THESE FINGERPRINTS THAT ARE
17 PROCESSED AND DEVELOPED ARE LATENT PRINTS, AS WE REFER TO THEM,
18 ARE LEFT ACCIDENTALLY AND NOT ON PURPOSE, AND THEY'RE RATHER
19 FRAGILE IN THAT THEY CAN BE SMEARED, SMUDGED, OR REMOVED IN
20 CLEANING OR EVEN POSSIBLY JUST NOT ANY SURFACE TOUCHED IN SUCH
21 A MANNER THAT WOULD LEAVE AN IDENTIFIABLE PRINT.
22 Q WHAT WOULD CAUSE THE SMUDGE OF FINGERPRINTS?
23 A SIMPLY SLIPPAGE OF A FINGER OR SOMEBODY
24 ELSE WIPING THE SURFACE, ANY CONTAMINATION DUST OR DISTURBANCE
25 COULD OBLITERATE IT.
26 Q AND ARE THEY EASILY OBLITERATED OR DESTROY-
27 ED?
28 A IN A FINGERPRINT THAT HAS RECENTLY BEEN
29 DEPOSITED ON A SURFACE THEY ARE QUITE FRAGILE AND CAN BE OBLIT-
30 ERATED.
31 Q MR. MOSER, DID YOU COMPARE THE KNOWN PRINTS
32 OF BARBARA ZEMAN, THE SISTER OF MARY LOU MONAHAN, WITH LATENTS

1 RECOVERED BY OFFICER TRUSZKOWSKI FROM THE 1977 DODGE VAN?

2 A I CAN'T RECALL. IF I MAY REFER TO AN
3 ENVELOPE IN THE -- WITH MY NOTES, I MIGHT BE ABLE TO TELL YOU.

4 Q WILL THAT ASSIST YOU IN REFRESHING YOUR
5 MEMORY?

6 A YES, SIR.

7 Q WILL YOU REFER TO IT, PLEASE.

8 A I FEAR, I DO NOT HAVE A RECORD OF THAT, AND
9 I CANNOT RECALL.

10 Q DID YOU COMPARE THE KNOWN PRINTS OF GEORGE
11 STEVEN MONAHAN'S DAUGHTER, MARY CATHERINE MONAHAN, WITH LATENTS
12 RECOVERED BY OFFICER TRUSZKOWSKI FROM THE SAME DODGE VAN?

13 A I DON'T RECALL I DID.

14 Q WHAT ABOUT FRIENDS OR BUSINESS ASSOCIATES
15 OF GEORGE STEVEN MONAHAN, WERE THEY COMPARED WITH THE LATENTS
16 RECOVERED?

17 A TO THE BEST OF MY RECOLLECTION, NO.

18 MR. HARMON: THANK YOU.

19 THAT CONCLUDES REDIRECT, YOUR HONOR.

20

21 RECROSS EXAMINATION

22

23 BY MR. COOPER:

24

25 Q WHEN YOU SAY THAT A LATENT PRINT IS IDENTI-
26 FIABLE, IS THAT TO SAY THAT IT'S SUFFICIENTLY CLEAR THAT YOU CAN
27 MAKE A COMPARISON?

28 A NOT NECESSARILY SIMPLY A COMPARISON. TO
29 BE IDENTIFIABLE IT WOULD NEED TO CONTAIN ENOUGH RIDGE CHARACTER-
30 ISTICS TO SATISFY THE EXAMINER IN ITS ENTIRETY THAT IT WAS EITHER
31 MADE OR NOT MADE BY THE SAME PERSON. IF IT WERE CONSIDERED
32 SIMPLY COMPARABLE, IT MAY ONLY BE TO UTILIZE IT TO ELIMINATE A

1 PERSON AS BEING NOT THE PERSON WHO LEFT THE PRINT.

2 Q I SEE.

3 OF THE OTHER LATENT PRINTS THAT WERE
4 LIFTED FROM THE VAN, WITH THE EXCEPTION OF THE ONE THAT YOU
5 TESTIFIED TO UP HERE, WOULD YOU SAY THAT THOSE OTHER PRINTS WERE
6 IDENTIFIABLE PRINTS?

7 A THE MAJORITY OF THEM WERE.

8 Q THEY WEREN'T -- THEY WEREN'T SMUDGED OR
9 OBLITERATED SO THAT IT WOULD JUST MAKE IT IMPOSSIBLE TO IDENTIFY
10 THEM IF YOU COMPARED IT WITH A KNOWN PRINT?

11 A NO, SIR. I BELIEVE THEY WERE COMPARABLE
12 AND MOST OF THEM IDENTIFIABLE.

13 Q WAS ONE OF THOSE IDENTIFIABLE LATENT PRINTS
14 LIFTED FROM THE BASE OF THE TABLE IN THE VAN?

15 A I JUST CANNOT RECALL EXACTLY THE LOCATION
16 OF EACH ONE. IT COULD HAVE BEEN.

17 Q DO YOU -- WOULD YOUR NOTES REFLECT THAT?

18 A NO, SIR. THEY WOULD NOT. THEY WOULDN'T
19 REFLECT THE LOCATION THAT THESE PRINTS WERE LIFTED FROM, NOT
20 WITHOUT REFERRING TO EACH OF THE LIFTS.

21 Q DO YOU HAVE THOSE WITH YOU NOW?

22 A I BELIEVE THEY'RE ALL HERE.

23 Q WOULD YOU JUST TAKE A QUICK LOOK AT YOUR
24 NOTES AND TELL US THESE OTHER IDENTIFIABLE LATENT PRINTS, WHERE
25 THEY WERE PURPORTEDLY LIFTED FROM IN OR ON THE VAN.

26 A WELL, THE FIRST ONE FROM THE INTERIOR PANEL
27 OF THE LEFT FRONT DOOR, PARTIAL PALM.

28 THE SECOND ONE FROM THE SAME LOCATION,
29 AND THEY ARE THE INTERIOR PANEL OF THE LEFT FRONT DOOR, PARTIAL
30 PALM.

31 THE THIRD ONE IS THE INTERIOR PANEL OF
32 THE LEFT FRONT DOOR.

1 THE FOURTH, INTERIOR PANEL OF THE LEFT
2 FRONT WINDOW.

3 THE NEXT ONE WAS FROM THE INTERIOR
4 SURFACE OF THE LEFT REAR WINDOW.

5 AND THE NEXT ONE FROM THE EXTERIOR
6 SURFACE OF THE LEFT DOOR.

7 THE NEXT CARD WAS FROM THE INTERIOR
8 SURFACE OF THE LEFT WING WINDOW.

9 THE NEXT WAS FROM A RIGHT FRONT TOP
10 OF A WHEEL WELL, WHICH IN THIS CASE APPEARS TO BE A SMUDGED
11 IMPRESSION THAT COULD HAVE BEEN MADE EITHER BY A FABRIC OR SOME
12 OTHER MATERIAL.

13 THE NEXT CARD WAS FROM A SIMILAR
14 LOCATION APPARENTLY AND ALSO OF THIS SMUDGED MATERIAL.

15 THE NEXT CARD IS FROM THE BASE OF A
16 TABLE APPROXIMATELY SIX INCHES ABOVE THE --

17 Q IS THAT THE --

18 A IS THAT THE ONE YOU'RE REFERRING TO, SIR?

19 Q YES. DOES THAT INDICATE THE KIND OF
20 SURFACE THAT IT WAS LIFTED FROM?

21 A NO, SIR, IT DOES NOT. IT WAS, HOWEVER,
22 IDENTIFIED TO THE DECEASED.

23 Q I SEE.

24 COULD YOU CONTINUE AND TELL US WHAT
25 OTHER LATENTS WERE LIFTED AND WHERE -- WHAT THEY WERE LIFTED
26 FROM?

27 A THE NEXT ONE IS FROM THE FRONT EDGE OF THE
28 REAR CARGO DOOR ABOVE THE CENTER. THAT ONE WAS ALSO IDENTIFIED
29 AS THE LEFT PALM OF THE DECEASED.

30 THE NEXT ONE IS APPROXIMATELY CENTER
31 OF THE TOP EDGE OF REAR CARGO DOOR, WHICH WAS ALSO IDENTIFIED
32 TO THE DECEASED.

1 THE NEXT LIFT WAS FROM THE EXTERIOR OF
2 THE PASSENGER'S DOOR, WING WINDOW; NOT IDENTIFIED.

3 THE NEXT LIFT WAS FROM THE TOP FRONT
4 EDGE OF THE REAR CARGO DOOR.

5 THE NEXT ONE IS FROM THE INTERIOR
6 FRONT EDGE OF THE RIGHT FRONT PASSENGER DOOR.

7 THE NEXT IS FROM THE INTERIOR OF THE
8 RIGHT REAR WINDOW WITH A, IN QUOTES, FOR SALE SIGN.

9 AND THAT COMPLETES THE LIST OF LATENT
10 PRINTS.

11 Q DO YOU HAVE A LATENT PRINT THAT WAS PUR-
12 PORTEDLY LIFTED FROM THE WOODEN PORTION OF THE HEADLINER PANEL?

13 A I BELIEVE THERE IS A -- WAS A PHOTOGRAPH
14 TAKEN OF THAT PRINT, WHICH I DID -- DID EXAMINE.

15 Q WERE YOU ABLE TO MATCH THAT LATENT PRINT
16 TAKEN ON THE PORTION OF THE HEADLINER PANEL WITH ANYONE?

17 A I DID NOT ASSIGN IT TO ANYONE INASMUCH AS
18 THE PRINT WAS, IN MY OPINION, INDISTINCT AND DID NOT CONFORM TO
19 THE STANDARDS WHICH I WOULD APPLY.

20 MR. COOPER: I SEE.

21 I HAVE NOTHING FURTHER OF THE WITNESS.

22 MR. HARMON: NOTHING FURTHER, YOUR HONOR.

23 THE COURT: YOU'RE EXCUSED.

24 THE WITNESS: THANK YOU.

25 (WHEREUPON, THE WITNESS WAS
26 EXCUSED.)

27 MR. HARMON: MAY WE APPROACH THE BENCH?

28 THE COURT: YOU MAY.

29 (WHEREUPON, SIDE BAR CONFER-
30 ENCE WAS HELD AT THE BENCH;
31 NOT REPORTED. AT THE CON-
32 CLUSION OF WHICH THE FOLLOW-

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ING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN, WE HAVE ANOTHER
MATTER OUTSIDE OF YOUR PRESENCE. SO WE WILL EXCUSE YOU AT THIS
TIME AND LISTEN TO THE ARGUMENTS OF COUNSEL, AND THEN WE WILL
BE BACK IN SESSION. I IMAGINE IT WILL BE AT LEAST 15 TO 20
MINUTES.

DURING THIS RECESS, YOU ARE
ADMONISHED NOT TO CONVERSE AMONG
YOURSELVES OR WITH ANYONE ELSE ON
ANY SUBJECT CONNECTED WITH THIS
TRIAL, OR READ, WATCH OR LISTEN
TO ANY REPORT OF OR COMMENTARY
ON THIS TRIAL WITH ANY PERSON
CONNECTED WITH THIS TRIAL BY ANY
MEDIUM OF INFORMATION, INCLUDING
WITHOUT LIMITATION, NEWSPAPER,
TELEVISION OR RADIO OR FORM OR
EXPRESS ANY OPINION ON ANY
SUBJECT CONNECTED WITH THIS TRIAL
UNTIL THE CASE IS FINALLY SUBMITTED
TO YOU.

WE WILL BE IN RECESS UNTIL THE TIME
INDICATED. YOU ARE EXCUSED AND MAY LEAVE THE COURTROOM AT THIS
TIME.

(WHEREUPON, THE JURY LEFT
THE COURTROOM AND THE FOLLOW-
ING PROCEEDINGS WERE HAD
OUTSIDE OF THEIR PRESENCE:)

THE COURT: COUNSEL, THIS IS OUTSIDE THE PRESENCE
OF THE JURY.

IN LINE WITH THE JONES AND THE TUCKER CASE,
I WOULD LIKE YOU GENTLEMEN TO ADDRESS THE ISSUES, AND THESE ARE

1 THE QUESTIONS THAT I THINK YOU OUGHT TO ADDRESS:

2 ONE, IS THERE SUBSTANTIAL EVIDENCE TO
3 ESTABLISHING THE ELEMENTS OF THE CRIME INVOLVED? I'M NOT TALK-
4 ING ABOUT THE CRIME FOR WHICH THE DEFENDANT NOW STANDS CHARGED
5 IN THIS COURTROOM, OR CRIMES.

6 TWO, WHAT IS THE NECESSITY FOR ADMIT-
7 TING THE EVIDENCE OF ANOTHER OFFENSE?

8 THREE, DOES A MERE ROBBERY CASE
9 ACTUALLY TEND TO ESTABLISH ONE OF THE ELEMENTS SET FORTH IN THE
10 NEVADA REVISED STATUTE, SECTION 48.045?

11 AND, FOUR, WHAT IS THE PROBATIVE VALUE
12 AND WHAT IS THE PREJUDICIAL EFFECT?

13 I THINK THOSE ARE THE QUESTIONS THAT
14 THE SUPREME COURT RAISED IN BOTH JONES, AT 85 NEVADA; AND TUCKER,
15 AT 82 NEVADA.

16 YOU MAY PROCEED.

17 MR. HARMON: THANK YOU, YOUR HONOR.

18 BEFORE I BEGIN OUR ARGUMENT, WE HAVE
19 COMPLIED WITH THE COURT'S REQUEST ON THE OTHER ISSUE RAISED BY
20 THE DEFENSE; THAT IS THE HUSBAND AND WIFE PRIVILEGE. WE HAVE
21 CERTIFIED COPIES, BOTH A MARRIAGE CERTIFICATE AND A DOCUMENT
22 DESCRIBED AS A DECREE OF DISSOLUTION OF MARRIAGE.

23 THE COURT: LET ME SEE THOSE, COUNSEL.

24 MR. HARMON: MAY I FILE THOSE, PLEASE.

25 MR. FRANZEN: WE HAVEN'T SEEN THOSE, YOUR HONOR.
26 MIGHT WE SEE THEM?

27 THANK YOU.

28 THE COURT: I BELIEVE THOSE HAVE ALREADY BEEN --
29 MARK THOSE AS COURT EXHIBITS.

30 THE CLERK: THAT WILL BE COURT'S EXHIBITS 3 AND 4.

31 THE COURT: ALL RIGHT. THEY WILL BE 3 AND 4. THE
32 MARRIAGE CERTIFICATE WILL BE MARKED 3 AND THE DIVORCE DECREE

1 WILL BE MARKED 4.

2 THESE, HOWEVER, WILL NOT GO TO THE JURY.

3 THE CLERK: YES, SIR. I KNOW.

4 THE COURT: ANY OBJECTION, COUNSEL?

5 MR. FRANZEN: MAY I HAVE THE COURT'S INDULGENCE.

6 THE COURT: COUNSEL, YOU'VE HAD TIME TO READ THEM.

7 MR. FRANZEN: MIGHT WE SHOW THEM TO THE DEFENDANT?

8 THE COURT: YOU MAY SHOW THEM TO HIM, BUT IS THERE
9 ANY OBJECTION?

10 MR. FRANZEN: FOR THE RECORD WE WOULD OBJECT,
11 COUNSEL.

12 THE COURT: FOR THE RECORD IT'S OVERRULED. SAME
13 WILL BE RECEIVED AS 3 AND 4.

14 ALL RIGHT. YOU MAY PROCEED WITH YOUR
15 ARGUMENT, SIR.

16 MR. HARMON: THANK YOU, YOUR HONOR.

17 IT IS THE POSITION OF THE STATE OF NEVADA,
18 REGARDING THE SEPARATE OFFENSE DESCRIBED BY MR. ED SCHWARTZ AS
19 OCCURRING IN THE QUEENS, NEW YORK, AREA ON OCTOBER 5, 1979,
20 THAT THE EVIDENCE BY PLAIN, CLEAR AND CONVINCING PROOF IS THAT
21 THE DEFENDANT SAM HOWARD IS THE PERSON COMMITTING THAT OFFENSE.

22 YOUR HONOR, MR. SCHWARTZ HAS TESTIFIED
23 AND MADE AN IN-COURT IDENTIFICATION, WHICH I PERCEIVED TO BE A
24 POSITIVE, UNEQUIVOCAL IDENTIFICATION, OF THE DEFENDANT. IT IS
25 TRUE THAT OVER THREE YEARS HAVE ELAPSED SINCE THE COMMISSION OF
26 THAT OFFENSE. FOR THAT REASON, I ANTICIPATE THAT THE COURT
27 WOULD PROPERLY BE CONCERNED OF WHETHER WE MET OUR BURDEN BY
28 SHOWING BY PLAIN, CLEAR AND CONVINCING EVIDENCE THAT MR. HOWARD
29 WAS THE PERPETRATOR OF THAT OFFENSE.

30 WE ALSO HAVE STANDING BY AS A PROPOSED
31 WITNESS DETECTIVE DEL GREEN, WHO IS WITH THE NEW YORK POLICE
32 DEPARTMENT. HE IS PREPARED TO TESTIFY TO A PHOTO LINEUP THAT

1 WAS SHOWN TO MR. SCHWARTZ ON OCTOBER THE 18TH, 1979; 13 DAYS
2 AFTER THE ALLEGED ROBBERY WAS COMMITTED. WE HAVE DISCUSSED
3 THIS MATTER THOROUGHLY WITH DETECTIVE GREEN. HE HAS WITH HIM
4 THE PHOTO SPREAD HE USED. WE HAVE EXAMINED THE PHOTOGRAPHS.
5 HE IS EXPECTED TO TESTIFY THAT A POSITIVE IDENTIFICATION WAS
6 MADE OF A PHOTOGRAPH OF DEFENDANT HOWARD ON OCTOBER 18, 1979.

7 WE THEREFORE ARE IN A POSITION OF
8 HAVING THE ONLY WITNESS REALLY AVAILABLE MAKE BOTH A POSITIVE
9 IDENTIFICATION IN THIS COURTROOM AND A POSITIVE IDENTIFICATION
10 OF THE DEFENDANT FROM PHOTOGRAPHS OCTOBER 18, 1979.

11 YOUR HONOR, REGARDING THE ISSUE OF
12 NECESSITY, WE FULLY APPRECIATE, AS IS SET FORTH IN THE JONES
13 AND TUCKER CASES, THAT THERE NEED BE A SHOWING OF NECESSITY
14 BEFORE EVIDENCE OF A SEPARATE CRIME WILL BE ADMITTED. AND I
15 WANT TO REITERATE AGAIN WHAT WE'VE ALREADY REPRESENTED TO THE
16 COURT AND WHAT I THINK SHOULD BE ABUNDANTLY CLEAR, THAT THE
17 STATE'S EVIDENCE CONNECTING SAM HOWARD, THE DEFENDANT, TO THE
18 MURDER OF GEORGE STEVEN MONAHAN AND ALSO TO AN ALLEGED ROBBERY
19 OF GEORGE STEVEN MONAHAN IS COMPLETELY CIRCUMSTANTIAL. WE HAVE
20 NO EYE-WITNESSES TO THE ACTUAL COMMISSION OF EITHER ROBBERY OR
21 MURDER.

22 IT'S TRUE, WE HAVE TWO WITNESSES,
23 BARBARA ZEMAN AND MARY LOU MONAHAN, WHO HAVE MADE POSITIVE
24 IDENTIFICATIONS IN COURT OF MR. HOWARD AS THE PERSON WHO WAS
25 POSING AS A SECURITY OFFICER IN THE AREA OF CAESARS PALACE THE
26 EVENING BEFORE, MARCH THE 26TH, 1980; AND HE APPARENTLY MADE
27 ARRANGEMENTS TO CONTACT MR. MONAHAN THE FOLLOWING MORNING,
28 MARCH 27, 1980. HELENE ZUCKERMAN, A DENTAL ASSISTANT, HAS
29 TESTIFIED THAT A PERSON WHO, I WOULD ARGUE FROM HER DESCRIPTION,
30 FIT THE PHYSICAL DESCRIPTION OF THE DEFENDANT APPEARED AT ABOUT
31 7:10 A.M. AND INQUIRED IF DOCTOR MONAHAN WAS IN, AND FURTHERMORE
32 INDICATED THAT HE KNEW THAT HE HAD A 7:30 A.M. APPOINTMENT;

1 HOWEVER, HELENE ZUCKERMAN WAS UNABLE TO MAKE AN IDENTIFICATION
2 IN COURT OF THE DEFENDANT. BARBARA ZEMAN, WHO MADE A POSITIVE
3 IDENTIFICATION IN COURT, ACCORDING TO DETECTIVE LEAVITT DID NOT
4 MAKE AN IDENTIFICATION WHEN PHOTOGRAPHS WERE SHOWN HER ON
5 MARCH THE 29TH, 1980.

6 AS I HAVE ALREADY INDICATED, EVEN
7 ASSUMING THAT IT IS THE DEFENDANT THAT MADE CONTACT WITH MR.
8 MONAHAN AND IN FACT WENT AHEAD AND FULFILLED HIS DESIRE TO HAVE
9 A TEST DRIVE IN THE 1977 DODGE VAN, WE HAVE NO EYE-WITNESSES
10 THAT HE, IN FACT, IS THE PERSON WHO SHOT AND KILLED MR. MONAHAN.

11 WHAT WE HAVE IS CHARLES MARINO, THE
12 OWNER AND MANAGER OF THE DEW DROP INN, STATING THAT HE SAW,
13 SOMEWHERE AROUND 7:45 A.M., THE DODGE VAN BACK IN TO THE REAR
14 OF THE DEW DROP INN. THERE'S NO EVIDENCE THAT HE SAW WHO THE
15 DRIVER WAS. HE DIDN'T PERCEIVE ANYTHING TO ESTABLISH, IN FACT,
16 THAT MR. HOWARD WAS RESPONSIBLE FOR PUTTING THE VEHICLE THERE
17 OR, IN FACT, OF MURDERING AND ROBBING THE VICTIM, WHO WAS SUB-
18 SEQUENTLY FOUND INSIDE.

19 WE DO HAVE EVIDENCE FROM DAWANA THOMAS
20 THAT SHE TOOK THE DEFENDANT, THE MORNING OF MARCH THE 27TH,
21 1980, TO AN AREA SHE DESCRIBED AS THE WESTCHESTER PLAZA. I
22 WOULD ASSUME IT IS CLOSE ENOUGH TO WINCHESTER PLAZA THAT THE
23 JURY WOULD MAKE THE CONNECTION, BUT THERE IS THIS SLIGHT AMBI-
24 GUITY. SHE ALSO TESTIFIED THAT IT WAS IN THE 1500 BLOCK OF
25 DESERT INN ROAD. I THINK THE EVIDENCE IS TO THE CONTRARY PRE-
26 VIOUSLY, THAT THE WINCHESTER PLAZA IS LOCATED AT 1700 DESERT INN
27 ROAD. THE DEFENSE ALSO CAPITALIZED, IN CROSS EXAMINATION, ON A
28 STATEMENT SHE MADE TO DETECTIVE LEAVITT THAT WAS THAT SHE TOOK
29 THE DEFENDANT MR. HOWARD TO A RESIDENTIAL AREA. SHE WAS
30 INSTRUCTED TO LEAVE. SHE HAS INDICATED IN HER OPINION IT WAS A
31 DOCTOR OR DENTIST OFFICE THAT THE DEFENDANT WENT TO. AND SHE
32 HAS TESTIFIED THAT SHE SAW HIM PERHAPS 45 MINUTES TO AN HOUR

1 LATER AND HE HAD AT THAT TIME A C.B. RADIO WITH WIRES HANGING
2 OUT OF IT.

3 THERE IS, OF COURSE, EVIDENCE THAT A
4 C.B. RADIO WAS REMOVED FROM THE HEADLINER PANEL OF THE VICTIM'S
5 VAN. HOWEVER, THERE IS NO POSITIVE CONNECTION, AS OF COURSE
6 THERE COULD NOT BE, BECAUSE AT SOME POINT BEFORE THE POLICE MADE
7 CONTACT WITH MR. HOWARD HE HAD DISPOSED OF THE PURPORTED C.B.
8 RADIO. AS TO WHETHER IT WAS, IN FACT, THE SAME C.B. RECOVERED
9 FROM THE 1977 DODGE VAN, CERTAINLY WE HAVE THE PREDICATE FOR
10 ARGUMENT TO THE JURY THAT IT WAS, BUT IT HASN'T BEEN CONCLU-
11 SIVELY SHOWN.

12 SHE ALSO HAS DESCRIBED SEEING THE
13 DEFENDANT WITH A WRISTWATCH. SHE HAS STATED THAT THE DEFENDANT
14 HAD PAWNED HIS WATCH SEVERAL DAYS PREVIOUS. SHE STATED THAT SHE
15 BELIEVED IT WAS OF THE BRAND NAME SEIKO; HOWEVER, THE DEFENSE
16 HAS ESTABLISHED THAT SHE HAS NO SPECIFIC RECOLLECTION NOW OF
17 PERSONALLY OBSERVING THE MAKE OF THE WATCH INSCRIBED ANYWHERE
18 ON THE WATCH THAT MR. HOWARD RETURNED WITH. FURTHERMORE, WHEN
19 MR. HOWARD WAS ARRESTED ON APRIL THE 1ST, 1980, IN DOWNEY,
20 CALIFORNIA, HE HAD A WATCH WITH HIM BUT IT WAS A DIFFERENT BRAND
21 NAME THAN A SEIKO.

22 SO AGAIN, WHILE THERE IS PERHAPS A
23 REASONABLE INFERENCE, MAYBE A STRONG INFERENCE, THAT THE WRIST-
24 WATCH HE CAME TO THE MOTEL WITH WAS TAKEN FROM THE PERSON OF
25 MR. MONAHAN. THERE'S NO CONCLUSIVE EVIDENCE OF THAT.

26 WE STILL GET BACK TO A VERY CIRCUM-
27 STANTIAL STATE OF THE EVIDENCE IN TERMS OF THE PROSECUTION. SHE
28 LATER, WHILE THEY WERE IN THE VEHICLE, APPARENTLY SAW A WALLET
29 WHICH WAS DESCRIBED TO DETECTIVE LEAVITT AS BEING EITHER BLACK
30 OR BROWN. THE VICTIM DIDN'T HAVE A WALLET ON. HIS WIFE HAS
31 SAID HE ALWAYS CARRIED A WALLET. AND AGAIN AN ARGUMENT CAN BE
32 MADE THAT PERHAPS THE WALLET CAME FROM GEORGE MONAHAN, BUT

1 THERE IS NO DEFINITE CONNECTION.

2 SHE ORIGINALLY RELATED TO THE POLICE
3 THAT SHE SAW NO CREDIT CARDS. ON THE WITNESS STAND SHE SAID SHE
4 DEFINITELY SAW A MASTER CHARGE CARD. AT ONE TIME IN THE TELE-
5 PHONE CONVERSATION SHE TOLD DETECTIVE LEAVITT SHE SAW A SUBSTAN-
6 TIAL NUMBER OF CREDIT CARDS.

7 THE VICTIM, MR. MONAHAN, ACCORDING TO
8 HIS WIFE, CARRIED CREDIT CARDS. SHE HAS SPELLED OUT SOME OF
9 THEM. I THINK IT WAS MORE PRIMARILY OIL COMPANIES THAT HE HAD
10 CARDS WITH. AND SHE DESCRIBED SOME FAMILY PICTURES THAT ARE
11 POSSIBLY CONSISTENT WITH PICTURES OBSERVED BY DAWANA THOMAS TO
12 HAVE BEEN IN THE POSSESSION OF THE DEFENDANT.

13 BUT WITH ALL THINGS CONSIDERED, YOUR
14 HONOR, IT IS THE CONTENTION OF THE STATE OF NEVADA THAT VERY
15 DEFINITELY ON THE INTENT TO COMMIT ROBBERY AND MOST DEFINITELY
16 IN TERMS OF THE IDENTITY OF THE PERPETRATOR OF THE KILLER OF
17 GEORGE STEVEN MONAHAN, AND TO PROVIDE INSIGHT INTO HIS MOTIVE
18 FOR KILLING, THAT IT IS NECESSARY TO INTRODUCE EVIDENCE FROM AN
19 ACTUAL EYE-WITNESS WHO WENT OUT WITH THE DEFENDANT UNDER VERY
20 SIMILAR CIRCUMSTANCES, AND HAVE MR. SCHWARTZ DESCRIBE THAT A
21 ROBBERY, IN FACT, OCCURRED AT GUNPOINT, AND TO GIVE THE JURY AN
22 OPPORTUNITY TO HEAR WHAT HAPPENED TO HIM AT THE HANDS OF THE
23 DEFENDANT AT A TIME NOT TOO REMOTE FROM MARCH 27TH, 1980.

24 CASES IN OUR JURISDICTION HAVE
25 EMPHASIZED THAT THERE SHOULD BE SOME UNIQUENESS OR SIMILARITY.
26 BUT THE CASE IS ON THIS POINT, YOUR HONOR, THAT I HAVE EXAMINED
27 CONCERNING THE AMOUNT OF SIMILARITY STRESS THAT THEY DON'T HAVE
28 TO BE EXACT. IT WOULD BE ALMOST IMPOSSIBLE TO FIND SEPARATE
29 OFFENSES BEING COMMITTED EXACTLY THE SAME.

30 RATHER IN THE NESTER CASE, WHICH IS
31 REPORTED AT 75 NEVADA, PAGE 41, THE DECISION HANDED DOWN IN 1959,
32 THEY STRESSED THAT IT WAS NECESSARY TO SHOW THAT THE TWO

1 OFFENSES WERE SIMILAR. AS THE COURT KNOWS, IN NESTER WE WERE
2 TALKING ABOUT TWO SEXUAL ASSAULTS. THE TIME LAPSE WAS ABOUT
3 SIX MONTHS. AND IT WAS CONTENDED BY THE PROSECUTION ON
4 APPELLATE REVIEW, AND FOR THE MOST PART ACCEPTED BY THE COURT,
5 THAT THERE WAS THE FDLLOWING SIMILARITIES:

6 NUMBER ONE, IN EACH INSTANCE THE
7 ASSAILANT HAD A SOFT-QUALITY VOICE AND A SOUTHERN ACCENT;

8 TWO, IN BOTH CASES THE HOME IN WHICH
9 THE VICTIM LIVED, OR HAD LIVED, WAS IN CLOSE PROXIMITY TO THE
10 ASSAILANT, ASSUMING THE APPELLANT WAS THE ASSAILANT;

11 THREE, BOTH CRIMES OCCURRED IN NORTH
12 LAS VEGAS;

13 FOUR, IN BOTH CASES THE FUSES OR
14 LIGHTS HAD BEEN UNSCREWED TO KEEP THE AREA IN DARKNESS;

15 FIVE, IN BOTH INSTANCES THE ASSAILANT
16 CONCEALED HIS FACE TO PREVENT IDENTIFICATION;

17 SIX, THE LANGUAGE USED BY THE ASSAIL-
18 ANT WAS PRACTICALLY IDENTICAL: SHUT UP OR I'LL KNOCK YOU OUT,
19 IN ONE CASE; AND SHUT UP OR I'LL KNOCK YOU COLD, IN THE OTHER;

20 SEVEN, IN EITHER ATTEMPT THERE WAS AN
21 ATTEMPT TO EMBRACE THE VICTIM BUT RATHER A FORCIBLE ENTRY IN THE
22 FIRST INSTANCE AND ENTRY WAS PRACTICALLY IMPOSSIBLE IN THE OTHER
23 CASE. AND THE ASSAILANT ATTEMPTED TO REMOVE THE OUTER GARMENTS
24 IN EITHER INSTANCE.

25 YOUR HONOR, THOSE ARE SIGNIFICANT
26 SIMILAR CHARACTERISTICS BUT THEY ARE THE TYPES OF THINGS THAT
27 ARGUABLY COULD HAVE OCCURRED BY -- HAD BEEN PERPETRATED BY A
28 NUMBER OF DIFFERENT ASSAILANTS. AND THEY SERVE ONLY TO EMPHA-
29 SIZE THAT THE CRIMES MUST BE SIMILAR AND NDT IDENTICAL.

30 THE SAME IS EMPHASIZED IN THE CASE OF
31 FRISAURA VERSUS STATE, F-R-I-S-A-U-R-A. I APOLOGIZE TO THE
32 COURT FOR ONLY HAVING THE NEVADA ADVANCED OPINION. IT'S 96

1 NEVADA 13. THE DECISION HANDED DOWN JANUARY THE 3RD, 1980. IN
2 THIS INSTANCE THE COURT EMPHASIZES THAT THE CRIMES REPORTED BY
3 BOTH VICTIMS WERE SIMILAR, AND GOES AHEAD TO TALK IN TERMS --

4 THE COURT: WHAT CASE AGAIN?

5 MR. HARMON: FRISAURA, F-R-I-S-A-U-R-A.

6 IN THE FRISAURA CASE, THE VICTIM HAD BEEN
7 CONTACTED BY A WOMAN IN THE BAR AT THE LAS VEGAS HILTON HOTEL.
8 IT BECOMES APPARENT THAT SHE WAS A PROSTITUTE BY TRADE. SHE HAD
9 A FOREIGN ACCENT. SHE TOLD HIM SHE WAS FROM HOLLAND, AND SHOWED
10 HIM HER PASSPORT. AND EVIDENCE OF ANOTHER VICTIM WAS PERMITTED
11 AT TRIAL.

12 THE COURT, IN ANALYZING THE SIMILARI-
13 TY, STATES THAT EACH OF THE WITNESSES REPORTED BEING PICKED UP
14 IN A HOTEL BAR ON THE LAS VEGAS STRIP DURING THE SAME WEEK BY A
15 WOMAN WITH A FOREIGN ACCENT, EACH WAS SHOWN A PASSPORT, EACH
16 TOOK THE WOMAN TO HIS HOTEL ROOM TO EAT AND WATCH TELEVISION,
17 AND EACH WAS ROBBED OF MONEY AND CHIPS.

18 THEN THEY SAY THAT SINCE THE CRIMES
19 REPORTED BY EACH OF THESE VICTIMS WERE SIMILAR, AND EACH VICTIM
20 INDIVIDUALLY IDENTIFIED APPELLATE AS THE PERPETRATOR OF THE
21 CRIME, THE EVIDENCE OF THESE CRIMES WAS PROPERLY ADMITTED INTO
22 EVIDENCE AT TRIAL TO SHOW IDENTITY.

23 IN THE CASE OF REED VERSUS STATE,
24 REPORTED AT 95 NEVADA, PAGE 190, A 1975 DECISION, THE COURT
25 REFERS TO SIMILAR DISTINCTIVE CRIMES. AND ALSO IN THE CASE OF
26 JUNIOR VERSUS STATE, REPORTED, I APOLOGIZE THAT I DON'T HAVE THE
27 NEVADA CITE, IT'S IN 89 NEVADA. THE PACIFIC CITATION IS 507
28 PACIFIC SECOND 1037, A 1973 CASE. THEY TALK AGAIN ABOUT BOTH
29 CRIMES BEING COMMITTED IN A SIMILAR FASHION, AND THEY WERE
30 DEALING THERE WITH ROBBERY OFFENSES.

31 YOUR HONOR, WE ARE OFFERING THE
32 EVIDENCE OF THE SCHWARTZ CRIME UNDER N.R.S. 48.045 BECAUSE OF

1 THE SPECIFIC EXCEPTIONS OF MOTIVE, INTENT AND IDENTITY.

2 IT SEEMS CRITICAL TO THE STATE THAT WE
3 MUST NOW SHOW THAT AN INTENT TO ROB EXISTED IN THE MIND OF THE
4 ASSAILANT OF GEORGE MONAHAN ON MARCH THE 27TH, 1980. THE
5 IDENTITY OF HIS ASSAILANT IS CRITICAL, AS IS MOTIVE.

6 NOW, YOUR HONOR, IT'S OUR CONTENTION,
7 FROM THE EVIDENCE ALREADY IN ADDUCED BY ED SCHWARTZ, THAT WE
8 HAVE SUBSTANTIAL SIMILARITY IN THE MODUS OPERANDIS BETWEEN THE
9 OFFENSE PERPETRATED UPON HIM OCTOBER THE 5TH, 1979, AND THE
10 OFFENSES PERPETRATED UPON GEORGE STEVEN MONAHAN MARCH THE 27TH,
11 1980. I WOULD CITE TO THE COURT AGAIN THE FOLLOWING SIMILARI-
12 TIES:

13 IN EACH INSTANCE THE APPARENT ASSAIL-
14 ANT HAS EXPRESSED AN INTEREST IN THE PURCHASE OF A MOTOR VEHICLE;

15 NUMBER TWO, IN EACH INSTANCE THE IN-
16 DIVIDUAL IDENTIFIED AS SAM HOWARD HAS INDICATED HE HAD THE CASH
17 AVAILABLE TO MAKE AN ALMOST IMMEDIATE PURCHASE OF THE VEHICLE.
18 HE HAD SO PERSUADED, IN FACT, -- IN ANY EVENT, THE PERSON WHO
19 HAD MADE CONTACT AT CAESARS PALACE HAD SO PERSUADED MR.
20 MONAHAN THAT THE SALE OF THE VAN WAS EMINENT THAT HE BROUGHT THE
21 TITLE OF THE VEHICLE WITH HIM TO HIS OFFICE THE MORNING OF
22 MARCH 27, 1980, ACCORDING TO HIS WIFE, MARY LOU MONAHAN;

23 POINT THREE, IN EACH INSTANCE THE
24 ASSAILANT WANTED A DEMO RIDE IN THE VEHICLE HE HAD EXPRESSED
25 AN INTEREST IN PURCHASING AND FOR WHICH HE SAID HE HAD THE
26 MONEY TO BUY. IN EACH INSTANCE WE HAVE EVIDENCE, THOUGH, ONLY
27 CIRCUMSTANTIAL IN THE CASE BEFORE THE BAR, THAT A ROBBERY
28 OCCURRED DURING THAT DEMONSTRATION RIDE;

29 POINT NUMBER FOUR, IN EACH INSTANCE
30 A GUN WAS USED;

31 POINT NUMBER FIVE, IN EACH INSTANCE
32 THE VEHICLE WAS TAKEN. WE HAVE MR. MARINO DESCRIBING SEEING

1 THE VAN PARKED TO THE REAR OF HIS BUSINESS. MR. SCHWARTZ HAS
2 DESCRIBED HOW THE 1980 OLDSMOBILE 98, AFTER HE HAD BEEN TOLD TO
3 GET OUT, WAS DRIVEN TO SOME OTHER POINT AND IT WAS RECOVERED
4 ABOUT A MONTH LATER IN THE QUEENS, NEW YORK, AREA;

5 POINT NUMBER SIX, IN EACH INSTANCE
6 THE WALLET AND OTHER PERSONAL EFFECTS AND VALUABLES WERE TAKEN
7 FROM THE PERSONS OF THE VICTIMS;

8 POINT NUMBER SEVEN, AS I INDICATED
9 BEFORE AND I STRESS AGAIN THAT I THINK THIS HAS TREMENDOUS
10 SIGNIFICANCE IN THE CONTEXT OF THESE TWO OFFENSES, EACH TIME
11 THE DEFENDANT SAID HE WAS EMPLOYED AS A SECURITY OFFICER. MR.
12 SCHWARTZ HAS STATED THAT HE TOLD HIM, IN THE QUEENS, NEW YORK,
13 AREA, THAT HE WAS EMPLOYED IN SECURITY. MR. SCHWARTZ BELIEVED
14 HE SAID HE WAS WITH THE BURNS SECURITY AGENCY IN LAS VEGAS,
15 NEVADA. THE DEFENDANT SAID HE WAS EMPLOYED AS A SECURITY
16 OFFICER FOR CAESARS PALACE. AND NOW SUBSEQUENTLY WE HAVE
17 EVIDENCE THAT HE HELD HIM OUT AT THE SAN BERNARDINO SEARS STORE
18 ALSO TO BE A SECURITY OFFICER. SO THAT APPARENTLY IS A RATHER
19 SALIENT AND DISTINCTIVE CHARACTERISTIC USED BY THE DEFENDANT
20 WHEN HE HAS APPROACHED DIFFERENT INTENDED VICTIMS;

21 POINT NUMBER EIGHT, MR. SCHWARTZ IN-
22 DICATED THAT ALTHOUGH HE COULD NOT REMEMBER SPECIFICALLY WHAT
23 THE IDENTIFICATION WAS WHICH WAS SHOWN TO HIM BY THE PERSON WHO
24 MADE CONTACT WITH HIM AND THEN ROBBED HIM, HE BELIEVED THE FIRST
25 NAME STARTED WITH "S". AND IT'S CLEAR FROM THE EVIDENCE BEFORE
26 THE COURT THAT THE DEFENDANT USED, ON OCCASION, THE ALIAS
27 HAROLD STANBACK. HE APPARENTLY SIGNED THAT NAME ON THE RETAIL
28 CREDIT CHECK FROM THE BOULEVARD SEARS STORE IN LAS VEGAS,
29 NEVADA. AND SOME TYPE OF EMPLOYMENT OR IDENTIFICATION CARD WAS
30 RECOVERED BY DETECTIVE AL LEAVITT FROM THE TRUNK OF THE BLACK
31 OLDSMOBILE CUTLASS IN THE NAME OF HAROLD STANBACK;

32 IN EACH INSTANCE THE OFFENSE OCCURRED

1 IN THE EARLY MORNING HOURS. AND MR. MONAHAN WAS SHOT IN THE BACK
2 OF THE HEAD. MR. SCHWARTZ HAS VERY VIVIDLY DESCRIBED HOW AT
3 ONE POINT HE WAS TOLD BY THE DEFENDANT AT GUNPOINT TO GET DOWN
4 WITH THE PALMS OF HIS HANDS ON THE FLOORBOARD AREA, OR HUMP AREA
5 IN THE MIDDLE OF THE FRONT SEAT.

6 YOUR HONOR, IT IS THE CONTENTION OF
7 THE STATE OF NEVADA THAT WE HAVE SHOWN SUBSTANTIAL SIMILARITY IN
8 THE TWO OFFENSES UNDER THE EXCEPTIONS OF MOTIVE, INTENT AND
9 IDENTITY BECAUSE IN THE TOTALLY CIRCUMSTANTIAL CASE WHICH THE
10 PROSECUTION HAS PRESENTED AT THIS POINT TO THE COURT AND THE
11 JURY WE CONTEND THE PROBATIVE VALUE OUTWEIGHS ANY PREJUDICIAL
12 EFFECT.

13 THE COURT: COUNSEL?

14 MR. COOPER: YOUR HONOR, FIRST OF ALL, ON THE
15 QUESTION OF THE SUFFICIENCY OF THE EVIDENCE OF THE OTHER CRIMES,
16 I WOULD SIMPLY SUBMIT THAT ACCORDING TO THE TUCKER DECISION,
17 EVIDENCE OF OTHER CRIMES MUST BE CLEAR AND CONVINCING. AND I
18 WOULD SUBMIT TO THE COURT THAT EVIDENCE OF THE OTHER CRIME,
19 THE NEW YORK CRIME, DOES NOT MEET THE TUCKER STANDARO; AND I
20 WILL SUBMIT IT WITH THAT.

21 ON THE QUESTION OF NECESSITY, YOUR HONOR,
22 IT SEEMS THAT MR. HARMON IS MAKING A DISTINCTION BETWEEN CIR-
23 CUMSTANTIAL AND DIRECT EVIDENCE. AND OF COURSE THE COURT WELL
24 KNOWS THAT THE LAW DRAWS NO DISTINCTION BETWEEN CIRCUMSTANTIAL
25 AND DIRECT EVIDENCE.

26 I, JUDGING FROM THE RECITATION OF THE
27 TESTIMONY AND EVIDENCE THAT'S BEEN PRESENTED UP TO THIS POINT,
28 JUST FROM SITTING HERE LISTENING TO MR. HARMON, IT WOULD SEEM
29 TO ME THAT THE STATE HAS A VERY OVERWHELMING CASE HERE:

30 HE POINTS OUT THE FACT THAT MR. HOWARD
31 WAS PUT AT THE VAN PRIOR TO THE DATE THE DECEASED WAS ALLEGEDLY
32 KILLED. THAT SEEMS TO BE UNQUESTIONED. THERE ARE, OF COURSE,

1 SOME THREE WITNESSES WHO PUT -- EXCUSE ME, SOME TWO WITNESSES
2 WHO PUT HIM AT THE SCENE PRIOR TO MARCH 27TH, IN THE AREA OF
3 THE VAN;

4 THERE'S AN IDENTIFICATION OF A FINGER-
5 PRINT PLACED ON THE VAN. ACCORDING TO MRS. MONAHAN'S TESTIMONY,
6 MR. HOWARD WAS NEVER IN A POSITION TO MAKE THAT PRINT. THE
7 TESTIMONY FROM THE STATE'S EXPERTS, THEIR FINGERPRINT EXPERTS,
8 WOULD CERTAINLY SEEM TO SUGGEST THAT THAT PRINT WAS A FRESH
9 PRINT, FAIRLY -- MADE FAIRLY RECENTLY;

10 THERE'S THE TESTIMONY OF DAWANA
11 THOMAS. SHE PUTS MR. HOWARD IN THE AREA OF DOCTOR MONAHAN'S
12 OFFICE;

13 THERE'S THE TESTIMONY FROM MRS.
14 MONAHAN THAT HER LATE HUSBAND HAD AN APPOINTMENT TO MEET WITH
15 MR. HOWARD ON MARCH -- IN THE MORNING OF MARCH 27TH. MISS
16 DAWANA THOMAS, OF COURSE, DROPPED MR. HOWARD OFF ACCORDING TO
17 HER TESTIMONY, IN THE IMMEDIATE VICINITY OF DOCTOR MONAHAN'S
18 OFFICE ON THE MORNING OF MARCH 27TH;

19 SHE FURTHER TESTIFIED THAT WITHIN A
20 VERY SHORT PERIOD OF TIME HE RETURNED THERE IN A SOMEWHAT
21 EXCITED STATE, HAVING IN HIS POSSESSION A WALLET. IT'S ALLEGED
22 THAT A WALLET WAS TAKEN FROM DOCTOR MONAHAN;

23 SHE TESTIFIED THAT SHE OBSERVED AT
24 LEAST ONE CREDIT CARD, AND I THINK HER TESTIMONY WAS THAT
25 POSSIBLY SHE OBSERVED OTHER CREDIT CARDS AS WELL;

26 HER TESTIMONY WAS THAT SHE OBSERVED A
27 C.B. RADIO WITH WIRES DANGLING FROM IT. THE TESTIMONY SHOWED
28 THAT A C.B. RADIO WAS TAKEN FROM THE VAN IN QUESTION AND IT
29 WOULD APPEAR, JUDGING FROM THE TESTIMONY, THAT THAT RADIO HAD
30 BEEN RIPPED FROM THE PANEL -- THE HEAD PANEL OF THE VAN;

31 THERE'S THE TESTIMONY OF MISS THOMAS
32 THAT THE DEFENDANT TOLD HER THAT HE WAS GOING TO ROB A PIMP,

1 THAT THERE WERE LADIES WITH HIM AND HE COULDN'T, ON MARCH 26TH.
2 THE STATE, IN THEIR EFFORT TO GET THAT TESTIMONY INTO EVIDENCE
3 HERE, SUGGESTED THAT THAT'S PRECISELY WHAT THE DEFENDANT WAS
4 REFERRING TO, WAS THE ROBBING OF DOCTOR MONAHAN.

5 I THINK, YOUR HONOR, THAT THERE IS
6 CERTAINLY SUFFICIENT EVIDENCE HERE UPON WHICH THE JURY COULD
7 WELL CONVICT THE DEFENDANT. I DON'T THINK THAT THE STATE HAS
8 MET THE STANDARDS SET OUT IN THE TUCKER CASE OF SHOWING THE
9 NECESSITY FOR BRINGING IN EVIDENCE OF OTHER CRIMES.

10 IN ADDITION, YOUR HONOR, THERE IS THE
11 TESTIMONY FROM MISS THOMAS THAT WHEN THEY -- WHEN THEY WENT TO
12 CHECK INTO THE HOTEL HERE IN LAS VEGAS, MR. HOWARD WAS HIDING
13 BEHIND THE WALL, GIVING THE INFERENCE THAT HE WAS POSSIBLY
14 HIDING SOMEONE OR DIDN'T WANT ANYONE TO SEE HIM. OF COURSE,
15 THERE IS THE -- THERE'S EVIDENCE THAT THE MOTEL ROOM IN WHICH
16 THEY STAYED WAS IN VERY CLOSE PROXIMITY TO WHERE THE DOCTOR'S
17 VAN WAS ULTIMATELY FOUND. I THINK THE TESTIMONY SHOWED THAT IT
18 WAS A HALF A BLOCK OR SO FROM THAT LOCATION.

19 AGAIN, MR. HARMON IS ARGUING THAT
20 BECAUSE IT'S CIRCUMSTANTIAL EVIDENCE THAT THAT MAKES THIS CASE
21 SUBSTANTIALLY WEAKER. AND OF COURSE THE COURT KNOWS THAT THE
22 LAW DOES NOT SEE EVIDENCE IN THAT LIGHT. IT MAKES NO DISTINC-
23 TION BETWEEN CIRCUMSTANTIAL AND DIRECT EVIDENCE.

24 ON THE QUESTION, YOUR HONOR, OF
25 SIMILARITY OF THE UNCHARGED OFFENSE AND THE UN -- AND THE
26 CHARGED OFFENSE, I WOULD LIKE TO READ INTO THE RECORD A PORTION
27 OF THE MAYES VERSUS THE STATE OF NEVADA CASE. I ONLY HAVE THE
28 NEVADA ADVANCED OPINION CITED, AND THAT'S AT 95 NEVADA ADVANCED
29 OPINION 3. THE COURT -- THE NEVADA SUPREME COURT IN THAT CASE,
30 YOUR HONOR, CITED THE HOLDING IN A CALIFORNIA CASE, PEOPLE
31 VERSUS HASTON, WHICH IS CITED AT 444 PACIFIC SECOND 91. AND IN
32 CITING THE HOLDING IN THAT COURT IN THAT CASE, THE NEVADA

1 SUPREME COURT STATED THAT WHEN THE PURPOSE FOR WHICH SUCH
2 EVIDENCE IS OFFERED -- AND THIS WAS A CASE, YOUR HONOR, IN WHICH
3 A WOMAN WAS TRIED ON A GRAND LARCENY CHARGE IN A TRICK ROLL SIT-
4 UATION, AND DURING HER TRIAL THE STATE SOUGHT TO INTRODUCE THAT
5 ON PRIOR OCCASIONS SHE HAD TRICK ROLLED TWO OTHER GENTLEMMN.
6 THAT EVIDENCE WAS ADMITTED, AND THE NEVADA SUPREME COURT REVERSED
7 AND REMANDED, HOLDING THAT THAT EVIDENCE WAS IMPROPERLY ADMITTED.
8 YOUR HONOR, IN CITING THE CALIFORNIA
9 CASE, IT SAYS:

10 WHEN THE PURPOSE FOR WHICH
11 SUCH EVIDENCE IS OFFERED IS THAT
12 OF IDENTIFYING THE DEFENDANT AS
13 THE PERPETRATOR OF THE CHARGED
14 OFFENSE WHO IS SHOWING MODUS
15 OPERANDI COMMON TO THE CHARGED
16 AND UNCHARGED OFFENSES, PARTIC-
17 ULAR CARE MUST BE EXERCISED TO
18 INSURE THAT THE INFERENCE OF
19 IDENTIFY UPON WHICH PROBATIVE
20 VALUE DEPENDS IS OF SIGNIFICANT
21 IMPORTANCE. IT IS APPARENTLY
22 INDICATED INFERENCE DOES NOT
23 ARISE FROM THE MERE FACT THAT
24 THE CHARGED AND UNCHARGED
25 OFFENSES SHARE COMMON MARKS OF
26 SIMILARITY, FOR IT MAY BE THAT
27 THE MARKS IN QUESTION ARE OF
28 SUCH BY NUMEROUS OTHER
29 CRIMES COMMITTED BY PERSONS
30 OTHER THAN THE DEFENDANT.

31 IT GOES ON TO SAY THAT:

32 THUS, IT MAY BE SAID THAT

1 THE INFERENCE OF IDENTITY
2 ARISES WHEN THE REMARKS
3 COMMON TO THE CHARGED AND
4 UNCHARGED ARE CONSIDERED
5 SINGLY OR IN COMBINATION,
6 LOGICALLY OPERATE TO SET THE
7 CHARGED AND UNCHARGED OFFENSES
8 APART FROM OTHER CRIMES OF THE
9 SAME GENERAL VARIETY, AND IN
10 SO DOING TEND TO SUGGEST THAT
11 THE PERPETRATOR OF THE UNCHARGED
12 OFFENSES WERE THE PERPETRATOR OF
13 THE CHARGED OFFENSES.

14 AND FINALLY IT CONCLUDES BY SAYING THAT:

15 THE IMPORTANT POINT TO BE
16 MADE IS THAT WHEN SUCH EVIDENCE
17 IS INTRODUCED FOR THE PURPOSE
18 OF INTRODUCING IDENTITY OF THE
19 PERPETRATOR OF THE CHARGED
20 OFFENSE, IT HAS PROBATIVE VALUE
21 ONLY TO THE EXTENT THAT DISTINC-
22 TIVE -- AND THAT WORD "DISTINC-
23 TIVE" IS EMPHASIZED -- DISTINC-
24 TIVE COMMON MARKS GIVE LOGICAL
25 FORCE TO THE INFERENCE OF
26 IDENTITY. IF THE INFERENCE IS
27 WEAK, THE PROBATIVE VALUE IS
28 LIKEWISE WEAK, AND THE COURT'S
29 DISCRETION SHOULD BE EXERCISED
30 IN FAVOR OF EXCLUSION.

31 NOW, MR. HARMON HAS CITED WHAT HE
32 BELIEVES TO BE SIMILARITIES IN THE CHARGED AND UNCHARGED

1 OFFENSE. I WOULD SUGGEST THAT THERE ARE EQUAL, IF NOT MORE,
2 DIFFERENCES IN THE CHARGED AND UNCHARGED OFFENSE:

3 IN THE CASE THAT'S BEING TRIED HERE,
4 IT'S ALLEGED THAT WE HAVE A PRIVATE PERSON WHO IS TRYING TO
5 SELL THE VAN. IN THE OFFENSE THAT OCCURRED IN NEW YORK, THAT
6 INVOLVED AN AUTOMOBILE DEALERSHIP;

7 IT'S ALLEGED THAT THE DEFENDANT IN
8 THE COURSE OF THE ROBBERY HERE KILLED THE SELLER OF THE VEHICLE.
9 THERE IS NO EVIDENCE THAT THE DEFENDANT IN NEW YORK KILLED OR
10 EVEN ATTEMPTED TO KILL THE VICTIM IN THAT CASE;

11 IN THE NEW YORK OFFENSE, THE TESTIMONY
12 FROM MR. SCHWARTZ WAS THAT HE WAS ORDERED TO TAKE OFF HIS
13 CLOTHES AT GUNPOINT. THERE IS NO EVIDENCE WHATSOEVER TO SUGGEST
14 THAT THAT WAS THE CASE HERE;

15 I THINK THE STATE EARLIER SUGGESTED
16 THAT, WHILE DOCTOR MONAHAN COULD POSSIBLY HAVE BEEN KILLED WHEN
17 HE PUT UP A STRUGGLE UPON BEING TOLD TO TAKE HIS CLOTHES OFF,
18 AND I SUBMIT THAT THAT'S NOTHING MORE THAN SHEER SPECULATION
19 ON THE PART OF THE STATE AND THERE'S CERTAINLY NO EVIDENCE TO
20 SUGGEST THAT. I THINK THERE WAS NO EVIDENCE TO SUGGEST THAT
21 THE DOCTOR'S CLOTHES, AT THE TIME HE WAS FOUND INSIDE THE VAN,
22 THAT THERE WAS ANY EVIDENCE TO SUGGEST THAT THERE HAD BEEN AN
23 ATTEMPT TO REMOVE HIS CLOTHES OR ANYTHING OF THAT NATURE;

24 THE OFFENSES OCCURRED IN -- CERTAINLY
25 OCCURRED IN DIFFERENT LOCATIONS. I DON'T RECALL THE EXACT TIME
26 THAT MR. SCHWARTZ TESTIFIED THE OFFENSE OCCURRED, BUT I WOULD
27 SUGGEST TO THE COURT THAT YOU HAVE A PROBLEM HERE OF THE REMOTE-
28 NESS OF THE TWO CRIMES;

29 MR. SCHWARTZ ALSO TESTIFIED THAT THE
30 INDIVIDUAL WHO ROBBED HIM HAD A NEW YORK ACCENT. THE TESTIMONY
31 IN THIS CASE FROM THE WITNESSES FROM THE SEARS STORE WAS THAT
32 THE DEFENDANT SPOKE IN -- WITH A TYPICAL BLACK ACCENT, SUGGESTING,

1 OF COURSE, THAT HE WASN'T VERY ARTICULATE AND USED QUITE A BIT
2 OF PROFANITY;

3 MR. HARMON SEEMS TO SUGGEST, YOUR
4 HONOR, BECAUSE CASH WAS TAKEN, A WALLET WAS TAKEN FROM THE
5 VICTIM IN BOTH CASES, THAT A GUN WAS USED IN BOTH CASES, THAT
6 THOSE ARE MARKS OF SIMILARITY UPON WHICH THE COURT SHOULD --
7 AND WHICH THE COURT SHOULD LOOK, IN DECIDING WHETHER OR NOT THIS
8 EVIDENCE SHOULD BE ADMITTED. AND I WOULD SUBMIT THAT IT'S NO
9 DIFFERENT FROM ANY OTHER ARMED ROBBERY.

10 TO THINK THAT AN INDIVIDUAL WHO GOES
11 OUT TO AN AUTO DEALER AND ASKS FOR A DEMONSTRATION RIDE AND
12 GOES OUT AND ROBS, THAT THAT'S SO UNIQUE; I WOULD SUBMIT, YOUR
13 HONOR, THAT IT ISN'T. AS A MATTER OF FACT, I HAVE BEFORE ME
14 NOW AN ARTICLE FROM THE LAS VEGAS SUN THAT'S DATED FEBRUARY 9TH
15 OF 1983. IT INVOLVES TWO GENTLEMEN FROM THE HENDERSON AREA
16 WHO, ACCORDING TO THE NEWSPAPER ACCOUNT, WENT TO BEN STEPMAN
17 DODGE, ASKED FOR A TEST DRIVE IN A VEHICLE, TOOK THE SALESMAN
18 WITH HIM, AND AT GUNPOINT ROBBED THE SALESMAN.

19 THE COURT: DID THEY BOTH SAY THEY WERE SECURITY
20 GUARDS?

21 MR. COOPER: NO, YOUR HONOR. THE NEWSPAPER
22 ACCOUNT THAT I HAVE HERE MAKES NO MENTION OF THAT.

23 I WOULD GRANT THAT THAT IS THE ONLY SIMI-
24 LARITY, THAT I SEE, BETWEEN THESE TWO OFFENSES, IS THAT THE
25 DEFENDANT --

26 THE COURT: DON'T YOU THINK THAT'S SIGNIFICANT?

27 MR. COOPER: I THINK IT'S CERTAINLY WORTH THE
28 COURT'S CONSIDERATION. I DON'T THINK, HOWEVER, THAT IT'S
29 SIGNIFICANT ENOUGH OR IS DISTINCTIVE ENOUGH TO JUSTIFY THE
30 COMMISSION OF THE EVIDENCE OF THE OTHER CRIME. I DON'T THINK
31 THAT THAT'S WHAT THE MAYES COURT HAD IN MIND WHEN IT STATED
32 THAT THE DISTINCTIVE COMMON MARKS MUST EXIST.

1 THE COURT: YOU WILL HAVE TO SAY THOUGH THAT THE
2 REPRESENTATION OF ONE SECURITY GUARD IS NOT A COMMON POINT THAT
3 WE FIND IN ROBBERY CASES, OR EVEN IN THE ROBBERY CASES WHICH
4 YOU HAVE MENTIONED IN THAT ARTICLE.

5 MR. COOPER: I CAN'T -- I CAN'T HONESTLY SAY THAT,
6 YOUR HONOR, YOU'RE CORRECT. I'M SURE IF I HAD TIME I WOULD GO
7 THROUGH THE PUBLIC DEFENDER FILES AND FIND WHERE INDIVIDUALS
8 HAVE REPRESENTED THEMSELVES AS SECURITY OFFICERS BEFORE WHILE
9 PERPETRATING ROBBERIES.

10 I WOULD SIMPLY STATE, YOUR HONOR, THAT I --
11 IT'S THE DEFENDANT'S POSITION THAT THAT ONE CHARACTERISTIC,
12 THAT ONE SIMILARITY IN THE UNCHARGED AND THE CHARGED OFFENSE,
13 WOULD NOT JUSTIFY AN ADMISSION OF THE PREVIOUS CRIME.

14 I WOULD SIMPLY IN CONCLUDING, YOUR
15 HONOR, STATE THAT THE PREJUDICIAL EFFECT OF THIS EVIDENCE WOULD
16 BE, OF COURSE, TO SUGGEST TO THE JURY THAT BECAUSE THE DEFENDANT
17 COMMITTED A SIMILAR OFFENSE IN THE PAST, HE LIKELY COMMITTED
18 THIS OFFENSE. I WOULD STRONGLY URGE THE COURT TO RULE IN FAVOR
19 OF THE DEFENDANT AND EXCLUDE ANY EVIDENCE OF THE NEW YORK
20 ARREST.

21 THE COURT: ANYTHING FURTHER?

22 MR. HARMON: YOUR HONOR, ONLY TO ADD IN REGARDS TO
23 THE ARTICLE REFERRED TO, THOSE ARE THE STICKLEY BROTHERS. I'M
24 QUITE FAMILIAR WITH THAT CASE. THE CAR SALESMAN WAS NOT ROBBED
25 UNLESS -- HE WAS NOT ROBBED OF ANY PERSONAL EFFECTS. THE
26 VEHICLE WAS TAKEN. HE WAS TOLD AT GUNPOINT TO GET IN THE TRUNK,
27 AND THEN THEY TOOK THE CAR AND THEY WENT TO A BANK AND ROBBED
28 IT. SO THERE ARE REALLY VERY FEW SIMILARITIES WHEN YOU CON-
29 sider the totality of what happened.

30 THE COURT: LET ME UNDERSTAND YOU CORRECTLY.

31 YOU ARE ASKING THAT IT BE ADMITTED TO
32 ESTABLISH WHAT NOW? IDENTITY?

1 MR. HARMON: MOTIVE AND INTENT.

2 THE COURT: THE COURT IS NOT UNMINDFUL OF THE
3 WEIGHT AND THE VALUE TO BE GIVEN TO THIS TYPE OF EVIDENCE, OR
4 VERY CLEARLY OF THE PREJUDICIAL EFFECT, HAVING BEEN THE ATTORNEY
5 WHO TRIED THE NESTER CASE AND REPRESENTED THE DEFENDANT IN THAT
6 CASE. AND AS YOU KNOW, THE NESTER CASE WAS AGAINST MY CLIENT
7 IN THAT CASE.

8 THE ISSUE HERE, HOWEVER, IS, LOOKING AT
9 THE TEST THAT OUR SUPREME COURT HAS LAID OUT IN THE TUCKER AND
10 THE JONES CASES, IS TO GO THROUGH AND TAKE A LOOK AT WHAT EACH
11 OF THESE REQUIREMENTS NEED BY WAY OF PROOF AND OTHER EVIDENCE.

12 THE FIRST THING THAT HAS TO BE DETER-
13 MINED IS: IS THERE CLEAR AND CONVINCING EVIDENCE OF THE
14 EVIDENCE THAT YOU'RE TRYING TO GET IN, THAT MR. HOWARD WAS THE
15 PERPETRATOR OF THAT OFFENSE WHICH OCCURRED, AS I FIGURE IT OUT,
16 ABOUT FIVE AND A HALF MONTHS BEFORE THE PRINCIPAL OFFENSE
17 OCCURRED.

18 OBVIOUSLY IN NEVADA WE HAVE CASES,
19 WHICH HAVE HELD, THAT DEFINES WHEN TO USE THIS AND WHEN IT IS
20 ADMISSIBLE IF THEY CONTAIN THE UNIQUENESS SET FORTH IN THE
21 RULES ESTABLISHED BY OUR LEGISLATURE AND BY OUR NEVADA SUPREME
22 COURT. THE FIRST ISSUE IS THE ISSUE OF NECESSITY; AND THE
23 SECOND, OF COURSE, BEING THE ISSUE OF WHETHER OR NOT THERE'S
24 SUBSTANTIAL EVIDENCE TO ESTABLISH THE ELEMENTS OF THE CRIMES IN
25 THIS CASE, AND SPECIFICALLY REFERRING TO THE CRIME OF ROBBERY
26 AND THE MURDER OF THE DOCTOR IN THIS CASE, AND I'M NOT REFERRING
27 TO THE SEARS ROBBERY. THERE IS, I THINK, AN AREA OF DOUBT, AND
28 THE DOUBT IN THAT AREA IS WHAT HAPPENED TO THE DEFENDANT
29 BETWEEN THE TIME THAT DAWANA LEFT HIM IN THE AREA OF DOCTOR
30 MONAHAN'S OFFICE AND THE TIME HE REAPPEARED BACK IN THEIR MOTEL
31 ROOM.

32 THE EVIDENCE HERE ESTABLISHES THAT HE

1 WAS LEFT IN THE AREA ABOUT 40 MINUTES LATER, 45 MINUTES THERE-
2 ABOUTS; WAS THEN SEEN WALKING WITH A C.B. IN HIS POSSESSION.
3 NO ONE CAN TIE THE C.B. TO THE VAN IN THIS CASE. THE ONLY
4 WITNESS THAT WE HAVE THAT MAY HAVE SEEN HIM, IN GOING BACK
5 THROUGH MY NOTES I FIND, WAS HELENE ZUCKERMAN. SHE WAS ASKED
6 BY COUNSEL IF SHE HAD SEEN THE DEFENDANT; AND SHE, IN EFFECT,
7 STATED THAT SHE COULDN'T IDENTIFY WHO THAT INDIVIDUAL WAS. SHE
8 GAVE A GENERAL DESCRIPTION OF THE INDIVIDUAL: BLACK MALE, 165,
9 28, HAD CASUAL CLOTHES ON; AND THEN SHE STATED THAT THE
10 DEFENDANT HERE IN THE COURTROOM APPEARED TO BE DARKER THAN THE
11 PERSON SHE SAW IN THE OFFICE. I THINK THAT WAS HER NOTATION OR
12 STATEMENT.

13 SO WE HAVE NO ONE, IN EFFECT, WHO CAN
14 IDENTIFY THIS DEFENDANT EVEN WITHOUT THE CIRCUMSTANTIAL
15 EVIDENCE. OF COURSE, THERE IS NO DIRECT, EYE-WITNESS TESTIMONY
16 THAT THE DEFENDANT COMMITTED THE OFFENSE AT ISSUE. THE
17 QUESTION OF IDENTITY OF COURSE IS RAISED BECAUSE OF THAT.

18 THAT BEING THE CASE, IT APPEARS TO ME
19 THAT THERE IS A NECESSITY TO ESTABLISH IDENTITY, AND THE STATE
20 STILL HAS TO PROVE THAT.

21 IN THIS CASE, UNLIKE OTHERS, WE DON'T
22 HAVE ANYONE WHO SAID, YES, I SAW HIM WITH A SMOKING GUN IN HIS
23 HAND, OR THEY FOUND A GUN IN HIS POSSESSION AND WERE ABLE TO
24 MATCH THE WEAPON TO THE BULLET THAT WAS FOUND AT THE SCENE HERE.
25 THAT WAS NOT DONE IN THIS CASE. IT'S SIMILAR BUT NOT YET AT
26 THE RIGHT TIME. CERTAINLY THEY CAN PUT HIM AT THE CAR, BUT
27 THERE'S AN ISSUE I THINK COUNSEL HAS RAISED ABOUT WHETHER OR
28 NOT HE EVER TOUCHED THE VEHICLE, ET CETERA. SO THERE IS A
29 QUESTION.

30 THE NEXT ISSUE, AFTER SHOWING NECES-
31 SITY, IS: IS THERE POINTS OF SIMILARITY SUFFICIENT TO TIE HIM
32 TO THIS PARTICULAR OFFENSE? THE OFFENSES ARE SIMILAR AND THERE-

1 FORE ADMISSIBLE.

2 IN GOING THROUGH AND LISTENING TO WHAT
3 COUNSEL HAS HAD TO SAY, I'M NOT CERTAIN THAT ALL OF THOSE ARE
4 POINTS OF SIMILARITY. BUT IT DOES ESTABLISH A PATTERN. IT DOES
5 ESTABLISH -- OBVIOUSLY THE MOTIVE SEEMS TO BE PRETTY CLEAR.
6 THERE'S BEEN A BIT OF NUANCES, BUT THE MOTIVE SEEMS CLEAR: HERE
7 AN INDIVIDUAL, THE DEFENDANT IN THIS CASE, IS ALLEGED TO HAVE
8 GONE BOTH TO THE VICTIM IN THIS CASE BEFORE THE COURT AND THE
9 VICTIM IN A NEW YORK CASE AND MADE REPRESENTATIONS THAT HE WAS
10 A SECURITY GUARD. THAT REPRESENTATION I THINK TO MOST PEOPLE
11 WOULD DISARM THEM TO BELIEVE THAT HE IS REALLY AN ENFORCER OF
12 THE LAW RATHER THAN A VIOLATOR OF THE LAW;

13 FURTHER, THE EVIDENCE OF COMMITTING
14 THE OFFENSE IS TO ISOLATE THE VICTIM IN THE VEHICLE, IT'S NOT
15 LIKE A NORMAL ROBBERY WHERE YOU GO TO A PLACE OF BUSINESS AND
16 YOU ROB THEM AT THEIR PLACE OF BUSINESS OR YOU ROB THEM ON THE
17 STREET; FURTHER, THE DEFENDANT DEALT VERY OPENLY WITH THE VICTIMS
18 BUT ALWAYS CONCEALED HIS IDENTITY BY THE USE OF SOME OTHER ALIAS,
19 SOME OTHER NAME; THE ROBBERY IN BOTH OF THESE CASES WERE BOTH
20 COMMITTED WITH THE USE OF A GUN AFTER THAT PERSON HAD BEEN ISO-
21 LATED FROM HIS PLACE OF RESIDENCE.

22 I THINK THE SIMILARITIES IN THESE
23 CASES ARE INDEED UNIQUE. I DON'T THINK THEY FALL WITHIN THE
24 MAYES TEST OF COMMON SIMILARITIES.

25 THE LAST ISSUE THEN TO DETERMINE IS
26 WHETHER OR NOT THE PROBATIVE VALUE IS OUTWEIGHED BY THE
27 PREJUDICIAL EFFECT. AS I HAVE MENTIONED PREVIOUSLY IN EARLIER
28 PROCEEDINGS, ANY EVIDENCE AGAINST A DEFENDANT IS GOING TO BE
29 PREJUDICIAL THAT TENDS TO CONNECT HIM TO THE PERPETRATION OF
30 THE OFFENSE.

31 THE COURT BELIEVES THAT THE PROBATIVE
32 VALUE IN THIS CASE SUBSTANTIALLY OUTWEIGHS THE PREJUDICIAL

1 EFFECT. AND THE COURT WILL GIVE A LIMITING INSTRUCTION,
2 INSTRUCTING THE JURY AS TO THE USE OF THIS TYPE OF EVIDENCE FOR
3 THE PURPOSES OF ESTABLISHING, AND WE WILL SAY FOR THE PURPOSES
4 OF ESTABLISHING, IDENTITY, MOTIVE AND INTENT.

5 WE WILL BE IN RECESS FOR TEN MINUTES,
6 AND THEN WE WILL PROCEED WITH YOUR NEXT WITNESS.

7 (WHEREUPON, FROM 11:38 A.M.
8 UNTIL 11:45 A.M., A RECESS
9 WAS HAD IN THE PROCEEDINGS,
10 AT THE CONCLUSION OF WHICH
11 THE FOLLOWING WAS HAD:)

12 THE COURT: WILL COUNSEL STIPULATE TO THE PRESENCE
13 OF THE JURY?

14 MR. SEATON: YES, YOUR HONOR.

15 MR. COOPER: YES.

16 THE COURT: YOU MAY PROCEED.

17 CALL YOUR NEXT WITNESS.

18 MR. HARMON: THANK YOU.

19 ED SCHWARTZ.

20 THE COURT: COME FORWARD.

21 YOU HAVE PREVIOUSLY BEEN SWORN, SIR. YOU
22 ARE STILL UNDER OATH.

23 MR. BAILIFF, WILL YOU TURN OFF THAT
24 LIGHT AND TAKE THAT EXHIBIT OFF, PLEASE.

25 YOU MAY PROCEED, COUNSEL.

26 MR. HARMON: THANK YOU, YOUR HONOR.

27 ..

28 ..

29 ..

30 ..

31 ..

32 ..

DIRECT EXAMINATION

BY MR. HARMON:

Q WILL YOU STATE YOUR NAME, PLEASE.

A ED SCHWARTZ.

Q SPELL YOUR LAST NAME.

A S-C-H-W-A-R-T-Z.

Q MR. SCHWARTZ, WHERE DO YOU WORK?

A AT THE PRESENT TIME?

Q YES.

A FREEPORT VOLVO, WHICH IS AT 146 WEST SUN-
RISE HIGHWAY, FREEPORT, NEW YORK.

Q ARE YOU IN CAR SALES?

A YES.

Q WERE YOU EMPLOYED AS A CAR SALESMAN ON
OCTOBER 5, 1979?

A YES, I WAS.

Q WHERE DID YOU WORK ON THAT DAY?

A AT PARAGONS OLDSMOBILE, NORTHERN BOULEVARD,
WHICH IS WOODSIDE, NEW YORK.

Q IS THAT THE STATE OF NEW YORK?

A STATE OF NEW YORK, CITY OF NEW YORK.

Q WHAT WERE THE NATURE OF YOUR DUTIES AT
PARAGONS OLDSMOBILE MOTORS ON OCTOBER 5, 1979?

A MY DUTIES AS SALESMAN WAS TO SELL AUTO-
MOBILES.

Q DO YOU RECALL WHAT TIME YOU ARRIVED AT WORK
ON OCTOBER 5, 1979?

A APPROXIMATELY 9:00 A.M.

Q SHORTLY AFTER YOU ARRIVED ON THE PREMISES
OF PARAGONS MOTORS ON OCTOBER 5, 1979, DID YOU MAKE CONTACT WITH

1 SOMEONE WHO REPRESENTED HIMSELF TO BE INTERESTED IN A VEHICLE?

2 A THAT'S TRUE.

3 WHEN I ARRIVED AT WORK THERE WAS SOME-
4 ONE WAITING IN THE SHOWROOM. I WAS THE FIRST SALESMAN IN, AND
5 THIS MAN APPROACHED ME, SAYING HE WAS INTERESTED IN PURCHASING
6 AN AUTOMOBILE.

7 Q WHAT HAPPENED AFTER THE MAN APPROACHED YOU?

8 A WE SAT AT MY DESK AND WE STARTED TO DISCUSS
9 THE PURCHASE OF AN OLDSMOBILE. HE WAS PARTICULARLY INTERESTED
10 IN A 98 OLDSMOBILE. AND WE PROCEEDED TO DISCUSSING THE VARIOUS
11 ASPECTS OF THE CAR.

12 Q WHAT YEAR OF 98 OLDSMOBILE?

13 A THAT WOULD BE 1980.

14 Q WILL YOU DESCRIBE THE INDIVIDUAL YOU MADE
15 CONTACT WITH WHO EXPRESSED AN INTEREST IN A 1980 98 OLDSMOBILE?

16 A HE WAS A BLACK INDIVIDUAL; FIVE FOOT TEN;
17 WEIGHING AROUND 150, 155 POUNDS; LIGHT SKIN.

18 Q DID YOU SAY LIGHT SKIN?

19 A RIGHT.

20 Q DID YOU FORM AN OPINION --

21 A WEARING --

22 Q DID YOU FORM AN OPINION REGARDING HIS
23 APPROXIMATE AGE?

24 A IN AND AROUND 30.

25 Q AT SOME POINT DID YOU HAVE A CONVERSATION
26 WITH THIS PERSON REGARDING HIS EMPLOYMENT?

27 A YES. WE, AS I SAID, WE WERE DISCUSSING THE
28 PURCHASE OF AN AUTOMOBILE. AND AT SOME POINT IN THE DISCUSSION
29 HE DREW OUT A BANK BOOK WHICH HAD A COUPLE THOUSAND DOLLARS IN
30 THE ACCOUNT; DREW OUT A LICENSE, DRIVER'S -- A NEW YORK STATE
31 DRIVER'S LICENSE AND SHOWED ME THE LICENSE AND SHOWED ME THESE
32 PARTICULAR DOCUMENTS. AND TO ME THEY WERE SORT OF A VERIFICA-

1 TION OF HIS INTEREST IN BUYING THE CAR.

2 SO WE CONTINUED FURTHER INTO THE DIS-
3 -- THE DISCUSSION REGARDING THE AUTOMOBILE. THEN HE ASKED ME
4 WHETHER HE COULD SEE A PARTICULAR AUTOMOBILE WE HAD IN STOCK,
5 WHICH WERE OUT IN AN OPEN LOT ACROSS THE STREET. AND AFTER
6 SEEING THESE DOCUMENTS, I TOOK HIM ACROSS THE STREET AND SHOWED
7 HIM THREE OR FOUR VARIOUS OLDSMOBILE 98'S.

8 Q MR. SCHWARTZ, MY SPECIFIC QUESTION OF YOU
9 WAS: AT SOME POINT DID THIS MAN TELL YOU HOW HE WAS EMPLOYED?

10 A YES. AND IN ADDITION TO SHOWING ME THE
11 BANK BOOK, THE LICENSE, HE ALSO TOLD ME HE WAS EMPLOYED BY A
12 SECURITY OUTFIT IN NEW YORK.

13 Q A SECURITY OUTFIT?

14 A YES.

15 HE HAD GIVEN ME VARIOUS POINTS OF
16 HAVING A JOB, HAVING SAY A DOWNPAYMENT, AND A DRIVER'S LICENSE;
17 WHICH ARE KEY ELEMENTS TO WHAT WE LOOK FOR.

18 Q DO YOU RECALL AT THIS TIME WHAT SECURITY
19 AGENCY THIS MAN SAID --

20 A I BELIEVE IT WAS --

21 Q (CONTINUING) -- THIS MAN SAID HE WAS
22 EMPLOYED WITH?

23 A I BELIEVE IT WAS BURNS.

24 Q B-U-R-N-S?

25 A N-S, YES.

26 Q NOW, YOU'VE INDICATED AT SOME POINT, THE MAN
27 PRODUCED SOME TYPE OF DRIVER'S LICENSE?

28 A THAT'S CORRECT.

29 Q DO YOU RECALL THE NAME ON THE LICENSE?

30 A THE NAME HAD AN "S" IN IT. I -- I DON'T
31 REMEMBER HOW MANY LETTERS WERE IN IT. THE ADDRESS WAS JAMAICA,
32 NEW YORK. AND I COULDN'T GIVE YOU THE EXACT NAME.

1 Q MR. SCHWARTZ, WILL YOU LOOK AROUND THE
2 COURTROOM TODAY AND STATE WHETHER THE PERSON WHO REPRESENTED
3 HIMSELF TO BE EMPLOYED BY BURNS SECURITY AGENCY ON OCTOBER 5,
4 1979, IS PRESENT IN COURT?

5 A YES. HE'S SITTING AT THE -- MY RIGHT --
6 TABLE, EXTREME RIGHT SEAT.

7 Q DESCRIBE HOW THE MAN IS DRESSED NOW.

8 A HE'S WEARING A LONG SLEEVED SPORT SHIRT,
9 OPEN AT THE COLLAR.

10 Q WHAT COLOR IS IT?

11 A IT IS A YELLOW.

12 MR. HARMON: YOUR HONOR, MAY THE RECORD SHOW THAT
13 THE WITNESS HAS IDENTIFIED THE DEFENDANT SAMUEL HOWARD.

14 THE COURT: THE RECORD MAY SO SHOW.

15 MR. HARMON: THANK YOU.

16

17 BY MR. HARMON:

18

19 Q NOW, MR. SCHWARTZ, YOU'VE ALSO INDICATED
20 THAT THE DEFENDANT SHOWED YOU SOME TYPE OF BANK BOOK?

21 A THAT'S CORRECT.

22 Q DID HE EXPLAIN WHAT HIS PURPOSE WAS IN
23 SHOWING THAT TO YOU?

24 A WELL, HE INDICATED TO ME THAT HE HAD ENOUGH
25 FOR A DOWNPAYMENT ON THE AUTOMOBILE, THAT HE WAS REGULARLY
26 EMPLOYED SO THAT THERE WOULD BE NO PROBLEM WITH THE CREDIT.

27 Q DID YOU GET A CHANCE TO SEE WHETHER HE HAD
28 SOME TYPE OF BALANCE IN THIS BOOK?

29 A YES. THERE WAS SEVERAL THOUSAND DOLLARS.

30 Q WHAT HAPPENED THEN AFTER YOU WALKED OVER
31 TO THE LOT AND YOU SAY YOU LOOKED AT A NUMBER OF VEHICLES?

32 A I SHOWED HIM VARIOUS -- WE HAD ABOUT THREE

1 OR FOUR 98'S IN STOCK AT THAT POINT. AND I SHOWED HIM THE CARS
2 WE HAD. WE LOOKED AT THEM, WE DISCUSSED THEM, TALKED A LITTLE
3 BIT ABOUT THE EQUIPMENT IN IT, AND THEN WE WENT BACK TO THE
4 SHOWROOM, BACK TO MY DESK.

5 AT THAT POINT WE WERE PRETTY DEEP IN
6 THE SALES PROCESS. AND HE ASKED ME WHETHER HE COULD HAVE A --
7 WE CALL IT A "DEMO RIDE".

8 AT THIS POINT I WAS FAIRLY NEW WITH
9 THIS ORGANIZATION AND I WENT INTO THE SALES MANAGER AND ASKED
10 HIM WHETHER I COULD IN FACT GIVE THIS INDIVIDUAL A DEMO RIDE.
11 MY CAR BEING A DIFFERENT CAR, I DIDN'T HAVE THE 98, AND I ASKED
12 THE SALES MANAGER WHETHER THERE WAS ONE AVAILABLE AND EXPLAINED
13 TO HIM BRIEFLY WHAT HAD TRANSPIRED. AND HE GAVE ME THE KEYS TO
14 HIS CAR, SINCE HE HAD A 98.

15 Q MR. SCHWARTZ, WHOSE IDEA WAS THE DEMONSTRATION RIDE FROM?
16

17 A THE DEFENDANT ASKED ME FOR THE DEMO RIDE.

18 Q HE BROUGHT THAT UP?

19 A HE BROUGHT IT UP, CORRECT.

20 Q AFTER YOU HAD ATTAINED THE KEYS TO A 98
21 OLDSMOBILE FROM YOUR SALES MANAGER, WHAT HAPPENED?

22 A WE THEN BOTH WENT OUT TO THE CAR AND WE
23 PROCEEDED ON TO DRIVE. I GOT BEHIND THE DRIVER'S SEAT, AND IN
24 TERMS OF A CIRCLE, I DROVE ABOUT THREE-QUARTERS OF THE WAY.
25 AND THEN THE DEFENDANT ASKED ME WHETHER HE COULD DRIVE, WHICH
26 WAS PERFECTLY ACCEPTABLE, AND I GOT OUT OF THE CAR.

27 Q DID ANYONE ELSE GO WITH YOU ON THE DEMONSTRATION RIDE BESIDES YOURSELF AND DEFENDANT MR. HOWARD?
28

29 A NO. JUST THE TWO OF US.

30 Q NOW, YOU'RE TESTIFYING THAT AT SOME POINT
31 THE DEFENDANT ASKED YOU IF HE COULD DRIVE?

32 A THAT'S CORRECT.

1 Q EXPLAIN WHAT HAPPENED THEN.

2 A AT THAT POINT I SAID, YES, SINCE THIS WAS
3 A NORMAL THING; AND I GOT OUT OF THE DRIVER'S SEAT AND WALKED
4 AROUND THE CAR TO THE PASSENGER'S SIDE. HE GOT OUT AND GOT INTO
5 THE DRIVER'S SIDE.

6 WE THEN PROCEEDED TO FINISH THE LAST
7 QUARTER, WE'LL SAY, OF THE CIRCLE, BACK TO THE SHOWROOM. AT
8 THAT POINT HE SAID TO ME, WOULD IT BE ALL RIGHT TO MAKE THE
9 SAME CIRCLE? AND SINCE HE HAD ONLY DRIVEN ABOUT A QUARTER OF
10 THE WAY, IT WAS A LOGICAL REQUEST. AND I SAID ALL RIGHT.

11 HE THEN WENT DOWN -- OR EAST ON
12 NORTHERN BOULEVARD FOR ABOUT THREE BLOCKS, THREE BLOCKS OR SO,
13 I DON'T KNOW, THREE OF FOUR. AND WE MADE A RIGHT TURN INTO A
14 ONE-WAY STREET. WE THEN PROCEEDED ABOUT A QUARTER OF THE WAY
15 DOWN THE BLOCK AND HE PULLED OVER TO THE CURB.

16 Q WHO PULLED OVER TO THE CURB?

17 A THE DEFENDANT. HE WAS DRIVING.

18 Q DID YOU TELL HIM TO PULL OVER TO THE CURB?

19 A NO.

20 Q DID YOU KNOW WHY HE WAS PULLING OVER TO
21 THE CURB?

22 A AT THAT VERY POINT, NO.

23 Q WHAT HAPPENED AFTER HE PULLED OVER TO THE
24 CURB?

25 A HE THEN PULLED OUT A GUN, POINTED THE GUN
26 AT ME, AND ORDERED ME TO GET INTO THE WELL, THE FLOOR OF THE
27 PASSENGER'S SEAT.

28 Q WHEN DID YOU --

29 A AND CROUCH DOWN.

30 Q (CONTINUING) -- FIRST BECAME AWARE THAT
31 THE DEFENDANT MR. HOWARD HAD A GUN?

32 A AT THE POINT HE PULLED OVER TO THE CURB

1 AND PULLED IT OUT.

2 Q DID YOU SEE WHERE HE WAS CARRYING THE GUN?

3 A I DIDN'T SEE IT UP TO THIS POINT. HE PULLED
4 IT OUT, I DON'T KNOW WHERE HE PULLED IT OUT OF.

5 Q WHERE WAS THE GUN WHEN HE FIRST PRODUCED
6 IT?

7 A IT WAS IN HIS LEFT HAND, POINTING AT ME.

8 Q DID HE GET IT FROM SOMEWHERE ON HIS PERSON?

9 A YES.

10 Q ARE YOU ABLE TO DESCRIBE THE GUN?

11 A THE GUN WAS A AUTOMATIC. THE SIZE OF IT
12 IS SOMEWHERE BETWEEN A .22 CALIBER AND A .45. I DON'T KNOW THE
13 EXACT SIZE.

14 Q IT WAS NOT A .22, AND NOT A .45?

15 A THAT IS CORRECT.

16 Q SOMEWHERE IN BETWEEN THAT RANGE?

17 A THAT IS CORRECT.

18 Q IT WAS A HANDGUN?

19 A YES, SIR.

20 Q WHAT DID THE DEFENDANT MR. HOWARD DO ONCE
21 YOU SAW A HANDGUN IN HIS LEFT HAND?

22 A AS I SAY, HE ORDERED ME DOWN IN THE WELL OF
23 THE PASSENGER'S SEAT.

24 Q WHAT WAS HE DOING WITH THE GUN AS HE
25 ORDERED YOU DOWN IN THE WELL IN THE PASSENGER'S SEAT?

26 A HE HAD IT -- HE HAD IT POINTED AT ME, AND
27 WHEN I WAS IN THE WELL IT WAS POINTED AT MY HEAD.

28 Q AT WHAT PART OF YOUR HEAD?

29 A SEEMED RIGHT IN BETWEEN MY EYE BROWS.

30 Q THEN WHAT HAPPENED, SIR?

31 A THEN HE ORDERED ME TO TAKE MY SHOES OFF,
32 THROW THEM IN THE BACK SEAT; ORDERED ME TO TAKE MY PANTS OFF,

1 THROW IT IN THE BACK SEAT; AND THEN PLACE --

2 Q DID YOU TAKE YOUR SHOES OFF?

3 A YES. I TOOK MY --

4 Q AND YOUR PANTS OFF?

5 A YES.

6 Q YOU FOLLOWED HIS INSTRUCTIONS?

7 A THAT IS CORRECT.

8 Q DID YOU RESIST IN ANYWAY?

9 A NO.

10 Q WHY?

11 A I'M SORRY.

12 Q WHY?

13 A WHY? I WAS SCARED.

14 Q WHAT HAPPENED AFTER YOU HAD TAKEN YOUR

15 SHOES AND PANTS OFF AND THROWN THEM INTO THE BACK SEAT?

16 A AND HE THEN ORDERED ME TO PLACE MY HANDS ON

17 THE TRANSMISSION HUMP BETWEEN THE TWO SEATS -- IT WAS A CARPETED

18 HUMP THERE -- AND SPREAD MY HANDS OUT AND PLACE THEM ON THE

19 HUMP.

20 Q WHAT WAS YOUR POSITION AT THIS TIME?

21 A I WAS CROUCHED AGAIN IN THE WELL LOOKING UP

22 AT HIM WITH MY HANDS SPREAD OUT.

23 Q THEN WHAT HAPPENED?

24 A I WAS WEARING A WATCH AND A RING, AND HE

25 TOLD ME TO TAKE THOSE OFF. I TOOK THE RING OFF AND THE WATCH

26 OFF AND HE TOOK THAT.

27 Q DID THE DEFENDANT STILL HAVE THE GUN OUT?

28 A YES, SIR.

29 Q WHAT WAS HE DOING WITH THE GUN?

30 A HE KEPT IT POINTED AT MY HEAD.

31 Q IS IT YOUR TESTIMONY THAT HE ORDERED YOU

32 TO TAKE THE RING AND THE WRISTWATCH OFF?

1 A I -- YES.

2 Q DID YOU GIVE THOSE ITEMS TO THE DEFENDANT

3 THEN?

4 A YES, I DID.

5 Q DID HE TAKE ANY OTHER VALUABLES OR PERSONAL

6 EFFECTS FROM YOUR PERSON?

7 A YES. THERE WERE -- THERE WAS A SUM OF

8 MONEY IN MY CLIP WALLET WHICH HAD A SUM OF MONEY, CREDIT CARDS,

9 DRIVER'S LICENSE, OTHER IDENTIFICATION.

10 Q DO YOU KNOW HOW MUCH MONEY YOU HAD?

11 A IT WAS ABOUT \$75.

12 Q WHAT HAPPENED AFTER THE RING, THE WRIST-

13 WATCH, YOUR CLIP WALLET WITH ITS CONTENTS AND A SUM OF MONEY,

14 WERE TAKEN BY THE DEFENDANT?

15 A HE THEN ORDERED ME TO KEEP CROUCHED DOWN,

16 DON'T TRY ANYTHING, AND PUT THE CAR IN GEAR. AND AGAIN I WAS

17 CROUCHED DOWN, SO IT SEEMED TO ME HE DROVE TO THE CORNER, MADE

18 A LEFT TURN, ANOTHER LEFT TURN, HE WENT BACK ON NORTHERN BOULE-

19 VARD A SHORT DISTANCE, AND HE DROVE INTO A LOT OF A BURGER KING

20 FAST FOOD CHAIN. HE PULLED UP ABOUT TEN OR FIFTEEN FEET FROM

21 A FENCE, THE BACK FENCE, AND ORDERED ME OUT OF THE CAR, TOLD ME

22 TO WALK TO THE FENCE AND DON'T LOOK BACK, AND THEN HE DROVE OFF.

23 THE COURT: COUNSEL, LET ME TAKE OUR NOON RECESS

24 NOW. WE'LL BE IN RECESS UNTIL 1:00 THIS AFTERNOON.

25 ..

26 ..

27 ..

28 ..

29 ..

30 ..

31 ..

32 ..

1 LAS VEGAS, NEVADA, THURSDAY, APRIL 21, 1983, AT 1:10 P.M.

2 * * * * *

3 (WHEREUPON, FROM 12:03 P.M.
4 UNTIL 1:10 P.M., THE NOON
5 RECESS WAS HAD IN THE PRO-
6 CEEDINGS, AT THE CONCLUSION
7 OF WHICH THE FOLLOWING WAS
8 HAD:)

9 THE COURT: WILL COUNSEL STIPULATE TO THE PRESENCE
10 OF THE JURY?

11 MR. SEATON: YES, YOUR HONOR.

12 MR. FRANZEN: YES, YOUR HONOR.

13 THE COURT: CALL YOUR NEXT WITNESS.

14 MR. HARMON: MAY WE RECALL ED SCHWARTZ, YOUR HONOR?

15 THE COURT: ED SCHWARTZ, COME FORWARD, SIR.

16 BE SEATED.

17 MR. HARMON: THANK YOU.

18
19 BY MR. HARMON:

20
21 Q MR. SCHWARTZ, AT SOME POINT WERE YOU
22 DIRECTED BY THE DEFENDANT, MR. HOWARD, TO GET OUT OF THE 1980
23 OLDSMOBILE 98?

24 A YES, I WAS.

25 Q WAS THAT AT GUNPOINT, SIR?

26 A YES, SIR.

27 Q WHAT HAPPENED AFTER YOU GOT OUT OF THE
28 VEHICLE?

29 A THE DEFENDANT ORDERED ME TO WALK ABOUT TEN
30 OR FIFTEEN FEET INTO A WIRE FENCE, WHICH WAS BACK OF THE BURGER
31 KING RESTAURANT, AND TOLD ME TO KEEP FACING THE FENCE UNTIL HE
32 DROVE OFF. AND I WAITED AWHILE, I HEARD THE CAR GO, AND THEN I

1 TURNED AROUND AND HE WAS GONE.

2 Q WHAT DID YOU DO AFTER THE DEFENDANT LEFT
3 THE AREA?

4 A WELL, I WAS STANDING IN THIS PARKING LOT
5 WITH JUST A SHIRT AND SOCKS ON, AND FORTUNATELY SOME INDIVIDUAL
6 DROVE UP AND GOT OUT OF THE CAR. AND I DON'T KNOW WHETHER HE
7 WAS GOING INTO THE RESTAURANT OR WHAT, BUT I WAVED TO HIM, CALLED
8 TO HIM. HE SORT OF TURNED AROUND READY TO RUN AWAY, AND I SAID
9 TO HIM, WOULD YOU PLEASE CALL THE POLICE, YOU KNOW, I'VE BEEN
10 ROBBED, AND CALL THE SHOWROOM. I TOLD HIM IT WAS PARAGONS.

11 AND HE WENT ACROSS THE STREET TO THE
12 TELEPHONE AND HE CALLED AND SHORTLY AFTER THAT THE POLICE AND
13 SOME FELLOWS FROM THE SHOWROOM CAME, WITH A PAIR OF COVERALLS.
14 I WASN'T DRESSED THEN.

15 Q MR. SCHWARTZ, DID THE DEFENDANT MR. HOWARD,
16 IN FACT, DRIVE AWAY IN THE OLDSMOBILE 98?

17 A THAT IS CORRECT.

18 Q UPON THE ARRIVAL OF THE POLICE DID YOU
19 REPORT TO THEM WHAT HAD OCCURRED?

20 A YES, I DID.

21 Q ON OR ABOUT OCTOBER THE 18TH, 1979, DID
22 YOU HAVE OCCASION TO BE SHOWN A GROUP OF PHOTOGRAPHS BY
23 DETECTIVE GREEN?

24 A YES, I WAS.

25 Q DO YOU REMEMBER WHERE THAT OCCURRED?

26 A AT MY HOME, EARLY EVENING.

27 Q AT YOUR HOME WHEN?

28 A EARLY EVENING.

29 Q DO YOU REMEMBER ABOUT HOW MANY PHOTOGRAPHS
30 WERE SHOWN TO YOU BY DETECTIVE GREEN?

31 A APPROXIMATELY EIGHT.

32 Q AT THE TIME YOU VIEWED THE PHOTOGRAPHS,

1 DID DETECTIVE GREEN SUGGEST TO YOU IN ANY MANNER WHAT PERSON OR
2 PERSONS YOU WERE TO IDENTIFY?

3 A NOT -- NONE WHATSOEVER.

4 Q DID YOU MAKE AN IDENTIFICATION?

5 A YES, SIR.

6 Q DO YOU KNOW WHETHER THE PERSON IS PRESENT
7 IN COURT WHOSE PHOTOGRAPH YOU IDENTIFIED OCTOBER 18TH, 1979?

8 A YES, I DO. HE'S SITTING AT THE -- MY
9 RIGHT-HAND -- TABLE, EXTREME RIGHT.

10 Q DID YOU, ON OCTOBER 18, 1979, IDENTIFY A
11 PHOTOGRAPH OF THE DEFENDANT SAMUEL HOWARD?

12 A YES, SIR.

13 Q WERE YOU IDENTIFYING THAT PHOTOGRAPH AS
14 THE PERSON WHO HAD COMMITTED THE OFFENSE UPON YOU OCTOBER 5,
15 1979?

16 A YES, I WAS.

17 Q HOW SURE WERE YOU OF YOUR IDENTIFICATION?

18 A I WAS POSITIVE IT WAS HIM.

19 Q AFTER YOU HAD INDICATED THAT YOU WERE
20 MAKING AN IDENTIFICATION TO DETECTIVE GREEN, WERE YOU ASKED TO
21 MARK THE BACK OF THE PHOTOGRAPH IN ANY FASHION?

22 A ACTUALLY IT WAS ALONGSIDE THE PHOTOGRAPH,
23 I SIGNED MY NAME.

24 Q DID YOU SIGN IT?

25 A AND THE DATE, YES, SIR.

26 Q THE PHOTOGRAPH YOU IDENTIFIED --

27 A NOT ON THE PHOTOGRAPH BUT RIGHT ADJOINING
28 IT.

29 MR. HARMON: THANK YOU.

30 THAT CONCLUDES DIRECT, YOUR HONOR.

31 THE COURT: CROSS?

32 ..

CROSS EXAMINATION

BY MR. COOPER:

Q MR. SCHWARTZ, THE DEFENDANT DIDN'T PHYSICAL-
LY INJURE YOU IN ANYWAY, DID HE?

A NO, HE DID NOT.

Q DID HE ATTEMPT TO?

A PHYSICAL INTIMIDATION WAS HOLDING A GUN AT
ME.

Q HE NEVER ATTEMPTED TO PHYSICALLY INJURE
YOU?

A NO.

Q INCLUDED IN THE ITEMS TAKEN FROM YOU WAS
A CHECKBOOK; IS THAT RIGHT?

A NO. THAT'S NOT CORRECT.

Q WERE PERSONAL CHECKS TAKEN FROM YOU?

A THERE WERE SEVERAL BLANK CHECKS THAT WERE
LOST.

Q HOW MANY?

A I BELIEVE TWO.

Q SOMETIME SUBSEQUENT TO THIS INCIDENT WERE
YOU INFORMED BY YOUR BANK THAT SOMEONE HAD ATTEMPTED TO CASH
ONE OF THOSE CHECKS?

A YES. I DID, RIGHT AFTER THE INCIDENT, I
WENT TO MY BANK, NOTIFIED THEM WHAT HAD HAPPENED, AND ASKED
WHETHER THEY WANTED TO CANCEL THE ACCOUNT OR NOT. THEY TOLD ME
THAT WOULDN'T BE NECESSARY, THEY WOULD, QUOTE, RED FLAG MY
ACCOUNT.

Q DID YOU LATER LEARN THAT ONE OF THOSE CHECKS
HAD BEEN CASHED?

A YES, I DID.

1 Q WERE YOU EVER SENT A COPY OF THAT IN YOUR
2 BANK STATEMENT, A COPY OF THAT CHECK?

3 A I DON'T BELIEVE SO. I -- I'M NOT SURE ON
4 THAT POINT.

5 Q DID YOU EVER INFORM THE NEW YORK POLICE
6 THAT ONE OF THOSE CHECKS HAD BEEN CASHED?

7 A YES, I DID.

8 Q DO YOU KNOW IF THEY GOT A COPY OF IT?

9 A I DO NOT KNOW.

10 Q WERE YOU EVER GIVEN A DESCRIPTION OF THE
11 INDIVIDUAL WHO TRIED TO CASH -- WHO DID CASH THAT CHECK?

12 A BY WHOM, SIR?

13 Q BY ANYONE ASSOCIATED WITH THE BANK.

14 A YES, I BELIEVE SO.

15 Q WAS IT DESCRIBED -- WAS THAT PERSON
16 DESCRIBED AS A BLACK MALE?

17 A I BELIEVE SO, YES.

18 Q YOU DIDN'T HAPPEN TO BRING THAT CHECK WITH
19 YOU, DID YOU?

20 A WHICH CHECK?

21 Q THE CHECK THAT WAS CASHED.

22 A NO, I DIDN'T.

23 Q DO YOU KNOW IF A HANDWRITING COMPARISON OF
24 ANY KIND WAS EVER MADE?

25 A I DON'T KNOW.

26 Q NOW, YOU TESTIFIED ON DIRECT EXAMINATION
27 THAT IT WAS AT YOUR RESIDENCE THAT YOU WERE SHOWN PHOTOGRAPHS
28 BY AN OFFICER WITH THE POLICE DEPARTMENT IN NEW YORK; IS THAT
29 RIGHT?

30 A THAT'S CORRECT.

31 Q WAS IT AT YOUR HOME THAT YOU SELECTED THE
32 DEFENDANT'S PICTURE?

1 A I WAS SHOWN EIGHT PICTURES, I BELIEVE, AT
2 MY HOUSE.

3 Q DID YOU -- WAS THAT THE ONLY TIME YOU WERE
4 SHOWN PHOTOGRAPHS, OR WERE THERE OTHER TIMES?

5 A I BELIEVE THAT WAS THE ONLY TIME PHOTO-
6 GRAPHS WERE SHOWN.

7 Q WHAT ABOUT DID YOU EVER ATTEND ANY OTHER
8 KIND OF -- STRIKE THAT.

9 DID YOU EVER GO TO THE POLICE STATION
10 AND LOOK AT PHOTOGRAPHS?

11 A I WAS AT THE POLICE STATION BUT NOT WITH
12 PHOTOGRAPHS PER SE.

13 Q WHEN YOU TESTIFIED HERE A DAY OR TWO AGO
14 OUTSIDE THE PRESENCE OF THE JURY YOU TESTIFIED THAT YOU WERE
15 SHOWN A SERIES OF PHOTOGRAPHS AT THE POLICE STATION, DIDN'T
16 YOU?

17 A NO, I DID NOT. I DIDN'T TESTIFY THEY WERE
18 PHOTOGRAPHS.

19 Q WHAT WERE THEY?

20 A THEY WERE -- I DON'T KNOW THE EXACT NAME
21 OF IT, BUT IT WAS A KODAK MACHINE OF SOME SORT THAT PROJECTED
22 PICTURES ON THE SCREEN.

23 Q THESE WERE PICTURES OF INDIVIDUALS?

24 A THAT IS CORRECT.

25 Q HOW MANY WERE YOU SHOWN?

26 A A HUNDRED, HUNDRED FIFTY.

27 Q UH-HUH. WAS THE DEFENDANT'S PICTURE IN
28 ANY OF THOSE HUNDRED, HUNDRED FIFTY THAT YOU WERE SHOWN?

29 A I BELIEVE SO.

30 Q WAS THIS BEFORE OR AFTER YOU SELECTED THE
31 DEFENDANT'S PHOTOGRAPH FROM THE HOME?

32 A IT WAS BEFORE.

1 Q DID YOU SELECT THE DEFENDANT'S PICTURE OUT
2 OF THE 150 -- HUNDRED TO HUNDRED FIFTY THAT YOU WERE SHOWN?
3 A I BELIEVE SO, YES.
4 Q AND WHO WAS -- WAS DETECTIVE GREEN PRESENT
5 THEN?
6 A NO, HE WAS NOT.
7 Q DO YOU KNOW WHO WAS?
8 A NO, I DO NOT. IN FACT, MAY I --
9 Q ARE YOU SAYING --
10 A (CONTINUING) -- MAY I ADD TO THAT?
11 Q WELL, LET ME ASK THE QUESTIONS, PLEASE.
12 A SURE.
13 Q ARE YOU SAYING YOU WENT DOWN TO THE POLICE
14 STATION AND YOU WERE SHOWN, THROUGH SOME KIND OF KODAK EQUIP-
15 MENT, PICTURES, NOT NECESSARILY CAMERA-PICTURE PHOTOGRAPHS, BUT
16 PICTURES OF A HUNDRED TO A HUNDRED FIFTY INDIVIDUALS, ONE OF
17 WHICH WAS THE DEFENDANT SAM HOWARD; THAT YOU SELECTED HIS PHOTO-
18 GRAPH; NOTIFIED THE POLICE OF THAT; AND THAT LATER ON THEY CAME
19 OUT TO YOUR RESIDENCE AND SHOWED YOU SOME SEVEN PHOTOGRAPHS OR
20 SO THAT INCLUDED THE DEFENDANT'S PHOTOGRAPH?
21 A THERE WERE ABOUT EIGHT. YES, SIR, THAT'S
22 ROUGHLY THE PROCEDURE.
23 Q NOW, YOU TESTIFIED THAT THIS MAN WHO GOT IN
24 THE CAR WITH YOU AND LATER ROBBED YOU SHOWED YOU A NEW YORK
25 LICENSE; IS THAT RIGHT; DRIVER'S LICENSE?
26 A AT MY DESK PRIOR TO GETTING INTO THE CAR.
27 Q DID IT APPEAR TO BE AUTHENTIC TO YOU?
28 A TO ME, YES.
29 Q YOU DIDN'T NOTICE ANY DISCREPANCY ABOUT IT?
30 A NO.
31 Q YOU LATER TOLD THE POLICE THAT THIS PERSON
32 -- THAT AS FAR AS YOU COULD RECALL, THE NAME ON THE DRIVER'S

1 LICENSE WAS ONE LARRY STAREET, S-T-A-R-E-T-T OR LARRY STANTON;
2 DIDN'T YOU?

3 A I NEVER POSITIVELY IDENTIFIED THE NAME. I
4 WASN'T SURE. IT WAS SOMEWHERE IN THAT RANGE, YES.

5 Q I SEE.

6 DID YOU USE THOSE NAMES?

7 A POSSIBLY, YES.

8 Q YOU ALSO TOLD THE POLICE THAT YOU WERE
9 QUITE CERTAIN THAT THE LAST NAME OF THE PERSON ON THE DRIVER'S
10 LICENSE YOU WERE SHOWN CONTAINED NO MORE THAN FIVE TO SIX
11 LETTERS; DIDN'T YOU?

12 A I NEVER SAID -- WHAT WAS YOUR QUOTE? --
13 QUITE CERTAIN? I DON'T BELIEVE I SAID THAT; THAT I THOUGHT IT
14 WAS.

15 Q YOU THOUGHT IT WAS.

16 YOU ALSO TOLD THE POLICE THAT THIS
17 PERSON SPOKE WITH A NEW YORK ACCENT; DIDN'T YOU?

18 A I BELIEVE I TOLD THEM THAT IT WAS NOT A
19 HEAVY NEW YORK ACCENT.

20 Q BUT YOU DID TELL THEM THAT YOU NOTED A --
21 SOME KIND OF A NEW YORK ACCENT?

22 A SLIGHT, YES.

23 Q AND YOU SAY THAT THIS PERSON WAS WELL
24 SPOKEN?

25 A YES, I WOULD --

26 Q APPEARED TO BE ARTICULATE?

27 A YES.

28 Q DO YOU KNOW WHY THE POLICE -- WHY -- STRIKE
29 THAT.

30 DO YOU KNOW WHY IT WAS -- WHY YOU WERE
31 SHOWN A PHOTOGRAPHIC LINEUP AT YOUR HOME AFTER YOU HAD ALREADY
32 IDENTIFIED THE DEFENDANT'S PHOTOGRAPH AMONG THE HUNDRED TO

1 HUNDRED FIFTY THAT YOU WERE SHOWN?

2 A I ONLY POINTED OUT WHO I THOUGHT IT WAS.
3 I NEVER TOLD THE RESULTS OF THAT AT THE INITIAL KODAK SCREENING,
4 WHATEVER IT IS, IN FLUORES- --

5 Q WELL, WHEN YOU SAW THE MICRO PICTURES OR
6 WHATEVER, DID YOU TELL THE POLICE THAT, "THIS IS THE GUY HERE
7 WHO ROBBED ME"?

8 A I SAID I BELIEVED THIS WAS THE MAN.

9 Q YOU TOLD THEM THAT YOU BELIEVED IT WAS?

10 A THAT'S RIGHT.

11 Q YOU WEREN'T -- YOU WEREN'T CERTAIN?

12 A I SAID I BELIEVED THAT WAS THE MAN.

13 Q UH-HUH. BUT WHEN THEY BROUGHT OUT THE
14 PHOTOGRAPHS, THE SEVEN PHOTOGRAPHS, AND MR. HOWARD'S PICTURE
15 WAS INCLUDED AMONG THOSE PHOTOGRAPHS, YOU LOOKED AT IT AND YOU
16 WERE POSITIVE AT THAT POINT?

17 A THERE WERE EIGHT PHOTOGRAPHS.

18 AND, YES, I WAS POSITIVE.

19 Q WHY WEREN'T YOU POSITIVE WHEN YOU WERE
20 SHOWN THE PHOTOGRAPHS EARLIER?

21 A POSSIBLY THERE WAS NOT AS SHARP A PHOTO.
22 I DON'T REALLY KNOW. I POINTED OUT WHO I THOUGHT THE PICTURE
23 WAS OF THE INDIVIDUAL.

24 Q WELL, YOU'VE TOLD US WHY YOU POS- --
25 POSSIBLY YOU WEREN'T POSITIVE WHEN YOU -- THE FIRST SHOWING OF
26 THE PICTURES. CAN YOU TELL US WHY YOU WERE POSITIVE AT THE
27 SECOND SHOWING?

28 A BECAUSE THAT PHOTOGRAPH WAS MUCH BETTER,
29 AND I POSITIVELY IDENTIFIED THE INDIVIDUAL AT THAT POINT.

30 Q SO THE REASON THEN IS BECAUSE THE PHOTO-
31 GRAPHS YOU WERE LATER SHOWN WERE BETTER PICTURES?

32 A POSSIBLY.

1 Q WHAT -- WHEN -- WELL, YOU SAID "POSSIBLY".

2 A WELL, AT THIS POINT IN TIME I -- I REALLY
3 DON'T KNOW THE EXACT REASON. IT WAS MORE OF, THAT WAS THE MAN.

4 Q HOW DID YOU DESCRIBE -- BEFORE YOU WERE
5 SHOWN ANY PHOTOGRAPHS AT ALL, HOW DID YOU DESCRIBE --

6 A EXCUSE ME.

7 Q (CONTINUING) -- THE MAN WHO ROBBED YOU TO
8 THE POLICE?

9 A AT THE TIME THE INCIDENT TOOK PLACE?

10 Q YES.

11 A I BELIEVE I DESCRIBED HIM ABOUT FIVE TEN;
12 WEIGHING ABOUT 150, 155 POUNDS; LIGHT TAN COMPLEXION; I BELIEVE
13 I USED THE WORD "LIGHT" BUILD AT THAT TIME.

14 Q DO YOU RECALL TELLING THE POLICE THAT THE
15 MAN WAS ABOUT 145 POUNDS?

16 A ONE HUNDRED FORTY FIVE, ONE HUNDRED FIFTY,
17 YES.

18 Q UH-HUH. AND DID YOU TELL THEM THAT HE WAS
19 LIGHT SKINNED OR BROWN SKINNED?

20 A WELL, IT WAS A RELATIVE THING.

21 THE DETECTIVE HAD ASKED ME WHAT COM-
22 PLEXION, AND HE WAS A BLACK DETECTIVE. AND HE SAID TO ME, I'M
23 BLACK BLACK, USE ME AS A COMPARATIVE, AND IS HE WHITER -- LIGHTER
24 COMPLEXION?

25 Q SO WHAT YOU TOLD HIM, HE WAS OF A LIGHTER
26 COMPLEXION THAN THE VERY DARK SKINNED POLICE OFFICER --

27 A THAT'S CORRECT.

28 Q (CONTINUING) -- YOU WERE TALKING TO?

29 A THAT'S CORRECT.

30 Q THAT WASN'T DETECTIVE GREEN, WAS IT?

31 A NO, SIR.

32 Q COULD THE REASON YOU WERE -- YOU WEREN'T

1 POSITIVE UPON THE FIRST VIEWING OF THE PICTURES THAT THE MAN
2 SELECTED WAS THE ONE WHO ROBBED YOU, COULD THAT BE BECAUSE YOU
3 JUST DIDN'T -- WEREN'T SURE?

4 A THE MAN I PICKED OUT, WHO I THOUGHT IT WAS,
5 WAS AS CLOSE AS I HAD SEEN IN ALL PHOTOGRAPHS, ALL THE MICRO
6 PICTURES, WHATEVER YOU WANT TO CALL THEM.

7 Q DID YOU TELL THE POLICE WHEN YOU LOOKED AT
8 THE MICROFILM OR WHATEVER THAT WAS, DID YOU ASK THEM TO SHOW YOU
9 A CLEARER PICTURE THAN THE --

10 A NO, I DIDN'T.

11 Q WHEN YOU WERE SHOWN THE EIGHT PHOTOGRAPHS
12 AT YOUR HOME, DO YOU RECALL -- STRIKE THAT.

13 THE SEVEN PHOTOGRAPHS WITH THE EXCLU-
14 SION OF THE ONE OF THE DEFENDANT, HAD YOU BEEN SHOWN THOSE
15 PHOTOGRAPHS WHEN YOU VIEWED THE PICTURES EARLIER?

16 A I DON'T BELIEVE SO.

17 Q SO AS FAR AS YOU KNOW, WHEN YOU WERE SHOWN
18 THOSE EIGHT PHOTOGRAPHS THE DEFENDANT'S PICTURE WAS THE ONLY ONE
19 THAT YOU RECALLED SEEING BEFORE AMONG THE HUNDRED TO ONE HUNDRED
20 FIFTY THAT WERE SHOWN EARLIER; IS THAT RIGHT?

21 A ARE YOU TALKING ABOUT THE OTHER PICTURES OR
22 THE PICTURES OF THE INDIVIDUAL --

23 Q I'M TALKING ABOUT --

24 A (CONTINUING) -- THE DEFENDANT, I'M SORRY?

25 Q I'M TALKING ABOUT THE EIGHT PICTURES YOU
26 WERE SHOWN AT YOUR HOME.

27 A YES.

28 Q OF THOSE EIGHT PICTURES DO YOU RECALL SEE-
29 ING ANY OF THE OTHER PICTURES IN THE EARLIER SHOWING?

30 A NO, I DIDN'T, EXCEPT FOR THE ONE POSSIBLY
31 THAT I THOUGHT WAS THE INDIVIDUAL AT THE INITIAL SCREENING.

32 MR. COOPER: I HAVE NOTHING FURTHER, YOUR HONOR.

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MR. HARMON: NO REDIRECT, YOUR HONOR.

THE COURT: YOU'RE EXCUSED.

(WHEREUPON, THE WITNESS WAS
EXCUSED.)

THE COURT: CALL YOUR NEXT WITNESS.

MR. SEATON: DELPHIL GREENE.

THE CLERK: RAISE YOUR RIGHT HAND, SIR.

WHEREUPON,

DELPHIL GREENE,

CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,
EXAMINED AND TESTIFIED AS FOLLOWS:

THE COURT: PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. SEATON:

Q WOULD YOU PLEASE STATE YOUR FULL NAME AND
SPELL YOUR LAST NAME?

A MY NAME IS DETECTIVE DELPHIL, D-E-L-P-H-I-L
GREENE, G-R-E-E-N-E.

Q IS IT DETECTIVE GREENE?

A THAT'S CORRECT, SIR.

Q WHERE ARE YOU A DETECTIVE?

A THE NEW YORK CITY POLICE DEPARTMENT.

Q HOW LONG HAVE YOU BEEN SO EMPLOYED?

A TWENTY TWO YEARS.

1 Q ARE YOU FAMILIAR WITH THE GENTLEMAN WHO
2 JUST LEFT THE COURTROOM, MR. ED SCHWARTZ?
3 A YES, I AM.
4 Q AND HAVE YOU HAD DEALINGS WITH HIM IN
5 REGARD TO A CRIMINAL CASE IN THE CITY OF NEW YORK?
6 A YES, I DID.
7 Q AND PURSUANT TO OUR REQUEST, DID YOU BRING
8 WITH YOU A PHOTOGRAPHIC LINEUP?
9 A YES, I DID.
10 Q MAY I HAVE THAT, PLEASE.
11 MR. HARMON: YOUR HONOR, MAY THIS ITEM BE MARKED
12 INTO EVIDENCE NEXT IN ORDER?
13 THE COURT: IT MAY SO BE MARKED.
14
15 BY MR. SEATON:
16
17 Q DETECTIVE GREENE, ON OCTOBER THE 18TH,
18 1979, DID YOU HAVE OCCASION TO GO TO MR. ED SCHWARTZ'S HOME?
19 A YES, I DID.
20 Q WHERE IS THAT LOCATED?
21 A IT'S LOCATED AT THE -- THE ADDRESS IS 25-44
22 PARSONS BOULEVARD, IN THE BOROUGH OF QUEENS, CITY OF NEW YORK.
23 Q DID YOU GO THERE BY YOURSELF OR WITH ANYONE
24 ELSE?
25 A I WENT THERE WITH ANOTHER POLICE OFFICER.
26 Q AND WHO WAS THAT PERSON?
27 A DETECTIVE JAMES CURRAN.
28 Q WHAT WAS THE PURPOSE OF YOUR GOING TO MR.
29 SCHWARTZ'S HOME?
30 A TO SHOW HIM A PHOTOGRAPHIC LINEUP.
31 Q LET ME SHOW YOU WHAT'S BEEN MARKED FOR
32 PURPOSES OF IDENTIFICATION AS STATE'S PROPOSED EXHIBIT 65, AND

1 ASK YOU IF YOU CAN IDENTIFY THAT PARTICULAR ITEM.

2 A YES, I CAN.

3 Q AND CAN YOU TELL US WHAT THAT IS, PLEASE?

4 A IT'S A PHOTO LINEUP OF SIX PHOTOGRAPHS WITH
5 THE DEFENDANT'S PHOTOGRAPH IN THE LINEUP.

6 Q DID YOU PUT THE STATE'S PROPOSED EXHIBIT 65
7 TOGETHER YOURSELF?

8 A YES, I DID.

9 Q AND CAN YOU TELL US HOW YOU SHOWED IT?
10 BEFORE YOU DO THAT, WHEN YOU WENT TO
11 MR. SCHWARTZ'S HOUSE WITH DETECTIVE CURRAN, WAS ANYONE AT MR.
12 SCHWARTZ'S HOUSE WITH HIM?

13 A NO.

14 Q APPROXIMATELY WHAT TIME OF DAY ON OCTOBER
15 THE 18TH, 1979, WAS THIS?

16 A IT WAS ABOUT 7:15 P.M.

17 Q AND DID YOU ENTER INTO THE HOUSE?

18 A YES, I DID.

19 Q AND WHERE DID THE SHOWING OF THE PHOTO
20 LINEUP TAKE PLACE?

21 A IN THE LIVING ROOM OF THE -- OF HIS HOUSE.

22 Q AND WHAT, IF ANYTHING, DID YOU SAY TO MR.
23 SCHWARTZ PRIOR TO HANDING HIM THE LINEUP?

24 A I TOLD HIM I HAD A PHOTO SPREAD; I WANTED
25 HIM TO REVIEW THE PHOTO SPREAD; WOULD HE TAKE HIS TIME AND
26 REVIEW IT.

27 Q DID YOU, IN ANYWAY, INDICATE WHO THE PAR-
28 TICULAR SUSPECT WAS IN THAT PHOTO SPREAD?

29 A NO, I DID NOT.

30 Q NOW, YOU INDICATED THAT YOU HAD PLACED A
31 PARTICULAR PICTURE IN THERE. DO YOU KNOW THE NAME OF THE INDI-
32 VIDUAL WHOSE PICTURE YOU PLACED INTO THAT PARTICULAR PHOTO

1 SPREAD MARKED AS STATE'S PROPOSED EXHIBIT 65?

2 A YES, I DO.

3 Q WHAT IS THAT NAME?

4 A SAM HOWARD.

5 Q AND I NOTED THAT STATE'S PROPOSED EXHIBIT
6 65 OPENS SO THAT YOU CAN SEE THE ENTIRETY OF THE PHOTOGRAPHS;
7 IS THAT CORRECT?

8 A THAT'S CORRECT.

9 Q AND WHEN IT IS CLOSED YOU CAN ONLY SEE THE
10 FACIAL PORTION OF THE INDIVIDUALS DEPICTED?

11 A THAT'S CORRECT.

12 Q AND IN WHAT POSITION WAS THE FOLDER WHEN
13 YOU HANDED IT TO MR. SCHWARTZ IN HIS HOME THAT EVENING ON
14 OCTOBER 18TH, 1979?

15 A IT WAS IN A CLOSED POSITION.

16 Q AND DID YOU ASK HIM THEN TO VIEW THE
17 PHOTOGRAPHS?

18 A YES, I DID.

19 Q DID HE DO SO?

20 A YES, HE DID.

21 Q DID HE MAKE AN IDENTIFICATION AFTER LOOKING
22 AT THE PHOTOGRAPHS?

23 A YES, HE DID.

24 Q FOR HOW LONG A PERIOD OF TIME DID HE LOOK
25 AT THE PHOTOGRAPHS PRIOR TO MAKING THE IDENTIFICATION, WOULD YOU
26 ESTIMATE?

27 A ABOUT A MINUTE.

28 Q AND DURING THAT MINUTE PERIOD OF TIME, OR
29 AT ANYTIME PRIOR TO HIS MAKING AN IDENTIFICATION, DID HE HAVE
30 AN OPPORTUNITY TO LOOK INSIDE THE FOLDER AT THE ACTUAL PICTURES
31 OF ANY OF THE INDIVIDUALS DEPICTED THERE?

32 A NO, HE DID NOT.

1 Q AND WHICH PHOTOGRAPH DID HE IDENTIFY?
2 A THE TOP MIDDLE PHOTOGRAPH.
3 Q AND DO YOU KNOW THE NAME OF THAT INDIVI-
4 DUAL WHOM HE IDENTIFIED?
5 A YES, I DO.
6 Q AND WHAT IS THAT NAME?
7 A SAMUEL HOWARD.
8 Q WHAT DID HE SAY TO YOU WHEN HE IDENTIFIED
9 SAMUEL HOWARD ON STATE'S PROPOSED EXHIBIT 65?
10 A SAID, THAT'S THE MAN THAT STUCK ME UP.
11 Q HOW MANY PHOTOGRAPHS ARE ON STATE'S PRO-
12 POSED EXHIBIT 65?
13 A SIX.
14 Q AND AFTER HAVING MADE THE IDENTIFICATION
15 OF SAM HOWARD AS THE MAN WHO STUCK HIM UP, DID YOU HAVE MR.
16 SCHWARTZ DO ANYTHING ON THAT PARTICULAR EXHIBIT 65?
17 A YES, I DID.
18 Q WHAT WAS THAT?
19 A I OPENED THE PHOTOGRAPH AND HAD HIM SIGN
20 ALONGSIDE THE PHOTOGRAPH. I PLACED THE TIME AND THE DATE WITH
21 THE SIGNATURE BEING PLACED ALONGSIDE THE PHOTOGRAPH.
22 Q AND DID HE DO THAT?
23 A YES, HE DID.
24 Q AND DID THAT TAKE PLACE AFTER HIS IDENTIFI-
25 CATION?
26 A YES, IT DID.
27 Q OR WAS THAT THE FIRST TIME HE HAD AN OPPOR-
28 TUNITY TO LOOK INSIDE OF THE FOLDER TO SEE THE ENTIRETY OF THE
29 PHOTOGRAPHS?
30 A THAT'S CORRECT.
31 Q ARE YOU FAMILIAR, DETECTIVE GREENE, WITH
32 SOME SORT OF PROCESS OF IDENTIFYING SUSPECTS IN THE NEW YORK

1 CITY AREA THAT HAS TO DO WITH A KODAK MACHINE OR SOMETHING LIKE
2 THAT?

3 A YES, I AM.

4 Q WHAT IS THAT PROCESS CALLED?

5 A THE -- THE NAME THEY HAVE FOR IT IS CALLED
6 "MIRAQUIC".

7 Q MIRAQUIC?

8 A MIRAQUIC.

9 Q HOW DO YOU SPELL THAT?

10 A M-I-R-A-Q-U-I-C.

11 Q WOULD YOU BRIEFLY EXPLAIN TO US HOW THAT
12 PARTICULAR PROCEDURE IS UTILIZED IN THE NEW YORK CITY AREA?

13 A YES, I CAN.

14 IT'S A SYSTEM WHERE YOU HAVE A VIEW-
15 ING MACHINE AND THERE'S A COMPUTER ATTACHED TO IT. A PERSON
16 COMES IN AND TELLS THE OPERATOR OF THE MACHINE, GIVES THEM THE
17 DESCRIPTION OF THE PERSON HE'S LOOKING FOR, TELLS HIM HIS HEIGHT,
18 HIS WEIGHT, RACE, OF ANY CHARACTERISTICS, SCARS, ANYTHING
19 UNUSUAL ABOUT THE INDIVIDUAL. THE OPERATOR FEEDS THIS INTO THE
20 COMPUTER AND THE COMPUTER SORTS OUT ONLY THE PHOTOGRAPHS OF THE
21 INDIVIDUALS FITTING THAT PARTICULAR DESCRIPTION.

22 Q IS IT AN ELIMINATION PROCESS THEN?

23 A YES, IT IS.

24 Q AND THEN WHAT HAPPENS TO THOSE PHOTOGRAPHS
25 THAT REMAIN?

26 A THEN THE INDIVIDUAL IS SEATED -- EXCUSE ME
27 -- IS SEATED AT THE COMPUTER AND HE'S GIVEN ABOUT NINE CASSETTES
28 THAT YOU PLACE IN THE COMPUTER. JUST PUSH THE BAR, THE ON/OFF
29 BUTTON ON THE TOP, AND THEN SEARCH THE CASSETTE FOR THE ONE
30 FITTING THAT DESCRIPTION AND THEY COME UP ONTO THE VIEWING
31 SCREEN.

32 Q ARE YOU AWARE OF WHETHER OR NOT MR.

1 SCHWARTZ HAS GONE THROUGH SUCH A PROCESS?

2 A YES, I AM.

3 Q AND DID HE TO YOUR KNOWLEDGE?

4 A YES, HE DID.

5 Q WERE YOU PRESENT WHEN HE DID?

6 A NO, I WASN'T.

7 Q IS THE PHOTOGRAPH OF SAM HOWARD ON STATE'S
8 PROPOSED EXHIBIT 65 ANY PART OF -- DOES IT HAVE ANY RELATIONSHIP
9 TO THAT EARLIER PROCESS THAT MR. SCHWARTZ WENT THROUGH WITH THE
10 COMPUTER?

11 A I DON'T QUITE UNDERSTAND.

12 Q LET ME ASK YOU THE QUESTION DIFFERENTLY.
13 WHERE DID THE PICTURE COME FROM THAT IS SAM HOWARD IN STATE'S
14 PROPOSED EXHIBIT 65?

15 A THAT CAME FROM THE POLICE DEPARTMENT -- NEW
16 YORK CITY POLICE DEPARTMENT CRIMINAL IDENTIFICATION UNIT.

17 MR. FRANZEN: YOUR HONOR, I'M GOING TO OBJECT AT
18 THIS POINT. MAY WE APPROACH THE BENCH?

19 THE COURT: YOU MAY.

20 (WHEREUPON, SIDE BAR CONFER-
21 ENCE WAS HELD AT THE BENCH;
22 NOT REPORTED. AT THE CON-
23 CLUSION OF WHICH THE FOLLOW-
24 ING WAS HAD:)

25 THE COURT: LADIES AND GENTLEMEN OF THE JURY, THE
26 COURT INSTRUCTS YOU TO DISREGARD THE LAST PORTION OF THAT LAST
27 STATEMENT OF THIS OFFICER.

28 PROCEED.

29 MR. SEATON: YOUR HONOR, THE ONLY THING REMAINING
30 FROM THE STATE WITH DETECTIVE GREENE IS TO MOVE FOR THE ADMISSION
31 OF STATE'S PROPOSED EXHIBIT 65.

32 THE COURT: ANY OBJECTION?

1 MR. FRANZEN: YES, YOUR HONOR, THERE ARE.

2 I'M SORRY. COULD WE -- MAY WE APPROACH
3 THE BENCH AGAIN?

4 THE COURT: YOU MAY.

5 (WHEREUPON, SIDE BAR CONFER-
6 ENCE WAS HELD AT THE BENCH;
7 NOT REPORTED. AT THE CON-
8 CLUSION OF WHICH THE FOLLOW-
9 ING WAS HAD:)

10 MR. FRANZEN: BASED ON OUR DISCUSSION AT THE
11 BENCH, WE HAVE NO OBJECTION TO THE DOCUMENT BEING ADMITTED.

12 THE COURT: SAME WILL BE RECEIVED.

13 MR. SEATON: THE STATE HAS NO OTHER QUESTIONS.

14 THE COURT: COUNSEL?

15

16 CROSS EXAMINATION

17

18 BY MR. FRANZEN:

19

20 Q OFFICER GREENE, WERE YOU THE INDIVIDUAL
21 WHO TOOK THE DESCRIPTION OF THE PARTY WHO ROBBED MR. SCHWARTZ?

22 A NO, I WASN'T.

23 Q YOU SAID ALSO THAT YOU WERE NOT PRESENT
24 AT THE TIME THAT HE LOOKED AT SOME PHOTOGRAPHS IN THIS MACHINE?

25 A THAT'S CORRECT.

26 Q WHERE DID YOU SAY YOU HAD GOTTEN -- STRIKE
27 THAT.

28 WHERE DID IT GO?

29 YOU SAY YOU GOT A DESCRIPTION -- YOU
30 GIVE A DESCRIPTION TO YOUR MACHINE AND YOU GET THE DESCRIPTION
31 THAT MATCHES IN GENERAL CHARACTERISTICS THE MAN WHO IS SUPPOSED
32 TO HAVE DONE THE ROBBERY: WEIGHT, FACIAL HAIR, RACE; THAT TYPE

1 OF THING?

2 A THAT'S CORRECT.

3 Q I'D LIKE TO SHOW YOU THE BOTTOM LEFT HAND
4 PICTURE, AND ASK YOU IF THE PERSON DEPICTED IN THAT BOTTOM LEFT
5 HAND PICTURE APPEARS TO BE BALD?

6 A THAT'S CORRECT.

7 Q WOULD THAT HAVE BEEN INCLUDED IN THE
8 DESCRIPTION OF THE MAN WHO DID THE ROBBERY? IS BALDNESS A
9 DISTINCTIVE CHARACTERISTIC?

10 A IF -- IF THE MAN --

11 Q WOULD THAT HAVE BEEN INCLUDED IN THE
12 DESCRIPTION?

13 A I DON'T UNDERSTAND WHAT YOU'RE SAY- -- SAY-
14 ING.

15 Q WHEN THE MAN GOES AND TALKS TO YOUR COMPUTER
16 OPERATOR WITH THE KODAK MACHINE AND HE'S ASKED A GENERAL DESCRIP-
17 TION: RACE, BUILD, WEIGHT, FACIAL HAIR; WOULD THEY ALSO ASK
18 HIM WHETHER OR NOT THE MAN WHO DID IT WAS BALD?

19 A THAT'S CORRECT, YES.

20 Q AND THAT'S HOW IT GETS DISPLAYED, BECAUSE
21 HE FITS THIS GENERAL DESCRIPTION; IS THAT CORRECT?

22 A THAT'S CORRECT.

23 Q NOW, THERE ARE SIX PHOTOGRAPHS DISPLAYED
24 IN STATE'S 65. DO YOU THINK IT'S POSSIBLE YOU MIGHT HAVE SHOWED
25 MR. SCHWARTZ EIGHT PHOTOGRAPHS? IS IT POSSIBLE THAT YOU SHOWED
26 MR. SCHWARTZ EIGHT PHOTOGRAPHS ON OCTOBER 18, 1979?

27 A IT'S NOT POSSIBLE.

28 Q FROM WHOM DID YOU GET -- STRIKE THAT.

29 YOU DIDN'T GET THE ORIGINAL DESCRIP-
30 TION OF THE MAN WHO DID THE ROBBERY; IS THAT CORRECT?

31 A THAT'S CORRECT.

32 Q DID MR. SCHWARTZ REPEAT IT TO YOU, OR WERE

1 YOU TAKING IT FROM POLICE REPORTS WHEN YOU GATHERED UP YOUR
2 PHOTOGRAPHS, OR DID YOU GET IT FROM ANYBODY? DID YOU JUST PICK
3 UP A BUNCH OF PHOTOGRAPHS OR DID YOU --

4 A NO. I DIDN'T JUST PICK --

5 Q (CONTINUING) -- OR DID YOU IDENTIFY PHOTO-
6 GRAPHS YOU PARTICULARLY WANTED?

7 A I HAD THE SUBJECT'S PHOTOGRAPH, AND THEN
8 I WENT TO THE FILE AND GOT PHOTOGRAPHS THAT MATCHED SIMILAR TO
9 THE SUBJECT'S PHOTOGRAPH.

10 Q DID MR. SCHWARTZ TELL YOU THAT HE'D PRE-
11 VIOUSLY IDENTIFIED THE SAME PHOTOGRAPH THAT HE IDENTIFIED ON
12 OCTOBER 18, 1979, IN HIS HOME?

13 A NO, HE DID NOT.

14 Q IS THIS SOMETHING THAT YOU WOULD HAVE
15 ASKED HIM?

16 A NO.

17 Q SO AS FAR AS YOU KNOW, HE COULD HAVE IDEN-
18 TIFIED THIS PHOTOGRAPH LATER AND YOU WERE JUST SHOWING HIM A
19 REINFORCEMENT OF A PRIOR IDENTIFICATION?

20 A I KNOW FOR A FACT THAT HE DIDN'T SEE THAT
21 PHOTOGRAPH BEFORE.

22 Q YOU DON'T KNOW THAT HE PREVIOUSLY SEEN A
23 PHOTOGRAPH OF THIS DEFENDANT BECAUSE YOU DID NOT ASK.

24 A I DON'T KNOW IF HE SEEN A PHOTOGRAPH OF
25 THAT PARTICULAR DEFENDANT, BUT I KNOW --

26 Q YOU DIDN'T --

27 A (CONTINUING) -- HE DIDN'T SEE --

28 Q DID YOU ASK HIM, WHO IS HE --

29 MR. SEATON: MAY THE WITNESS BE PERMITTED TO
30 ANSWER. HE WAS CUT OFF IN MID-SENTENCE, YOUR HONOR.

31 THE COURT: YES. YOU MAY ANSWER, SIR.

32 ..

1 BY MR. FRANZEN:

2
3 Q DID YOU SAY, SIR, THAT YOU KNEW --
4 THE COURT: LET HIM ANSWER THE QUESTION.

5 MR. FRANZEN: I'M SORRY, YOUR HONOR.

6
7 BY MR. FRANZEN:

8
9 Q ANSWER THE QUESTION FIRST, IF YOU KNOW IT.

10 A I KNOW FOR A FACT THAT HE DID NOT IDENTIFY
11 THAT INDIVIDUAL -- THAT INDIVIDUAL'S PHOTOGRAPH AT ANYTIME.

12 Q IF HE HAD, WOULD THE SHOWING, TO YOUR
13 KNOWLEDGE, WOULD THE REPEAT SHOWING OF THIS TYPE OF PHOTOGRAPH
14 REINFORCE POSITIVE NATURE OF AN IDENTIFICATION?

15 MR. SEATON: YOUR HONOR, I'M GOING TO OBJECT.
16 THAT'S AN IMPROPER HYPOTHETICAL. IT ASSUMES FACTS NOT IN
17 EVIDENCE.

18 THE COURT: SUSTAINED.

19
20 BY MR. FRANZEN:

21
22 Q OFFICER, I'M SORRY, I'M GETTING A LITTLE
23 CONFUSED. THE PHOTOGRAPH THAT MR. SCHWARTZ IDENTIFIED, ARE YOU
24 SAYING THE ONE HE IDENTIFIED WHEN YOU WENT TO HIS HOME THAT HE'D
25 NEVER SEEN A PHOTOGRAPH BEFORE THAT TIME OF THE DEFENDANT?

26 A I DON'T KNOW THAT, NO.

27 Q DID YOU ASK HIM IF HE'D EVER SEEN A PHOTO-
28 GRAPH OF THE DEFENDANT BEFORE WHEN YOU WENT TO HIS HOME TO SHOW
29 HIM THE PHOTO DISPLAY?

30 A WHEN I SHOWED HIM THAT PHOTO LINEUP --

31 Q YOU -- THE PHOTO LINEUP.

32 A (CONTINUING) -- I SHOWED HIM SIX PHOTO-

1 GRAPHS. NOW, I DON'T KNOW WHO HE HAD IN MIND WHO WAS THE
2 DEFENDANT IN HIS CASE; I DON'T KNOW.

3 Q NO. MY QUESTION, SIR, IS: IT'S YOUR
4 TESTIMONY THAT MR. SCHWARTZ, PRIOR TO YOUR GOING AND SHOWING
5 YOUR PHOTO LINEUP TO HIM AT HIS HOME, HAD NEVER BEFORE SEEN A
6 PHOTOGRAPH OF THE DEFENDANT?

7 A THAT I DON'T KNOW.

8 Q DO YOU KNOW IF HE'D EVER BEFORE SEEN A
9 PHOTOGRAPH OF THE DEFENDANT IN THIS MACHINE?

10 A THAT I DON'T KNOW.

11 Q IT WOULD NOT NECESSARILY HAVE BEEN THE
12 SAME PHOTOGRAPH OR IT COULD HAVE BEEN THIS PHOTOGRAPH, YOU JUST
13 DON'T KNOW?

14 A COULD HAVE BEEN.

15 MR. FRANZEN: NOTHING FURTHER, YOUR HONOR.

16 MR. SEATON: NOTHING BY THE STATE, YOUR HONOR.

17 THE COURT: YOU'RE EXCUSED.

18 (WHEREUPON, THE WITNESS WAS
19 EXCUSED.)

20 THE COURT: THE STATE, DO YOU HAVE ANY FURTHER
21 WITNESSES?

22 MR. SEATON: NO, WE HAVE NO FURTHER WITNESSES. BUT
23 WE DO HAVE AN OFFER OF ADMISSION FOR SOME OF THE REMAINING
24 EVIDENCE.

25 THE COURT: BUT FOR THE PURPOSE OF THE RECORD YOU
26 HAVE NO MORE EXHIBITS TO INTRODUCE AND THE STATE WILL REST WITH
27 THE EXCEPTION OF THE EXHIBIT OFFER?

28 MR. SEATON: THAT IS CORRECT.

29 THE COURT: ALL RIGHT.

30 LADIES AND GENTLEMEN, WE WILL TAKE
31 A RECESS. YOU ARE ADMONISHED NOT TO CON-
32 VERSE AMONG YOURSELVES OR WITH ANYONE ELSE

1 ON ANY SUBJECT CONNECTED WITH THIS
2 TRIAL, OR READ, WATCH OR LISTEN TO
3 ANY REPORT OF OR COMMENTARY ON THIS
4 TRIAL WITH ANY PERSON CONNECTED WITH
5 THIS TRIAL BY ANY MEDIUM OF INFORMA-
6 TION, INCLUDING WITHOUT LIMITATION,
7 NEWSPAPER, TELEVISION OR RADIO OR
8 FORM OR EXPRESS ANY OPINION ON ANY
9 SUBJECT CONNECTED WITH THIS TRIAL
10 UNTIL THE CASE IS FINALLY SUBMITTED
11 TO YOU.

12 WE HAVE SOME MATTERS TO TAKE CARE OF AND
13 WE WILL RECONVENE AT 3:00 O'CLOCK THIS AFTERNOON. THE DEFENSE
14 WILL THEN START THEIR CASE OR ANY WITNESSES THAT THEY DESIRE TO
15 CALL THEN.

16 SO YOU ARE EXCUSED AND MAY LEAVE THE COURT-
17 ROOM AT THIS TIME. WE HAVE A MATTER TO TAKE CARE OF OUTSIDE OF
18 YOUR PRESENCE.

19 (WHEREUPON, THE JURY LEFT
20 THE COURTROOM AND THE
21 FOLLOWING PROCEEDINGS WERE
22 HAD OUTSIDE OF THEIR
23 PRESENCE:)

24 THE COURT: APPROACH THE BENCH.

25 (WHEREUPON, SIDE BAR CONFER-
26 ENCE WAS HELD AT THE BENCH;
27 NOT REPORTED. AT THE CON-
28 CLUSION OF WHICH THE
29 FOLLOWING WAS HAD:)

30 THE COURT: MR. HOWARD, WOULD YOU STAND, PLEASE.

31 MR. HOWARD, DURING THIS RECESS I WANT YOU
32 TO DISCUSS WITH YOUR ATTORNEYS YOUR RIGHT, YOUR CONSTITUTIONAL

1 RIGHT, TO TESTIFY OR NOT TESTIFY AS YOU SEE FIT.

2 IN THIS REGARD I INSTRUCT COUNSEL TO
3 ADVISE MR. HOWARD ABOUT HIS STATUTORY RIGHTS UNDER N.R.S.
4 175.171 AND 175.181, AND ALSO THE CARTER VERSUS KENTUCKY CASE,
5 WHICH WILL ALLOW THE GIVING OF AN INSTRUCTION WITH REGARDS TO
6 HIS DESIRING NOT TO TESTIFY IF HE DOESN'T CARE TO TESTIFY.

7 WHATEVER YOUR DECISION, MR. HOWARD,
8 IT HAS TO BE FREE AND VOLUNTARY. YOU MUST DO SO KNOWINGLY AND
9 UNDERSTANDINGLY. YOU HAVE THE CONSTITUTIONAL RIGHT NOT TO
10 TESTIFY. YOU, HOWEVER, HAVE A RIGHT TO TESTIFY IF YOU SO
11 DESIRE. THAT DECISION WHICH IS TO BE MADE IS TO BE MADE ENTIRE-
12 LY BY YOURSELF. CONSULT WITH YOUR ATTORNEYS. AFTER YOU HAVE
13 CONSULTED WITH THEM, YOU DECIDE WHAT YOU'RE GOING TO DO.

14 DO YOU UNDERSTAND WHAT I HAVE SAID TO
15 YOU, SIR?

16 DEFENDANT HOWARD: YES, YOUR HONOR.

17 MY WILL IS TO TESTIFY.

18 THE COURT: ALL RIGHT.

19 YOU UNDERSTAND THAT IF YOU DO TESTIFY THAT
20 YOU WILL BE SUBJECT TO CROSS EXAMINATION AND YOUR TESTIMONY WILL
21 BE IN QUESTION AND ANSWER FORM.

22 DEFENDANT HOWARD: YES.

23 THE COURT: DIRECTED BY YOUR ATTORNEYS TO YOU AND
24 BY QUESTION AND ANSWER FORM BY THE STATE TO YOU. DO YOU UNDER-
25 STAND THAT, SIR?

26 DEFENDANT HOWARD: YES, SIR.

27 THE COURT: ALL RIGHT.

28 WE WILL BE IN RECESS IN THIS MATTER UNTIL
29 3:00 O'CLOCK THIS AFTERNOON.

30 (WHEREUPON, FROM 1:57 P.M.
31 UNTIL 3:15 P.M., A RECESS
32 WAS HAD IN THE PROCEEDINGS,

1 AT THE CONCLUSION OF WHICH
2 THE FOLLOWING PROCEEDINGS
3 WERE HAD OUTSIDE THE PRESENCE
4 OF THE JURY:)

5 THE COURT: LET THE RECORD REFLECT THIS IS OUTSIDE
6 THE PRESENCE OF THE JURY.

7 YOU CAN PROCEED, COUNSEL.

8 MR. FRANZEN: YES, YOUR HONOR. THIS IS OUR MOTION.
9 IT WAS ALREADY PARTIALLY GRANTED WHEN YOUR HONOR ADMONISHED THE
10 JURY TO DISREGARD THE LAST WORDS GIVEN BY DETECTIVE GREENE FROM
11 NEW YORK WHERE HE STATED THAT THE IDENTIFICATION PICTURES CAME
12 FROM I THINK HE SAID CRIMINAL IDENTIFICATION OF NEW YORK. WE
13 OBJECTED TO THE STATEMENT OF THE SOURCE OF THOSE PHOTOGRAPHS AS
14 BEING EVIDENCE OF OTHER CRIMES AND CRIMINAL ACTIVITY BY THE
15 DEFENDANT. BUT THE COURT HAD NOT PREVIOUSLY RULED THAT TO BE
16 ADMISSIBLE AT A NESTER HEARING THAT WE HAD HAD REGARDING MR.
17 SCHWARTZ'S TESTIMONY, NOR HAS THE COURT RULED TO BE ADMISSIBLE
18 REGARDING THE SAN BERNARDINO OFFENSE. WE BELIEVED THAT EVIDENCE
19 AGAIN TO BRING IN ADDITIONAL EVIDENCE OF OTHER CRIMES IS PREJU-
20 DICIAL, IT HAD NO PROBATIVE VALUE AT ALL; AND ON THOSE GROUNDS
21 WE'D MOVE FOR A MISTRIAL.

22 THE COURT: COUNSEL.

23 MR. SEATON: YES, YOUR HONOR.

24 THE EVIDENCE SHOWED BEFORE THE QUESTION
25 ELICITED THE ANSWER GIVEN THAT THE DEFENDANT'S PHOTO WAS IN THE
26 COMPUTER WHICH MR. SCHWARTZ HAD PICKED OUT. THAT WOULD CERTAIN-
27 LY LEAD THE JURY TO BELIEVE THAT PERHAPS THE PHOTOGRAPH WAS
28 LEGITIMATELY IN THE NEW YDRK FILE SOME PLACE.

29 SECONDLY, THEY WERE ALREADY VERY AWARE
30 OF THE CRIME AGAINST MR. SCHWARTZ AND CAN WELL ASSUME THAT THE
31 PHOTOGRAPHS WERE SIMPLY BROUGHT UP AS A RESULT OF THAT CRIME.

32 HOWEVER, I THINK THE REAL REASON THAT

1 THE MOTION SHOULD BE DENIED IS THAT IF THERE IS ANY PROBLEM WITH
2 THE PARTICULAR ANSWER THAT CAME OUT, THAT THE ADMONISHMENT THAT
3 YOUR HONOR GAVE TO THE JURY WAS CERTAINLY ADEQUATE TO WITHDRAW
4 ANY OF THE PROBLEM THAT HAD ARISEN. IT WAS SUCH A MINOR
5 NATURE, AT LEAST THE ANSWER WAS, THAT SHOULDN'T BE UTILIZED AT
6 THIS TIME FOR A SUCCESSFUL MOTION FOR A MISTRIAL.

7 THE COURT: COUNSEL, AS YOU WILL RECALL, I ASKED
8 IF YOU WANTED A MORE SPECIFIC ADMONISHMENT WITH REGARDS TO THE
9 FACT THAT IT CAME OUT I BELIEVE IN THE CRIMINAL LABEL, I FORGET
10 WHAT THE WORDING WAS. AND COUNSEL ADVISED THEY DID NOT WANT A
11 SPECIFIC ADMONISHMENT BUT A BASIC ADMONISHMENT. IT WAS BASED
12 UPON THAT GENERAL ADMONISHMENT REQUEST THAT I ADMONISHED THE
13 JURY.

14 THERE ARE OTHER POSSIBILITIES AS TO HOW
15 THOSE PHOTOGRAPHS WENT AND GOT INTO THOSE RECORDS. COUNSEL
16 SUGGESTED THAT THE DEFENDANT COULD HAVE BEEN PHOTOGRAPHED PRIOR
17 TO THE SHOWING OF THESE RECORDS TO THE DEFENDANT OR TO THE
18 VICTIM IN THIS CASE. I DON'T FEEL THAT A MISTRIAL, BASED ON
19 THAT RATHER PERNICIOUS STATEMENT IS WARRANTED. SURELY IT
20 WASN'T INTENTIONAL. I DON'T THINK THIS OFFICER INTENTIONALLY
21 ADDED THAT AND ELUDED TO IT. SO FOR THOSE REASONS, YOUR REQUEST
22 IS DENIED.

23 ANYTHING ELSE OUTSIDE OF THE PRESENCE
24 OF THE JURY BEFORE WE PROCEED TO CALL THE WITNESSES FOR THE
25 DEFENSE?

26 MR. SEATON: NOT BY THE STATE. BUT WHEN THE JURY
27 DOES COME BACK IN, YOUR HONOR, IT WOULD BE OUR INTENTION TO MOVE
28 FOR THE ADMISSION OF CERTAIN PIECES OF EVIDENCE AND THEN REST
29 OUR CASE.

30 THE COURT: ALL RIGHT. CALL THE JURY.

31 MR. COOPER: YOUR HONOR, THERE IS ONE OTHER THING.

32 THE COURT: YES.

1 MR. COOPER: OF COURSE, AT THE TIME WE TOOK THE
2 LATEST RECESS THE COURT INFORMED THE DEFENDANT OF HIS RIGHT TO
3 TESTIFY AND ASK THAT WE GO OVER WITH HIM HIS RIGHT TO TESTIFY
4 AND NOT TO TESTIFY. AND WE HAVE DONE THAT.

5 MR. HOWARD HAS INDICATED TO US THAT IT'S
6 HIS INTENTION TO TAKE THE STAND AND TESTIFY. WE WANTED IT SHOWN
7 ON THE RECORD THAT BOTH MR. FRANZEN AND I HAVE ADVISED MR.
8 HOWARD THAT WE THINK IT'S NOT IN HIS BEST INTEREST TO TAKE THE
9 STAND. NOTWITHSTANDING THAT, HE HAS MADE THE DECISION TO
10 TESTIFY.

11 THE COURT: ALL RIGHT.

12 IS THAT AN ACCURATE REPRESENTATION, MR.
13 HOWARD?

14 DEFENDANT HOWARD: THAT'S CORRECT, YOUR HONOR.

15 THE COURT: ALL RIGHT.

16 MR. COOPER: YOUR HONOR, I MIGHT ALSO POINT OUT
17 THAT WE'VE HAD OCCASION, SEVERAL OCCASIONS, TO TALK TO MR.
18 HOWARD AND WE QUITE FRANKLY DON'T KNOW WHAT HIS TESTIMONY WILL
19 CONSIST OF. AND I JUST WANTED THAT ON THE RECORD AS WELL. HE
20 HAS NEVER -- NEVER INFORMED US AS TO WHAT HE WILL TESTIFY TO
21 WHEN HE TAKES THE STAND.

22 THE COURT: ALL RIGHT.

23 MR. HOWARD, AS I HAVE PREVIOUSLY MENTIONED
24 TO YOU, THE COURT WILL OBVIOUSLY ALLOW YOU TO TESTIFY IF THAT'S
25 YOUR DESIRE. REMEMBER, HOWEVER, THAT YOUR TESTIMONY WILL BE
26 LIMITED TO THOSE QUESTIONS THAT WILL BE PROPOUNDED TO YOU OR
27 ASKED OF YOU BY YOUR ATTORNEYS AND BY THE CROSS EXAMINATION,
28 WHICH WILL TAKE PLACE BY THE DISTRICT ATTORNEY. YOU ARE AWARE
29 OF THAT, SIR?

30 DEFENDANT HOWARD: YES, YOUR HONOR.

31 THE COURT: ALL RIGHT. FINE, SIR. YOU CAN BE
32 SEATED.

1 IS THERE ANYTHING FURTHER OUTSIDE OF THE
2 PRESENCE OF THE JURY?

3 MR. SEATON: NOT BY THE STATE.

4 MR. COOPER: NO, YOUR HONOR.

5 MR. FRANZEN: YES, YOUR HONOR. IF YOUR HONOR WILL
6 RECALL, WHEN THE STATE INTRODUCED STATE'S 65 WE HAD A BENCH CON-
7 FERENCE.

8 THE COURT: YES.

9 MR. FRANZEN: REGARDING THE TAPING OF --

10 THE COURT: MISS CLERK, IF YOU WOULD TAKE AND TAPE
11 THE EDGES OF THAT PARTICULAR EXHIBIT AND ALSO IF YOU WILL NOTE
12 ACROSS THE TOP OF BOTH OF THE PHOTOGRAPHS, THERE IS KIND OF A
13 BLANK SPOT RIGHT ALONG THE TOP THERE AND I WOULD TAPE THAT AS
14 WELL. DON'T TAPE OVER THE FACE BUT JUST OVER THE COPY OF IT SO
15 THAT IT COULDN'T BE PULLED OUT.

16 THE CLERK: YES, SIR.

17 THE COURT: ALL RIGHT.

18 ANYTHING ELSE, GENTLEMEN?

19 MR. SEATON: NOT BY THE STATE.

20 MR. COOPER: NO.

21 THE COURT: ALL RIGHT. YOU MAY PROCEED.

22 CALL THE JURY.

23 BEFORE THE JURY GETS IN HERE, I WANT
24 YOU PEOPLE RIGHT OVER THERE HERE -- WOULD YOU JURORS STEP OUT
25 JUST FOR ONE SECOND, PLEASE. JUST FOR ONE SECOND. JUST KEEP
26 THE JURY OUT FOR JUST ONE SECOND.

27 I NOTICED SEVERAL TIMES DURING THESE
28 PROCEEDINGS THAT SEVERAL OF YOU HAVE GOTTEN A LITTLE BIT AGITA-
29 TED, OR WHATEVER. IF I SEE THAT AGAIN I'M GOING TO ASK THAT YOU
30 BE REMOVED FROM THE COURTROOM OR LEAVE THE COURTROOM. THESE
31 PROCEEDINGS WILL BE CONDUCTED VERY QUIETLY AND CALMLY AND I
32 DON'T WANT THAT TO HAPPEN AGAIN.

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YOU MAY CALL THE JURY.

(WHEREUPON, THE JURY ENTERED
THE COURTROOM AND THE FOLLOW-
ING PROCEEDINGS WERE HAD:)

THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.

(WHEREUPON, SIDE BAR CONFER-
ENCE WAS HELD AT THE BENCH;
NOT REPORTED. AT THE CON-
CLUSION OF WHICH THE FOLLOW-
ING WAS HAD:)

THE COURT: ALL RIGHT. YOU MAY PROCEED, COUNSEL.

MR. COOPER: YOUR HONOR, WE WOULD CALL AS OUR
FIRST WITNESS DETECTIVE LEAVITT.

MR. SEATON: YOUR HONOR, BEFORE THAT OCCURS, I
DON'T BELIEVE THE STATE HAS RESTED.

MR. CODPER: OH, I'M SORRY.

MR. SEATON: WE DO HAVE A FEW EVIDENTIARY MATTERS
TO COVER.

THE COURT: ALL RIGHT. PROCEED, COUNSEL.

MR. SEATON: THANK YOU.

THE STATE WOULD MOVE FOR THE INTRODUCTION
INTO EVIDENCE AT THIS TIME THE FOLLOWING ITEMS: EXHIBIT 31-B,
THE PISTOL; EXHIBIT 31; EXHIBIT 34-A AND 34-B, WHICH ARE THE
BULLETS AND CARTRIDGE CASES FROM THE TEST FIRING DDNE BY
RICHARD GOOD; ADDITIONALLY EXHIBIT -- PROPGSED EXHIBIT 47, WHICH
IS A DRAWING BY MR. KINSEY; EXHIBIT 48, WHICH IS ANOTHER DRAW-
ING BY MR. KINSEY; AND STATE'S PROPDSED EXHIBIT 55, WHICH IS
A DRAWING BY MRS. MONAHAN. AND I BELIEVE THAT IS THE EXTENT OF
THE REMAINDER OF THE STATE'S OFFER.

THE COURT: ANY OBJECTION TO ANY OF THOSE EXHIBITS,
COUNSEL?

MR. FRANZEN: NO, YOUR HONOR.

1 THE COURT: ALL RIGHT. SAME WILL BE RECEIVED AND
2 ADMITTED INTO EVIDENCE.

3 MR. SEATON: THANK YOU, YOUR HONOR.

4 THE STATE RESTS AT THIS TIME, YOUR HONOR.

5 THE COURT: CALL YOUR FIRST WITNESS, COUNSEL.

6 MR. COOPER: I CALL DETECTIVE LEAVITT.

7
8 WHEREUPON,

9
10 ALFRED B. LEAVITT,

11
12 CALLED AS A WITNESS HEREIN BY THE DEFENDANT HAVING BEEN PRE-
13 VIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

14
15 THE COURT: YOU'VE BEEN PREVIOUSLY SWORN. YOU'RE
16 STILL UNDER OATH.

17 YOU MAY PROCEED, COUNSEL.

18
19 DIRECT EXAMINATION

20
21 BY MR. COOPER:

22
23 Q DETECTIVE LEAVITT, AS PART OF YOUR INVES-
24 TIGATION IN THIS CASE DID YOU HAVE OCCASION TO GO TO THE WESTERN
25 SIX MOTEL, LOCATED AT 4125 BOULDER HIGHWAY, HERE IN LAS VEGAS,
26 WITH DAWANA THOMAS?

27 A YES.

28 Q I SEE.

29 ABOUT WHEN WOULD THAT HAVE BEEN, DO
30 YOU KNOW?

31 A APPROXIMATELY MAY 20TH.

32 Q I SEE.

1 WHAT WAS YOUR PURPOSE IN GOING THERE?
2 A TO SEE IF SHE COULD LOCATE THE ROOM WHERE
3 THEY HAD PREVIOUSLY STAYED.

4 Q YOU SAY THIS WAS MAY 20TH. WOULD THAT HAVE
5 BEEN OF 1980?

6 A YES.

7 Q I SEE.

8 AND YOUR PURPOSE IN GOING THERE WAS
9 TO SEE IF SHE COULD LOCATE THE ROOM WHERE SHE AND MR. HOWARD
10 ALLEGEDLY STAYED?

11 A YES.

12 Q WAS SHE ABLE TO SHOW YOU THE ROOM WHERE
13 THEY STAYED?

14 A NO.

15 Q AS PART OF YOUR INVESTIGATION IN THIS CASE,
16 DID YOU ACQUIRE FROM MRS. MONAHAN A LIST OF THE CREDIT CARDS
17 THAT THE DOCTOR PURPORTEDLY HAD IN HIS POSSESSION?

18 A YES.

19 Q INCLUDING -- WAS A MASTER CHARGE CARD
20 INCLUDED IN THAT LIST OF CREDIT CARDS?

21 A NO.

22 MR. COOPER: I HAVE NO FURTHER QUESTIONS, YOUR
23 HONOR.

24 THE COURT: COUNSEL?

25

26 CROSS EXAMINATION

27

28 BY MR. HARMON:

29

30 Q DETECTIVE LEAVITT, YOU HAVE INDICATED ON
31 DIRECT EXAMINATION THAT DAWANA THOMAS DID NOT SHOW YOU THE ROOM
32 WHERE SHE AND THE DEFENDANT MR. HOWARD STAYED.

1 A THAT'S CORRECT.

2 Q ARE WE TALKING ABOUT WHERE THEY WERE STAY-

3 ING THE NIGHT OF MARCH THE 26TH, 1980, AND AT LEAST UNTIL MID-

4 DAY MARCH 27, 1980?

5 A THAT'S CORRECT.

6 Q DID SHE SHOW YOU THE MOTEL THAT THEY WERE

7 STAYING IN?

8 A YES, SHE DID.

9 Q WHAT WAS IT?

10 A A WESTERN SIX MOTEL.

11 Q THAT'S AT 4115, IS IT BOULDER HIGHWAY, OR

12 WAS IT 25?

13 A 4125 BOULDER HIGHWAY.

14 Q I'M SORRY. 4125 BOULDER HIGHWAY?

15 A YES.

16 Q AND SHE POINTED THAT OUT TO YOU?

17 A YES, SHE DID.

18 MR. HARMON: THANK YOU.

19 THAT'S ALL, YOUR HONOR.

20 THE COURT: REDIRECT?

21 MR. COOPER: NOTHING FURTHER, YOUR HONOR.

22 THE COURT: YOU'RE EXCUSED.

23 (WHEREUPON, THE WITNESS WAS

24 EXCUSED.)

25 THE COURT: CALL YOUR NEXT WITNESS.

26 MR. COOPER: WE WILL CALL MR. WILL.

27 THE CLERK: RAISE YOUR RIGHT HAND.

28 ..

29 ..

30 ..

31 ..

32 ..

1 WHEREUPON,

2

3

EARL E. WILL,

4

5

CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,
6 EXAMINED AND TESTIFIED AS FOLLOWS;

7

8

THE COURT: PROCEED.

9

10

DIRECT EXAMINATION

11

12

BY MR. FRANZEN:

13

14

Q MR. WILL, WOULD YOU PLEASE GIVE US YOUR

15

FULL NAME?

16

A EARL E. WILL.

17

Q WOULD YOU SPELL YOUR LAST NAME, PLEASE.

18

A W-I-L-L.

19

Q HOW ARE YOU EMPLOYED, SIR?

20

A CLARK COUNTY FIRE DEPARTMENT.

21

Q ON MARCH 27TH, 1980, DID YOU HAVE AN

22

OCCASION TO BE AT THE DEW DROP INN, HERE IN LAS VEGAS, NEVADA?

23

A YES, I DID.

24

Q DO YOU RECALL WHAT TIME YOU ARRIVED?

25

A IT WAS WITHIN MOMENTS EITHER WAY OF 7:30

26

A.M.

27

Q DID YOU GO INTO THE DEW DROP INN?

28

A YES.

29

Q AND WHAT WAS YOUR PURPOSE AT THAT TIME

30

GOING INTO THE DEW DROP INN?

31

A I WAS GOING IN TO SEE DANNY MILLER IN THE

32

DEW DROP, WHO WORKS THERE.

1 Q HAD YOU --
2 A I'M SORRY. GO AHEAD.
3 Q WAS YOUR PURPOSE THERE TO GO DRINK?
4 A NO.
5 Q WHAT WAS YOUR PURPOSE THERE TO GO?
6 A IT WAS TO -- IT WAS TO SEE DANNY ABOUT SOME
7 AUTO PARTS. I HAD SOME INFORMATION ON IT. MY SON WAS WORKING
8 ON A CAR AND I JUST GOTTEN OFF WORK.
9 Q WHILE YOU WERE IN THE DEW DROP INN DID YOU
10 HAPPEN TO SEE A WHITE MALE ADULT WHO ATTRACTED YOUR ATTENTION?
11 A YES.
12 Q COULD YOU TELL US SOMETHING ABOUT THAT
13 PARTICULAR INDIVIDUAL?
14 A HE WAS AT THE -- WHAT WOULD BE THE EAST
15 END OF THE BAR, WHERE THEY HAD A, AS I REMEMBER, A BOTTLE OF
16 BEER IN FRONT OF HIM AND HAD AN OLD TELEPHONE. HE CAME UP AND
17 ASKED ME IF I WANTED TO BUY A PHONE.
18 MR. SEATON: OBJECTION, YOUR HONOR. THAT'S HEAR-
19 SAY.
20 MR. FRANZEN: IT'S NOT GOING TO THE TRUTH OF THE
21 MATTER ASSERTED, YOUR HONOR.
22 THE COURT: ALL RIGHT.
23 MR. SEATON: WELL, YOUR HONOR, I WOULD ASK THE
24 COURT WHAT IT IS GOING TOWARD. I DON'T THINK IT'S GOING TO
25 SHOW --
26 THE COURT: I UNDERSTAND. YOU'RE NOT GOING TO GO
27 ANY FURTHER WITH THE CONVERSATION, ARE YOU?
28 MR. FRANZEN: NO, YOUR HONOR.
29 THE COURT: ALL RIGHT. PROCEED.
30 ..
31 ..
32 ..

1 BY MR. FRANZEN:

2
3 Q DID YOU COME TO AN OPINION ABOUT THIS
4 PERSON?

5 A YES.

6 Q WHAT WAS THE OPINION?

7 A THAT HE SEEMED STRANGE.

8 Q DID YOU DECIDE TO STAY IN THE BAR UNTIL HE
9 LEFT?

10 A YES.

11 Q AND AFTER HE LEFT WHAT HAPPENED?

12 A A SHORT TIME THEREAFTER I WAS LEAVING AND
13 I WALKED OUT THE -- WHAT WOULD BE THE SOUTHEAST DOOR, WHICH IS
14 ON THE SOUTH WALL, AND WAS LOOKING TO SEE IF HE WAS OUT IN THE
15 PARKING LOT AND -- DO YOU WANT ME TO CONTINUE OR --

16 Q GO AHEAD.

17 A OKAY. I WALKED THEN PAST THE END OF THE
18 BUILDING, WHICH WOULD BE THE BACK, AND THERE WAS A VAN SITTING
19 THERE.

20 AND AT THAT TIME THE OWNER OF THE
21 BAR CAME WALKING AROUND THE END OF THE VAN AND I ASKED HIM IF
22 THE FELLOW WAS THERE.

23 HE SAID HE THOUGHT HE WAS IN THE VAN
24 SLEEP -- HE SAID HE WAS IN THE VAN SLEEPING.

25 MR. SEATON: OBJECTION, HEARSAY. I ASK THAT THAT
26 LAST STATEMENT BE STRICKEN.

27 MR. FRANZEN: IT'S NOT HEARSAY. IT WAS DENIED BY
28 THE PRIOR WITNESS AS IMPEACHMENT PURPOSES BUT I'LL CLARIFY IT.

29
30 BY MR. FRANZEN:

31
32 Q DID YOU KNOW THE OWNER OF THE DEW DROP INN,

1 SIR, AT THAT TIME?

2 A AT THAT TIME I KNEW HIM.

3 Q IS THAT CHUCK MARINO?

4 A I DIDN'T KNOW HIS LAST NAME. ALL I KNOW
5 HIM BY WAS CHUCK.

6 MR. FRANZEN: OKAY.

7 THE PURPOSE -- EXCUSE ME, YOUR HONOR. THE
8 PURPOSE OF THE TESTIMONY REGARDING THE OWNER OR CHUCK STATING
9 THAT THE WHITE MALE ADULT WAS IN THE VAN BUT MR. MARINO WHEN HE
10 TESTIFIED FOR THE STATE DENIED MAKING THAT STATEMENT.

11 THE COURT: THE OBJECTION IS OVERRULED, COUNSEL.

12 MR. FRANZEN: I HAVE NO FURTHER QUESTIONS, YOUR
13 HONOR.

14 THE COURT: CROSS?

15 MR. SEATON: NO QUESTIONS BY THE STATE, YOUR HONOR.

16 THE COURT: YOU'RE EXCUSED, SIR.

17 (WHEREUPON, THE WITNESS WAS
18 EXCUSED.)

19 THE COURT: CALL YOUR NEXT WITNESS.

20 MR. COOPER: YOUR HONOR, WE WOULD CALL MR. MCBRIDE.

21 THE CLERK: RAISE YOUR RIGHT HAND.

22

23 WHEREUPON,

24

25

JOHN MCBRIDE,

26

27 CALLED AS A WITNESS HEREIN BY THE DEFENDANT WAS FIRST DULY SWORN,
28 EXAMINED AND TESTIFIED AS FOLLOWS:

29

30

THE COURT: PROCEED.

31

32

DIRECT EXAMINATION

BY MR. COOPER:

Q WOULD YOU STATE YOUR NAME AND SPELL YOUR
LAST NAME, PLEASE.

A JOHN MCBRIDE, M-C-B-R-I-D-E.

Q HOW OLD ARE YOU, MR. MCBRIDE?

A TWENTY NINE.

Q I SEE.

AND WHERE DO YOU RESIDE?

A DENVER, COLORADO.

Q I SEE.

WHERE DID YOU RESIDE, SIR, ON MARCH
27TH, 1980?

A LAS VEGAS, NEVADA.

Q COULD YOU GIVE US THE ADDRESS AT WHICH YOU
RESIDED?

A FOURTEEN HUNDRED GOLDEN ARROW DRIVE, 14 --
I'M NOT SURE EXACTLY.

Q IS THAT LOCATED IN LAS VEGAS, CLARK COUNTY,
NEVADA?

A YES, IT IS.

Q ARE YOU FAMILIAR WITH THE INTERSECTION OF
DESERT INN AND BOULDER HIGHWAY, SIR?

A YES, I AM.

Q I SEE.

WHERE WOULD YOU HAVE BEEN LIVING ON
MARCH 27TH OF 1980 IN RELATION TO THAT INTERSECTION?

A I WOULD HAVE BEEN APPROXIMATELY FOUR MILES
TO THE WEST OF THAT INTERSECTION.

Q WERE YOU AT THAT RESIDENCE IN THE -- ON

1 THE EARLY MORNING HOURS OF THAT DATE, MARCH 27TH OF 1980?

2 A YES, I WAS.

3 Q DO YOU RECALL CONTACTING THE POLICE ON
4 THAT DATE?

5 A YES, I DO.

6 Q I SEE.

7 WHAT TIME WOULD THAT HAVE BEEN?

8 A APPROXIMATELY 6:00 P.M. IN THE EVENING.

9 Q WHAT WAS YOUR REASON FOR CONTACTING THE
10 POLICE?

11 A I HAD NOTICED A VAN THAT DROVE UP AND
12 BEHIND THE APARTMENT COMPLEX, AND THEN THEY HAD SHOWN A --
13 A PICTURE OF IT ON THE TELEVISION ON THE NEWS THAT EVENING
14 REQUESTING ANY INFORMATION THAT ANYBODY HAD ABOUT IT.

15 Q I SEE.

16 WHEN YOU HEARD THIS ON THE
17 TELEVISION DID YOU IMMEDIATELY CONTACT THE POLICE?

18 A YES, I DID.

19 Q I SEE.

20 DO YOU RECALL IF YOU WENT TO THE
21 POLICE STATION OR IF THEY CAME OUT TO TALK TO YOU?

22 A THEY CAME OUT TO THE HOUSE.

23 Q I SEE.

24 HOW MANY OFFICERS CAME OUT?

25 A AH, FROM WHAT I CAN REMEMBER, I BELIEVE
26 THERE WAS THREE OR FOUR THAT ACTUALLY CAME TO THE HOUSE.

27 Q LET ME ASK YOU, WERE YOU EMPLOYED AT THE
28 TIME, SIR?

29 A I WAS DOING SOME LANDSCAPING WORK AT THE
30 TIME.

31 Q SO ARE YOU EMPLOYED NOW?

32 A YES, I AM.

1 Q WHAT KIND OF WORK DO YOU DO?
2 A I'M A BANKER.
3 Q IN DENVER?
4 A YES.
5 Q NOW, YOU DON'T RECALL THE NAME OF THE
6 POLICE OFFICERS WHO CAME OUT?
7 A NO, I DON'T.
8 Q DID YOU TALK TO THEM IN YOUR RESIDENCE
9 THERE ON GOLDEN ARROW?
10 A YES, I DID.
11 Q DID YOU EVER GIVE THE POLICE A WRITTEN
12 STATEMENT?
13 A NOT THAT I CAN RECALL, NO.
14 Q I SEE.
15 AS YOU WERE TALKING TO THE
16 POLICE OFFICERS, WERE THEY TAKING NOTES?
17 A IT APPEARED SO, BUT I'M NOT -- I CAN'T
18 REMEMBER. I DIDN'T KNOW.
19 Q YOU COULDN'T SWEAR TO THAT?
20 A I -- I WOULD BELIEVE SO, YES, BUT I
21 COULDN'T SWEAR TO IT.
22 Q I SEE.
23 WHAT DID YOU TELL THE POLICE
24 OFFICERS THAT YOU SAW, MR. MCBRIDE?
25 A THAT I SAW A VAN, THE VAN THAT THEY HAD
26 ON TELEVISION, PULL UP BEHIND MY APARTMENT COMPLEX IN THE
27 MORNING.
28 Q DID YOU TELL THEM ABOUT WHAT TIME IT
29 WAS THAT THE VAN PULLED UP?
30 A I BELIEVE I -- I BELIEVE I DID. I --
31 Q DO YOU RECALL WHAT TIME THE VAN PULLED
32 UP?

1 A IT WAS APPROXIMATELY I BELIEVE ABOUT
2 8:30 TO A QUARTER TO 9:00, I BELIEVE WAS THE TIME ZONE.

3 Q COULD IT HAVE BEEN EARLIER?

4 A NOT THAT I RECALL, NO.

5 Q IS YOUR MEMORY OF THIS EVENT CLEAR IN
6 YOUR MIND GIVEN THE TIME LAPSE?

7 A CERTAIN PORTIONS OF IT, YES. NOT --

8 Q I SEE.

9 HAS ANYONE CONTACTED YOU
10 REGARDING TESTIFYING IN THIS CASE OVER THIS THREE-YEAR PERIOD
11 THAT HAS ELAPSED?

12 A JUST THE PUBLIC DEFENDER'S OFFICE.

13 Q I SEE.

14 AND WERE YOU EVER CONTACTED BY
15 THE DISTRICT ATTORNEY'S OFFICE?

16 A NO, I WAS NOT.

17 Q WHAT ABOUT MEMBERS OF THE LAS VEGAS
18 METROPOLITAN POLICE DEPARTMENT?

19 A NO, SIR.

20 Q WHEN WAS IT THAT THE PUBLIC DEFENDER'S
21 OFFICE CONTACTED YOU?

22 A I BELIEVE IT WAS APPROXIMATELY ABOUT
23 A WEEK AND A HALF AGO WHEN I FIRST RECEIVED MY FIRST PHONE
24 CALL.

25 Q I SEE.

26 WOULD YOU CONTINUE AND TELL US
27 WHAT YOU TOLD THE POLICE?

28 A THAT I -- THAT ON THE MORNING IN
29 QUESTION THAT I SAW THE VAN PULL UP BEHIND MY APARTMENT
30 COMPLEX BUILDING.

31 Q HOW -- WHERE WERE YOU AT THE TIME YOU
32 SAW THIS VAN?

1 A LOOKING OUT OF MY KITCHEN WINDOW.

2 Q IS THIS A ONE-STORY BUILDING OR TWO?

3 A TWO STORIES.

4 Q I SEE.

5 AND ON WHAT FLOOR WERE YOU
6 LIVING ON?

7 A SECOND FLOOR.

8 Q I SEE.

9 WOULD YOU HAVE BEEN ON THE
10 SECOND FLOOR WHEN YOU OBSERVED THIS VAN?

11 A YES, I WAS.

12 Q NOW, HOW FAR WAS THE VAN FROM YOUR --
13 DID YOU SAY YOUR KITCHEN WINDOW WAS FROM WHERE YOU OBSERVED
14 THE VAN?

15 A YES, I WAS -- YES, IT WAS.

16 Q HOW FAR WAS THE VAN FROM YOUR KITCHEN
17 WINDOW WHEN YOU SAW IT?

18 A IT WAS APPROXIMATELY, AT MAXIMUM, 15
19 FEET AND TO THE LEFT OF ME.

20 Q I SEE.

21 TELL US WHAT YOU OBSERVED ABOUT
22 THE VAN.

23 A I OBSERVED A FANCY VAN THAT DIDN'T BELONG
24 TO THE NEIGHBORHOOD, WHICH IS WHAT BASICALLY DREW MY ATTENTION
25 TO IT. I LOOKED AT THE VAN. I BELIEVED THERE WAS SOME
26 WRITING. I CAN'T DESCRIBE WHAT THE WRITING SAID AT THIS
27 POINT.

28 Q DO YOU RECALL WHERE THE WRITING WAS ON
29 THE VAN?

30 A NOT PARTICULARLY. I DO REMEMBER A LARGE
31 WINDOW IN THE BACK OF THE VAN. IT HAD PULLED UP. I WAS
32 WATCHING THE VAN. THERE WAS A --

1 Q DID YOU NOTICE ANYTHING ELSE INSIDE
2 THE VAN?

3 A YES. THERE WAS A LARGE, AH, BLACK
4 MALE WITH A LARGE AFRO, APPROXIMATELY ABOUT 200 POUNDS.

5 Q DO YOU RECALL WHAT THIS BLACK MAN WAS
6 WEARING?

7 A NO.

8 Q I SEE.

9 YOU SAID THAT HE HAD A LARGE
10 AFRO; IS THAT RIGHT?

11 A (NO AUDIBLE RESPONSE.)

12 Q CAN YOU DESCRIBE FOR US IN A LITTLE MORE
13 DETAIL WHAT YOU MEAN?

14 A IT WAS LONGER THAN -- I WOULD IMAGINE
15 FOUR INCHES. IT WAS A RATHER BULKY AFRO.

16 Q WAS IT -- WAS IT -- DOES IT PROJECT
17 MORE THAN MY HAIR DOES?

18 A OH, YES, MOST DEFINITELY.

19 Q WHAT ABOUT THE GENTLEMAN WHO'S SEATED
20 NEXT TO ME, WAS IT LARGER THAN HIS HAIR?

21 A YES, IT WAS.

22 Q WOULD YOU SAY IT WAS CONSIDERABLY
23 LARGER?

24 A YES.

25 Q DO YOU RECALL TELLING THE POLICE, MR.
26 MCBRIDE, THAT THIS -- THAT YOU OBSERVED THIS MAN GET OUT
27 OF THE VAN AND WALK BETWEEN THE BUILDINGS?

28 A I DON'T REMEMBER THAT PORTION OF IT,
29 NO.

30 Q IS IT POSSIBLE YOU COULD HAVE TOLD THEM
31 THAT?

32 A YES, IT IS.

1 Q DID YOU SEE ANYONE ELSE INSIDE THE VAN,
2 MR. MCBRIDE?

3 A NO.

4 Q DO YOU RECALL ANY OF THE CLOTHING THAT
5 THIS INDIVIDUAL WAS WEARING?

6 A NO, NOT AT ALL.

7 Q I SEE.

8 YOU TESTIFIED EARLIER THAT IT
9 APPEARED TO YOU HE WAS A BIG MAN?

10 A YES.

11 Q IN RELATION --

12 A APPROXIMATELY ABOUT 200 POUNDS.

13 Q WHAT LEAD YOU TO THAT CONCLUSION?

14 A HIS FEATURES. AND I WOULD HAVE TO SAY
15 THAT HE WAS LARGE IN FEATURE.

16 Q WHERE? UPPER BODY? LOW BODY?

17 A IT SEEMED TO BE UPPER BODY, FACIAL
18 FEATURES.

19 Q DO YOU RECALL IF THIS MAN HAD ANY FACIAL
20 HAIR?

21 A NOT REALLY, NO.

22 Q HOW FAR WOULD HE HAVE BEEN FROM YOU WHEN
23 YOU OBSERVED HIM?

24 A ABOUT 15 FEET.

25 Q DID YOU HAVE A PROFILE VIEW OF HIM OR
26 WERE YOU LOOKING AT HIM STRAIGHT ON?

27 A IT WASN'T QUITE A PROFILE. IT WASN'T
28 QUITE STRAIGHT ON. IT WAS MORE LIKE WHAT I'M LOOKING TOWARDS
29 YOU AT THIS POINT (INDICATING).

30 Q I SEE.

31 I'D LIKE TO SHOW YOU, MR. MCBRIDE,
32 WHAT'S BEEN MARKED AS STATE'S EXHIBIT 1, AND ASK YOU IF THAT

1 APPEARS TO BE THE VAN YOU SAW ON THE DATE IN QUESTION?

2 A YES, IT DOES.

3 Q ARE YOU CERTAIN OF THAT?

4 A YEAH.

5 Q WOULD YOU LOOK ABOUT THE COURTROOM,
6 MR. MCBRIDE, AND TELL US IF THERE IS ANYONE IN THE COURTROOM
7 THAT YOU SAW IN THE VAN ON THAT DAY?

8 A NOT THAT I CAN RECALL, NO.

9 MR. COOPER: I HAVE NO FURTHER QUESTIONS OF THE
10 WITNESS, YOUR HONOR.

11 THE COURT: CROSS.

12 MR. SEATON: YES, YOUR HONOR.

13
14 CROSS-EXAMINATION

15
16 BY MR. SEATON:

17 Q COULD YOU DESCRIBE A LITTLE MORE CLEARLY
18 WHERE IT IS YOU LIVED? WHERE IS GOLDEN ARROW?

19 A GOLDEN ARROW IS APPROXIMATELY TWO BLOCKS
20 OFF OF MARYLAND PARKWAY TO THE EAST AND APPROXIMATELY TWO
21 BLOCKS OFF OF -- TWO TO THREE BLOCKS OFF OF DESERT INN TO
22 THE NORTH.

23 Q ARE YOU FAMILIAR WITH THE WINCHESTER
24 PLAZA ON DESERT INN ROAD AT ABOUT 1700, JUST A FEW BLOCKS
25 FROM MARYLAND PARKWAY?

26 A NO. NOT -- DOESN'T RING A BELL WITH ME,
27 NO.

28 Q YOUR ADDRESS WAS 1457.

29 A IT'S 1457, YES.

30 Q AND DOES GOLDEN ARROW PARALLEL DESERT
31 INN ROAD?

32 A YES, IT DOES.

1 Q WOULD YOU -- AND YOU'RE ABOUT -- GOLDEN
2 ARROW IS ABOUT WHAT? DID YOU SAY TWO BLOCKS NORTH OF DESERT
3 INN ROAD?
4 A IT'S EITHER TWO TO THREE.
5 Q AND WOULD 1457 GOLDEN ARROW BE APPROXIMA-
6 TELY THE SAME PLACE THAT 1500 DESERT INN ROAD WOULD BE, GOING
7 EAST OR WEST?
8 A YEAH. IT WOULD BE IN THE APPROXIMATE.
9 Q SO YOU'RE APPROXIMATELY TWO OR THREE
10 BLOCKS THEN FROM THE 1500 BLOCK OF DESERT INN ROAD?
11 A YES. WELL, I WOULD -- I WOULD IMAGINE
12 ABOUT ONE BLOCK -- OH, YES. IT DOES BACK IN TWO OR THREE
13 BLOCKS INTO THE APARTMENT COMPLEX.
14 Q I SEE.
15 BUT YOU WERE PROBABLY ABOUT
16 ONE BLOCK AWAY FROM THAT AREA; IS THAT WHAT YOU'RE SAYING?
17 A OH, I'M SORRY. YEAH.
18 Q ALL RIGHT. IS YOUR APARTMENT AT 1457
19 GOLDEN ARROW APPROXIMATELY ONE BLOCK AWAY THEN FROM THE 1500
20 BLOCK OF D.I.?
21 A IT WOULD BE CLOSE, YES.
22 Q OKAY.
23 WHEN YOU LIVED IN THE -- HOW
24 LONG DID YOU LIVE AT 1457?
25 A TWO AND A HALF YEARS.
26 Q AND AROUND THIS TIME WHEN YOU SAW THE
27 VAN HAD YOU BEEN TRAVELING IN THAT AREA GOING TO AND FROM
28 YOUR --
29 A I'M SORRY. I DIDN'T UNDERSTAND THE
30 QUESTION.
31 Q DID YOU OWN AN AUTOMOBILE?
32 A YES, I DID.

1 Q AND WOULD YOU LEAVE YOUR APARTMENT AND
2 GO FOR DRIVES EITHER FOR WORK OR TO THE STORE?

3 A OH, YES. YES.

4 Q OKAY.

5 WOULD YOU HAVE OCCASION, DURING
6 THAT PERIOD OF TIME, AND PERHAPS, OH, LET'S SAY A MONTH IN
7 ADVANCE OF THIS PARTICULAR DATE, TO BE DRIVING ON DESERT
8 INN ROAD IN THE 15 TO 1700 BLOCK AREA?

9 A COULD HAVE BEEN, YES.

10 Q DO YOU KNOW WHERE SEARS IS OVER THAT
11 AT THE BOULEVARD MALL?

12 A YES.

13 Q DID YOU DRIVE AROUND THAT AREA A LOT?

14 A YES. YES. YES.

15 Q IS IT POSSIBLE THAT YOU COULD HAVE SEEN
16 THE VAN AT PLACES OTHER THAN YOUR APARTMENT, FOR EXAMPLE ON
17 THE CORNER OF DESERT INN AND MARYLAND PARKWAY?

18 A IT WAS A -- IT WAS A NEW -- IT'S SOMETHING
19 NEW THAT I SAW AND THAT'S THE REASON WHY IT STUCK TO MY HEAD.

20 Q THERE'S NO POSSIBLE --

21 A IF I DID IT WASN'T GOING TO STAY WITH
22 ME.

23 Q DID YOU TELL US WHAT YOUR EMPLOYMENT WAS
24 AT THAT PERIOD OF TIME?

25 A I WAS DOING LANDSCAPING.

26 Q WHAT IS OUT IN BACK OF YOUR SECOND FLOOR
27 KITCHEN WINDOW?

28 A IT'S AN ALLEYWAY BASICALLY FOR THE
29 RESIDENTS OF THE APARTMENT COMPLEX WOULD PARK A COUPLE OF
30 THEIR VEHICLES.

31 Q I SEE.

32 AND WERE THERE OTHER VEHICLES

1 OUT THERE ON THAT PARTICULAR DAY?

2 A I BELIEVE MY TRUCK WAS, AND I BELIEVE
3 THE VAN WAS, EITHER ONE AT THAT TIME.

4 Q SO THERE WERE ONLY TWO VEHICLES THERE
5 AT THE TIME?

6 A YES.

7 Q WHERE WAS YOUR --

8 A I'M RIGHT BEHIND MY KITCHEN WINDOW.

9 Q AND THE VAN WOULD HAVE BEEN TO ITS RIGHT
10 OR LEFT?

11 A TO ITS LEFT.

12 Q AND DID THE VAN PULL IN FRONTWARDS OR
13 DID IT BACK IN?

14 A PULLED IN FRONTWARDS.

15 Q WHAT HAPPENED IMMEDIATELY AFTER IT
16 PULLED IN? DID SOMEBODY GET OUT RIGHT AWAY OR DID THEY STAY
17 IN THE VAN FOR AWHILE?

18 A FROM WHAT I CAN REMEMBER OF THE SITUATION,
19 I BELIEVE THEY STAYED IN THE VAN FOR A SHORT PERIOD OF TIME.

20 AS FAR AS -- I CAN'T REMEMBER
21 MUCH BEYOND THAT.

22 Q WHEN THEY -- IF THEY PULLED THE VAN IN
23 TO YOUR APARTMENT COMPLEX, RATHER THAN BACKING IT IN, YOU
24 WOULD HAVE THEN BEEN ABLE TO SEE INTO THE FRONT WINDOW OF
25 THE VAN; IS THAT NOT TRUE?

26 A YES. AND I --

27 Q AND I SUPPOSE YOU SAW ONE INDIVIDUAL
28 IN THERE AT LEAST AT THAT TIME?

29 A YES.

30 Q WERE YOU ABLE TO TELL AT THAT TIME
31 WHETHER OR NOT THE PERSON WAS A BLACK PERSON?

32 A YES, I WAS.

1 Q AND IT WAS A BLACK PERSON?

2 A YES, SIR.

3 Q AND DID HE JUST SIT THERE FOR A FEW
4 MINUTES BEFORE EXITING THE VAN?

5 A IT -- IT APPEARED THAT WAY OR FROM WHAT
6 I CAN RECALL, YES.

7 Q I SEE.

8 SO HE -- HE REALLY DIDN'T
9 LEAVE YOUR VIEW UNTIL HE WALKED OUT OF THE VAN AND WALKED
10 INTO THE --

11 A NO, I DIDN'T. AND I DON'T KNOW WHERE
12 HE WENT AT THAT POINT. I WAS DISTRACTED. I DON'T KNOW WHAT
13 THE DISTRACTION WAS, BUT I WAS DISTRACTED AT THAT POINT AND
14 THERE WAS SOMETHING ELSE THAT CAME UP AND I TOOK MY EYES
15 OFF OF WHERE HE WAS GOING.

16 Q WHEN HE GOT UP OUT OF THE VAN DID HE
17 IMMEDIATELY STAND ON THE PAVEMENT AND CLOSE THE DOOR OF THE
18 VAN?

19 A I DON'T REMEMBER.

20 Q DO YOU RECALL IF HE WENT AROUND TO THE
21 BACK OR SIDE OF THE VAN OR ANYTHING LIKE THAT OR DID HE GO
22 STRAIGHT INTO THE APARTMENT COMPLEX?

23 A I -- I REALLY DON'T -- I COULD TAKE A
24 HUNCH, BUT THAT'S ALL, THAT'S WHAT IT WOULD BE, BECAUSE I
25 DON'T RECALL THAT MUCH ABOUT IT.

26 Q IF HE HAD GONE AROUND TO THE -- HE WAS
27 TO YOUR LEFT. YOU WERE LOOKING AT THE LEFT SIDE OF THE VAN;
28 IS THAT CORRECT?

29 A CORRECT, THE DRIVER'S SIDE.

30 Q HE HAD GONE AROUND TO THE RIGHT-HAND
31 SIDE OF THE VAN, THERE WERE CARGO DOORS ON THAT SIDE, YOU
32 WOULD HAVE LOST SIGHT OF HIM, PROBABLY HAD BEEN AWARE OF THAT;

1 IS THAT A FAIR STATEMENT?

2 A YES.

3 Q SO IT'S SAFE TO ASSUME THAT HE DIDN'T
4 GO AROUND THE VAN. HE WENT INTO THE APARTMENT COMPLEX
5 SOMEWHERE?

6 A YES. YES.

7 Q AND WAS HE -- WHAT WAS HIS BUILD LIKE,
8 THIS PERSON?

9 A RATHER HEAVY BUILT.

10 Q MEANING --

11 A I WOULD ESTIMATE IT AT APPROXIMATELY
12 200 POUNDS.

13 Q WAS HE FAT?

14 A NO. SEEMED TO BE MORE HEAVY IN FEATURE.
15 THIS WASN'T NECESSARILY FAT. IT WAS JUST VERY HEAVY IN
16 FEATURE. IT WAS NOT MUSCLE BUT HE WAS HEAVY, YOU KNOW, FOR
17 HIS SIZE.

18 Q HOW TALL WAS HE?

19 A APPROXIMATELY SIX FOOT.

20 Q CAN YOU RECALL THE COLOR OF ANY OF HIS
21 CLOTHING?

22 A NOT THAT STAYED WITH ME AT THIS POINT,
23 NO.

24 Q WAS HE CARRYING ANYTHING IN HIS HANDS?
25 DO YOU KNOW IF HE HAD A JACKET ON?

26 A IT DOESN'T RING A BELL, A JACKET, NO.

27 Q HOW LONG DO YOU THINK THIS INDIVIDUAL
28 WAS IN YOUR VIEW?

29 A I WOULD HAVE TO ESTIMATE AT LEAST
30 APPROXIMATELY FIVE MINUTES.

31 Q WELL, WHAT -- YOU SAID THAT HE GOT OUT
32 OF THE CAR, THE VAN, AND WALKED INTO THE APARTMENT COMPLEX,

1 WHICH WOULD NOT TAKE FIVE MINUTES, WOULD IT?

2 A NO.

3 Q WHAT WAS HE DOING DURING THAT PERIOD OF
4 TIME, FIVE-MINUTE PERIOD OF TIME?

5 A THIS IS WHEN I'M SEEING INSIDE THE VAN
6 IN THE DRIVER'S SEAT.

7 Q COULD YOU SEE HIS FEATURES CLEARLY WHEN
8 HE WAS IN THE VAN AND IN THE DRIVER'S SEAT?

9 A YES.

10 Q YOU COULD IDENTIFY HIS BIG AFRO AND HIS
11 HEAVINESS AND THAT SORT OF THING?

12 A YES.

13 Q AT THAT TIME HOW LONG DO YOU THINK HE
14 WAS IN THE VAN AS OPPOSED TO OUTSIDE OF THE VAN?

15 A OH, I -- I JUST REMEMBER THAT THERE WAS
16 A , YOU KNOW, A PERIOD OF TIME THAT HE WAS IN THE VAN AND I
17 WAS STANDING THERE WATCHING AND I COULDN'T SAY HOW LONG IT
18 WAS BEFORE HE WAS OUT OR THAT I DIDN'T VIEW HIM ANYMORE.

19 Q HOW FAR A DISTANCE DO YOU THINK IT WAS
20 FROM THE DRIVER'S DOOR OF THE VAN TO WHERE YOU LOST SIGHT
21 OF HIM?

22 A I WOULD IMAGINE NO MORE THAN ABOUT 10,
23 12 FEET.

24 Q AND HOW DID HE GET TO THAT POINT? DID
25 HE RUN OR WALK OR WHAT?

26 A I DON'T REMEMBER.

27 Q IS IT SAFE TO ASSUME THAT OUT OF THE
28 FIVE MINUTES THAT YOU WATCHED HIM, THAT A VERY MINUTE PORTION
29 OF THAT TIME WAS WHILE HE WAS OUT OF THE VAN?

30 A HE -- YES. I WOULD SAY THAT WAS PRETTY
31 CLOSE. I, YOU KNOW--

32 Q SO MOST OF THE TIME WOULD HAVE BEEN

1 SPENT SITTING IN THE VAN.

2 A YEAH.

3 Q AND YOU WERE AT YOUR WINDOW, YOUR
4 KITCHEN WINDOW, OBSERVING HIM THIS ENTIRE TIME?

5 A YEAH. I WAS CALLED AWAY AT ONE POINT
6 AND THAT'S WHEN I LOST TRACK OF WHAT HAD HAPPENED.

7 Q THAT WAS AFTER THE FIVE MINUTES?

8 A I GUESS, YES.

9 Q DID YOU SEE A WHITE PERSON IN THAT
10 AREA?

11 A NO.

12 Q ANY OTHER PERSON?

13 A NO.

14 Q YOU SAID THERE WAS A LARGE WINDOW IN
15 THE VAN. WHERE WAS THAT?

16 A IT WAS IN THE BACK OF THE VAN, THE BACK
17 PORTION OF THE BOARD, QUARTER PANEL. NO, THAT'S ON THE LEFT
18 SIDE -- ON THE DRIVER'S SIDE, YES.

19 Q SO THAT WAS A WINDOW THAT YOU COULD
20 READILY OBSERVE AND SEE?

21 A YES.

22 Q NOW, ARE YOU FAMILIAR WITH THE INSIDES
23 OF THOSE KINDS OF VAN?

24 A NOT PARTICULARLY, NO.

25 Q COULD YOU SEE INTO THE BACK OF THIS
26 PARTICULAR VAN?

27 A I COULD SEE A PORTION INTO THE BACK, BUT
28 NOT THE WHOLE VAN.

29 MR. SEATON: COURT'S INDULGENCE.

30 YOUR HONOR, THAT CONCLUDES THE STATE'S
31 QUESTIONS.

32 THE COURT: COUNSEL?

REDIRECT EXAMINATION

BY MR. COOPER:

Q MR. MCBRIDE, I WOULD LIKE FOR YOU TO
LOOK AT THE JURY, FACE THE JURY, AND INDICATE WITH YOUR HANDS
ABOUT HOW BIG THIS MAN'S AFRO WAS, PLEASE.

A IT APPEARED TO BE AT LEAST IN THIS
LENGTH AREA (INDICATING).

Q THANK YOU.

YOU GAVE YOUR STATEMENT TO THE
POLICE ON THE 27TH OF MARCH, DIDN'T YOU?

A I BELIEVE THAT WAS THE DATE, YES.

Q 1980.

WOULD YOU ANSWER ALOUD, SIR?

A YES, I BELIEVE SO.

Q WERE YOU EVER SHOWN ANY PHOTOGRAPHIC
LINEUPS?

A NO.

Q WERE YOU EVER ASKED BY THE POLICE TO
VIEW ANY PHYSICAL LINEUPS?

A (NO AUDIBLE RESPONSE.)

MR. COOPER: I HAVE NOTHING FURTHER OF
THE WITNESS.

MR. SEATON: NOTHING BY THE STATE, YOUR
HONOR.

THE COURT: YOU'RE EXCUSED.

(WHEREUPON, THE WITNESS WAS
EXCUSED.)

THE COURT: CALL YOUR NEXT WITNESS.

MR. COOPER: COURT'S INDULGENCE, PLEASE.

LORA MALLEK.

THE COURT: LORA MALLEK.

1 THE CLERK: RAISE YOUR RIGHT HAND.

2
3 WHEREUPON,

4 LORA FALLOR MALLEK,
5 CALLED AS A WITNESS HEREIN BY THE DEFENDANT, WAS FIRST DULY
6 SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

7 THE COURT: PROCEED.

8
9 DIRECT EXAMINATION

10
11 BY MR. COOPER:

12 Q WOULD YOU STATE YOUR NAME AND SPELL YOUR
13 LAST NAME FOR THE RECORD, PLEASE?

14 A MY NAME IS LORA FALLOR MALLEK. WHICH ONE
15 DO YOU WANT --

16 Q YOUR LAST NAME. WOULD YOU SPELL YOUR
17 LAST NAME, PLEASE?

18 A M-A-L-L-E-K, MALLEK.

19 Q WHERE DO YOU LIVE? IS IT MRS. OR MISS?

20 A IT'S MISS.

21 Q MISS MALLEK, WHERE DO YOU RESIDE?

22 A TWELVE -- OR 5012 LARKSPUR.

23 Q IS THAT HERE IN LAS VEGAS?

24 A YES.

25 Q I SEE.

26 WERE YOU RESIDING IN LAS VEGAS
27 ON THE 27 OF MARCH OF 1981?

28 A YES, I WAS.

29 Q DO YOU RECALL WHERE YOU WERE RESIDING
30 AT THAT TIME?

31 A OH, NO, I DON'T.

32 Q HAVE YOU MOVED SEVERAL TIMES SINCE THEN?

1 A YES, I HAVE.

2 Q I SEE.

3 DO YOU RECALL IF YOU WERE
4 EMPLOYED ON THAT DATE? MARCH 27TH OF 1980?

5 A YES, SIR.

6 Q WHERE WERE YOU EMPLOYED, MA'AM?

7 A AH, AH, THE MOBIL STATION.

8 Q WHICH MOBIL STATION IS THAT?

9 A ANTHONY'S MOBIL STATION ON BOULDER
10 HIGHWAY.

11 Q ARE YOU FAMILIAR WITH THE INTERSECTION
12 OF BOULDER HIGHWAY AND DESERT INN ROAD?

13 A YES, SIR, I AM.

14 Q WHERE WOULD THE MOBIL STATION BE IN
15 RELATION TO THAT INTERSECTION?

16 A AH, IT'S RIGHT ON THE CORNER OF LAMB
17 AND BOULDER HIGHWAY.

18 Q ARE YOU FAMILIAR WITH THE DEW DROP INN?

19 A YES, SIR, I AM.

20 Q I SEE.

21 WHERE IS THAT LOCATED?

22 A RIGHT ACROSS THE STREET ON, AH, BOULDER
23 HIGHWAY.

24 Q I SEE.

25 HOW FAR IS THE MOBIL STATION
26 THAT YOU WORKED AT ON MARCH 27TH OF 1980 FROM THE DEW DROP
27 INN?

28 A OH, WALKING DISTANCE.

29 Q I SEE.

30 WOULD IT BE SAFE TO SAY THAT
31 IT'S LESS THAN A BLOCK?

32 A YES. I WOULD SAY IT WOULD BE.

1 Q IN WHAT CAPACITY WERE YOU EMPLOYED AT
2 ANTHONY'S MOBIL STATION ON BOULDER HIGHWAY ON MARCH 27TH OF
3 1980?

4 A OH, --

5 Q WHAT KIND OF WORK DID YOU DO THERE?

6 A AH, I PUMPED GAS AND KEPT THE STATION
7 CLEAN AND EVERYTHING.

8 Q I SEE.

9 DO YOU RECALL AT SOME TIME ON
10 MARCH 27TH OF 1980 HAVING A DISCUSSION WITH POLICE OFFICERS
11 OF THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT?

12 A NO, SIR, I DON'T.

13 Q DO YOU RECALL GIVING THE POLICE OFFICERS,
14 A MEMBER OF THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
15 A STATEMENT ON MARCH 27TH OF 1980?

16 A OH, YES, SIR, I DO.

17 Q I SEE.

18 HOW IS IT THAT YOU CAME TO GIVE
19 THEM THAT STATEMENT?

20 A OH, I WAS SITTING AT THE -- AT THE INN.

21 Q ARE YOU REFERRING TO THE DEW DROP INN?

22 A YES, SIR, I AM. I'M NERVOUS.

23 Q I SEE. OKAY.

24 CAN YOU TELL US -- WELL, FIRST
25 OF ALL, TELL US WHAT TIME -- WHAT WERE YOUR WORKING HOURS ON
26 MARCH 27TH OF 1980 AT THE MOBIL STATION? WHAT HOURS WERE YOU
27 WORKING?

28 A I WORKED FROM 8:00 TO 5:00.

29 Q I SEE.

30 DO YOU RECALL WHAT TIME YOU GOT
31 OFF WORK THAT DAY?

32 A OH, NO, I DON'T.

1 ALL I KNOW IS THAT, AH, WE
2 WORK ON A, AH, WE WORK LATE. IT WAS BETWEEN 6:00 AND 7:00,
3 I BELIEVE.

4 Q I SEE.

5 A BECAUSE WE HAD TO WORK LATE.

6 Q I SEE.

7 A IT WAS WINDY.

8 Q DO YOU RECALL WHERE YOU WENT ONCE YOU
9 GOT OFF WORK?

10 A UH-HUH, RIGHT ACROSS THE STREET TO THE
11 INN.

12 Q ARE YOU REFERRING TO THE DEW DROP INN?

13 A YES, SIR, I AM.

14 Q DID YOU GO THERE ALONE?

15 A NO, SIR. I DID NOT.

16 Q I SEE.

17 WHO WENT WITH YOU?

18 A AH, AH, A MAN BY THE NAME OF, AH, OF
19 EDDIE. I DON'T REMEMBER HIS LAST NAME.

20 Q WAS HE ALSO AN EMPLOYEE OF THE MOBIL
21 STATION?

22 A YES, SIR, HE WAS.

23 Q I SEE.

24 DO YOU STILL WORK AT THAT
25 STATION?

26 A NO, SIR, I DON'T.

27 Q DO YOU RECALL ABOUT WHAT TIME IT WAS
28 THAT YOU AND EDDIE WENT TO THE DEW DROP INN?

29 A WELL, I -- BY THE TIME WE CLOSED THE
30 STATION UP, I THINK ABOUT A QUARTER AFTER 7:00, I BELIEVE.

31 Q I SEE.

32 A SOMETHING LIKE THAT.

1 Q COULD IT HAVE BEEN SLIGHTLY EARLIER?
2 A IT COULD HAVE BEEN.
3 Q I SEE.
4 WHAT HAPPENED? SO YOU AND EDDIE
5 WENT TO THE DEW DROP INN; IS THAT RIGHT?
6 A YES, SIR.
7 Q DID THERE COME A TIME WHILE YOU WERE
8 THERE THAT YOU HAD A TALK WITH POLICE OFFICERS?
9 A PARDON?
10 Q DID THERE COME A TIME WHILE YOU WERE AT
11 THE DEW DROP INN THAT YOU HAD A TALK WITH A POLICE OFFICER?
12 A YES, SIR.
13 Q HOW DID THAT COME ABOUT?
14 A WE WERE SITTING AT THE TABLE. WE WAS
15 TALKING.
16 Q YOU SAY "WE". ARE YOU TALKING ABOUT
17 YOU AND EDDIE?
18 A YES, SIR.
19 AND WE WERE -- WELL, YOU KNOW,
20 TALKING, YOU KNOW, AND PLAYING POOL AND, AH --
21 Q HAD YOU HAD ANYTHING TO DRINK?
22 A YES.
23 Q HOW MUCH?
24 A ONE BEER.
25 Q ONE BEER?
26 A UH-HUH. AND I DIDN'T EXACTLY GET TO
27 FINISH IT, BUT, AH, WE WERE SIT -- THERE WAS SOME MEN COME
28 IN AND, AH, POLICE OFFICERS. I DON'T KNOW HOW MANY THERE WERE
29 OF THEM. AND, AH, THEY STARTED ASKING QUESTIONS ABOUT, AH,
30 AH, A VAN THAT WAS OUT BACK.
31 Q WERE THEY DIRECTING THESE QUESTIONS TO
32 ANYONE IN PARTICULAR, OR DID THEY?

1 A NO.

2 Q WERE THEY KIND OF ASKING EVERYBODY IN

3 THE BAR?

4 A YEAH, EVERYBODY; AND THEY WERE ASKING

5 EVERYBODY.

6 Q WHAT KIND OF QUESTIONS WERE THEY ASKING?

7 A AH, IF ANYONE KNOWS THE VAN, AND, AH,

8 AH, IN THE BACK. AND AS FAR AS I KNOW, I DON'T THINK ANYBODY

9 DID.

10 Q I SEE.

11 A I KNOW I DIDN'T.

12 Q I SEE.

13 DID YOU TELL THEM THAT?

14 A YES, SIR, I DID.

15 Q WHAT HAPPENED?

16 A OH, ONE OF -- IF I'M NOT MISTAKEN, I

17 THINK ONE OF THEM ASKED ME OR IF, AH, AH -- THEY ASKED WHERE

18 ME AND --

19 Q I SEE.

20 A (CONTINUING) -- AH, EDDIE WORKED. AND

21 WE TOLD THEM IT WAS, AH, THE MOBIL STATION RIGHT ACROSS, AH,

22 THE STREET.

23 Q THEY ASKED YOU WHERE YOU AND EDDIE WORKED?

24 A YES.

25 Q UH-HUH.

26 A AND WE WERE STILL IN OUR WORK CLOTHES.

27 Q I SEE.

28 A AND, AH, THEN THEY, AH, STARTED ASKING

29 QUESTIONS ABOUT, AH, IF THERE WAS, AH, ANYONE, AH, PARTICULAR,

30 AH, VEHICLE THAT, AH, WE SERVICE. AND I SAID, NO, NOT REALLY,

31 I DON'T GUESS.

32 Q DID THERE COME A TIME WHEN YOU WENT

1 OUTSIDE?

2 A YES, SIR.

3 Q I SEE.

4 AND WHY DID YOU GO OUTSIDE?

5 A AH, THEY WANTED ME TO TAKE A LOOK,
6 AH, AH, AT THE, AH, THE VAN OUT BACK TO SEE, AH, AH --

7 Q DID YOU GO OUTSIDE?

8 A YES, SIR, I DID.

9 Q OKAY.

10 DID YOU SEE A VAN PARKED OUT
11 BACK?

12 A YES, SIR.

13 Q I SHOW YOU WHAT'S BEEN MARKED AS STATE'S
14 EXHIBIT 1, AND ASK YOU IF YOU RECOGNIZE THAT?

15 A YES, SIR, I DO.

16 Q HOW IS THAT YOU RECOGNIZE IT?

17 A WELL, AH, THAT (INDICATING).

18 Q WELL, WHAT ARE YOU POINTING TO THERE?

19 A BLACK OAK.

20 Q IS THAT THE VAN YOU SAW PARKED BEHIND
21 THE DEW DROP INN WHEN YOU WENT OUTSIDE TO LOOK AT IT?

22 A YES, SIR, IT IS.

23 Q I SEE.

24 DID YOU TELL THE POLICE -- WHAT
25 DID YOU TELL THE POLICE AFTER YOU SAW THIS VAN?

26 MR. HARMON: YOUR HONOR, I OBJECT TO WHAT SHE
27 TOLD THE POLICE. I THINK IT'S IRRELEVANT. IF SHE KNOWS
28 SOMETHING, LET'S FIND OUT WHAT SHE KNOWS.

29 MR. COOPER: YOUR HONOR, WE WILL GET INTO THAT.

30 THE COURT: THE OBJECTION IS SUSTAINED.

31 ..

32 ..

1 BY MR. COOPER:

2 Q DID YOU TELL THE POLICE YOU HAD SEEN
3 THAT VAN EARLIER?

4 MR. HARMON: OBJECTION TO WHAT SHE TOLD THE
5 POLICE.

6 THE COURT: SUSTAINED.

7

8 BY MR. COOPER:

9 Q DID YOU GIVE A STATEMENT TO THE POLICE?

10 MR. HARMON: OBJECTION, IRRELEVANT, YOUR HONOR.

11 THE COURT: SUSTAINED.

12 JUST HAVE HER TESTIFY TO WHAT SHE KNOWS,
13 COUNSEL, NOT WHAT SHE'S SUPPOSED TO KNOW. I THINK THAT'S
14 THE BASIS, TOLD SOMEBODY. I THINK THAT'S THE BASIS OF THE
15 OBJECTION.

16

17 BY MR. COOPER:

18 Q HAVE YOU SEEN THE VAN BESIDES --

19 MR. HARMON: OBJECTION. THAT'S LEADING AND
20 SUGGESTIVE.

21

22 BY MR. COOPER:

23 Q HAD YOU SEEN THAT VAN BEFORE, MISS MALLEK?

24 A YES, SIR, I DID.

25 Q DID YOU TELL THE POLICE YOU HAD SEEN IT
26 BEFORE?

27 MR. HARMON: OBJECTION TO WHAT SHE TOLD THE
28 POLICE.

29 THE COURT: SUSTAINED.

30

31 BY MR. COOPER:

32 Q WHEN HAD YOU SEEN THE VAN BEFORE?

1 A EARLIER THAT AFTERNOON.
2 Q DO YOU RECALL APPROXIMATELY WHAT TIME IT
3 WAS THAT YOU SAW THAT VAN?
4 A AH, AH, BETWEEN 3:00 AND 4:00 O'CLOCK.
5 Q I SEE.
6 WHERE DID YOU SEE THE VAN?
7 A AH, AH, AT THE GAS STATION.
8 Q ARE YOU REFERRING TO THE MOBIL STATION
9 THAT YOU --
10 A YES, SIR, I AM.
11 Q (CONTINUING) -- WERE WORKING IN AT THE
12 TIME?
13 A YES, SIR.
14 Q I SEE.
15 WAS THIS BETWEEN 3:00 AND 4:00 --
16 YOU SAID BETWEEN 3:00 AND 4:00; IS THAT RIGHT?
17 A UH-HUH.
18 Q WOULD THIS HAVE BEEN IN THE AFTERNOON
19 OR IN THE MORNING HOURS?
20 A IN THE AFTERNOON?
21 Q I SEE.
22 DID THE VAN COME TO YOUR
23 STATION?
24 A YES, SIR, IT DID.
25 Q DID YOU SERVICE THE VAN?
26 A I SURE DID.
27 Q DO YOU RECALL WHO WAS IN THE VAN?
28 A THERE WAS A, AH, A BLACK MAN DRIVING,
29 A WOMAN, AND, AH, ANOTHER MAN, AND --
30 Q THE OTHER MAN, COULD YOU TELL WHAT RACE
31 HE WAS?
32 A AH, THE BEST I COULD TELL I THINK HE WAS

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1953

1 WHITE.

2 Q I SEE.

3 A HE WAS WHITE. THAT'S ALL -- YOU KNOW,
4 I JUST GOT, AH, A QUICK, AH, AH, GLIMPSE OF HIM.

5 Q WHO WAS DRIVING THE VAN, THE WOMAN,
6 THE BLACK MAN, OR THE WHITE MAN?

7 A THE BLACK MAN WAS DRIVING THE VAN.

8 Q I SEE.

9 WHERE WAS THE WOMAN?

10 A AH, SITTING, AH, ON THE PASSENGER SIDE
11 BY THE DOOR.

12 Q I SEE.

13 AND WHERE WAS THE MAN WHO YOU
14 BELIEVED TO BE A WHITE MAN?

15 A AH, SITTING IN THE BACK.

16 Q I SEE.

17 DO YOU RECALL ANYTHING ABOUT
18 THE CLOTHING THAT THE WHITE MAN HAD ON?

19 A NO, SIR, I DON'T. I JUST GOT A -- AH,
20 A QUICK GLIMPSE OF HIM. THAT'S ALL.

21 Q WHAT CAN YOU TELL US ABOUT THE BLACK
22 MAN WHO WAS DRIVING THE VAN? CAN YOU GIVE US A DESCRIPTION
23 OF HIM?

24 A AH, OH, THE BEST I CAN REMEMBER, HE HAD
25 THESE, AH, AN AFRO; A BIG BUSHY AFRO.

26 Q BUT HOW BIG WOULD YOU SAY HIS AFRO WAS?

27 A OH, BROTHER.

28 Q WOULD YOU SAY IT WAS A LARGE AFRO?

29 A YEAH. YOU KNOW, BUSHY.

30 Q OKAY. COULD YOU INDICATE WITH YOUR HANDS
31 ABOUT HOW FAR HIS HAIR STOOD OUT?

32 A I'D SAY MAYBE OUT TO HERE (INDICATING).

-1201-

1954

1 Q I SEE. ALL OVER MAYBE.
2 MR. COOPER: YOUR HONOR, MAY THE RECORD REFLECT
3 SHE'S INDICATED ABOUT FOUR TO FIVE INCHES?
4 THE COURT: I THINK THE JURY CAN MAKE THAT
5 DETERMINATION, COUNSEL. I DON'T KNOW IF THAT IS A CORRECT
6 REPRESENTATION OR NOT.
7 MR. COOPER: VERY WELL.
8
9 BY MR. COOPER:
10 Q DID YOU NOTICE WHETHER THIS BLACK MAN
11 HAD ANY FACIAL HAIR, MISS MALLEK?
12 A YES. HE HAD A MUSTACHE AND LONG SIDE-
13 BURNS, AND IT LOOKED LIKE HE WAS, STARTING, AH, A BEARD.
14 Q UH-HUH. DO YOU RECALL ANYTHING ABOUT
15 THE DRESS OF THIS BLACK MAN YOU SAW DRIVING THE VAN?
16 A AH, HE HAD ON, AH, A BRIGHT RED SHIRT,
17 DRESS SHIRT.
18 Q WAS IT A LONG SLEEVED SHIRT OR A SHORT
19 SLEEVED SHIRT?
20 A I DON'T REMEMBER. I DON'T REMEMBER.
21 Q I SEE.
22 WHAT CAN YOU TELL US ABOUT THE
23 DESCRIPTION OF THE WOMAN WHO WAS SEATED IN THE PASSENGER
24 SIDE OF THE VAN?
25 A SHE HAD WIRE FRAMMED GLASSES ON. THE
26 BEST I COULD TELL, AH, SHE HAD LONG BLACK HAIR, OH, ABOUT
27 AH, THE MIDDLE OF HER BACK FROM WHAT I COULD TELL.
28 Q DID IT APPEAR THAT HER HAIR WERE -- ARE
29 YOU FAMILIAR WITH BRAIDS?
30 A YEAH, I THINK.
31 Q WAS HER HAIR IN BRAIDS?
32 A NO, SIR, IT WAS NOT.

1 Q AND YOUR TESTIMONY IS THAT HER HAIR
2 REACHED DOWN ABOUT THE MIDDLE OF HER BACK?
3 A UH-HUH, THE BEST I COULD TELL BY THE
4 WAY IT LOOKED.
5 Q DO YOU RECALL WHAT THE WOMAN WAS
6 WEARING AT THE TIME?
7 A SHE HAD ON A WHITE SHIRT WITH, AH,
8 WITH BLACK, AH, A BOW TIE.
9 Q IS THERE ANYTHING ELSE YOU CAN TELL US
10 ABOUT THIS WOMAN?
11 A SHE HAD A MOLE -- A MOLE ON HER RIGHT
12 CHEEK.
13 Q DO YOU RECALL HER SAYING ANYTHING IN
14 YOUR PRESENCE WHILE THERE?
15 A NO. SHE NEVER SAID A WORD.
16 Q DID YOU HAVE ANY CONVERSATION AT ALL
17 WITH THE DRIVER OF THE VAN, THE BLACK MAN?
18 A AH, YEAH. YOU KNOW, AH, SMALL TALK,
19 YOU KNOW, AH, ABOUT THE WEATHER AND EVERYTHING. YOU KNOW,
20 JUST -- JUST SMALL TALK. THAT'S ALL.
21 Q DID -- WHAT KIND OF SERVICES DID YOU
22 PERFORM ON THE VAN?
23 A I FILLED THE VAN UP AND, AH, I STARTED,
24 AH, AH, TO WASH THE WINDOWS AND HE TOLD ME NOT TO EXCEPT
25 FOR, AH, HIS SIDE.
26 Q YOU WASHED THE WINDOWS?
27 A UH-HUH.
28 Q THE WINDSHIELD ON THE DRIVER'S SIDE?
29 A UH-HUH. I WAS GOING TO, AH, YOU KNOW,
30 THE OIL, AND HE TOLD ME NOT TO DO THAT.
31 Q HE TOLD YOU NOT TO DO THE OIL?
32 A UH-HUH. NOT TO CHECK THE OIL.

-1203-

1 Q IS THIS THE BLACK MAN YOU'VE DESCRIBED
2 WITH THE VERY LARGE AFRO?
3 A UH-HUH.
4 Q WOULD YOU ANSWER YES OR NO, PLEASE.
5 A YES.
6 Q DID ANYONE -- EITHER THE BLACK MAN OR
7 THE WOMAN YOU'VE DESCRIBED, OR THE MAN IN THE BACK WHO YOU
8 DESCRIBED AS A WHITE MAN -- DID EITHER OF THEM EVER GET OUT
9 OF THE VAN?
10 A NO, SIR.
11 Q HOW DID -- HOW WAS THE GAS PAID FOR?
12 A AH, AT FIRST, AH, I THOUGHT HE GAVE ME,
13 AH, AH, A MOBIL CARD; BUT, AH, I GOT TO LOOKING AND IT WAS,
14 AH, A, AH, MASTER CHARGE CARD. AND, AH, I COULDN'T TAKE IT.
15 SO IT, AH, AH, WAS IN CASH.
16 Q THE MAN GAVE YOU A MASTER CHARGE CARD?
17 A UH-HUH.
18 Q DID YOU FILL OUT THE -- A SLIP ON THAT
19 CARD?
20 A YES, SIR.
21 Q I SEE.
22 WHY DIDN'T YOU ACCEPT THE MASTER
23 CHARGE CARD?
24 A MY BOSS TOLD ME, AH, AH, NOT TO.
25 Q I SEE.
26 A THAT WE WOULDN'T.
27 Q WHAT DID YOU DO WITH THE SLIP THAT YOU
28 FILLED OUT?
29 A I TORE IT UP AND THREW IT AWAY.
30 Q THE MAN PAID YOU IN CASH?
31 A YES, SIR.
32 Q DO YOU RECALL WHAT THE BILL WAS?

1 A OH, SHOOT, NO, SIR, I SURE DON'T.
2 Q NOW, THIS WOMAN THAT YOU DESCRIBED AS
3 BEING IN THE VAN, COULD YOU TELL WHETHER SHE WAS A BLACK
4 WOMAN OR A WHITE WOMAN OR OF ANY OTHER RACE THAT YOU KNOW OF?
5 A NO, SIR. SHE COULD HAVE BEEN BLACK,
6 BUT, AH, SHE WAS, AH, DARK COMPLETED. I REALLY COULDN'T,
7 YOU KNOW, I REALLY CAN'T, AH, YOU KNOW, I DIDN'T REALLY
8 NOTICE THAT WELL. BUT SHE DID HAVE DARK -- DARK SKIN --
9 COMPLETED SKIN.
10 Q COULD YOU TELL WHETHER SHE WAS BLACK OR
11 WHITE?
12 A NO, NOT REALLY.
13 Q WOULD YOU SAY THAT HER COMPLEXION WAS
14 DARKER OR LIGHTER THAN MINE?
15 A LIGHTER THAN YOURS.
16 Q WOULD IT BE SAFE TO SAY, MISS MALLEK,
17 THAT HER COMPLEXION WAS SO LIGHT THAT YOU HAD PROBLEMS IN
18 DECIDING WHETHER SHE WAS BLACK OR WHITE?
19 A YES, SIR.
20 Q WHAT YOU'VE TESTIFIED TO HERE TODAY, DID
21 YOU INFORM THE POLICE OF THAT?
22 A YES, SIR.
23 Q ON MARCH 27TH OF 1980?
24 A YES, SIR.
25 Q DID YOU GIVE THEM A WRITTEN STATEMENT?
26 A YES, SIR.
27 Q DID YOU SIGN THAT STATEMENT?
28 A YES, SIR.
29 Q WERE WAS THE STATEMENT GIVEN?
30 A AT THE STATION, POLICE STATION.
31 Q THE POLICE ASKED YOU TO ACCOMPANY THEM
32 TO THE STATION?

1 A YES, SIR.

2 Q NOW, REGARDING THE VAN THAT YOU SAW,
3 IS THERE ANYTHING ABOUT THAT VAN THAT CAUSED IT TO STICK IN
4 YOUR MIND?

5 A THE LADDER ON THE BACK AND THE "BLACK
6 OAK" ON THE SIDE.

7 Q YOU RECALL THE LADDER ON THE BACK OF
8 THE VAN?

9 A UH-HUH.

10 Q DID YOU SEE IN WHICH DIRECTION THE VAN
11 WENT WHEN IT LEFT THE SERVICE STATION?

12 A WHEN IT LEFT, AH, THE STATION, IT WENT
13 THROUGH THE PARKING LOT, AH, AH, THE MAYFAIR PARKING LOT,
14 ON THAT, AH, AH, STREET.

15 Q AND IS THE MAYFAIR PARKING LOT NEAR
16 THIS MOBIL STATION YOU TESTIFIED TO?

17 A YES, SIR.

18 Q HOW CLOSE IS IT?

19 A RIGHT NEXT DOOR.

20 Q YOU SAW THE VAN GO TO THE MAYFAIR LOT?

21 A UH-HUH.

22 Q DID YOU SEE WHERE THE VAN WENT FROM
23 THAT POINT?

24 A IT CROSSED BOULDER HIGHWAY AND MADE
25 A LEFT TURN GOING TOWARDS HENDERSON, AND THAT'S THE LAST TIME
26 I SEEN IT.

27 Q THAT WAS THE LAST TIME YOU SAW IT UNTIL
28 YOU SAW IT THAT NIGHT AT THE DEW DROP INN?

29 A UH-HUH.

30 MR. COOPER: I HAVE NOTHING FURTHER OF THE
31 WITNESS, YOUR HONOR.

32 THE COURT: CROSS.

CROSS-EXAMINATION

BY MR. HARMON:

Q IS IT MRS.?

A NO, SIR. IT'S MISS.

Q MISS MALLEK?

A UH-HUH.

Q HOW LONG DID YOU WORK AT THE MOBIL
STATION NEAR THE INTERSECTION OF BOULDER HIGHWAY AND DESERT
INN ROAD?

A AH, FOUR WEEKS. THREE OR FOUR WEEKS.

Q WHEN WAS THE FIRST TIME ON MARCH 27TH,
1980, THAT YOU WENT TO THE DEW DROP INN?

A THE FIRST TIME?

Q YES, THE FIRST TIME ON THAT DATE?

A AH, AH, RIGHT AFTER WORK.

Q THAT WAS WHAT TIME APPROXIMATELY?

A AH, AH, A QUARTER AFTER 7:00, 7:30,
SOMETHING LIKE THAT.

Q WE'RE TALKING ABOUT IN THE EVENING?

A UH-HUH. YES, SIR.

Q BUT YOU WERE NOT IN THE AREA OF THE DEW
DROP INN BETWEEN 7:00 AND 8:00 O'CLOCK IN THE MORNING?

A NO, SIR.

Q ON MARCH 27, 1980?

A NO, SIR, I WAS NOT.

Q YOU WEREN'T IN POSITION TO SEE A CERTAIN
VAN BACK INTO THE REAR OF THE DEW DROP INN AT THAT TIME,
WERE YOU?

A NO, SIR.

Q BUT YOU SAY YOU WORKED AT THE MOBIL
GAS STATION FOR THREE OR FOUR WEEKS?

1 A UH-HUH, YES, SIR.

2 Q IS THERE ANY REASON WHY YOUR TERM OF

3 EMPLOYMENT WAS SO SHORT THERE?

4 A NO, HUH-UH. I JUST STARTED WORKING

5 THERE AND I WAS THERE -- I THINK I WAS THERE ABOUT TWO MONTHS,

6 SOMETHING LIKE THAT, BECAUSE I GOT HURT ON THE JOB AND, AH --

7 Q HOW LONG HAD YOU BEEN WORKING AT THE GAS

8 STATION AS OF MARCH 27, 1980?

9 A LET'S SEE. I STARTED ABOUT THE FIRST --

10 FIRST WEEK OF MARCH, I BELIEVE, OR THE LAST PART OF FEBRUARY,

11 SOMETHING LIKE THAT.

12 Q YOU'D BEEN WORKING FOR PERHAPS THREE OR

13 FOUR WEEKS?

14 A YES, SIR.

15 Q DO YOU RECALL NOW ON MARCH 27TH, 1980,

16 HOW MANY VANS YOU SERVICED?

17 A GEE, NO. THERE WAS A LOT OF THEM.

18 Q A LOT OF VANS?

19 A YEAH. A LOT OF VANS, CARS, TRUCKS.

20 Q HOW MANY VANS WOULD YOU SAY PULLED INTO

21 THE MOBIL GAS STATION ON MARCH 27, 1980?

22 A SHUUU! GOOD QUESTION.

23 MAYBE HALF A DOZEN, MAYBE MORE.

24 I DON'T KNOW.

25 Q NOW, ASIDE FROM THE VEHICLE YOU SAY YOU

26 RECOGNIZE WHEN THE POLICE DIRECTED YOUR ATTENTION TO IT,

27 WHICH WAS PARKED TO THE REAR --

28 A UH-HUH.

29 Q (CONTINUING) -- OF THE DEW DROP INN,

30 WILL YOU DESCRIBE THE OTHER VANS THAT YOU SERVICED MARCH THE

31 27TH, 1980?

32 A AH, SOME OF THEM WERE PLAIN, SOME OF

1 THEM WERE WHITE, BROWN, OLD, NEW, USED.

2 Q DO YOU REMEMBER THE MAKE -- THE MAKE OF
3 ANY OF THESE OTHER VANS?

4 A NO, SIR.

5 Q DO YOU REMEMBER THE YEARS?

6 A NO.

7 Q WELL, WHAT WERE THE COLORS OF THE VANS
8 THAT PULLED INTO YOUR SERVICE STATION ON THAT DAY?

9 A BROWN, WHITE, PURPLE; ALL KINDS; ALL
10 COLORS.

11 Q NOW, IT'S YOUR TESTIMONY THAT YOU SAW
12 THREE PEOPLE IN THIS PARTICULAR VAN ABOUT WHICH YOU'VE BEEN
13 TESTIFYING?

14 A UH-HUH.

15 Q DID THOSE PEOPLE BEHAVE IN SOME UNUSUAL
16 WAY THAT CAUSED YOU TO PAY A LOT OF ATTENTION TO THEM WHEN
17 THEY WERE IN YOUR SERVICE STATION?

18 A NO, NOT REALLY.

19 Q HOW LONG WERE THEY THERE?

20 A OH, SAY ABOUT 10, 15, 20 MINUTES, SOME-
21 THING LIKE THAT; NOT LONG.

22 Q DID THEY GET OUT AT ALL?

23 A NO.

24 Q THE DARK-COMPLECTED WOMAN DIDN'T GET OUT?

25 A NO. NEITHER ONE OF THEM GOT OUT.

26 Q THE WHITE MAN DIDN'T GET OUT?

27 A HUH-UH.

28 Q NOR DID THE BLACK MAN, WHO WAS DRIVING?

29 A HUH-UH. NEITHER ONE OF THEM GOT OUT.

30 Q THEY PAID YOU, DIDN'T THEY?

31 A YES.

32 Q WAS THERE ANYTHING UNUSUAL AT ALL ABOUT

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1 THAT TRANSACTION WITH THEM?

2 A I DIDN'T THINK SO AT THE TIME.

3 Q HOW MANY PEOPLE WOULD YOU SAY YOU
4 SERVICED DURING YOUR SHIFT ON MARCH THE 27TH, 1980?

5 A OH, MY GOODNESS. I DON'T KNOW. QUITE
6 A FEW.

7 Q WHAT WAS THERE THAT CAUSED THE TRANS-
8 ACTION YOU HAD WITH THESE THREE PEOPLE YOU HAVE DESCRIBED,
9 WHAT CAUSED THAT TO STAND OUT IN YOUR MIND?

10 A I DON'T KNOW.

11 Q DESCRIBE THIS VAN THEY WERE IN.

12 A IT WAS A, AH, BLACK VAN; IT HAD SOME
13 KIND OF FANCY LETTERS ON THE DRIVER'S SIDE, "BLACK OAK"; IT
14 HAD A, AH, SOME KIND OF PICTURES ON THE BOTTOM, I COULDN'T TELL
15 YOU EXACTLY WHAT THEY WERE; AND, AH, IT HAD A LADDER IN THE
16 BACK; AND, AH, A BIG WINDOW ON THE SIDE. IT WAS A PRETTY
17 VAN.

18 Q NOW, YOU SAW THE VAN PARKED TO THE
19 REAR OF THE DEW DROP INN?

20 A LATER ON THAT NIGHT, I DID.

21 Q WHEN THE POLICE POINTED IT OUT TO YOU?

22 A UH-HUH. YES, SIR.

23 Q YOU GOT A GOOD LOOK AT IT AT THAT TIME,
24 DIDN'T YOU?

25 A YES, SIR.

26 Q NOW, WHEN YOU DESCRIBE THIS VEHICLE
27 YOU SAY IT WAS IN THE SERVICE STATION BETWEEN 3:00 AND 4:00
28 O'CLOCK IN THE AFTERNOON ARE YOU REMEMBERING WHAT YOU SAW
29 THEN OR WHAT YOU SAW WHEN THE VEHICLE WAS PARKED BEHIND THE
30 DEW DROP INN?

31 A WHAT I SAW AT THE STATION. THE VAN THAT
32 I SERVICED AT THE STATION.

1 Q ISN'T IT A FACT, MISS MALLEK, THAT YOU
2 JUST THINK YOU SAW THAT VAN AT THE SERVICE STATION?
3 A NO, SIR.
4 Q YOU'RE SURE, OUT OF ALL THE VANS THAT
5 CAME IN AND ALL THE CUSTOMERS YOU HAVE, THAT YOU POSITIVELY
6 REMEMBER SEEING A VAN WITH "BLACK OAK" WRITTEN ON IT BETWEEN
7 3:00 AND 4:00 P.M. IN THE AFTERNOON?
8 A YES, SIR. THE BEST I CAN REMEMBER IT
9 WAS 3:00 -- 3:00 OR 4:00 O'CLOCK IN THE AFTERNOON.
10 Q YOU WANTED TO BE HELPFUL, DIDN'T YOU,
11 WHEN THE POLICE CAME INTO THE DEW DROP INN?
12 A WELL, WHAT DO YOU MEAN?
13 Q WHEN THEY WANTED INFORMATION ABOUT THE
14 VEHICLE YOU WANTED TO BE HELPFUL, LIKE ANY GOOD CITIZEN,
15 DIDN'T YOU?
16 A UH-HUH, I THOUGHT I WAS.
17 Q AND SO YOU THOUGHT ABOUT IT AND YOU
18 BELIEVED THAT YOU SEEN THE VEHICLE.
19 A AH, I DID SEE THE VEHICLE AT THE SERVICE
20 STATION.
21 Q BETWEEN 3:00 AND 4:00 P.M.?
22 A YES, SIR. IF I REMEMBER CORRECTLY, YES,
23 I THINK THAT'S WHAT TIME IT WAS. BUT THEN WE WERE BUSY THAT
24 DAY, TOO. I DON'T KNOW WHAT TIME IT WAS. IT COULD HAVE BEEN
25 EARLIER, IT COULD HAVE BEEN LATER.
26 Q WELL, IT COULD HAVE BEEN AS EARLY AS
27 BETWEEN 7:00 AND 8:00 O'CLOCK IN THE MORNING, COULDN'T IT?
28 A NO, I DON'T THINK SO, BECAUSE I DIDN'T
29 START WORK 'TIL 8:00.
30 Q NOW, YOU'VE GIVEN A RATHER DETAILED
31 DESCRIPTION OF THE PEOPLE WHO WERE INSIDE THAT VEHICLE?
32 A UH-HUH, THE BEST --

1 Q IS THAT THE WAY YOU REMEMBER THEM OR
2 WERE YOU JUST GUESSING WHEN YOU GAVE THE STATEMENT TO THE
3 POLICE ABOUT HOW THEY WERE DRESSED AND HOW THEY LOOKED?

4 A THAT'S THE WAY I REMEMBER SEEING THEM.

5 Q BUT YOU ACTUALLY REMEMBER THAT THE MAN
6 WHO WAS DRIVING WAS WEARING A BRIGHT RED SHIRT?

7 A UH-HUH.

8 Q OUT OF ALL THE PEOPLE YOU SERVICED
9 YOU REMEMBER THAT?

10 A UH-HUH. UH-HUH. I DON'T REMEMBER IF
11 IT WAS LONG SLEEVED OR SHORT SLEEVED THOUGH.

12 Q DID YOU SEE OTHER PERSONS WHO WERE
13 DRIVING VEHICLES THAT DAY WHO HAD BRIGHT RED SHIRTS ON?

14 A YES. WE HAD ALL KINDS OF SHIRTS, POK-A-
15 DOTS. I SERVICED A LOT OF PEOPLE THAT DAY.

16 Q CAN YOU REMEMBER IN YOUR MIND NOW ONE
17 OTHER VEHICLE DISTINCT BY COLOR AND MAKE AND DESCRIPTION,
18 THAT CAME INTO THE SERVICE STATION ON MARCH THE 27TH, 1980?

19 A NO.

20 Q CAN YOU THINK OF THE PHYSICAL DESCRIP-
21 TION OF ONE OTHER PERSON WHO WAS DRIVING THE VEHICLE THAT
22 CAME INTO YOUR SERVICE STATION ON THAT DATE?

23 A DRIVING WHAT KIND OF VEHICLE?

24 Q WELL, IT'S HARD TO SAY WHAT KIND
25 BECAUSE YOU COULDN'T REMEMBER ANY OTHER SPECIFIC VEHICLE.

26 MR. FRANZEN: YOUR HONOR --

27
28 BY MR. HARMON:

29 Q LET'S TALK ABOUT CUSTOMERS. ASIDE FROM
30 THE THREE YOU SAY YOU CAN DESCRIBE, CAN YOU DESCRIBE ANY
31 OTHER CUSTOMER WHO CAME INTO YOUR SERVICE STATION ON MARCH
32 THE 27TH, 1980?

1 A UH-HUH.
2 Q WHO?
3 A THERE WAS A -- LET'S SEE. THERE WAS
4 A LITTLE OLD MAN COME IN THERE.
5 Q WHAT WAS THE OLD MAN DRIVING?
6 A HE WAS DRIVING AN OLD, AH, CHEVY.
7 Q WHAT COLOR WAS IT?
8 A BROWN, I BELIEVE.
9 Q YOU BELIEVE?
10 A SORT OF A RUSTY, DIRTY BROWN. IT WAS
11 ALL -- IT WAS BEAT UP. AND HE HAS -- HE WAS GRAY HAired.
12 HE WORE, AH, A PAIR OF JEANS, AND, AH, AH, A PLAID SHIRT.
13 HE WAS ONE OF OUR REGULAR CUSTOMERS THAT CAME IN. HIS NAME
14 WAS DAVE, I BELIEVE.
15 Q WERE THESE THREE PEOPLE YOU'RE DESCRIB-
16 ING, WHO WERE IN THE VAN, BETWEEN 3:00 AND 4:00 P.M., REGULAR
17 CUSTOMERS?
18 A NO.
19 Q LET'S TALK ABOUT NON- --
20 A FIRST TIME I EVER SEEN THEM.
21 Q LET'S TALK ABOUT NON-REGULAR CUSTOMERS
22 THEN. EXCEPT FOR THOSE THREE, CAN YOU DESCRIBE THE APPEARANCE
23 OF ANY OTHER CUSTOMER ON THAT DATE TO --
24 MR. FRANZEN: YOUR HONOR, THE PROSECUTOR IS
25 ARGUING WITH THE WITNESS. SEVERAL TIMES SHE'S SAID SHE CANNOT.
26 SHE GIVES GENERAL DESCRIPTIONS OF CLOTHING AND VEHICLES,
27 OBVIOUSLY THE ONLY THING THAT STICKS IN HER MIND IS THIS VAN
28 AND WHAT HAPPENED SUBSEQUENTLY --
29 THE COURT: WELL, NOW YOU'RE ARGUING, COUNSEL.
30 I BELIEVE IT'S GETTING REPETITIOUS, COUNSEL.
31 MR. HARMON: THANK YOU.
32 THAT'S ALL, YOUR HONOR.

1 MR. COOPER: I HAVE A FEW.

2
3 REDIRECT EXAMINATION

4
5 BY MR. COOPER:

6 Q MISS MALLEK, I WANT YOU TO LOOK ABOUT
7 THE COURTROOM AND TELL ME IF THE BLACK MAN YOU SAW DRIVING
8 THE VAN IS PRESENT IN COURT TODAY?

9 MR. HARMON: OBJECTION. THAT EXCEEDS THE SCOPE
10 OF CROSS, YOUR HONOR.

11 MR. COOPER: HE QUESTIONED HER ABOUT THE BLACK
12 MAN IN THE VAN, YOUR HONOR.

13 THE COURT: OVERRULED.

14
15 BY MR. COOPER:

16 Q LOOK ABOUT THE COURTROOM AND TELL US IF
17 YOU SAW -- IF THE MAN YOU SAW IN THE VAN THAT DAY IS IN THE
18 COURTROOM NOW?

19 A NO, SIR, HE IS NOT.

20 MR. COOPER: I HAVE NOTHING FURTHER OF THE
21 WITNESS, YOUR HONOR.

22
23 RECROSS EXAMINATION

24
25 BY MR. HARMON:

26 Q YOU SAID, "NO, SIR, HE IS NOT".

27 A YES. THAT'S WHAT I SAID, HE'S NOT HERE.

28 Q BUT YOU WOULD REMEMBER AFTER THREE YEARS?

29 A I THINK I WOULD.

30 Q THE MAN NEVER GOT OUT OF THE VEHICLE?

31 A NO. HE NEVER DID GET OUT OF THE VEHICLE.

32 Q DID HE SWEAR AT YOU OR THREATEN YOU?

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A NO.

Q DID HE DO SOMETHING TO CAUSE YOU TO
RIVET YOUR ATTENTION TO HIM?

A NO. WE JUST HAD A NICE --

Q IF WE PARADE --

A (CONTINUING) -- TALK --

Q (CONTINUING) -- EACH OF THE CUSTOMERS
INTO THIS COURTROOM YOU SERVICED ON MARCH THE 27TH, 1980,
COULD YOU SAY WHETHER THEY WERE HERE IN COURT?

A NO, I DON'T THINK SO. WHY?

MR. HARMON: THANK YOU.

THAT'S ALL.

MR. COOPER: I HAVE NOTHING FURTHER OF THIS
WITNESS, YOUR HONOR.

THE COURT: YOU'RE EXCUSED.

(WHEREUPON, THE WITNESS WAS
EXCUSED.)

THE COURT: CALL YOUR NEXT WITNESS.

MR. COOPER: COURT'S INDULGENCE, PLEASE.

WE CALL MR. CHAPMAN, PLEASE.

MR. FRANZEN: CHAPLIN, C-H-A-P-L-I-N (SIC).

THE COURT: APPROACH THE BENCH.

(WHEREUPON, SIDE BAR CONFERENCE
AT BENCH; NOT REPORTED. AT THE
CONCLUSION OF WHICH THE FOLLOWING
WAS HAD:)

THE COURT: HAVE HIM COME FORWARD.

YOU TWO GENTLEMEN ARE EXCLUDED FROM THE
COURTROOM. STEP OUTSIDE.

A VOICE: US, TOO?

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THE COURT: YOU, TOO.

SWEAR THE WITNESS.

THE CLERK: RAISE YOUR RIGHT HAND, PLEASE.

WHEREUPON,

RICHARD CHAPMAN,
CALLED AS A WITNESS HEREIN BY THE DEFENSE, WAS FIRST DULY
SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU MAY BE SEATED.

THE COURT: PROCEED.

DIRECT EXAMINATION

BY MR. FRANZEN:

Q SIR, WOULD YOU PLEASE ADJUST YOUR
MICROPHONE THERE SO YOU'RE COMFORTABLE.

WOULD YOU PLEASE GIVE YOUR
FULL NAME?

A RICHARD CHAPMAN.

Q AND WOULD YOU SPELL YOUR LAST NAME,
PLEASE?

A C-H-A-P-M-A-N.

Q AND WHERE DO YOU RESIDE, SIR?

A I RESIDE AT WESTERN 6 MOTEL, 4125
BOULDER HIGHWAY, LAS VEGAS.

Q AND WHAT IS YOUR OCCUPATION?

A I'M THE MOTEL MANAGER.

Q AND WHAT ARE SOME OF YOUR DUTIES THERE,
SIR?

A I HAVE THE RESPONSIBILITY FOR SUPERVISING
THE OVERALL OPERATION OF THE MOTEL TO ASCERTAIN THAT THE
EMPLOYEES ALL PERFORM THEIR FUNCTIONS IN ACCORDANCE WITH THE

1 COMPANY POLICY.

2 Q DO YOU HAVE CARE AND CUSTODY OF CERTAIN
3 REGISTRATION CARDS, SIR?

4 A I HAVE CARE AND CUSTODY OF ALL
5 REGISTRATION CARDS.

6 Q DO YOU HAVE ANY OF THOSE CARDS WITH YOU
7 TODAY?

8 A YES, I DO.

9 Q WERE YOU ASKED BY MR. KIDD OF MY OFFICE
10 TO BRING THOSE CARDS WITH YOU?

11 A YES, I WAS.

12 Q WHAT DATES -- WELL, STRIKE THAT.

13 DO THESE -- WHAT DO THESE
14 REGISTRATION CARDS CONTAIN?

15 A THEY CONTAIN?

16 Q WHAT INFORMATION?

17 A WELL, WHEN -- WHEN THE GUEST REGISTERS
18 AT THE MOTEL WE ASK THEM TO FILL OUT THE REGISTRATION CARD,
19 WHICH ASKS FOR THEIR NAME, ADDRESS, THE TYPE, MAKE AND
20 MODEL OF VEHICLE THEY'RE DRIVING, AND THEIR LICENSE PLATES.

21 Q NOW, THE REGISTRATION CARDS THAT YOU
22 HAVE BROUGHT TO COURT TODAY, WHAT DATES DO THEY COVER?

23 A THE CARDS I HAVE COVER THE DATES OF
24 MARCH 24TH THROUGH MARCH 28TH, 1980.

25 Q AND ARE THESE REPORTS KEPT IN THE ORDINARY
26 COURSE OF YOUR BUSINESS, SIR?

27 A YES, THEY ARE, SIR.

28 Q AND WHERE ARE THESE REPORTS KEPT?

29 A OH, AFTER THE GUEST CHECKS OUT, THESE
30 RECORDS ARE KEPT IN A LOCKED STORAGE CABINET FOR 10 YEARS.

31 Q AND ARE THESE MARCH 24, 1980, TO MARCH
32 28, 1980, REGISTRATION CARDS KEPT THERE AT YOUR PREMISES AT

1 THE WESTERN 6 MOTEL?

2 A YES, THEY ARE.

3 Q DID YOU RETRIEVE THEM FROM STORAGE AT
4 THE WESTERN 6 MOTEL AT MR. KIDD'S REQUEST?

5 A YES, I DID.

6 Q DID YOU, AT HIS REQUEST, PUT THEM ASIDE
7 SO THAT HE MIGHT LOOK AT THEM?

8 A YES.

9 Q IS THERE ANYWAY YOU CAN TELL IF ANY
10 GUEST REGISTRATION CARDS ARE MISSING FROM BETWEEN THE DATES
11 OF MARCH 24, 1980, AND MARCH 28, 1980?

12 A THE REGISTRATION CARDS ARE SEQUENTIALLY
13 NUMBERED.

14 Q SO BY "SEQUENTIALLY NUMBERED" YOU MEAN
15 SUCH AS: ONE, TWO, THREE, FOUR, FIVE AND SO ON?

16 A YES.

17 Q IN THE EVENT THAT A CARD IS MISSING
18 WOULD ANYTHING BE PLACED IN ITS PLACE SO THAT YOU WOULD KNOW
19 THAT IT WAS MISSING?

20 A JUST DON'T LOSE REGISTER CARDS.

21 Q WOULD IT --

22 A BUT, YES, AH, IF THEY'RE -- WE WOULD
23 PUT IN A PIECE OF PAPER WITH THE SEQUENTIAL NUMBERING ON
24 IT, SAYING THAT THIS REGISTER CARD WAS MISSING.

25 Q WOULD THIS BE IN THE FORM OF A RECEIPT?

26 A YES, SIR.

27 Q WOULD THE RECEIPT HAVE AN EXPLANATION
28 OF WHY IT WAS MISSING?

29 A YES, IT WOULD.

30 Q NOW, DO YOU KNOW IF MR. KIDD OF MY OFFICE
31 HAS GONE THROUGH THOSE REGISTRATION CARDS OF MARCH 24, 1980
32 TO MARCH 28, 1980?

1 A YES, HE WENT THROUGH ALL OF THE CARDS.
2 Q ARE AT LEAST THE CARDS IN YOUR POSSESSION,
3 SIR?
4 A YES, SIR.
5 MR. FRANZEN: MIGHT I HAVE THESE MARKED, YOUR
6 HONOR, AS DEFENSE EXHIBITS?
7 THE COURT: THEY MAY BE MARKED.
8 WHAT IS IT GOING TO BE, THE LETTER?
9 THE CLERK: C, SIR.
10 MR. FRANZEN: WE MOVE FOR THE ADMISSION, YOUR
11 HONOR, OF PROPOSED EXHIBIT C.
12 MR. SEATON: YOUR HONOR, WE ARE GOING TO HAVE
13 NO OBJECTION TO THE ENTRY OF DEFENDANT'S PROPOSED EXHIBIT C,
14 BUT WE THINK THAT A MORE APPROPRIATE FOUNDATION BE LAID.
15 THE COURT: I BELIEVE IT IS. YOU HAVEN'T TIED
16 IT ALL UP, COUNSEL.
17 MR. FRANZEN: YOUR HONOR, IF I COULD APPROACH THE
18 THE BENCH TO EXPLAIN HOW TO TIE IT UP. I HAVE A --
19 THE COURT: ALL RIGHT. APPROACH THE BENCH.
20 (WHEREUPON, SIDE BAR CONFERENCE
21 AT BENCH; NOT REPORTED. AT THE
22 CONCLUSION OF WHICH THE FOLLOWING
23 WAS HAD:)
24
25 BY MR. FRANZEN:
26 Q SIR, THESE ARE THE EXHIBITS -- EXHIBIT C,
27 DEFENSE PROPOSED EXHIBIT C, ARE THE BUSINESS RECORDS OF THE
28 WESTERN 6 MOTEL LOCATED AT 4125 BOULDER HIGHWAY, LAS VEGAS,
29 NEVADA.
30 A THAT IS CORRECT.
31 Q AND THESE RECORDS WOULD INDICATE WHO
32 WAS REGISTERED IN THE WESTERN 6 MOTEL BETWEEN MARCH 24, 1980

1 AND MARCH 28, 1980?

2 A THAT'S CORRECT.

3 MR. FRANZEN: NO FURTHER QUESTIONS, YOUR HONOR.

4 THE COURT: CROSS?

5 MR. SEATON: THANK YOU, YOUR HONOR.

6

7

CROSS EXAMINATION

8

9 BY MR. SEATON:

10 Q HOW LONG HAVE YOU BEEN THE MANAGER OF
11 THE WESTERN 6 MOTEL?

12 A I'VE BEEN AT THIS LOCATION A LITTLE OVER
13 ONE YEAR.

14 Q YOU WERE NOT THERE ON MARCH 27TH OF 1980?

15 A NO, SIR. I WAS NOT.

16 Q IN MARCH OF 1980 WERE YOU AWARE THAT ALL
17 OF THESE CARDS, THAT HAVE BEEN MARKED AS STATE'S -- OR
18 DEFENSE PROPOSED EXHIBIT C --

19 A ALL THE MOTELS OPERATE THE SAME THERE.

20 Q NO. I'M SPEAKING TO THESE PARTICULAR
21 CARDS. IN MARCH OF 1980, DID YOU HAVE ANY FAMILIARITY WITH
22 THE CARDS THAT HAVE BEEN MARKED AS --

23 A NO, SIR.

24 Q (CONTINUING) -- DEFENSE EXHIBIT PROPOSED
25 C?

26 HAVE YOU EVER LOOKED THROUGH EACH
27 OF THE DEFENDANT'S PROPOSED EXHIBIT C?

28 A NO, I HAVE NOT.

29 Q HOW MANY CARDS WOULD YOU ESTIMATE ARE
30 IN THAT PILE?

31 A OH, FIVE -- 25 -- ABOUT 60 A DAY, FIVE
32 DAYS -- MAYBE 300.

1 Q THREE HUNDRED CARDS.
2 AND YOU HAVE NOT LOOKED AT ANY
3 OF THEM?

4 A NO, SIR.

5 Q YOU HAVEN'T LOOK AT THESE NAMES ON THE
6 CARDS?

7 A NO.

8 Q AT ALL?

9 MR. HARMON: COURT'S INDULGENCE.

10

11 BY MR. SEATON:

12 Q MR. CHAPMAN, YOU STATE THAT ALL OF THE
13 MOTELS WORK THE SAME. HAVE YOU WORKED FOR WESTERN 6 MOTELS
14 IN THE PAST?

15 A I'VE BEEN WITH THE COMPANY A LITTLE OVER
16 SIX YEARS.

17 Q AND WHERE HAVE YOU WORKED IN THE PAST?

18 A OH, WE HAD PROPERTY ON INDUSTRIAL ROAD
19 IN LAS VEGAS THAT OPENED IN 1977. AND I WORKED PHOENIX --

20 Q WHEN DID --

21 A (CONTINUING) -- SCOTTSDALE, TUCSON,
22 OVER IN CAL-FULLERTON.

23 Q ALL AT WESTERN 6 MOTELS?

24 A YES, SIR.

25 Q WHEN DID YOU WORK AT THE INDUSTRIAL
26 MOTEL?

27 A '77, '78. I WAS GOING THERE ONCE A
28 MONTH AND LIVING WITH THE MOTEL FOR ABOUT, OH, UNTIL ABOUT
29 LABOR DAY OF 1978. THEN I WAS ASSIGNED TO PHOENIX AND I WAS
30 DOWN THERE FOR FIVE YEARS.

31 Q SO YOU WERE IN PHOENIX FROM '78 THROUGH
32 '83?

1 A NO. I CAME UP TO THIS BOULDER HIGHWAY
2 MOTEL THE FIRST OF APRIL IN 1982, AND I'VE BEEN THERE SINCE.

3 Q FROM '78 TO '82 THEN WERE YOU IN BOTH
4 THE PHOENIX AND THE SCOTTSDALE ESTABLISHMENTS?

5 A LABOR DAY OF 1980 I -- I WAS AT THE
6 PHOENIX PROPERTY UNTIL APRIL 1ST, 1981.

7 Q SO THEN FROM --

8 A EXCUSE ME, '78 TO '82.

9 Q WHEN WERE YOU IN SCOTTSDALE?

10 A AH, 1978 I WOULD GO IN THERE ONCE A
11 MONTH, AND COME UP TO INDUSTRIAL ROAD ONCE A MONTH.

12 Q WHEN WERE YOU IN FULLERTON?

13 A IN FEBRUARY, 1978.

14 Q AND WHEN WERE YOU IN TUCSON?

15 A I'D GONE TO TUCSON ABOUT THE SAME TIME
16 I'D GONE TO SCOTTSDALE, INDUSTRIAL AND THAT WOULD BE FIRST
17 EIGHT MONTHS OF 1978.

18 Q AT THE TIME OF MARCH -- LET ME GET THIS
19 DOWN STRAIGHT SO THAT I FULLY UNDERSTAND IT.

20 IN MARCH OF 1980 THEN WERE YOU
21 WORKING IN PHOENIX?

22 A YES, SIR.

23 Q AND DURING THAT PERIOD OF TIME HAD YOU
24 BEEN TO THE BOULDER HIGHWAY WESTERN 6 MOTEL IN A MANAGERIAL
25 CAPACITY?

26 A NO, SIR.

27 Q AND AT THAT TIME HAD YOU EVER BEEN -- DID
28 YOU KNOW FOR A FACT HOW THE PROCEDURES WORKED IN THE BOULDER
29 HIGHWAY WESTERN 6 MOTEL?

30 A NO.

31 Q AND AGAIN, SO THAT THE RECORD IS PERFECTLY
32 CLEAR, DURING THAT TIME HAD YOU EVER SEEN THE EXHIBITS THAT

1 HAVE BEEN MARKED AS DEFENSE PROPOSED EXHIBIT C?

2 A NO.

3 Q ANY OF THEM?

4 A (NO AUDIBLE RESPONSE.)

5 Q AND SINCE THAT TIME HAVE YOU EVER SEEN
6 ANY OF THOSE EXHIBITS MARKED AS DEFENSE EXHIBIT C?

7 A NO. JUST -- JUST THE FIVE DAYS I PULLED
8 OUT OF THE FILE.

9 MR. SEATON: THANK YOU.

10 THAT CONCLUDES THE STATE'S QUESTIONS.

11
12 REDIRECT EXAMINATION

13
14 BY MR. FRANZEN:

15 Q MR. CHAPMAN, YOU SAY YOU PULLED THOSE
16 DAYS OUT OF THE FILE. HOW FAR BACK DO YOUR FILES GO REGARDING
17 THESE REGISTRATION CARDS?

18 A AT THIS LOCATION THEY WOULD GO BACK TO
19 -- WE OPENED THIS MOTEL IN ABOUT THE FIRST OF JUNE, 1979.

20 Q AND YOU ARE THE CUSTODIAN WHO HAS THE
21 CARE AND CUSTODY OF THESE RECORDS AT 4215 BOULDER HIGHWAY?

22 A YES, SIR.

23 Q IN YOUR OCCUPATION WORKING FOR WESTERN
24 6 AROUND THE COUNTRY, HAVE YOU HAD OCCASION AT THESE OTHER
25 LOCATIONS ALSO TO HAVE CHARGE OF THESE REGISTRATION CARDS
26 WHEN YOU WERE IN CHARGE OF THE MOTEL?

27 A YES, YOU WOULD.

28 Q NOW, IF SOMEONE REGISTERED THERE OR GOT
29 A ROOM AT YOUR MOTEL THEY FOLLOWED YOUR PROCEDURING, THE
30 WESTERN 6 MOTEL --

31 MR. SEATON: EXCUSE ME, YOUR HONOR, WHICH MOTEL
32 IS HE SPEAKING OF?

1 MR. FRANZEN: I HAVEN'T FINISHED THE QUESTION
2 YET.

3
4 BY MR. FRANZEN:

5 Q IF SOMEONE REGISTERED AT A WESTERN 6
6 MOTEL, CORPORATION MOTEL, IS THE STANDARD PROCEDURE OF THE
7 CORPORATION TO REQUIRE A GUEST TO REGISTER ON ONE OF THE
8 REGISTRATION CARDS?

9 A YES, IT IS.

10 Q AND IS IT THE STANDARD PROCEDURE FOR
11 EACH OF THE MOTELS TO MAINTAIN THEIR REGISTRATION CARDS?

12 A YES, IT IS.

13 Q NOW, HOW LONG DO THEY MAINTAIN THESE
14 CARDS?

15 A WE'RE TO KEEP THESE CARDS FOR 10 YEARS.

16 Q IF SOMEONE REGISTERED ON MARCH 26TH,
17 1980, UNDER THE NAME OF DEBBIE JACKSON, WOULD THAT BE IN THOSE
18 FILES?

19 MR. SEATON: OBJECTION, YOUR HONOR. THAT CALLS
20 FOR SOME -- FOR SPECULATION ON THE PART OF THE WITNESS.

21 THE COURT: I BELIEVE IT DOES, COUNSEL.

22 MR. FRANZEN: I DON'T SEE THE SPECULATIVE NATURE,
23 YOUR HONOR, IF SHE REGISTERED AT THE MOTEL FOLLOWING THE --

24 THE COURT: THAT'S A CONCLUSION FOR THE JURY TO
25 REACH, NOT FOR THIS MAN TO REACH.

26 MR. FRANZEN: NO FURTHER QUESTIONS, YOUR HONOR.

27 MR. SEATON: NO FURTHER QUESTIONS.

28 THE COURT: YOU'RE EXCUSED.

29 (WHEREUPON, THE WITNESS WAS
30 EXCUSED.)

31
32 THE COURT: COUNSEL, APPROACH THE BENCH.

1 (WHEREUPON, SIDE BAR CONFERENCE
2 AT BENCH; NOT REPORTED. AT THE
3 CONCLUSION OF WHICH THE FOLLOWING
4 WAS HAD:)

5
6 THE COURT: LADIES AND GENTLEMEN OF THE JURY, WE
7 ARE GOING TO TAKE OUR RECESS AT THIS TIME. AS I MENTIONED TO
8 YOU YESTERDAY, WE BELIEVE THAT WE CAN CONCLUDE THE TESTIMONY.
9 I'VE JUST BEEN INFORMED BY THE DEFENSE THAT THEY HAVE ONE VERY
10 BRIEF SHORT WITNESS AND THEN ONE OTHER WITNESS AND WE SHOULD BE
11 ABLE TO THEN HAVE THE DEFENSE'S CASE IN THIS AFTERNOON,
12 PROBABLY WITHIN THE NEXT HOUR TO HOUR AND A HALF.

13 SO IN VIEW OF THE FACT THAT WE'RE THAT
14 CLOSE, I THINK WE SHOULD PRESS ON THIS EVENING AND CONCLUDE
15 THE TESTIMONY TODAY SO WE CAN INSTRUCT YOU TOMORROW, YOU CAN
16 LISTEN TO THE ARGUMENTS AND THE MATTER WILL BE SUBMITTED TO
17 YOU. OTHERWISE, THE ONLY ALTERNATIVE IS TO GO INTO SATURDAY,
18 AND I DON'T WANT TO DO THAT IF WE CAN AVOID IT.

19 SO WE WILL TAKE A TEN-MINUTE RECESS NOW
20 AND THEN WE WILL RECONVENE AND HEAR THE OTHER TWO WITNESSES
21 FROM THE DEFENSE.

22 DURING THIS RECESS YOU ARE
23 ADMONISHED NOT TO CONVERSE AMONG
24 YOURSELVES OR WITH ANYONE ELSE ON
25 ANY SUBJECT CONNECTED WITH THIS
26 TRIAL, OR READ, WATCH OR LISTEN
27 TO ANY REPORT OF OR COMMENTARY ON
28 THIS TRIAL WITH ANY PERSON
29 CONNECTED WITH THIS TRIAL BY ANY
30 MEDIUM OF INFORMATION, INCLUDING
31 WITHOUT LIMITATION, NEWSPAPER,
32 TELEVISION OR RADIO; OR FORM OR

1 EXPRESS ANY OPINION ON ANY
2 SUBJECT CONNECTED WITH THIS
3 TRIAL UNTIL THE CASE IS
4 FINALLY SUBMITTED TO YOU.
5
6
7
8
9

10 WE WILL BE IN RECESS.

11 (WHEREUPON, FROM 4:50 P.M. UNTIL
12 5:10 P.M. A RECESS WAS HAD IN
13 THE PROCEEDINGS, AT THE CONCLU-
14 SION OF WHICH THE FOLLOWING WAS
15 HAD:)

16
17 THE COURT: COUNSEL STIPULATE TO THE PRESENCE
18 OF THE JURY?

19 MR. SEATON: YES, YOUR HONOR.

20 MR. FRANZEN: YES, YOUR HONOR.

21 THE COURT: CALL YOUR NEXT WITNESS.

22 MR. FRANZEN: YOUR HONOR, WE'D MOVE FOR THE
23 ADMISSION OF DEFENSE C.

24 THE COURT: ANY OBJECTION?

25 MR. SEATON: NO, YOUR HONOR.

26 THE COURT: SAME WILL BE RECEIVED.

27 MR. FRANZEN: CALL MR. MICHAEL KIDD.

28 THE COURT: COME FORWARD. COUNSEL, APPROACH
29 THE BENCH.

30 (WHEREUPON, SIDE BAR CONFERENCE
31 AT BENCH; NOT REPORTED. AT THE
32 CONCLUSION OF WHICH THE FOLLOWING

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WAS HAD:)

THE COURT: ALL RIGHT. PROCEED?

THE CLERK: SIR, RAISE YOUR RIGHT HAND.

WHEREUPON,

MICHAEL KIDD,

CALLED AS A WITNESS HEREIN BY THE DEFENSE, WAS FIRST DULY
SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU MAY BE SEATED.

THE COURT: PROCEED.

DIRECT EXAMINATION

BY MR. FRANZEN:

Q MR. KIDD, WOULD YOU PLEASE GIVE YOUR
FULL NAME AND SPELL YOUR LAST NAME.

A MICHAEL KIDD, K-I-D-D.

Q AND HOW ARE YOU EMPLOYED, SIR?

A INVESTIGATOR?

Q AND WHO EMPLOYS YOUR SERVICES AS AN
INVESTIGATOR?

A CLARK COUNTY PUBLIC DEFENDER'S OFFICE.

Q AND HOW LONG HAVE YOU BEEN SO EMPLOYED?

A SIX YEARS.

Q PRIOR TO BEING EMPLOYED AS A PUBLIC,
DEFENDER INVESTIGATOR, WHAT WAS YOUR EMPLOYMENT?

A I WORKED FOR THE DEPARTMENT OF ENERGY.

Q IN WHAT CAPACITY?

A IN SECURITY.

Q AND HOW LONG WERE YOU SO EMPLOYED?

A FOURTEEN YEARS.

-1227-

1 Q AND DID YOU HAVE A SECURITY CLEARANCE?
2 A YES.
3 Q WHAT WAS YOUR SECURITY CLEARANCE?
4 A SECRET.
5 Q AND PRIOR TO THAT HOW WERE YOU EMPLOYED,
6 SIR?
7 A I WAS IN THE UNITED STATES ARMY.
8 Q ON APRIL 13, 1983, DID YOU HAVE OCCASION
9 TO SPEAK WITH A MISTER CHUCK MORENO?
10 A YES, I DID.
11 Q WHERE DID THIS CONVERSATION TAKE PLACE?
12 A AT HIS RESIDENCE.
13 Q AND WHERE IS THAT?
14 A THAT'S ON FIVE PENNIES DRIVE, 3411.
15 Q DID YOU HAVE AN OCCASION AT THAT TIME
16 TO QUESTION MR. MORENO REGARDING A VAN?
17 A YES, I DID.
18 Q COULD YOU RELATE YOUR DISCUSSION WITH
19 MR. MORENO REGARDING THAT VAN?
20 A YES. I ASKED HIM IF HE HAD --
21 MR. SEATON: OBJECTION, YOUR HONOR. THAT'S
22 HEARSAY.
23 MR. FRANZEN: HE COULD BE MORE PARTICULAR IF
24 YOUR HONOR WISHES, BUT I DIDN'T WANT TO GO INTO LEADING
25 QUESTIONS.
26 THE COURT: WELL, I THINK IN VIEW OF THE
27 OBJECTION YOU'RE GOING TO HAVE TO, COUNSEL.
28 MR. FRANZEN: THAT'S FINE, YOUR HONOR.
29
30 BY MR. FRANZEN:
31 Q MR. KIDD, ON APRIL 13, 1983, AT APPROX-
32 IMATELY 11:15 A.M., IN MR. MORENO'S HOME, DID YOU ASK MR.

1 MORENO WHETHER HE SAW ANYTHING ON THE FLOOR OF A BLACK VAN
2 CONTAINING THE WORDS "BLACK OAK" ON ITS SIDE, LOCATED WHEN
3 HE LOOKED AT IT TO THE REAR OF THE DEW DROP INN ON MARCH
4 27, 1980?

5 A YES, I DID.

6 Q WHAT DID HE TELL YOU REGARDING THE
7 CONDITION OF THE FLOOR OF THE VAN ON MARCH 27, 1980, WHEN
8 HE RELATED HE LOOKED AT THAT VAN?

9 A HE STATED THAT HE DID NOT NOTICE ANYTHING
10 UNUSUAL IN THE VAN REGARDING THE CONDITION, THE CONDITION OF
11 THE TABLE.

12 Q DID HE STATE THAT HE NOTICED NOTHING
13 UNUSUAL ABOUT THE VAN'S INTERIOR?

14 A NO.

15 LATER IN THE CONVERSATION HE
16 DID STATE THAT HE RECALLED THAT HE SAW SOME PILLOWS OR
17 POSSIBLY TIRES IN THE BACK, BUT HE WASN'T SURE.

18 Q DID HE RELATE TO YOU WHETHER OR NOT
19 THE INTERIOR OF THE VAN WAS DISHEVELED OR MESSED UP?

20 A HE SAID HE DIDN'T -- NO. HE SAID HE
21 SAW NOTHING UNUSUAL AND IT WASN'T MESSED UP.

22 Q HE DID SAY, ON APRIL 13, 1983, AT
23 APPROXIMATELY 11:15 A.M., THAT THE INTERIOR OF THE VAN WAS
24 NOT DISHEVELED NOR WAS IT MESSED UP?

25 A THAT'S CORRECT.

26 Q MR. KIDD, HAVE YOU HAD OCCASION TO GO
27 TO THE WESTERN 6 MOTEL, LOCATED AT 4125 BOULDER HIGHWAY?

28 A YES, I HAVE.

29 Q THERE DID YOU MEET A MISTER CHAPMAN?

30 A I MET HIS WIFE.

31 Q HIS WIFE.

32 DID YOU OBTAIN FROM THE WESTERN

1 6 MOTEL SOME REGISTRATION CARDS?

2 A YES.

3 Q WHAT DATES -- STRIKE THAT.

4 DID YOU GO THROUGH THESE
5 REGISTRATION CARDS?

6 A YES, I DID.

7 Q WHAT DATE DID THESE REGISTRATION CARDS
8 COVER?

9 A FROM MARCH THE 24TH, 1980, THROUGH
10 MARCH THE 28TH, 1980.

11 Q SHOWING YOU DEFENDANT'S EXHIBIT C, WHICH
12 ARE GUEST REGISTRATION CARDS FOR CALIFORNIA 6 WESTERN MOTELS.
13 DO YOU RECOGNIZE THESE, SIR? TAKE A MOMENT AND LOOK AT
14 THEM.

15 A YES, I DO.

16 Q DID YOU GO THROUGH THOSE CARDS?

17 A YES, I DID.

18 Q WHEN YOU WENT THROUGH THOSE CARDS DID
19 YOU FIND A DEBBIE JACKSON'S NAME ON ANY OF THOSE GUEST
20 REGISTRATION CARDS?

21 A NO, I DIDN'T.

22 Q DID YOU FIND ADAWANA THOMAS ON ANY OF
23 THOSE GUEST REGISTRATION CARDS CONTAINED IN DEFENSE EXHIBIT
24 C?

25 A NO, I DIDN'T.

26 Q DID YOU FIND ADAWANA BOYD'S NAME ON ANY
27 OF THE GUEST REGISTRATION CARDS CONTAINED IN DEFENDANT'S
28 EXHIBIT C?

29 A NO, I DIDN'T.

30 Q DID YOU FIND, IN DEFENDANT'S EXHIBIT C,
31 THE NAME SAMUEL HOWARD CONTAINED ON ANY OF THOSE GUEST
32 REGISTRATION CARDS?

1 A NO, I DIDN'T.
2 Q DID YOU FIND, ON ANY OF THOSE GUEST
3 REGISTRATION CARDS, THE NAME OF DAWANA HOWARD?

4 A NO, I DIDN'T.
5 MR. FRANZEN: I HAVE NOTHING FURTHER.
6 THE COURT: CROSS.
7 MR. SEATON: THANK YOU, YOUR HONOR.
8

9 CROSS EXAMINATION
10

11 BY MR. SEATON:

12 Q MR. KIDD, WHEN YOU WENT TO SEE MR. MORENO
13 ON APRIL THE 13, 1983, WHAT TIME DID YOU GO TO HIS HOUSE?

14 A THAT WAS 11:15 IN THE MORNING.

15 Q AND DID YOU CALL HIM FIRST?

16 A YES, I DID.

17 Q AND HOW DID YOU IDENTIFY YOURSELF?

18 A AS AN INVESTIGATOR WITH THE PUBLIC
19 DEFENDER'S OFFICE.

20 Q DID YOU SAY THAT YOU WERE AN INVESTIGATOR
21 WITH THE PUBLIC DEFENDER'S OFFICE OR P.D.'S OFFICE OR HOW
22 DID YOU PUT IT TO HIM?

23 A PUBLIC DEFENDER'S OFFICE.

24 Q DO YOU REMEMBER THAT?

25 A YES.

26 Q AND WHEN YOU SPOKE TO HIM, I THINK ON
27 DIRECT YOU SAID THAT HE TOLD YOU THAT THE VAN WAS NOT DISHEVEL-
28 ED OR MESSED UP. WERE THOSE YOUR WORDS?

29 A YES.

30 Q DID YOU ASK HIM THAT SPECIFIC QUESTION
31 USING THOSE WORDS?

32 A YES. I TALKED TO HIM ABOUT THE INTERIOR

1 OF THE VAN ON THREE DIFFERENT -- AT THREE DIFFERENT PORTIONS
2 OF THE CONVERSATION I HAD WITH HIM.

3 Q AND WHAT DID HE SAY THE FIRST PORTION?

4 A HE NOTICED NOTHING UNUSUAL.

5 Q WHAT HAD YOU ASKED HIM TO ELICIT THAT
6 RESPONSE?

7 A IF -- WHEN HE LOOKED IN THE VAN IF HE
8 NOTICED ANYTHING. I DIDN'T WANT TO -- TO GET TOO LEADING
9 WITH HIM. I WANTED IT TO COME OUT IN HIS OWN WORDS.

10 Q AND LATER HE INDICATED THAT MAYBE THERE
11 WERE SOME PILLOWS THROWN AROUND?

12 A NO. THE NEXT PORTION WAS --

13 Q DID HE LATER ON?

14 A YES, HE DID LATER ON.

15 Q LATER ON HE DID SAY THAT?

16 A THAT WAS ON THE 3RD.

17 Q DID HE INDICATE -- WELL, WHAT DID HE
18 INDICATE TO YOU ON THE SECOND TIME?

19 A WELL, THE SECOND TIME I WROTE DOWN THAT
20 HE DIDN'T NOTICE ANYTHING UNUSUAL IN THE VAN. AND THEN I
21 WENT BACK AND ASKED HIM AGAIN. I SAID, THE CONDITION OF THE
22 VAN, DID YOU NOTICE ANYTHING UNUSUAL ABOUT THAT? AND THEN I
23 ASKED HIM, DID YOU NOTICE ANYTHING UNUSUAL ABOUT THE TABLE?
24 AND THEN I ASKED HIM IF HE NOTICED ANYTHING UNUSUAL ABOUT
25 THE FLOOR OF THE VAN, WAS IT MESSED UP? DISORDERLY?
26 DISHEVELED?

27 Q AND HIS ANSWER WAS NO?

28 A NO TO ALL OF THOSE.

29 Q AND WERE ALL THESE CONVERSATIONS ON THE
30 FIRST TIME OR THE SECOND TIME OR THE THIRD TIME?

31 A THIS WAS ON THE SECOND TIME THAT I WENT
32 BACK AND ASKED HIM ABOUT THAT SPECIFIC PART OF THE CONVERSATION

1 Q AND THEN WHAT SORT OF A QUESTION DID
2 YOU ASK HIM TO GET -- TO FIND OUT ABOUT THE PILLOWS BEING
3 SPREAD AROUND?

4 A WELL, THERE AGAIN, AS WE -- THE
5 CONVERSATION PROBABLY TOOK ABOUT 15 MINUTES. AND I WENT BACK
6 AND I SAID, AH, WHEN YOU LOOKED AT THE VAN YOU COULDN'T SEE
7 ANYTHING IN THE VAN?

8 AND HE SAID, WELL, I COULD SEE
9 SOME PILLOWS, WHAT APPEARED TO BE PILLOWS OR POSSIBLY TIRES
10 IN THE BACK OF THE VAN.

11 Q WHAT DID YOU ASK HIM ABOUT THE INTERIOR
12 OF THE VAN AFTER HE TOLD YOU THAT THERE MIGHT BE PILLOWS
13 OR TIRES IN THE BACK OF THE VAN?

14 A WOULDN'T -- I DIDN'T DISCUSS IT ANY
15 FURTHER WITH HIM.

16 Q NOW, THE FIRST DISCUSSION THAT YOU --
17 THAT HE SAID THERE WAS NOTHING UNUSUAL, THE SECOND DISCUSSION
18 HE SAID THERE WAS NOTHING UNUSUAL, THE THIRD DISCUSSION HE
19 SAID THAT THERE WERE PILLOWS OR TIRES IN THE BACK; IS THAT
20 RIGHT?

21 A RIGHT.

22 Q A FAIR GENERAL ASSESSMENT?

23 A RIGHT.

24 Q WHAT DID HE SAY THE FOURTH TIME YOU ASKED
25 HIM ABOUT IT?

26 A I DON'T RECALL ASKING HIM THAT SPECIFIC
27 QUESTION AGAIN. IF I -- IF IT CAME UP, IT WAS JUST -- WE
28 JUST KIND OF TALKED BACK AND FORTH FOR A FEW MINUTES; GENERAL
29 CONVERSATION.

30 Q COURT'S INDULGENCE.

31 MAY I APPROACH THE WITNESS?

32 LET ME SHOW YOU, MR. KIDD, STATE'S

1 EXHIBITS 8, 10, AND 14.

2 WITH REGARDS TO STATE'S EXHIBIT 14,
3 WHICH IS A PICTURE OF THE EMPTY FLOOR OF THE VAN --

4 A YES.

5 Q (CONTINUING) -- DID YOU SHOW HIM, MR.
6 MORENO, THAT PHOTOGRAPH AND ASK IF THAT APPEARED TO LOOK
7 ANYTHING LIKE THE VAN ON THAT PARTICULAR MORNING?

8 A NO. I HAD NO PHOTOGRAPHS OF THE VAN
9 AVAILABLE TO ME.

10 Q WELL, JUST FOR THE RECORD, LET ME ASK
11 YOU IF, WOULD STATE'S EXHIBITS 8 AND 10, YOU WERE ABLE TO
12 SHOW MR. MORENO EITHER OF THOSE PHOTOGRAPHS TO ASK HIM
13 WHETHER OR NOT ON THE MORNING HE LOOKED INTO THE VAN IT
14 APPEARED TO LOOK ANYTHING LIKE EITHER OF THOSE PICTURES?

15 A NO.

16 Q THANK YOU.

17 WHEN YOU LOOKED THROUGH
18 DEFENDANT'S EXHIBIT C, HOW LONG DID IT TAKE YOU TO LOOK
19 THROUGH THAT PARTICULAR EXHIBIT?

20 A I BELIEVE IT WAS THERE POSSIBLY FOR ABOUT
21 20 MINUTES. I BELIEVE THAT'S HOW LONG.

22 Q AND HOW MANY CARDS ARE CONTAINED IN
23 EXHIBIT C?

24 A I COULDN'T REALLY TELL YOU. I BELIEVE
25 MR. CHAPMAN MENTIONED THAT THERE WAS ABOUT 60 CARDS A DAY.
26 AND THAT COVERS FOUR DAYS. SO MAYBE 240 CARDS.

27 Q WOULD IT SURPRISE YOU IF THERE WERE 300
28 CARDS IN THERE?

29 A NO, IT WOULDN'T.

30 Q AND IT TOOK YOU ABOUT 20 MINUTES TO GO
31 THROUGH THEM ALL?

32 A YES.

1 Q AND WHEN YOU BEGAN TO GO THROUGH THEM
2 WHAT WAS IN YOUR MIND? WHAT WERE YOU LOOKING FOR?

3 A I WAS LOOKING FOR ANYTHING UNUSUAL,
4 A NEW YORK LICENSE PLATE, ANY OF THE -- THE NAMES THAT I HAD
5 BEEN GIVEN TO LOOK FOR.

6 Q WHAT NAMES WERE YOU GIVEN TO LOOK FOR?

7 A EITHER THE -- ANY NAME WITH DAWANA IN IT,
8 OF COURSE; AND DAWANA THOMAS; DEBBIE JACKSON; DAWANA BOYD.

9 Q ANY OTHER NAMES?

10 A THE DEFENDANT'S NAME, SAMUEL HOWARD,
11 SAMUEL BOYD, HAROLD STANDBACK.

12 Q AND SO YOU WERE LOOKING FOR ANYTHING
13 UNUSUAL. YOU WERE LOOKING FOR THOSE SPECIFIC NAMES? YOU
14 WERE LOOKING FOR LICENSE NUMBERS?

15 A RIGHT.

16 Q ANYTHING ELSE?

17 A THAT WAS BASICALLY IT.

18 Q AND IT TOOK YOU 20 MINUTES TO DO THAT,
19 TO GO THROUGH THE STACK OF 250 OR 300?

20 A APPROXIMATELY. IT COULD HAVE BEEN A
21 LITTLE FASTER OR A LITTLE LONGER.

22 Q DID YOU NOTICE, AS YOU WENT THROUGH
23 THERE, COULD YOU TELL US IF IN THAT STACK THERE IS THE NAME
24 OF DEBBIE JACKMAN (SIC)?

25 A DEBBIE JACKMAN?

26 Q JACKMAN.

27 A NO, I DON'T BELIEVE SO. I DON'T RECALL
28 ANY NAMES DEBBIE.

29 Q COULD THERE HAVE BEEN A NAME OF DEBBIE
30 JACKMAN OR ANYTHING -- WHAT I REALLY WANT TO ASK YOU IS,
31 COULD THERE BE -- COULD THERE BE IN THAT STACK --

32 MR. FRANZEN: YOUR HONOR, I'D OBJECT. THIS IS

1 SPECULATIVE.

2 THE COURT: LET HIM ASK HIS QUESTION, COUNSEL.

3 MR. FRANZEN: CAN THERE BE --

4

5 BY MR. SEATON:

6 Q WAS THERE, DO YOU RECALL, IN THE STACK
7 OF 300 EXHIBITS, OR 300 PAGES IN DEFENDANT'S EXHIBIT C, WERE
8 THERE ANY NAMES THAT ARE SIMILAR TO ANY OF THESE NAMES OR
9 WERE YOU RULING THOSE OUT, ALSO?

10 A I'M SORRY. I COULDN'T TELL YOU THAT IF
11 THERE IS.

12 IN WHAT WAY DO YOU MEAN SIMILAR?

13 Q WELL, LIKE THE LAST NAME OF JACKMAN OR
14 SOMETHING CLOSE TO JACKSON.

15 A WELL, I BELIEVE THERE WERE TWO CARDS IN
16 THE NAME OF JACKSON. AND I THINK --

17 Q AND WHAT WERE THE FIRST NAMES ON THOSE?

18 A I THINK ONE WAS ANTHONY AND I BELIEVE
19 THE OTHER WAS A BARBARA.

20 Q AND WERE THERE ANY NAMES, ANY CARDS,
21 IN THE LAST NAME OF THOMAS?

22 A I REALLY DON'T RECALL.

23 Q WERE THERE ANY CARDS IN THE LAST NAME
24 OF BOYD?

25 A I DON'T BELIEVE SO.

26 Q WERE THERE ANY CARDS IN THE LAST NAME
27 OF HOWARD?

28 A NO. I DON'T BELIEVE THERE WERE.

29 MR. HARMON: COURT'S INDULGENCE.

30

31 BY MR. SEATON:

32 Q MR. KIDD, HAVE YOU HAD ANY EXPERIENCE OR

1 TRAINING IN THE AREA OF HANDWRITING?

2 A NO, I HAVEN'T.

3 Q ARE YOU A HANDWRITING EXPERT?

4 A NO, I'M NOT.

5 Q DO YOU KNOW WHAT DAWANA THOMAS' HAND-
6 WRITING LOOKS LIKE?

7 A I DON'T BELIEVE I'VE EVER SEEN IT.

8 Q SO IF HER HANDWRITING WERE ON ONE OF
9 THOSE THREE CARDS, IN STATE'S -- IN DEFENSE EXHIBIT C, YOU
10 WOULDN'T BE AWARE OF IT?

11 A NO, I WOULDN'T.

12 MR. SEATON: I HAVE NOTHING FURTHER.

13 MR. FRANZEN: NOTHING, YOUR HONOR.

14 THE COURT: YOU ARE EXCUSED.

15 (WHEREUPON, THE WITNESS WAS
16 EXCUSED.)

17
18 THE COURT: CALL YOUR NEXT WITNESS.

19 MR. COOPER: YOUR HONOR, WE WOULD CALL THE
20 DEFENDANT, SAMUEL HOWARD.

21 THE COURT: MR. HOWARD, COME FORWARD, SIR.

22 THE CLERK: RAISE YOUR RIGHT HAND, SIR.

23 DO YOU SOLEMNLY SWEAR TO TELL THE TRUTH,
24 THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH SO HELP YOU GOD?

25 DEFENDANT HOWARD: DO I SWEAR IN --

26 THE COURT: ADMINISTER THE AFFIRMATION.

27 THE CLERK: YES, SIR.

28 RAISE YOUR RIGHT HAND.

29 ..

30 ..

31 ..

32 ..

1 WHEREUPON,

2 SAMUEL HOWARD,

3 HAVING BEEN CALLED BY THE DEFENDANT, AFFIRMED TO TELL THE
4 TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, WAS
5 EXAMINED AND TESTIFIED AS FOLLOWS:

6 THE CLERK: YOU MAY BE SEATED.

7 THE COURT: PROCEED.

8 MR. COOPER: THANK YOU.

9
10 DIRECT EXAMINATION

11
12 BY MR. COOPER:

13 Q WOULD YOU STATE YOUR NAME AND SPELL
14 YOUR LAST NAME FOR THE RECORD, PLEASE?

15 A SAMUEL HOWARD, H-O-W-A-R-D.

16 Q HOW OLD ARE YOU, MR. HOWARD?

17 A THIRTY-FOUR.

18 Q MR. HOWARD, I WANT TO DIRECT YOUR
19 ATTENTION TO MARCH 26 OF 1980. CAN YOU TELL US IF YOU WERE
20 IN LAS VEGAS ON THAT DAY?

21 A I CAN'T ACTUALLY RECALL THAT DATE,
22 BUT I KNOW I WAS IN LAS VEGAS.

23 Q DO YOU RECALL DURING WHAT PERIOD OF
24 TIME YOU WERE IN LAS VEGAS?

25 A WELL, I WAS HERE I THINK THE LATTER PART
26 OF '79 AND THE BEGINNING OF '80. YEAH, BUT THE DATE I'M
27 NOT SURE.

28 Q IT'S POSSIBLE YOU COULD HAVE BEEN IN
29 LAS VEGAS ON MARCH 26TH OF 1980?

30 A IT'S POSSIBLE.

31 Q I SEE.

32 DURING 1980, WHILE YOU WERE IN

1 LAS VEGAS, WERE YOU HERE ALONE OR WERE YOU WITH SOMEONE?
2 A I WAS HERE WITH SOMEONE, YES.
3 Q AND WHO WERE YOU WITH?
4 A DAWANA.
5 Q WOULD THAT BE --
6 A HER BROTHER, EXCUSE ME.
7 Q WOULD THAT BE DAWANA THOMAS, THE YOUNG
8 LADY WHO TESTIFIED EARLIER IN THESE PROCEEDINGS?
9 A DAWANA HOWARD, DAWANA THOMAS; AND HER
10 BROTHER AND THE KIDS.
11 Q WHAT'S DAWANA'S BROTHER'S NAME?
12 A LONNIE.
13 Q DO YOU KNOW WHERE LONNIE LIVES?
14 A TUCSON, ARIZONA.
15 Q CAN YOU DESCRIBE LONNIE FOR US?
16 A AH, HE'S ABOUT FIVE-EIGHT, FIVE-NINE;
17 DARK COMPLEXION OR DARKER THAN I AM; AND AFRO; AROUND 24 --
18 24, 25.
19 Q DO YOU RECALL IF -- DID THERE COME A TIME
20 WHEN YOU LEFT LAS VEGAS IN 1980?
21 A A NUMBER OF TIMES.
22 Q WOULD YOU GO AND COME BACK, GO AND COME
23 BACK?
24 A A NUMBER OF OCCASIONS.
25 Q ABOUT HOW MANY OCCASIONS WOULD YOU SAY
26 YOU LEFT LAS VEGAS AND RETURNED?
27 A I -- I CAN'T RECALL. BUT I GUESS AROUND
28 ABOUT EIGHT TO TEN.
29 Q IS IT YOUR TESTIMONY YOU CANNOT SPECIFI-
30 CALLY RECALL BEING IN LAS VEGAS ON MARCH 26TH OF 1980?
31 A NO. NOT THAT SPECIFIC DATE I'M NOT SURE.
32 Q DO YOU RECALL BEING IN LAS VEGAS IN

1 MARCH OF 1980?

2 A I COULD HAVE BEEN, BUT THE DATE I'M
3 NOT SURE OF.

4 Q WHILE IN LAS VEGAS EITHER PART OF 1980,
5 DID YOU HAVE OCCASION TO GO TO A SEARS STORE LOCATED NEAR
6 MARYLAND PARKWAY AND DESERT INN ROAD?

7 A OH, THE LOCATION I DON'T KNOW. I WENT
8 TO A NUMBER OF SEARS STORES AND MALLS. I DON'T KNOW IF THAT
9 WAS THE PARTICULAR ONE. BUT I WOULD HAVE GONE TO A NUMBER
10 OF THEM.

11 Q MR. HOWARD, YOU HEARD THE TESTIMONY OF
12 ONE KEITH KINSEY EARLIER IN THESE PROCEEDINGS; IS THAT
13 CORRECT?

14 A YES.

15 Q DID YOU HEAR MR. KINSEY TESTIFY THAT
16 ON MARCH 26TH OF 1980 YOU ENTERED THE SEARS STORE LOCATED
17 AT THE BOULEVARD MALL?

18 A OKAY. OKAY.

19 Q DID YOU -- DID YOU HEAR HIM TESTIFY TO
20 THAT?

21 A YES, YES.

22 Q WAS HE TELLING THE TRUTH?

23 A HE COULD HAVE BEEN, 'CAUSE I KIND OF
24 REMEMBER THE INCIDENTS, NOT CHRONOLOGICALLY, BUT I REMEMBER
25 RECALLING AN INCIDENT WHERE I HAD HASSLES, YOUR KNOW, IN
26 THE STORE, I DON'T KNOW WHICH STORE IT WAS.

27 Q DID YOU HEAR MR. KINSEY TESTIFY THAT ON
28 MARCH 26TH OF 1980, WHILE IN THE SECURITY OFFICE AT THE
29 SEARS STORE IN THE BOULEVARD MALL, YOU ROBBED HIM OF HIS
30 WALKIE-TALKIE AND BADGE. DID YOU HEAR HIM TESTIFY TO THAT,
31 SIR?

32 A YES, I DID.

1 Q WAS HE TELLING THE TRUTH WHEN HE SO
2 TESTIFIED?

3 A OKAY. AGAIN, I'M NOT SURE, OKAY,
4 'CAUSE WHEN I HAD THIS HASSLE I FLASHBACK TO VIETNAM. YOU
5 KNOW, I HAD FLASHBACKS OF VIETNAM. YOU KNOW, I THOUGHT, YOU
6 KNOW, ALL OF A SUDDEN THESE PEOPLE GATHER AROUND ME AND THEY
7 TEND TO JUST MAKE ME -- REMIND ME OF THAT. AND I JUST SIMPLY
8 DIDN'T RECALL WHAT HAPPENED, YOU KNOW. BUT I DON'T THINK
9 THAT I ACTUALLY ROBBED NOBODY BUT IT COULD HAVE HAPPENED.

10 Q ARE YOU SAYING --

11 A AS A MATTER OF FACT, I GAVE A STATEMENT
12 TO THIS EFFECT TO DETECTIVE AL LEAVITT IN CALIFORNIA. NOW,
13 HE TOOK THE STAND BUT HE NEVER SAID IT. I HAVE THE STATEMENT
14 ALSO IN MY PROPERTY.

15 Q IS IT YOUR TESTIMONY THAT WHILE YOU
16 MIGHT HAVE COMMITTED THIS ROBBERY OF MR. KINSEY AT THE SEARS
17 STORE ON MARCH 26TH OF 1980, YOU HAVE NO RECOLLECTION OF THAT?

18 A NO, I HAVE NO RECOLLECTION. BUT I COULD
19 HAVE -- LIKE -- I CAN'T REMEMBER, YOU KNOW, IF I DID OR NOT,
20 BUT IT'S A POSSIBILITY THAT I DID.

21 Q I WANT TO DIRECT YOUR ATTENTION TO THE
22 FOLLOWING DAY, MR. HOWARD, MARCH 27TH OF 1980. DO YOU RECALL
23 IF YOU WERE IN LAS VEGAS ON THAT DAY?

24 A OKAY. IF -- OKAY. IF THIS HAPPENED ON
25 THE 26TH, I THINK THAT I LEFT LAS VEGAS IMMEDIATELY THAT
26 EVENING BECAU- -- THAT AFTERNOON BECAUSE THERE WAS HELICOPTERS
27 IN PURSUIT AND I FELT THAT I HAD CRIMES COMMITTED AGAINST ME
28 IN NEW YORK AND I JUMPED BAIL AND I DIDN'T WANT TO GET ARRESTED.
29 SO RIGHT AWAY I JUST LEFT AND WENT TO CALIFORNIA.

30 Q DO YOU RECALL --

31 A ON THE --

32 Q EXCUSE ME. DO YOU RECALL IF ON MARCH 26TH

1 OF 1980, IN THE EVENING HOURS AROUND 8:00 O'CLOCK OR SO,
2 HAVING MET A GENTLEMAN THERE WHO HAD A VAN FOR SALE AT
3 CAESARS PALACE.

4 A NO.

5 Q YOU HAVE NO RECOLLECTION OF THAT?

6 A NO. BUT I REMEMBER DOCTOR -- DETECTIVE
7 AL LEAVITT SHOWING ME PICTURES OF VANS AND ASKED ME DID I
8 RECALL VANS?

9 AND I SAID, I THINK I REMEMBER
10 SOME VANS BUT NOT IN PARTICULAR.

11 AND -- WELL, GO ON, ASK YOUR
12 QUESTION.

13 Q DID YOU, ON MARCH 27 OF 1980, HAVE
14 OCCASION TO MEET DOCTOR MONAHAN IN THE VICINITY OF -- THE
15 VICINITY OF THE 1700 BLOCK OF DESERT INN ROAD HERE IN LAS
16 VEGAS?

17 A NO.

18 Q DID YOU, AT GUNPOINT, ROB DOCTOR MONAHAN?

19 A NO.

20 Q MR. HOWARD, DID YOU SHOOT AND KILL DOCTOR
21 MONAHAN?

22 A NO.

23 Q DID YOU HAVE PRIOR FELONY CONVICTIONS,
24 MR. HOWARD?

25 A YES. I'M PRESENTLY DOING TIME OUT IN
26 THE STATE OF CALIFORNIA, AS YOU SEE I'M DRESSED IN MY PRISON
27 CLOTHES NOW FOR.

28 Q WHAT WERE YOU CONVICTED OF IN THE STATE
29 OF CALIFORNIA?

30 A WELL, THEY HAVE PRINTED IN THE PAPER
31 HERE THAT IT WAS KIDNAP, ROBBERY OR CAR THEFT; BUT IT'S NOT
32 ACCURATE.

1 Q WHAT WERE YOU ACTUALLY CONVICTED OF, SIR?

2 A CAR THEFT AND ROBBERY.

3 Q DO YOU HAVE ADDITIONAL FELONY CONVICTIONS?

4 A IN ABSENCIA, IN NEW YORK, THEY CONVICTED
5 ME OF POSSESSION OF STOLEN PROPERTY, GAMBLING RECEIPTS, A
6 ROBBERY; I THINK THAT'S ABOUT IT.

7 Q I SEE.

8 YOU HEARD THE TESTIMONY OF DWANA
9 BOYD EARLIER IN THESE PROCEEDINGS THAT ON MARCH 27 OF 1980
10 SHE DROPPED YOU OFF NEAR A DENTIST OFFICE ON DESERT INN ROAD
11 IN LAS VEGAS, NEVADA; IS THAT TRUE, SIR?

12 A THAT'S FALLIBLE, INCORRECT.

13 Q DID YOU -- YOU HEARD MRS. BOYD -- EXCUSE
14 ME, MS. THOMAS TESTIFY THAT ON THE MORNING OF MARCH 27 OF
15 1980 YOU RETURNED TO A ROOM AT THE WESTERN 6 MOTEL, I BELIEVE,
16 AND THAT YOU HAD IN YOUR POSSESSION A C.B. RADIO, A WALLET
17 CONTAINING SEVERAL CREDIT CARDS, I BELIEVE, AND A WATCH.
18 DID YOU HEAR THAT TESTIMONY, MR. HOWARD?

19 A I HEARD THE TESTIMONY, YES.

20 Q IS THAT TESTIMONY TRUE?

21 A IT'S INCORRECT.

22 MR. COOPER: I HAVE NO FURTHER QUESTIONS OF THE
23 WITNESS, YOUR HONOR.

24 THE COURT: CROSS.

25 MR. HARMON: THANK YOU, YOUR HONOR.

26

27 CROSS EXAMINATION

28

29 BY MR. HARMON:

30 Q MR. HOWARD, YOU HAVE BEEN CONVICTED IN
31 THE STATE OF CALIFORNIA OF TWO FELONIES?

32 A THREE, WHATEVER.

1 Q IS THAT --
2 A I'M NOT SURE.
3 Q WERE YOU CONVICTED OF UNLAWFUL DRIVING
4 OR TAKING OF A MOTOR VEHICLE?
5 A YES.
6 Q WERE YOU ALSO CONVICTED OF ROBBERY WITH
7 USE OF A WEAPON?
8 A YES.
9 Q THAT WEAPON BEING A FIREARM?
10 A YES.
11 Q NOW, YOU STATED YOU ALSO HAVE BEEN
12 CONVICTED OF A FELONY IN THE STATE OF NEW YORK; IS THAT
13 CORRECT?
14 A IN ABSENCIA, YES.
15 Q WHAT DO YOU MEAN BY "IN ABSENCIA"?
16 A WELL, I WAS OUT ON A \$10,000 BAIL AND
17 I JUMPED BAIL.
18 Q BUT YOU SAT THROUGH THE FIRST TWO DAYS
19 OF THE TRIAL AND THEN YOU TOOK OFF; IS THAT CORRECT?
20 A I BELIEVE SO. I DON'T REMEMBER HOW MANY
21 DAYS IT WAS.
22 Q AND THEY CONTINUED WITH THE TRIAL AND
23 CONVICTED YOU, EVEN THOUGH YOU WERE ABSENT; IS THAT TRUE?
24 A I THINK PRETTY MUCH.
25 Q OF ROBBERY WITH USE OF A WEAPON?
26 A I DON'T KNOW WHAT PACIFICALLY (SIC) IT
27 WAS, BUT I KNOW IT WAS ROBBERY AND POSSESSION.
28 Q WELL, IT WAS A QUEENS NURSE, A QUEENS
29 COLLEGE NURSE, NAMED DOROTHY WEISBAND; WAS IT NOT?
30 A YES.
31 Q AND YOU ROBBED HER AT GUNPOINT?
32 A NO. I DIDN'T ROB HER AT GUNPOINT.

1 MR. COOPER: YOUR HONOR, I'M GOING TO ENTER --
2 ENTER AN OBJECTION AT THIS POINT. I THINK COUNSEL IS GOING
3 A BIT FAR WITH HIS QUESTIONS.

4 MR. HARMON: YOUR HONOR, THE DEFENDANT SAID
5 HE JUMPED BAIL IN THE STATE OF NEW YORK. HE VOLUNTEERED THAT.

6 THE COURT: I UNDERSTAND THAT, BUT YOU'RE NOT
7 ENTITLED TO GO INTO DETAIL, COUNSEL.

8 THE OBJECTION IS SUSTAINED,

9
10 BY MR. HARMON:

11 Q MR. HOWARD, IT'S YOUR TESTIMONY NOW THAT
12 YOU HAVE NO SPECIFIC RECOLLECTION OF BEING AT THE SEARS STORE
13 IN LAS VEGAS, NEVADA, WHICH IS LOCATED IN THE BOULEVARD
14 MALL?

15 A WELL, VERY VAGUE. MY MEMORY IS NOT AS
16 GOOD AS YOUR WITNESS' MEMORY. IT'S BEEN OVER THREE YEARS.
17 BUT IF YOU GO INTO DETAIL MAYBE I COULD ANSWER TO THE BEST
18 OF MY KNOWLEDGE BECAUSE I HAVE NOTHING TO HIDE. I'M GOING
19 TO TELL THE TRUTH NO MATTER WHAT, MR. HARMON.

20 Q YOU WERE INTERVIEWED BY DETECTIVE AL
21 LEAVITT --

22 A LEAVITT, YEAH.

23 Q (CONTINUING) -- OF THE LAS VEGAS METRO-
24 POLITAN POLICE DEPARTMENT ON APRIL THE 2ND, 1980?

25 A I DON'T REMEMBER THE DATE.

26 Q HE INTERVIEWED YOU IN SAN BERNARDINO?

27 A YES.

28 Q CALIFORNIA.

29 A YES.

30 Q IT WAS SHORTLY AFTER YOU'D BEEN ARRESTED
31 BY DOWNEY POLICE IN DOWNEY, CALIFORNIA?

32 A YES. AH, YEAH.

1 Q DIDN'T YOU TELL DETECTIVE LEAVITT IN
2 SAN BERNARDINO, CALIFORNIA, THAT YOU RECALLED BEING IN A
3 DEPARTMENT STORE IN LAS VEGAS AND PULLING A GUN ON THREE OR
4 FOUR GUYS, AND YOU RECALLED TAKING A RADIO AND TAKING A
5 BADGE THAT LOOKED LIKE A POLICEMAN'S BADGE?

6 A I DON'T RECALL TELLING THEM THAT, BUT I
7 COULD HAVE. SIMPLE FACT --

8 Q YOU'RE SAYING NOW YOU HAVE NO RECOLLECTION
9 --

10 MR. FRANZEN: YOUR HONOR, I'M -- LET THE WITNESS
11 COMPLETE THE ANSWER.

12 MR. HARMON: YOUR HONOR, IT CALLED FOR YES OR NO.

13 THE COURT: THIS IS CROSS, COUNSEL.

14 PROCEED.

15

16 BY MR. HARMON:

17 Q YOU'RE SAYING YOU HAVE NO RECOLLECTION
18 NOW OF TELLING DETECTIVE LEAVITT WHAT I JUST RELATED?

19 A I COULD HAVE, BUT I CAN'T RECALL TELLING
20 HIM BECAUSE IT'S ALL POSSIBILITIES, SIR, AND PLUS THE FACT IF
21 I DID I CERTAINLY WOULD BE AWARE OF IT SINCE THIS INDICENT.

22 MR. HARMON: YOUR HONOR, HE'S ANSWERED THE
23 QUESTION.

24 THE COURT: YOU'VE ANSWERED THE QUESTION?

25 DEFENDANT HOWARD: YES.

26

27 BY MR. HARMON:

28 Q YOU'VE ALSO STATED YOU NEVER MET DOCTOR
29 GEORGE STEPHEN MONAHAN?

30 A I HEARD THE NAME BEFORE. WOULD YOU
31 LIKE ME TO GO INTO DETAIL?

32 Q NO.

BUT YOU'VE TESTIFIED YOU HAVEN'T

1 MET HIM?

2 A NO, I HAVEN'T.

3 Q YOU NEVER HAD ANY CONTACT WITH HIM?

4 A NO, SIR.

5 Q WHEN ASKED IF YOU ROBBED HIM AND
6 MURDERED HIM YOU SAID NO; IS THAT CORRECT?

7 A NO.

8 Q YOU SPECIFICALLY REMEMBER THAT YOU
9 DIDN'T NOW?

10 A NO, I DIDN'T.

11 Q DIDN'T YOU TELL DETECTIVE LEAVITT DURING
12 THE SAME INTERVIEW IN SAN BERNARDINO, CALIFORNIA, WHEN HE
13 SHOWED YOU A PICTURE OF THE VAN AND, IN FACT, ACCUSED YOU
14 OF KILLING DOCTOR MONAHAN, DIDN'T YOU SAY, QUOTE, "I'M NOT
15 DENYING KILLING SOMEONE IN LAS VEGAS" --

16 A I SAID I WAS --

17 Q (CONTINUING) -- "I COULD HAVE KILLED
18 SOMEONE IN LAS VEGAS, HOWEVER I DO NOT RECALL WHETHER I DID
19 OR NOT", END OF QUOTATION.

20 A OKAY, SIR. I REMEMBER SAYING --

21 Q IS THAT WHAT YOU SAID TO DETECTIVE
22 LEAVITT?

23 A I CAN'T RECALL SAYING THAT IN SPECIFIC.
24 I CAN'T RECALL IT.

25 Q BUT YOU ARE SAYING SPECIFICALLY NOW THAT
26 YOU REMEMBER THAT YOU DID NOT KILL OR ROB DOCTOR MONAHAN?

27 A I'M NOT THAT CALLOUS, SIR, TO KILL
28 ANY HUMAN BEING. I DID ENOUGH OF THAT IN VIETNAM. SO I
29 DON'T WANT TO DO IT HERE.

30 Q WERE YOU EVER EMPLOYED AS A SECURITY
31 GUARD BY CAESARS PALACE?

32 A NO. I WOULDN'T TAKE SUCH A LOW POSITION.

1 Q WERE YOU EVER EMPLOYED AS A SECURITY
2 GUARD BY THE BURNS SECURITY AGENCY IN NEW YORK?

3 A NO.

4 Q HAVE YOU EVER USED THE ALIAS GEORGE
5 WILLIAMS?

6 A I THINK SO.

7 Q HAROLD STANBACK?

8 A I BELIEVE SO.

9 Q ELIJAH GILL?

10 A YEAH, DEFINITELY.

11 Q MR. HOWARD, DURING THE LATTER PART OF
12 1979 AND THE EARLY PART OF 1980 WHEN YOU REMEMBER BEING IN
13 LAS VEGAS, NEVADA, WHAT WAS YOUR MEANS OF SUPPORT, SIR?

14 A I WORKED FOR MR. B'S CLOTHES DOWN ON
15 FREMONT, FREMONT AND SIXTH -- SIXTH OR SEVENTH STREET.

16 Q WHERE DID YOU STAY DURING THAT PERIOD OF
17 TIME?

18 A AT THE ELDORADO, AND THEN EVENTUALLY I
19 GOT AN APARTMENT DOWN ON FREMONT AT 5100, I'M NOT SURE WHAT
20 NUMBER, BUT THE -- THE NEW APARTMENTS DOWN ON FREMONT NEAR
21 EASTERN; ME AND DWANA.

22 Q DWANA THOMAS?

23 A YES.

24 Q NOW, YOU'VE INDICATED THAT YOU'RE WHAT?
25 THIRTY-FOUR YEARS OF AGE?

26 A YES.

27 Q DURING MARCH OF 1980 WHAT WAS YOUR
28 APPROXIMATE WEIGHT AND HEIGHT?

29 A OH, I WOULDN'T RECALL EXACTLY. BUT I'VE
30 ALWAYS BEEN, I THINK, AROUND 160, AROUND 175.

31 Q AND HOW TALL ARE YOU?

32 A FIVE, ELEVEN.

1 Q HAVE YOU SEEN THE MAN'S LEATHER JACKET
2 WHICH IS IN EVIDENCE?

3 A YES, THE JACKET.

4 Q IS THAT YOUR LEATHER JACKET?

5 A I DON'T REMEMBER IT. I DON'T KNOW
6 SPECIFICALLY IT'S MINE. I'D HAVE TO SEE IT. MAYBE I'LL KNOW.

7 MR. HARMON: MAY I HAVE THE COURT'S INDULGENCE?

8 THE COURT: YOU MAY.

9
10 BY MR. HARMON:

11 Q THIS ARTICLE OF CLOTHING IS IN EVIDENCE
12 AS STATE'S EXHIBIT 44-A. IS THIS YOUR JACKET, SIR?

13 A LET'S SEE IT FIRST, SIR. I'M NOT LIKE
14 YOUR WITNESSES. I HAVEN'T REHEARSED IT.

15 I'M NOT SURE. I HAD A JACKET
16 BEFORE THAT, BUT I'M NOT SURE THAT THAT'S MY JACKET.

17 Q I'M SHOWING YOU STATE'S EXHIBIT 60
18 THROUGH 63. IT'S A BLACK OLDSMOBILE CUTLASS. DO YOU RECOGNIZE
19 THAT VEHICLE?

20 A YES, I DO.

21 Q YOU WERE DRIVING THAT FOR A PERIOD OF
22 TIME IN LAS VEGAS, NEVADA; WERE YOU NOT?

23 A YES, SIR. I THINK SO, YES.

24 Q IN FACT, YOU AND DAWANA THOMAS WERE USING
25 THAT VEHICLE WHEN YOU WERE ARRESTED APRIL THE 1ST, 1980, IN
26 DOWNEY, CALIFORNIA?

27 A YES, SIR. ALL THREE OF US WAS USING IT.

28 LET ME SEE THEM, PLEASE.

29 Q WHO IS ALL THREE OF US?

30 A YEAH. THAT'S IT.

31 ME, DAWANA AND LONNIE.

32 Q WHAT'S LONNIE'S LAST NAME?

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A BOYD.

Q LONNIE BOYD IS A MAN YOU SAID HAVE AN AFRO AND IS ABOUT FIVE, EIGHT OR FIVE FEET NINE?

A YES.

Q HOW OLD IS HE?

A AROUND 24, 25.

Q IS IT YOUR TESTIMONY THAT DURING THE ENTIRE PERIOD OF TIME YOU WERE IN LAS VEGAS, NEVADA, DURING THE LATTER PART OF 1979 AND THE EARLY PART OF 1980 WITH DAWANA THOMAS, THAT HER TWO CHILDREN AND HER BROTHER, LONNIE BOYD, WERE ALSO PRESENT?

A REPEAT THAT AGAIN.

Q DURING WHAT PERIOD OF TIME WAS LONNIE BOYD, THE BROTHER OF DAWANA THOMAS, PRESENT WITH YOU IN LAS VEGAS?

A WELL, I WAS HERE, LET'S SEE, THE LATTER PART OF '79, BEGINNING OF '80. THE MONTHS I CAN'T RECALL. LET'S SEE.

Q WAS HE STAYING WITH THE THREE OF YOU?

A AT ONE POINT, YES.

Q AT WHAT POINT?

A UNTIL HE DISAPPEARED.

Q WELL, WHEN DID HE DISAPPEAR?

A I CAN'T REMEMBER PACIFIC (SIC) DATE BUT HE LEFT BEFORE US. HE JUST LEFT. IT WASN'T ENOUGH ROOM.

Q HOW MUCH PRIOR TO YOUR ARREST BY POLICE OFFICERS OF THE DOWNEY POLICE DEPARTMENT IN THE STATE OF CALIFORNIA WAS IT THAT LONNIE BOYD DISAPPEARED?

A AH, I CAN'T RECALL.

Q ARE YOU TALKING ABOUT DAYS? WEEKS? A MONTH?

A IT WASN'T MONTHS. SO ROUGHLY IT WOULD

1 HAVE TO BE WEEKS, I IMAGINE.

2 Q WEEKS, NOT DAYS?

3 A NO, NOT DAYS.

4 DON'T QUOTE ME ON THAT, BUT
5 I KNOW IT WASN'T A MONTH AND IT WAS MORE THAN DAYS.

6 Q AT LEAST A WEEK PRIOR TO YOUR ARREST?

7 A AT LEAST.

8 YOUR HONOR, COULD I HAVE A
9 GLASS OF WATER, PLEASE? THANK YOU.

10 Q MR. HOWARD, WHEN YOU WERE IN LAS VEGAS,
11 NEVADA, DID YOU HAVE A FIREARM?

12 A OKAY. I CAN'T REMEMBER THE TYPE OF
13 FIREARM. I HAD A NUMBER OF FIREARMS.

14 Q HAVE YOU SEEN THE GUN WHICH IS IN
15 EVIDENCE AS STATE'S EXHIBIT 31-B?

16 A YES.

17 Q DID YOU HAVE THAT GUN?

18 A I DON'T REMEMBER THAT GUN AT ALL.

19 Q DIDN'T YOU, IN FACT, TELL DETECTIVE
20 LEAVITT WHEN HE INTERVIEWED YOU IN SAN BERNARDINO, CALIFORNIA,
21 THAT YOU HAD A GUN IN LAS VEGAS, NEVADA?

22 A YES. I REMEMBER TELLING HIM I HAD A
23 FEW GUNS. I HAD, AH, HANDGUNS, AUTOMATIC M-16'S, THOMPSONS,
24 ALL SORTS OF GUNS.

25 Q ARE YOU TALKING ABOUT HAVING AN M-16
26 WHILE YOU WERE IN LAS VEGAS, NEVADA?

27 A YES, I BELIEVE SO.

28 Q WHAT IS AN M-16?

29 A IT'S A -- WELL, IT'S A -- THE TYPE THAT
30 I USED IN THE MARINE CORPS AFTER THEY TRANSFERRED -- TRANS-
31 FERRED FROM M-1 -- M-14'S, I'M SORRY.

32 Q WHAT WERE YOU DOING WITH AN M-16?

1 A SELLING IT. BUYING THEM AND SELLING
2 THEM FOR A PROFIT.

3 Q YOU SAID YOU HAD A THOMPSON?

4 A YES.

5 Q WHAT DO YOU MEAN BY THAT?

6 A SUBMACHINE GUN.

7 Q YOU HAD A THOMPSON SUBMACHINE GUN WHILE
8 YOU WERE IN LAS VEGAS?

9 A I DON'T KNOW IF I HAD SPECIFICALLY
10 WHILE I WAS HERE, BUT I KNOW I HAD ON OCCASION.

11 Q YOU SAID YOU HAD VARIOUS AUTOMATICS?

12 A MANY.

13 Q NOW, STATE'S EXHIBIT 31-B IS A .357
14 MAGNUM.

15 A YES.

16 Q SMITH & WESSON REVOLVER?

17 A YES.

18 Q SPECIFICALLY DID YOU HAVE THAT GUN?

19 A I'M NOT SURE IF I HAD THAT GUN OR NOT.
20 BUT I HAD QUITE A FEW .357 MAGNUMS, REMINGTONS, SMITH & WESSONS.

21 Q DO YOU RECALL WHERE YOU WERE ARRESTED ON
22 APRIL THE 1ST, 1980 BY THE DOWNEY POLICE DEPARTMENT?

23 A YES, L.A. COUNTY.

24 Q AT A SHOPPING CENTER, THE STONEWOOD
25 SHOPPING CENTER?

26 A YES. YES.

27 Q DO YOU REMEMBER BEING IN A THRIFTY DRUG
28 STORE THERE?

29 A NO. BUT IT'S ON THE REPORT. I DON'T
30 REMEMBER BEING -- ACTUALLY BEING THERE.

31 Q WELL, DIDN'T YOU, IN FACT, HIDE A GUN
32 IN THE THRIFTY DRUG STORE?

1 A NO, I DIDN'T.

2 Q ISN'T THAT WHAT YOU TOLD DETECTIVE

3 LEAVITT WHEN HE INTERVIEWED YOU?

4 A NO. THAT WAS IN A STIPULATION FROM

5 THE -- EXCUSE ME, ONE OF THE OFFICIALS AT THE JAIL THAT IF

6 I DIDN'T SAY THIS, IN FACT, THEY WOULD SEND ME TO THE MENTAL

7 HOSPITAL, WHICH THEY EVENTUALLY DID.

8 Q WHERE DID YOU GET THE SECURITY BADGE

9 AND BADGE CASE THAT YOU HAD WITH YOU IN DOWNEY, CALIFORNIA?

10 A I DIDN'T HAVE IT WITH ME.

11 Q YOU DIDN'T HAVE A SECURITY BADGE?

12 A NO.

13 Q WHAT ABOUT THE TWO-WAY RADIO THAT YOU

14 HAD ON YOU WHEN YOU WERE ARRESTED? WHERE DID THAT COME FROM?

15 A OKAY. WELL, THIS RADIO, THIS -- ALL

16 THIS MATERIAL THAT THEY SAY I HAD IN DOWNEY, I DON'T RECALL

17 HAVING ANYTHING.

18 OKAY. I HAD A C.B. RADIO. IT

19 WAS A WALKIE-TALKIE RADIO. BUT IT'S THE ONE THAT YOU -- IT'S

20 LIKE A C.B. FROM A CAR THAT YOU CAN CORRESPOND IN THE SAME

21 FASHION. AND THE ONE --

22 Q YOU LIKE TO USE CITIZENS BAND RADIOS,

23 C.B.'S?

24 A WELL, I'M NOT FASCINATED BY THEM, NO.

25 Q HAVEN'T YOU USED THEM?

26 A YES.

27 Q YOU SAID YOU'RE NOT FASCINATED BY THEM.

28 YOU LIKE THEM, DON'T YOU?

29 A NOT REALLY.

30 Q HAVEN'T YOU USED VARIOUS C.B. RADIOS

31 IN THE PRESENCE OF DAWANA THOMAS?

32 A IN TRAVELING FROM NEW YORK TO CALIFORNIA

1 TO MEXICO, BACK EAST, WEST; YES, I HAVE.

2 Q COURT'S INDULGENCE.

3 MR. HOWARD, DO YOU REMEMBER
4 BEING IN A SEARS STORE IN SAN BERNARDINO, CALIFORNIA?

5 A NO. I CAN'T REMEMBER, BUT PERHAPS I
6 WERE BECAUSE I NORMALLY GO TO ALL MALLS HUSSLING.

7 Q WHAT DO YOU MEAN "HUSSLING"?

8 A WELL, LIKE ONE OF YOUR WITNESSES STATED,
9 DAWANA HOWARD, WELL, DAWANA BOYD, WHATEVER SHE CALLS HERSELF
10 NOW, SHE STATED THAT I HUSSLED; AND I DID, YOU KNOW, HUSSLE.

11 BUT I DON'T KNOW WHAT ALL --
12 WHAT STORE, BECAUSE THERE HAVE BEEN SO MANY.

13 Q SO YOU HAVE NO SPECIFIC MEMORY NOW OF
14 GOING INTO A SAN BERNARDINO SEARS STORE AND ATTEMPTING TO GET
15 A REFUND ON A SANDER?

16 A NO.

17 Q YOU DON'T RECALL SPECIFICALLY WHEN IT
18 WAS YOU LEFT LAS VEGAS?

19 A NO, NOT THE DATE. BUT I KNOW IT WAS
20 IN '80.

21 Q YOU JUST REMEMBER IT WAS IN 1980?

22 A YES.

23 Q DID YOU LEAVE IN A HURRY?

24 A YES, 'CAUSE THE HELICOPTERS WAS OVERHEAD
25 AND CHASING, YOU KNOW, -- AND AGAIN, THAT GAVE ME FLASHBACKS.
26 AND I JUST WANTED TO GET AWAY BECAUSE I -- PERHAPS I TRIED
27 TO SHOOT DOWN PROBABLY, YOU KNOW, SO TO GET AROUND THAT I
28 WOULDN'T, I JUST LEFT.

29 Q YOU LEFT WITH DAWANA THOMAS AND YOU WENT
30 TO CALIFORNIA?

31 A AND HE --

32 Q WELL, WHERE WERE YOU STAYING AT THE TIME

1 YOU LEFT LAS VEGAS?

2 A AT THE TIME I THINK WE WERE STAYING
3 ON FREMONT. I'M NOT SURE. I'M NOT SURE.

4 Q YOU LEFT IN THE BLACK OLDS CUTLASS?

5 A YES.

6 Q THE BLACK OLDS CUTLASS?

7 A YES.

8 MR. HARMON: THAT CONCLUDES CROSS, YOUR HONOR.

9 THE COURT: COUNSEL?

10 MR. COOPER: NO.

11 THE COURT: YOU'RE EXCUSED, SIR.

12 DEFENDANT HOWARD: YOUR HONOR, MAY I SAY SOME-
13 THING BEFORE THE JURY?

14 THE COURT: YOU MAY NOT, SIR. YOU'RE GOING TO
15 HAVE TO BE SEATED.

16 ANY FURTHER WITNESSES?

17 MR. COOPER: YOUR HONOR, THAT CONCLUDES OUR CASE
18 IN CHIEF. WE REST AT THE TIME.

19 THE COURT: THE STATE?

20 MR. HARMON: YOUR HONOR, I'D LIKE TO RECALL
21 DETECTIVE LEAVITT.

22 THE COURT: ALL RIGHT. CALL DETECTIVE LEAVITT.

23
24 WHEREUPON,

25 ALFRED B. LEAVITT,
26 CALLED AS A WITNESS HEREIN BY THE STATE, HAVING BEEN PREVIOUSLY-
27 DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

28 THE COURT: YOU HAVE BEEN PREVIOUSLY SWORN. YOU
29 ARE STILL UNDER OATH.

30 PROCEED.

31 MR. HARMON: THANK YOU, YOUR HONOR.

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1 BY MR. HARMON:

2 Q DETECTIVE LEAVITT, DID YOU ADVISE THE
3 DEFENDANT, MR. HOWARD, OF CERTAIN CONSTITUTIONAL RIGHTS IN
4 THE COMMENCEMENT OF YOUR INTERVIEW APRIL THE 2ND, 1980?

5 A YES. I READ HIM HIS RIGHTS FROM MY
6 RIGHTS OF PERSON CARD.

7 Q DO YOU RECALL WHAT RIGHTS SPECIFICALLY
8 YOU READ THE DEFENDANT?

9 A YES.

10 Q IN FACT, DO YOU HAVE THE RIGHTS OF THE
11 PERSON CARD WITH YOU AT THIS TIME?

12 A IT'S IN THE COURTROOM, YES.

13 Q DO YOU HAVE IT?

14 A NO. I THINK IT'S IN THE EVIDENCE BAG.

15 MR. HARMON: COURT'S INDULGENCE.

16 MAY I APPROACH THE WITNESS, YOUR HONOR?

17 THE COURT: YOU MAY.

18
19 BY MR. HARMON:

20 Q DETECTIVE LEAVITT, I AM SHOWING YOU
21 WHAT HAS BEEN MARKED AS PROPOSED EXHIBIT 45-A. DO YOU RECOG-
22 NIZE THE EVIDENCE ENVELOPE?

23 A YES, I DO.

24 Q DID YOU, ON OR ABOUT APRIL THE 2ND, 1980,
25 PLACE SOMETHING INSIDE THE ENVELOPE?

26 A YES. THE CONTENTS OF THE ENVELOPE
27 CONTAINED THE RIGHTS OF THE PERSON ARREST CARD THAT I READ
28 TO MR. HOWARD ON APRIL 2ND, 1980.

29 Q IS THE ENVELOPE IN A SEALED CONDITION?

30 A YES, IT IS.

31 Q WILL YOU CUT IT OPEN FROM THE BOTTOM,
32 LEAVING THE SEALS INTACT, AND WILL YOU REMOVE ITS CONTENTS,

-1257-

1 PLEASE?

2 STATE FOR THE RECORD WHAT YOU
3 JUST REMOVED.

4 A A RIGHTS OF PERSON ARRESTED CARD SIGNED
5 BY MYSELF.

6 MR. HARMON: YOUR HONOR, WITH THE COURT'S
7 PERMISSION, MAY WE HAVE THIS MARKED AS PROPOSED EXHIBIT 45-A?

8 THE COURT: IT MAY BE.

9
10 BY MR. HARMON:

11 Q I AM SHOWING YOU NOW, FOR THE RECORD,
12 WHAT IS MARKED PROPOSED EXHIBIT 45-A. CAN YOU IDENTIFY IT?

13 A YES. THIS IS THE RIGHTS OF THE PERSON
14 ARRESTED CARD THAT I READ TO THE DEFENDANT, SAM HOWARD, ON
15 APRIL 2ND, 1980. AND IT HAS MY SIGNATURE ON THE CARD, MY
16 PERSONNEL NUMBER, ALSO THE CASE NUMBER, AND DETECTIVE HATCH'S
17 SIGNATURE.

18 Q IS THIS CARD IN SUBSTANTIALLY THE SAME
19 CONDITION NOW AS IT WAS ON THE DATE YOU READ THESE RIGHTS TO
20 THE DEFENDANT?

21 A YES, IT IS.

22 Q YOU HAVE READ CERTAIN RIGHTS TO THE DEFEN-
23 DANT. DID YOU ASK HIM IF HE UNDERSTOOD?

24 A YES.

25 Q DID HE REPLY?

26 A YES. HE UNDERSTOOD -- HE INDICATED THAT
27 HE UNDERSTOOD HIS RIGHTS FULLY. AS A MATTER OF FACT, HE
28 INDICATED THAT HE HAD BEEN ADVISED OF HIS RIGHTS NUMEROUS
29 TIMES.

30 Q AT SOME POINT DID YOU ASK HIM TO SIGN
31 THE RIGHTS CARD?

32 A YES.

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Q WHAT DID HE SAY TO THAT?

A HE REFUSED TO SIGN IT.

MR. HARMON: YOUR HONOR, AT THIS TIME I OFFER
PROPOSED EXHIBIT 45-A.

THE COURT: ANY OBJECTION, COUNSEL?

MR. FRANZEN: IF WE MIGHT SEE IT, YOUR HONOR.

THE COURT: IS THERE ANY OBJECTION, COUNSEL?

MR. FRANZEN: NO, YOUR HONOR.

THE COURT: SAME WILL BE RECEIVED.

MR. HARMON: THANK YOU, YOUR HONOR.

BY MR. HARMON:

Q DETECTIVE LEAVITT, WOULD YOU READ INTO
THE RECORD NOW THE RIGHTS YOU READ MR. HOWARD APRIL THE 2ND,
1980?

A YES.

YOU HAVE THE RIGHT TO REMAIN SILENT.
IF YOU GIVE UP THAT RIGHT TO REMAIN
SILENT, ANYTHING YOU SAY CAN AND WILL
BE USED AGAINST YOU IN A COURT OF LAW.
YOU HAVE A RIGHT TO SPEAK TO AN ATTORNEY
BEFORE ANSWERING QUESTIONS AND TO HAVE
AN ATTORNEY PRESENT WITH YOU WHILE YOU
ANSWER ANY QUESTIONS. IF YOU CANNOT
AFFORD AN ATTORNEY, AN ATTORNEY WILL BE
PROVIDED FOR YOU BY THE COURT AT NO
COST TO YOU. AND YOU NEED NOT ANSWER
ANY QUESTIONS UNTIL THE ATTORNEY HAS
BEEN APPOINTED FOR YOU. IF YOU DECIDE
TO ANSWER QUESTIONS NOW, YOU MAY STOP
AT ANY TIME AND ASK TO TALK TO AN
ATTORNEY BEFORE ANY QUESTIONING CONTINUES.

1 IF YOU DECIDE TO STOP ANSWERING
2 QUESTIONS ONCE YOU'VE BEGUN, ALL
3 QUESTIONS WILL STOP. I HAVE READ
4 THE ABOVE AND FULLY UNDERSTAND THESE
5 RIGHTS.

6 Q DETECTIVE LEAVITT, AFTER YOU HAD
7 ADVISED THE DEFENDANT OF CERTAIN RIGHTS, AND AFTER HE
8 ACKNOWLEDGED UNDERSTANDING CERTAIN CONSTITUTIONAL RIGHTS,
9 DID YOU ASK HIM CERTAIN QUESTIONS?

10 A YES, I DID.

11 Q DID YOU DIRECT A CERTAIN LINE OF QUESTIONS
12 AS TO WHETHER HE WAS AT A SEARS STORE IN LAS VEGAS, NEVADA,
13 LOCATED AT THE BOULEVARD MALL?

14 A YES, I DID.

15 Q WHAT DID THE DEFENDANT SAY TO YOU ON
16 APRIL THE 2ND, 1980, ABOUT THAT?

17 A HE INDICATED THAT HE RECALLED BEING
18 AT A DEPARTMENT STORE WHERE HE PULLED A GUN ON THREE OR
19 FOUR PEOPLE AND HAD TAKEN A RADIO AND A BADGE CASE WITH A
20 BADGE IN IT THAT LOOKED LIKE A POLICEMAN'S.

21 Q IT LOOKED LIKE A POLICEMAN'S BADGE?

22 A YES.

23 Q AT SOME POINT DURING YOUR INTERVIEW OF
24 APRIL THE 2ND, 1980, DID YOU PRODUCE A PHOTOGRAPH OF A
25 CERTAIN VAN?

26 A YES, I DID.

27 Q DID YOU DISPLAY THAT TO THE DEFENDANT,
28 MR. HOWARD?

29 A YES, I DID.

30 Q ARE YOU ABLE TO DESCRIBE THE VEHICLE
31 WHICH WAS SHOWN ON THE PHOTOGRAPH THAT YOU LET MR. HOWARD
32 VIEW?

1 A YES. IT'S A 1977 DODGE VAN, BLACK IN
2 COLOR.

3 MR. HARMON: MAY I HAVE THE COURT'S INDULGENCE?

4 MAY I APPROACH THE WITNESS, YOUR HONOR?

5 THE COURT: YOU MAY.

6
7 BY MR. HARMON:

8 Q DETECTIVE LEAVITT, I'M SHOWING YOU NOW
9 WHAT APPEARS TO BE A POLAROID PHOTOGRAPH OF A VEHICLE,
10 MARKED AS PROPOSED EXHIBIT 66. DO YOU RECOGNIZE THAT PHOTO-
11 GRAPH?

12 A YES. THIS IS THE PHOTOGRAPH OF THE
13 DODGE VAN THAT I SHOWED TO MR. HOWARD ON APRIL 2ND, 1980.
14 IT HAS MY SIGNATURE AND THE DATE ON THE BACK OF IT.

15 Q IS THIS A PHOTOGRAPH OF THE SAME 1977
16 DODGE VAN YOU VIEWED ON MARCH 27, 1980, TO THE REAR OF THE
17 DEW DROP INN AT 4200 EAST BOULDER HIGHWAY?

18 A YES, IT IS.

19 Q IT IS YOUR TESTIMONY THAT YOU SHOWED
20 THIS PHOTOGRAPH, PROPOSED 66, TO MR. HOWARD ON APRIL THE
21 2ND, 1980?

22 A YES.

23 Q IS THE PHOTOGRAPH IN SUBSTANTIALLY THE
24 SAME CONDITION NOW AS IT WAS ON APRIL 2ND, 1980?

25 A YES, IT IS.

26 Q DID MR. HOWARD HAVE A CHANCE TO LOOK
27 AT THIS PHOTOGRAPH?

28 A YES, HE DID.

29 Q DETECTIVE LEAVITT, AT SOME POINT DID YOU,
30 IN CONNECTION WITH THAT PHOTOGRAPH, ACCUSE HIM OF BEING THE
31 PERSON WHO MURDERED GEORGE STEVEN MONAHAN?

32 A YES, I DID.

1 Q IN LAS VEGAS, NEVADA?
2 A YES.
3 Q WHAT DID THE DEFENDANT SAY WHEN YOU
4 MADE THAT ACCUSATION?
5 A HE ASKED ME WHAT THE VAN HAD TO DO WITH
6 IT. AND THAT'S WHEN I ACCUSED HIM OF MURDERING DOCTOR
7 MONAHAN. AND HE RELATED TO ME THAT HE WASN'T DENYING MURDER-
8 ING SOMEONE IN LAS VEGAS, THAT HE MERELY COULDN'T REMEMBER
9 WHETHER HE DID OR NOT.
10 Q DID HE SAY "I'M NOT DENYING KILLING
11 SOMEONE IN LAS VEGAS. I COULD HAVE KILLED SOMEONE IN LAS
12 VEGAS, HOWEVER I DO NOT RECALL WHETHER I DID OR NOT"?
13 A YES.
14 Q IS THAT EXACTLY WHAT HE SAID?
15 A YES.
16 Q YOU PUT THAT IN QUOTES IN YOUR REPORT;
17 IS THAT CORRECT?
18 A THAT'S CORRECT.
19 Q DETECTIVE LEAVITT, DID YOU ALSO ASK
20 DEFENDANT HOWARD, ON APRIL THE 2ND, 1980, IF HE HAD THE
21 SAME GUN IN LAS VEGAS WHICH HE WAS ARRESTED WITH IN THE STATE
22 OF CALIFORNIA?
23 A YES, I DID.
24 Q WHAT DID HE SAY ABOUT THAT?
25 A IT WAS THE SAME GUN.
26 Q DID HE SAY, IN FACT, THAT HE HAD STASHED
27 THE GUN?
28 A YES.
29 Q DID HE TELL YOU WHERE HE HAD HIDDEN IT?
30 A IN A SHOPPING CENTER AT THE LOCATION
31 WHERE HE WAS ARRESTED IN CALIFORNIA.
32 MR. HARMON: COURT'S INDULGENCE, PLEASE.

1 FITZGERALD WAS AT THE TIME THEY WERE IN LAS VEGAS AT THE
2 FREMONT HOTEL. AND MR. HOWARD GENERATED THE FACT THAT HE
3 DID NOT RECALL ANYTHING ABOUT A MURDER IN LAS VEGAS; DIDN'T
4 HE?

5 MR. HARMON: YOUR HONOR, I OBJECT TO THE REFERENCE
6 TO BOBBY FITZGERALD AND OTHER AREAS THAT OBVIOUSLY GO BEYOND
7 THE SPECIFIC AREAS THAT WERE PERTINENT TO DIRECT EXAMINATION.

8 MR. COOPER: YOUR HONOR, HE'S GONE INTO THE
9 OFFICER'S STATEMENT --

10 MR. HARMON: I KNEW, BUT --

11 MR. COOPER: (CONTINUING) -- OF THE INTERVIEW
12 OF THE DEFENDANT IN SAN BERNARDINO. NOW SURELY WE'RE ENTITLED
13 TO BRING OUT THE FULL CONTEXT OF THAT STATEMENT.

14 THE COURT: OBJECTION OVERRULED. IT DOES GO
15 TO THE ISSUE OF WHETHER OR NOT HE KILLED SOMEONE AND I THINK
16 THAT STATEMENT SPECIFICALLY REFERS TO IT.

17
18 BY MR. COOPER:

19 Q YOU THEN ASKED MR. HOWARD IF HE CALLED
20 SEEING A VAN IN LAS VEGAS. AND HE INDICATED THAT HE DID NOT
21 OR COULD NOT; IS THAT RIGHT?

22 A YES.

23 Q HE THEN ASKED YOU WHAT DID A VAN HAVE TO
24 DO WITH THE MURDER OF DOCTOR MONAHAN; DIDN'T HE?

25 A YES.

26 Q SO HE DENIED, ON SOME FOUR OR FIVE
27 OCCASIONS PRIOR TO MAKING THIS STATEMENT THAT YOU TESTIFIED
28 TO ON DIRECT, THAT HE KNEW -- RECALLED ANYTHING ABOUT THE
29 MURDER OF A DOCTOR IN LAS VEGAS; DIDN'T HE?

30 A YES.

31 MR. COOPER: I HAVE NOTHING FURTHER, YOUR HONOR.

32 MR. HARMON: NO REDIRECT, YOUR HONOR.

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THE COURT: YOU'RE EXCUSED.

THE WITNESS: THANK YOU.

(WHEREUPON, THE WITNESS WAS
EXCUSED.)

MR. HARMON: MAY WE APPROACH THE BENCH, YOUR
HONOR?

THE COURT: YES.

(WHEREUPON, SIDE BAR CONFERENCE
AT BENCH; NOT REPORTED. AT THE
CONCLUSION OF WHICH THE FOLLOW-
ING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY,
WE ARE ALMOST DONE WITH THE TESTIMONY. WE HAVE JUST A LITTLE
BIT MORE TO GO AND IT WILL BE SUBMITTED TO YOU. I THINK WE
HAVE ONE OR TWO WITNESSES LEFT AND THOSE ARE JUST, COUNSEL
ADVISED ME, VERY SHORT. THEY ADVISED ME THAT THEY WILL BE
READY TO GO FIRST THING IN THE MORNING. SO WE ARE GOING TO
START COURT TOMORROW MORNING AT 8:30.

MY VOICE IS GIVING IN.

DURING THIS RECESS YOU ARE
ADMONISHED NOT TO CONVERSE AMONG
YOURSELVES OR WITH ANYONE ELSE ON
ANY SUBJECT CONNECTED WITH THIS
TRIAL, OR READ, WATCH OR LISTEN
TO ANY REPORT OF OR COMMENTARY
ON THIS TRIAL WITH ANY PERSON
CONNECTED WITH THIS TRIAL BY ANY
MEDIUM OF INFORMATION, INCLUDING
WITHOUT LIMITATION, NEWSPAPER,
TELEVISION OR RADIO; OR FORM OR

1 EXPRESS ANY OPINION ON ANY
2 SUBJECT CONNECTED WITH THIS
3 TRIAL UNTIL THE CASE IS
4 FINALLY SUBMITTED TO YOU.
5

6 WE WILL BE IN RECESS UNTIL 8:30
7 TOMORROW MORNING.
8

9 (WHEREUPON, AT 6:25 P.M. THE
10 EVENING RECESS WAS HAD.)
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