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 Electronically Filed Jun 25 2020 10:51 a.m. Elizabeth A. Brown Clerk of Supreme Court 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 2 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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/s/ L. Hollis Ruggieri
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EXHIBIT B

EXHIBIT B

CASE NO. C53867

DEPARTMENT NO. V

DOCKET H

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

PLAINTIFF,

VS.

SAMUEL HOWARD, AKA KEITH,

DEFENDANT.

REPORTER'S TRANSCRIPT OF

PENALTY HEARING

BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE

MONDAY, MAY 2, 1983, AT 11:10 A.M.

APPEARANCES:

FOR THE STATE: MELVIN T. HARMON, ESQUIRE
DANIEL M. SEATON, ESQUIRE
200 SOUTH THIRD STREET
LAS VEGAS, NV 89101
DEPUTY DISTRICT ATTORNEYS

FOR THE DEFENDANT: MARCUS D. COOPER, ESQUIRE
GEORGE E. FRANZEN, ESQUIRE
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LAS VEGAS, NV 89101
DEPUTY PUBLIC DEFENDERS

REPORTED BY: RENEE SILVAGGIO, C.S.R. NO. 122

VOLUME X

I N D E X

STATE'S WITNESSES:

DEFENDANT'S WITNESSES:

E X H I B I T S

LAS VEGAS, NEVADA, MONDAY, MAY 2, 1983, AT 11:10 A.M.

* * * * * * * * *

THE COURT: WILL COUNSEL STIPULATE TO THE PRESENCE OF THE JURY, AND THE ALTERNATES?

MR. HARMON: THE STATE DOES, YOUR HONOR.

MR. COOPER: YES, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, THE ATTORNEYS HAVE ASKED THAT THIS MATTER BE CONTINUED UNTIL THIS AFTERNOON. SOME MATTERS HAVE BEEN RAISED TO THE COURT WHICH MUST BE TAKEN CARE OF AND ADDRESSED BY THE COURT AND COUNSEL BEFORE WE CAN PROCEED.

SO I AM GOING TO CONTINUE THIS UNTIL 1:45 THIS AFTERNOON. SO I WILL HAVE TO ADMONISH YOU AT THIS TIME AND WE WILL BE PROCEEDING SOME TIME AFTER 1:45, BECAUSE I'M ASKING THE ATTORNEYS TO COME BACK AND ARGUE AT THAT TIME.

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.

IT WOULD PROBABLY BE BETTER FOR YOU TO COME BACK AT 2:00 O'CLOCK THIS AFTERNOON. COUNSEL WILL BE

BACK AT 1:45.

MR. HARMON: JUDGE, MAY WE APPROACH THE BENCH.

THE COURT: YES.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH, NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, IT MIGHT BE BETTER TO HAVE YOU ALL BACK HERE AT 1:45. SO EVERYBODY WILL BE HERE AT 1:45. WE WILL CONTINUE THIS MATTER UNTIL THEN.

ANYTHING FURTHER TO COME BEFORE THE COURT AT THIS TIME, BEFORE WE RECESS, GENTLEMEN?

MR. HARMON: NOT BY THE STATE, YOUR HONOR.

MR. FRANZEN: NOT BY THE DEFENSE, YOUR HONOR.

THE COURT: WE WILL BE IN RECESS.

(WHEREUPON, FROM 11:12 A.M. UNTIL 2:00 P.M., THE NOON RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: LET THE RECORD REFLECT THIS IS A HEARING OUTSIDE OF THE PRESENCE OF THE JURY.

GENTLEMEN, AS YOU KNOW, WE HAVE BEEN DISCUSSING IN CHAMBERS THE PROBLEM THAT HAS BEEN BROUGHT TO OUR ATTENTION, AND THAT IS THE FACT THAT ONE OF THE JURORS HAS BEEN IN CONTACT WITH THIS COURT AND APPARENTLY HAS TALKED TO REPRESENTATIVES OF THE DISTRICT ATTORNEYS OFFICE, TO THE JURY COMMISSIONER, AND I DON'T KNOW WHO ELSE.

I DID, OVER THE WEEK INSTRUCT MY LAW

CLERK, MR. GARCIA, TO NOTIFY THE JURY COMMISSIONER TO PROVIDE ME WITH A STATEMENT OF WHAT SHE RECALLS WITH REFERENCE TO ANY CONVERSATION OR CONTACT THAT HAS BEEN MADE WITH HER BY MARILYN CAPASSO, ONE OF THE JURORS IN THIS CASE. THE STATEMENT HAS BEEN PREPARED, IT IS UNSWORN, BUT A COPY OF IT HAS BEEN SUPPLIED TO BOTH THE STATE AND TO THE DEFENDANT'S COUNSEL. THE MATTER WAS CONTINUED FROM THIS MORNING TO GIVE THEM AN OPPORTUNITY TO EXAMINE THAT STATEMENT AND TO PREPARE FOR HEARING THIS AFTERNOON.

THIS BEING 1:45 ON THE DATE IN QUESTION, THE COURT WILL REFLECT THAT THE JURY COMMISSIONER IS NOW PRESENT IN THE COURTROOM, MRS. KENNINGTON, AND SHE IS HERE AND AVAILABLE FOR QUESTIONING. COUNSEL FOR THE DEFENDANT HAS REQUESTED THE OPPORTUNITY TO MAKE INQUIRY AND THAT REQUEST HAS BEEN GRANTED.

I BELIEVE THAT THAT TAKES CARE OF EVERYTHING THAT'S TRANSPIRED TODAY.

COUNSEL?

MR. FRANZEN: YOUR HONOR, AS I ADVISED YOUR HONOR IN CHAMBERS PRIOR TO CONVENING TO COURT, MR. COOPER AND I DO HAVE A MOTION TO RENEW OUR MOTION TO WITHDRAW AS COUNSEL FOR MR. HOWARD. THAT IS BASED UPON THE PARTICULAR IRRECONCILABLE DIFFERENCES WITH MR. HOWARD WE HAVE WITH MR. HOWARD AND MR. HOWARD HAS WITH US. NOT ONLY ARE THEY CONTINUING BUT NEW ONES ARE ARISING AS EACH STAGE OF THIS PROCEDURE DEVELOPS.

PRESENTLY MR. HOWARD HAS ADVISED US THAT HE DOES NOT WISH US TO PUT INTO EVIDENCE ANY MATTERS OF MITIGATION. WE HAVE MATTERS OF MITIGATION, BUT HE DOES NOT WISH US TO PRESENT THEM; NOR DOES HE WISH US TO ARGUE TO THE JURY BY WAY OF MITIGATION, ALTHOUGH WE ARE GOING TO ARGUE; NOR DOES MR. HOWARD -- STRIKE THAT.

WE BELIEVE THAT SINCE THERE HAS BEEN

A SHIFTING OF STAGES BEFORE THE COURT THAT NEW COUNSEL FOR THIS INDIGENT DEFENDANT SHOULD BE APPOINTED WHO MIGHT BE ABLE TO GET ALONG WITH MR. HOWARD, PERSUADE HIM TO WHAT WE BELIEVE IS MR. HOWARD'S BEST INTEREST.

WE HAVE SOME MITIGATING CIRCUMSTANCES THAT MR. HOWARD DOES NOT WISH US TO PRESENT. AND I'M NOT EVEN SURE IF IT'S APPROPRIATE IN LIGHT OF THOSE INSTRUCTIONS TO INFORM THE DISTRICT ATTORNEY AND YOUR HONOR NOW AS TO WHAT THEY ARE.

ONE OF THEM I THINK I SHOULD TELL YOUR HONOR, PERHAPS I SHOULD TELL FURTHER, ONE OF THEM THAT WE HAVE LEARNED WITHOUT THE HELP OF MR. HOWARD, BUT THROUGH OTHER SOURCES, THAT AS A YOUNG MAN HIS FATHER KILLED HIS MOTHER AND HIS YOUNGER SISTER IN HIS PRESENCE. AND MR. HOWARD'S FATHER'S APPARENTLY INCARCERATED FOR THIS AND OTHER OFFENSES. THIS WOULD BE ADMISSIBLE UNDER OUR MITIGATING CIRCUMSTANCES STATUTE, UNDER THE LANGUAGE ALLOWING ANY OTHER MITIGATION WHICH THE DEFENDANT DID.

THE COURT: HOW WOULD THAT TEND TO MITIGATE, COUNSEL?

MR. FRANZEN: WELL, IT WOULD TEND TO MITIGATE, YOUR HONOR, IN THAT WE'VE ALSO LEARNED THAT THE DEFENDANT, AGAIN WITHOUT HIS ASSISTANCE, WAS DETERMINED TO BE INCOMPETENT SOME TIME AFTER THE -- HIS ARREST OF APRIL 11, 1980.

WE'VE TALKED TO DOCTOR O'GORMAN ABOUT THE EFFECT OF WITNESSING HIS MOTHER AND INFANT SISTER BEING MURDERED BY HIS FATHER BEFORE AND IN HIS PRESENCE. AND DOCTOR O'GORMAN AT THIS TIME IS UNABLE TO GIVE AN OPINION. HE'S UNABLE TO GIVE AN OPINION BECAUSE OF IRRECONCILABLE DIFFERENCES THAT MR. HOWARD HAS HAD WITH US, WHICH HAVE BEEN CONVEYED AND CARRIED OVER INTO AN IRRECONCILABLE DIFFERENCE WITH DOCTOR O'GORMAN.

THE COURT: BUT MR. HOWARD HAS BEEN FOUND TO BE COMPETENT.

MR. FRANZEN: YES, YOUR HONOR. BUT WE BELIEVE THAT THESE WOULD BE ADMISSIBLE MITIGATING FACTORS AT THE PENALTY PHASE.

WE HAVE HAD SOME OF THIS CONFIRMED HERE IN OPEN COURT WHEN DAWANA THOMAS HAS TESTIFIED THAT AFTER HIS ARREST SHE VISITED HIM IN A MENTAL HOSPITAL OR MENTAL WARD. I'M NOT QUITE SURE. I DON'T RECALL HER EXACT TERMINOLOGY.

MR. HOWARD, IN HIS CONTINUING DIFFERENCES WITH US, HAS REFUSED TO SIGN ANY MEDICAL RELEASES THAT WOULD RELEASE THE DOCTORS IN WHOSE CARE HE WAS TO DISCUSS HIS CASE HISTORY AND HIS DIAGNOSIS.

ALSO DETECTIVE LEAVITT, WHEN DETECTIVE LEAVITT QUESTIONED THE DEFENDANT, STATED THAT THE DEFENDANT WAS VERY UPSET. HE REQUESTED TO MEET A PSYCHIATRIST DUE TO MENTAL ILLNESS. AND THE DEFENDANT DIDN'T KNOW WHY HE WAS DOING THESE TERRIBLE THINGS OR HURTING PEOPLE. I DON'T RECALL THE EXACT LANGUAGE USED IN DETECTIVE LEAVITT'S REPORT, BUT THAT IS THE GIST OF IT. BUT THAT HE THINKS THAT PERHAPS IT WAS SOMETHING TO DO WITH HAVING SEEN HIS FATHER KILL HIS MOTHER AND SISTER, AND ALSO POSSIBLY EXPERIENCE HE RECEIVED IN VIET NAM.

I BELIEVE ALL OF THESE WOULD GO TO MITIGATION. AND MR. HOWARD HAS INSTRUCTED US NOT TO PRESENT THESE AND INDEED NOT TO ARGUE THEM.

AND ON THOSE GROUNDS, BECAUSE OF THE IRRECONCILABLE DIFFERENCES, WE WOULD REQUEST TO BE ALLOWED TO WITHDRAW AND THAT OTHER COUNSEL BE APPOINTED TO THE INDIGENT DEFENDANT FOR THE PURPOSES OF THE PENALTY PHASE HEARING.

WE'D ALSO REQUEST THAT THE COURT CANVAS MR. HOWARD.

THE COURT: MR. HOWARD, YOU HEARD THE STATEMENTS OF COUNSEL. DO YOU HAVE ANYTHING TO STATE TO THE COURT AT THIS TIME?

DEFENDANT HOWARD: EXCUSE ME, YOUR HONOR.

THE COURT: DO YOU HAVE ANYTHING TO STATE TO THE COURT AT THIS TIME?

DEFENDANT HOWARD: WELL, BASICALLY WHAT HE SAID IS TRUE. WE HAD DIFFERENCES STARTING BACK IN NOVEMBER. AND I'D RATHER NOT FOR THEM TO ENTER ANY MITIGATING FACTORS ON MY BEHALF.

THE COURT: ALL RIGHT. YOU ARE AWARE OF THE FACT THAT THOSE MITIGATING FACTORS MAY POSSIBLY BE OF ASSISTANCE TO YOU IN THIS MATTER?

DEFENDANT HOWARD: YES. I'M AWARE, YOUR HONOR.

THE COURT: AND BEING FULLY AWARE OF THAT, YOU STILL DON'T DESIRE THAT THEY PRESENT THOSE; IS THAT CORRECT?

DEFENDANT HOWARD: EXACTLY.

THE COURT: THANK YOU. YOU MAY BE SEATED.

THE STATE.

MR. HARMON: YOUR HONOR, WE OBJECT TO THE TIMING OF THE RENEWAL OF THIS MOTION.

IT IS TRUE, AS MR. FRANZEN SUGGESTS, THAT WE'RE MOVING INTO ANOTHER PHASE OF THE PROCEEDING. HOWEVER, N.R.S. 175.552 MAKES IT CLEAR THAT THE HEARING THAT WE'RE ABOUT THE COMMENCE, THE PENALTY HEARING, SHOULD BE CONDUCTED BEFORE THE TRIAL JURY AS SOON AS PRACTICAL. AND IT IS NOT PRACTICAL TO THINK THAT IN A TRIAL AS INVOLVED AS THIS ONE IS THAT WE COULD EXPECT TO SUBSTITUTE ADDITIONAL COUNSEL IN AND HAVE THE PENALTY HEARING IN THE NEAR FUTURE.

PERSONALLY, THE STATE BELIEVES THAT ALSO WOULD BE A GREAT DISADVANTAGE TO MR. HOWARD TO TRY TO GET NEW COUNSEL WHO HAVE NOT SEEN THE WITNESSES TESTIFY. I

ANTICIPATE THE JURY IS GOING TO BE INSTRUCTED THAT THEY MAY CONSIDER EVIDENCE INTRODUCED AT BOTH THE GUILT AND PENALTY PHASE OF THESE PROCEEDINGS.

IN TERMS OF MITIGATION, YOUR HONOR, THOSE FACTORS ARE CLEARLY SET FORTH IN N.R.S. 200.030. IT SEEMS TO US THAT THE ONLY THING ARGUABLY THAT MIGHT APPLY IS PARAGRAPH TWO, THAT REQUIRES THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

OF COURSE, PERHAPS THE COURT WILL HAVE TO RULE ON THIS AT SOME POINT IN THESE PROCEEDINGS, BUT I WOULD THINK IT IS CERTAINLY QUESTIONABLE AT THIS POINT THAT AN INCIDENT THAT OCCURRED YEARS AGO, IS VERY REMOTE IN TIME FROM THE MURDER OF GEORGE MONAHAN, IS GOING TO BE THE TYPE OF SITUATION THAT HAS PLACED THE DEFENDANT UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE. AND IF IT DOESN'T FIT INTO THAT CATEGORY THEN IT WON'T BE ADMISSIBLE. WE DON'T THINK THAT NUMBER SEVEN, ANY OTHER MITIGATING CIRCUMSTANCE, APPLIES. IT WOULD HAVE TO BE PARAGRAPH TWO.

BUT THE MOTION IS UNTIMELY. MR. HOWARD HAS BEEN ABLY REPRESENTED BY COUNSEL UP TO THIS POINT, AND WE MOST CERTAINLY THINK THAT THEY SHOULD CONTINUE TO REPRESENT HIM IN THE FRUIT OF THE REMAINDER OF THESE PROCEEDINGS.

THE COURT: ANYTHING FURTHER, COUNSEL?

MR. FRANZEN: NOT FROM THE DEFENSE, YOUR HONOR.

THE COURT: ALL RIGHT. OF COURSE, I MUST EXAMINE INTO THE SITUATION THAT WE HAVE PRESENTLY. WE NOW HAVE A MOTION TO BE RELEASED BY COUNSEL. A SIMILAR MOTION WAS MADE AT THE COMMENCEMENT OF THESE PROCEEDINGS, AND WE ARE NOW FACED WITH A RENEWAL OF THAT MOTION.

THE COURT HAS HAD AN OPPORTUNITY TO SIT

AND OBSERVE COUNSEL AND THE DEFENDANT THROUGHOUT THESE PROCEEDINGS, AND I THINK THAT THE DEFENDANT HAS CLEARLY SHOWN THAT HIS STATE OF MIND IS CLEAR, ELUSIVE, THAT HE IS INTELLIGENT, FOR I HEARD HIM TESTIFY AND I HEARD HIM STATE HIS POSITIONS ON A NUMBER OF ISSUES THROUGHOUT AND I HAVE FOUND THAT HE IS COMPETENT TO STAND TRIAL AND TO ASSIST IN HIS DEFENSE. IT IS OBVIOUS TO ME THAT HE IS AND HAS BEEN COMPETENT. HE HAS, ON MANY OCCASIONS, CONFERRED WITH COUNSEL AND HE HAS RECEIVED COMPETENT AND ABLE REPRESENTATION IN THESE PROCEEDINGS.

I DON'T KNOW OF AN ISSUE THAT HAS BEEN CONSIDERED BY THIS COURT THAT WASN'T CONTESTED BY THE DEFENSE THROUGH THE ATTORNEYS. AND I DON'T KNOW OF A DEFENSE THAT MAY BE SO DILIGENT IN RAISING THESE ISSUES, AND I THINK THIS HAS BEEN DONE BECAUSE COUNSEL'S PRIORITY TO PERSONAL RESPONSIBILITY; AND, SECONDLY, BECAUSE OF THE ISSUE THAT HAS BEEN RAISED RECENTLY.

IT APPEARS TO ME THAT MR. HOWARD UNDERSTANDS AND COMPREHENDS THE NATURE OF A PENALTY HEARING. HE HAS JUST BEEN INQUIRIED WITH REGARDS TO HIS UNDERSTANDING OF THE NATURE OF MITIGATING CIRCUMSTANCES AND THE VALUE TO HIM. HE HAS RESPONDED THAT HE DOES NOT DESIRE TO HAVE THIS EVIDENCE DEDUCED, WHETHER IT IS MITIGATING CIRCUMSTANCES UNDER THE BROAD AND GENERAL CATEGORY NUMBER SEVEN OF OTHER MITIGATING CIRCUMSTANCES, THAT IS: ONE, HIS EXPERIENCE IN VIET NAM, AND TWO, THE FACT THAT AS A CHILD HE WATCHED HIS MOTHER AND SISTER BEING KILLED BY HIS FATHER. WHETHER THOSE TWO FALL INTO THAT CATEGORY, I'M NOT REALLY CERTAIN. THEY PROBABLY FALL IN THE STATE OF MIND OF THE TYPE OF EVIDENCE, CATEGORY TWO, IF THEY ARE INDEED MITIGATING CIRCUMSTANCES. AND I AM NOT CONVINCED IN MY OWN MIND, NOR HAS THERE BEEN ANY EVIDENCE OF LAW OR ANYTHING ELSE PRESENTED TO ME, THAT THEY ARE. BECAUSE WHEREVER THE NATURE OF THESE PROCEEDINGS, THERE MUST BE ONE FURTHER TIE.

AND THAT TIE IS THAT -- IS THE IMPACT UPON THAT PERSON WHO HAS GONE THROUGH THE CIRCUMSTANCES: THE FACT THAT WE'VE GONE THROUGH THIS PARTICULAR PHASE AND HAVING OBSERVED HIS MOTHER HAS BEEN KILLED, AND NUMBER TWO, THAT HE WAS IN VIET NAM. THERE MUST BE A FURTHER TIE AND FURTHER EVIDENCE AND THAT IS THAT THERE IS INDEED A TIE BETWEEN THE EXPERIENCE AND THIS MANIFESTATION UPON HIM AT THIS POINT OR AT THE TIME OF THE KILLING. AND NEITHER COUNSEL HAVE EVEN ELUDED TO THE FACT THAT THERE IS SUCH A TIE. SO UNLESS THERE WERE, THAT EVIDENCE WOULD NOT BE ADMISSIBLE WITHOUT THAT CONNECTION BECAUSE IT WOULD CERTAINLY TAKE, I BELIEVE, EXPERT TESTIMONY TO ESTABLISH THE CAUSE AND EFFECT UPON HIM. BUT WHATEVER THAT MIGHT BE, WE MAY NOT HAVE TO CROSS THAT BRIDGE BECAUSE AT THIS POINT HE DOESN'T WANT IT INTRODUCED.

AND COUNSEL ALWAYS HAVE TO UNDERSTAND THE CANON OF ETHICS OF THE PROFESSION, THAT YOU ARE THE AGENTS AND NOT THE PRINCIPALS. YOUR PRINCIPAL IS MR. HOWARD. HE IS IN EFFECT, FOR THE PURPOSES OF THIS TRIAL, YOUR BOSS. HE HAS SO INSTRUCTED YOU.

YOU GENTLEMEN, OF COURSE, POINTED IT OUT AND I THINK IT'S BEEN ABLY POINTED OUT AT THIS POINT, WHAT HIS ALTERNATIVES ARE. HE HAS AT LEAST PRELIMINARILY INDICATED TO THE COURT WHICH ALTERNATIVE HE DESIRES TO FOLLOW. SO YOU GENTLEMEN FOUND THAT ALTERNATIVE. YOUR MOTION TO WITHDRAW IS DENIED.

NOW, LET'S THEN PROCEED TO THE NEXT ISSUE.

MR. FRANZEN: YOUR HONOR, AS TO THE NEXT ISSUE, I BELIEVE IT HAS TO DO WITH THE JUROR WHO SPOKE WITH THE JURY COMMISSIONER.

THE COURT: ALL RIGHT.

MR. FRANZEN: AS STATED PREVIOUSLY IN CHAMBERS

IN THE PRESENCE OF THE DISTRICT ATTORNEY, IT'S OUR POSITION THAT HAVING ONCE BEEN SENT BY THE DISTRICT ATTORNEYS OFFICE TO THE JURY COMMISSIONER, THAT THIS JURY WAS TAINTED AND THAT THE STATE IS NOW BARRED FROM SEEKING THE DEATH PENALTY.

WE BELIEVE THAT A VARIETY OF STATUTES -- STATUTORILY AND CONSTITUTIONAL VIOLATIONS HAVE OCCURRED AND THIS AGAIN IS BASED UPON DISCUSSION IN CHAMBERS, WHICH I THINK WILL BE FOLLOWED BY SOME STATEMENTS BY THE DISTRICT ATTORNEY AND YOU AND THE JURY COMMISSIONER.

WE BELIEVE THAT BY -- WELL, FIRST OFF, THE JUROR WAS UNDER THE ADMONITION OF THE COURT, UNDER N.R.S. 17.141, NOT TO DISCUSS THE CASE. THE DISTRICT ATTORNEY WAS PRESENT, AS WELL AS YOURSELF.

UNDER STATE V. LEWIS, 59 NEVADA 262, 275, THAT STATUTE AND THE WORDS OF THAT CASE SHOULD HAVE BEEN AND ALWAYS OUGHT TO BE STRICTLY COMPLIED WITH. IT HAS NOT BEEN COMPLIED WITH BY THE DISTRICT ATTORNEY DISCUSSING WITH THE JURY COMMISSIONER, NOR HAS IT BEEN COMPLIED WITH BY THE JUROR DISCUSSING IT WITH THE JURY COMMISSIONER OR WITH ANYONE ELSE AS IT DEVELOPS.

WE BELIEVE WE ARE PUT IN AN UNTENABLE POSITION. WE WOULD LIKE TO KNOW WHAT WAS SAID TO THE JUROR AND WHAT THE JUROR SAID, YET WE DON'T WISH TO PUT PRESSURE ON THIS JUROR TO BRING BACK THE DEATH PENALTY. WE WISH TO HAVE A FAIR AND IMPARTIAL JURY IMPARTIALLY COMPOSED OF THIS JUROR. SO WE HAVE A PROBLEM INQUIRING OF THE JURY, AND WE ARE SORT OF -- IF WE ARE ASKING THE JURY WHAT IS YOUR NUMERICAL DIVISION BY FURTHER INQUIRY, IT WAS HERE UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION THAT WE ARE ENTITLED TO A FAIR AND IMPARTIAL HEARING, YET WE ARE ALSO ENTITLED TO PROCESS UNDER THE FIFTH AMENDMENT AND WE NEED TO KNOW WHAT WAS SAID ON THIS.

WE BELIEVE THAT A HEARING OF THIS JUROR

VIOLATES THE FIFTH -- I'M SORRY, YOUR HONOR, VIOLATES THE SIXTH AMENDMENT. WE THINK THERE IS A PER SE VIOLATION HERE AND THAT THE PUNISHMENT MATTER SHOULD BE SUBMITTED TO THE JURY AS COMPOSED, PRESENTLY COMPOSED, TO INCLUDE THIS JUROR, BUT CANNOT BE BARRED FROM SEEKING THE DEATH PENALTY.

THE COURT: WHY SHOULD THEY BE BARRED FROM SEEKING ANY PENALTIES?

MR. FRANZEN: WHY SHOULDN'T THEY?

THE COURT: IF YOU FOLLOWED YOUR STATEMENTS LOGICALLY, THEN THE STATE UNDER ANY CIRCUMSTANCES CAN'T ASK THAT THIS DEFENDANT BE PUNISHED FOR ANYTHING.

MR. FRANZEN: YOU VERY WELL MAY BE RIGHT, YOUR HONOR. BUT IT SHOULD BE RECALLED THAT WE WERE NOT THE ONES -- THE DEFENSE WAS NOT THE ONES WHO SENT THE JUROR TO THE JURY COMMISSIONER. AND I BELIEVE THE STATEMENT, IF YOUR HONOR WILL RECALL, AND PERHAPS IT WILL BE REITERATED BY MR. HARMON BECAUSE HE IS THE ONE WHO SENT THE JUROR TO THE JURY COMMISSIONER.

NOW, THIS CHANGE OCCURRED AFTER THE DEFENDANT WAS FOUND GUILTY. SO I DON'T BELIEVE WE'RE GOING TO HAVE AN EFFECT, BUT WE'RE GOING TO HAVE AN EFFECT ON THE PENALTY PHASE. AND I THINK THAT IS THE EFFECT THAT WE HAVE.

NOW, I REALIZE THAT THE ALTERNATIVE -- WELL, I'LL LEAVE IT AT THAT FOR THE TIME BEING.

THE OTHER STATUTES THAT HAVE BEEN VIOLATED BY THIS ARE 175.391, WHICH STATES:

> THE COURT SHALL NOT PERMIT ANY COMMUNICATION TO BE MADE TO THEM, MEANING THE JURORS, OR MAKE ANY HIMSELF, UNLESS BY ORDER OF THE COURT, EXCEPT TO ASK THEM IF THEY HAVE AGREED UPON THEIR VERDICT.

THERE HAS BEEN MORE COMMUNICATION DONE THAN TO MERELY ASK THIS JUROR, HAS A VERDICT BEEN REACHED? AND IT WAS NOT DONE IN COURT.

UNDER ANOTHER STATUTE, WHICH HAS BEEN VIOLATED, 175.451 STATES:

> IF A JUROR, AND I'M PARA-PHRASING, YOUR HONOR, BUT IF A JUROR DESIRES TO BE INFORMED ON ANY POINT OF LAW ARISING IN THE CAUSE, THEY MUST REQUIRE THE OFFICER TO CONDUCT THEM INTO COURT. UPON THEIR BEING BROUGHT INTO COURT, THE INFORMATION REQUIRED SHALL BE GIVEN IN THE PRESENCE OF, OR AFTER NOTICE TO, THE DISTRICT ATTORNEY, AND THE DEFENDANT OR HIS COUNSEL.

WELL, IT WASN'T DONE IN THIS INSTANCE. THE DEFENDANT'S PRESENCE I BELIEVE CANNOT BE WAIVED IN THIS TYPE OF MATTER AND WE HAVE NO ORDER OF WHAT WAS ACTUALLY COMMUNICATED, ALTHOUGH WE HAVE THE UNSWORN STATEMENT, AND I PRESUME --

THE COURT: WELL, COUNSEL, DON'T EVEN BELABOR THAT BECAUSE YOUR CITATION IS SO INAPPROPRIATE THAT REALLY IT DOESN'T EVEN MERIT ANY CONSIDERATION.

WHAT YOU ARE REFERRING TO, 175.451, SAYS AFTER THE JURY HAS RETIRED AND ALSO REFERS TO DURING THE RELATIVE PHASE, NOT AFTERWARDS.

NOW, THE REASON BY ANALOGY, THAT'S SOMETHING ELSE. BUT TO SAY IT'S A DIRECT VIOLATION, THAT DOESN'T EVEN APPLY.

MR. FRANZEN: OKAY. CLEARLY, YOUR HONOR, THE

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JURY IS NOT ENTITLED TO REACH A VERDICT BUT THEY ARE STILL UNDER THE ADMONITION. INDEED YOUR HONOR INSTRUCTED THEM, IF I RECALL CORRECTLY, THAT IF ANY QUESTIONS DID ARISE, THEY SHOULD GO THROUGH THE COURT OFFICERS.

THE COURT: THAT'S DURING THE MURDER PHASE, COUNSEL, AS POINTED OUT IN THE STATUTE.

MR. FRANZEN: AND YOUR HONOR ADVISED THEM NOT TO DISCUSS THE CASE.

THE COURT: I ADVISED THEM IN THE GENERAL ADMONITION STATUTE.

MR. FRANZEN: YES, YOUR HONOR.

NOW, ON THOSE GROUNDS, YOUR HONOR, WE THINK THE STATE IS BARRED IN THIS MATTER OF SEEKING THE DEATH PENALTY. IT SEEMS THAT IF THEY ARE ALLOWED TO PROCEED, WE WILL MOVE FOR A MISTRIAL, AND SO WE DO.

THE COURT: THE STATE.

MR. HARMON: YOUR HONOR, WE CERTAINLY CAN'T AGREE THAT THE DEFENSE HAS BEEN PLACED IN AN UNTENABLE POSITION. WE ARE BEGINNING TO WONDER WHEN WE'RE GOING TO FIND OUT EXACTLY WHAT THIS JUROR HAS ON HER MIND. WE'RE CONCERNED, TOO. THE STATE HAS AN INTEREST IN HAVING 12 JURORS AT THIS POINT WHO WILL FOLLOW THE LAW WHICH THE COURT WILL GIVE THEM AND CONSIDER EQUALLY THE PUNISHMENTS PROVIDED FOR IN THIS STATE FOR MURDER IN THE FIRST DEGREE.

THERE HAS BEEN NOT PER SE A VIOLATION BY THIS JUROR OF THE COURT'S OR ANY STATUTE IN 175 OF THE NEVADA STATUTES.

A WEEK AGO TODAY, I BELIEVE BY MY CALCULATION, WOULD BE APRIL THE 25TH, 1983, QUITE EARLY IN THE MORNING, SOMEWHERE AROUND 9:00 O'CLOCK, SUDDENLY THE JUROR UNDER CONSIDERATION, I HAVE FORGOTTEN HER NAME NOW, MATERIALIZED IN THE DOORWAY OF THE MAJOR VIOLATORS UNIT OFFICE. I HADN'T ASKED

HER TO COME THERE. I WAS SURPRISED TO SEE HER.

SHE STARTED TO SAY SOMETHING TO ME, AND MY FIRST WORDS WERE, "YOU ARE STILL UNDER THE COURT'S ADMONITION. I CAN'T TALK TO YOU. I DON'T KNOW IF THE DISTRICT ATTORNEYS OFFICE CAN HAVE COMMUNICATION WITH YOU."

SHE THEN SAID, "I HAVE TRIED TO GET IN TOUCH WITH THE COURT OFFICERS. I HAVE A PROBLEM. I CAN'T WAIT 'TIL NEXT MONDAY."

AT WHICH TIME I SAID, "YOU MUST SEE THE JURY COMMISSIONER THEN BECAUSE I CAN'T HAVE ANY CONVERSATION WITH YOU."

THERE WAS NO DISCUSSION ABOUT THE CASE. THERE'S NO INDICATION THAT THE DEFENSE IS SUGGESTING THAT SOMEHOW AN INDICATION HAS BEEN GIVEN OF A NUMERICAL IN TERMS OF HOW THIS JUROR STANDS. THAT'S PREPOSTEROUS. THERE WAS NO DISCUSSION ON JURY DELIBERATION, NO DISCUSSION ABOUT THIS CASE.

MR. FRANZEN CHIDES THE REPRESENTATIVE OF THE DISTRICT ATTORNEYS OFFICE NOW FOR SENDING THIS JUROR TO THE JURY COMMISSIONER. WHERE WERE WE TO SEND HER? TO A PALM READER? TO A SOOTHSAYER? SHE HAD TO GO SOMEWHERE FOR GUIDANCE AND THAT'S WHERE WE SENT HER.

YOUR HONOR, OUR HANDS ARE PERFECTLY CLEAN IN REGARDS TO THIS. WE WERE CONFRONTED WITH AN AWKWARD SITUATION. I THINK WE HANDLED IT IN THE BEST WAY IT COULD HAVE HAPPENED. IF IT HAPPENED BY SURPRISE AGAIN TOMORROW, WE'D DO IT THE SAME WAY.

WE DON'T THINK THERE'S BEEN ANY PER SE PREJUDICE TO THE DEFENDANT. IT'S RIDICULOUS TO ASSERT NOW THAT FOR SOME REASON THE PROSECUTION IS NOW FORBIDDEN TO SEEK THE DEATH PENALTY.

AT THE MOST IF WE DISCOVER THAT THIS JUROR, REGARDLESS OF WHAT SHE TOLD US ORIGINALLY, IS NOW UNABLE

TO FOLLOW THE LAW, AND UNABLE TO CONSIDER THE PUNISHMENT PROVIDED FOR IN THIS STATE BY OUR LEGISLATURE, WE ARGUE THAT N.R.S. 175.556 THEN APPLIES. IF SHE IS DISQUALIFIED, IT THEN BECOMES APPARENT THAT THE STATUTORY PROCEDURE TAKES EFFECT OF WHERE THE JURY IS UNABLE TO REACH A MANDATORY VERDICT REGARDING THE SENTENCE, THAT WOULD BRING INTO PLAY A THREE-JUDGE PANEL. BUT THERE'S NOTHING THAT HAS OCCURRED, NOR COULD IT OCCUR UNDER THE PRESENT CIRCUMSTANCES, THAT WOULD PRECLUDE THE PROSECUTION FROM SEEKING ANY OF THE THREE PUNISHMENTS WHICH MIGHT BE CONSIDERED APPROPRIATE FOR THIS CASE.

THE COURT: ANYTHING FURTHER?

MR. FRANZEN: YES, YOUR HONOR.

REGARDING THE SUGGESTION OF A THREE-JUDGE PANEL, THE STATE HAD THE OPPORTUNITY ON VOIR DIRE TO QUESTION THE JUROR AND DID SO; WE ALSO DID AND DID SO; AND WE BOTH ACCEPTED.

THE STATUTE DOES NOT PROVIDE FOR THE SUBSTITUTION OF A PANEL AT THIS STAGE UNDER THESE CIRCUMSTANCES. ONLY AFTER A PANEL IS UNABLE TO REACH A DECISION WOULD A THREE-JUDGE PANEL BE CREATED.

WE HAVE YET TO FIND OUT WITH THEIR DELIBERATING, WHETHER THE PANEL WOULD BE ABLE TO REACH A DECISION. THAT PANEL MIGHT COME BACK WITH HER PARTICIPATING IN ANY OF THE THREE VERDICTS.

THE COURT: LET ME ASK YOU THIS, AND I DON'T KNOW WHAT THIS YOUNG LADY IS GOING TO SAY BECAUSE WE'RE PRETTY MUCH ALL IN THE SAME POSITION. NONE OF US HAVE HEARD HER AND KNOW WHAT SHE WILL SAY. BUT IF SHE WERE TO TAKE THE STAND AND SAY, I DON'T INTEND TO FOLLOW THE LAW, THAT I NEVER INTENDED TO FOLLOW THE LAW, YOU MEAN THAT WE WOULD HAVE TO WAIT AND GIVE HER AN OPPORTUNITY TO GO TO A DECISION BEFORE SHE COULD BE REMOVED FROM THE PANEL?

MR. FRANZEN: IF SHE SAID THAT WHEN SHE WAS RESPONDING TO THE VOIR DIRE QUESTIONS THAT SHE WAS BEING DELIBERATELY UNTRUTHFUL, WHICH IS YOUR HYPOTHETICAL TO ME, THEN PERHAPS WE MOVE ON TO A THREE-JUDGE PANEL IN AN ALTERNATE PERHAPS. MY RESEARCH HASN'T -- I HAVEN'T HAD THE TIME TO RESEARCH THAT SECOND STEP.

THE COURT: WELL, STATUTES OF THIS TYPE ARE STILL RATHER NEW, BUT --

MR. FRANZEN: BUT CLEARLY, BASED ON THE UNITED STATES SUPREME COURT DECISIONS AND FEDERAL DECISIONS ON FEDERAL HABEAS REVIEWING STATE DEATH PENALTIES, DEATH PENALTY STATUTES HAVE TO BE STRICTLY CONSTRUED. THEY HAVE TO BE STRICTLY CONSTRUED TO AVOID ARBITRARY AND CAPRICIOUS DEATH SENTENCES.

IF YOU STRICTLY CONSTRUE OUR STATUTE, WE HAVEN'T YET GOT TO THE POINT, EVEN IF SHE SAYS NOW I CANNOT CONSIDER A DEATH PENALTY, WE HAVE NOT YET GOT TO THE POSITION OF APPOINTING A THREE-JUDGE PANEL BECAUSE THE TRIGGERING MECHANISM HASN'T OCCURRED. THE PREDICATE ISN'T THE PANEL IS UNABLE TO REACH A VERDICT. IF SHE PARTICIPATES AS A PANEL MEMBER, EVEN SAYING NOW, AFTER TWO WEEKS, THREE WEEKS, I DON'T BELIEVE I CAN RETURN A DEATH PENALTY, THE DEFENDANT IS ENTITLED TO HAVE HER PARTICIPATE IN THE PANEL.

THE COURT: ALL RIGHT.

THE INQUIRY HERE, GENTLEMEN, AS YOU'RE WELL AWARE, IS WHETHER OR NOT THIS JUROR CAN SIT AND TRY THIS CASE FAIRLY AND IMPARTIALLY, BOTH TO THE STATE AND TO THE DEFENSE. THAT IS GOING TO REQUIRE INQUIRY, IN VIEW OF WHAT HAS HAPPENED TO DATE.

I AM GOING TO, AFTER WE FINISH THESE PROCEEDINGS THEN, HAVE HER COME IN AND WE WILL MAKE INQUIRY OF HER AS TO WHO SHE SPOKE TO, WHAT SHE TOLD THEM, WHAT THEY TOLD

HER, WHO WAS SHE REFERRED TO, WHO REFERRED HER, AND ANYTHING ELSE THAT MAY BE PERTINENT TO THE PROCESS THAT SHE WENT THROUGH. AND THEN I INTEND TO INQUIRE OF HER IF SHE STILL BELIEVES THAT SHE COULD SIT AND BE A FAIR AND IMPARTIAL JUROR AND WHETHER HER ANSWER WITH REGARDS TO THE RANGE OF PENALTIES, WHICH SHE ANSWERED IN HER INITIAL INQUIRY, IS HER ANSWER THE SAME NOW AS IT WAS THEN. I BELIEVE THAT THAT WOULD PROBABLY BE AS FAR AS WE WOULD HAVE TO GO TO ASCERTAIN, ONE, WHAT OCCURRED AND, TWO, WHAT HER STATE OF MIND IS WITH REGARDS TO HER ABILITY TO BE FAIR AND IMPARTIAL.

NOW, DOES ANYONE FIND ANY PROBLEM WITH THAT APPROACH?

MR. HARMON: THE STATE HAS NO PROBLEM.

THE COURT: COUNSEL?

MR. FRANZEN: YOUR HONOR, IN HOUSEKEEPING, IS THE STATEMENT, THE UNSWORN STATEMENT, GOING TO BE FILED?

THE COURT: WHAT?

MR. FRANZEN: IS THE UNSWORN STATEMENT GOING TO BE FILED?

THE COURT: YES. IT WILL BE.

MR. FRANZEN: WILL WE HAVE THE OPPORTUNITY TO SPEAK WITH THE DECLARANT OUTSIDE THE COURT?

THE COURT: SHE IS RIGHT HERE AND YOU WILL HAVE AN OPPORTUNITY TO SPEAK TO HER AND THE OPPORTUNITY TO PUT HER ON THE STAND.

MR. FRANZEN: VERY WELL.

THE COURT: NOW, THE QUESTIONS THAT I INTEND TO ASK OF THE JUROR, THE MATERIAL POSITION OF THOSE QUESTIONS WERE PROVIDED TO ME BY THE DEFENSE. SO WE WILL MAKE INQUIRY, FIRST OF ALL, OF THE JURY COMMISSIONER AND THEN WE WILL MAKE INQUIRY OF HER.

COME FORWARD.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

WHEREUPON,

LYNN KENNINGTON,

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

THE COURT: YOU MAY PROCEED.

COUNSEL, FOR THE RECORD, SINCE WE WILL BE FILING THE STATEMENT, WE WILL MARK THIS STATEMENT AS EXHIBIT NUMBER 1 -- COURT'S EXHIBIT NUMBER 1.

MR. FRANZEN: YOUR HONOR, WE'VE HAD SEVERAL COURT EXHIBITS ALREADY.

THE COURT: ALL RIGHT. LET'S SEE.

DO YOU HAVE ANYTHING THERE THAT WOULD INDICATE OUR LIST OF COURT EXHIBITS?

THE CLERK: NO. WELL, YOUR HONOR, I DON'T KNOW.

MR. FRANZEN: YOUR HONOR, DO YOU RECALL THE LETTERS? THERE WERE TWO LETTERS.

THE COURT: WELL, THE PROBLEM IS THAT WE'RE CHANGING CLERKS AND -- WHERE IS MY CLERK?

THE CLERK: I BELIEVE SHE'S ON VACATION.

THE COURT: OH. ALL RIGHT.

WELL, WE WILL MARK THIS -- I KNOW WE HAVE A MARKING FOR COURT'S EXHIBITS SOMEWHERE. WE WILL MARK THIS COURT EXHIBIT NUMBER 5. I DON'T THINK WE WENT UP THAT HIGH.

YOU MAY PROCEED, COUNSEL.

MR. FRANZEN: THANK YOU, YOUR HONOR.

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DIRECT EXAMINATION

BY MR. FRANZEN:

Q IS IT MISS KENNINGTON?

A MRS.

Q MRS. KENNINGTON?

A YES.

Q WHEN DID YOU FIRST SEE, IF YOU DID SEE, THIS JUROR, MS. CAPASSO?

A WELL, THE FIRST TIME I SEEN HER WAS ON THE MORNING SHE CHECKED IN FOR JURY -- EXCUSE ME. I CHECKED HER IN AND SHE SIGNED THE PAY VOUCHER, AND I GAVE HER HER BADGE NUMBER.

Q WHEN DID YOU NEXT SEE HER?

A WELL, I SEEN HER FREQUENTLY DURING THE TWO WEEKS -- IT WAS TWO WEEKS, WASN'T IT, YOUR HONOR, THE TRIAL WAS GOING ON?

I SEEN HER FREQUENTLY. THE JURORS WERE IN AND OUT ON RECESS AND LUNCH HOURS. AND I SEEN HER QUITE FREQUENTLY DURING THE NEXT TWO WEEKS.

PROBABLY THE DATE YOU'RE WANTING ME TO TALK ABOUT IS LAST MONDAY. AND SHE DID APPEAR IN MY OFFICE LAST MONDAY, APRIL THE 25TH.

Q HAD YOU RECEIVED ANY INDICATION FROM ANY-ONE REGARDING --

A NO. ABSOLUTELY NOT.

Q (CONTINUING) -- SHE WAS COMING?

A I HAD GONE UP TO ORIENTATION AND WE COMPLETED THAT ABOUT 10:30. IT WAS SOMEWHERE BETWEEN 11:00 AND 11:30. I HAD JUST MADE THE FINAL ROUNDS OF THE COURTS AND I WENT INTO THE OFFICE AND A MEMBER OF MY STAFF SAID, THERE IS A JUROR FROM DEPARTMENT FIVE THAT HAS A PROBLEM THAT NEEDS TO TALK

TO YOU.

Q DO YOU REMEMBER WHO THE MEMBER OF YOUR STAFF WAS?

A SUSAN GRIFFIN.

Q DID SHE RELATE TO YOU WHAT THE PROBLEM WAS?

A NOT A WORD. MONDAY IS TOO BUSY. SHE JUST SAID, YOU HAVE SOMEONE WAITING FOR YOU, AND SHE DID STATE THAT IT WAS A JUROR FROM DEPARTMENT FIVE.

Q DID YOU EVER RECEIVE A COMMUNICATION FROM THE DISTRICT ATTORNEYS OFFICE?

A NO.

Q LET ME FINISH THE QUESTION.

A OH. SORRY.

Q DID YOU EVER RECEIVE A COMMUNICATION FROM THE DISTRICT ATTORNEYS OFFICE REGARDING THIS JUROR NOT TO DISCUSS THE CASE THAT SHE WAS SITTING AS A JUROR ON?

A I RECEIVED NO COMMUNICATION FROM THE DISTRICT ATTORNEYS OFFICE.

Q DID THE JUROR, MS. CAPASSO, EXPLAIN WHO HAD SENT HER, IF ANYONE, TO THE JURY COMMISSIONER?

A I WENT OUT INTO THE LOUNGE AND SHE WAS THE ONLY ONE SITTING THERE. I RECOGNIZED HER AND I SAID, GOOD MORNING. MAY I HELP YOU? AND I INVITED HER INTO MY OFFICE.

Q BUT DID SHE EVER EXPLAIN WHO SENT HER?

A YES. I -- SHE BASICALLY STARTED OUT WITH THAT SHE HAD TRIED TO -- TO GET IN TOUCH WITH DEPARTMENT FIVE, OR MEMBERS OF THE COURT, AND THAT SHE HAD GONE TO THE DISTRICT ATTORNEYS OFFICE. SHE DID NOT MENTION ANY NAMES TO ME AT ALL. BUT SHE SAID THAT IT HAD BEEN RECOMMENDED THAT SHE COME AND TALK TO ME, BUT SHE DID NOT GIVE ME ANY NAMES.

Q DID SHE GIVE ANY INDICATION SHE TALKED TO MORE THAN ONE PARTY?

A NO.

Q AT THE DISTRICT ATTORNEYS OFFICE?

A NO. I THINK TO THE BEST OF MY RECOLLECTION SHE SAID THE DISTRICT ATTORNEYS OFFICE.

Q AT THAT TIME WERE YOU AWARE THAT THE -- A GUILTY VERDICT HAD COME BACK ON THE TRIAL PRESENTLY BEFORE JUDGE MENDOZA INVOLVING THAT JURY?

A THAT'S REALLY HARD TO ANSWER. I KNEW THAT THEY WERE OUT DELIBERATING, AND I HAD CHECKED. I KNEW THAT THEY HAD BEEN OUT DELIBERATING, YES; BUT I, NO, I CAN'T HONESTLY SAY I KNEW. WE HAD NINE TRIALS THAT WEEK.

Q WHAT DID YOU ADVISE HER REGARDING THE PENALTY HEARING, IF ANYTHING?

A OKAY. WHEN SHE -- SHE CAME INTO SEE ME AND SHE SAID SHE HAD A PROBLEM, THE FIRST THING I DID WAS ADMONISH HER. I SAID, PLEASE DO NOT DISCUSS ANYTHING.

Q WHAT DID YOU --

A OKAY. I'M JUST TRYING TO TELL YOU, COUNSEL

Q I'M TRYING TO FOCUS IN ON ONE AREA, MA'AM.

WHAT DID YOU TELL HER, IF ANYTHING, ABOUT THE PENALTY PHASE?

A I DON'T REALLY UNDERSTAND YOUR QUESTION.

Q DID YOU TELL HER HOW THE PENALTY PHASE WORKS OR DID YOU TELL HER --

A OH, ABSOLUTELY NOT.

Q (CONTINUING) -- ADDITIONAL EVIDENCE WOULD COME IN?

A ABSOLUTE- -- WELL, I DID MAKE THE STATEMENT -- OKAY. WE TALKED A LITTLE BIT ABOUT IT AND I SAID, I MADE THE STATEMENT TO HER, I SAID, ARE YOU AWARE OF THE FACT THAT THERE WILL BE OTHER EVIDENCE PRESENTED TO YOU? AND THAT'S ALL I SAID.

Q WHAT CAUSED YOU TO -- DID SHE HAVE A QUESTION THAT CAUSED THAT RESPONSE?

A BECAUSE SHE WAS SO CONCERNED AS NOT TO THE VERDICT. SHE SAID SHE TRULY BELIEVED THE VERDICT. BUT SHE HAD -- SHE HAD A PROBLEM AS TO THE PENALTY OR SENTENCE. YES, THAT'S WHAT CAUSED IT.

Q DID SHE APPEAR TO BE MORE -- WELL, STRIKE THAT.

DID YOU ADVISE HER THAT -- WELL, DID SHE ASK TO BE EXCUSED?

A SHE CAME IN. SHE SAID SHE HAD A PROBLEM. AND SHE SAID THAT -- AND I HAVE TO JUST TELL YOU WHAT SHE SAID -- SHE SAID, I HAVE A PROBLEM. SHE SAID, I HAVEN'T BEEN ABLE TO SLEEP ALL WEEKEND. SHE SAID, I HAVE NO PROBLEM WITH THE VERDICT. I BELIEVE THE MAN IS GUILTY. BUT I HAVE A PROBLEM WITH HAVING THIS MAN ON MY CONSCIENCE.

Q OKAY. LET ME ASK THE QUESTION AGAIN.

A OKAY.

Q DID SHE ASK TO BE EXCUSED?

A SHE NEVER CAME OUT AND ASKED TO BE EXCUSED, NO.

Q DID YOU ADVISE HER THAT IF SHE WAS EXCUSED IT MIGHT CAUSE A MISTRIAL?

A I TOLD HER VERY FRANKLY I DIDN'T KNOW WHAT WOULD HAPPEN. I SAID THAT WE HAD TO BE VERY CAREFUL THAT A MISTRIAL DIDN'T HAPPEN, THAT I DO NOT KNOW WHETHER A JUROR WHO HAD NOT PARTICIPATED IN THE DELIBERATION -- YOU KNOW, BECAUSE SHE MADE THE STATEMENT OF SOMETHING ABOUT THERE ARE TWO ALTERNATES -- AND I SAID, YES, I KNEW THAT, BUT, I SAID, I WAS NOT AWARE OF WHETHER OR NOT AN ALTERNATE COULD BE SUBSTITUTED AFTER THE VERDICT HAD BEEN DELIVERED.

Q DID YOU ADVISE HER OF THE INCONVENIENCE OF

A MISTRIAL?

A I DON'T THINK SO.

Q OR ANYTHING ABOUT --

A SHE SEEMED TO BE VERY UPSET AND SHE SAID REPEATEDLY, I DON'T WANT TO CAUSE A MISTRIAL.

Q WELL, DID YOU TELL HER WHAT A MISTRIAL WAS?

A HEAVENS NO.

Q YOU TOLD HER YOU WANTED TO AVOID A MISTRIAL BUT DIDN'T EXPLAIN WHAT IT WAS?

A NO, I DIDN'T.

Q SHE SAID SHE WANTED TO AVOID A MISTRIAL?

A THAT'S RIGHT.

Q SHE APPEARED TO HAVE SOME CONCEPT OF WHAT A MISTRIAL WAS?

A YES.

Q DID YOU ADVISE HER, WHEN YOU TOLD HER THAT ADDITIONAL EVIDENCE WOULD BE PRESENTED AT THE PENALTY HEARING, DID YOU ADVISE HER AS TO WHAT KIND OF ADDITIONAL EVIDENCE?

A NO.

Q WHY DID YOU FEEL IT NECESSARY TO EVEN MAKE THAT STATEMENT THAT ADDITIONAL EVIDENCE WOULD BE PRESENTED AT THE PENALTY HEARING?

A I GUESS IT WAS HER CONCERN THAT SHE STRONGLY BELIEVED THE MAN WAS GUILTY BUT SHE SEEMED TO HAVE A PROBLEM WITH THE PENALTY. AND I WAS JUST TRYING TO REASSURE HER THAT, THAT, YOU KNOW, IT WOULD BE A UNANIMOUS VOTE AND THAT THERE WOULD BE OTHER FACTS BROUGHT OUT.

Q BUT IT WOULD BE EASIER TO RETURN A VERDICT --

A I DIDN'T SAY "EASIER".

Q I'M TRYING TO INTERPRET YOUR -- YOUR ANSWER.

A OKAY.

Q WHEN YOU WANTED TO REASSURE HER THAT SHE HAD NO PROBLEM WITH THE GUILTY PHASE, THAT SHE HAD PROBLEMS WITH THE PENALTY PHASE, YOU WISHED TO REASSURE HER -- REASSURANCE MEANS, I THINK FROM YOUR CONTENT -- CONTENT OF HOW YOU ARE EXPLAINING THIS -- THAT IT WOULD BE AN EASIER DECISION TO MAKE IN THAT ADDITIONAL EVIDENCE WAS GOING TO BE PRESENTED?

A I DON'T THINK THAT WAS MY INTENT AT ALL. I DON'T THINK IT IS EASY. I DON'T THAT EASY WAS MY INTENT AT ALL.

Q WELL, HOW LONG DID THE JUROR STAY WITH YOU?

A SHE WAS PROBABLY IN MY OFFICE LESS THAN FIVE OR TEN MINUTES, BECAUSE I TOLD HER I HAD NO AUTHORITY TO TALK TO HER. THE ONLY THING I COULD DO WAS TO GET THE INFORMATION TO JUDGE MENDOZA AS FAST AS I COULD AND I WOULD FOLLOW HIS DIRECTIONS.

Q WHEN SHE TOLD YOU THAT SHE WAS HAVING TROUBLE WITH AN ASPECT OF THIS CASE, DID YOU AT THAT TIME TELL HER THAT SHE COULD NOT TALK WITH YOU?

A I TOLD HER NOT TO TALK ABOUT ANY FACTS OF THE CASE.

SHE SAID, I HAVE TO TALK TO SOMEONE. THE LADY WAS ALMOST IN TEARS.

Q LET ME -- LET ME AGAIN ASK THE QUESTIONS.

A OKAY. I'M SORRY.

Q MA'AM, WHEN SHE SAID THAT SHE WAS HAVING PROBLEMS WITH THE CASE DID YOU TELL HER THAT YOU COULD NOT TALK TO HER ABOUT THE CASE?

A YES.

Q WHEN SHE TOLD YOU THAT SHE WAS HAVING PROBLEMS WITH THE PENALTY ASPECT OF THE CASE YOU WENT ON TO

TELL HER THAT THERE WOULD BE ADDITIONAL EVIDENCE?

A YES.

Q AND THAT IT WOULD TAKE A UNANIMOUS VOTE?

A YES. I SAID THAT.

Q AND THAT YOU WISHED TO AVOID A MISTRIAL?

A COUNSEL, VERY HONESTLY I -- I DON'T KNOW IF THAT IS THE RIGHT CONTEXT, BUT THOSE WORDS WERE STATED, YES.

Q AFTER THE CONVERSATION WITH JUROR CAPASSO --

A UH-HUH.

Q (CONTINUING) -- WHAT DID YOU DO?

A I IMMEDIATELY CALLED DEPARTMENT FIVE. I HAD NO ANSWER AND SO I CALLED COURT ADMINISTRATION. I ASKED THEM, YOU KNOW, FOR A NUMBER.

I WAS TOLD -- I CALLED THE CLERK'S OFFICE, FOR ROBERTA. SHE WAS ON VACATION. FINALLY I CALLED DEPARTMENT SIX, AND I SAID, IF YOU SEE THE LAW CLERK FROM DEPARTMENT FIVE, WILL YOU HAVE HIM CALL ME. HE CALLED ME ABOUT 1:30 THAT DAY.

Q DID YOU ATTEMPT TO CONTACT THE CHIEF JUDGE, STEVE HUFFAKER?

A NO.

Q DID YOU ATTEMPT TO CONTACT ANY OTHER JUDGE FOR GUIDANCE?

A NO.

Q AFTER YOU SPOKE WITH JUDGE MENDOZA'S LAW CLERK, WHAT DID YOU DO?

A WELL, FOR THE REST OF THE DAY NOTHING ABOUT THAT CASE.

THEN THE NEXT MORNING I TALKED TO AGAIN HIS LAW CLERK AND WE HAD NOT BEEN ABLE TO GET THE INFORMATION TO JUDGE MENDOZA.

THE ONLY THING I DID THEN WAS TO CALL MARILYN AND TELL HER THAT I HAD BEEN UNABLE TO GET ANY FURTHER DIRECTIONS.

AND AT THAT TIME WHEN I CALLED, SHE SAID, OH, I FEEL MUCH BETTER. I'VE BEEN ABLE TO SLEEP.

I SAID, WELL, WE WILL STILL FOLLOW STRICT ORDERS OF JUDGE MENDOZA. AND I TOLD HER SHE HAD TO APPEAR BY MONDAY. THAT'S IT.

Q YOU SAID, STILL FOLLOW THE STRICT ORDERS OF JUDGE MENDOZA?

A BASICALLY I WANTED HER TO FOLLOW THE ADMONISHMENT OF THE COURT.

Q WAIT A MINUTE. WAIT A MINUTE. WAIT A MINUTE.

HAD -- YOU GOT TO WAIT UNTIL I FINISH THE QUESTION, PLEASE.

A OKAY.

Q YOU SAID, FOLLOW THE STRICT ORDERS OF JUDGE MENDOZA. HAD YOU, BETWEEN THE INTERVAL OF SEEING HER IN YOUR JURY COMMISSIONER'S CHAMBERS AND THAT PHONE CALL, BEEN IN COMMUNICATION WITH JUDGE MENDOZA REGARDING INSTRUCTIONS?

A I -- I PERSONALLY? NO.

Q YOU SAY YOU PERSONALLY. DURING THAT TIME INTERVAL HAD YOU RECEIVED INSTRUCTIONS FROM ANOTHER PARTY RELATING JUDGE MENDOZA'S INSTRUCTIONS?

A NO.

Q IN YOUR CONVERSATIONS WITH JUROR CAPASSO, DID SHE EVER MENTION WHETHER SHE HAD A CONVERSATION OR DISCUSSION REGARDING THE CASE WITH ANYONE ELSE?

A NO.

Q ONE OF THE THINGS YOU TOLD HER WHEN SHE EXPLAINED SHE WAS HAVING DIFFICULTY, WAS THAT AT THE PENALTY

HEARING THE STATE WOULD PRESENT OTHER FACTS NOT BROUGHT OUT DURING THE TRIAL?

A YES. I THINK I STATED THAT. VERY HONESTLY, YES, I DID.

Q DID YOU SAY ANYTHING ELSE REGARDING THE PRESENTATION OF EVIDENCE AT THE PENALTY PHASE?

A NO. NO. IN FACT, I DON'T EVEN KNOW IF I SAID "STATE". I MIGHT -- I WANTED HER TO KNOW THAT THERE WOULD BE OTHER EVIDENCE BROUGHT OUT.

Q IN YOUR STATEMENT OF APRIL 30TH -- DO YOU HAVE A COPY OF YOUR STATEMENT?

A NO, I DON'T.

Q WOULD YOU LIKE TO SEE IT?

A THANK YOU, YOUR HONOR.

Q THE PAGES ARE UNNUMBERED, BUT ON PAGE TWO AT 15 THROUGH 18 --

A UH-HUH.

Q (CONTINUING) -- YOUR EXPLANATION TO HER WAS THE STATE WOULD PRESENT OTHER FACTS; WOULD THAT BE CORRECT?

A WELL, WHEN YOU BROUGHT THE QUESTION UP I HAVE TO -- VERY HONESTLY, I DON'T KNOW IF I SAID "STATE" OR "COUNSEL".

Q DID YOU EVER SEEK TO DIRECT JUROR CAPASSO TO ANY OTHER JUDGE IN THE ABSENCE OF JUDGE MENDOZA?

A NO, SIR. I DID NOT.

MR. FRANZEN: NOTHING FURTHER, YOUR HONOR.

THE COURT: THE STATE.

MR. HARMON: VERY BRIEFLY, YOUR HONOR.

MAY I APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YOU MAY.

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CROSS EXAMINATION

BY MR. HARMON:

Q IS IT LYNN KENNINGTON, FOR THE RECORD?

A YES.

Q MRS. KENNINGTON, I AM SHOWING YOU NOW WHAT HAS BEEN PREVIOUSLY MARKED AS THE COURT'S EXHIBIT NUMBER 5.

A UH-HUH.

Q IS THAT A STATEMENT PREPARED BY YOU AND SIGNED BY YOU?

A YES, IT IS.

Q DOES THAT SET FORTH YOUR BEST RECOLLECTION OF WHAT OCCURRED --

A YES.

Q (CONTINUING) -- AT THE TIME YOU HAD THE DISCUSSION IN QUESTION WITH THE JUROR ON APRIL THE 25TH, 1983?

A YES, IT DOES.

MR. HARMON: THANK YOU.

WE HAVE NOTHING FURTHER, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. FRANZEN:

Q MA'AM, WHAT CAUSED YOU TO MAKE THE STATEMENT --

THE COURT: COUNSEL, DO YOU WANT TO HAND THAT BACK TO ME.

MR. HARMON: I'M SORRY. THAT'S MY COPY.

THE WITNESS: ON FRIDAY AFTERNOON I RECEIVED A PHONE CALL AT HOME FROM JUDGE MENDOZA'S LAW CLERK STATING THAT

HE HAD DISCUSSED THE MATTER WITH JUDGE MENDOZA BY PHONE, THAT JUDGE MENDOZA WANTED MY STATEMENT ON HIS DESK BY SUNDAY MORNING. I CAME TO THE COURTHOUSE ON SATURDAY AND PREPARED IT.

BY MR. FRANZEN:

Q SO APRIL 30TH WOULD BE THE SATURDAY FOLLOWING THE PHONE CALL?

A YES, SIR.

MR. FRANZEN: OKAY. I HAVE NO FURTHER QUESTIONS.

MR. HARMON: NOTHING FURTHER, YOUR HONOR.

THE COURT: YOU'RE EXCUSED.

THE WITNESS: THANK YOU, JUDGE.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

THE COURT: ANY FURTHER WITNESSES?

MR. FRANZEN: WE HAD INITIALLY WISHED THE OPPORTUNITY TO QUESTION THE DISTRICT ATTORNEYS INVOLVED. IT WAS IF THE COURT IS NOT INCLINED TO DO THAT.

THE COURT: NO. THAT ISN'T WHAT I SAID AT ALL, COUNSEL. I SAID THAT IF YOU HAVE ANY QUESTIONS YOU MAY DIRECT THEM TO ME AND THEN I WILL DIRECT THEM TO THE DISTRICT ATTORNEY.

MR. FRANZEN: THIS WOULD BE A QUESTION FOR MR. HARMON, YOUR HONOR: KNOWING THAT MS. CAPASSO --

THE COURT: COUNSEL, WHY DON'T YOU JUST HAND HIM THE QUESTIONS AND THEN LET HIM READ THEM AND LET HIM RESPOND. THAT WOULD BE JUST AS EASY A WAY I KNOW.

MR. FRANZEN: VERY WELL, YOUR HONOR.

COULD THIS BE MARKED AS AN EXHIBIT, YOUR HONOR?

THE COURT: WHY DON'T YOU JUST GIVE IT TO HIM AND HE CAN STATE THE QUESTIONS AND GIVE THE ANSWERS.

MR. HARMON: THANK YOU.

YOUR HONOR, FOR THE RECORD, THE QUESTION BY MR. FRANZEN IS:

SIR, KNOWING MS. CAPASSO WAS A JUROR AND UNDER THE COURT'S ADMONITION NOT TO DISCUSS THE CASE, WHY DID YOU SEND HER TO THE JURY COMMISSION?

I'VE ALREADY TRIED TO ANSWER THAT QUESTION. I'LL REPEAT IT. SHE SAID SHE HAD A PROBLEM. SHE SAID THAT IT COULDN'T WAIT UNTIL NEXT MONDAY. SHE INDICATED SHE TRIED TO GET AHOLD OF THE COURT PERSONNEL AND NO ONE WAS AVAILABLE.

I WASN'T REALLY PREPARED FOR THIS. AS I THINK BACK ABOUT IT, I WAS TRYING TO GET READY FOR A 9:00 O'CLOCK CALENDAR, I WAS ATTEMPTING TO FINALIZE ARRANGEMENTS ON OUT OF STATE WITNESSES FOR THE PENALTY HEARING IN THIS CASE, AND I ALSO HAD IN MIND FINISHING SUBPOENAS ON THE PATRICK LIZOTTE MURDER CASE, WHICH IS SET TO START NEXT WEEK. SHE MATERIALIZED. THE FIRST THOUGHT IN MY MIND WAS, I HAD TO SEND HER SOMEWHERE. SO I SENT HER TO THE JURY COMMISSIONER'S OFFICE.

THE COURT: IS THAT THE ONLY QUESTION THAT YOU HAD?

MR. FRANZEN: NO, YOUR HONOR. I'M WRITING ONE MORE, PLEASE.

THE COURT: YOU'RE WRITING ONE MORE?

IS THIS GOING TO BE YOUR LAST QUESTION?

MR. FRANZEN: DEPENDING ON THE RESPONSE, YOUR HONOR.

THE COURT: WELL, WHY DON'T YOU JUST STATE IT, BECAUSE APPARENTLY I THOUGHT YOU HAD MORE THAN ONE QUESTION. SO JUST STATE YOUR QUESTION AND WE WILL HAVE HIM RESPOND.

MR. FRANZEN: SIR, KNOWING THE JUROR STATED SHE HAD A PROBLEM, DID YOU ADMONISH HER NOT TO DISCUSS THE CASE WITH THE JURY COMMISSION?

MR. HARMON: I'VE ALREADY TRIED TO ANSWER THAT QUESTION. I'D BE GLAD TO.

MY RECOLLECTION OF THE CONVERSATION, I TOLD HER I COULDN'T TALK WITH HER AND NO ONE IN THE DISTRICT ATTORNEYS OFFICE COULD TALK TO HER. SHE WAS STILL UNDER THE COURT'S ADMONISHMENT.

I TOLD HER THAT ALL I COULD DO WAS SEND HER TO THE JURY COMMISSION. THERE WAS NO FURTHER COMMENT.

MR. FRANZEN: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ALL RIGHT. ANY OTHER WITNESSES BEFORE WE BRING THE JUROR IN?

MR. FRANZEN: NO, SIR.

THE COURT: WE'LL TAKE ABOUT A TEN MINUTE RECESS AND THEN HAVE THE JUROR SITTING IN HER REGULAR SPOT, JUST THE ONE JUROR, AND THAT IS JUROR NUMBER TEN, IS IT?

WE'LL BE IN RECESS FOR ABOUT TEN MINUTES.

(WHEREUPON, FROM 3:00 P.M. UNTIL 3:20 P.M., A RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: LET THE RECORD REFLECT THE PRESENCE OF COUNSEL AND MS. MARILYN CAPASSO.

JUROR NUMBER TEN, MS. CAPASSO: CAPASSO.

THE COURT: MS. CAPASSO, BECAUSE OF YOUR INQUIRY APPARENTLY ON THE 25TH, THE INQUIRY TO THE COMMISSIONER AS WELL AS TO OTHER PEOPLE, A QUESTION HAS ARISEN AS TO WHO YOU SPOKE

TO, WHAT YOU TOLD THEM, WHO SENT YOU TO ANY OF THE OFFICES THAT YOU WENT TO, WHAT YOU SAID AT THOSE OFFICES, AND WHAT OCCURRED GENERALLY.

I MIGHT JUST POINT OUT TO YOU THAT WE ARE NOT INQUIRING AS TO WHAT YOUR PRESENT STATE OF MIND IS AT THIS POINT. WE MERELY WANT TO FIND OUT WHAT OCCURRED IN YOUR OWN LANGUAGE. AND IF YOU COULD JUST KIND OF TELL US WHAT DID OCCUR.

JUROR NUMBER TEN, MS. CAPASSO: OKAY. I CAME TO SEE YOU. AND THE COURT CLERK, I DON'T KNOW HIS NAME, INFORMED ME THAT YOU WERE OUT OF TOWN AND WOULDN'T BE BACK UNTIL THE NEXT WEEK, AND SUGGESTED THAT --

THE COURT: THE DATE SET FOR THE HEARING?

JUROR NUMBER TEN, MS. CAPASSO: RIGHT. RIGHT.

THE COURT: OKAY.

JUROR NUMBER TEN, MS. CAPASSO: AND SUGGESTED THAT MAYBE I TALK TO THE DISTRICT ATTORNEY.

I WENT UP TO THEIR OFFICE AND MR. HARMON SAID THAT, YOU KNOW --

THE COURT: WHO DID YOU TALK TO IN MY OFFICE?

JUROR NUMBER TEN, MS. CAPASSO: EXCUSE ME.

THE COURT: WHO DID YOU TALK TO IN MY OFFICE?

JUROR NUMBER TEN, MS. CAPASSO: NO. NO. NOT YOUR OFFICE. I WENT UP TO THE DISTRICT ATTORNEYS OFFICE.

I FIRST TALKED TO A COURT CLERK. OKAY. I DON'T KNOW WHAT THE GENTLEMAN'S NAME WAS.

THE COURT: A COURT CLERK. WHERE WAS THIS AT?

JUROR NUMBER TEN, MS. CAPASSO: RIGHT OUTSIDE THE DOOR HERE.

THE COURT: AND DO YOU KNOW WHOSE CLERK IT WAS OR WHO THE INDIVIDUAL WAS?

JUROR NUMBER TEN, MS. CAPASSO: NO. I -- I DON'T

KNOW WHO HE WAS.

THE COURT: THIS ROOM WAS CLOSED, WAS IT NOT?

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE COURT: SO YOU DON'T KNOW WHO THE INDIVIDUAL WAS THAT THEN TALKED TO YOU ABOUT THIS MATTER?

JUROR NUMBER TEN, MS. CAPASSO: NO. NO.

THE COURT: THEN WHAT DID YOU DO?

JUROR NUMBER TEN, MS. CAPASSO: THEN I WENT UP TO THE DISTRICT ATTORNEYS OFFICE AND I SPOKE WITH THIS SECRETARY. SHE SAID, YOU KNOW, TO GO IN AND SEE MR. HARMON.

AND I WENT IN THERE AND HE TOLD ME THAT I COULD NOT, YOU KNOW, SPEAK WITH HIM BECAUSE I WAS ADMONISHED ABOUT IT, AND SUGGESTED THAT I WOULD COMMUNICATE WITH HIM THROUGH MS. KENNINGTON.

I THEN WENT DOWN TO HER OFFICE AND SPOKE TO HER AND TOLD HER THE PROBLEM THAT I WAS HAVING. AND THAT WAS --

THE COURT: WHAT SPECIFICALLY DID YOU TELL HER?

JUROR NUMBER TEN, MS. CAPASSO: LET ME THINK.

I TOLD HER THAT I WAS JUST HAVING A HARD TIME DEALING WITH THE SENTENCING.

THE COURT: WHAT DID SHE RESPOND TO YOU?

JUROR NUMBER TEN, MS. CAPASSO: OH, GOD. I DON'T EVEN REMEMBER.

SHE TOLD ME THAT, YOU KNOW, OTHER EVIDENCE WOULD BE GIVEN, YOU KNOW, TRIED TO REASSURE ME NOT TO FEEL BAD ABOUT IT, AND THAT WAS ABOUT IT. SHE SAID THAT SHE WOULD TRY AND GET IN TOUCH WITH YOU OR TRY AND CONTACT SOMEONE ELSE AND GET BACK TO ME, AND THAT WAS IT.

THE COURT: AT ALL TIMES YOU KNEW THAT THIS HEARING HAD BEEN SET FOR 10:00 O'CLOCK THIS MORNING?

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE COURT: CORRECT?

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE COURT: AND YOU WERE AWARE THAT ANY FURTHER PROCEEDINGS -- OFFICIAL PROCEEDINGS WOULD BE CONDUCTED AT THAT TIME?

JUROR NUMBER TEN, MS. CAPASSO: YEAH. BY TALKING TO YOU I THOUGHT THAT I COULD BE EXCUSED BEFORE THE HEARING WAS SET. THAT'S INITIALLY WHY I CAME TO SPEAK TO YOU.

THE COURT: ALL RIGHT.

NOW, YOU HAVE NEVER INDICATED YOUR FEELINGS ABOUT THIS CASE, EXCEPT ABOUT YOUR OWN PERSONAL FEELINGS, TO ANYONE, DID YOU?

JUROR NUMBER TEN, MS. CAPASSO: NO.

THE COURT: YOU REMEMBER THE QUESTIONS THAT WERE PROPOUNDED TO YOU BY BOTH THE STATE AND THE DEFENDANT WHEN YOU FIRST STARTED THIS TRIAL?

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE COURT: AND IS YOUR FEELING AS EXPRESSED THEN THE SAME NOW AS IT WAS THEN?

JUROR NUMBER TEN, MS. CAPASSO: WHOA.

THE COURT: WOULD YOUR ANSWERS BE THE SAME OR ARE THEY THE SAME?

JUROR NUMBER TEN, MS. CAPASSO: THAT'S HARD TO ANSWER.

I GUESS THE ANSWERS TO THE QUESTION WOULD BE THE SAME, BUT I'M HAVING A HARD TIME BEING THE ONE TO PUSH THE BUTTON.

THE COURT: ALL RIGHT.

COUNSEL, APPROACH THE BENCH.

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(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: YOU HEARD THE THREE POSSIBLE PUNISHMENTS FOR MURDER IN THE FIRST DEGREE, DID YOU NOT?

JUROR NUMBER TEN, MS. CAPASSO: UH-HUH.

THE COURT: YOU WILL HAVE TO SPEAK UP.

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE COURT: CAN YOU CONSIDER THEM EQUALLY AT THIS TIME?

JUROR NUMBER TEN, MS. CAPASSO: I CAN CONSIDER THEM BUT I DON'T PARTICULARLY WANT TO IMPOSE THEM.

THE COURT: YOUR ANSWER TO THAT QUESTION WOULD BE --

JUROR NUMBER TEN, MS. CAPASSO: WHOA (INDICATING). YES.

THE COURT: IS THERE ANYTHING IN THE DISCUSSION THAT YOU HAD WITH THE JURY COMMISSIONER THAT WOULD CAUSE YOU TO CHANGE YOUR FEELING WITH REGARD TO THOSE QUESTIONS THAT I'VE PREVIOUSLY ASKED?

JUROR NUMBER TEN, MS. CAPASSO: IN REGARDS TO THOSE QUESTIONS?

THE COURT: YES.

JUROR NUMBER TEN, MS. CAPASSO: NO.

THE COURT: OR IN REGARDS TO ANY QUESTION?

JUROR NUMBER TEN, MS. CAPASSO: NO.

THE COURT: ALL RIGHT.

THE STATE?

MR. HARMON: NOTHING.

THE COURT: DEFENSE?

MR. FRANZEN: NOTHING, YOUR HONOR.

THE COURT: ALL RIGHT. YOU ARE EXCUSED. JUST GO OUTSIDE AND WAIT OUT THERE.

JUROR NUMBER TEN, MS. CAPASSO: OKAY.

(WHEREUPON, THE JUROR LEFT THE COURTROOM AND THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: COUNSEL, I BELIEVE IT'S YOUR MOTION, COUNSEL. ANYTHING FURTHER? ANY ADDITIONAL WITNESSES?

MR. FRANZEN: NO, YOUR HONOR, NOT TO MY KNOWLEDGE.

THE COURT: THE STATE?

MR. HARMON: YOUR HONOR, WE HAVE NO ADDITIONAL WITNESSES TO CALL.

I PERSONALLY THINK, GIVEN THE JUROR'S RESPONSE TO THE COURT'S QUESTIONS, SHE DOESN'T WANT TO BE WHERE SHE IS, BUT IF WE WERE TO BRING THE OTHER ELEVEN IN THEY PROBABLY WOULDN'T WANT TO BE THERE EITHER.

I THINK WE SHOULD GO FORWARD AND ALLOW HER TO REMAIN SEATED. I DON'T THINK SHE'S STATED GROUNDS FOR DISQUALIFICATION.

MR. FRANZEN: YOUR HONOR, THE -- OUR POSITION IS PREVIOUSLY STATED, THAT DUE TO BEING SENT TO THE JURY COMMISSIONER'S AND, AS WAS EXPLAINED BY HER, SHE WAS TO COMMUNICATE TO MR. HARMON THROUGH THE JURY COMMISSIONER. I THINK THE JUROR HAS BEEN TAINTED AND WE WOULD RESPECTFULLY URGE THE COURT TO BAR THE STATE FROM SEEKING THE DEATH PENALTY UNDER A STRICT APPLICATION AS STATED IN STATE V. LEWIS AND THE OTHER ADDITIONAL STATUTE.

THE COURT: THE QUESTION BEFORE THE COURT IS REALLY OUT OF FAIRNESS: CAN THIS JUROR BE FAIR AND IMPARTIAL?

SHE, BY HER ANSWERS, CONTINUES TO MAINTAIN THAT SHE CAN. SHE SEEMS TO BE FROM THE EVIDENCE HERE PROBABLY

MORE INCLINED TOWARDS THE DEFENSE THAN THE STATE, AS SHE HAS SOME PROBLEM IN IMPOSING THE DEATH PENALTY, OR IMPOSING A PENALTY WITHOUT EVER STATING EXACTLY WHAT THAT PENALTY IS.

IT WOULD APPEAR THAT SHE WANTED TO GET OFF THIS JURY FROM HER OWN STATEMENTS, AND SHE HAS BEEN UNABLE TO DO SO.

IT WOULD FURTHER APPEAR TO THIS COURT THAT IF SHE WERE DISQUALIFIED, THAT NEITHER OF THE ALTERNATIVE -- NEITHER ALTERNATE JUROR COULD SIT IN THE CASE. HAVING CONSIDERED THAT PROBLEM SINCE IT WAS RAISED THIS MORNING, IT APPEARS TO ME THAT THE ONLY COMPETENT JURORS WOULD BE THOSE WHO ACTUALLY HEARD THE TESTIMONY OF THE CASE IN CHIEF. THE ALTERNATE JURORS COULD NOT SIT IN THE PENALTY PHASE FOR THE OBVIOUS REASON THAT THERE WOULD BE EVIDENCE THAT WAS BROUGHT OUT IN THAT PARTICULAR PHASE AND THEN DISCUSSED BY THE JURORS. THERE THE ALTERNATES WILL BE LACKING IN THAT DISCUSSION AND IN THAT CONSIDERATION. AND IN THAT DISCUSSION AND CONSIDERATION THE JURORS ARRIVE AT THE PENALTY OF MURDER IN THE FIRST DEGREE. IT WOULD BE SHEER SPECULATION FOR US NOW TO SAY THAT THESE ALTERNATE JURORS WOULD HAVE ARRIVED AT THAT SAME DECISION OR CONCLUSION.

THAT BEING THE CASE, IT WOULD THEREFORE BE BASICALLY UNFAIR TO THE PARTIES TO HAVE SOMEONE SIT WHO HAS NEVER DISCUSSED OR CONSIDERED THE GUILT OR INNOCENCE OF THE DEFENDANT. IT COULD VERY EASILY HAVE BEEN THAT THESE JURORS, OR THESE ALTERNATES, MAY ARRIVE AT A DIFFERENT VERDICT. THEY MAY HAVE ARRIVED AT A VERDICT ENTIRELY DIFFERENT, BUT STILL A CONVICTION OF THE DEFENDANT. AND SINCE THEY HAVE NOT CONSIDERED THE GUILT OR THE INNOCENCE PHASE, IT IS NOW NOT -- THEY ARE NOT COMPETENT NOW TO SIT IN THE PENALTY PHASE.

THE QUESTION STILL RESOLVES ITSELF DOWN TO A CONSIDERATION OF WHETHER OR NOT THIS JUROR CAN INDEED

SIT. I HAVE HEARD NOTHING AT THIS POINT THAT WOULD CAUSE ME TO DISQUALIFY HER. I THINK THAT THE DISCUSSION THAT SHE HAS HAD DID NOT IN ANYWAY TAINT HER ABILITY TO SIT IN THIS CASE FOR FAIRNESS AND IMPARTIALITY.

I MAKE THE OBSERVATION THAT SHE WASN'T THE ONLY ONE WHO WAS CRYING WHEN THE VERDICT CAME IN. IF YOU REMEMBER, THERE WERE THREE OTHER JURORS -- TWO OTHER JURORS WHO WERE CRYING AT THE TIME THAT THE VERDICT WAS RENDERED IN THE PREVIOUS PROCEEDING. TWO OF THOSE JURORS WERE SITTING ON THE TOP ROW. SO THIS WAS -- SHE WASN'T THE ONLY ONE THAT WAS EXPRESSING SOME EMOTION WITH THE VERDICT. SHE'S BEEN THE ONLY ONE WHO APPARENTLY HAS WANTED TO GET OFF AND AT LEAST TAKEN SOME STEPS TOWARDS THAT. BUT THERE IS NOTHING IN THIS RECORD THAT I CAN FIND THAT WOULD WARRANT THAT REMOVAL.

THE STATE, I BELIEVE, HAS TAKEN THE POSITION THAT THERE IS NO BASIS FOR REMOVING HER. I CAN'T FIND ANY. YOUR MOTION IS DENIED.

LET'S NOW CALL THE JURY OR ARE WE READY FOR THAT? DO YOU HAVE ANY OTHER MOTIONS?

MR. FRANZEN: THERE IS ONE OTHER MOTION, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUMSTANCES LISTED IN THE STATE'S NOTICE AND SUPPLEMENT.

THE COURT: COUNSEL.

MR. FRANZEN: YOUR HONOR, BASICALLY THE STATUTE, AS WE'VE ARGUED ON OUR ASPECTS OF THIS CASE, IS A DEATH PENALTY SITUATION WHICH, ACCORDING TO NUMEROUS COURT DECISIONS, MUST BE STRICTLY CONSTRUED AND IT MUST BE STRICTLY CONSTRUED BECAUSE THE SUPREME COURT HAS STATED THAT WE MUST AVOID ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. AND IF A STATUTE IS NOT IN ITSELF STRICTLY WRITTEN OR IS NOT STRICTLY CONSTRUED

AND DOES NOT PROVIDE CLEAR AND OBJECTIVE STANDARDS TO PROVIDE SPECIFIC AND DETAILED GUIDANCE TO THE JURY OR TO THE OTHER BODY, IF IT'S A PANEL, A THREE-JUDGE PANEL, IT IS UNCONSTITUTIONAL. AND I BELIEVE GODFREY V. GEORGIA, AT 446 U.S. WOULD ELABORATE ON IT.

GOING TO THE SPECIFIC -- STRIKE THAT.

ONE OTHER ASPECT OF REQUIRING A STRICT INTERPRETATION OF THE STATUTES ARE OUR NEVADA CASES INTERPRETING THE DEATH PENALTY STATUTE AND REQUIRING A STRICT APPLICATION: SMITH V. STATE; AND THEN YET ANOTHER ASPECT OF THIS SAME PROBLEM REQUIRED STRICT APPLICATION IS THE WELL KNOWN RULE OF CONSTRUING PENAL STATUTES STRICTLY AGAINST THE STATE AND IN FAVOR OF THE ACCUSED WITH DOUBTS AS TO ITS APPLICABILITY BEING GIVEN TO THE DEFENDANT.

WE FURTHER, IN THIS INSTANCE, HAVE A LEGISLATIVE HISTORY OF THE DEATH PENALTY STATUTE IN WHICH THE COURT -- I BEG YOUR PARDON, IN WHICH THE LEGISLATURE WAS DIRECTED BY THE NEVADA ATTORNEY GENERAL THAT CLEAR DIRECTIONS TO THE JURY ARE GOING TO BE REQUIRED, SOME LIMITED NUMBER OF AGGRAVATING CIRCUMSTANCES. AND THE ATTORNEY GENERAL, IN ADDRESSING THE LEGISLATURE, RELIED UPON GREG V. OREGON, PROFITT V. FLORIDA, AND GORDON V. TEXAS; ALL ADDRESSED TO THIS ISSUE.

WITH THAT IN MIND, I GO TO THE AGGRAVATING CIRCUMSTANCES THAT THE STATE WISHES TO INTRODUCE. FIRST OF ALL, THE STATE HAS DECIDED NOT TO INTRODUCE THOSE FACTORS THAT THEY HAVE IDENTIFIED IN THEIR SUPPLEMENTAL NOTES, AND THOSE ARE THREE ALLEGED ROBBERIES THAT OCCURRED IN THE CITY OF NEW YORK. SO WE ARE LEFT WITH A SAN BERNARDINO ROBBERY --

THE COURT: AND THAT'S ALREADY IN EVIDENCE, RIGHT?

MR. FRANZEN: NO, I DON'T BELIEVE WE HAD THE ROBBERY IN SAN BERNARDINO. WE HAD A DIFFERENT INCIDENT, A SEARS

STORE. BUT PERHAPS --

MR. HARMON: WHEN THE DEFENDANT TOOK THE WITNESS STAND IT WAS BROUGHT OUT FOR THE PURPOSE OF IMPEACHMENT ONLY THAT HE WAS CONVICTED OF UNLAWFUL --

THE COURT: IT'S ALREADY IN?

MR. HARMON: YES.

THE COURT: AND HE HAS SO ADMITTED?

MR. HARMON: RIGHT.

MR. FRANZEN: THEY WISH TO BRING IN EYE-WITNESS TESTIMONY REGARDING THAT OFFENSE, AND FROM THE POLICE OFFICER LIST I PRESUME THEY ALSO WISH TO BRING IN DETAILS OF THE INVESTIGATION AND APPREHENSION AND WHATEVER ELSE WOULD COME OUT OF THAT. THE STATUTE DOES NOT PROVIDE FOR THAT. WHAT THEY ARE LIMITED TO IS PROVING A PRIOR FELONY CONVICTION FOR VIOLENCE. AND THEY CAN DO THAT AS THEY ALREADY I THINK ARE PREPARED TO DO, WITH CERTIFIED COPIES OF JUDGMENTS OF CONVICTION OR CERTIFIED COPIES OF COURT MINUTES.

THE COURT: WELL, ISN'T OUR STATUTE SILENT AS TO HOW YOU PROVE IT?

MR. FRANZEN: IF IT'S SILENT, YOUR HONOR, IT HAS TO BE STRICTLY CONSTRUED, WHICH MY ARGUMENT IS THAT THEY HAVE TO PROVE IT BY THE CERTIFIED COPIES -- AND I DON'T BELIEVE IT'S SILENT -- BY A PERSON WHO HAS BEEN PREVIOUSLY CONVICTED, CONVICTION IS SHOWN BY CERTIFIED COPIES. THE EVIDENCE CONCERNING THE INVESTIGATION AND THE ACTUAL FACTS AND CIRCUMSTANCES DO NOT SHOW CONVICTION. THEY'RE RETRYING THE CASE BEFORE YOUR HONOR.

NOW, THE STATE IS ALSO CONTENDING THAT THE MURDER WAS DONE TO PREVENT A LAWFUL ARREST, THE MURDER FOR WHICH MR. HOWARD NOW STANDS CONVICTED BEFORE YOUR HONOR.

THE ARGUMENT BEFORE THE JURY BY MR. SEATON, IF I RECALL CORRECTLY, WAS THAT IT WASN'T DONE TO

PREVENT A LAWFUL ARREST, IT WAS DONE PURSUANT TO MR. HOWARD'S ALLEGED DOCTOR JECKYL AND MR. HYDE PERSONALITY, THAT WHEN HE GOT THE GUN THE POTION -- THE GUN WAS THE POTION THAT CAUSED MR. HOWARD TO KILL DOCTOR MONAHAN WHEN DOCTOR MONAHAN REFUSED TO DISROBE. THERE'S NO EVIDENCE OR THERE HAS BEEN NONE ARGUED AS OF YET THAT THIS WAS DONE TO PREVENT A LAWFUL ARREST.

MR. SEATON: PARDON ME FOR INTERRUPTING, YOUR HONOR, BUT I THINK I CAN SAVE THE COURT SOME TIME IN THIS PARTICULAR ISSUE. WE DO NOT PLAN TO BRING FORWARD PROOF OF THAT AS FAR AS AN AGGRAVATING CIRCUMSTANCE IS CONCERNED.

THE COURT: WELL, WHY DON'T YOU JUST TELL US SPECIFICALLY WHAT YOU DO INTEND TO PROVE SO MAYBE WE CAN SAVE SOME ARGUMENT TIME.

MR. SEATON: WELL, I THINK HE'S AWARE OF THE OTHER TWO AREAS THAT WE'RE INTERESTED IN. ONE IS, AS HE POINTS OUT, THE SAN BERNARDINO ROBBERY.

THE COURT: WHAT ADDITIONAL ARE YOU GOING TO BRING FORWARD ON THAT?

MR. SEATON: WE ARE GOING TO BRING FORWARD EYE-WITNESS TESTIMONY OR TESTIMONY OF THOSE PEOPLE WHO WERE DOWN IN SAN BERNARDINO AND ARE FAMILIAR WITH THE CRIME AND CAN TELL THE JURY A LITTLE MORE ABOUT THE FACTUAL CIRCUMSTANCES UNDERLYING.

THE REASON FOR THAT, AND I'LL JUST BRIEFLY ELUDE TO IT HERE BECAUSE IT IS 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 CIRCUMSTANCES BEYOND A REASONABLE DOUBT. AND IN ADDITION TO THAT, THAT PARTICULAR AGGRAVATING CIRCUMSTANCE HAS TO DO WITH THE USE OF FORCE OR VIOLENCE. 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.

THE COURT: ALL RIGHT.

MR. SEATON: THE OTHER ACT THAT WE INTEND TO BRING FORTH HAS ALSO BEEN PUT INTO EVIDENCE AND AGAIN BY THE DEFENDANT'S OWN ADMISSIONS, AND THAT IS THE CONVICTION IN ABSENTE IN NEW YORK OF THE ROBBERY WITH A WEAPON OF A NURSE IN QUEENS, NEW YORK, IN 1978. AND AS I STATED --

THE COURT: DO YOU HAVE WITNESSES?

MR. SEATON: WE HAVE WITNESSES. WE HAVE THE NURSE HERE AND THE DETECTIVE WHO WORKED THE CASE. WE WOULD WANT TO PUT THEM ON AS OPPOSED TO ANY DOCUMENTATION FOR THE SAME REASONS, THAT IS TO SHOW THE JURY BEYOND A REASONABLE DOUBT THAT THE USE OF FORCE AND/OR VIOLENCE WAS USED IN THE COMMISSION OF THAT PARTICULAR ROBBERY.

THOSE ARE THE ITEMS THAT WE PLAN TO BRING FORTH BEFORE THE COURT TO SHOW AGGRAVATING CIRCUMSTANCES.

WELL, I SHOULD ADD ONE MORE THAT IS TOO APPARENT AND PERHAPS THE REASON I FORGOT ABOUT IT, BUT ALSO THAT THIS PARTICULAR MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY. THAT IS ANOTHER AGGRAVATING CIRCUMSTANCE THAT WE PLAN TO SHOW OR THAT HAS BEEN SHOWN BY VIRTUE OF THE EVIDENCE HERE.

THE COURT: YOU MERELY INTEND TO ARGUE?

MR. SEATON: WE'LL JUST ARGUE THAT THAT'S BEEN SHOWN AS CLEARLY AS IT CAN BE.

THE COURT: SO REALLY THERE ARE THREE AGGRAVATING CIRCUMSTANCES THAT YOU ARE BRINGING FORTH.

MR. SEATON: WELL, THERE ARE TWO AGGRAVATING CIRCUMSTANCES.

THE COURT: SAN BERNARDINO AND NEW YORK AND THE --

MR. SEATON: THOSE TWO COMBINED AND THEN THE MURDER DURING THE COMMISSION OF A ROBBERY.

THE COURT: AND WHAT SECTION ARE THE FIRST TWO?

MR. SEATON: SUBSECTION.

THE SUBSECTION TWO HAS TO DO WITH THE SAN BERNARDINO AND NEW YORK CASE AND SUBSECTION FOUR HAS TO DO WITH THE COMMISSION OF A MURDER DURING THE COURSE OF A ROBBERY.

THE COURT: ALL RIGHT. COUNSEL, PROCEED.

MR. FRANZEN: YES, YOUR HONOR. DURING THE DISCUSSION THE DISTRICT ATTORNEY HAS INTERRUPTED MY ARGUMENT. IF I MAY HAVE A MOMENT TO FIND MY PLACE.

THE COURT: ALL RIGHT.

MR. FRANZEN: MOST OF MY ARGUMENTS THEN HAVE BEEN DONE AWAY WITH BY THE LIMITING OF THE AGGRAVATING CIRCUMSTANCES, EXCEPT TO REITERATE, YOUR HONOR, THAT THE STATUTES SPEAKS OF CONVICTIONS AND THE RETRYING OF THE PRIOR CASE IS NOT WHAT IS SPOKEN OF IN N.R.S. 200.033.

THE COURT: A NEW TRIAL?

MR. FRANZEN: IT SOUNDS LIKE FROM THE DESCRIPTION OF THE WITNESSES THAT ARE BEING CALLED THAT THE STATE WISHES TO CALL THE POLICE OFFICERS, THE ALLEGED VICTIMS, WHO HAVE ALREADY PREVIOUSLY TESTIFIED AND RESULTED IN A CONVICTION, TO DESCRIBE THE CRIME, TO RETRY IT BEFORE THIS JURY WHAT THE PRIOR -- WHAT THESE WITNESSES HAVE ALREADY DESCRIBED TO A PRIOR JURY.

AGAIN THE STATUTE SPEAKS OF CONVICTIONS, NOT THE RETRIAL OF THE FACTS AND CIRCUMSTANCES OF THE PRIOR CONVICTION. IT SPEAKS OF CONVICTIONS WHICH ARE PROVED BY CERTIFIED COPIES OF JUDGMENTS OF CONVICTION OR CERTIFIED COPIES OF COURT MINUTES, WHICH ACCORDING TO THEIR NOTICE OF INTENT TO SEEK THE DEATH PENALTY THEY ARE PREPARED TO PROVE THIS BY --

THE COURT: DOESN'T ONE JUST MERELY GO TO CORROBORATING THE OTHER?

MR. FRANZEN: THESE WITNESSES DON'T GO TO PROVE A CONVICTION. THESE WITNESSES JUST GO TO ADD, IF YOU WOULD,

THE UNCOMFORTABLE DETAILS WHICH FEED INTO THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

WE ARE LIMITED BY THE STATUTE AND THAT STATUTE MUST BE STRICTLY CONSTRUED. THESE WITNESSES DON'T SPEAK OF CONVICTIONS.

THE COURT: ALL RIGHT. I UNDERSTAND WHAT YOU'RE SAYING.

MR. FRANZEN: AS TO THE ABSENTE AND AFTER THE SKIPPING OF BOND OF THE NEW YORK CONVICTION, THE FACT THAT IT'S IN ABSENTE OR IT WAS AFTER THE DEFENDANT SKIPPED BOND, ARE IRRELEVANT AND SHOULDN'T BE ALLOWED TO BE ARGUED BY THE STATE. THE FACT OF A CONVICTION IS ONE THING, BUT THE MANNER IN WHICH IT'S PROCURED, IN ABSENTE, AND AFTER THE DEFENDANT SKIPPED BOND, ARE IRRELEVANT UNDER OUR STATUTES AND UNDER U.S. SUPREME COURT CASES I'VE MENTIONED.

I WOULD FURTHER NOTE THAT THESE WITNESSES, I DOUBT, WERE IN COURT AT THE TIME OF THE CONVICTION. AND THEY COULD NOT FROM PERSONAL KNOWLEDGE TESTIFY THE DEFENDANT WAS CONVICTED. THIS IS GOING TO COME FROM COURT RECORDS, WHICH IS, FROM THE STATE'S NOTICE, I PRESUME THEY ARE INTENDING AND ARE PREPARED TO PROVE IT IN THAT MANNER.

THANK YOU, YOUR HONOR.

MR. SEATON: YOUR HONOR, AS TO A COMMENT THAT WAS JUST MADE A MOMENT AGO ABOUT THE USE OF THE FACT OF THE DEFENDANT BEING TRIED IN ABSENTE, AND RUNNING OUT ON BOND, WE DIDN'T BRING THAT UP. THE DEFENDANT BROUGHT THAT OUT ON DIRECT EXAMINATION WHEN HE WAS ON THE STAND.

WE HAVE NO INTENTION OF BELABORING THAT POINT. THAT POINT HAS BEEN MADE.

WHAT IS IMPORTANT FOR THE STATE, IN BOTH THE SAN BERNARDINO AND THE NEW YORK CONVICTIONS, BY WAY OF BRINGING THE EYE-WITNESS TESTIMONY IN BEFORE THE JURY, IS

TO PROVE AGGRAVATING CIRCUMSTANCES, NUMBER TWO, BEYOND A REASONABLE DOUBT. I MIGHT JUST READ IT FOR A MOMENT. IT SAYS, AND I QUOTE:

> THE MURDER WAS COMMITTED BY A PERSON WHO WAS PREVIOUSLY CONVICTED OF ANOTHER MURDER OR A FELONY, AND THIS IS THE IMPORTANT LANGUAGE, INVOLVING USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

NOW, THE MERE FACT OF A WEAPON BEING PRESENT IN THE NAME OF THE CHARGE UNDER WHICH THE DEFENDANT IS CONVICTED, I DON'T THINK TELLS THE JURY ENOUGH ABOUT THE NATURE OF THOSE ACTS TO ALLOW THEM TO COME TO THE CONCLUSION THAT BEYOND A REASONABLE DOUBT THE STATE HAS SHOWN THAT THERE IS A THREAT OR USE OF VIOLENCE.

AND IT'S IMPORTANT THAT THE STATE BE ABLE TO SHOW THE JURY THE ACTS, AND MAYBE THAT'S THE IMPORTANT THING HERE. THE JURY ISN'T DECIDING AS MUCH THE FACT OF THE CONVICTION AS THEY ARE WHAT'S THE UNDERLYING FACTS OF THAT CONVICTION. WHAT WAS IT THAT THE JURY WAS ABLE TO CONSIDER IN ORDER FOR THAT JURY TO DETERMINE THAT THERE WAS A USE OR THREAT OF VIOLENCE? AND THOSE ARE THE THINGS THAT WE WISH TO BRING BEFORE THE JURY AT THIS PARTICULAR TIME.

THE COURT: WHAT WAS THE DATE OF YOUR FILING OF THE AGGRAVATING CIRCUMSTANCES?

MR. SEATON: COURT'S INDULGENCE.

THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY, THE ORIGINAL ONE, WAS FILED ON JANUARY THE 7TH, 1983.

THE COURT: BUT YOU HAVE NOT FILED ANY SEPARATE DOCUMENT THAT SAYS THAT THESE ARE THE AGGRAVATING CIRCUMSTANCES?

MR. SEATON: YES. THE AGGRAVATING CIRCUMSTANCES

ARE ENUMERATED IN THAT PARTICULAR DOCUMENT.

THE COURT: ALL RIGHT. THE DATE AGAIN?

MR. SEATON: JANUARY 7TH, 1983.

AS A MATTER OF FACT, YOUR HONOR, IF YOU HAVE A COPY OF THE POINTS AND AUTHORITIES THAT WE TURNED IN OVER THE WEEKEND, EXHIBIT "A" WOULD BE THAT PARTICULAR DOCUMENT.

THE COURT: ALL RIGHT.

MR. SEATON: AND I COULD MAKE A COPY AVAILABLE TO THE COURT.

THE COURT: I HAVE THAT HERE. PROCEED.

UNFORTUNATELY YOUR POINTS AND AUTHORITIES DID NOT HAVE THAT PENALTY PHASE, A COPY OF IT.

MR. SEATON: WELL, I WAS GOING TO DO THIS ANYWAY. LET ME AT THIS TIME FILE IN OPEN COURT A COPY OF BOTH THE --

THE COURT: GOOD. DO IT.

MR. SEATON: (CONTINUING) -- ITEMS THAT WE GAVE TO THE COURT. I WILL GIVE THEM TO THE COURT FIRST AND THEN THEY CAN BE FILED AT A LATER TIME.

THE THICKER OF THE TWO, YOUR HONOR, WOULD BE THE EXHIBITS.

DOES THE COURT WISH ME TO PROCEED?

THE COURT: PROCEED.

MR. SEATON: THE ONLY OTHER THING THAT I WOULD ADD AT THIS TIME IS THAT I WOULD THINK THAT COUNSEL IS CONFUSED WHAT WE'RE DOING HERE TODAY WITH THE STATUTE THAT ALLOWS DEFENDANTS TO BE IMPEACHED BY USE OF PRIOR CONVICTIONS. AND THERE THE LAW IS PRETTY CLEAR THAT YOU'RE LIMITED THE WAY HE IS TRYING TO LIMIT THE STATE IN THIS PARTICULAR ACTION. BUT THERE'S A VERY GOOD REASON AND A VERY GOOD DISTINCTION. THE REASON THAT THEY --

THE COURT: I DON'T HAVE TO GET INTO THAT, COUNSEL.

MR. SEATON: YOUR HONOR?

THE COURT: I DON'T HAVE TO GET INTO THAT.

MR. SEATON: THANK YOU.

THEN THE STATE WOULD HAVE NOTHING FURTHER TO ADD.

MR. FRANZEN: SUBMITTED, YOUR HONOR.

THE COURT: ALL RIGHT.

YOUR MOTION TO PROHIBIT THE USE OF ALLEGED AGGRAVATING CIRCUMSTANCES IS DENIED.

IT DOES APPEAR THAT THE STATE IS ENTITLED TO BRING FORTH CIRCUMSTANCES IN BOTH TWO AND FOUR, SUBSECTIONS TWO AND FOUR OF 175.554 -- PARDON ME. THAT WOULD NOT BE THE STATUTE. THE STATUTE OF AGGRAVATION, YOU GAVE ME THE WRONG CITATION, COUNSEL.

WHAT IS THE STATUTE OF AGGRAVATION NUMBER?

MR. FRANZEN: IT'S 200.020, I BELIEVE, YOUR HONOR.

THE COURT: 200.020?

MR. SEATON: IT'S .033, YOUR HONOR.

MR. HARMON: IT'S .033.

THE COURT: SUBSECTION TWO SAYS THAT:

> MURDER WAS COMMITTED BY A PERSON WHO WAS PREVIOUSLY CONVICTED OF ANOTHER MURDER OR A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER ...

IT WOULD APPEAR THAT THIS EVIDENCE IS SUPPLEMENTAL AND SUPPLEMENTARY TO THE ADMISSION OF THE CONVICTION IN SAN BERNARDINO.

...

... THE USE OF FORCE AND VIOLENCE MAY BE SHOWN BY OTHER EVIDENCE.

THE SAME APPLIES TO THE NEW YORK SITUATION, WHERE HE WAS TRIED AND THEN HE ABSCONDED, AND HE WAS TRIED IN ABSENTE. THE PARTICULARS OF THE CASE DOES APPEAR THAT THE EVIDENCE WOULD GO TO THE QUESTION OF USE OF FORCE OR VIOLENCE, WHICH IS SUPPLEMENTARY TO THE EVIDENCE WHICH WOULD BE SUPPLIED BY WAY OF I BELIEVE THERE IS A CERTIFIED COPY OF CONVICTION. IS THAT WHAT YOU'RE GOING TO USE, OR AS AN EXEMPLIFIED COPY?

MR. HARMON: YOUR HONOR, WHAT WE HAVE IS A CERTIFIED COPY. WE HAVE A MINUTE ORDER OUT OF THE STATE OF NEW YORK.

THE COURT: ALL RIGHT.

AND SUBSECTION FOUR IS ALREADY IN EVIDENCE THAT REQUIRES ARGUMENT IN THAT IS APPARENTLY UNDER THE FELONY MURDER RULE.

SO, COUNSEL, YOUR MOTIONS ARE DENIED AND WE WILL TAKE ABOUT A TEN MINUTE RECESS AND START AT 4:00 O'CLOCK WITH THE TAKING OF EVIDENCE.

NOW, IS THERE ANY FURTHER MOTIONS TO COME BEFORE THE COURT?

MR. HARMON: JUST AN INQUIRY OF THE COURT REGARDING PROCEDURE.

THE COURT: YES.

MR. HARMON: DOES THE COURT WANT US TO SIMPLY START BY GIVING EVIDENCE OR WILL THERE BE OPENING STATEMENTS OR HOW ARE WE TO PROCEED? HOW ARE WE PROCEEDING?

FROM THE STATE'S POINT OF VIEW, WE DON'T FEEL IT'S GOOD TO BE SO INVOLVED THAT OPENING STATEMENTS ARE NECESSARY. BUT WE WANT TO BE PREPARED.

THE COURT: WELL, I THINK YOU CAN MAKE A VERY BRIEF STATEMENT OF THE NATURE OF THE HEARING AND THE PROCEEDING, AND MAYBE STATE THE STATUTE, AND THEN STATE VERY BRIEFLY THE WITNESSES THAT YOU INTEND TO BRING AND WHAT YOU PROPOSE TO SHOW.

I WOULD BE VERY CAREFUL BECAUSE IF IT DOESN'T GET IN THEN YOU HAVE THAT PROBLEM. BUT THIS IS WHAT YOU INTEND TO SHOW.

MR. SEATON: MAY WE APPROACH THE BENCH FOR JUST A MOMENT.

THE COURT: YES, COUNSEL.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: MISS CLERK, YOU MAY FILE THIS, PLEASE.

MR. FRANZEN: FOR THE PURPOSES OF CLARIFICATION OF THE RECORD, RESERVES OF THE FELLOW RIGHTS, WE WOULD AGAIN RENEW OUR MOTION FOR A MISTRIAL BASED ON THE INSTANCE INVOLVING JUROR CAPASSO.

THE COURT: YOUR MOTION, FOR THE RECORD, COUNSEL, IS DENIED.

MR. FRANZEN: THANK YOU, YOUR HONOR.

THE COURT: WE'LL BE IN RECESS FOR TEN MINUTES. HAVE THE JURY READY TO PROCEED AT THAT TIME. HAVE YOUR FIRST WITNESS IN THE COURTROOM.

MR. HARMON: THANK YOU.

(WHEREUPON, FROM 3:57 P.M. UNTIL 4:05 P.M., A RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

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

MR. HARMON: THE STATE DOES, YOUR HONOR.

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: YOU MAY PROCEED, COUNSEL.

MR. HARMON: THANK YOU, YOUR HONOR.

(OPENING STATEMENT)

BY MR. HARMON:

JUDGE MENDOZA, COUNSEL, LADIES AND GENTLEMEN OF THE JURY:

AS YOU WERE PREVIOUSLY ADVISED, POTENTIALLY THERE WERE TWO PHASES TO THIS TRIAL. YOU'VE MADE YOUR DECISION REGARDING THE GUILT OF THE DEFENDANT, AND NOW WE'RE COMMENCING THE PENALTY HEARING PHASE OF THESE PROCEEDINGS.

BY LAW IN THIS STATE THERE ARE CERTAIN FACTORS REFERRED TO AS MITIGATING CIRCUMSTANCES WHICH AGGRAVATE MURDER IN THE FIRST DEGREE. THE STATE OF NEVADA HAD ALLEGED THAT THERE ARE TWO SUCH AGGRAVATING CIRCUMSTANCES IN REGARD TO THIS DEFENDANT. AND DURING THIS PENALTY HEARING, EVIDENCE WILL BE INTRODUCED TO THIS PARTICULAR SUBJECT:

AGGRAVATING CIRCUMSTANCE NUMBER ONE, AS ALLEGED BY THE STATE OF NEVADA, IS THAT THE MURDER WAS COMMITTED BY A PERSON WHO WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

DURING THE PENALTY PHASE OF THESE PROCEEDINGS THE STATE INTENDS TO CALL A NUMBER OF WITNESSES WHO

WILL ESTABLISH THAT THE DEFENDANT HAS, ON TWO PRIOR OCCASIONS, BEEN CONVICTED OF THE OFFENSES OF ROBBERY WITH THE USE OF A WEAPON:

SPECIFICALLY ON MAY 24, 1978, ON THE CAMPUS OF QUEENS COLLEGE, NEW YORK, THE VICTIM BEING DOROTHY WEISBAND, W-E-I-S-B-A-N-D. THE DEFENDANT, BY MEANS OF A GUN, PERPETRATED A ROBBERY. HE WAS THEREAFTER CONVICTED IN ABSENTIA IN THE QUEENS SUPREME COURT ON JULY 13, 1979, IN THE STATE OF NEW YORK. IN REGARDS TO THAT INCIDENT, THE STATE WILL INTRODUCE TESTIMONY FROM DOROTHY WEISBAND, THE VICTIM, AND ALSO DETECTIVE JOHN MCNICHOLAS, M-C- CAP N-I-C-H-O-L-A-S, WHO ALSO WAS INVOLVED IN THE INVESTIGATION OF THE CASE;

THE STATE OF NEVADA ALSO INTENDS TO OFFER, IN CONNECTION WITH THIS SAME AGGRAVATING CIRCUMSTANCE, EVIDENCE TO SHOW THAT IN SAN BERNARDINO, CALIFORNIA, ON MARCH 29 1980, THE DEFENDANT ALSO COMMITTED ROBBERY BY USE OF A WEAPON. THE VICTIM WILL BE IDENTIFIED AS JAMES DAVID HILYER, H-I-L-Y-E-R. THE EVIDENCE WOULD SHOW IN THAT CASE THAT ON OR ABOUT MAY THE 27TH, 1982, THE DEFENDANT WAS CONVICTED OF THE OFFENSE OF ROBBERY WITH USE OF A WEAPON. AND THE STATE OF NEVADA WILL OFFER THE TESTIMONY OF SANDEE LOFGREN, L-O-F-G-R-E-N, A POLICE OFFICER WITH THE SAN BERNARDINO POLICE DEPARTMENT; AND PERHAPS EVIDENCE FROM ANOTHER OFFICER; BOTH PERSONS BEING INVOLVED IN THE INVESTIGATION OF THAT CASE.

ADDITIONALLY, THERE WILL BE DOCUMENTARY EVIDENCE OFFERED TO ESTABLISH THE COMMISSION OF THESE TWO PRIOR FELONIES OF VIOLENCE BY THE DEFENDANT MR. HOWARD.

ADDITIONALLY, AND THIS WAS EVIDENCE INTRODUCED DURING THE GUILT PHASE OF THESE PROCEEDINGS, THE STATE HAS ALSO ALLEGED THAT ANOTHER AGGRAVATING CIRCUMSTANCE OF MURDER IN THE FIRST DEGREE EXISTS IN THIS CASE, THAT BEING THAT THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED

IN THE COMMISSION OF A ROBBERY.

LADIES AND GENTLEMEN, THOSE ARE THE AREAS THAT YOU WILL BE CONSIDERING IN THIS PHASE OF THE PROCEEDINGS IN CONNECTION WITH YOUR DECISION TO IMPOSE THE APPROPRIATE PUNISHMENT. THANK YOU.

THE COURT: DOES COUNSEL DESIRE TO MAKE ANY STATEMENT TO THE COURT AT THIS TIME?

MR. COOPER: NO, YOUR HONOR. WE DO NOT.

THE COURT: CALL YOUR FIRST WITNESS.

MR. SEATON: DOROTHY WEISBAND.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

WHEREUPON,

DOROTHY WEISBAND,

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

THE COURT: BE SEATED, PLEASE.

PROCEED.

DIRECT EXAMINATION

BY MR. SEATON:

Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL YOUR LAST NAME FOR THE RECORD.

A DOROTHY WEISBAND, W-E-I-S-B-A-N-D.

Q IS IT MISS OR MRS.?

A MRS.

Q MRS. WEISBAND, WHERE DO YOU PRESENTLY

RESIDE?

A IN BAYSIDE, NEW YORK.

Q WHERE IS THAT?

A BAYSIDE?

Q BAYSIDE.

A NEW YORK.

Q THAT'S IN THE STATE OF NEW YORK?

A YES, IN THE COUNTY OF QUEENS.

Q WHERE IS THAT IN NEW YORK?

A NEW YORK CITY, PART OF NEW YORK CITY.

Q I SEE.

HOW LONG HAVE YOU RESIDED IN THAT AREA?

A IN THE SAME HOUSE, 28 YEARS.

Q WHAT IS YOUR OCCUPATION?

A I'M A REGISTERED NURSE.

Q AND FOR WHOM ARE YOU EMPLOYED?

A FOR QUEENS COLLEGE, WHICH IS PART OF THE CITY UNIVERSITY.

Q AND HOW LONG HAVE YOU BEEN EMPLOYED WITH QUEENS COLLEGE?

A ELEVEN YEARS. JUNE WILL BE ELEVEN YEARS.

Q JUNE WILL BE ELEVEN YEARS.

WHAT ARE THE NATURE OF YOUR DUTIES AS A REGISTERED NURSE WITH QUEENS COLLEGE IN NEW YORK CITY?

A I HANDLE TRAUMAS AND HELP WITH THE ATHLETIC DEPARTMENT, HELP -- GIVE ASSISTANCE TO THE TRAINER IN TREATING THE ATHLETES FOR THEIR INJURIES OR PREPARING THEM FOR THEIR GAMES.

Q WITH REGARDS TO PREPARING THEM FOR THEIR GAMES, COULD YOU ELABORATE ON THAT A LITTLE BIT? HOW DO YOU HELP THE ATHLETIC DEPARTMENT AT THE QUEENS COLLEGE IN THAT SENSE?

A WELL, IF THERE'S A WEAK ANKLE OR WEAK ELBOW OR A WEAK KNEE, I HELP TAPE IT BEFORE THEY START THE GAME --

MR. FRANZEN: I OBJECT AT THIS TIME AS TO RELEVANCE TO THE ISSUE BEFORE THE COURT AND THE JURY.

MR. SEATON: WELL --

THE COURT: ALL RIGHT.

COUNSEL, I BELIEVE YOU ARE FAR AFIELD.

BY MR. SEATON:

Q MRS. WEISBAND, HAVE YOU WORKED WITH ANY OF THE BOXERS AT QUEENS COLLEGE?

A YES. MANY OF THEM WOULD COME IN AND I -- COME IN AND I'D TAPE THEIR HANDS BEFORE THEY WORKOUT.

Q AND WERE YOU FAMILIAR -- STRIKE THAT.

HAVE YOU EVER KNOWN AN INDIVIDUAL NAMED SAM HOWARD?

A YES.

Q WOULD YOU LOOK ABOUT THE COURTROOM AND TELL US IF HE'S PRESENT IN THE COURTROOM TODAY?

A YES.

Q WOULD YOU POINT TO HIM AND DESCRIBE WHAT HE'S WEARING, PLEASE.

A HE'S SITTING OVER THERE. HE'S WEARING A BLUE JACKET AND A LIGHT BEIGE SHIRT (INDICATING).

MR. SEATON: YOUR HONOR, MAY THE RECORD REFLECT THE IDENTIFICATION OF SAM HOWARD.

THE COURT: THE RECORD MAY SO SHOW.

..

..

..

BY MR. SEATON:

Q AND HOW WAS IT THAT YOU CAME TO KNOW SAM HOWARD?

A SAM HOWARD WAS A STUDENT AT QUEENS COLLEGE AND WITH THE BOXING CLUB. AND HE WOULD WORKOUT A FEW TIMES A WEEK AND WOULD COME INTO THE OFFICE AND I WOULD TAPE HIS HANDS BEFORE HE WOULD START WORKING OUT.

Q WHEN DID YOU FIRST COME TO BE ACQUAINTED WITH SAM HOWARD?

A SOMEWHERE AROUND '75 OR '76.

Q 1975 OR '76?

A RIGHT.

Q AND WAS THAT THERE AT QUEENS COLLEGE?

A YES.

Q WAS THAT THROUGH HIS INTEREST IN BOXING AT THE COLLEGE?

A YES.

Q AND HOW LONG A PERIOD OF TIME DID YOU KNOW HIM?

A FOR ABOUT A YEAR AND A HALF OR TWO.

Q WOULD YOU SEE HIM ON A FAIRLY REGULAR BASIS DURING THAT YEAR AND A HALF OR TWO?

A FOR ABOUT A YEAR AND A HALF ON A REGULAR BASIS.

Q LET ME CALL YOUR ATTENTION TO MAY THE 24TH, 1978. DO YOU RECALL THAT PARTICULAR DAY?

A YES. I CERTAINLY DO.

Q AND WERE YOU WORKING ON THAT PARTICULAR DAY?

A YES, I WAS.

Q WHERE WERE YOU?

A I WAS WORKING IN MY OFFICE. IT WAS -- IT HAPPENED TO BE THE DAY AFTER THE LAST DAY OF CLASSES AND THERE WEREN'T STUDENTS ON CAMPUS THAT DAY, ONLY A FEW THAT WERE DOING SPECIAL PROJECTS. AND I WAS DOING CLERICAL WORK. I WAS ALONE IN THE OFFICE.

Q ABOUT WHAT TIME IS IT THAT YOU ARE REFERRING TO NOW?

A IN THE EVENING, IN THE EARLY EVENING.

Q OKAY.

A ABOUT 7:00 OR A QUARTER AFTER 7:00 OR 20 AFTER 7:00. SOMETHING -- IT WAS AFTER 7:00 I KNOW BECAUSE I HAD MY DINNER HOUR BETWEEN 6:30 AND 7:00 AND THIS WAS AFTER MY DINNER.

Q AND YOU WERE IN YOUR OFFICE DOING CLERICAL WORK?

A YES.

Q OKAY.

AT THAT MOMENT WAS ANYONE IN THE OFFICE WITH YOU, ANY OTHER CLERKS?

A NO.

Q YOU WERE ALONE THERE?

A YES.

Q AND DID ANYONE COME INTO THE OFFICE ABOUT THAT TIME?

A YES. SAM HOWARD CAME INTO THE OFFICE. AND I ASKED HIM, WHAT CAN I DO FOR HIM?

AND HE SAID THAT HE HAD INJURED HIS FINGER EARLIER IN THE DAY AND THAT ANOTHER ONE OF THE NURSES HAD LOOKED AT IT, AND ASKED IF SHE WAS THERE SO SHE COULD LOOK AT IT.

I TOLD HIM THAT THE OTHER NURSE WAS NOT THERE. HE LOOKED AROUND THE PREMISES.

AND I ASKED HIM IF I COULD LOOK AT THE

FINGER. AND WITH THAT HE TOOK A GUN OUT OF HIS POCKET. HE WAS WEARING A -- AN ARMY FATIGUE JACKET. IT WAS A SERVICE FATIGUE JACKET. IT WAS RAINING VERY HARD THAT NIGHT, AND HE PULLED THE GUN OUT AND SAID, WHAT I REALLY WANT IS YOUR MONEY.

Q NOW, LET ME STOP YOU FOR A MOMENT.

CAN YOU DESCRIBE A LITTLE BIT CLEARLY HOW THE DEFENDANT WAS DRESSED AT THIS TIME?

A HE WAS WEARING A KNIT STOCKING CAP PULLED DOWN ON HIS HEAD (INDICATING), BUT HIS FACE WAS CLEARLY IDENTIFIABLE.

Q WHEN YOU SAY --

A I KNEW WHO IT WAS AS SOON AS HE CAME IN.

Q WHEN YOU SAY "PULLED DOWN" DO YOU MEAN OVER HIS EARS?

A OVER HIS EARS, YES.

Q OKAY.

A AND HE WAS WEARING AN ARMY FATIGUE JACKET.

Q DID HE HAVE PANTS ON?

A YES. HE WAS WEARING PANTS, BUT I DON'T REALLY REMEMBER WHETHER THEY WERE BLUE DENIMS OR GREEN DENIM.

Q OKAY.

AND CAN YOU RECALL WHERE THE POCKET WAS ON THE ARMY FATIGUE JACKET WHERE HE TOOK THE GUN FROM?

A IT WAS RIGHT ON THE SIDE.

Q ON THE SIDE AS HE WORE THE JACKET?

A ON THE SIDE, RIGHT.

Q AND WHEN HE TOOK THE GUN OUT WHAT DID HE DO WITH IT?

A HE POINTED IT AT ME AND SAID, WHAT I REALLY WANT IS YOUR MONEY.

Q CAN YOU DESCRIBE THE GUN FOR US?

A IT WAS A SHORT SNOUTED GUN. I HAD NEVER

SEEN A GUN BEFORE, EXCEPT FOR A TOY GUN. SO THAT THIS WAS, YOU KNOW, ONE THAT CHILDREN PLAYED WITH.

AND ALL I CAN SAY, IT WAS A SHORT SNOUTED GUN THAT FIT INTO HIS HAND AND FIT INTO THE POCKET.

Q BY "SHORT SNOUTED" DO YOU MEAN SHORT BARRELLED?

A I GUESS THAT'S WHAT I MEAN. IT WASN'T A LONG ONE. IT WAS SHORT.

Q OKAY.

CAN YOU RECALL THE COLOR OF IT?

A I'M TRYING TO RECALL. THE DETECTIVES THAT CAME IN TO SEE ME LATER IN THE EVENING WAS WEARING A SIMILAR GUN. NOW, IT WAS VERY SIMILAR IN SIZE, BUT THEY WERE DIFFERENT COLORS.

NOW, I DON'T REMEMBER WHETHER THE ONE THAT SAM CARRIED WAS A GUN METAL GRAY OR A BLUISH OR A MORE BLUE COLOR. WHETHER THE DETECTIVES WAS MORE BLUE AND SAM'S WAS MORE GRAY, THAT I DON'T REMEMBER.

Q WHOSE --

A I JUST REMEMBER THERE WAS A DIFFERENCE IN THE COLOR.

Q THANK YOU.

AND WHO WAS THE DETECTIVE TO WHOM YOU REFER?

A DETECTIVE JOHN MCNICHOLAS.

Q IS THAT THE GENTLEMAN WHO'S BEEN OUT IN THE HALLWAY WITH YOU?

A YES, IT IS.

Q AND DID HE TAKE HIS GUN OUT AND SHOW IT TO YOU?

A YES.

Q AND YOU WERE ABLE TO LOOK AT IT THEN?

A YES.

Q DID YOU TELL HIM THEN THAT THAT LOOKED SOMEWHAT SIMILAR?

A RIGHT.

Q THEN THE DEFENDANT'S GUN?

A EXCEPT FOR THE DIFFERENCE IN COLOR.

Q WHEN SAM HOWARD TOOK THE PISTOL OUT OF HIS POCKET AND POINTED IT AT YOU, WHAT EXACTLY DID HE SAY TO YOU?

A WELL, AT FIRST, HE SAID WHAT I REALLY WANT IS YOUR MONEY.

AND I TOLD HIM THAT I DIDN'T MUCH MONEY. I ONLY HAD $2 IN CHANGE WITH ME.

AND HE BECAME VERBALLY VERY ABUSIVE.

Q AND WHAT DO YOU MEAN WHEN YOU SAY "HE BECAME VERBALLY ABUSIVE"?

A WELL, FOR A YEAR AND A HALF OR TWO YEARS MY CONTACT WITH HIM WAS HE'D ALWAYS BE POLITE, AND NOW HE STARTED CALLING ME A MOTHER FUCKER, A WHITE MOTHER FUCKER, A WHITE BITCH, AND KEPT REPEATING THIS OVER AND OVER.

Q I SEE.

AND WAS HE DEMANDING ANYTHING OF YOU WHEN HE WAS SAYING THESE PARTICULAR OBSCENITIES?

A HE KEPT TELLING ME NOT TO LOOK AT HIM AND TO CRAWL TO WHERE I HAD MY PURSE.

Q TO CRAWL TO WHERE YOU HAD YOUR PURSE?

A TO CRAWL TO WHERE I HAD MY PURSE.

I TOLD HIM THAT THE PURSE WAS LOCKED UP.

Q WHERE WAS THE PURSE LOCKED UP?

A IN A CLOSET IN OUR OFFICE.

Q IN THE OFFICE THAT YOU WERE PRESENTLY IN?

A WELL, IT WAS IN ANOTHER ROOM. IT WAS IN

ANOTHER ROOM, BUT IT WAS IN THE SAME OFFICE.

Q I SEE.

A IT WAS JUST IN ANOTHER ROOM.

Q WHERE WERE YOU AND SAM HOWARD FROM THAT CLOSET?

A APPROXIMATELY LIKE FROM HERE TO WHERE THE EXIT SIGN IS (INDICATING), I WOULD SAY, IN DISTANCE.

Q AND HOW CLOSE WERE YOU AND SAM HOWARD TO ONE ANOTHER AT THIS TIME?

A WELL, WHEN I HAD ASKED TO LOOK AT HIS FINGER I -- I -- AND HE PULLED OUT THE GUN, I WAS -- HE WAS STANDING RIGHT NEXT TO ME.

Q YOU COULD HAVE REACHED OUT AND TOUCHED HIM?

A OH, YES.

Q AND AFTER HE SAID ALL OF THESE THINGS TO YOU AND TOLD YOU TO GET DOWN ON THE FLOOR AND CRAWL TO THE PURSE, WHAT DID YOU DO?

A I GOT DOWN ON MY HANDS AND KNEES AND I CRAWLED TO MY PURSE. I --

Q HOW WERE YOU DRESSED AT THAT TIME?

A I WAS WEARING MY NURSE'S UNIFORM.

Q WHITE?

A WHITE UNIFORM, WHITE SHOES AND STOCKINGS.

Q AND TELL US HOW YOU WENT FROM THAT POINT, WHERE YOU AND THE DEFENDANT WERE, TO WHERE THE PURSE WAS.

A WELL, I WAS CRAWLING ALL THE WAY AND HE WAS BEING -- HE KEPT REPEATING THESE WORDS OVER AND OVER TO ME. AND I --

Q WHAT WORDS DID HE REPEAT OVER AND OVER TO YOU?

A MOTHER FUCKER, WHITE BITCH, OVER AND OVER.

AND I THOUGHT, WELL, I WOULD APPEAL TO HIM: SAM, I HAD ALWAYS BEEN SO NICE TO YOU, WHY ARE YOU ACTING THIS WAY?

AND HE JUST KEPT SAYING, DON'T TURN AROUND AND LOOK AT ME, YOU WHITE BITCH, YOU MOTHER FUCKER.

AND I WAS REALLY AT THIS POINT VERY INWARDLY HYSTERICAL. BUT I CRAWLED TO THE CLOSET, I OPENED THE CLOSET AND HANDED HIM MY PURSE.

Q WHEN HE CAME INTO THE OFFICE ORIGINALLY WAS HIS DEMEANOR CALM OR HOW WOULD YOU DESCRIBE IT?

A YES, AS NORMAL AS IT HAS ALWAYS BEEN.

Q AND HOW WOULD YOU DESCRIBE THIS DEMEANOR OF HIS DURING THE PERIOD OF TIME THAT HE WAS CALLING YOU ALL THESE NAMES AND MAKING YOU CRAWL ON YOUR HANDS AND KNEES TO YOUR PURSE?

A VIOLENT.

Q DID THAT CHANGE OF PACE -- DID THAT CHANGE OF ATTITUDE TAKE PLACE WHEN HE BROUGHT THE GUN OUT?

A AS SOON AS HE BROUGHT THE GUN OUT.

Q DO YOU KNOW WHY HE MADE YOU GET ON YOUR HANDS AND KNEES INSTEAD OF WALKING OVER TO YOUR PURSE?

A WELL, I ASSUMED THAT WE HAVE EMERGENCY DOORS THAT OPEN TO THE OUT DOORS, AND HALF THE DOOR IS GLASS. AND I ASSUMED THAT HE -- THAT HE THOUGHT THAT IF ANYBODY WOULD COME, YOU KNOW, WOULD APPROACH THE DOOR AND WOULD LOOK IN, MIGHT SEE HIM, YOU KNOW, WITH ME. SO HE HAD ME CRAWLING AND HE HAD HIS BACK TO THE DOORS SO THAT SOMEONE COULD NOT SEE HIM HOLDING THE GUN.

Q WHEN YOU GOT TO THE CLOSET ON YOUR HANDS AND KNEES, HOW DID YOU GET YOUR PURSE?

A I -- I HAD MY KEYS WITH ME AND I OPENED THE CLOSET DOOR. AND AT THAT TIME I GOT UP AND I HANDED HIM

MY PURSE.

Q DID HE COME WITH YOU AS YOU CRAWLED?

A OH, YES, YES. HE WAS WALKING BEHIND ME, YELLING ALL THESE ABUSIVE WORDS.

Q AND HOW DID YOU PHYSICALLY GET THE PURSE TO HIM?

A I JUST STOOD UP AND TOOK IT OUT OF THE DRAWER THAT I KEPT IT IN AND HANDED IT TO HIM.

Q AND WHAT HAPPENED THEN?

A AND THEN HE TOLD ME TO GET TO THE CORNER OF THE CLOSET. IT'S A WALK-IN CLOSET WHERE WE KEEP OUR STATIONERY SUPPLIES. AND HE TOLD ME TO GET TO THE CORNER OF THE CLOSET AND TAKE -- REMOVE MY CLOTHES.

AND I SAID, I'M NOT GOING -- I WALKED TO THE CORNER OF THE CLOSET, BUT I SAID, SAM, I'M NOT GOING TO REMOVE MY CLOTHES.

HE SAID, I'M GOING TO SHOOT YOU.

I SAID, YOU'LL HAVE TO SHOOT ME WITH MY CLOTHES ON. I'M NOT GOING TO TAKE MY CLOTHES OFF.

Q DID HE SAY ANYTHING ELSE ABOUT THIS?

A WELL, HE KEPT TELLING ME TO TAKE MY CLOTHES OFF, THAT HE WAS GOING TO KILL ME. HE REPEATED IT A FEW TIMES.

Q AND WHERE WAS THE GUN AT THIS TIME?

A IN HIS HAND ALL THE TIME.

Q AND WHERE WAS IT POINTED?

A AT ME.

Q DID YOU TAKE YOUR CLOTHES OFF?

A NO, I DID NOT.

Q AND WHEN YOU WERE SAYING THAT YOU -- TO HIM THAT YOU WOULDN'T TAKE YOUR CLOTHES OFF, WHERE WERE YOU?

A PROBABLY AS --

Q NOT IN DISTANCES, BUT WHERE?

A I WAS IN THE CORNER -- I WENT TO THE CORNER OF THE CLOSET, AS HE INSTRUCTED ME TO GO. AND HE WAS STANDING NEAR THE DOOR OF THE CLOSET.

Q AND DID HE HAVE THIS PURSE IN HIS HAND AT THAT TIME?

A YES, HE DID.

Q DID HE GO THROUGH IT THEN?

A YES.

Q WHAT DID HE TAKE OUT OF IT?

A HE TOOK OUT THE CAR KEYS AND THE -- AND MY, UH, WALLET.

Q IS THE -- DID YOU HAVE THE $2 IN THE WALLET?

A YES.

Q AND WHAT DID HE DO WITH THE WALLET?

A HE TOOK THE WALLET WITH HIM. I ALSO HAD MY CREDIT CARDS IN THERE.

Q DID YOU SEE WHERE HE PUT THE WALLET?

A NO. I REALLY DIDN'T.

Q WHAT DID HE DO WITH THE CAR KEYS WHEN HE GOT THEM?

A WHEN HE TOOK THE CAR KEYS HE ASKED ME IF MY CAR WAS PARKED RIGHT OUTSIDE THE DOOR OF THE OFFICE. THE EMERGENCY DOOR, THE NURSES KEEP THE CARS THERE. HE KNEW THAT CAR WAS MINE.

Q HOW DID HE KNOW THAT CAR WAS YOURS?

A WELL, AT A PREVIOUS TIME WHEN HE HAD COME IN ONCE WITH A GROUP OF FELLOWS TO HAVE THEIR HANDS TAPED, I HAD TAKEN THE CAR TO WORK THAT DAY AND THE EMERGENCY ROOM DOORS WERE OPEN AND IT WAS A NEW CAR AND IT WAS VERY ATTRACTIVE.

Q WHAT KIND OF A CAR WAS IT?

A IT WAS A, A CADILLAC, A SILVER CADILLAC WITH RED LEATHER SEATS.

Q WHAT YEAR WAS IT?

A A 1977.

Q SO IT WAS NEW AT THAT TIME?

A YES. IT WAS NEW AT THAT TIME, AND, YOU KNOW, THE FELLOWS WERE, YOU KNOW, ADMIRING THE CAR. AND I DIDN'T GENERALLY USE THAT CAR. I -- MY HUSBAND -- MY HUSBAND USED THAT CAR. I JUST GENERALLY USE THE OLD PLYMOUTH TO GO TO WORK WITH.

BUT THAT DAY IT WAS RAINING VERY HARD AND MY HUSBAND SUGGESTED THAT I TAKE THE CADILLAC, BECAUSE THE WINDSHIELD WIPERS ON THE OLD PLYMOUTH WERE NOT THAT GOOD.

Q SO IS IT YOUR TESTIMONY THAT THE DEFENDANT WAS AMONG THAT GROUP OF INDIVIDUALS EARLIER WHO HAD LOOKED AT YOUR CAR?

A RIGHT.

Q AND THAT YOU KNOW HOW HE KNEW IT WAS YOUR CAR?

A YES.

Q AND WHAT CONVERSATION DID YOU HAVE WITH THE DEFENDANT AT THE TIME OF THE ROBBERY ABOUT YOUR CAR?

A WHEN HE TOOK THE KEYS TO THE CAR HE ASKED ME IF THE -- THERE WAS A BURGLAR ALARM SYSTEM IN THE CAR, AND THERE WAS A STICKER ON THE CAR THAT THERE WAS A BURGLAR ALARM SYSTEM.

AND HE ASKED ME IF THE BURGLAR ALARM SYSTEM WAS ON.

AND I SAID NO, THAT IT WASN'T.

AND HE SAID, YOU -- SOMETHING TO THE EFFECT THAT I BETTER NOT BE LYING ABOUT THE BURGLAR ALARM SYSTEM NOT BEING ON.

Q DID HE SAY WHAT HE WOULD DO IF YOU WERE LYING ABOUT THE BURGLAR ALARM SYSTEM BEING ON?

A I CAN'T REALLY RECALL THAT. I JUST REMEMBER HIM SAYING THAT YOU BETTER NOT BE LYING, AND IT SOUNDED THREATENING.

Q DID YOU HAVE ANY OTHER CONVERSATIONS WITH SAM HOWARD AT THAT TIME?

A NO. THEN -- AT THAT TIME, WITH THAT, HE LEFT. HE LOCKED ME IN THE CLOSET.

Q HOW DID HE LOCK YOU IN THE CLOSET?

A WITH THE KEYS.

Q HAD YOU ALSO GIVEN THE KEYS TO HIM?

A WELL, HE TOOK THE KEYS.

Q AFTER YOU --

A RIGHT.

Q AFTER YOU HAD UNLOCKED THE CLOSET?

A RIGHT.

Q OKAY.

HE TOOK THE KEYS.

A WELL, THEY WERE IN THE DOOR OF THE -- I HAD LEFT THEM IN THE DOOR OF THE CLOSET WHEN HE HAD OPENED THE CLOSET. AND HE LOCKED THE CLOSET AND TOOK THE KEYS WITH HIM.

Q WERE YOU INSIDE THE CLOSET WHEN HE LOCKED IT?

A AND I WAS INSIDE THE CLOSET.

Q AND HOW DID YOU --

A WE HAVE A -- HE WAS NOT AWARE THAT THERE WAS A LOCK INSIDE THE CLOSET THAT I COULD GET OUT.

Q AND DID YOU USE THAT LOCK INSIDE THE CLOSET TO GET OUT?

A YES, I DID.

Q I DO HAVE ANOTHER RATHER TECHNICAL

QUESTION. WERE YOU AFRAID FOR YOUR LIFE DURING THIS COURSE OF EVENTS?

A OH, YES, I WAS. I -- AS SOON AS I SAW THAT GUN, I FIGURED I WAS DEAD. NO WAY DID I THINK THAT HE WOULD LET ME -- I HAD HIM AND I -- I -- I JUST KNEW THAT I WAS DEAD. I KNEW THAT NOTHING I COULD DO WOULD -- AND THAT TRAUMA HAS STAYED WITH ME. I STILL HAVE NIGHTMARES ABOUT IT. IT'S A HORRENDOUS KIND OF FEELING.

I -- I MEAN HOW -- HOW WAS HE GOING TO LET ME LIVE AFTER DOING THIS TO ME?

Q MRS. WEISBAND, DID YOU EVER SEE THAT CADILLAC AGAIN?

A YES.

MR. FRANZEN: YOUR HONOR, I AM GOING TO OBJECT. WE'VE ESTABLISHED THE OFFENSE. WHERE ARE WE GOING HERE?

MR. SEATON: I WAS JUST GOING TO TIE UP THE CAR COMING BACK TO HER.

THE NEXT WITNESS WILL TESTIFY, YOUR HONOR, AS A DETECTIVE, ABOUT HAVING TO DO WITH THIS CASE, PART OF WHICH WAS GOING TO THE AREA WHERE THE CAR WAS IN ORDER TO GET THE DEFENDANT BACK TO NEW YORK.

THE COURT: TIE HIM TO THE CAR? TIE THE DEFENDANT TO THE CAR?

MR. SEATON: YES.

THE COURT: THE OBJECTION IS OVERRULED.

MR. SEATON: IT WILL BE VERY BRIEF.

BY MR. SEATON:

Q DID YOU SEE THE 1977 CADILLAC AGAIN?

A YES, I DID. A WEEK AFTER THE ROBBERY -- A DAY AFTER THE ROBBERY SAM HOWARD HAD CALLED ME AT HOME. HE

HAD MY DRIVER'S LICENSE AND HE KNEW MY HOME AND I WAS LISTED IN THE TELEPHONE DIRECTORY. HE CALLED ME AND ASKED HOW MUCH THE PROPERTY WAS WORTH TO ME. AND I --

Q BY "PROPERTY" DID HE MEAN THE AUTOMOBILE?

A YES.

AND I -- I TOLD HIM IT WAS WORTH NOTHING, BECAUSE AT THE TIME I WAS JUST SO FRIGHTENED THAT HE EVEN CONTACTED ME.

AND THEN I -- WHEN I SAID "NOTHING", HE SAID, HOW MUCH IS YOUR LIFE WORTH TO YOUR HUSBAND?

AND AT THAT POINT I -- I JUST HUNG UP. I JUST WAS SO TERRIFIED. AND I CALLED DETECTIVE MCNICHOLAS BECAUSE I DIDN'T KNOW WHAT TO DO AT THAT POINT.

Q AND DID THERE COME A TIME THEN WHEN YOU DID REGAIN POSSESSION OF THE 1977 CADILLAC?

A YES. UH, UH, A WEEK AFTER THE ROBBERY. THE ROBBERY HAPPENED ON A WEDNESDAY AND THE FOLLOWING WEDNESDAY I GOT A CALL FROM A POLICE OFFICER IN TEXAS.

Q DO YOU REMEMBER WHERE IN TEXAS?

A NO, I REALLY DON'T.

Q OKAY.

TELL US WHAT THE POLICE OFFICER SAID.

A HE ASKED ME IF I WAS DOROTHY WEISBAND.

AND I SAID, YES.

AND HE SAID --

MR. FRANZEN: YOUR HONOR, WE WOULD OBJECT.

THE WITNESS: HERE'S THE CADILLAC.

MR. FRANZEN: WE HAVE A HEARSAY OBJECTION, YOUR HONOR, AND CONFRONTATION.

THE COURT: SUSTAINED.

MR. SEATON: MAY I BE HEARD, YOUR HONOR, BRIEFLY?

MR. FRANZEN: OUT OF THE PRESENCE OF THE JURY,

YOUR HONOR, IF HE WISHES TO.

THE COURT: APPROACH THE BENCH.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: PROCEED.

BY MR. SEATON:

Q MRS. WEISBAND, DID THERE COME A TIME WHEN YOU TESTIFIED IN COURT IN NEW YORK REGARDING THESE MATTERS?

A YES.

Q AND WHAT KIND OF A PROCEEDING WAS THAT?

A UH, UH, A REGULAR TRIAL, UH, FOR, UH, UH, THIS. I GUESS IT WOULD BE THE CITY AGAINST SAM HOWARD FOR ROBBERY ONE. I DON'T KNOW WHAT THE TECHNICALITIES ARE.

Q SO --

A IT WAS A TRIAL.

Q THE SAME --

A SAM HOWARD WAS ON TRIAL FOR THE ROBBERY OF MY AUTOMOBILE AND THE USE OF A GUN.

Q AND DID YOU TESTIFY IN THAT TRIAL?

A YES, I DID.

Q AND ON THE DAY THAT YOU TESTIFIED, WAS SAM HOWARD PRESENT IN COURT?

A NO, HE WASN'T.

Q WERE YOU CROSS EXAMINED BY HIS DEFENSE ATTORNEY?

A YES, I WAS.

MR. SEATON: THAT CONCLUDES THE QUESTIONS BY THE STATE, YOUR HONOR.

THE COURT: CROSS?

MR. FRANZEN: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU'RE EXCUSED.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

THE COURT: CALL YOUR NEXT WITNESS.

MR. SEATON: JOHN MCNICHOLAS.

THE CLERK: PLEASE REMAIN STANDING AND RAISE YOUR RIGHT HAND.

WHEREUPON,

JOHN F. MCNICHOLAS,

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

THE CLERK: PLEASE BE SEATED.

THE COURT: PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. SEATON:

Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL YOUR LAST NAME FOR THE RECORD?

A DETECTIVE JOHN F. MCNICHOLAS, CAP M-C- CAP N-I-C-H-O-L-A-S.

Q DETECTIVE MCNICHOLAS, WHERE ARE YOU EMPLOYED?

A NEW YORK CITY POLICE DEPARTMENT, 1113

PRECINCT, DETECTIVE UNIT.

Q AND WHAT ARE YOUR DUTIES?

A I INVESTIGATE CRIMES IN THAT IMMEDIATE AREA.

Q ANY PARTICULAR KINDS OF CRIMES?

A ALL KINDS OF CRIMES.

Q HOW LONG HAVE YOU BEEN EMPLOYED WITH THAT PARTICULAR DIVISION?

A I'VE BEEN WITH THEM 13 YEARS.

Q ARE YOU FAMILIAR WITH A MAN BY THE NAME OF SAMUEL HOWARD?

A I AM.

Q COULD YOU TELL US IF HE'S PRESENT IN COURT?

A HE IS.

Q WOULD YOU POINT HIM OUT AND DESCRIBE WHAT HE'S WEARING, PLEASE.

A (INDICATING) IT'S THE YELLOW SHIRT AND BLUE WINDBREAKER.

MR. SEATON: AGAIN, YOUR HONOR, MAY THE RECORD REFLECT IDENTIFICATION OF SAM HOWARD.

THE COURT: THE RECORD MAY SO SHOW.

BY MR. SEATON:

Q ARE YOU FAMILIAR WITH DOROTHY WEISBAND, THE WITNESS WHO JUST LEFT THE COURTROOM?

A I AM.

Q CAN YOU TELL US HOW YOU BECAME INVOLVED WITH THE CASE THAT HAD TO DO WITH DOROTHY WEISBAND AND THE DEFENDANT SAM HOWARD?

A ON MAY 24TH OF '78, I RECEIVED A CASE OF AN

ARMED ROBBERY AT QUEENS COLLEGE WITH MS. WEISBAND, WHO WAS THE COMPLAINANT. AND SHE IDENTIFIED SAM HOWARD AS THE ONE WHO ROBBED HER.

Q NOW, DID YOU INTERVIEW MS. WEISBAND?

A I DID.

Q AND WHEN AND WHERE DID YOU DO THAT?

A I INTERVIEWED HER THAT NIGHT, THE EVENING OF THE 24TH OF MAY, AT HER HOME.

Q AND WHAT DID SHE TELL YOU WHILE YOU WERE PRESENT IN HER HOME?

A SHE TOLD ME THAT THE SAM HOWARD SHE HAD KNOWN FOR A YEAR, YEAR AND A HALF, CAME IN THROUGH THE GYM AND THE NURSES QUARTERS WHERE SHE WAS, AND AFTER INQUIRING ABOUT IF THERE WAS ANOTHER NURSE THERE, WHEN SHE, MS. WEISBAND, TOLD HIM THERE WASN'T, HE WANTED HER TO LOOK AT HIS FINGER, AND WHEN SHE WENT TO LOOK AT THE FINGER HE DREW A GUN FROM THE JACKET POCKET AND DEMANDED HER MONEY AND PROPERTY.

Q DID YOU ASK HER TO DESCRIBE THE GUN?

A I DID.

Q WAS SHE ABLE TO?

A SHE SAID SHE WASN'T SURE WHAT TYPE IT WAS. BUT SHE SAID IT WAS A SMALL BARRELLED GUN. AT WHICH TIME, I SHOWED HER MY GUN, AND SHE SAID IT LOOKED LIKE THAT REVOLVER BUT IT WAS A DIFFERENT COLOR.

Q WHAT KIND OF GUN DO YOU HAVE?

A I HAVE A .38 SMITH AND WESSON SNUB NOSE.

Q IS THAT WHAT KIND OF A GUN YOU HAD ON THE NIGHT IN QUESTION?

A YES, IT IS.

Q ARE YOU FAMILIAR WITH A SMITH AND WESSON .357 MAGNUM --

A I AM FAMILIAR.

Q (CONTINUING) -- REVOLVER?

A YES.

Q HOW SIMILAR IS THAT KIND OF A GUN TO THE WEAPON THAT YOU CARRIED ON THAT DAY?

A OH, VERY -- IT'S THE SAME MAKE, BUT IT'S COMPLETELY DIFFERENT. IT'S A MUCH BIGGER GUN, THE MAGNUM.

Q THE MAGNUM IS A --

A WELL --

Q YOUR GUN IS SMALLER?

A IT'S THE GUN THAT I CARRY IN CIVILIAN CLOTHES WHEN I'M OFF DUTY.

Q DID YOU TALK ABOUT, OR WERE YOU ABLE TO LOCATE, THE ADDRESS OF THE DEFENDANT, SAM HOWARD?

A YES, I WAS. I LOCATED IT.

Q PLEASE GO AHEAD.

A I WENT TO THIS SCHOOL, QUEENS COLLEGE, AND THEY GAVE ME INFORMATION ON MR. HOWARD.

I WENT TO HIS RESIDENCE ON FOTCH BOULEVARD AND AT THAT TIME INTERVIEWED WITH A WOMAN THERE, I BELIEVE SHE IDENTIFIED HERSELF AS HIS GRANDMOTHER, AND SAID THAT SAM DID NOT LIVE THERE AT THAT TIME.

Q AND SUBSEQUENT TO THAT DISCUSSION WERE YOU ABLE TO OBTAIN A PHOTOGRAPH?

A I WAS.

Q OF SAM HOWARD?

A I -- I DID. I OBTAINED A PHOTOGRAPH FROM QUEENS COLLEGE.

Q AND DID YOU HAVE AN OPPORTUNITY AGAIN TO TALK WITH DOROTHY WEISBAND REGARDING ANY PHONE CALLS THAT SHE MAY HAVE RECEIVED?

A YES. THE NEXT -- THE 25TH, IN THE EVENING, SHE CALLED AND SHE SAID THAT SAM HOWARD HAD CALLED HER HOUSE

AND THAT HE HAD THREATENED HER.

I NOTIFIED THE PRECINCT WHERE MS. WEISBAND LIVES, AND TOLD THEM. AND THEY SAID THAT THEY WOULD TRY TO GIVE HER HOUSE AS MUCH ATTENTION AS THEY POSSIBLY COULD.

Q AND DID YOU, IN YOUR CAPACITY AS A DETECTIVE IN THE NEW YORK CITY POLICE DEPARTMENT, ATTEMPT TO PUT OUT PAPERWORK THAT WOULD HELP YOU IN LOCATING SAMUEL HOWARD?

A YES. I -- I SENT OUT WANTED CARDS.

Q WHAT IS A "WANTED CARD"?

A A WANTED CARD IS A -- WE SEND THROUGH OUR COMMUNICATIONS BUREAU AND WE PUT IT ON A COMPUTER, A TELETYPE THROUGHOUT THE CITY, THROUGHOUT THE COUNTRY.

AND ON THE 30TH OF MAY WE WERE NOTIFIED THAT SAMUEL HOWARD WAS ARRESTED IN DALLAS, TEXAS.

Q PRIOR TO THAT TIME HAD A WARRANT OF ARREST BEEN ISSUED BY NEW YORK CITY?

MR. FRANZEN: YOUR HONOR, COULD WE APPROACH THE BENCH, PLEASE.

THE COURT: YOU MAY.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

BY MR. SEATON:

Q LET'S CLARIFY WHERE WE WERE WHEN WE INTERRUPTED OURSELVES JUST NOW, DETECTIVE.

YOU SAY -- YOUR TESTIMONY IS THAT IN ORDER TO TRY TO FIND SAM HOWARD YOU PUT OUT A WANTED CARD OR CARDS?

A THAT'S CORRECT.

Q AND THEN YOUR TESTIMONY IS THAT THOSE WANTED CARDS ARE PUT INTO A COMPUTER?

A THEY HAVE -- THEY ARE PUT IN A COMMUNICATIONS DIVISION OF THE NEW YORK CITY POLICE DEPARTMENT.

Q AND DO THEY GO COUNTRY WIDE?

A COUNTRY WIDE.

Q IN EVERY STATE IN THE UNION?

A WELL, THAT'S RIGHT.

Q AND THEN MY OTHER QUESTION TO YOU EARLIER WAS, HAD A WARRANT OF ARREST FOR SAM HOWARD FOR THE ROBBERY OF DOROTHY WEISBAND BEEN ISSUED BY THE NEW YORK CITY POLICE DEPARTMENT COURTS?

A AFTER I SENT OUT A WANTED CARD?

Q YES, AT ANYTIME?

A LATER ON WHEN -- AFTER WE FOUND OUT HE WAS IN DALLAS, TEXAS, WE -- WE GOT AN ARREST WARRANT FOR HIM.

Q AND THEN WAS HE ARRESTED IN DALLAS, TEXAS, FOR THAT ARREST WARRANT?

A YES. I -- I WENT DOWN TO DALLAS AND PLACED HIM UNDER ARREST AND BROUGHT HIM BACK.

Q ALL RIGHT.

CAN YOU DESCRIBE THE MONTH AND THE YEAR THAT YOU WENT BACK TO DALLAS, TEXAS?

A IT WAS IN JUNE OF '78, A MONTH LATER.

Q AND YOU SAY YOU BROUGHT THE DEFENDANT BACK?

A I DID.

Q AFTER HE CAME BACK TO THE STATE OF NEW YORK WAS A TRIAL HELD ON THESE PARTICULAR CHARGES?

A YES, THERE WAS.

Q AND SAM HOWARD WAS THE DEFENDANT?

A HE WAS.

Q WERE YOU A PART OF THAT TRIAL AS A WITNESS?

A I TESTIFIED.

Q WHEN THE TRIAL PHASE FIRST BEGAN, TO YOUR KNOWLEDGE, WAS SAM HOWARD PRESENT?

A I WAS TOLD HE WAS PRESENT THE FIRST --

MR. FRANZEN: I OBJECT AS TO HEARSAY, YOUR HONOR.

THE COURT: SUSTAINED.

BY MR. SEATON:

Q WHEN DID YOU TESTIFY IN THE TRIAL?

A IT WAS THE SECOND DAY.

Q AND WHEN YOU TOOK THE STAND WAS SAM HOWARD PRESENT?

A HE WAS NOT.

Q DO YOU KNOW OF YOUR OWN KNOWLEDGE WHAT THE OUTCOME OF THAT TRIAL WAS?

A HE WAS CONVICTED.

Q AND WHAT WAS HE CONVICTED OF?

A HE WAS CONVICTED OF ROBBERY ONE.

Q DOES ROBBERY ONE IMPLY ANYTHING TO DO WITH THE WEAPON?

A WEAPON OR USE OF FORCE.

MR. SEATON: THAT CONCLUDES THE STATE'S QUESTIONS.

THE COURT: CROSS.

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CROSS EXAMINATION

BY MR. FRANZEN:

Q OFFICER, WERE YOU PRESENT WHEN THE VERDICT WAS RETURNED?

A NO, I WAS NOT.

Q YOU WERE TOLD THIS BY ANOTHER PARTY?

A THE DISTRICT ATTORNEY TOLD ME.

MR. FRANZEN: YOUR HONOR, I MOVE TO STRIKE THAT TESTIMONY FROM THE RECORD.

THE COURT: COUNSEL?

MR. SEATON: YOUR HONOR, IT'S THE SAME ARGUMENT THAT WE HAVE MADE AT THE BENCH. THE TYPES OF EVIDENCE, WHICH ARE ADMISSIBLE IN THE COURT -- THE STATE, EXCUSE ME, WOULD STAND BY REPRESENTATIONS OF THE BENCH, ACCORDING TO N.R.S. 175.552.

THE COURT: WELL, I UNDERSTAND THAT, COUNSEL. BUT YOU HAVE MORE IN THIS RECORD THAN THAT, IF YOU GO BACK AND THINK ABOUT IT.

MR. SEATON: WE UNDERSTAND THAT, YOUR HONOR.

THE COURT: ALL RIGHT.

THEN RESTATE IT FOR THE RECORD, PLEASE.

MR. SEATON: PARDON ME.

THE COURT: THEN STATE IT FOR THE RECORD WHAT ELSE YOU HAVE TO SUPPORT THE ALLEGATION.

MR. SEATON: WELL, IT'S THE DEFENDANT'S OWN ADMISSION THAT HE WAS TRIED IN ABSENTIA, IN NEW YORK. I CAN'T REMEMBER THE STATE OF THE RECORD IF HE SAID THAT HE WAS THERE AT THE BEGINNING OF THE PROCEEDING, BUT CERTAINLY WE ALL UNDERSTAND IN THIS COURTROOM WHAT BEING TRIED IN ABSENTIA IS.

MR. FRANZEN: YOUR HONOR, I THINK AT THE MOMENT

WE ARE COMING INTO TESTIFY TO THE WITNESS, AND THIS SHOULD BE DONE OUTSIDE THE PRESENCE OF THE JURY.

THE COURT: YOUR REQUEST IS DENIED.

MR. SEATON: SO IF THE STATE'S FEELING THAT IN LIGHT OF THE BURDEN THAT IS PLACED ON THE STATE, AS THE COURT WILL PROBABLY INSTRUCT THE JURY REGARDING BEYOND A REASONABLE DOUBT TO PROVE, THAT IT'S NECESSARY OR IT IS SUPPORTIVE FOR THE STATE'S CASE FOR THIS WITNESS TO TESTIFY TO EVENTS THAT HE'S VERY FAMILIAR WITH. HE WAS THE DETECTIVE IN CHARGE OF THE CASE. HIS TESTIMONY IS THAT HE HEARD THIS INFORMATION FROM THE DEPUTY DISTRICT ATTORNEY.

THE COURT: WELL, WHAT ELSE DO YOU HAVE? I KNOW THAT YOU'VE GOT SOMETHING ELSE THAT YOU HAVEN'T --

MR. SEATON: WE HAVE A DOCUMENT THAT WE ARE GOING TO --

THE COURT: WHY DON'T YOU BRING THAT FORWARD AND GET AROUND THAT ISSUE SO I WON'T HAVE TO RULE ON HALF THE EVIDENCE AT ONE TIME.

MR. SEATON: THE STATE WOULD MOVE FOR THE INTRODUCTION INTO EVIDENCE AT THIS TIME OF PROPOSED 1, WHICH HAS BEEN MARKED FOR IDENTIFICATION. IT SHOULD BE SOMETHING OTHER THAN STATE'S PROPOSED EXHIBIT 1 THOUGH AS I SEE IT HERE, YOUR HONOR. IT WOULD BE THE NEXT IN LINE, WHICH IS IN THE 50'S OR 60'S, I BELIEVE. AND IT PURPORTS TO BE A CERTIFIED COPY OF MINUTES FROM THE SUPREME COURT OF NEW YORK, THE HONORABLE VINCENT F. NARROW.

THE COURT: WHAT'S YOUR NEXT NUMBER THERE, PLEASE.

THE CLERK: SIXTY NINE.

THE COURT: IT'S NUMBER 69.

ALL RIGHT. THIS WILL BE REMARKED AS STATE'S 69.

MR. SEATON: WE ARE WONDERING NOW, YOUR HONOR,

IF THAT HAS BEEN PREVIOUSLY MARKED.

THE NUMERICAL CHANGE IS APPROPRIATE, YOUR HONOR. WHAT WAS THE NUMBER THAT THE COURT SAID?

THE COURT: SIXTY NINE.

MR. SEATON: THEN THE STATE WOULD MOVE FOR THE ADMISSION OF STATE'S PROPOSED 69.

MR. FRANZEN: MAY I TAKE ONE MORE LOOK AT IT, YOUR HONOR.

WE WOULD OBJECT, YOUR HONOR. THE CERTIFICATION DOES NOT APPEAR TO BE AN IDENTIFICATION BY THE JUDGE THAT THE PERSON WHO IS WRITING THERE WHO IS A CLERK IS INDEED A CLERK OF THAT COURT.

THE COURT: COUNSEL?

MR. SEATON: I THINK THE DOCUMENT IS PROPERLY CERTIFIED, YOUR HONOR, UNDER N.R.S. 52.125. THERE IS NO REQUIREMENT HERE OF AN EXEMPLIFIED COPY, SIMPLY A CERTIFIED COPY.

IF MY MEMORY SERVES ME CORRECTLY, A CLERK'S STAMP IS DIRECTLY OVER THE CLERK'S SIGNATURE, WHICH WOULD SATISFY THE REQUIREMENTS OF THE STATUTE AND THAT THIS IS APPROPRIATELY A CERTIFIED DOCUMENT OF THE MINUTES SHOWING THE CONVICTION OF THE DEFENDANT.

THE COURT: IT DOES CONTAIN THE WORDS, "A TRUE EXTRACT OF THE MINUTES OF 4-26-83" AND IT'S SIGNED BY THE CLERK WITH THE CLERK'S SEAL.

THE OBJECTION IS OVERRULED. THE SAME WILL BE RECEIVED.

MR. SEATON: THANK YOU, YOUR HONOR.

THE COURT: NOW, YOUR OBJECTION, COUNSEL, IS OVERRULED. IT APPEARS THAT THE OFFICIAL MINUTES OF THE COURT REFLECT THAT THIS INDIVIDUAL WAS CONVICTED OF THE OFFENSE WHICH IS CORROBORATED BY THIS OFFICER'S TESTIMONY.

MR. SEATON: SO THEN MIGHT --

THE COURT: PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

BY MR. SEATON:

Q DETECTIVE, WAS IT THE SUPREME COURT OF NEW YORK IN WHICH THE TRIAL OF SAM HOWARD WAS HELD?

A QUEENS COUNTY, RIGHT.

Q QUEENS COUNTY IS WHERE YOU TESTIFIED?

A YES.

Q AND AGAIN FOR THE RECORD, DO YOU KNOW OF THE FACT OF WHETHER OR NOT HE WAS CONVICTED?

A YES, HE WAS.

MR. FRANZEN: YOUR HONOR, AREN'T WE ON CROSS? WASN'T I EXAMINING THE OFFICER?

MR. SEATON: I DON'T BELIEVE I CONCLUDED.

THE COURT: NO, HE HASN'T FINISHED HIS CASE YET.

MR. SEATON: I'M CLOSE.

THE COURT: IT'S BEEN A LONG DAY, COUNSEL. BUT YOU'LL HAVE AN OPPORTUNITY.

PROCEED.

BY MR. SEATON:

Q ARE YOU AWARE, DETECTIVE MCNICHOLAS, AS TO WHETHER OR NOT THE DEFENDANT WAS CONVICTED OF THE CRIME OF ROBBERY WITH USE OF A DEADLY WEAPON AGAINST DOROTHY WEISBAND?

A YES, HE WAS.

MR. SEATON: THAT CONCLUDES THE STATE'S QUESTIONS, YOUR HONOR.

THE COURT: CROSS.

CROSS EXAMINATION CONTINUED

BY MR. FRANZEN:

Q OFFICER, YOUR OPINION OF WHETHER OR NOT HE WAS CONVICTED IS BASED UPON WHAT THE DISTRICT ATTORNEY TOLD YOU?

A YES.

MR. FRANZEN: NOTHING FURTHER.

MR. SEATON: ONE QUESTION, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. SEATON:

Q WAS THAT THE DEPUTY DISTRICT ATTORNEY WHO TRIED THE CASE?

A IT WAS.

MR. SEATON: THANK YOU.

NOTHING FURTHER.

MR. FRANZEN: NOTHING.

THE COURT: YOU'RE EXCUSED, SIR.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

THE COURT: COUNSEL, APPROACH THE BENCH.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, WE

ARE GOING TO TAKE OUR AFTERNOON RECESS AT THIS TIME. WE WILL BE IN RECESS UNTIL 10:00 O'CLOCK TOMORROW MORNING. AT THE RATE IN WHICH WE ARE PROGRESSING NOW, IT APPEARS THAT THIS MATTER WILL BE SUBMITTED TO YOU TOMORROW.

AFTER DISCUSSION WITH THE ATTORNEYS, BOTH FOR THE STATE AND FOR THE DEFENSE, IT DOES APPEAR THAT WE WILL NOT CONTINUE TO NEED THE SERVICES OF THE ALTERNATE JURORS. SO THEY NEED NOT REAPPEAR TOMORROW. THE REST OF YOU, HOWEVER, ARE INSTRUCTED TO BE HERE AT 10:00 O'CLOCK TOMORROW MORNING.

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 10:00 O'CLOCK TOMORROW MORNING. MAY I SEE COUNSEL IN CHAMBERS.

(WHEREUPON, AT THE HOUR OF 5:00 P.M. THE EVENING RECESS WAS HAD IN THE PROCEEDINGS.)

RPLY

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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

WILLIAM GITTERE, Warden, and AARON D. FORD,[1] Attorney General for the State of Nevada,

Respondents.

Case Nos. 81C053867; A-18-780434-W[2]
Dept. No. XVII

Date of Hearing: February 7, 2020
Time of Hearing: 10 AM

(Death Penalty Case)

[1] Aaron D. Ford is now Nevada Attorney General. As such, he should be substituted in for his predecessor. *See* NRCP 25(d).

[2] In compliance with the Court's instructions, Mr. Howard is filing this reply in the C case number while including the A case number in the caption as well.

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO MOTION TO DISMISS

It is undisputed that the sole aggravating circumstance supporting Petitioner Samuel Howard's death sentence has been vacated. Even though the death sentence plainly has no legal foundation left, the State wishes to execute him. To do so, the State draws weak distinctions with Supreme Court precedent that is directly on point, invokes procedural bars that are plainly inapplicable, and creates an imaginary evidentiary objection that is in any event easily cured. As set forth in the accompanying memorandum of points and authorities, because the State's arguments are all meritless, and because there is no legal basis to execute Mr. Howard, its motion to dismiss should be denied, and Mr. Howard's death sentence should be vacated.

DATED this 2nd day of December 2019.

HENDRON LAW GROUP LLC

/s/ Lance J. Hendron

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MEMORANDUM OF POINTS AND AUTHORITIES

On both the procedure and the substance, the State's arguments are insubstantial. Mr. Howard will first address the procedural posture of the petition and demonstrate that it is properly before the Court for merits review. Then, he will take up the substance and show why relief must be afforded.

Because many of the issues are interrelated, every part of this reply is incorporated by reference into every other part. *See* NRCP 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."); NRS 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

I. The Petition Is Not Procedurally Barred

In an attempt to prevent Mr. Howard from having his compelling constitutional claim addressed by the Court, the State asserts a series of procedural defenses. *See* Oppo. & Mot. to Dismiss, filed Oct. 30, 2019 (hereinafter "Motion to Dismiss" or "MTD"), at 14–17. All are inapposite. Mr. Howard addresses each in turn.

A. The Petition Is Not Time Barred

First, the State contends that Mr. Howard's petition is untimely under NRS 34.726(1). *See* MTD at 15. Typically, a post-conviction petition must be filed within one year from when the Nevada Supreme Court issues its remittitur in the direct appeal, *see* NRS 34.726(1), which has not happened here. However, the statute does not defeat merits review where a petitioner can show good cause and prejudice. *See, e.g.*, *State v. Boston*, 131 Nev. 981, 984, 363 P.3d 453, 455 (2015) (en banc); *Wilson v. State* (*Wilson II*), 127 Nev. 740, 744, 267 P.3d 58, 60 (2011) (en banc). Mr. Howard can show both.

1. Mr. Howard Has Good Cause

Under unambiguous Nevada law, there is good cause for missing the one-year deadline codified in NRS 34.726(1) if the claim was raised "within a reasonable time after it became available." *Wilson II*, 127 Nev. at 745, 267 P.3d at 61; *accord Boston*, 131 Nev. at 985, 363 P.3d

at 455.[3] The Nevada Supreme Court has recently determined that one year is a "reasonable time" under NRS 34.726(1). *See Rippo v. State*, 134 Nev. 411, 421, 423 P.3d 1084, 1097, *amended on rehearing on unrelated grounds*, 432 P.3d 167 (2018) (en banc) (per curiam) (table).

A straightforward application of this test dictates a result in Mr. Howard's favor. Mr. Howard's claim is that the New York order nixing his robbery conviction infected his Nevada death sentence with constitutional infirmity. By definition, he could not have offered that theory until the New York order appeared. Accordingly, his claim became available, at the earliest, on May 22, 2018, when the Queens County Supreme Court released its decision. *See* Pet. for Writ of Habeas Corpus, filed Sept. 4, 2018 (hereinafter "Pet."), Ex. 2. Mr. Howard filed the petition in this case on September 4, 2018. *See* Pet. That is well short of a year from May 22, 2018, and pursuant to *Rippo*, his petition is timely.

Hoping to complicate this clear picture, the State strives to create confusion about what exactly made Mr. Howard's claim "available." In particular, the State homes in on the length of time that elapsed after his sentencing and before he litigated his robbery conviction in New York. *See, e.g.*, MTD at 17 (insisting that Mr. Howard "should have raised that issue *with the New York courts*" earlier). The State misapprehends the meaning of the word "available." According to the first definition in a preeminent dictionary, the term signifies "present or ready *for immediate use*." *See* https://www.merriam-webster.com/dictionary/available [https://perma.cc/YJ6S-89G6].[4] A claim based on a conviction being invalidated is obviously not "ready for immediate use" when the conviction has not yet been invalidated. Following the plain language of the Nevada Supreme Court, Mr. Howard's claim was undeniably brought within a year of it being available, and it is thus timely.

Aside from having no foothold in binding precedent, the State's test is unworkable. The State insinuates that Mr. Howard's campaign against his robbery conviction in New York was

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[3] In this reply, unless otherwise noted, all internal quotation marks, footnotes, and citations are omitted and all emphasis is added.

[4] The website perma.cc allows the user to freeze a website for perpetuity in its present version with a constant address. Mr. Howard employs the service here to guarantee the cited websites are not altered or destroyed during the litigation.

founded on the absence of a sentence in that jurisdiction, and that as a result he could have sought recourse in Queens at any time after the jury found him guilty in absentia. *See, e.g.*, MTD at 21 ("Petitioner could have challenged the infirmity of his New York conviction at any time *since trial*."). Not so. The New York order was instead rooted in the unreasonable *delay* in sentencing Mr. Howard. *See* Pet., Ex. 2 at 3 (characterizing Mr. Howard's "position" as that "he is entitled to relief afforded by [N.Y. Crim. Proc. Law § 380.30(1)] in that his *sentence must be pronounced without reasonable delay*" and subsequently agreeing with that position and vacating the conviction); *see also* N.Y. Crim. Proc. Law § 380.30(1) ("Sentence must be pronounced *without unreasonable delay*."). According to the State, Mr. Howard should be faulted for not going into New York court right after his robbery trial, even though he would have had no vehicle to protest his conviction at that time. That is illogical in the extreme. The far simpler approach is to say that "available" means "available," and the claim had only to be brought within a reasonable time of the New York court acting, just as Mr. Howard did.

In the cases mentioned by the State, the Nevada Supreme Court has characterized claims as previously "available" because the facts allowing them to be brought existed before the limitations period closed, which is not true here. For instance, in *Hathaway v. State*, 119 Nev. 248, 253–54, 71 P.3d 503, 507 (2003) (per curiam), the Court used, as examples of claims that are immediately available, situations where "counsel failed to inform the petitioner of the right to appeal," where the defendant "received misinformation about the right to appeal," or where "counsel refused to file an appeal after the petitioner requested." Similarly, in *Pellegrini v. State*, 117 Nev. 860, 889–90, 34 P.3d 519, 538–39 (2001) (en banc) (per curiam), the Nevada Supreme Court considered a claim available earlier when it was based on the defendant's mental health at the time of the offense. These are all facts that arise before the conviction is final. That is, information about a defendant's mental state when the crime occurred is by definition information that has already come into being by the time of post-conviction. Likewise, a defendant who has been misled or defied by a lawyer about his appeal is aware of that shortly after trial. The lesson of such cases is that a claim is available when the factual basis for it is out

there in the world at the time the statute of limitations expired, and had only to be collected and presented by the inmate.

That is not Mr. Howard's case. The single fact giving rise to his claim is the vacatur of the New York conviction. And that fact had not been born in any form until the Queens court ruled.

Rather than the State's preferred authorities, the more instructive cases here are those in which petitions were deemed timely because they were properly founded on changes in the law. *See Bejarano v. State*, 122 Nev. 1066, 1071, 146 P.3d 265, 269 (2006) (en banc) (involving a new case about double-counting felony aggravators in capital cases); *Boston*, 131 Nev. at 984, 363 P.3d at 455 (concerning a new case about juvenile life sentences). When the Nevada Supreme Court has regarded such petitions as timely, it is because the prisoner raised his claim within a year of the favorable precedent appearing. *See Bejarano*, 122 Nev. at 1071, 146 P.3d at 269 (explaining that "a claim pursuant to [a new] decision was not reasonably available to Bejarano" until the decision was published.); *Boston*, 131 Nev. at 985, 363 P.3d at 455 (noting that the "Supreme Court did not decide" the favorable new case until 2010, and "Boston filed his petition within one year of the Court's decision," which constituted "good cause for the late filing" assuming that he was correct about the meaning of the new case.

Importantly, in neither *Bejarano* nor *Boston* did the Court ask whether the petitioner previously made the *argument* that later led to the change in the law, the approach the State is pushing here. In other words, the Court did not pose the question of whether Mr. Bejarano had in a previous proceeding challenged the double-counting of aggravators or whether Mr. Boston challenged his life sentence as unconstitutional because of his age. As just stated, the Court inquired only into whether the inmates had advanced their claims within a year of the new cases upon which they were founded.

The same framework governs Mr. Howard's claim. He asserted his claim as soon as the new order enabling it had been issued, and that is all the law required. If the State were right that Mr. Howard had an obligation to make the *underlying* argument about the delayed sentence to a New York court earlier than he did, then Mr. Bejarano would have had an obligation to attack

the double-counting earlier and Mr. Boston would have had an obligation to present the youth-based Eighth Amendment theory earlier. After all, they were just as capable of doing so as Mr. Howard was of proceeding in New York's courts. The State's logic cannot be squared with Nevada Supreme Court's methodology in these cases.

Admittedly, *Bejarano* and *Boston* deal with good cause in the context of an unavailable "*legal* basis," in the sense that the caselaw was not yet there to substantiate the claim. *Boston*, 131 Nev. at 984, 363 P.3d at 455; *accord Bejarano*, 122 Nev. at 1072, 146 P.3d at 270. But the Nevada Supreme Court has said that good cause "may be established where *the factual or* legal basis for the claim was not reasonably available." *Bejarano*, 122 Nev. at 1073, 146 P.3d at 270. There is no reason to treat the two differently, and good cause is present.

Apparently dissatisfied by Nevada precedent, the State looks to U.S. Supreme Court opinions construing cause in the federal habeas context. *See* MTD at 21. Even though the State may find these decisions more helpful to it, they have no bearing here, where the only issue is whether Mr. Howard has cause under *Nevada* law. He has shown that he did, and the State does nothing to undermine the conclusion.

2. Mr. Howard Can Show Prejudice

Once good cause has been established, prejudice becomes the next hurdle. *See Wilson II*, 127 Nev. at 745, 267 P.3d at 61. Mr. Howard surmounts it with ease.

"To demonstrate actual prejudice," Mr. Howard "must show error that worked to his actual and substantial disadvantage." *Boston*, 131 Nev. at 985, 363 P.3d at 455. It is difficult to imagine a situation in which prejudice is as apparent as it is here. In the absence of the invalid New York robbery conviction, there are now no aggravating factors left. *See* Pet. at 11–12.[5] Aggravators are constitutionally and statutorily required for the imposition of a death sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 341–42 (1992); *Lowenfield v. Phelps*, 484 U.S. 231, 244

[5] For the Court's convenience, the verdict form reflecting the two aggravators found by the jury is appended to this reply as Exhibit 1, Attachment A. As noted in the petition, it is also available in the record on appeal for Nevada Supreme Court case number 23386. *See* Pet. at 12. To the extent it is necessary, Mr. Howard respectfully requests that the Court take judicial notice of the attachments to Exhibit 1. *See* NRS 47.130; *Mack v. Estate of Mack*, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009) (en banc).

(1988); NRS 200.033. Consequently, once the New York aggravator is removed from the equation, there is nothing to support the death penalty. As a result, Mr. Howard was actually prejudiced.

If the Court considers prejudice in more detail, the result remains the same. As recounted in the petition, given the relatively thin aggravation, the significant mitigation, and the prosecution's reliance on the New York conviction, there was prejudice in the conventional sense even if one ignores the fact that the absence of any aggravators is per se prejudicial. *See* Pet. at 8–10.

Below, Mr. Howard refutes the State's theory that actual innocence has not been established because testimony about the underlying conduct in New York was presented to the jury. *See infra* at 16–19. To the degree the State intends the theory to go to prejudice as well, it is refuted for the same reasons. For present purposes, Mr. Howard will add only that even if the Court accepts the State's erroneous belief that testimony about *conduct* can posthumously revive a vacated *conviction*, there is still prejudice. This is so because the jury was in fact repeatedly told by the prosecutors and their witnesses that Mr. Howard had been convicted.

In its opening statement, the prosecution made sure to inform the jury that Mr. Howard had been "*convicted* in absentia in the Queens Supreme Court on July 13, 1979, in the State of New York." MTD, Ex. B at 1463[6] ("He was thereafter *convicted* in absentia in the Queens Supreme Court on July 13, 1979, in the State of New York."). In examining the detective from the New York case, the prosecution took care to elicit the same fact through his testimony. *See id.* at 1487 ("Q. Do you know of your own knowledge what the outcome of that trial was? A. He was *convicted*. Q. And what was he *convicted* of? A. He was *convicted* of Robbery One."); *id.* at 1491 ("Q. And again for the record, do you know of the fact of whether or not he was *convicted*? A. Yes, he was."). And finally, at closing argument, the prosecution hammered

[6] Exhibit B to the State's Motion to Dismiss is a transcript from Mr. Howard's capital sentencing in Nevada. The documents appended to Exhibit 1 to this reply as Attachments D and E are transcripts from the same proceeding. All three of those transcripts are in Volume 15 of the record on appeal in Nevada Supreme Court case number 23386. The pin-cites here are to the page numbers in the record on appeal, which are also visible in the attached versions of the transcripts.

away at the conviction. *See* Ex. 1, Att. E at 1572 ("We are talking about someone who is now shown to have committed a violent felony against a nurse *for which he has been convicted*, and there was absolutely no provocation for that."); *id.* at 1573 ("He was *convicted* in absentia of robbery with use of a weapon and of theft of a motor vehicle."); *id.* at 1574 ("You heard the testimony of Detective John McNicholas, that the defendant was *convicted* of these crimes. . . . Mr. Howard had previously been *convicted* of a crime involving the use of violence even before he came to Las Vegas in 1980, and that is the circumstance that aggravates murder in the first degree, and that's been proven beyond a reasonable doubt.").

The existence of a conviction is itself a highly aggravating piece of information for a jury, and here it caused prejudice quite apart from the underlying facts of the offenses. *See State v. Bowman*, 337 S.W.3d 679, 692 (Mo. 2011) (en banc) (granting sentencing relief on a comparable claim because "[e]ven if the prosecution's evidence regarding the underlying facts of Bowman's two prior murder convictions were properly admissible as non-statutory aggravating prior bad acts, the Court cannot assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that Bowman previously had been convicted of two murders"); *State v. McFadden*, 216 S.W.3d 673, 678 (Mo. 2007) (en banc) (similar).

In summary, this was a short sentencing in which the prosecution pervasively employed the fact of the New York conviction to secure a death sentence. Any reasonable juror would have been greatly affected by the knowledge that a separate state's criminal justice system had officially placed a black mark on Mr. Howard's record years before the Nevada murder occurred. No matter what framework the Court applies, the error here "worked to" Mr. Howard's "actual and substantial disadvantage," *Boston*, 131 Nev. at 985, 363 P.3d at 455, and prejudice has been shown to excuse the petition's untimeliness.

B. The Petition Is Not Barred As Successive Or Waived

The State submits that Mr. Howard's petition "is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ." MTD at 17. It is neither.

NRS 34.810(1)(b)(2) provides that a petition should be dismissed if the claim could have been "[r]aised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction

relief." For the reasons outlined above, Mr. Howard's petition could not have been filed until the New York order was issued in May 2018, and before that his most recent post-conviction proceeding was commenced in October 2016. Section 34.810(1)(b)(2) is, by its own terms, inapplicable.

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

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

Mr. Howard's claim does not fall within either prong of the provision. It does "allege new or different grounds" for relief and thus escapes the first prong. On the second prong, a claim is an abuse of the writ if it "could . . . have been raised earlier." *Bejarano*, 122 Nev. at 1072, 146 P.3d at 269. Based as it was on the recent New York order, Mr. Howard's claim could not have been. Given the statute's plain language, Mr. Howard's petition is not barred by NRS 34.810(2).

In the Motion to Dismiss, the State alludes to the Nevada Supreme Court's 2014 denial of a claim challenging the prior-conviction aggravator. *See* MTD at 21. It is not evident what significance the State gleans from it. To the extent the State is implying that Mr. Howard's current petition is precluded by NRS 34.810 because he either did contest the aggravator on the same ground he uses now, or that he could have, it is mistaken. As relevant here, the Nevada Supreme Court in 2014 rejected a claim that the aggravator was invalid because there was no judgment and sentence in New York, which were—Mr. Howard posited—necessary for a conviction as a matter of Nevada law. *See Howard v. State* (*Howard I*), No. 57469, 2014 WL 3784121, at *5 (Nev. 2014) (per curiam) (unpublished disposition).[7] That is quite distinct from the present claim, which is that the conviction has definitively been *vacated* by the New York

[7] Mr. Howard is now challenging his death sentence in federal habeas on the ground noted above, i.e., the New York robbery case did not lead to a conviction under Nevada law given the absence of a judgment and sentence. In this reply, Mr. Howard refers to a robbery "conviction" without using quotation marks or the like for ease of reference. He does not thereby concede that there was in fact a conviction as a matter of Nevada law.

courts, thereby destabilizing his death sentence. Mr. Howard did not make *that* claim in 2014, and it would have been impossible to do so, as the vacatur had not yet occurred. Thus, Mr. Howard neither did, nor could have, lodged the claim earlier, and NRS 34.810(2) is inapplicable.

Since Mr. Howard's petition is not covered by either NRS 34.810(1)(b)(2) or by NRS 34.810(2), the State's reliance on those provisions can be rejected out of hand. However, if the Court disagrees and regards the provisions as in play, Mr. Howard can show good cause and prejudice to overcome the bars for the same reasons surveyed above. *See supra* at 3–9; *see also Bejarano*, 122 Nev. at 1072, 146 P.3d at 269–70 (applying the same good cause and prejudice analysis for defaults under both the timeliness provision of NRS 34.726(1) and the successive provisions of NRS 34.810). No matter how the Court approaches the questions of successiveness and waiver, they do not foreclose relief.

C. The Provision Is Not Barred By Laches

The State's laches argument, *see* MTD at 15–16, is even more misguided than its arguments on timeliness and successiveness.

Nevada's laches rule permits a court to dismiss delayed petitions where the delay has prejudiced the State in certain respects. *See* NRS 34.800. The most sensible way for the Court to dispatch the State's laches defense is for it to simply find, in an exercise of discretion, that laches was not meant to be used in a scenario like this one. Notably, laches allows, but does not require, a court to dismiss a petition for delay. *See* NRS 34.800(1) ("A petition *may* be dismissed if" the specified grounds are satisfied). Such a dismissal ought not to be ordered here.

The laches statute has two components. NRS 34.800(1)(a) authorizes dismissal where the delay "[p]rejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." For two straightforward reasons, this prong has no role to play here.

First, the State has not shown that a delay impaired in any respect its ability to oppose the petition. It offers nine words on this front: "the State is prejudiced in its ability to answer the Sixth Petition." MTD at 16. That bare statement, with no elaboration or explanation, is woefully

inadequate. A review of the State's Motion to Dismiss reveals that, contrary to its naked assertion otherwise, it has had no difficulty responding to Mr. Howard's petition. Resolution of the petition turns almost entirely on a pure question of law, namely, whether the invalidation of his prior conviction renders his death sentence unconstitutional. To respond to the petition, the State had to do nothing more than basic legal research. It was just as capable of doing the research now as it was at any time in the past, if not more so.

Second, even if one takes as true the State's implausible and wholly unsupported view that it was prejudiced in responding to the petition, "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). Mr. Howard's petition is based on the Queens order and he took every step he could to get it timely filed after the order was issued. Consequently, even if the State was somehow prejudiced in responding, the prejudice is eclipsed by Mr. Howard's diligence.

The other element of the laches statute authorizes dismissal where the delay "[p]rejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b). This element is best disposed of with reference to *State v. Powell*, 122 Nev. 751, 758–59, 138 P.3d 453, 458 (2006) (en banc), which shows that Nevada courts are not to utilize laches to bar a petition where the petitioner acted promptly as soon as the factual predicate for the claim was available to him. Plus, there *is* a fundamental miscarriage of justice, as there are no valid aggravators left, which means that Mr. Howard is as a legal matter actually innocent of the death penalty. *See infra* at 15–19.

In overview, the State's laches defense widely misses the mark.

D. There Is No Problem With The New York Order

In a cursory footnote, the State maintains that the copy of the New York order attached to his petition is defective because it was not certified or file-stamped. *See* MTD at 26 n.9.

As an initial matter, the argument is waived as inadequately briefed. A passing footnote with no authority or explanation on the central question—the need for a certification or file

stamp—is patently inadequate. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (en banc) (declining to consider an appellate issue because it was "not supported by cogent argument and citation to relevant authority").

If the Court elects to forgive the State's perfunctory treatment of the matter and answer the question, it should easily determine that there is no evidentiary problem with the document.

To begin, undersigned habeas counsel authenticated the order as a true and correct copy of the document it purported to be. *See* Pet., Ex. 3. The State does not even acknowledge the authentication, let alone defeat it.

Nor could it plausibly do so. Mr. Howard asked the Court to take judicial notice of the Queens order. *See* Pet. at 7 n.10. As a court record, the order is a proper subject for judicial notice, and therefore no formal certification or authentication is required. *See Beckner v. ReconTrust Co.*, No. 2:12-cv-3379, 2012 WL 13013048, at *1 (C.D. Cal. Oct. 15, 2012) (rejecting a party's similar objection because court filings "need not be verified or certified before they can be subject to judicial notice"); *Sanders v. Gross*, No. 86 C 2248, 1987 WL 10558, at *1 (N.D. Ill. May 5, 1987) (denying a motion to strike court filings because "[j]udicially noticed pleadings need not be authenticated by affidavit"). By authenticating the document, Mr. Howard did *more* than was strictly necessary, and even without the authentication the order can properly be taken into account.

In cryptic fashion, the State disputes the propriety of judicial notice. Its only explication is the following quotation from *Rippo*: "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." MTD at 26 n.9. From that language, the State somehow infers that "the Nevada Supreme Court has rejected [Mr. Howard's] view of judicial notice." *Id.* Mr. Howard does not follow the State's logic. The referenced opinion does not analyze judicial notice at all. In fact, the phrase "judicial notice" does not even appear in *Rippo*. Moreover, the facts at issue in the paragraph focused on by the State have no similarity to Mr. Howard's case. The excerpted sentence from *Rippo* was written to refute a claim that appellate counsel was ineffective, on the reasoning that the attorney could

not have been deficient for omitting an argument based on material outside the trial record, since he was limited to that record in his briefing before the Nevada Supreme Court. *See Rippo*, 134 Nev. at 429, 423 P.3d at 1102. What any of that has to do with Mr. Howard's situation is anyone's guess, for the State does not connect the dots. Mr. Howard is *not* here alleging ineffective assistance and he is *not* on appeal. Consequently, he is *not* restricted to the facts available at some prior stage of the case and he *is* permitted to introduce new evidence. *See* NRS 34.370(4) (contemplating the consideration of new evidence in post-conviction proceedings).

Looking past the State's irrelevant authority to the caselaw that is actually on point, it supports Mr. Howard's request for judicial notice. Such notice can be taken of records in a different case when the two are closely related and "a valid reason present[s] itself." *Mack*, 125 Nev. at 91–92, 206 P.3d at 106. Applying those factors, the Queens order easily fits the bill. The cases are intertwined because the Nevada prosecution relied on the Queens conviction. And an eminently valid reason presents itself: the conviction has been vacated and the Nevada death sentence has lost its single remaining aggravator. Judicial notice is appropriate.

Assuming arguendo that the State's undeveloped and unsupported attack on the Queens order is well-founded, the error can be quickly remedied. Attached to this reply is a certified version of the New York order. *See* Ex. 1, Att. B.[8] Also attached is another certified document in which the Queens County Clerk attests that the New York robbery case "was dismissed and all pending criminal charges related to this action were also dismissed." Ex. 1, Att. C. The Clerk adds that under New York law the robbery proceeding "shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status occupied before the arrest and prosecution." *Id.* Even by the State's artificial and hyper-technical standards, these documents surely qualify as admissible and they confirm that the New York courts vacated Mr. Howard's robbery conviction.[9]

[8] At the latest hearing, the Court indicated, with the State's consent, that it would consider attachments to this reply corroborating the New York dismissal. *See* Ex. 2 at 3–4.

[9] Undersigned counsel will bring hard copy originals of the certified order and the certificate of disposition from the Queens County Clerk to oral argument on the State's Motion to Dismiss, so

Finally, even if the State were correct that there is a material flaw with the New York order, it would be wrong about its ramifications. It is black-letter Nevada law that a post-conviction petition cannot be summarily denied without an evidentiary hearing if the claim is "supported by specific factual allegations not belied by the record that, if true, would entitle [the inmate] to relief." *Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154 (2015); *accord Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (per curiam). Mr. Howard has asserted that his New York robbery conviction was vacated by the Queens County Supreme Court. *See* Pet. at 12. Far from being belied by the record, the allegation is confirmed by it, in the form of the order taking that action. *See id.*, Ex. 2; Ex. 1, Atts. B, C. It follows that the Court is not permitted to summarily deny the petition on the State's Motion to Dismiss due to any perceived gap in the facts underlying Mr. Howard's claim. Rather, if there is such a gap, the Court must hold an evidentiary hearing to determine whether the New York conviction has in fact been vacated.

Mr. Howard does not believe such an empty ceremony is a good use of the Court's or the parties' time, given that the State refrains from disputing the fact of the vacatur and it has now been established beyond any fairminded debate. Instead, no matter how inconvenient it might be for the State, the Court should simply accept the incontrovertible fact at the root of the instant case, namely, that the sole aggravator underlying Mr. Howard's death sentence has been set aside.

E. Any Procedural Bar Is Excused By Actual Innocence Of The Death Penalty

In the event the Court feels any of the preceding procedural bars is an obstacle to the petition, it should be forgiven because Mr. Howard's claim renders him actually innocent of the death penalty. *See Lisle v. State*, 131 Nev. 356, 361–62, 351 P.3d 725, 729–30 (2015) (en banc) (reiterating that actual innocence overcomes any procedural default).

The State is unpersuaded of Mr. Howard's actual innocence, *see* MTD at 22–25, but its reservations are insubstantial.

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that the Court and the prosecutor can have a chance to inspect the documents in person and satisfy themselves of their legitimacy, if they so wish.

As a general matter, the State's objection is that the jury heard evidence about some facts associated with the New York *conduct* with which Mr. Howard was charged, and that was good enough. *See id.* at 22. The State misunderstands the law. At the time Mr. Howard was tried—and today—the aggravator at issue required a showing that he had been "*convicted* of . . . a [violent] felony." *Howard v. Filson* (*Howard II*), No. 2:93-cv-1209, 2016 WL 7173763, at *1 (D. Nev. Dec. 8, 2016) (quoting NRS 200.033(2) (1979)); *accord* NRS 200.033(2)(b). Mr. Howard's claim flows from the vacatur of his conviction. Jurors cannot find the aggravator without a conviction, regardless of what the State told them about Mr. Howard's *behavior* in New York. That is all it takes to see his actual innocence.

The State gets hung up on the comments the prosecutors made at trial, the testimony given at sentencing, and the instructions provided to the jury. *See* MTD at 25. Again, though, the State is looking at the case through the wrong lens. Actual innocence turns on whether the petitioner has proven that, "but for a constitutional error, no reasonable juror would have found him death eligible." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A defendant is only eligible for the death penalty if one or more statutory aggravating circumstances are found. *See Lisle*, 131 Nev. at 365–68, 351 P.3d at 732–34; NRS 175.554(3); Ex. 1, Att. D at 1538 (indicating that the jury was instructed that it could "impose a sentence of death only if it" found "at least one aggravating circumstance"). Here, the error is the consideration of a conviction that was later nullified and that stands now as the sole surviving aggravator. As a consequence, the question—for actual innocence purposes—is not, as the State would have it, what the jury was told about the New York robbery. The question is what *would* the jury have been told had the New York conviction already been vacated. On that crucial question, the State is silent. Presumably, that is because the prosecutor would have told the jury nothing about the conviction, since it would have been a legal nullity.

Indeed, the case would not have even reached the capital sentencing phase because the State would have been deprived of any aggravators to pursue. *See* SCR 250(4)(c) (requiring the State to file a notice of intent to seek the death penalty prior to any sentencing that alleges "all aggravating circumstances the state intends to prove"); *see also Kirksey v. State*, 107 Nev. 499,

503, 814 P.2d 1008, 1010 (1991) ("Kirksey correctly asserts that he must be given notice prior to the penalty hearing of each aggravating circumstance that the state will seek to prove at the penalty hearing."); *Wilson v. State* (*Wilson I*), 99 Nev. 362, 370 n.4, 664 P.2d 328, 332 n.4 (1983) (quoting a statute from the time of Mr. Howard's sentencing that allowed the prosecution to assert an aggravator, "other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing").

Furthermore, although the State is right that the prosecutor "argued that the jury needed to make its own independent judgment regarding the existence of the prior violent felony aggravating circumstance," MTD at 24, he certainly did not make the implausible suggestion that it could do so without a valid conviction. The prosecutor's perspective was that "the mere recitation of what the conviction was for is not, in the state's mind, *adequate* to comply with" its "burden of proof." *Id.* Stated differently, the prosecutor felt he needed *more* than just the conviction. That does not signify the nonsensical proposition that the conviction itself was unnecessary to prove that Mr. Howard had a conviction. *See, e.g.*, *State v. Autry*, 103 Nev. 552, 556, 746 P.2d 637, 640 (1987) (per curiam) (explaining what it means for an element to be "necessary but not sufficient").

The State had good reason to proffer evidence to the jury about the facts underlying the New York robbery. Under the controlling statute, it was required to prove that Mr. Howard had been "convicted of . . . a felony *involving the use or threat of violence*." *Howard II*, 2016 WL 7173763, at *1 (quoting NRS 200.033(2) (1979)); *accord* NRS 200.033(2)(b); MTD, Ex. B at 1459 (containing the Court's quotation of the statute, which provided that the "murder was committed by a person who was previously convicted of another murder or a felony involving the use or threat of violence"); *id.* at 1462 (including the prosecutor's characterization to the jury of the aggravator as requiring a showing "that the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence"); Ex. 1, Att. D at 1539–40 (establishing that the jury was told by the trial court that the aggravator required that the murder be "committed by a defendant who was previously convicted of a felony involving the use or threat of violence"). Testimony about the offense was relevant because it went to that

second element—the presence of violence. In the prosecutor's own words, the testimony, "as opposed to any documentation," was "to show the jury beyond a reasonable doubt that the use of force and/or violence was used in the commission of that particular robbery." MTD, Ex. B at 1454; *see id.* at 1457 (reflecting that the prosecutor later added, in support of the same argument, that the bare fact of the charge and conviction did not "tell[] the jury enough about the nature of those acts to allow them to come to the conclusion that beyond a reasonable doubt the State has shown that there is a threat or use of violence"). The trial judge allowed the testimony over the defense's objection on that very ground, to wit, because "[t]he particulars of the case" and "the evidence would go to the question of use of force or violence." *Id.* at 1460.

Contrary to the State's insinuation, that the testimony was used to prove that the offense was violent does not mean that it was unnecessary to prove that there was a conviction in the first place. Both were required, and one has been completely obviated by a binding judicial ruling that is entitled to full faith and credit from this Court. *See City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533, 537, 267 P.3d 48, 50 (2011) (en banc) ("Under the Full Faith and Credit Clause of the United States Constitution, a final judgment entered in a sister state must be respected by the courts of this state." (citing U.S. Const. art. IV, § 1)).

Simply put, the State's reliance on the discussion that did occur at trial about the robbery case is misplaced, for under a proper analysis none of that discussion would have taken place. There was a single aggravator and it is now gone. This is about as clear-cut a case of actual innocence of the death penalty as any court is likely to see.

The State's substantive analysis of actual innocence revolves around four cases. *See* MTD at 22–24. Not one of those opinions even uses the phrase "actual innocence"—let alone interprets it. *See Johnson v. Mississippi*, 486 U.S. 578 (1988); *Spivey v. Head*, 207 F.3d 1263 (11th Cir. 2000); *Gibbs v. Johnson*, 154 F.3d 253 (5th Cir. 1998); *Gardner v. State*, 764 S.W.2d 416 (Ark. 1989) (per curiam). The cases do nothing to bolster the State's counterintuitive position that a prisoner whose death sentence is supported by a single aggravating conviction that has been vacated is somehow still "eligible for the death penalty." *Lisle*, 131 Nev. at 362, 351

P.3d at 730. Mr. Howard is not, and actual innocence therefore overcomes any procedural bar that might otherwise apply, making merits review necessary.

II. The Petition Is Meritorious

The State does not truly engage with the merits of Mr. Howard's claim anywhere in its Motion to Dismiss, given that its entire argument section is directed at the procedural bars. *See* MTD at 14–26. That being the case, once the Court finds that the bars are no impediment to the petition, it can immediately grant relief.

Should the Court inquire further, it will reach the same destination.

The only content in the State's Motion to Dismiss that could be read as going to the merits, even though it is placed confusingly in its section on actual prejudice, is a vain attempt to distance the instant case from *Johnson*. *See id.* at 23–25. Its effort is unavailing.

The difference between *Johnson* and the scenario presented now, in the State's judgment, is that in the former the only evidence supporting the aggravator was a court document confirming the conviction, whereas here there was testimony at sentencing about the conduct with which Mr. Howard was charged in New York. *See id.* at 22–23. Specifically, the State fixates on the *Johnson* Court's remark that "the prosecutor did not introduce any evidence concerning the alleged" prior offense "itself" and that "the only evidence relating to the" offense "consisted of a document establishing that petitioner had been convicted of that offense in 1963." *Johnson*, 486 U.S. at 585. Although the difference between the two cases does exist, it is legally meaningless.

In *Johnson*, three aggravating circumstances remained in the case when it reached the U.S. Supreme Court. *See* 486 U.S. at 581. As detailed earlier, in most capital regimes an aggravator is necessary to render a defendant eligible for the death penalty. *See supra* at 7–8; *see Johnson*, 486 U.S. at 581 (observing that "the jury found three aggravating circumstances, *any one of which*, as a matter of Mississippi law, would have been sufficient to support a capital sentence"). Only one of those three aggravators was thrown into doubt by the *Johnson* appeal. *See id.* That meant that Mr. Johnson was *eligible* for a death sentence, regardless of whether his challenge to the prior-conviction aggravator succeeded or not.

By virtue of the other two aggravators, the State would have been permitted at Mr. Johnson's sentencing to present evidence regarding the prior offense, even if the conviction had already been invalidated. *See Hodges v. State*, 912 So. 2d 730, 756 (Miss. 2005) (en banc) (clarifying that Mississippi law "does not limit the evidence that can be presented at the sentencing phase" to aggravators, and that evidence of unadjudicated bad acts can still be relevant at such a proceeding), *disagreed with on other grounds by Ross v. State*, 954 So. 2d 968, 987–88 (Miss. 2007). That being so, the U.S. Supreme Court in *Johnson* was operating in a context in which the submission of evidence about the underlying conduct in New York, apart from the proof of the conviction itself, was possible. It made sense, then, for the Court to rely upon the fact that no such evidence was offered. The Court was in essence rejecting one conceivable defense for the opinion below: that other equally aggravating evidence about the prior offense might have led the jury to impose death even if there had been no conviction.

Here, no such rejection is necessary, because no such evidence was possible. There is only one aggravator left, and it has been struck down. No evidence about Mr. Howard's New York conduct is relevant, as no capital penalty-phase proceeding would have taken place at all had the vacatur already occurred, let alone one that delved into the robbery case. In short, the reasoning from *Johnson* that the State hangs its hat on was necessary to grant relief in that case, but it is not necessary in this one.

Mr. Howard's reading of *Johnson* is reinforced by *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). In that case, the defendant was sentenced to death in Florida after a penalty-phase proceeding in which "the State presented two witnesses to testify regarding Armstrong's 1985 conviction of indecent assault and battery on a child of the age of fourteen" in Massachusetts. *Id.* at 715. The victim of the Massachusetts offense testified at length about the details of the assault. *See id.* at 716–17. After the direct appeal in Florida, a Massachusetts court vacated the prior conviction. *See id.* at 717. Despite the testimony about the underlying conduct at the penalty phase, the Florida Supreme Court had no trouble granting *Johnson* relief. *See id.* at 718. Such testimony was actually seen as *strengthening* the defendant's claim, as it made the prejudice even more apparent. *See id.* ("Given the nature of the crime underlying the vacated

conviction—a sexual offense upon a child—and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt."). No harmless error inquiry is required here, given the absence of any remaining aggravators. Still, the Florida Supreme Court's well-reasoned opinion shows at a minimum that the State is incorrect to confine *Johnson* to cases in which there was no testimony at the capital sentencing about the underlying offense.

The State claims that other courts share its gloss on *Johnson*, but they do not.

For starters, the key statute in the State's first cited authority obligated the government to prove that the defendant "*committed* another felony." *Gardner*, 764 S.W.2d at 419 (Purtle, J., dissenting). It was natural for the Arkansas Supreme Court to feel that the aggravator was satisfied by proof about the "nature of petitioner's conduct," *id.* at 418, because the aggravator was trained on that conduct, i.e., on what actions the defendant *committed*. By contrast, the Nevada statute demands a *conviction*, *see supra* at 16, and testimony regarding what a defendant did says nothing about whether it led to a valid conviction. Considering the language of the Arkansas statute, it is unsurprising that the court there could point to its established "practice" of relying on evidence other than "proof of a conviction." *Gardner*, 764 S.W.2d at 418. It is equally unsurprising that Nevada has the opposite practice. Its statute requires a conviction, so its caselaw does as well. *See Kirksey*, 107 Nev. at 504, 814 P.2d at 1011 (rebuffing a challenge to the aggravator in question because the record left "no doubt" that the defendant "was actually *convicted* of the robbery").

Gibbs, the State's second citation, is dealt with even more easily. The claim there was that the prosecution "relied upon inaccurate evidence of a prior offense," i.e., evidence that was presumably inaccurate *at the time of trial*. *Gibbs*, 154 F.3d at 258. There is no indication in *Gibbs* that a court subsequently reversed the aggravating conviction. Needless to say, that is the soul of Mr. Howard's claim. When inaccuracy is the issue, a court can logically emphasize "the testimony at trial of the victim," as *Gibbs* did. *Id.* When the validity of a conviction is the issue,

as it is here, no such testimony can suffice, because the victim—and any account of the crime—sheds no light on the purely legal question of whether the conviction remains lawful.

In the State's final cited case, the claim failed because of a lack of prejudice. *See Spivey*, 207 F.3d at 1282 (denying the claim on the reasoning that "the error was harmless because the effect was neither substantial nor injurious"). The defendant before the Eleventh Circuit had multiple aggravators still in place at the time he asserted his *Johnson* claim. *See Spivey v. State*, 319 S.E.2d 420, 438 (Ga. 1984) (indicating that the jury had found a robbery-murder aggravator in addition to the prior-conviction aggravator). Georgia permits both statutory and non-statutory aggravation. *See Tharpe v. Head*, 533 S.E.2d 368, 370 (Ga. 2000). Under that scheme, at least one statutory aggravator must be present to render a defendant eligible for capital punishment. *See Arrington v. State*, 687 S.E.2d 438, 445 (Ga. 2009); *Hall v. Terrell*, 679 S.E.2d 17, 22 (Ga. 2009). Once a statutory aggravator has been established and the defendant is death-eligible, the jury can consider non-statutory aggravation "in its deliberations on the ultimate question of whether to impose the death sentence." *Ross v. State*, 326 S.E.2d 194, 203 (Ga. 1985), *overruled on other grounds by O'Kelley v. State*, 604 S.E.2d 509, 511–12 (Ga. 2004). Conduct connected to prior crimes is admissible as non-statutory aggravation, even when it does not lead to a conviction. *See Pace v. State*, 524 S.E.2d 490, 505 (Ga. 1999).

These principles make sense of the Eleventh Circuit's rationale in *Spivey*. Mr. Spivey's *Johnson* claim did not call into question his eligibility for death, because the robbery-murder aggravator remained in force. Since he would still have been death-eligible even if the *Johnson* claim prevailed, the issue was whether the *weighing* process would have resulted in death. And at the weighing stage, the conduct associated with the prior crime would still have been fair game for the jury as non-statutory aggravation.

That rationale cannot be utilized in Mr. Howard's case. The prior conviction is the only aggravator remaining. Because the *Johnson* claim eliminates it, there is no death eligibility, and the inquiry does not get to the weighing stage. Hence, there is no room for the consideration of non-statutory mitigation. The conduct with which Mr. Howard was charged in New York is

irrelevant, and the testimony given about it at his Nevada trial cannot save his unconstitutional death sentence.

Throwing out another red herring, the State avers that "the mere fact of the adjudication" in the robbery case "was not at issue since Petitioner admitted the New York conviction." MTD at 25. For one thing, Mr. Howard was hardly competent to testify to whether or not he was convicted, since by all accounts he was absent from court when the jury reached its verdict. More to the point, it does not matter whether "the mere fact of the adjudication" was ever contested at trial—it is *now* being contested, because it has *now* been established that no such adjudication legally exists, and that is the crux of a *Johnson* claim. In *Johnson* itself, there is no indication that the defendant questioned the fact of his prior conviction at his capital sentencing. *See* 486 U.S. at 580–81 (describing the penalty phase proceedings). Nor could he have: unlike Mr. Howard, Mr. Johnson was actually sentenced and incarcerated for the New York offense. *See id.* at 581. Clearly, a defendant need not challenge the fact of his conviction at trial in order to later raise a *Johnson* claim. All that he needs is a court order vacating the prior conviction, and Mr. Howard has that.

In a last-ditch attempt to salvage its defective death sentence, the State comments that the prosecution at Mr. Howard's sentencing "never presented the jury with a judgment of conviction in the New York case." MTD at 25. As mentioned earlier, it is of no moment *how* the State proved the conviction at sentencing. His death sentence now rests on a conviction that has no lawful effect. That is more than enough under *Johnson*. As it happens, Mr. Johnson's prosecutor did not introduce a judgment of conviction either. He introduced a document reflecting Mr. Johnson's "commitment" to jail for the offense. *See Johnson*, 486 U.S. at 581. The minutes from the Queens case that the Nevada prosecutor presented to the jury was used for the exact same purpose: to show that Mr. Howard had been convicted of robbery in New York. *See* MTD, Ex. B at 1490 ("Now, your objection, counsel, is overruled. It appears that the official minutes of the court reflect that this individual *was convicted* of the offense which is corroborated by this officer's testimony."). Of note, the *only* relevant item on the minutes states that Mr. Howard "was found guilty in absentia by jury verdict." Ex. 1, Att. F. Evidently, the

prosecution understood that it was required to prove Mr. Howard's conviction, as that was the only role for the minutes to play. Because that conviction has been erased as a matter of law, the death sentence has no footing.

In sum, despite the State's valiant efforts to create daylight between this case and *Johnson*, it is directly on point. Most significantly, in both cases, a death sentence was predicated on a prior conviction that was subsequently vacated. The similarities continue to an uncanny extent: both prior convictions were for violent felonies in the State of New York; both defendants were sentenced to death elsewhere in the early 1980s; both had their prior convictions later invalidated by New York courts; and both pursued post-conviction relief as a result in the jurisdiction that imposed their death sentences. Insofar as the cases diverge, the difference makes Mr. Howard's claim *more* compelling, for his now-void conviction is the only remaining basis for his death sentence, whereas Mr. Johnson had two other aggravators. The U.S. Supreme Court awarded Mr. Johnson relief, and Mr. Howard is entitled to it even more so.

In the alternative, if the Court agrees with the State that *Johnson* does not apply to Mr. Howard's fact pattern and that the Eighth Amendment does not compel relief, it should vacate his death sentence under the cruel-and-unusual-punishment and due process clauses of the Nevada Constitution. *See* Nevada Const. art. I, secs. 6 & 8. "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." *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 293 (1982); *accord Oregon v. Hass*, 420 U.S. 714, 719 (1975). *Johnson* was animated by the idea that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment." 486 U.S. at 584. It was further motivated by the notion that capital "decisions cannot be predicated on mere caprice or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Id.* at 585. Even if the facts of *Johnson* differ from the present case in any meaningful respect, those principles have equal force here, where a death sentence now hinges on a single conviction that is no longer a conviction. In

the event the Court denies relief under the Eighth Amendment, it should still invalidate the death sentence as unreliable under the state constitution.

III. Conclusion

Notwithstanding the State's intent to execute a man whose sole aggravator has been nullified, the Constitution clearly forbids it. Mr. Howard respectfully asks the Court to deny the State's Motion to Dismiss and vacate his death sentence or, if necessary, hold an evidentiary hearing.

DATED this 2nd day of December 2019.

Respectfully submitted,

HENDRON LAW GROUP LLC

/s/ Lance J. Hendron

LANCE J. HENDRON, ESQ.
Nevada Bar No. 11151
625 S. Eighth St.
Las Vegas, Nevada 89101

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ. (admitted *pro hac vice)*
Idaho Bar No. 9648
720 W. Idaho St., Ste. 900
Boise, Idaho 83702

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (admitted *pro hac vice)*
Idaho Bar No. 10494
720 W. Idaho St., Ste. 900
Boise, Idaho 83702

CERTIFICATE OF SERVICE

I hereby certify that service of this Reply in Support of Petition and Response to Motion to Dismiss was made this 2nd day of December 2019, by electronic filing and by email to:

Jonathan E. VanBoskerck
Chief Deputy District Attorney
Office of the Clark County District Attorney
Jonathan.VanBoskerck@clarkcountyda.com

/s/ L. Hollis Ruggieri
L. Hollis Ruggieri
Paralegal
Federal Defender Services of Idaho

Exhibit 1

(Declaration of Jonah J. Horwitz, dated December 2, 2019)

DECLARATION OF JONAH J. HORWITZ

I, Jonah J. Horwitz, declare as follows:

1. I am an attorney with Federal Defender Services of Idaho.
2. I represent Petitioner Samuel Howard in his federal habeas proceedings and in this state post-conviction action.
3. The document appended to this declaration as Attachment A is a true and correct copy of the special verdict in Mr. Howard's capital case in Nevada, signed on May 4, 1983, and reflecting the aggravating circumstances found by the jury.
4. The document appended to this declaration as Attachment B is a true and correct copy of the order by the Queens County Supreme Court in Mr. Howard's robbery case, dated May 22, 2019. Attachment B bears the certification and seal of the Queens County Clerk.
5. The document appended to this declaration as Attachment C is a true and correct copy of a Certificate of Disposition from the Queens County Supreme Court. Attachment C bears the certification and seal of the Queens County Clerk.
6. The document appended to this declaration as Attachment D is a true and correct copy of the transcript of the proceedings held at Mr. Howard's capital sentencing in Nevada on May 3, 1983.
7. The document appended to this declaration as Attachment E is a true and correct copy of the transcript of the proceedings held at Mr. Howard's capital sentencing in Nevada on May 4, 1983.
8. The document appended to this declaration as Attachment F is a true and correct copy of the minutes of the Queens County, New York robbery case against Mr. Howard in Indictment Number 1227-78, which were introduced into evidence by the prosecution at his capital sentencing in Nevada on May 2, 1983 and marked at that time as State's Proposed Exhibit 1.
9. I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

DATED this 2nd day of December 2019.

/s/ Jonah J. Horwitz
Jonah J. Horwitz

Attachment A

(Special Verdict Form, signed May 4, 1983)

CASE NO. C53867

DEPT. NO. V

4:20 p.m.
FILED IN OPEN COURT
May 4 1983
LORETTA BOWMAN, COUNTY CLERK
By Tona Duncan Deputy

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
SAMUEL HOWARD,
Defendant.

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, SAMUEL HOWARD, GUILTY of Murder in the First Degree, designate that the aggravating circumstance or circumstances which are checked below have been established beyond a reasonable doubt.

☒ The murder was committed by a defendant who was previously convicted of a felony involving the use or threat of violence to the person of another.

☒ The murder was committed while the defendant was engaged in the commission of any robbery.

We, the Jury, state there are no mitigating circumstance or circumstances sufficient to outweigh the aggravating circumstance or circumstances designated.

DATED at Las Vegas, Nevada, this 4 day of May, 1983.

FOREMAN Leo Gates

(R)

8 218299

Attachment B

(Queens County Supreme Court Order, dated May 22, 2019)

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

P R E S E N T:
HON. RONALD D. HOLLIE,
JUSTICE

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SAMUEL HOWARD

Defendant.

----------X

Ind. No. 1227/78
Motion: Motion To Vacate The Conviction and To Dismiss the Indictment Pursuant To C.P.L § 380.30(1) C.P.L § 330.30(1) C.P.L § 440.10(1)

The following papers numbered
1 to 4 submitted on this motion.

Joel M. Cohen, Esq.
For the Motion

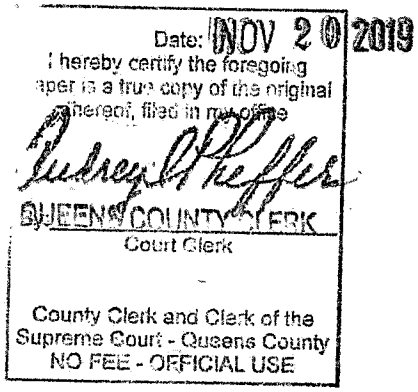
Richard A. Brown, D.A.
By: A.D.A Edward D. Saslaw
Opposed

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

The defendant's motion is granted solely to the extent that a hearing is ordered to be held on March 22, 2018.

Dated: January 31, 2018

RONALD D. HOLLIE, J.S.C.


Date: NOV 20 2019
I hereby certify the foregoing
paper is a true copy of the original
thereof, filed in my office
QUEENS COUNTY CLERK
Court Clerk
County Clerk and Clerk of the
Supreme Court - Queens County
NO FEE - OFFICIAL USE

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

PRESENT:

HON. RONALD D. HOLLIE,
JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK:

-against-

SAMUEL HOWARD,

Defendant

Ind. No. 1227/78
Motion To Vacate The Conviction And To Dismiss The Indictment Pursuant To C.P.L. § 380.30(1) C.P.L. § 330.30(1) C.P.L. § 440.10(1)

The following papers numbered
1 to 5 submitted on this motion

Joel M. Cohen, Esq.
For the Motion

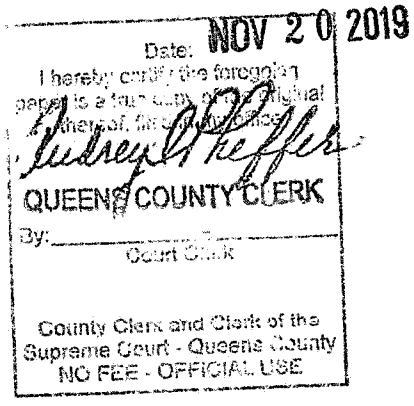
Richard A. Brown, D.A.
By: A.D.A. Edward D. Saslaw, Esq.
Opposed

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.


Date: NOV 20 2019
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paper is a true copy of the original
thereof, filed in this office
QUEENS COUNTY CLERK
By:
Court Clerk
County Clerk and Clerk of the
Supreme Court - Queens County
NO FEE - OFFICIAL USE

THE PEOPLE OF THE STATE OF NEW YORK : BY: RONALD D. 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:

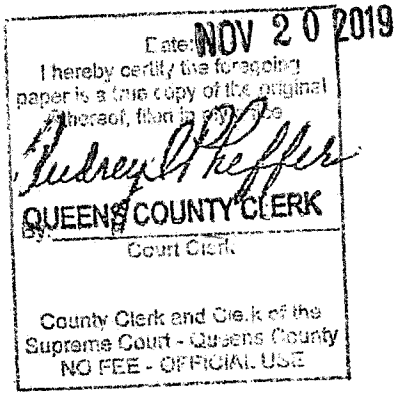
1) During jury selection, on the above referenced indictment, the defendant failed to appear and a bench warrant was issued on 7/10/79.

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.


Date: NOV 20 2019
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thereof, filed in my office
QUEENS COUNTY CLERK
By
Court Clerk
County Clerk and Clerk of the
Supreme Court - Queens County
NO FEE - OFFICIAL USE

It is the defendant's position that he is entitled to relief afforded by *C.P.L.§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 fo sentence on his New York conviction.

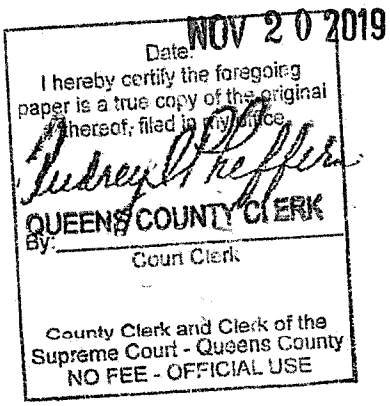
It is the People position that if a Defendant absconds from New York and is arrested and incarcerated on an unrelated matter in another state, People have no obligation to make reasonable efforts to produce the Defendant for sentencing in this state, even if they know where he was incarcerated.

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 *C.P.L.§ 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 #1227/78 is vacated and the indictment dismissed under *C.P.L. §380.30 (1), 330.30* and for *440.10.*

May 22, 2018

Ronald D. Hollie, J.S.C.


Date: NOV 20 2019
I hereby certify the foregoing
paper is a true copy of the original
thereof, filed in my office.
QUEENS COUNTY CLERK
By:
Court Clerk
County Clerk and Clerk of the
Supreme Court - Queens County
NO FEE - OFFICIAL USE

Attachment C

(Queens County Supreme Court Certificate of Disposition)

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

FEE:$10.00

CERTIFICATE OF DISPOSITION DISMISSAL

DATE: 11/08/2018

CERTIFICATE OF DISPOSITION NUMBER: 52679

PEOPLE OF THE STATE OF NEW YORK
VS.

HOWARD,SAMUEL

DEFENDANT

CASE NUMBER:	1227-78
LOWER COURT NUMBER(S):	Q813715
DATE OF ARREST:	06/23/1978
ARREST #:	10714610/78
DATE OF BIRTH:	08/18/1948
DATE FILED:	06/29/1978

I HEREBY CERTIFY THAT IT APPEARS FROM AN EXAMINATION OF THE RECORDS ON FILE IN THIS OFFICE THAT ON 05/23/2018 THE ABOVE ACTION WAS DISMISSED AND ALL PENDING CRIMINAL CHARGES RELATED TO THIS ACTION WERE ALSO DISMISSED BY THE HONORABLE HOLLIE,R THEN A JUDGE OF THIS COURT.

THE DEFENDANT WAS DISCHARGED FROM THE JURISDICTION OF THE COURT.

THE ABOVE MENTIONED DISMISSAL IS A TERMINATION OF THE CRIMINAL ACTION IN FAVOR OF THE ACCUSED AND PURSUANT TO SECTION 160.60 OF THE CRIMINAL PROCEDURE LAW "THE ARREST AND PROSECUTION SHALL BE DEEMED A NULLITY AND THE ACCUSED SHALL BE RESTORED, IN CONTEMPLATION OF LAW, TO THE STATUS OCCUPIED BEFORE THE ARREST AND PROSECUTION".

IN WITNESS WHEREOF,I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL ON THIS DATE 11/08/2018.

Audrey I. Pheffer
QUEENS COUNTY CLERK

COURT CLERK

Attachment D

(Capital Sentencing Transcript, May 3, 1983)

LAS VEGAS, NEVADA, TUESDAY, MAY 3, 1983 AT 3:30 P.M.

* * * * * * * * *

(WHEREUPON, FROM 12:13 A.M. UNTIL 3:30 P.M., A RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: LET THE RECORD REFLECT THIS IS OUTSIDE THE PRESENCE OF THE JURY.

MISS CLERK, AT THIS TIME I WILL HAND YOU THE SHEET ENTITLED "PENAL LAW, ROBBERY IN THE FIRST DEGREE, SECTION 160.150," WHICH YOU WILL MARK AS THE NEXT COURT EXHIBIT NUMBER, WHICH WILL BE 6, I BELIEVE.

THE CLERK: I HAVE 5.

THE COURT: THIS WILL BE 6.

THE CLERK: OKAY.

THE COURT: ANYTHING FURTHER TO COME BEFORE THE COURT AT THIS TIME?

MR. COOPER: YES, YOUR HONOR.

YOUR HONOR MAY RECALL YESTERDAY ON THE RECORD WE BROUGHT TO THE COURT'S ATTENTION THE FACT THAT WHILE THE DISCUSSIONS WITH MR. HOWARD, IT WAS HIS DECISION THAT DURING THE PENALTY PHASE OF THIS TRIAL WE PRESENT NO EVIDENCE OF MITIGATING FACTORS, CIRCUMSTANCES, AND THAT WE MAKE NO ARGUMENT AT THE CLOSE OF THE EVIDENCE.

MR. HOWARD WAS CANVASSED BY YOUR HONOR AND INDICATED AT THAT TIME THAT IT WAS HIS DESIRE NOT TO HAVE US ARGUE OUR MITIGATING CIRCUMSTANCES. OF COURSE, TODAY HE TOOK THE STAND AND OFFERED WHAT WE CONSIDERED TO BE EVIDENCE OF MITIGATING CIRCUMSTANCES.

AFTER DISCUSSING WITH HIM LESS THAN

15 MINUTES AGO WHETHER IT'S STILL HIS DESIRE THAT WE NOT ARGUE IN THIS CASE, HE HAS EQUIVOCATED AND INDICATED THAT HE WOULD LEAVE IT UP TO HIS COUNSEL. I WOULD REQUEST THAT THE COURT CANVAS MR. HOWARD SO HE CAN BE PERFECTLY CLEAR ON THIS MATTER AS TO WHAT HIS WISHES ARE.

MAY I HAVE THE COURT'S RULING THAT HE IS COMPETENT AND IT'S HIS DECISION, AND WE WOULD CERTAINLY LIKE TO HAVE DEFINITE CONFIRMATION OF THAT.

THE COURT: MR. HOWARD, WOULD YOU STAND, SIR.

YOU HAVE HEARD THE STATEMENTS OF YOUR ATTORNEY. DO YOU DESIRE THEM TO ARGUE OR NOT AT THESE PROCEEDINGS, SIR?

DEFENDANT HOWARD: YESTERDAY, YOUR HONOR, I DIDN'T -- I DIDN'T UNDERSTAND MITIGATING FACTORS, WHATEVER. AND SO I -- I'M NOT QUALIFIED TO TELL THEM TO ARGUE OR NOT TO ARGUE. IT'S ENTIRELY UP TO -- UP TO THE ATTORNEY.

THE COURT: NO IT ISN'T, SIR. IT'S ENTIRELY UP TO YOU UPON CONFERRING WITH THEM. IT'S YOUR DECISION, NOT THEIR DECISION. AND IT'S OBVIOUS THAT YOU SHOULD SIT DOWN WITH THEM AND DISCUSS IT.

NOW, THEY'VE SAID THEY WOULD DISCUSS IT WITH YOU AND THE STATE IS GOING TO BE ARGUING. THEY WILL BE ARGUING THAT THERE IS AGGRAVATING CIRCUMSTANCES, AND AS THEY HAVE INDICATED, THEY WILL BE ASKING FOR THE DEATH PENALTY.

DEFENDANT HOWARD: YES, YOUR HONOR. I UNDERSTAND THAT.

BUT I'M NOT QUALIFIED TO TELL THEM WHAT TO ARGUE OR WHATEVER, YOU KNOW. SO IT'S UP TO THEM. IF THEY WANT TO ARGUE, THEY CAN; IF NOT, YOU KNOW, IT'S STILL OKAY.

THE COURT: WELL, YOU'RE THE ONE TO DETERMINE WHETHER THEY ARGUE OR NOT ARGUE, SIR.

NOW, AS FAR AS THE CONTENTS OF THEIR

ARGUMENT, UNDOUBTEDLY THEY WILL ARGUE AS BEST THEY CAN AS LAWYERS WITH WHAT THEY HAVE TO DEAL WITH. BUT THE DECISION IS STILL YOURS, EITHER YES OR NO, SIR.

DEFENDANT HOWARD: IT'S UP TO THEM, YOUR HONOR. I -- I DON'T UNDERSTAND. I REALLY STILL DON'T UNDERSTAND WHAT YOU MEAN BY ARGUING OR WHAT. I TOOK THE STAND. THAT'S THE BEST I COULD DO. SO, YOU KNOW, I'M READY FOR THE DECISION, WHATEVER.

THE COURT: WELL, DO YOU OPPOSE THEIR ARGUING OR NOT?

YESTERDAY YOU WERE OPPOSED TO THEIR ARGUING. ARE YOU OPPOSING THAT THEY ARGUE AT THIS TIME?

DEFENDANT HOWARD: WELL, I DIDN'T UNDERSTAND, YOUR HONOR. THE BAILIFF --

THE COURT: WELL, ARE YOU? JUST ANSWER THE QUESTION.

DEFENDANT HOWARD: OPPOSE WHAT, YOUR HONOR? I DON'T UNDERSTAND WHAT YOU MEAN. OPPOSE WHAT?

THE COURT: MR. HOWARD, I'M GOING TO TELL YOU ONE MORE TIME AS CLEARLY AS I CAN, SIR, AND THEN I'M GOING TO LEAVE IT TO YOU TO DECIDE WHETHER YOU'RE GOING TO INSTRUCT YOUR LAWYERS TO ARGUE OR NOT.

IN THE HEARING THAT IS ABOUT TO BE HELD, THE PENALTY PHASE OF THIS CASE, THE STATE HAS NOW PRESENTED EVIDENCE AND YOU HAVE NOW PRESENTED EVIDENCE.

THIS IS VERY SIMILAR TO THE TRIAL OF THE CASE IN WHICH THE STATE PRESENTED EVIDENCE AND YOU PRESENTED EVIDENCE. AT THAT TIME THE STATE ARGUED THEIR CASE TO THE JURY AND THAT IS AND THAT MEANS THAT THEY SUMMARIZE THE EVIDENCE TO THE JURY AND ARGUED HOW THE LAW APPLIES TO THE EVIDENCE THAT'S SUBMITTED.

YOUR ATTORNEYS DID THE VERY SAME THING.

NOW YOUR ATTORNEYS ARE GOING TO HAVE THE SAME OPPORTUNITY AS THEY HAD IN THE CASE ON THE ISSUE OF GUILT OR INNOCENCE.

THE STATE WILL ARGUE. THEY HAVE THE RIGHT TO OPEN AND CLOSE. THEY WILL AGAIN ARGUE THE FACTS OF THIS CASE AND THEY WILL ALSO ARGUE HOW THE LAW APPLIES. YOUR ATTORNEYS WILL ALSO HAVE THAT OPPORTUNITY.

DO YOU UNDERSTAND WHAT I HAVE SAID TO YOU, SIR?

DEFENDANT HOWARD: YES. YES, YOUR HONOR.

THE COURT: ALL RIGHT.

DO YOU HAVE ANY -- THE ONLY QUESTION THEN IS, IN VIEW OF YOUR PREVIOUS STATEMENT THAT YOU DID NOT WANT YOUR ATTORNEYS TO ARGUE THE CASE TO THE JURY, THE ONLY DECISION FOR YOU TO MAKE NOW IS WHETHER OR NOT YOU WANT THEM TO OR NOT.

YOU CAN BE SEATED AND YOU MAY CONFER WITH YOUR ATTORNEYS AND WHEN I CALL AND ASK IF THE DEFENSE DESIRES TO ARGUE, THEN WE SHALL HAVE A DECISION FROM YOU ONE WAY OR THE OTHER, SIR.

YOU MAY BE SEATED.

ANYTHING FURTHER OUTSIDE OF THE PRESENCE OF THE JURY?

MR. HARMON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. CALL THE JURY.

MR. FRANZEN: YOUR HONOR, MIGHT WE CONFER WITH THE DEFENDANT BEFORE THE JURY IS BROUGHT IN?

THE COURT: ALL RIGHT. GO AHEAD.

MR. COOPER: YOUR HONOR, AFTER FURTHER DISCUSSION WITH MR. HOWARD, IT'S HIS DECISION THAT WE ARGUE THE CASE.

IN LIGHT OF THAT DECISION, YOUR HONOR, I FEEL COMPELLED AT THIS TIME TO MOVE THE COURT FOR A CONTINUANCE OF ONE DAY TO GIVE US THE OPPORTUNITY TO MORE FULLY PREPARE FOR CLOSING ARGUMENT. BASED ON MR. HOWARD'S DECISION YESTERDAY,

IT WAS OUR IMPRESSION THAT THERE WOULD BE NO ARGUMENT BY THE DEFENSE COUNSEL.

I MADE SOME NOTES DURING THE LUNCH HOUR, HOWEVER, I FEEL THAT GIVEN ADDITIONAL TIME, A MORE BETTER ARGUMENT COULD BE PREPARED, SOLELY IF THE COURT WOULD DEEM US A MATTER OF ONE DAY TO GIVE US THAT OPPORTUNITY.

THE COURT: THE STATE?

MR. HARMON: YOUR HONOR, WE LEAVE THAT TO THE COURT. WE ARE PREPARED TO GO THIS AFTERNOON. WE CAN ALSO ARGUE TOMORROW.

THE COURT: WELL, IT'S OBVIOUS THAT EVEN IF WE STARTED ARGUING TODAY WE PROBABLY WOULDN'T FINISH UNTIL WELL AFTER 5:00 O'CLOCK.

MR. HARMON: WE WOULD GO WELL PAST 5:00, YOUR HONOR.

THE COURT: ALL RIGHT.

WE WILL CALL THE JURY BACK IN AND INSTRUCT THEM AND THEN WE WILL COMMENCE WITH THE ARGUMENTS TOMORROW MORNING. THE STATE COMMENCES AT 10:00 AND YOU FOLLOW AT THAT TIME.

MR. HARMON: FINE.

THE COURT: CALL THE JURY.

(WHEREUPON, AT THE HOUR OF 3:40 P.M., THE JURY ENTERED THE COURTROOM AND THE FOLLOWING PROCEEDINGS WERE HAD:)

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

MR. FRANZEN: YES, YOUR HONOR.

MR. SEATON: YES, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, IT HAS NOW BECOME MY DUTY TO INSTRUCT YOU AS TO THE LAW IN THIS

PENALTY HEARING. AND AS I HAVE PREVIOUSLY MENTIONED TO YOU WHEN WE WERE INVOLVED IN THE GUILT PHASE, THESE INSTRUCTIONS ARE IN WRITING AND THEY WILL BE GIVEN TO YOU. YOU WILL BE ABLE TO TAKE THEM BACK TO THE JURY ROOM WITH YOU TO DISCUSS AND TO CONSIDER AT THE TIME THAT YOU ARE DELIBERATING IN THIS MATTER.

IT IS NOW MY DUTY AS JUDGE TO INSTRUCT YOU IN THE LAW THAT APPLIES TO THIS PENALTY HEARING. IT IS YOUR DUTY AS JURORS TO FOLLOW THESE INSTRUCTIONS AND TO APPLY THE RULES OF LAW TO THE FACTS AS YOU FIND THEM FROM THE EVIDENCE.

YOU MUST NOT BE CONCERNED WITH THE WISDOM OF ANY RULE OF LAW STATED IN THESE INSTRUCTIONS. REGARDLESS OF ANY OPINION YOU MAY HAVE AS TO WHAT THE LAW OUGHT TO BE, IT WOULD BE A VIOLATION OF YOUR OATH TO BASE A VERDICT UPON ANY OTHER VIEW OF THE LAW THAN THAT GIVEN IN THE INSTRUCTIONS OF THE COURT.

IF, IN THESE INSTRUCTIONS, A RULE, DIRECTION OR IDEA IS REPEATED OR STATED IN DIFFERENT WAYS, NO EMPHASIS THEREON IS INTENDED BY ME AND NONE MUST BE INFERRED BY YOU. FOR THAT

REASON, YOU ARE NOT TO SINGLE OUT ANY CERTAIN SENTENCE OR ANY INDIVIDUAL POINT OR INSTRUCTION AND IGNORE THE OTHERS, BUT YOU ARE TO CONSIDER ALL THE INSTRUCTIONS AS A WHOLE AND REGARD EACH IN THE LIGHT OF ALL THE OTHERS.

THE ORDER IN WHICH THE INSTRUCTIONS ARE GIVEN HAS NO SIGNIFICANCE AS TO THEIR RELATIVE IMPORTANCE.

THE TRIAL JURY SHALL FIX THE PUNISHMENT FOR EVERY PERSON CONVICTED OF MURDER OF THE FIRST DEGREE.

THE JURY SHALL FIX THE PUNISHMENT AT:

1. DEATH, OR
2. LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE, OR,
3. LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE.

YOU ARE INSTRUCTED THAT THE LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE DOES NOT EXCLUDE EXECU-

TIVE CLEMENCY.

THE STATE HAS ALLEGED THAT CERTAIN AGGRAVATING CIRCUMSTANCES ARE PRESENT IN THIS CASE.

THE DEFENDANT HAS ALLEGED THAT CERTAIN MITIGATING CIRCUMSTANCES ARE PRESENT IN THIS CASE.

IT IS YOUR DUTY TO DETERMINE:

A. WHETHER AN AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES ARE FOUND TO EXIST;

B. WHETHER A MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES ARE FOUND TO EXIST; AND

C. BASED UPON THESE FINDINGS, WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT OR DEATH.

THE JURY MAY IMPOSE A SENTENCE OF DEATH ONLY IF IT FINDS AT LEAST ONE AGGRAVATING CIRCUMSTANCE HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT AND FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND. OTHERWISE, THE PUNISHMENT IMPOSED SHALL

BE IMPRISONMENT IN THE STATE PRISON FOR LIFE WITH OR WITHOUT THE POSSIBILITY OF PAROLE.

THE BURDEN RESTS UPON THE PROSECUTION TO ESTABLISH ANY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

A REASONABLE DOUBT IS ONE BASED ON REASON. IT IS NOT MERE POSSIBLE DOUBT, BUT IS SUCH A DOUBT AS WOULD GOVERN OR CONTROL A PERSON IN THE MORE WEIGHTY AFFAIRS OF LIFE. IF THE MINDS OF THE JURORS, AFTER THE ENTIRE COMPARISON AND CONSIDERATION OF ALL THE EVIDENCE, ARE IN SUCH A CONDITION THAT THEY CAN SAY THEY FEEL AN ABIDING CONVICTION OF THE TRUTH OF THE CHARGE, THERE IS NOT A REASONABLE DOUBT. DOUBT TO BE REASONABLE MUST BE ACTUAL AND SUBSTANTIAL, NOT MERE POSSIBILITY OR SPECULATION.

YOU ARE INSTRUCTED THAT THE FOLLOWING FACTORS ARE CIRCUMSTANCES BY WHICH MURDER OF THE FIRST DEGREE MAY BE AGGRAVATED:

1. THE MURDER WAS COMMITTED BY A DEFENDANT WHO WAS

PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

2. THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF ANY ROBBERY.

ROBBERY IS THE UNLAWFUL TAKING OF PERSONAL PROPERTY FROM THE PERSON OF ANOTHER OR IN HIS PRESENCE, AGAINST HIS WILL, BY MEANS OF FORCE OR VIOLENCE OR FEAR OF INJURY, IMMEDIATE OR FUTURE, TO HIS PERSON OR PROPERTY. SUCH FORCE OR FEAR MUST BE USED TO OBTAIN OR RETAIN POSSESSION OF THE PROPERTY, OR TO PREVENT OR OVERCOME RESISTANCE TO THE TAKING, IN EITHER OF WHICH CASES THE DEGREE OF FORCE IS IMMATERIAL. SUCH TAKING CONSTITUTES ROBBERY WHENEVER IT APPEARS THAT, ALTHOUGH THE TAKING WAS FULLY COMPLETED WITHOUT THE KNOWLEDGE OF THE PERSON FROM WHOM TAKEN, SUCH KNOWLEDGE WAS PREVENTED BY THE USE OF FORCE OR FEAR.

THE VALUE OF PROPERTY OR MONEY TAKEN IS NOT AN ELEMENT OF THE CRIME OF ROBBERY, AND IT IS ONLY NECESSARY THAT THE STATE PROVE THE TAKING OF SOME PROPERTY OR MONEY.

THE OFFENSE OF ROBBERY IS A FELONY UNDER THE LAWS OF THE STATE OF NEVADA.

MURDER OF THE FIRST DEGREE MAY BE MITIGATED BY ANY OF THE FOLLOWING CIRCUMSTANCES, EVEN THOUGH THE MITIGATING CIRCUMSTANCE IS NOT SUFFICIENT TO CONSTITUTE A DEFENSE OR REDUCE THE DEGREE OF THE CRIME:

1. ANY OTHER MITIGATING CIRCUMSTANCES.

THE JURY IS INSTRUCTED THAT IN DETERMINING THE APPROPRIATE PENALTY TO BE IMPOSED IN THIS CASE THAT IT MAY CONSIDER ALL EVIDENCE INTRODUCED AT BOTH THE PENALTY HEARING PHASE OF THESE PROCEEDINGS AND AT THE TRIAL OF THIS MATTER.

THE LAW RECOGNIZES TWO CLASSES OF EVIDENCE. ONE IS DIRECT EVIDENCE AND THE OTHER IS CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE KNOWLEDGE OF THE COMMISSION OF THE CRIME WHICH HAS BEEN COMMITTED, SUCH AS AN EYE-WITNESS.

CIRCUMSTANTIAL EVIDENCE IS THE PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES WHICH TEND TO SHOW WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY. THE LAW MAKES NO DISTINCTIONS BETWEEN THE WEIGHT TO BE GIVEN EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. THEREFORE, ALL OF THE EVIDENCE IN THE CASE, INCLUDING THE CIRCUMSTANTIAL EVIDENCE, SHOULD BE CONSIDERED BY YOU IN ARRIVING AT YOUR VERDICT.

ALTHOUGH YOU ARE TO CONSIDER ONLY THE EVIDENCE IN THE CASE IN REACHING A VERDICT, YOU MUST BRING TO THE CONSIDERATION OF THE EVIDENCE YOUR EVERYDAY COMMON SENSE AND JUDGMENT AS REASONABLE MEN AND WOMEN. THUS, YOU ARE NOT LIMITED SOLELY TO WHAT YOU SEE AND HEAR AS THE WITNESSES TESTIFY. YOU MAY DRAW REASONABLE INFERENCES FROM THE EVIDENCE WHICH YOU FEEL ARE JUSTIFIED IN THE LIGHT OF COMMON EXPERIENCE, KEEPING IN MIND THAT INFERENCES SHOULD NOT BE BASED ON SPECULATION OR GUESS.

THE VERDICT MAY NEVER BE INFLUENCED BY SYMPATHY, PREJUDICE OR PUBLIC OPINION. YOUR DECISION

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SHOULD BE THE PRODUCE OF SINCERE JUDGMENT AND SOUND DISCRETION IN ACCORDANCE WITH THESE RULES OF LAW.

THE COURT HAS SUBMITTED TWO SETS OF VERDICTS TO YOU. ONE SET OF VERDICTS REFLECTS THE THREE POSSIBLE PUNISHMENTS WHICH MAY BE IMPOSED. THE OTHER SET OF VERDICTS ARE SPECIAL VERDICTS. THEY ARE TO REFLECT YOUR FINDINGS WITH RESPECT TO THE PRESENCE OR ABSENCE AND WEIGHT TO BE GIVEN ANY AGGRAVATING CIRCUMSTANCE AND ANY MITIGATING CIRCUMSTANCES.

IT WILL BE THE JURY'S DUTY TO SELECT ONE APPROPRIATE VERDICT PERTAINING TO THE PUNISHMENT WHICH IS TO BE IMPOSED AND ONE APPROPRIATE SPECIAL VERDICT PERTAINING TO THE JURY'S FINDINGS WITH RESPECT TO AGGRAVATING AND MITIGATING CIRCUMSTANCES.

DURING YOUR DELIBERATION YOU WILL HAVE ALL THE EXHIBITS WHICH WERE ADMITTED INTO EVIDENCE, THESE WRITTEN INSTRUCTIONS AND FORMS OF VERDICT, WHICH HAVE BEEN PREPARED FOR YOUR CONVENIENCE.

YOUR VERDICTS MUST BE

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UNANIMOUS. WHEN YOU HAVE AGREED UPON YOUR VERDICTS, THEY SHOULD BE SIGNED AND DATED BY YOUR FOREMAN.

MR. HARMON: MAY WE APPROACH THE BENCH, YOUR HONOR?

THE COURT: YOU MAY.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, COUNSEL HAS BROUGHT TO MY ATTENTION THAT I MISREAD ONE OF THE INSTRUCTIONS. I HAVE JUST CHECKED WITH THE COURT REPORTER AND I HAVE.

THE INSTRUCTION SHOULD READ AS FOLLOWS:

YOU ARE INSTRUCTED THAT THE SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE DOES NOT EXCLUDE EXECUTIVE CLEMENCY.

NO EMPHASIS IS INTENDED BY ME IN READING THIS, BUT ONLY TO CORRECT THE RECORD AND TO MAKE IT CLEAR.

ALL RIGHT. LADIES AND GENTLEMEN OF THE JURY, IN VIEW OF THE HOUR, COUNSEL HAS AGREED THAT THERE IS NO WAY THAT WE WOULD BE ABLE TO FINISH THE CASE TODAY UNLESS WE WENT WELL INTO THE EVENING. SO WE ARE GOING TO CONTINUE THIS MATTER UNTIL 10:00 O'CLOCK TOMORROW MORNING, AT WHICH TIME YOU WILL HEAR THE ARGUMENTS OF COUNSEL AND THEN THE MATTER WILL BE SUBMITTED TO YOU.

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DURING THIS RECESS, LADIES AND GENTLEMEN, 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 10:00 O'CLOCK TOMORROW MORNING. WE HAVE SOME MATTERS TO TAKE CARE OF OUTSIDE OF YOUR PRESENCE. SO YOU CAN LEAVE THE COURTROOM AT THIS TIME.

(WHEREUPON, AT 3:55 P.M. THE JURY LEFT THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE OF THEIR PRESENCE:)

THE COURT: OUTSIDE THE PRESENCE OF THE JURY.

I BELIEVE, GENTLEMEN, THAT YOU HAD SOME INSTRUCTIONS THAT YOU WERE GOING TO PROPOSE?

MR. FRANZEN: YES, YOUR HONOR. WE HAVE THEM.

THE COURT: WELL, FIRST OF ALL, ARE THERE ANY OBJECTIONS ON THE PART OF THE STATE AS TO ANY INSTRUCTIONS GIVEN?

MR. HARMON: NO, YOUR HONOR.

THE COURT: DO YOU OFFER ANY ADDITIONAL INSTRUCTIONS AT THIS TIME?

MR. HARMON: NO, YOUR HONOR.

THE COURT: AND IT'S A MATTER OF TRIAL STRATEGY THAT YOU OFFER NO FURTHER INSTRUCTIONS AT THIS TIME?

MR. HARMON: IT IS, YOUR HONOR.

THE COURT: THANK YOU.

COUNSEL, DO YOU HAVE ANY OBJECTION TO ANY OF THE INSTRUCTIONS GIVEN?

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. STATE THE NUMBER AND YOUR OBJECTION.

MR. FRANZEN: INSTRUCTION NUMBER FIVE, YOUR HONOR, WHICH INSTRUCTS THE JURY THAT THE SENTENCE OF LIFE IMPRISONMENT --

THE COURT: COUNSEL, STAND, PLEASE.

MR. FRANZEN: I'M SORRY, YOUR HONOR.

IT INSTRUCTS THE JURORS THAT:

THE SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE DOES NOT EXCLUDE EXECUTIVE CLEMENCY.

WE REALIZE THAT N.R.S. 175.161, SUB-PARAGRAPH 7, ALLOWS THE GIVING OF SOME INSTRUCTIONS WHEN THE POSSIBILITY OF SUCH A SENTENCE EXISTS. HOWEVER, I BELIEVE THE STATUTE WAS ENACTED IN THE LATE 1960'S. IT WAS ENACTED PRIOR TO THE RECENT DEVELOPMENT OF CAPITAL PUNISHMENT LAW BY THE UNITED STATES SUPREME COURT: THE FURMAN, THE GEORGIA, THE PROFFITT, AND OTHER DISCUSSIONS THAT WE HAVE PREVIOUSLY MENTIONED IN OUR DISCUSSION OF WHAT TYPE OF AGGRAVATING CIRCUMSTANCE COULD BE CIVEN TO A SENTENCING JURY AND THAT THEIR SENTENCING DISCRETION MUST BE A CHANNELED DISCRETION, STRICTLY CONTROLLED. WE BELIEVE THAT THIS TYPE OF -- THIS TYPE OF INSTRUCTION DEMEANS THE JURY'S OWN DUTY IN THE JURY'S OWN MIND, AND ENCOURAGES THEM TO GIVE LESS -- GIVE LESS THAN THEIR COMPLETE

ATTENTION AND CONCERN TO THE SENTENCING OF MR. HOWARD, AND THAT THEY WILL BELIEVE THAT ANY MISTAKE THEY MAKE WILL BE CURED BY THE EXECUTIVE DEPARTMENT OF OUR STATE.

WE WOULD ALSO OBJECT BECAUSE THERE HAVE BEEN NO EVIDENCE PRESENTED BEFORE THIS COURT TO BE PRESENTED TO THE JURY AS TO HOW THIS EXECUTIVE CLEMENCY PROGRAM WORKS. WE BELIEVE THAT EVIDENCE WILL BE PRESENTED, IF IT WAS PREVENTED, MR. HOWARD, GIVEN HIS RECORD HAS ADMITTED ON THE STAND, WOULD NEVER GET EXECUTIVE CLEMENCY.

THE CURRENT GOVENOR, OF COURSE, NEVER -- THE CURRENT GOVENOR OF COURSE DID NOT GRANT EXECUTIVE CLEMENCY OR URGE IT WHEN HE WAS A MEMBER OF THE PARDONS BOARD WHEN HE WAS WITH THE NEVADA ATTORNEY GENERAL.

THE COURT: COUNSEL, LET'S STAY OFF POLITICS, PLEASE.

MR. FRANZEN: THE OTHER OBJECTION, YOUR HONOR, WAS AS WHEN WE APPROACHED THE BENCH WE OBJECTED TO THE REPEATING OF THE -- THE REPEATING OF THIS PARTICULAR INSTRUCTION BECAUSE OF THE UNDUE EMPHASIS SUCH A REPEATING OF IT WOULD HAVE ON THAT LANGUAGE REGARDING EXECUTIVE CLEMENCY.

WE REALIZE THAT THE COURT REPORTER REFLECTS THAT YOUR HONOR MISSPOKE HIMSELF REGARDING THIS INSTRUCTION, PARTICULARLY IF I RECALL CORRECTLY, YOUR HONOR INSTRUCTED THEM, "YOU ARE INSTRUCTED THAT THE SENTENCE OF LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE," RATHER THAN WITHOUT THE POSSIBILITY OF PAROLE, "DOES NOT EXCLUDE EXECUTIVE CLEMENCY."

WE BELIEVE THAT THE ERROR OR THE MISTAKE WOULD HAVE BEEN CURED BY THE PRESENTATION OF THIS INSTRUCTION TO THE JURY WHEN THEY WENT BACK FOR THEIR DELIBERATIONS.

THE COURT: COUNSEL.

MR. HARMON: YOUR HONOR, N.R.S. 175.176, SUB-

HEADING 7, MAKES IT INCUMBENT UPON THE COURT TO GIVE THIS INSTRUCTION IF IT'S REQUESTED BY EITHER PARTY. THE STATE HAS REQUESTED IT, THEREFORE THE STATUTORY LANGUAGE THAT IT SHALL BE GIVEN TAKES EFFECT.

THE COURT: COUNSEL, THE STATUTE VERY CLEARLY STATES THAT IT MUST BE GIVEN IF REQUESTED BY COUNSEL. THE STATE REQUESTED IT. I GAVE IT.

WITH REGARDS TO THE REPEATING OF THE INSTRUCTION, THIS COURT IS INTERESTED IN REVEALING THE TRUTH, RATHER THAN OBSCURING IT. FOR THAT REASON, I READ IT.

NOW, ARE THERE ANY OTHER INSTRUCTIONS THAT YOU OBJECT TO?

MR. FRANZEN: FORGIVE ME. INSTRUCTION NUMBER NINE, YOUR HONOR.

THE COURT: NUMBER NINE?

MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUMSTANCES BY WHICH MURDER IN THE FIRST DEGREE MAY BE AGGRAVATED. WE DO NOT BELIEVE THAT THE STATE HAS PROVED BEYOND A REASONABLE DOUBT THE PRIOR FELONY CONVICTION IN SAN BERNARDINO.

THE COURT: WELL, THAT'S AN ISSUE TO BE DETERMINED BY THE JURY, NOT BY THIS COURT OR BY THE DISTRICT ATTORNEY.

MR. FRANZEN: WELL, I BELIEVE, YOUR HONOR, WE HAVE A STATEMENT GIVEN BY MR. HOWARD ON DIRECT EXAMINATION AND NO CORPUS.

THE COURT: WELL, WE WILL LET THE JURY DECIDE THAT ISSUE.

ALL RIGHT. ANYTHING FURTHER?

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: YES.

MR. FRANZEN: INSTRUCTION NUMBER TWELVE, REGARDING MITIGATING CIRCUMSTANCES, OUR OBJECTION TO THIS TIES

INTO THE PREVIOUSLY REJECTED INSTRUCTION. WOULD THE COURT PREFER THAT I WAIT TO PROFFER THE PROPOSED INSTRUCTION OR DISCUSS IT AT THIS TIME?

THE COURT: WELL, YOU CAN DISCUSS IT, I BELIEVE, AT THIS TIME.

MR. FRANZEN: YOUR HONOR, INSTRUCTION NUMBER TWELVE FAILS TO LIST ANY OF THE MITIGATING CIRCUMSTANCES WHICH WE BELIEVE THE JURY'S ATTENTION SHOULD BE DIRECTED TO.

THE COURT: CAN YOU TELL ME OF ANY CASE, STATUTE OR AUTHORITY WHERE IT CLEARLY SETS FORTH AND DEFINES ADDITIONAL MITIGATING CIRCUMSTANCES?

MR. FRANZEN: YOUR HONOR, THE --

THE COURT: IN THE STATE OF NEVADA, SIR.

MR. FRANZEN: I CANNOT STATE OR IDENTIFY A NEVADA SUPREME COURT DECISION ON THE ISSUE.

THE COURT: DO YOU KNOW WHERE THE LEGISLATURE HAS FURTHER CLARIFIED WHAT THEY MEAN BY ANY OTHER MITIGATING CIRCUMSTANCE?

MR. FRANZEN: I KNOW THAT AT THE TIME THE NEVADA LEGISLATURE WAS CREATING OUR NEVADA DEATH PENALTY STATUTE, I BELIEVE IN 1977, THEY WERE CONCERNED WITH A VARIETY OF SUPREME COURT DECISIONS: FURMAN, GREGG, AND THE OTHER ONE. IF I MAY HAVE THE COURT'S INDULGENCE FOR JUST ONE MOMENT.

THE COURT: WELL, THIS IS NEW INFORMATION THAT YOU ARE IMPARTING TO THE COURT AT THIS TIME; IS THAT CORRECT? YOU HAVE NEVER IMPARTED THIS TO ME AT ANYTIME.

MR. FRANZEN: WELL, I HAVE IMPARTED TO YOUR HONOR THAT WE BELIEVE WE ARE ENTITLED TO HAVE A LISTING OF THE AGGRAVATING -- OR THE MITIGATING CIRCUMSTANCES TO BRING TO THE ATTENTION OF THE --

THE COURT: BUT YOU HAVE NEVER STATED BEFORE THAT THERE IS ANY STATUTORY OR CASE SUPPORT FOR IT.

MR. FRANZEN: THERE IS NO, TO MY KNOWLEDGE, NO NEVADA CASE AUTHORITY ON THIS.

THE COURT: ALL RIGHT. PROCEED.

MR. FRANZEN: WE DID REQUEST AN OPPORTUNITY TO GO TO THE OFFICE AND BRING BACK SOME AUTHORITY.

THE COURT: NO. YOU REQUESTED AN OPPORTUNITY TO GO HAVE THAT PARTICULAR ITEM TYPED, WHICH I GAVE YOU, AND EXTENDED THE TIME WITHIN WHICH YOU COULD PRESENT IT AND/OR THAT WE COULD GET IT INTO THE RECORD. BUT AT NO TIME HAVE YOU REQUESTED OF ME THAT YOU HAVE ANYTHING IN YOUR OFFICE WHICH WOULD SUPPORT ANYTHING TO SHOW ADDITIONAL MITIGATING CIRCUMSTANCES. YOU MAY HAVE THOUGHT --

MR. FRANZEN: I'M NOT ARGUING ADDITIONAL MITIGATING CIRCUMSTANCES, YOUR HONOR. I'M ARGUING THAT THE LIST OF MITIGATING CIRCUMSTANCES THAT THE DEFENDANT IS ENTITLED TO HAVE PRESENTED TO THE JURY REFLECTS HIS CHARACTER AND HIS LIFE, AND HE IS ENTITLED UNDER THE CHANNELED DISCRETION DECISION BY THE UNITED STATES SUPREME COURT, AND BY, IT JUST CAME TO ME AT THE MOMENT, THE ONE I HAVE PREVIOUSLY CITED TO YOUR HONOR, WHERE THE NEVADA SUPREME COURT SPEAKS OF THIS CHANNELED DISCRETION.

IN ORDER TO PROPERLY CHANNEL AND DIRECT THE JURY'S DISCRETION TO KNOW THIS MAN'S CHARACTER AND BACKGROUND, HE IS ENTITLED TO A LISTING OF THOSE CIRCUMSTANCES THAT HE CONSIDERS TO BE IN MITIGATION.

THE COURT: YOU SAY HE IS ENTITLED TO THAT, HOWEVER YOU DON'T HAVE ANY AUTHORITY THAT SAYS THAT; IS THAT CORRECT?

MR. FRANZEN: AT THE MOMENT, I DO NOT.

THE COURT: ALL RIGHT.

MR. FRANZEN: I'M ARGUING THAT THE CHANNELED DISCRETION CASES BY THE UNITED STATES SUPREME COURT WOULD

DIRECT YOUR HONOR TO LIST THESE MITIGATING CIRCUMSTANCES WHICH WE BELIEVE HAVE BEEN PROVEN THROUGH MR. HOWARD'S TESTIMONY.

THE COURT: WHERE ARE THEY, BECAUSE THIS IS THE FIRST TIME I HAVE EVER HEARD OF SUCH A PROPOSAL.

MR. FRANZEN: THEY'RE IN THE PROPOSED INSTRUCTIONS IN WHICH WE DISCUSSED WITH YOUR HONOR THAT THE DEFENDANT -- THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL AND EMOTIONAL DISTURBANCE, WHICH WAS SUB-PARAGRAPH 2 OF N.R.S. 200.033.

WE ALSO WISH THAT THE JURY BE INSTRUCTED THAT A MITIGATING CIRCUMSTANCE THAT COULD BE CONSIDERED WOULD BE THAT THE DEFENDANT HAS A HISTORY OF MENTAL ILLNESS. SUB-PARAGRAPH 3 IN OUR PROPOSED INSTRUCTIONS WAS THAT THE DEFENDANT HAS BEEN IN THE PAST, IN MENTAL OR PSYCHIATRIC WARDS OR HOSPITALS. AND SUB-PARAGRAPH 4 WAS THAT THE DEFENDANT HAS HONORABLY SERVED HIS COUNTRY IN THE MILITARY. AND SUB-PARAGRAPH 5 WAS THAT THE DEFENDANT WAS PRESENT AND OBSERVED THE MURDER OF HIS MOTHER AND HIS SISTER BY HIS FATHER.

THE COURT: ALL RIGHT.

MAY I SEE THAT PROPOSED INSTRUCTION, COUNSEL.

MR. FRANZEN: YES, YOUR HONOR.

MAY THE RECORD REFLECT I AM PROVIDING COUNSEL FOR THE STATE WITH A COPY.

THE COURT: ALL RIGHT.

MR. HARMON: THANK YOU.

THE COURT: I WILL MARK THIS DEFENDANT'S PROPOSED "A", NOT GIVEN, AND SIGNED THIS DATE.

MR. FRANZEN: THANK YOU, YOUR HONOR.

YOUR HONOR, TO MAKE THE RECORD CLEAR, THIS WAS ONE OF THE PROPOSED INSTRUCTIONS THAT YOUR HONOR ALLOWED US TO SEND MR. COOPER TO HAVE TYPED.

THE COURT: I'M AWARE OF THAT. THAT ISN'T WHAT I WAS RAISING. I WAS RAISING THE FACT THAT YOU SAID THAT YOU HAD A LIST AT YOUR OFFICE OF THESE WITH SUPPORTING CASE AUTHORITY.

MR. FRANZEN: NO. NO. THAT WAS NOT WHAT I INTENDED TO SAY.

THE COURT: OKAY. ALL RIGHT.

IF YOU INTENDED TO SAY THAT YOU WERE JUST GOING TO GO OVER AND GET THEIR LIST TYPED, THEN I CONCUR THAT'S WHAT YOU ASKED ME FOR AND THAT'S WHAT I DID.

MR. FRANZEN: IF I -- I MISSPOKE MYSELF, IF THAT'S WHAT YOUR HONOR --

THE COURT: THAT'S WHAT YOU SAID.

MR. FRANZEN: OKAY.

THE COURT: NOW, DO YOU WANT ANOTHER -- DO YOU HAVE --

MR. FRANZEN: THAT'S OUR OBJECTION TO PROPOSED 12 AND OUR PROPOSED "A", YOUR HONOR. I HAVE OTHER OBJECTIONS, IF YOU WISH ME TO.

THE COURT: ALL RIGHT.

THE STATE'S RESPONSE.

MR. HARMON: AS TO PROPOSED "A", YOUR HONOR?

THE COURT: AS TO PROPOSED "A" AND THE GIVING OF INSTRUCTION TWELVE.

MR. HARMON: YOUR HONOR, PROPOSED "A" IS CLEARLY A JUDICIAL COMMENT ON THE EVIDENCE. WE THINK, SINCE NO AUTHORITY WHATSOEVER HAS BEEN OFFERED, IT CERTAINLY WOULD BE UNFAIR FOR THE COURT IN EFFECT TO BE TELLING THIS JURY, FOR EXAMPLE, TO HAVE SERVED IN THE MILITARY MITIGATES MURDER IN THE FIRST DEGREE. WHILE IN THE MILITARY SERVICE, EVEN BY THE DEFENDANT'S TESTIMONY, WAS ABOUT 13 YEARS AGO. I CAN'T IMAGINE THAT THERE IS ANY AUTHORITY THAT WOULD SUGGEST AS A

MATTER OF LAW THAT MITIGATES MURDER IN THE FIRST DEGREE. THE SAME APPLIES TO ALL OF THESE.

NUMBER FIVE, THE DEFENDANT SAID HE WAS TWO YEARS OLD. WELL, PERHAPS HIS MEMORY IS BETTER THAN MINE, BUT I'M NOT COGNIZANT OF VERY MUCH THAT HAPPENED WHEN I WAS TWO. AND CERTAINLY THERE IS NONE, THERE COULD BE NO AUTHORITY WHICH WOULD SAY AS A MATTER OF LAW THAT TYPE OF SITUATION WOULD MITIGATE A MURDER BY A 31-YEAR-OLD MAN.

YOUR HONOR, IT'S ALL A MATTER OF ARGUMENT. INSTRUCTION NUMBER TWELVE, WHICH INCORPORATES INTO IT THE ONLY MITIGATING CIRCUMSTANCE SET FORTH IN N.R.S. 200.035 WHICH COULD POSSIBLY BE APPLICABLE; ANY OTHER MITIGATING CIRCUMSTANCE HAS BEEN READ TO THE JURY.

AFTER THAT, NOW THE DEFENSE MAY ARGUE THAT EACH OF THESE FIVE CATEGORIES FALLS WITHIN THAT CIRCUMSTANCE. SO WE'RE COVERED. AND TO DO OTHERWISE WOULD BE UNFAIR TO THE STATE AND I THINK WOULD CONFUSE AND MISLEAD THE JURY.

THE COURT: THE LAW I THINK IS RATHER CLEAR WITH REGARDS TO THE ISSUE OF MITIGATING OFFENSES FROM A HIGHER OFFENSE TO A LOWER OFFENSE. OUR STATUTES HAVE FOR YEARS SET FORTH THE CERTAIN TYPES OF MITIGATING CIRCUMSTANCES, SUCH AS IN THE KILLING OF A HUMAN AND THE KILLING IS WITHOUT INTENT IS SECOND DEGREE RATHER THAN FIRST DEGREE. IT IS NOTED, HOWEVER, THAT ACCIDENTAL KILLING OF ANOTHER HUMAN BEING, WHEN AN ACCIDENT OCCURS, IS NOT MURDER; FOR THE LAW SAYS THAT THE ACT CLEARLY IS INNOCENT RATHER THAN CRIMINAL IN NATURE.

THE REASON I MENTION THESE IS BECAUSE OF THE FACT THAT THE FOCUS OF ANY MITIGATING STATUTE SHOULD BE, AND IS, IN OUR PRESENT LAW, BASED UPON THE STATE OF MIND OR THE CIRCUMSTANCES AT THE TIME OF THE COMMISSION OF THE OFFENSE, NOT IN SOME OTHER FAR AND DISTANT TIME, AS THESE

EXPRESSIONS OF MITIGATING CIRCUMSTANCES WOULD DICTATE.

THE STATUTE 200.035 SAYS THAT MURDER IN THE FIRST DEGREE MAY BE MITIGATED BY ANY OF THE FOLLOWING CIRCUMSTANCES, EVEN THOUGH THE MITIGATING CIRCUMSTANCE IS NOT SUFFICIENT TO CONSTITUTE A DEFENSE OR REDUCE THE DEGREE OF THE CRIME.

IF YOU WANT TO STEP OUTSIDE, WHY DON'T YOU DO THAT.

THE CLERK: THANK YOU.

THE COURT: THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITIES, AND THEN IT GOES ON DOWN THE LINE.

THESE OFFENSES OR STATEMENTS THAT ARE DEFINED HERE, THAT IF MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME OR EMOTIONAL DISTURBANCE, THERE IS NO EVIDENCE IN THIS RECORD, EXCEPT THE DEFENDANT'S OWN STATEMENT, THAT HE HAS HAD MENTAL PROBLEMS IN THE PAST, NOT EVEN THE DEFENDANT'S STATEMENTS, TO INDICATE THAT HE EVER HAD -- WAS MENTALLY ILL OR EMOTIONALLY DISTURBED AT THE TIME OF THE KILLING OF THE VICTIM IN THIS CASE. THE REASON VERY OBVIOUSLY HE DENIES IT.

FURTHER, THERE IS NO PSYCHIATRIC TESTIMONY IN THIS RECORD WHICH TIES THE DEFENDANT TO THAT EVENT AND STATES THAT AT THE TIME OF THAT EVENT HE WAS EMOTIONALLY AND MENTALLY ILL OR DISTURBED; FOR IT IS OBVIOUS THAT HE COULD HAVE BEEN MENTALLY ILL AT ANY OTHER TIME AND STILL NOT BE A MITIGATING CIRCUMSTANCE IN THIS CASE. THAT'S WHAT WE HAVE HERE. IT SAYS THE DEFENDANT HAS A HISTORY OF MENTAL ILLNESS OR THAT THE DEFENDANT HAS IN THE PAST BEEN IN MENTAL AND PSYCHIATRIC WARDS OR THAT HE SERVED HONORABLY IN THE UNITED STATES SERVICE OR THAT HE OBSERVED THE MURDER OF HIS MOTHER AND SISTER. I DON'T THINK THE LAW HAS GONE YET TO THE POINT OF

SAYING THAT MERELY BECAUSE I FOUGHT FOR MY FLAG I AM ENTITLED TO HAVE MY FIRST DEGREE MURDER CONSIDERED SECOND OR MANSLAUGHTER, OR THE FACT THAT I WAS MENTALLY ILL AT THE AGE OF 16, THAT AT THE AGE OF 30, I AM ENTITLED TO HAVE MY MURDER OF THE FIRST DEGREE CONSIDERED MANSLAUGHTER.

THE ISSUE I THINK IN ANY OTHER MITIGATING CIRCUMSTANCE MUST FOCUS, PARTICULARLY IN THESE AREAS WHEN WE ARE TALKING ABOUT A MENTAL STATE OF THIS DEFENDANT, MUST FOCUS UPON THE TIME OF THE KILLING. THERE WAS NEVER A DEFENSE OF INSANITY RAISED IN THIS CASE. THIS IS MERELY, IT LOOKS TO ME LIKE, AN ATTEMPT TO RAISE AN INSANITY DEFENSE AT THIS LATE DATE UNDER SOME KIND OF LIMITED LIABILITY THEORY OR APPROACH. I FIND NONE STATED IN THE STATUTE EXCEPT TWO, AND THAT IS CLEAR THAT THERE HAS TO BE SOME EVIDENCE IN THE RECORD. AND THERE ISN'T ANY EVIDENCE IN THE RECORD THAT AT THE TIME OF THE KILLING OF THE VICTIM THE DEFENDANT WAS MENTALLY ILL OR EMOTIONALLY DISTURBED.

FOR THOSE REASONS, COUNSEL, THE COURT DID NOT GIVE IT, BUT DID GIVE INSTRUCTION TWELVE. I HAVE NO IDEA WHAT THE LEGISLATURE MEANT OR MEANS BY, "ANY OTHER MITIGATING CIRCUMSTANCE" AND I KNOW OF NO COURT, NOR DO I KNOW OF ANY LEGISLATURE -- LEGISLATOR, THAT HAS DEFINED WHAT THAT MEANS. IT'S THERE AND IT'S FOR THAT REASON I THINK YOU ARE ENTITLED AT LEAST TO ARGUE THAT THE TESTIMONY HE GAVE MAY FALL UNDER THIS CATEGORY. BUT FOR ME TO RULE, AS A MATTER OF FACT, THAT IT IS A MITIGATING CIRCUMSTANCE IS BEYOND, I BELIEVE, MY CALL. IT IS A MATTER FOR THE JURY TO MAKE THAT CONSIDERATION AND THAT DECISION. AND FOR THOSE REASONS, COUNSEL, I REFUSED TO GIVE THE INSTRUCTION. AND MAYBE SOME SUPREME COURT DOWN THE LINE MAY DEFINE THAT FOR US, BUT AS OF THE MOMENT, THAT'S THE LAW.

COUNSEL?

MR. FRANZEN: OUR NEXT OBJECTION, YOUR HONOR,

INSTRUCTION FIFTEEN, THE SECOND PARAGRAPH, WHICH DIRECTS THE SENTENCING AUTHORITY, IN THIS CASE THE JURY, TO HAVE NO SYMPATHY IN THE SENTENCING PROCESS. WE BELIEVE THAT THE SENTENCING PROCESS ALWAYS HAS ROOM FOR SYMPATHY AND MERCY. AND INDEED WHEN YOUR HONOR IS ENGAGED IN THE SENTENCING PROCESS HIMSELF, I'M SURE HE HEARS MANY SUCH PLEAS. WE BELIEVE THAT THE JURY SHOULD NOT BE PRECLUDED FROM EXPRESSING MERCY OR SYMPATHY FOR THE DEFENDANT.

THE COURT: THE STATE.

MR. HARMON: YOUR HONOR, I THINK THAT COUNSEL IS ASKING THE JURY TO IGNORE THE OATH THEY'VE ALREADY TAKEN, WHICH IS TO DECIDE THIS CASE ON THE FACTS AND THE LAW WHICH THE COURT GIVES THEM.

WE ARE IN THE PENALTY PHASE NOW, BUT WE STILL DON'T THINK THE VERDICT SHOULD BE BASED ON SYMPATHY, PREJUDICE OR PUBLIC OPINION. IT SHOULD BE BASED ON THE LAW AND THE EVIDENCE.

THE COURT: YOU TREEGED MY INTELLECTUAL CURIOSITY, COUNSEL.

MR. FRANZEN: THANK YOU.

THE COURT: SO I HAVE LOOKED AT THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE TO SEE WHAT SYMPATHY IS. ONE OF ITS DEFINITIONS SAYS:

A FEELING OR EXPRESSION
OF PITY OR SORROW FOR THE
DISTRESS OF ANOTHER.

I DON'T THINK THAT'S THE FUNCTION OF THE JURY. AND I THINK THE LAW HAS BEEN VERY CLEARLY STATED OVER THE YEARS THAT WHILE WE KNOW THAT EVERYONE MUST USE THEIR COMMON SENSE IN ARRIVING AT A VERDICT, I DON'T THINK WE'LL EVER TAKE THE HUMAN EMOTION OR THE HUMAN ASPECT OUT OF IT, AND PROBABLY MORE VERDICTS ARE DECIDED BY SYMPATHY THAN THE OTHER.

BUT THE FACT REMAINS THAT THE LAW IS CLEAR THAT AS A MATTER OF LAW, WE ASK JURORS TO SET ASIDE THEIR PERSONAL FEELINGS AND DECIDE THE CASE UPON THE LAW AND THE FACTS AS PRESENTED TO THEM AND HOPEFULLY APPROACHING IT VERY OBJECTIVELY. WHETHER THEY DO OR NOT IS ENTIRELY THEIR OWN DECISION. HOWEVER, YOUR OBJECTION IS NOTED AND RECORDED.

ANYTHING FURTHER?

MR. FRANZEN: YES, YOUR HONOR. WE ALSO OBJECT, BECAUSE OF THE FORM OF INSTRUCTION 12 AND THE OBJECTION OF OUR PROPOSED INSTRUCTION "A", THE FORM OF THE VERDICTS IN WHICH THE CHECKLIST OF CIRCUMSTANCES GIVEN TO THE JURY REGARDING MITIGATING CIRCUMSTANCES DOES NOT INCLUDE THOSE THAT WE THINK SHOULD HAVE BEEN LISTED IN PROPOSED "A".

THE COURT: THE STATE?

MR. HARMON: YOUR HONOR, OUR OBJECTION IS ALREADY A MATTER OF RECORD AS IT PERTAINS TO PROPOSED "A", AND WE WOULD LIKE TO INCORPORATE THE SAME ARGUMENT AGAIN.

THE COURT: ALL RIGHT.

ANYTHING FURTHER, GENTLEMEN?

MR. HARMON: NOT FROM THE STATE, YOUR HONOR.

THE COURT: FILE THIS IN THE FILE, PLEASE.

MR. FRANZEN: YOUR HONOR, DOES THE SPECIAL VERDICT LISTING THE AGGRAVATING CIRCUMSTANCES, DOES THAT INCLUDE ALL OF THOSE THAT ARE IN THE STATUTE?

THE COURT: NO.

MR. FRANZEN: JUST THE TWO THAT THE STATE --

THE COURT: JUST THE TWO. THE VERDICTS MERELY CONTAIN THAT MURDER WAS COMMITTED BY THE DEFENDANT WHEN HE WAS PREVIOUSLY CONVICTED OF A FELONY AND THE MURDER WAS COMMITTED WHEN THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY.

ANYTHING FURTHER, GENTLEMEN?

MR. FRANZEN: YES, YOUR HONOR. THERE IS ONE

MORE PROPOSED INSTRUCTION. I APOLOGIZE, THE LAST PORTION OF IT SHOULD PROBABLY BE STRICKEN. WHEN MR. COOPER TOOK IT OVER HE WAS GOING FROM SOME SCRATCH NOTES THAT I HAD DONE.

MAY I APPROACH THE BENCH, YOUR HONOR?

MAY THE RECORD REFLECT I HAVE PROVIDED COUNSEL FOR THE STATE WITH A COPY.

THIS PROPOSED INSTRUCTION, YOUR HONOR, SHOULD END AT "BEYOND A REASONABLE DOUBT" PERIOD, AND SHOULD READ THAT "MITIGATING CIRCUMSTANCES DO NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT" AND THE LANGUAGE THAT FOLLOWS IT SHOULD BE STRICKEN, TO-WIT: "BUT ARE CIRCUMSTANCES RELATING TO HIS CHARACTER."

THE COURT: COUNSEL, I THINK WE CAN ERASE ALL OF THAT.

MR. FRANZEN: THANK YOU.

MR. HARMON: THIS IS PROPOSED "B", YOUR HONOR?

THE COURT: YES.

MR. HARMON: WE OBJECT TO THE GIVING OF THE INSTRUCTION, YOUR HONOR. WE THINK THAT THE JURY HAS ALREADY BEEN PROPERLY INSTRUCTED.

YOUR HONOR, INSTRUCTION SEVEN EXPLAINS THAT THE PROSECUTION HAS A BURDEN OF ESTABLISHING ANY MITIGATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. IN CONNECTION WITH THAT, INSTRUCTION SIX HAS CLEARLY SPELLED OUT THAT BEFORE, AND I READ NOW, BEGINNING AT LINE 13:

> THE JURY MAY IMPOSE A SENTENCE OF DEATH ONLY IF IT FINDS AT LEAST ONE AGGRAVATING CIRCUMSTANCE HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT AND FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFI-

CIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

WE THINK THAT'S SUFFICIENT, YOUR HONOR. IT'S APPARENT THERE IS NO BURDEN UPON THE DEFENSE, BUT IF THE JURY IS SATISFIED THAT THERE IS ONE AGGRAVATING CIRCUMSTANCE PROVEN BEYOND A REASONABLE DOUBT THEN IT'S A MATTER OF BALANCING THE WEIGHT BETWEEN THAT CIRCUMSTANCE AND ANY MITIGATING CIRCUMSTANCE.

THE COURT: WHERE WAS THAT TAKEN FROM, COUNSEL? WHAT'S THE STATUTORY CITE ON IT?

MR. HARMON: INSTRUCTION NUMBER SIX, YOUR HONOR, IS TAKEN FROM 175.554, SUB-HEADINGS 2 AND 3.

THE COURT: MAY I SEE THAT, PLEASE.

MR. HARMON: YES, YOUR HONOR.

THE COURT: COUNSEL, IT APPEARS THAT THIS ISSUE, AS RESOLVED BY THE NEVADA REVISED STATUTE AT 175.554, SUB-SECTION 3, WHICH SAYS:

> WHEN A JURY OR A PANEL OF JUDGES IMPOSES THE SENTENCE OF DEATH, THE COURT SHALL ENTER ITS FINDINGS ON THE RECORD AND THE JURY SHALL RENDER WRITTEN VERDICTS SIGNED BY THE FOREMAN. THE FINDINGS OR VERDICT SHALL DESIGNATE THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH ARE FOUND BEYOND A REASONABLE DOUBT AND SHALL STATE THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

IT IS OBVIOUS THAT THE STATE LEGISLATURE HAS DETERMINED THE STANDARD OF PROOF AND THE WEIGHT OF PROOF AND GIVING THIS WOULD BE CONTRARY TO THAT SECTION. IT IS MARKED "B", NOT GIVEN.

MR. FRANZEN: YOUR HONOR, DOES THAT -- I DON'T HAVE A COPY OF THAT STATUTE WITH ME. DOES THAT MEAN THAT THE DEFENDANT HAS THE BURDEN OF PROOF REGARDING MITIGATING CIRCUMSTANCES?

THE COURT: WELL, I DON'T KNOW WHAT INTERPRETATION YOU GIVE IT, BUT THAT'S THE LANGUAGE OF THE STATUTE:

> THE FINDING OR VERDICT SHALL DESIGNATE THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH WERE FOUND BEYOND A REASONABLE DOUBT, AND SHALL STATE THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

THAT'S THE LANGUAGE OF THE STATUTE.

MR. FRANZEN: FOR THE RECORD THEN, YOUR HONOR, I THINK I SHOULD MAKE THE OBJECTION THAT ON RELIANCE ON THIS STATUTE I THINK WOULD BE MISPLACED, BUT THAT STATUTE, IF APPLIED, IS A BURDEN OF PROOF FOR THE DEFENDANT, THE OUTWEIGHING OF BEYOND A REASONABLE DOUBT OR AT LEAST EQUAL AND BEYOND A REASONABLE DOUBT OF MITIGATING CIRCUMSTANCES AND IT WOULD PLACE A BURDEN UPON THE DEFENDANT.

THE COURT: WELL, THAT'S A NICE LEGAL POINT YOU CAN RAISE LATER, COUNSEL.

FURTHER, IN 175.554, IT SAYS THAT:

> A PANEL OF JUDGES SHALL DETERMINE, AND THEN IT GOES ON, THE JURY OR THE

PANEL OF JUDGES MAY IMPOSE A SENTENCE OF DEATH ONLY IF IT FINDS AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND FURTHER FINDS THAT THERE ARE NO AGGRAVATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

SO IT'S A REPETITION OF THE SAME STANDARD.

MISS CLERK, I HAND YOU INSTRUCTION "B", IT MAY BE PLACED IN THE FILE, NOT GIVEN.

NOW, IS THERE ANYTHING ELSE, GENTLEMEN?

MR. HARMON: NOT BY THE STATE, YOUR HONOR.

THE COURT: WELL, I HATE TO ASK YOU, ARE YOU RAISING ANOTHER ONE?

MR. FRANZEN: NO. I GUESS NOT, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL. WE'LL BE IN RECESS.

(WHEREUPON, AT THE HOUR OF 4:27 P.M. THE EVENING RECESS WAS HAD IN THE PROCEEDINGS.)

Attachment E

(Capital Sentencing Transcript, May 4, 1983)

LAS VEGAS, NEVADA, WEDNESDAY, MAY 4, 1983, AT 10:10 A.M.

* * * * * * * * *

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: LET THE RECORD REFLECT THIS IS OUTSIDE THE PRESENCE OF THE JURY.

YOU MAY PROCEED.

MR. FRANZEN: YOUR HONOR, THERE'S TWO MATTERS.

FIRST, ALTHOUGH THE DEFENDANT HAS INSTRUCTED US NOT TO PRESENT THIS EVIDENCE, AND YOU HAVE INSTRUCTED US TO FOLLOW HIS INSTRUCTIONS, WE HAVE --

THE COURT: I HAVEN'T INSTRUCTED YOU ANY SUCH THING. I JUST ADVISED YOU. I JUST ADVISED YOU TO FOLLOW THE CANNONS OF ETHICS, AND THE CANNONS OF ETHICS TELL YOU WHAT YOUR POSITION IS.

YOU MAY PROCEED.

MR. FRANZEN: WE ARE IN POSSESSION OF CERTIFIED COPIES OF JUDGMENTS OF CONVICTION OF THE DEFENDANT'S FATHER, REFLECTING THE 1952 MURDER OF TWO INDIVIDUALS AND AN ATTEMPT MURDER ON ANOTHER INDIVIDUAL. WE THINK THAT THAT, TOGETHER WITH THE TESTIMONY OF MR. MIKE KIDD, OUR INVESTIGATOR WHO SPOKE WITH THE ALABAMA PRISON AUTHORITIES, WHO DESCRIBED THAT THE DEFENDANT -- THAT ONE SAM HOWARD IS IN THEIR CUSTODY AT THE MOMENT ON A 1975 MURDER. AND THEY HAVE IN THEIR POSSESSION A DOCUMENT DESCRIBING THE 1952 MURDER, IN WHICH IT IS STATED THAT MR. HOWARD, THE PRESENT DEFENDANT'S FATHER, MURDERED HIS WIFE, HIS DAUGHTER AND ATTEMPTED TO MURDER A THIRD INDIVIDUAL. WE THINK THAT THAT SHOULD BE INTRODUCED BEFORE THE JURY. I WOULD REQUEST PERMISSION TO REOPEN FOR THAT LIMITED PURPOSE.

IF YOUR HONOR IS NOT INCLINED TO ALLOW THAT, WE WOULD REQUEST PERMISSION TO FILE THAT WITH THE COURT

AT THIS TIME AND ALLOW MR. KIDD TO DESCRIBE THE CONVERSATION HE HAD WITH THE ALABAMA PRISON AUTHORITIES.

THE COURT: COUNSEL, YESTERDAY ALL DAY WE HAD YOU OBJECTING VOCIFEROUSLY ABOUT ANY HEARSAY AT ALL AND NOW YOU WANT YOUR MAN TO COME IN AND TESTIFY. IT'S ALL RIGHT FOR YOUR HEARSAY BUT NOT FOR THE STATE'S HEARSAY.

MR. FRANZEN: IF THE COURT WILL RECALL, N.R.S. 200.033 (SIC) STATES, IN ITS CONCLUDING PARAGRAPH, THAT:

ANY EVIDENCE DEEMED MITI-
GATING AND AGGRAVATING OR
ANY OTHER EVIDENCE MAY COME IN.
WE THINK THIS IS RELIABLE.

THE COURT: WHAT HAS CHANGED BETWEEN THE STATE'S HEARSAY AND YOUR HEARSAY? YOU OBJECTED VOCIFEROUSLY WHEN THE STATE WAS GOING TO BRING IN EVIDENCE ABOUT THE SAN BERNARDINO DETECTIVE WITH A CONVERSATION WITH ONE OF THE VICTIMS.

MR. FRANZEN: THAT IS THE DIFFERENCE, YOUR HONOR.

THE COURT: NOW YOU'RE NOT OBJECTING TO ALLOW YOUR MAN TO COME INTO NEVADA AS TO HEARSAY WITH SOMEONE BACK IN THE STATE, WHATEVER IT IS.

MR. FRANZEN: WELL, THAT --

THE COURT: I FAIL TO SEE ANY DIFFERENCE, COUNSEL, IN THE QUALITY OF TESTIMONY.

MR. FRANZEN: MAY WE ALLOW MR. KIDD TO TESTIFY, YOUR HONOR, TO PROFFER PROOF?

THE COURT: WELL, IF IT'S GOING TO BE HEARSAY, COUNSEL, I DIDN'T ALLOW THE STATE TO DO IT. YOU CAN MAKE A REPRESENTATION AS TO WHAT HE WOULD SAY. THAT'S APPROPRIATE.

MR. FRANZEN: WELL, I THINK I HAVE THAT, YOUR HONOR.

THE COURT: ALL RIGHT.

THEN BY WAY OF AN OFFER OF PROOF; IS THAT

RIGHT?

MR. FRANZEN: YOUR HONOR, MAY WE FILE THE CERTIFIED COPIES OF JUDGMENTS OF CONVICTION AS TO THE DEFENDANT'S INVOLVMENT --

THE COURT: ANY OBJECTION?

MR. HARMON: YOUR HONOR, FOR WHAT PURPOSE ARE THEY BEING FILED, JUST FOR THE RECORD?

THE COURT: WELL, WE WILL FILE IT JUST SO WE CAN DISCUSS IT.

MR. HARMON: WELL, THAT'S FINE.

MR. FRANZEN: MAY THE RECORD REFLECT, YOUR HONOR, I'M PROVIDING COUNSEL FOR THE STATE WITH A COPY.

MR. HARMON: THANK YOU.

MR. FRANZEN: WE DID REQUEST THAT THE PRISON -- OR OUR INVESTIGATOR RATHER REQUESTED THAT THE PRISON SEND TO US THE DOCUMENTS REFLECTING INFORMATION I HAVE JUST RELATED. THE PRISON INITIALLY AGREED AND WE WERE EXPECTING TO HAVE IT AS CERTIFIED DOCUMENTS, HOWEVER, SUBSEQUENTLY THEY NOTIFIED MR. KIDD, MY INVESTIGATOR, THAT THEY WOULD NOT SEND IT TO US BECAUSE WE WERE NOT A CRIMINAL JUSTICE AGENCY.

THE COURT: IS THIS THE FIRST TIME YOU HAVE HAD AN OPPORTUNITY TO VIEW IT?

MR. HARMON: YES, IT IS, YOUR HONOR. WE VIEWED IT THOUGH. NOW WE HAVEN'T SEE THE ORIGINAL.

THE COURT: COUNSEL, THE STATE?

MR. HARMON: YOUR HONOR, WASN'T THIS MATTER SUBMITTED YESTERDAY? THEY PUT ON THEIR CASE AND WE CONSIDERED WHETHER WE WOULD OFFER ANY REBUTTAL AND WE CONCLUDED WE WOULD NOT. WE CAME TO COURT THIS MORNING PREPARED TO ARGUE THE MATTER TO THE JURY, NOT TO CONSIDER --

THE COURT: THE MATTER HAS BEEN SUBMITTED, COUNSEL. THAT'S TRUE.

MR. HARMON: NOW, IN REGARDS TO EVIDENCE CONCERNING THE CONVICTION IN 1952, YESTERDAY DURING THE SETTLEMENT OF INSTRUCTIONS THE DEFENSE WAS ASKING THAT THE COURT INSTRUCT THE JURY AS TO PARTICULAR ALLEGED MITIGATING CIRCUMSTANCES, SAYING THAT THEY WERE PROVEN, THEY WERE UNREBUTTED. WELL, THE FACT IS MR. HOWARD HAS ALREADY TESTIFIED TO THESE CIRCUMSTANCES. HE SAID WHEN HE WAS TWO YEARS OLD HIS FATHER MURDERED HIS SISTER AND HIS MOTHER AND HE WAS AN EYE-WITNESS. THAT IS NOT REBUTTAL. IT'S A MATTER OF RECORD. IT'S ALREADY BEFORE THE JURY FOR WHATEVER WEIGHT IT HAS.

NOW, COUNSEL HAS INCORRECTLY CITED THE PERTINENT STATUTE. IT'S NOT 200.033. IT'S N.R.S. 175.552. THAT SECTION DOES SAY:

> THE COURT MAY ADMIT ANY EVIDENCE WHICH IS DEEMED RELEVANT TO SENTENCE, WHETHER OR NOT THE EVIDENCE IS ORDINARILY ADMISSIBLE.

NOW, WE ARE NOT OBJECTING TO THE ADMISSIBILITY OF THESE DOCUMENTS BECAUSE THEY'RE HEARSAY, NOR DO WE OBJECT TO THE TESTIMONY OF MIKE KITT BECAUSE IT'S HEARSAY. WE STILL MAINTAIN THAT AT THIS TYPE OF HEARING HEARSAY IS ADMISSIBLE. WE ARE SAYING, YOUR HONOR, IT'S NOT 1952. IT'S NOT RELEVANT TO THE SENTENCE IN THIS CASE. IT'S NOT RELEVANT THAT A TWO-YEAR-OLD IS EXPOSED TO THIS SORT OF THING, BECAUSE I THINK WE CAN RELY ON OUR COMMON SENSE, WHICH SAYS THIS TYPE OF THING IS HIGHLY UNLIKELY TO MAKE ANY TYPE OF IMPRESSION ON SOMEONE OF YEARS THAT TENDER. IF WE WERE TALKING ABOUT FOUR OR FIVE OR NINE OR TEN OR ELEVEN, THAT'S DIFFERENT; BUT NOT A TWO-YEAR-OLD.

SO IT WOULD BE UNFAIR AT THIS POINT TO REOPEN THE CASE TO PUT UNDUE EMPHASIS ON SOMETHING THAT

HAPPENED IN 1952. IT'S TOO REMOTE. IT'S NOT RELEVANT AND THE COURT SHOULD DENY ANY MOTION TO REOPEN.

THE COURT: ANYTHING FURTHER TO COME BEFORE THE COURT?

MR. FRANZEN: ON THIS ISSUE, SUBMITTED, YOUR HONOR.

THE COURT: YOUR OFFER IS DENIED. IT MAY BE FILED.

AND THE REASONS THAT COUNSEL HAS STATED I THINK ARE VERY CLEAR. THE EVIDENCE FROM YESTERDAY AND THE EVIDENCE AS IT NOW STANDS, MR. HOWARD'S ASSERTIONS TO THE FACT THAT HIS PARENTS OR HIS MOTHER WAS KILLED AND HIS SISTER WAS KILLED IS IN THE RECORD AND UNCONTROVERTED. AS I MENTIONED TO COUNSEL, YOU CAN ARGUE IT.

HOWEVER, THE REAL QUESTION THAT I STATED TO YOU YESTERDAY ON THE SETTLEMENT OF INSTRUCTIONS WAS: WHAT'S THE CONNECTION? AND THERE HAS BEEN NONE. THERE IS NO MEDICAL CONNECTION OR PSYCHIATRIC CONNECTION AND IT DOES NOT APPEAR THAT THIS WOULD IN ANYWAY BE RELEVANT OR ANYWAY ASSIST THE JURY IN THIS MATTER. SO YOUR OFFER IS DENIED.

MR. FRANZEN: YOUR HONOR, WILL THE STATE BE PRECLUDED, HOWEVER, FROM ARGUING THAT THAT DID NOT HAPPEN?

MR. HARMON: WE'RE NOT GOING TO ARGUE THAT IT DIDN'T HAPPEN, YOUR HONOR.

THE COURT: I THINK THAT THE EVIDENCE CLEARLY SHOWS THAT THERE'S ONLY ONE VERSION OF WHAT HAPPENED.

MR. FRANZEN: THANK YOU, YOUR HONOR.

THE COURT: THERE WAS NOTHING TO BE CONTROVERTED --

MR. FRANZEN: ONE OTHER --

THE COURT: (CONTINUING) -- UNLESS THEY'RE GOING TO DISREGARD THE TESTIMONY ENTIRELY, AND THE JURY CAN DO

THAT IF THEY WANTED TO.

MR. FRANZEN: VERY WELL, YOUR HONOR.

ONE OTHER MATTER THAT CAME TO MY ATTENTION WHEN I GOT BACK TO THE OFFICE AT THE CONCLUSION OF YESTERDAY EVENING'S TRIAL PROCEEDINGS, THERE WAS AN ARTICLE IN THE MAY 3RD, 1983, LAS VEGAS REVIEW JOURNAL REGARDING THE JUROR WHOM WE HAD THE HEARING WITH, JUROR MARILYN CAPASSO, IN WHICH THE ARTICLE STATES THAT MYSELF AND MR. COOPER ATTEMPTED TO DISQUALIFY HER AND REMOVE HER FROM THE JURY. WE WOULD LIKE THE PANEL INQUIRED OF IT, WITHOUT SINGLING OUT MS. CAPASSO, IF THEY HAVE READ ANY ARTICLES OR HEARD ANY PUBLICITY REGARDING THIS. WE DO NOT WISH TO ALIENATE MS. CAPASSO IN THE LIGHT OF THE NEXT JUROR. SHE IS NOT THAT --

THE COURT: WELL, EVERY INDICATION IT SEEMS IS DEEMING YOUR WAY, SIR.

MR. FRANZEN: THAT WAS PRIOR TO THE ARTICLE IN THE NEWSPAPER.

THE COURT: ALL RIGHT.

DOES THE STATE HAVE ANY OBJECTION?

MR. HARMON: NO, YOUR HONOR.

MR. FRANZEN: MAY WE FILE THE ARTICLE, YOUR HONOR? I HAVE THE ORIGINAL OR XEROX.

THE COURT: WELL, WE WILL WAIT AND SEE WHETHER OR NOT THERE IS ANY RESPONSE TO IT, COUNSEL. IF THERE IS, THEN YOU MAY FILE IT.

CALL THE JURY.

(WHEREUPON, THE JURY ENTERED THE COURTROOM AND THE FOLLOWING PROCEEDINGS WERE HAD:)

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

MR. HARMON: THE STATE DOES, YOUR HONOR.

MR. COOPER: YES, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, AS YOU KNOW, EACH DAY I ADMONISH YOU ACCORDING TO THE STATUTE ABOUT VIEWING TELEVISION, RADIO, AND THAT SORT OF THING. THE LAST SEVERAL DAYS THERE HAVE BEEN ARTICLES, I BELIEVE, IN THE NEWSPAPERS. HAVE ANY OF YOU READ OR SEEN OF THOSE ARTICLES?

(WHEREUPON, NEGATIVE RESPONSE FROM JURY.)

THE COURT: HAVE ANY OF YOU READ THOSE ARTICLES?

(WHEREUPON, NEGATIVE RESPONSE FROM JURY.)

THE COURT: I BELIEVE THAT ANSWERS THE INQUIRY, GENTLEMEN.

MR. HARMON: YES, YOUR HONOR.

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: YOU MAY PROCEED.

(CLOSING ARGUMENT)

BY MR. HARMON:

JUDGE MENDOZA, COUNSEL, LADIES AND GENTLEMEN OF THE JURY:

I THINK THAT I FEEL SOMEWHAT THE SAME WAY THIS MORNING AS THE PHILOSOPHER GOETHE APPARENTLY FELT WHEN HE EXPRESSED HIMSELF IN THIS MANNER:

I CAN PROMISE YOU TO BE SINCERE BUT NOT IMPARTIAL.

I AM PROUD TO BE A PROSECUTING ATTORNEY. I HAVE VERY DEEP-SEATED FEELINGS ABOUT THIS CASE.

THE POSITION THAT WE WILL TAKE IN REGARDS TO THE SENTENCE OF SAMUEL HOWARD IS NOT A POSITION REACHED SIMPLY ON AN IMPULSE. IT HAS COME AS A RESULT OF

REFLECTION, A CONSIDERATION OF THE EVIDENCE IN THIS CASE, OF HIS BACKGROUND, AND THE LAW WHICH THE COURT HAS GIVEN TO YOU.

I CONFESS THAT I HAVE A PREJUDICE. I LOATHE MURDER AND I DESPISE THOSE WHO MURDER. I BELIEVE IN THE RULE OF LAW, AND I BELIEVE THAT THOSE WHO COMMIT CRIMES, PARTICULARLY CRIMES OF ROBBERY AND MURDER, DESERVE TO BE PUNISHED. AND I BELIEVE THEIR PUNISHMENT SHOULD FIT THEIR CRIME. AND IT IS THE POSITION OF THE STATE OF NEVADA THAT THE MAN WHO KILLED GEORGE MONAHAN, SAMUEL HOWARD, HAS FORFEITED HIS PRIVILEGE TO CONTINUE TO LIVE.

EVEN IF GIVEN A LIFE SENTENCE, EVEN IF PERMITTED TO LIVE, CERTAINLY IN THE RESTRICTIVE EXISTENCE OF INCARCERATION, MR. HOWARD WOULD HAVE MANY BLESSINGS ASSOCIATED WITH MORTALITY. HE COULD EAT AND SLEEP AND READ, IN MORTALITY AT LEAST.

GEORGE MONAHAN ISN'T EVER GOING TO READ ANOTHER BOOK. HE'S NOT GOING TO ENJOY THE BLESSINGS EVEN OF CONSIDERING WHAT HIS SENSES PROVIDE FOR HIM. AND EVERY INSTINCT I FEEL AS A CITIZEN AND AS A PROSECUTOR TELLS ME THAT THE FATE OF HIS KILLER SHOULD NOT BE BETTER THAN HIM. IT IS SAM HOWARD WHO BRUTALLY TOOK FROM GEORGE MONAHAN THE PRIVILEGE TO ENJOY LIFE.

MR. HOWARD, FOR THE MOST PART IN THIS COURTROOM, HAS BEEN A MODEL OF DECORUM. HE STANDS WHEN THE JUDGE COMES INTO COURT. HE SHOWS RESPECT. HE TOOK THE WITNESS STAND AND EXHIBITED CERTAINLY SOME FEELING FOR HIS FAMILY. HOW DIFFERENT HIS MANNER MUST HAVE BEEN ON MARCH THE 27TH, 1980, WHEN HE CONFRONTED GEORGE MONAHAN WITH A GUN.

NOW, WHEN WE GET CAUGHT UP IN THE TESTIMONY OF VARIOUS WITNESSES AND WHEN IT'S ONE-TO-ONE WITH THE DEFENDANT, SOMETIMES THERE'S A TEMPTATION TO BE SYMPATHETIC. SOMETIMES THERE'S A TEMPTATION TO FORGET THAT THE PERSON ON

TRIAL HAS COMMITTED A MURDER. IN THIS COURTROOM THERE IS SOMEONE WHO HAS KILLED ANOTHER HUMAN BEING.

NOW THAT THOUGHT IN AND OF ITSELF IS PRETTY AWESOME TO ME. IT'S ALMOST TOO GREAT TO EVEN CONTEMPLATE. IT'S HARD FOR ME TO FIGURE OUT THE MENTALITY OF SOMEONE WITHOUT PROVOCATION. NOW IF WE'RE TALKING ABOUT PROVOCATION OR SELF-DEFENSE OR SOMEONE WHO HAS GONE TO VIET NAM WHO KILLED, I CAN BEGIN TO UNDERSTAND THAT. WHAT IS THE MENTALITY OF SOMEONE WHO WILL TAKE A GUN, LIKE STATE'S EXHIBIT 31-B, AND OPEN IT AND PUT BULLETS INSIDE AND THEN POINT THAT GUN AT THE BACK OF SOMEBODY'S HEAD AND PULL THE TRIGGER?

WELL, IT'S A PERSON OF THAT MENTALITY WHO IS PRESENT IN THIS COURTROOM. AND THE EVIDENCE IN THIS CASE HAS EXHIBITED HOW RAPIDLY HIS MOOD SWINGS CAN CHANGE. HE CAN BE POLITE AND A GENTLEMAN AT ONE MOMENT AND THEN IN THE NEXT MOMENT HE'S A MAN WHO IS SHOUTING PROFANITIES, WHO IS VIOLENT AND BOISTEROUS AND LOUD. AND THAT'S BEEN ILLUSTRATED BY THE TESTIMONY OF KEITH KINSEY, THE SECURITY GUARD FROM SEARS, AND MIKE CONNELY, THE MAN WHO PLACED MR. HOWARD UNDER ARREST IN DOWNEY, CALIFORNIA, APRIL THE 1ST, 1980.

BEFORE MR. KINSEY TRIED TO PUT THE CUFFS ON HIM, THERE WAS NO GUN PRODUCED. BUT SOMETHING TRIGGERS A MECHANISM IN THIS MAN THAT BRINGS ABOUT AN ANIMAL INSTINCT AND THEN HE'S DANGEROUS.

OFFICER CONNELY SAID THE FELLOW WASN'T DOING THAT MUCH UNTIL HE TRIED TO CUFF HIM AND THEN HE WAS BOISTEROUS AND LOUD AND VIOLENT.

MR. HOWARD TOOK THE WITNESS STAND YESTERDAY AND ALTHOUGH HE DENIES THAT HE IS MENTALLY ILL, AND HE TOLD YOU THAT HE KNEW WHAT HE WAS DOING IN MARCH 1980, IN FACT, HE SAID HE ALWAYS KNOWS WHAT HE'S DOING, AND THAT INCLUDED WHAT HE WAS DOING ON THE WITNESS STAND YESTERDAY.

HE DID TELL YOU THAT HE HAD BEEN IN AND OUT OF A NUMBER OF MENTAL FACILITIES, AND HE LISTED CREEDMORE HOSPITAL IN NEW YORK, BELLEVIEW, AND THE V.A. HOSPITAL IN NEW YORK. HE SAID HE'D BEEN IN ATASCADERO, PATTEN STATE HOSPITAL, IN THE STATE OF CALIFORNIA. HE SAID HE'D BEEN IN WARD B IN SAN BERNARDINO AND VACAVILLE IN THE STATE OF CALIFORNIA. IN FACT, INTERESTINGLY ENOUGH, HE SAID, REGARDING VACAVILLE, THEY PUT ME WITH CHARLIE MANSON BECAUSE THEY SAY I'M THE SAME TYPE OF PERSON.

WELL, LADIES AND GENTLEMEN, IF THE TESTIMONY YESTERDAY WAS MEANT TO SUGGEST TO YOU THAT RATHER THAN PUNISHMENT THE MAN NEEDS HELP, I WOULD SAY, IF WE TAKE HIS TESTIMONY AT FACE VALUE, SAM HOWARD HAS BEEN THROUGH A SERIES OF MENTAL HOSPITALS FOR MANY YEARS. WHAT IS SOCIETY TO DO WITH HIM? AND WHAT RIGHTS DO INNOCENT, DECENT, LAW-ABIDING PEOPLE HAVE IN TERMS OF PROTECTING THEIR PRIVILEGE TO LIVE?

DURING OUR OPENING STATEMENTS, WE ADVISED YOU THAT THE STATE OF NEVADA IN THIS CASE, CONSISTENT WITH GUIDELINES PROVIDED US BY THE LEGISLATURE, HAS ALLEGED THAT THERE ARE FACTORS IN THIS CASE WHICH AGGRAVATE MURDER IN THE FIRST DEGREE. THE COURT HAS ADDRESSED THAT SUBJECT IN ITS INSTRUCTIONS.

AS YOU KNOW, YOU WERE ADVISED AT THE OUTSET IN THESE PROCEEDINGS THAT FIRST DEGREE MURDER CARRIES THREE POSSIBLE PUNISHMENTS IN THIS STATE. THEY ARE THE DEATH PENALTY AND THEY ARE LIFE WITHOUT AND LIFE WITH THE POSSIBILITY OF PAROLE. AND IT IS YOUR PROVINCE, AS AWESOME AS THE RESPONSIBILITY IS, TO SELECT THE PROPER PUNISHMENT. I'M NOT STANDING BEFORE YOU SUGGESTING THAT IT'S PLEASANT. I DO SUGGEST THAT YOUR CHOICE IS CLEAR.

IN INSTRUCTION NUMBER SIX THE COURT INFORMS YOU THAT:

THE JURY MAY IMPOSE A SENTENCE OF DEATH ONLY IF IT FINDS AT LEAST ONE AGGRAVATING CIRCUMSTANCE HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT AND FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES FOUND.

SO THAT'S THE STANDARD. HAS THE STATE ESTABLISHED AT LEAST ONE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT? AND IF THEY HAVE, DO THOSE CIRCUMSTANCES OUTWEIGH ANY MITIGATION IN THIS CASE?

INSTRUCTION NUMBER NINE SETS FORTH THE AGGRAVATING CIRCUMSTANCES THE STATE HAS ALLEGED AND I SUBMIT WHICH THE STATE HAS PROVEN IN THIS CASE, BOTH DURING THE GUILT AND PENALTY PHASES OF THESE PROCEEDINGS:

AGGRAVATING CIRCUMSTANCE NUMBER ONE, THE MURDER WAS COMMITTED BY A DEFENDANT WHO WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

YOU SEE, WHEN WE CONSIDER SAMUEL HOWARD WE'RE NOT TALKING ABOUT SOMEONE WHO COMMITTED HIS FIRST OFFENSE IN RELATIONSHIP TO GEORGE MONAHAN BETWEEN 7:10 AND 7:45 IN THE MORNING ON MARCH THE 27TH, 1980. WE ARE TALKING ABOUT SOMEONE WHO IS NOW SHOWN TO HAVE COMMITTED A VIOLENT FELONY AGAINST A NURSE FOR WHICH HE HAS BEEN CONVICTED, AND THERE WAS ABSOLUTELY NO PROVOCATION FOR THAT.

DOROTHY WEISBAND HAS TESTIFIED THAT ON

MAY THE 24TH, 1978, SOMETIME AFTER 7:00 O'CLOCK P.M., SHE WAS IN HER OFFICE ALONE IN THE GYMNASIUM ON THE CAMPUS OF QUEENS COLLEGE IN NEW YORK, AND AN INDIVIDUAL SHE'D KNOWN FOR PERHAPS A YEAR AND A HALF CAME IN AND HE ASKED HER WHERE THE OTHER NURSE WAS THAT WAS USUALLY THERE. SHE TOLD HIM THAT THE OTHER NURSE WASN'T IN THE AREA. HE THEN SAID THAT HE INJURED HIS FINGER WHILE BOXING. AND BECAUSE THAT WAS HER DUTY, SHE ASKED HIM TO SHOW HER THE FINGER. AND THEN HE REACHED TO HIS RIGHT SIDE, AS I REMEMBER HER ILLUSTRATING, AND PRODUCED A GUN AND SAID, "WHAT I REALLY WANT IS YOUR MONEY."

WELL, I THINK THE EVIDENCE CLEARLY ESTABLISHES WHAT SAMUEL HOWARD CLEARLY WANTED WAS HER AUTOMOBILE. AND HE TOOK IT. AND HE TOOK IT AT GUNPOINT. AND HE TERRIFIED THIS LADY IN THE PROCESS. DO YOU REMEMBER HER TESTIMONY: IT WAS A TREMENDOUS TRAUMA. I STILL HAVE NIGHTMARES ABOUT IT. NOW, WHY DOES SHE STILL HAVE NIGHTMARES? BECAUSE SHE KNEW THAT HE KNEW THAT SHE COULD RECOGNIZE HIM AGAIN. AND SHE TOLD YOU IN COURT SHE DIDN'T THINK HE WOULD LET HER LIVE TO IDENTIFY HIM. CAN YOU IMAGINE THE IMPACT SAMUEL HOWARD HAS HAD ON THE LIFE OF A DECENT HUMAN BEING, DOROTHY WEISBAND?

NOW, PARKED OUTSIDE, BECAUSE IT WAS A RAINY DAY AND CONTRARY TO HER USUAL CUSTOM, WAS A 1977 SILVER CADILLAC. MR. HOWARD HAD SEEN THAT BEFORE. THERE IS NO DOUBT HE SAW IT THAT NIGHT AND DETERMINED HE WAS GOING TO HAVE IT. THAT VEHICLE WAS DISCOVERED A MONTH LATER IN TEXAS. AND MR. HOWARD TOOK THE KEYS AND WHATEVER VALUABLES MRS. WEISBAND HAD AT GUNPOINT, AND THEN HE LEFT IN HER CAR AND FLED THAT JURISDICTION. AND THEN WHEN HE WAS BROUGHT BACK AND TRIED, HE DIDN'T WAIT AROUND FOR THE VERDICT EITHER. HE WAS CONVICTED IN ABSENTIA OF ROBBERY WITH USE OF A WEAPON AND OF THEFT OF A MOTOR VEHICLE.

MRS. WEISBAND SAID HE WAS USUALLY

POLITE BUT, QUOTE, HE BECAME VERY ABUSIVE AND VIOLENT AS SOON AS HE BROUGHT OUT THE GUN. AND HE STARTED TO USE THE WORDS, "MOTHER FUCKER", AND IT WAS "WHITE MOTHER FUCKER", AND "WHITE BITCH". AND HE KEPT TELLING ME NOT TO LOOK AT HIM. AND THEN HE TOLD HER TO CRAWL ON ALL FOURS OVER TO THE CLOSET, WHERE SHE HAD HER PURSE LOCKED INSIDE THE CLOSET. AND PERHAPS ONE OF THE ULTIMATE INDIGNITIES TO A WOMAN, HE TOLD HER AT GUNPOINT TO TAKE OFF HER CLOTHES. AND SHE TOLD HIM SHE WOULDN'T. AND HE KEPT REPEATING THAT AND TOLD HER SHE BETTER OR HE WOULD KILL HER.

WELL, IT WASN'T ENOUGH TO TERRORIZE HER THAT NIGHT. THIS MAN CALLED HER A WEEK LATER. HE WANTED TO CONTINUE TO HARASS HER LIFE AND TO PROJECT HIMSELF INTO THE PSYCHE OF DOROTHY WEISBAND. AND HE SAID, HOW MUCH IS THE PROPERTY WORTH?

WHAT'S SHE GOING TO SAY WITH THE SHOCK AT BEING CONFRONTED WITH THE ROBBER AGAIN? NOTHING.

AND THEN HE SAID, HOW MUCH IS YOUR LIFE WORTH TO YOUR HUSBAND?

THINK ABOUT THAT. THINK ABOUT BEING ON THE RECEIVING END OF THAT KIND OF TALK.

MR. HOWARD, HOW MUCH IS YOUR LIFE WORTH TO SOCIETY?

LADIES AND GENTLEMEN, COURT MINUTES ARE IN EVIDENCE AS STATE'S EXHIBIT 69. YOU HEARD THE TESTIMONY OF DETECTIVE JOHN MCNICHOLAS, THAT THE DEFENDANT WAS CONVICTED OF THESE CRIMES. THERE IS NO DOUBT THEY OCCURRED MAY 24, 1978. MR. HOWARD HAD PREVIOUSLY BEEN CONVICTED OF A CRIME INVOLVING THE USE OF VIOLENCE EVEN BEFORE HE CAME TO LAS VEGAS IN 1980, AND THAT IS THE CIRCUMSTANCE THAT AGGRAVATES MURDER IN THE FIRST DEGREE, AND THAT'S BEEN PROVEN BEYOND A REASONABLE DOUBT.

CIRCUMSTANCE NUMBER TWO ALLEGED IS

SET FORTH IN INSTRUCTION NINE AS FOLLOWS:

THE MURDER WAS COMMITTED
WHILE THE DEFENDANT WAS ENGAGED
IN THE COMMISSION OF ANY ROBBERY.

WELL, OUR LEGISLATURE, THE PEOPLE WE PUT IN OFFICE, HAS MADE CERTAIN JUDGMENTS IN TERMS OF WHAT CIRCUMSTANCES AGGRAVATE A FIRST DEGREE MURDER.

ROBBERY, AS YOU HAVE BEEN INSTRUCTED, IS A CRIME OF VIOLENCE. IT INVOLVES THREAT. IT INVOLVES FORCE. MANY TIMES IT INVOLVES THE USE OF A GUN. IT'S AN APPARENTLY DANGEROUS FELONY. YOU KNOW, IT'S BAD ENOUGH TO DECIDE YOU'RE GOING TO KILL ANYONE, BUT TO INCLUDE ALSO THE NOTION YOU'RE GOING TO ROB AND KILL THEM, AND MAYBE MURDER IS VERY PROBABLY THE LIKELY OUTGROWTH OF ANY ROBBERY. THE LAW IN THIS STATE SAYS IF YOU ROB AND MURDER, THAT AGGRAVATES MURDER IN THE FIRST DEGREE. I'VE ALREADY MADE A FINDING IN CONNECTION WITH THIS CASE. BUT MR. HOWARD NOT ONLY MURDERED GEORGE MONAHAN, HE ROBBED HIM. SO CERTAINLY THAT AGGRAVATING CIRCUMSTANCE HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

THERE'S LITTLE DOUBT THAT MR. HOWARD TOOK THE SEIKO WRISTWATCH FROM GEORGE MONAHAN. THERE'S LITTLE DOUBT THAT THE C.B. RADIO HE CARRIED INTO THE MOTEL 6 WITH WIRES HANGING OUT OF IT HAD BEEN TAKEN FROM GEORGE MONAHAN'S VAN. DAWANA THOMAS SAW CREDIT CARDS AND PHOTOGRAPHS OF CHILDREN, FAMILY-TYPE PICTURES, SOON AFTER HE CAME BACK AFTER A 45-MINUTE ABSENCE TO THE MOTEL. BOTH THOSE AGGRAVATING CIRCUMSTANCES HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT. THIS IS A ROBBERY/MURDER. AND IT'S A ROBBERY/MURDER COMMITTED BY A DEFENDANT WHO HAS ALREADY COMMITTED AND BEEN CONVICTED OF A PRIOR CRIME OF ROBBERY.

I SUGGEST FROM THOSE FACTS BEING PROVEN THAT INSTRUCTION SIX TAKES EFFECT. YOU CERTAINLY ARE

NOW JUSTIFIED IN CONSIDERING THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE. AND IT'S RATHER JUST A QUESTION THEN OF WHAT KIND OF MITIGATING CIRCUMSTANCES THERE ARE AND WHAT OTHER FACTORS YOU ALSO MAY CONSIDER IN DETERMINING WHETHER OR NOT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH ANY MITIGATING CIRCUMSTANCE.

WELL, LADIES AND GENTLEMEN, WITHOUT FURTHER COMMENT ON MITIGATION, THE DEFENDANT HAS NOT TALKED ABOUT ANYTHING THAT WOULD SUGGEST THAT HE WAS UNDER ANY TYPE OF EXTREME MENTAL PRESSURE OR EMOTIONAL PRESSURE IN MARCH OF 1980. THERE IS NOTHING TO SUGGEST, BY THE TESTIMONY EITHER OF SAMUEL HOWARD OR DAWANA THOMAS, WHO KNEW HIM VERY WELL IN MARCH 1980, THAT ON THE DAY HE KILLED GEORGE MONAHAN THERE WAS ANYTHING TO MITIGATE THE CRIME.

WHAT WE HAVE IS MURDER IN COLD BLOOD. WHAT WE HAVE IS AN EXECUTION. WHAT WE HAVE IS SAM HOWARD AT SOME POINT DECIDING, AND I CAN'T TELL YOU WHAT THE TRICK MECHANISM WAS, WHETHER IT WAS REFUSAL BY DOCTOR MONAHAN TO REMOVE HIS SHOES OR AN ARTICLE OF CLOTHING OR WHETHER HE RESISTED IN SOME WAY THE TAKING OF THE C.B. RADIO OUT OF HIS VAN. I ONLY KNOW WHAT THE EVIDENCE AND THE PHOTOGRAPHS PHOTOGRAPHICALLY SHOW, THAT AT SOME POINT HE WAS MADE TO LAY FACE DOWN AND HE WAS SHOT IN THE BACK OF THE HEAD. IT'S NOT A ROBBERY. IT'S MURDER BY PREMEDITATION. THERE IS NO JUSTIFICATION FOR WHAT HAPPENED AND THERE'S CERTAINLY NOTHING BEEN OFFERED IN MITIGATION.

ARE WE GOING TO SAY, AS COMMENDABLE AS IT IS, THAT SOMEONE WHO SERVES IN THIS COUNTRY IN THE MILITARY HAS A RIGHT TO COME BACK TO THIS COUNTRY AND MURDER? WELL, THAT WOULD DO A DISSERVICE TO EVERY HONORABLE SERVICEMAN WHO HAS COME HOME FROM VIET NAM OR ANYWHERE OR ANY OTHER PLACE AND HAS A JOB AND HAS A FAMILY AND BEHAVES HIMSELF RESPONSIBLY.

AND TO SUGGEST THAT A THING THAT

HAPPENED 30 YEARS AGO MITIGATES A MURDER IN 1980 IS RIDICULOUS.

SO WHILE YOU ARE CONSIDERING THE FACT THAT TWO MITIGATING CIRCUMSTANCES ARE PROVEN BEYOND A REASONABLE DOUBT, CONSIDER THESE FACTS, ALSO:

CONSIDER THE MAN WHO WAS DESCRIBED BY KEITH KINSEY AND HIS BEHAVIOR IN MARCH 26, 1980. HE KIND OF STOOD UP ON THE CHAIRS AND SAID HE WASN'T AFRAID TO DIE AND HE WOULD KILL ALL OF US. WHO WAS MR. KINSEY TALKING ABOUT, BECAUSE HERE ARE MORE LIVES IN JEOPARDY, MORE PEOPLE.

AND KINSEY TOLD US HE COULD TELL THE GUN WAS LOADED AND HE THOUGHT IT LOOKED LIKE STATE'S EXHIBIT 31-B. HE LOOKED DOWN THE BARREL OF THE GUN, UP INTO THE CYLINDER, AND HE SAW BULLETS. HE WAS THERE WITH TOM MAJOR, ONE OF THE MANAGERS OF THE SEARS STORE, AND DELAN SCHIEFEISTEIN, WHO ALSO WORKED THERE.

THEN WE GET THE PARADOX AND PERSONALITY OF MR. HOWARD. KEITH KINSEY ALSO QUOTED HIM AS SAYING, "PLEASE GET OUT OF THE WAY OR I'LL BLOW YOUR FUCKING HEADS OFF." AND THEN WHEN THEY WERE ALL DOWN ON ALL FOURS AND HOWARD WAS TAKING THE SECURITY BADGE AND IDENTIFICATION AND THE WALKIE-TALKIE RADIO, HE MUMBLED THAT HE COULD BE A COP NOW. AND AS HE LEFT HE SAID, "DON'T ANY OF YOU M.FER'S COME AFTER ME OR I'M GOING TO SHOOT YOU ALL."

MIKE CONNELY STATED THAT AT SOME POINT AFTER HE HAD PUT THE CUFFS ON THE DEFENDANT ON APRIL THE 1ST, 1980, AT THE STONEWOOD SHOPPING CENTER, IN DOWNEY, CALIFORNIA, AFTER THE DEFENDANT HAD MANIFESTED HIS VIOLENCE AND HIS BOISTEROUSNESS, HE SAID, "JUST GO AHEAD AND KILL ME."

WELL, YOU HAVE THE POWER TO GRANT THAT WISH TODAY. THE STATE OF NEVADA IS ASKING YOU TO GRANT THAT WISH.

MR. HOWARD SAID ON THE WITNESS STAND

HIMSELF, "I'VE HURT ALOT OF PEOPLE AND I DON'T KNOW WHY."

WELL, YOU HAVE EVIDENCE OF ALOT OF PEOPLE WHOSE LIVES HAVE BEEN AFFECTED BY SAMUEL HOWARD, THE DEFENDANT IN THIS COURTROOM:

MAY 24, 1978, DOROTHY WEISBAND, ROBBERY WITH A WEAPON AND VEHICLE THEFT;

OCTOBER THE 5TH, 1979, WILL ED SCHWARTZ EVER FORGET WHAT HAPPENED TO HIM? ROBBERY WITH A WEAPON AND VEHICLE THEFT;

MARCH THE 26TH, KEITH KINSEY, TOM MAJOR AND DELAN SCHIEFEISTEIN AT THE SEARS STORE, ATTEMPTED TO OBTAIN MONEY UNDER FALSE PRETENSES, IT STARTED OUT AS, BUT IT ENDED UP AS A ROBBERY WITH A WEAPON;

STEVEN HOUCHEN, JUST ACROSS THE STREET FROM THE BOULEVARD MALL, JUST DRIVING HIS CAR FROM HIS APARTMENT TO WORK, AND THIS GUY CRASHES INTO THE BACK OF HIM. AND HE WANTS AN EXPLANATION AND HE'S TOLD AT GUNPOINT TO MIND HIS BUSINESS;

MARCH THE 28TH, 1980, BOB SMITH AND NORMA DONALDSON AT THE SEARS STORE IN SAN BERNARDINO. IT WASN'T ENOUGH TO MURDER, YOU KNOW, THIS MAN DIDN'T LEARN A LESSON. IT WASN'T ENOUGH TO MURDER GEORGE MONAHAN AND COMMIT ROBBERY AT THE SEARS STORE IN LAS VEGAS. HE'S TRYING TO DO THE SAME THING TWO DAYS LATER IN SAN BERNARDINO. AND AGAIN THERE IS AN ATTEMPT OF OBTAINING MONEY UNDER FALSE PRETENSES. IT'S A SANDER/GRINDER AT THIS TIME. ONLY WHEN MR. SMITH AND MRS. DONALDSON TRIED TO CHECK HIM OUT, HE LEFT;

APRIL THE 1ST, 1980, ISN'T THIS A CHILLING THOUGHT: THE MAN WHO DONE THESE THINGS IS WALKING AROUND IN A SHOPPING CENTER WITH A GUN. AND THAT'S TESTIFIED TO BY BOB SLATER, ROY CAMPOS AND MIKE CONNELY, LAW ENFORCEMENT OFFICERS IN THE STATE OF CALIFORNIA. HE'S CARRYING A CONCEALED

WEAPON, THAT SUSPECT. I CHILL RIGHT TO THE BOTTOM OF MY FEET; AND WE ALSO KNOW, BECAUSE THE DEFENDANT ADMITTED THIS ON THE WITNESS STAND, THAT IN MAY 1982 HE WAS CONVICTED IN THE STATE OF CALIFORNIA OF STILL ANOTHER ROBBERY WITH THE USE OF A WEAPON AND THE UNLAWFUL TAKING AND USING OF A MOTOR VEHICLE. THE PATTERN IS CLEARLY ESTABLISHED.

SO WHEN YOU CONSIDER THE FACT THAT TWO AGGRAVATING CIRCUMSTANCES HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT, AND WHEN YOU CONSIDER THE APPROPRIATE PUNISHMENT FOR SAMUEL HOWARD, CONSIDER THOSE FACTORS IN DECIDING WHETHER THE AGGRAVATION OUTWEIGHS ANY MITIGATING CIRCUMSTANCE.

THE DEFENDANT HAS MANIFESTED A RECKLESS DISREGARD OF CONSEQUENCE AND SOCIAL DUTY.

WELL, I SUBMIT, LADIES AND GENTLEMEN, IN VIEW OF THIS EVIDENCE AS A JUROR YOU HAVE A LEGAL DUTY. YOU KNOW WHAT THE EVIDENCE IS. YOU KNOW WHAT THE BACKGROUND IS OF THIS DEFENDANT. THE COURT HAS EXPLAINED TO YOU THE CIRCUMSTANCES THAT AGGRAVATE FIRST DEGREE MURDER, AND I SUGGEST YOU HAVE A LEGAL DUTY TO IMPOSE THE DEATH PENALTY. I ALSO SUGGEST, AS REPRESENTATIVES OF THIS COMMUNITY, THAT YOU HAVE A SOCIAL DUTY.

HOW OFTEN IS IT THAT WE HEAR PEOPLE, WHEN THEY'RE OUT ON THE STREETS, TALK ABOUT WHAT IS WRONG WITH THE SYSTEM OF CRIMINAL JUSTICE, WHO SUGGEST THAT THEY COULD IMPOSE THIS AND IMPOSE THAT. THIS IS YOUR CHANCE TO DO SOMETHING. ARE YOU GOING TO GIVE SAMUEL HOWARD ANOTHER CHANCE TO TERRORIZE PEOPLE LIKE KEITH KINSEY, DOROTHY WEISBAND, TOM MAJOR AND ED SCHWARTZ, AND STEVE HOUCHEN, WITH A LOADED GUN?

WELL, YOU HAVE YOUR POWER TODAY TO MAKE SURE THAT THAT NEVER HAPPENS. DON'T LET YOUR CHANCE SLIP AWAY. SEND AN UNMISTAKABLE MESSAGE OUT TO THIS COMMUNITY --

MR. FRANZEN: YOUR HONOR, I'M GOING TO OBJECT TO

UNMISTAKABLE MESSAGES TO THE COMMUNITY. THIS IS NOT --

THE COURT: SUSTAINED.

MR. FRANZEN: I REQUEST THE JURY BE ADMONISHED TO DISREGARD THAT.

THE COURT: THE JURY IS SO ADMONISHED.

PROCEED.

MR. HARMON: LADIES AND GENTLEMEN, WHEN WE CONSIDER THE PURPOSE OF PUNISHMENT THERE ARE A NUMBER OF FACTORS TO BE TAKEN INTO CONSIDERATION. I WOULD SUBMIT TWO OF THE PRIMARY FACTORS ARE PUNISHMENT AND DETERRENTS.

MR. HOWARD, BY THE EVIDENCE IN THIS CASE, HAS SHOWN AN INCLINATION TO USE A GUN. HE HAS SHOWN A RECKLESS DISREGARD OF HIS SOCIAL DUTY.

AS I BEGAN TO SAY, YOU HAVE IT WITHIN YOUR POWER TODAY TO SEE TO IT THAT HE NEVER COCKS ANOTHER GUN, THAT HE NEVER PULLS THE TRIGGER ON ANOTHER GUN, THAT HE NEVER TERRORIZES OR THREATENS DECENT CITIZENS AGAIN.

TO QUOTE PERCY SHELLY IN HIS POEM, "WHEN THE LAMP IS SHATTERED", HE STATED AS FOLLOWS:

WHEN THE LAMP IS SHATTERED

THE LIGHT IN THE DUST LIES DEAD.

THE LIFE OF GEORGE MONAHAN WAS SHATTERED BY A BULLET TO THE BACK OF HIS HEAD ON MARCH THE 27TH, 1980. LIKE THE SHATTERED LAMP THE POET SPEAKS OF, HIS LIGHT WENT OUT ON DESERT INN ROAD ON THAT SAME DAY. THE STATE OF NEVADA IS ASKING YOU TO LET THE LIGHT GO OUT OF MR. SAMUEL HOWARD.

MANY YEARS AGO ANOTHER POET SAID:

A WORD ONCE SENT ABROAD FLIES

IRREVOCABLY...

AND I WANT TO SUBSTITUTE THE WORD "BULLET". THE BULLET OF SAMUEL HOWARD SENT ABROAD, ONCE FIRED

INTO THE BODY OF GEORGE MONAHAN, GEORGE MONAHAN'S LIFE IS IRREVOCABLE. AND I AM ASKING YOU, AS A REPRESENTATIVE OF THE STATE OF NEVADA IN ALL SINCERITY, AND YET WITH THE IMPARTIALITY I TOLD YOU I HAD, TO SEE TO IT THAT THE PUNISHMENT YOU IMPOSE TODAY WILL BE AS IRREVOCABLE, AS FINAL AND AS DEADLY AS SAMUEL HOWARD'S BULLET. THANK YOU.

THE COURT: COUNSEL.

MR. COOPER: THANK YOU.

(CLOSING ARGUMENT)

BY MR. COOPER:

LADIES AND GENTLEMEN, IF I SEEM NERVOUS AND TENTATIVE AND UNSURE, IT'S BECAUSE I AM.

I'VE REPRESENTED ALOT OF CRIMINAL DEFENDANTS. I'VE ARGUED BEFORE JURIES ON MANY OCCASIONS. BUT I'VE NEVER BEEN IN A POSITION OF HAVING TO ARGUE FOR A MAN'S LIFE OR TRYING TO PERSUADE A JURY OR ANYONE TO SPARE THE LIFE OF A FELLOW HUMAN BEING. AND IT'S NOT AN EASY TASK. IT'S NOT A TASK THAT I WELCOME OR ONE THAT I RELISH.

I HAVE GIVEN THIS CASE A GREAT DEAL OF THOUGHT, AND, YOU KNOW, LIKE MR. HARMON, I DON'T HAVE THE ANSWERS HERE. I DON'T KNOW WHAT THE ANSWERS ARE. I FEEL A VERY AWESOME, VERY HEAVY RESPONSIBILITY. I'M SURE IT'S NOWHERE NEAR THE RESPONSIBILITY THAT YOU MUST FEEL.

I'VE TRIED ANALYZING THIS. I'VE GONE OVER IN MY MIND TIME AND AGAIN THIS CASE. I'VE TRIED PUTTING MYSELF IN SAMUEL HOWARD'S POSITION. I'VE TRIED PUTTING MYSELF IN THE POSITION OF DOCTOR MONAHAN'S FRIENDS AND HIS RELATIVES. I'VE -- I HAVE SEVEN BROTHERS AND I WONDER WHAT MY FEELINGS WOULD BE IF MY BROTHER HAD BEEN KILLED. MY HEART GOES OUT TO DOCTOR MONAHAN'S RELATIVES AND HIS FRIENDS. I'M SURE HE WAS A

GOVERNMENT ADDED AN INGREDIENT TO THAT POTION WHEN THEY SENT SAMUEL HOWARD TO FIGHT IN VIET NAM.

IT SEEMS THAT SAMUEL HOWARD HAS BEEN EXPOSED TO VIOLENCE ALL OF HIS LIFE. I'M NOT TRYING TO JUSTIFY WHAT HE DID. I'M NOT TRYING TO MAKE EXCUSES FOR WHAT HE DID. BUT I DON'T KNOW THAT KILLING HIM IS THE RIGHT THING TO DO.

AFTER HAVING BEEN EXPOSED TO VIOLENCE IN HIS -- IN VIOLENCE, THAT WITHOUT HAVING EXPERIENCED THAT, I DON'T THINK WE CAN SIT HERE TODAY AND SAY WHAT THAT MUST HAVE BEEN LIKE.

THE STATE HAS THE GUN THAT WAS USED TO KILL DOCTOR MONAHAN. THEY HAVE PICTURES OF DOCTOR MONAHAN LYING DEAD IN HIS VAN. I -- I WISH THAT I HAD PICTURES TO PRESENT TO YOU OF SAMUEL HOWARD WHEN HE WITNESSED THE TRAGIC EVENT EARLY IN HIS CHILDHOOD, OR PICTURES TO PRESENT TO YOU THE HORRIFYING EXPERIENCES HE MUST HAVE EXPERIENCED WHILE IN VIET NAM. HE WAS TRAINED TO KILL. HE WAS ASKED TO KILL. HE WAS GIVEN THE MEANS BY WHICH TO KILL. NOW THE STATE IS ASKING YOU TO KILL HIM.

I PLANNED TO RECITE HIS MENTAL HISTORY. I DON'T KNOW THAT THAT'S NECESSARY. I THINK IT'S CLEAR THAT SAMUEL HOWARD IS NOT A REMOTE- -- A MENTALLY DISABLED INDIVIDUAL. HE'S BEEN IN AND OUT OF MENTAL INSTITUTIONS PRACTICALLY ALL OF HIS LIFE. HE'S BEEN DIAGNOSED AS SCHIZOPHRENIC, WHICH DOVETAILS WITH THE PROSECUTION'S THEORY OF HIS PERSONALITY, A MAN WHO HAS ATTEMPTED TO COMMIT SUICIDE, HAS EXPRESSED A DESIRE TO DIE, TO JOIN HIS MOTHER AND HIS SISTER, WHO HAS PLEADED FOR PSYCHIATRIC TREATMENT.

I -- I WANT TO BELIEVE THAT BEFORE YOU CAN TAKE A MAN'S LIFE YOU HAVE TO BE CERTAIN OF HIS GUILT. YOU HAVE TO BE ABSOLUTELY CERTAIN. I KNOW THAT IN DECIDING THE GUILT OR INNOCENCE OF A DEFENDANT THAT THAT'S NOT THE BURDEN OF

PROOF. THAT IS PROOF BEYOND A REASONABLE DOUBT. BUT IT SEEMS TO ME THAT WHEN YOU ARE ASKED TO TAKE THE LIFE OF SOMEONE THAT EVERYTHING THAT'S RIGHT AND MORAL WITHIN YOU TELLS YOU THAT YOU HAVE TO BE ABSOLUTELY CERTAIN.

NOW, I KNOW THAT BASED UPON YOUR VERDICT, YOU MORE OR LESS PLACE YOUR STAMP OF APPROVAL ON MR. HARMON'S AND MR. SEATON'S THEORY THAT THE WITNESSES PRESENTED WERE EITHER MISTAKEN OR THEIR STATEMENTS WERE MISINTERPRETED OR THAT THEY LIED OR WHATEVER. CAN YOU BE SO CERTAIN TO THE POINT THAT YOU WILL SEND SAMUEL HOWARD TO THE EXECUTIONER'S CHAMBER?

MR. HARMON MADE REFERENCE TO THE FACT THAT -- THE FACT THAT SAMUEL HOWARD SERVED IN VIET NAM SHOULD NOT SERVE AS A MITIGATING FACTOR IN THIS CASE. HE MAY BE RIGHT. I DON'T KNOW THE ANSWER TO THAT. I KNOW THAT THERE ARE THOUSANDS OF MEN WHO RETURNED FROM THAT TRAGEDY THAT WERE NEVER THE SAME. I KNOW THAT, AND AGAIN I'M NOT SUGGESTING THAT THAT'S AN EXCUSE, BUT I CAN ONLY HOPE THAT YOU WOULD TAKE THAT INTO CONSIDERATION. WE AREN'T ALL EQUALLY STRONG. ALOT OF MEN RETURNED FROM THAT WAR TO LEAD NORMAL LIVES, AND THEY RETURNED TO THEIR FAMILIES AND THEIR JOBS AND TO THEIR PROFESSIONS AS DOCTORS OR LAWYERS OR DENTISTS OR ANY NUMBER OF HONORABLE PROFESSIONS. I WONDER WHAT SAMUEL HOWARD RETURNED TO.

I'VE ASKED MYSELF WHAT PURPOSE IS TO BE ACCOMPLISHED BY KILLING HIM? MR. HARMON SUGGESTS THAT IT SERVES AS A DETERRENT. THERE HAVE BEEN PEOPLE EXECUTED IN THIS COUNTRY FOR CENTURIES AND THE KILLINGS GO ON. I DON'T THINK THAT ORDERING SAMUEL HOWARD TO DIE IS GOING TO SERVE AS A DETERRENT TO ANYONE. IF THERE'S A DETERRENT, IT'S IN THE CERTAINTY OF PUNISHMENT AND NOT IN THE SEVERITY OF PUNISHMENT.

MR. HARMON SUGGESTED THAT BY KILLING HIM YOU PUNISH HIM. WHAT CAN BE ACCOMPLISHED BY KILLING SAMUEL HOWARD THAT COULD NOT BE ACCOMPLISHED BY PUTTING HIM IN PRISON

FOR THE REST OF HIS LIFE?

MR. SEATON MAY SUGGEST TO YOU THAT, WELL, THERE'S A POSSIBILITY THAT HE WILL RECEIVE EXECUTIVE CLEMENCY SOMEDAY. WHEN WAS THE LAST TIME THAT YOU HEARD OF A GOVERNOR OF THIS STATE GRANTING EXECUTIVE CLEMENCY TO AN INDIVIDUAL CONVICTED OF FIRST DEGREE MURDER AND SENTENCED TO PRISON FOR THE REST OF HIS LIFE?

WE CAN PUT MEN ON THE MOON. WE CAN PERFORM ALL KINDS OF SUPER HUMAN FEATS. CERTAINLY WE CAN PUT SAMUEL HOWARD AWAY FOR THE REST OF HIS LIFE SO THAT HE DOES NOT HARM MEMBERS OF SOCIETY.

MR. HARMON SEEMS TO INFER THAT BY DOING THAT, THAT MR. HOWARD WILL CONTINUE TO ENJOY LIFE: HE'LL EAT AND HE'LL SLEEP AND HE'LL READ. I PERSONALLY CAN'T IMAGINE A FATE MORE HORRIFYING THAN SPENDING THE REST OF MY LIFE IN MAXIMUM SECURITY IN THE NEVADA STATE PRISON. HAVING TOURED THAT FACILITY MYSELF, I CAN TELL YOU IT LEAVES A VERY, VERY DEEP IMPRESSION ON YOU. IT'S GROTESQUE. IT'S A FATE WORSE THAN DEATH. IT'S A VIOLENT AND DEMORALIZING ENVIRONMENT IN THAT PRISON.

I THINK THAT THE ONLY -- THE ONLY REASON THAT THE STATE CAN REALLY OFFER YOU TO JUSTIFY THE KILLING OF SAMUEL HOWARD, IF IT'S A JUSTIFICATION, IS FOR VENGEANCE AND VENGEANCE ALONE. I HAVE THOUGHT ABOUT THAT AND I HAVE THOUGHT ABOUT IT AND I CAN COME UP WITH NO LEGITIMATE REASON FOR TAKING THIS MAN'S LIFE, EXCEPT THAT YOU HATE WHAT HE DID. AND THAT'S THE ONLY REASON THAT ANYONE, I THINK, COULD HAVE FOR KILLING HIM, AND THAT'S BECAUSE THEY HATE HIM. DOES THAT MAKE -- DOES THAT MAKE US ANY BETTER THAN SAMUEL HOWARD? IS THAT THE MARK OF A TRULY CIVILIZED SOCIETY?

I THINK IT WAS CLAREANCE DARRELL WHO ONCE SAID, IN ONE OF HIS FAMOUS CASES, THAT WE'RE MADE MORE THAN

WE MAKE, THAT WE'RE AFFECTED BY THE THINGS AROUND US.

I AM WHAT I AM BECAUSE -- BECAUSE OF MY HEREDITY AND BECAUSE OF THE ENVIRONMENT THAT I WAS BROUGHT UP IN. YOU ARE WHAT YOU ARE BECAUSE OF YOUR HEREDITY AND YOUR ENVIRONMENT. AND SAMUEL HOWARD IS WHAT HE IS BECAUSE OF HIS HEREDITY AND BECAUSE OF HIS ENVIRONMENT, AND HE HAS NO CONTROL OVER HIS HEREDITY AND HE HAS NO CONTROL OVER HIS ENVIRONMENT. THOSE ARE THE THINGS THAT HAVE SHAPED HIM.

I WANT SO MUCH FOR YOU TO TRY AND UNDERSTAND HIM, TRY AND UNDERSTAND THE EVENTS THAT HAVE MADE HIM, THAT HAVE SHAPED HIM. IF YOU DO THAT I THINK THAT'S ALL THAT'S NECESSARY.

MR. HARMON ASKS THAT YOU KILL SAMUEL HOWARD BECAUSE HE KILLED DOCTOR MONAHAN. THAT'S ALL. WITHOUT THE SLIGHTEST LOGIC, WITHOUT THE SLIGHTEST APPLICATION TO LIFE, SIMPLY FROM ANGER AND NOTHING ELSE. IS THAT WHAT JUSTICE IS ALL ABOUT? I DON'T THINK SO.

I DON'T THINK THAT THERE'S ANY JUSTIFICATION FOR TAKING THE LIFE OF SAMUEL HOWARD. THE PITIFUL CREATURE THAT HE IS, THERE'S NO WORTHWHILE PURPOSE IN KILLING HIM.

I KNOW THAT WE DIDN'T -- WE DIDN'T TRY AND CONVINCE YOU, OR PRESENT EVIDENCE, THAT SAMUEL HOWARD WAS LEGALLY INSANE AT THE TIME THAT HE KILLED DOCTOR MONAHAN. BUT IF YOU TAKE A CAREFUL LOOK AT THE INSTRUCTIONS, PARTICULARLY INSTRUCTION NUMBER TWELVE, YOU WILL FIND THAT IN CONSIDERING MITIGATING CIRCUMSTANCES, IF YOU FIND THAT THERE ARE MITIGATING CIRCUMSTANCES, THAT IT'S NOT NECESSARY TO SHOW THAT THOSE MITIGATING CIRCUMSTANCES WOULD HAVE CONSTITUTED A DEFENSE TO THIS CRIME OR THAT IT WOULD HAVE REDUCED THE DEGREE OF THE CRIME.

THE TEST FOR LEGAL INSANITY IS: DID

THE DEFENDANT KNOW THE DIFFERENCE BETWEEN RIGHT AND WRONG? I PERSONALLY HAVE PROBLEMS WITH THAT. I THINK IT'S AN ANTIQUATED TEST. IT'S DEVELOPED IN THE DAYS OF QUEEN VICTORIA, CENTURIES AGO. AND DESPITE THE MANY STRIDES THAT HAVE BEEN MADE IN THE AREA OF PSYCHIATRY IN TRYING TO UNDERSTAND HUMAN BEINGS, WE STILL ADHERE TO THAT TEST. WE'RE GOING TO KILL HIM BECAUSE HE'S MENTALLY DISTURBED. HE'S OBVIOUSLY DISTURBED.

I WANT HIS MILITARY SERVICE, HIS HONORABLE DISCHARGE FROM VIET NAM, HIS PURPLE HEART AND HIS OTHER MEDALS, TO STAND FOR SOMETHING. WHETHER IT WILL OR NOT, I DON'T KNOW.

I WANT TO KNOW WHY -- WHY IT SEEMS THAT IN THIS COUNTRY THE POOR AND THE OPPRESSED AND THE IMPOVERISHED ARE THE ONES WHO GO TO THE EXECUTIONER'S CHAMBER. WHEN WAS THE LAST TIME YOU HEARD OF A RICH MAN, A PERSON WHO'S WELL OFF, BEING EXECUTED IN THIS COUNTRY? IT SEEMS -- IT SEEMS AS IF WE'VE RESERVED THAT FATE FOR PEOPLE LIKE SAMUEL HOWARD.

I PUT IT IN YOUR HANDS AND I ASK THAT YOU BE KIND AND CONSIDERATE TO THE LIVING AND TO THE DEAD. THANK YOU.

THE COURT: THE STATE.

MR. SEATON: THANK YOU.

(CLOSING ARGUMENT)

BY MR. SEATON:

YOUR HONOR, COUNSEL, LADIES AND GENTLEMEN OF THE JURY:

I DON'T KNOW THAT I CAN BE AS ELOQUENT AS MR. HARMON, NOR AS EMOTIONAL AS MR. COOPER. BOTH OF WHOM YOU HAVE HEARD THIS MORNING I THINK ARE SPEAKING TO YOU FROM THEIR HEART, FROM THE VERY DEPTH OF THEIR SOULS. I SHALL AT

LEAST TRY TO DO THAT WITH YOU.

I FIRST WANT TO DIRECT SOME OF MY REMARKS TO SOME OF THE THINGS THAT MR. COOPER SAID. HE SAID WHAT HE SAID BECAUSE HE FELT IT AND HE MEANT IT, NOT BECAUSE HE WAS ATTEMPTING TO GENERATE ANY SORT OF SYMPATHY OR GOOD FEELING ON YOUR PART ON BEHALF OF THE DEFENDANT SAM HOWARD, BUT BECAUSE TRULY HE FELT THOSE THINGS. BUT WE'VE GOT TO BE CAREFUL IN PROCEEDINGS SUCH AS THIS THAT WE DO NOT LET THE EMOTIONS OVERRIDE. THERE ARE TWO SIDES TO EVERY COIN.

MR. COOPER, FOR EXAMPLE, MENTIONS TO YOU THAT SAMUEL HOWARD IS A PRODUCT OF HIS ENVIRONMENT. HE IS WHAT HE IS TODAY BECAUSE OF THE THINGS THAT HAPPENED THROUGH HIS LIFE. AND THAT'S PROBABLY TRUE.

ISN'T IT BECAUSE OF THE ENVIRONMENT THAT HE WAS IN THAT GEORGE MONAHAN IS WHAT HE IS TODAY, WHICH IS DEAD? SAMUEL HOWARD CREATED A FALSE ENVIRONMENT IN THE WORLD OF THIS HEALTHY, ACTIVE, YOUNG, SUCCESSFUL DENTIST WITH A FAMILY.

HE HAD A NICE VAN. YOU'VE SEEN THE PICTURES OF IT. IT'S A NICE VAN, SOMETHING THAT ALL OF US WOULD WANT TO OWN. THE INTERIOR OF IT WAS DESIGNED NICELY. IT HAD A C.B. RADIO. IT HAD A FOUR-TRACK STEREO. IT HAD ALL THE NICETIES THAT YOU WOULD WANT IN A VAN. AND IT WAS A GREAT ENVIRONMENT.

SAMUEL HOWARD GOT IN THAT VAN AND HE DID, IN FACT, HAVE AN IMPACT UPON THE ENVIRONMENT OF DOCTOR MONAHAN. AND BECAUSE OF THAT ENVIRONMENT, THE ONLY PERSON IN THIS CASE WHO HASN'T BEEN IN THIS COURTROOM TO TELL YOU ANYTHING ABOUT IT IS DOCTOR GEORGE MONAHAN, AND THAT'S BECAUSE OF ONE PERSON AND ONE PERSON ONLY. SO BEFORE YOU START THINKING TOO SYMPATHETICALLY ABOUT THE ENVIRONMENT IN WHICH SAMUEL HOWARD WAS RAISED, THINK ALONG WITH THAT ABOUT THE ENVIRONMENT IN WHICH

CAUSED THE DEATH, THE ENDING OF THE LIFE, OF DOCTOR GEORGE MONAHAN.

ALONG THE SAME LINES, MR. COOPER CANNOT IMAGINE A FATE WORSE THAN SPENDING THE REST OF YOUR LIFE IN PRISON. WELL, I CAN. I'VE JUST TALKED ABOUT IT. THAT FATE HAS OCCURRED ALREADY IN THIS CASE. IT'S SOMETHING THAT NO ONE CAN DO ANYTHING ABOUT. THE FATE OF DOCTOR MONAHAN. IF YOU'VE GOT THE CHOICE YOURSELF OF SPENDING THE REST OF YOUR LIFE IN PRISON OR DYING AT THIS MOMENT, IS THERE ANY QUESTION AS TO WHAT THAT CHOICE WOULD BE?

AS MR. HARMON SO ABLY POINTED OUT, WOULD YOU PREFER THE CONFINES OF THE GRAVE AND WHATEVER THERE IS BEYOND THIS LIFE TO THE ABILITY, AS WE CHOOSE TO HAVE IT TODAY, TO READ, TO EAT, TO TALK TO OTHER PEOPLE, TO MOVE ABOUT, EVEN THOUGH IT'S A RESTRICTED SOCIETY, WITHIN A SOCIETY FORM? I CAN'T IMAGINE, EXCEPT A SUICIDAL PERSON, ANYONE MAKING A DIFFERENT CHOICE THAN THE ONE THAT SAMUEL HOWARD HAS ALREADY MADE FOR BOTH HE AND DOCTOR MONAHAN.

SAMUEL HOWARD CHOSE FOR DOCTOR MONAHAN TO HAVE HIM DIE AND TO CURTAIL HIS LIFE FOR HIMSELF AND FOR THOSE FRIENDS AND RELATIVES AND LOVED ONES AROUND HIM. AND SAMUEL HOWARD CHOSE TO LIVE, AND HE STANDS BEFORE YOU TODAY, THROUGH MR. COOPER, BEGGING FOR HIS LIFE. I WONDER IF DOCTOR MONAHAN BEGGED FOR HIS LIFE. I WONDER IF HE HAD THE OPPORTUNITY TO SAY TO SAM HOWARD: DON'T SHOOT ME, TAKE MY CAR, TAKE MY WALLET, TAKE ANYTHING I'VE GOT BUT PLEASE DON'T SHOOT ME. AND IF HE DIDN'T SAY THAT, DID HE AT LEAST THINK IT FOR THAT SPLIT SECOND OR MAYBE A MATTER OF MINUTES THAT HE KNEW HE WAS GOING TO DIE?

AND WHAT WAS SAM HOWARD'S RESPONSE TO THAT PLEA FOR LIFE THAT SAM HOWARD SITS BEFORE YOU TODAY MAKING FOR HIMSELF? AS EASILY AS PULLING THE TRIGGER OF THAT PISTOL,

HE MADE HIS DECISION.

ARE WE TO HAVE MERCY FOR SAM HOWARD? THAT'S ONE OF THE QUESTIONS BEFORE YOU TODAY, OR ONE OF THE WAYS TO PUT THE QUESTION THAT'S BEFORE YOU.

LET'S THINK ABOUT MERCY FOR A MOMENT. NOW, WE KNOW WHAT MERCY IS. YOU GIVE IT TO SOMEONE. YOU DON'T TREAT THEM AS HARSHLY AS YOU OTHERWISE COULD. BUT THINK FOR A MOMENT OF THE PURPOSE OF MERCY. MERCY IS DESIGNED TO SET AN EXAMPLE, TO CREATE STANDARDS. MERCY IS USEFUL IF IT IS NOT GIVEN DISCRIMINATELY. IF YOU GIVE MERCY TO EVERYONE, THEN THERE IS NO REASON FOR THEM TO DO ANYTHING TO BENEFIT THAT MERCY. THEY CAN GO OUT AND ACT AS TERRIBLY AS THEY WISH AND KNOW THAT YOU, THE GENTLE JURY, IS GOING TO GIVE THEM MERCY.

NO. THAT'S WHY MERCY IS GIVEN TO SOME AND WITHHELD FROM OTHERS. WHAT HAPPENS WHEN WE GIVE MERCY TO SOMEONE? LET'S TAKE A KILLING SITUATION. SOMEONE KILLS AND COMES BEFORE THE JURY AND THE JURY SAYS TO THEM, YOU'VE KILLED, YOU'VE COMMITTED THE HIGHEST CRIME KNOWN TO MAN AND GOD, BUT THERE WERE EXTENUATING CIRCUMSTANCES. THERE WERE SUBSTANTIAL MITIGATING CIRCUMSTANCES THAT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES. PERHAPS IT'S A HUSBAND OR WIFE WHO KILLS THE OTHER ONE BECAUSE THERE IS A FAMILY ARGUMENT AND EMOTIONS RUN HIGH AND THERE'S A KITCHEN KNIFE LYING CLOSE BY AND IT'S PICKED UP IN A, JUST IN A FIT OF RAGE, AND USED; OR PERHAPS IT'S A BARROOM BRAWL THAT STARTS OUT AS A FRIENDLY POOL GAME BETWEEN TWO PEOPLE HAVING HAD TOO MUCH TO DRINK AND THEY ARGUE ABOUT THE NATURE OF THE GAME AND ONE SWINGS THE POOL CUE AT THE OTHER AND KILLS HIM. THESE ARE REASONS TO TREAT THOSE KINDS OF CASES AND OTHERS LIKE THEM DIFFERENTLY FROM THIS KIND OF CASE. YOU GIVE MERCY IN THAT KIND OF CASE. WHERE THERE ARE NO EXTENUATING CIRCUMSTANCES FOR THE KILLING, WHERE THERE IS NO REASON FOR THAT KILLING TO HAVE TAKEN PLACE, YOU DO NOT GIVE MERCY.

TO GIVE MERCY TO SAMUEL HOWARD IS TO TELL ALL OF THE OTHER PEOPLE WHO GO OUT AND COMMIT THESE KINDS OF HEINOUS, HORRIBLE ANIMAL-LIKE CRIMES TO GO AHEAD AND DO THE SAME THING BECAUSE OTHER JURIES LIKE YOU ARE LIKELY TO DO THE SAME THING.

MR. FRANZEN: YOUR HONOR, I'M GOING TO HAVE TO REGISTER AN OBJECTION.

THE COURT: THE OBJECTION IS OVERRULED.

YOU MAY PROCEED.

MR. SEATON: THANK YOU, YOUR HONOR.

MR. HARMON STATED TO YOU THAT THERE WERE TWO REASONS TO IMPOSE THE PUNISHMENT OF DEATH, AND THEY ARE PUNISHMENT AND DETERRENTS. BUT DETERRENT REALLY BREAKS DOWN INTO TWO KINDS OF DETERRENTS. SO I WOULD LIKE TO VIEW IT AS THOUGH THERE ARE THREE REASONS FOR CAPITAL PUNISHMENT:

THE FIRST BEING THE PUNISHMENT OF THE DEFENDANT. CAPITAL PUNISHMENT IS SIMPLY AN EXPRESSION OF SOCIETY'S OUTRAGE AT A PARTICULARLY TERRIBLE ACT THAT HAS OCCURRED. AND THE INSTINCT FOR RETRIBUTION, VENGEANCE IS, AS MR. COOPER CALLS IT, IS A NATURAL OUTGROWTH IN PROBABLY ALL HUMAN BEINGS. HOW MANY TIMES HAVE YOU FELT THAT YOU WANTED TO GET EVEN WITH SOMEONE FOR DOING SOMETHING? AND IF YOU DON'T HAVE THESE KINDS OF PUNISHMENT THEN YOU SOW THE SEEDS OF ANARCHY IN A SOCIETY. YOU GIVE REASON FOR SOCIETY TO SAY: OUR SYSTEM DOESN'T WORK, THE PUNISHMENT ISN'T STRONG ENOUGH, WE NEED VIGILANTE JUSTICE, WE NEED LYNCH MOBS. WELL, I DON'T THINK ANY OF US WANT THAT. WE READ ARTICLES THAT IT'S STARTING TO HAPPEN BECAUSE THE WAY SOCIETY IS GOING, BUT WE DON'T WANT IT, I THINK, IN OUR MOST HONEST OBJECTIVE STATE OF MIND. AND THE PUNISHMENT PART, THE RETRIBUTION PART, IS NOT THE MAIN REASON. IN FACT, I WOULD NUMBER IT AS THE LEAST OF THE REASONS.

I TAKE ISSUE WITH MR. COOPER. I THINK

I CAN SPEAK FOR MR. HARMON, BUT CERTAINLY FOR MYSELF, WE ARE NOT HERE ADVOCATING THAT THE DEATH PENALTY BE IMPOSED UPON SAM HOWARD MAINLY BECAUSE WE THINK HE OUGHT TO BE PUNISHED. THAT IS SIMPLY MENTIONED BECAUSE IT IS ONE OF THE REASONS THAT MANY PEOPLE WOULD UTILIZE, ALONG WITH THE OTHER DETERRENT REASONS. IT'S NOT A FORBIDDEN OBJECTIVE OF OUR SOCIETY. AND IT IS CERTAINLY NOT INCONSISTENT WITH OUR RESPECT FOR THE DIGNITY OF OTHER HUMAN BEINGS. AND EVEN THOUGH IT IS THE LESSER OF THE THREE REASONS, AS I POSED THEM TO YOU, IT IS A REASON WHICH MAY BE CONSIDERED FOR GIVING THE DEATH PENALTY TO SAM HOWARD.

THE OTHER REASON THAT HAS BEEN TALKED ABOUT IS TO DETER PEOPLE FROM KILLING WE SET AN EXAMPLE. IF YOU IMPOSE THE DEATH PENALTY UPON SAM HOWARD, MAYBE OTHER KILLERS WILL LOOK AT THAT AND DECIDE THAT, YES, INDEED THE DEATH PENALTY IS WORKING AND I DON'T WANT TO DO THAT.

NOW, PROOF OF DETERRENTS IS DIFFICULT. WE DON'T HAVE MANY CRIMINALS WHO WALK INTO THE CHIEF OF POLICE AND SAY, YOU KNOW, I WAS THINKING ABOUT KILLING SOMEBODY BUT I READ THE OTHER DAY THAT THE DEATH PENALTY IS IN EFFECT AND SO THAT DETERRED ME. WE DON'T HAVE THAT SORT OF STATISTICAL ANALYSIS.

WE DO HAVE STATISTICAL ANALYSIS, HOWEVER, IN MANY, MANY STUDIES THAT HAVE BEEN MADE OF THE TEN-YEAR PERIOD THAT THERE WAS NO DEATH PENALTY, AND THE NUMBER OF KILLINGS DOUBLED FROM TEN THOUSAND ANNUALLY TO TWENTY THOUSAND ANNUALLY, OR THEREABOUTS, DEPENDING ON THE STATISTICS THAT YOU WANT TO BELIEVE. WE KNOW THAT WITHOUT A DEATH PENALTY BEING UTILIZED IN THIS COUNTRY THAT MURDERS SKYROCKET. DOESN'T LOGIC TELL US, DOESN'T LOGIC SAY TO US THAT IF THERE IS A DEATH PENALTY THAT MURDER WOULD DECREASE, OR AT LEAST IF THEY INCREASE THEY WOULD INCREASE MORE SLOWLY THAN THEY WOULD WITHOUT THE DEATH PENALTY?

YOU CAN'T DETER ALL MURDERERS. THE IRRATIONAL, EMOTIONAL KIND THAT I SPOKE OF BEFORE, THEY'RE NOT GOING TO BE DETERRED. YOU CAN DETER THE PREMEDITATORS THOUGH, THE PEOPLE LIKE SAM HOWARD, THE PEOPLE WHO DO MURDER FOR ECONOMIC GAIN. AND SAM HOWARD DID MURDER FOR ECONOMIC GAIN, ALTHOUGH HE WASN'T REALLY SUCCESSFUL. I CAN REMEMBER $2 THAT DOCTOR MONAHAN HAD AND $2 THAT DOROTHY WEISBAND HAD. BUT IF YOU CAN -- IF YOU CAN ALTER THEIR BUSINESS DECISION, THAT IS THAT OF THE BUSINESS DECISION OF THE CRIMINAL, IF YOU CAN MAKE HIM WEIGH THE COST OF THE CRIME VERSUS THE POTENTIAL GAIN OF THE CRIME, AND IF YOU ARE ABLE TO IMPOSE A HIGHER COST, YOU ARE GOING TO DETER OTHER PEOPLE FROM KILLING.

I THINK THAT IF YOU WERE TO IMPOSE THE DEATH PENALTY IN THIS CASE, AS MR. HARMON HAS SUGGESTED, THAT IT WOULD BE A VERY STRONG POSSIBILITY THAT THE LIFE OF SOME FUTURE VICTIM OF SOME OTHER MURDERER MAY BE SAVED.

NOW, THE THIRD REASON FOR IMPOSING THE DEATH PENALTY, AND THIS IS THE ONE I THINK WE HAVEN'T TALKED TOO MUCH ABOUT, AND IT'S THE ONE THAT I MOST STRONGLY BELIEVE APPLIES IN THIS CASE, IS THIS: TO IMPOSE THE DEATH PENALTY AGAINST SAM HOWARD IN THIS CASE IS TO MAKE ABSOLUTELY SURE THAT HE NEVER KILLS AGAIN. NOW, THAT'S OUR GOAL, TO MAKE SURE THAT SAM HOWARD NEVER KILLS AGAIN. I ALSO DON'T WANT HIM TO ROB AGAIN AND TO PUT PEOPLE INTO FEAR OF THEIR LIVES AGAIN.

BUT LET'S FACE THE QUESTION THAT MR. COOPER TALKED ABOUT: ARE THERE WAYS TO KEEP HIM FROM KILLING AGAIN WITHOUT GIVING HIM THE DEATH PENALTY? IT WOULD APPEAR TO ME THAT THERE ARE ONLY TWO -- TWO POSSIBILITIES: ONE IS REHABILITATION AND ONE IS PUTTING HIM IN PRISON FOR THE REST OF HIS LIFE.

NOW, THE REHABILITATION SOUNDS PRETTY GOOD. YOU TAKE A PERSON LIKE SAM, WHO'S HAD A TERRIBLE LIFE,

HE'S A BAD, EVIL PERSON, AND YOU MOLD HIM. YOU TAKE THE PSYCHIATRISTS, WELL WE KNOW THEY DON'T WORK, BUT YOU TAKE THE PSYCHIATRISTS AND THE SOCIAL WORKERS AND THE PEOPLE UP IN THE PRISON, MOST OF WHOM ARE OTHER PRISONERS WHO ARE OF THE SAME MOLD THAT HE IS, AND SOMEHOW IN THAT ENVIRONMENT YOU REHABILITATE SAM HOWARD, MAKE HIM A USEFUL CITIZEN.

WELL, PROBABLY 65 PERCENT OR SO OF THE CRIMINALS THAT APPEAR IN OUR COURTS APPEAR THERE AGAIN. THAT'S CALLED RECIDIVISM. IT'S AT AN ALL-TIME HIGH AND IT ISN'T STOPPING. AND FORGET ABOUT THE STATISTICS, SAM HOWARD IS A RECIDIVIST. HOW MANY TIMES DID MR. HARMON TIP OFF THAT SAM HOWARD HAD BEEN IN OUR JUDICIAL SYSTEM OR SHOULD HAVE BEEN IN OUR JUDICIAL SYSTEM BECAUSE OF THE CRIMES HE COMMITTED. HE IS A RECIDIVIST OF THE FIRST MAGNITUDE. HE IS INCAPABLE OF REHABILITATION. HE'S 34 YEARS OLD. HE IS WHAT HE IS. HE'S A PRODUCT, AS MR. COOPER SUGGESTS, OF HIS ENVIRONMENT. AND WHATEVER HE IS TODAY IS WHAT HE'S GOING TO BE FOR THE REST OF HIS LIFE AND NO AMOUNT OF WORK ON HIM BY ANY SOCIAL WORKER OR PSYCHIATRIST IS GOING TO CHANGE THAT.

THINK ABOUT THAT FOR A MINUTE, THE PSYCHIATRIC TREATMENT. THAT WAS BROUGHT ON AS A SORT OF A BACK DOOR METHOD OF GETTING THIS INSANITY BUSINESS BEFORE US. AND IT'S A LITTLE HARD FOR THE STATE TO REBUT THAT WHEN IT COMES IN THE WAY IT DOES. WE DON'T HAVE AN OPPORTUNITY TO BRING IN THE PSYCHIATRISTS WHO HAVE EXAMINED HIM.

MR. FRANZEN: YOUR HONOR, I'M GOING TO OBJECT. THEY HAVE HAD AN OPPORTUNITY TO HAVE A REBUTTAL OR SURREBUTTAL.

THE COURT: THE JURY CAN DETERMINE THAT. THE OBJECTION IS NOTED AND OVERRULED.

MR. SEATON: THANK YOU, YOUR HONOR.

THE COURT: PROCEED.

MR. SEATON: BUT THE TESTIMONY FROM THE

DEFENDANT HIMSELF PROBABLY DOES A BETTER JOB OF TELLING US ABOUT THE MENTAL STATUS OF SAMUEL HOWARD THAN ANY GROUP OF PSYCHIATRISTS COULD POSSIBLY DO.

REMEMBER THIS: SAM SAT UP ON THE STAND AND HE TOLD YOU ALL OF THE MENTAL INSTITUTIONS THAT HE'S BEEN TO AND ALL OF THE PSYCHIATRISTS THAT HE'S BEEN TO AND ALL THE TREATMENT THAT HE'S GOTTEN. BUT HE DIDN'T TELL YOU THE END OF THE STORY OR THE END OF EACH ONE OF THOSE STORIES. THE END OF EACH ONE OF THOSE STORIES IS THAT HE LEFT THOSE INSTITUTIONS. NOW, THEY'RE GOING TO LET HIM OUT EITHER ONLY IF HE'S CURED OF WHATEVER AILS HIM OR IF THEY DETERMINE THAT THEY CAN'T DO HIM ANY GOOD. AND THAT'S THE KIND OF HUMAN BEING THAT WE'VE GOT HERE IN FRONT OF US TODAY. IT HAS NOTHING TO DO WITH CURE. HE DOESN'T NEED TO BE -- HE CAN'T BE CURED. HE'S GOT ANTI-SOCIAL BEHAVIOR. THAT'S WHAT CAME OUT ON THE EXAMINATION OF SAM HOWARD. WHAT DOES THAT MEAN? HE'S MEAN. I DON'T HAVE TO PROVE THAT TO YOU. YOU ALL KNOW HOW MEAN SAM HOWARD IS. MEAN IS PERHAPS ONE OF THE KINDEST WORDS I CAN USE ABOUT SAM HOWARD. NO REHABILITATION -- THE REHABILITATION OF SAM HOWARD COULD NEVER TAKE PLACE.

NOW, THE OTHER METHOD BY WHICH WE KEEP SAM HOWARD FROM KILLING SOMEONE ELSE IN THE FUTURE IS TO PUT HIM IN PRISON FOR LIFE, SUGGESTS MR. COOPER. DOES MR. COOPER THINK THAT SAM HOWARD, WHILE IN PRISON FOR LIFE, WOULD BE INCAPABLE OF HARMING OTHER PRISONERS, OR HOW ABOUT ANOTHER GUARD? I'VE BEEN UP TO THE NEVADA STATE PRISON TOO, AND THEY ALL INTERMINGLE, GUARDS AND PRISONERS ALIKE. AND HOW MANY CASES HAVE YOU READ ABOUT IN THE PAPERS OF THE RIOTS AND THINGS OF THAT NATURE?

HOW ABOUT AN ESCAPE? COULD HE ESCAPE FROM PRISON? WELL, HOPEFULLY NOT, BUT IT'S POSSIBLE. IF HE EVER ESCAPED AND WAS IN THAT KIND OF POSTURE, WOULD HE KILL

AGAIN? WELL, IF ANYBODY WANTS TO SUGGEST TO ME THAT, WELL, MAYBE HE WOULDN'T, WE HOPE HE WOULDN'T, I THINK YOU'RE NOT THINKING ALONG THE RIGHT LINES. OF COURSE HE'S GOING TO. NOW HE FINDS HIMSELF IN THE DEEPEST, DARKEST CORNER HE'S EVER BEEN IN IN HIS LIFE AND HE'D DO ANYTHING TO GET OUT OF IT.

HOW ABOUT RELEASE? ARE YOU GOING TO GIVE SAM HOWARD LIFE WITH THE POSSIBILITY OF PAROLE? DO YOU THINK MAYBE SAM HOWARD MIGHT KILL AGAIN IF HE WERE PAROLED AND OUT ON THE STREETS? DO YOU THINK HE'D GO BACK TO USING ALL THOSE GUNS THAT HE LOVES: THE THOMPSON MACHINE GUN, THE PISTOLS? WOULD HE FIND ANOTHER DOROTHY WEISBAND, A FRIEND FOR A YEAR AND A HALF, AND STICK HER UP AND PUT HIMSELF IN THE POSITION AGAIN OF WHATEVER HAPPENED TO DOCTOR MONAHAN AGAIN? MIGHT HE DO THAT?

AND, YES, I AM GOING TO TELL YOU, AS MR. COOPER SUGGESTS THAT I WOULD, THAT AS THE INSTRUCTION TELLS YOU, AND IT WOULDN'T BE THERE IF IT WEREN'T A POSSIBILITY OF REALITY, LIFE WITHOUT THE POSSIBILITY OF PAROLE DOES NOT EXCLUDE EXECUTIVE CLEMENCY. THAT MEANS SOMEBODY COULD LET HIM LOOSE, EVEN THOUGH THE JURY HAS GIVEN HIM LIFE WITHOUT THE POSSIBILITY OF PAROLE, EVEN THOUGH THAT'S YOUR VERDICT AND YOU SAY, SAM, YOU'VE GOT TO STAY IN JAIL THE REST OF YOUR LIFE, SOMEONE CAN TURN THAT DECISION AROUND.

AND THERE ARE SO MANY CASES WHERE NON-EXECUTED MURDERERS WHO HAVE BEEN SENT TO PRISON HAVE KILLED AGAIN IN ANY ONE OF THESE SITUATIONS THAT I HAVE JUST ENUMERATED.

AND NOW ANOTHER QUESTION THAT HAS TO BE ANSWERED IN DETERMINING HOW WE CAN KEEP SAM HOWARD FROM MURDERING AGAIN IS: WOULD HE MURDER AGAIN? IS IT POSSIBLE THAT HE WOULD? I'M NOT GOING TO GO INTO DETAILS, BUT I'M GOING TO REMIND YOU THE NAMES OF DOROTHY WEISBAND, ED SCHWARTZ, KEITH KINSEY, TOM MAJOR, DELAN SCHIEFEISTEIN, STEVE HOUCHEN,

THE GENTLEMAN DOWN IN SAN BERNARDINO FOR WHOM SAM WAS CONVICTED OF ROBBING AND WITH A WEAPON, AND GEORGE MONAHAN.

CAN YOU SEE THE PATTERN OVER THE YEARS THAT DEVELOPED WITH SAM? AND WE SEE IT WITH SO MANY CRIMINALS ON DIFFERENT LEVELS. IT'S A ROBBERY WITH A GUN, HE LIKES CARS, HE LIKES TO GET PEOPLE IN PRIVATE PLACES. HE'S DONE THIS ON WHAT DO WE HAVE HERE? SIX -- AT LEAST SIX SITUATIONS THAT WE KNOW OF.

HAS HE BEEN CAUGHT EVERY TIME HE'S DONE CRIMES LIKE THIS? I DON'T KNOW THE ANSWER TO THAT. YOU DON'T KNOW THE ANSWER TO THAT. THERE'S ONLY ONE MAN IN THIS COURT THAT KNOWS THE ANSWER TO THAT. BUT GIVEN HIS HISTORY, GIVEN HIS PROPENSITY FOR VIOLENCE, HIS LOVE FOR GUNS -- IN FACT, HE TOLD US THE ANSWER TO IT NOW THAT I THINK ABOUT IT. HE STOOD ON THE STAND AND HE SAID SOMETHING ABOUT LIKING TO GO INTO SHOPPING CENTERS BECAUSE, AND I CAN'T REMEMBER THE EXACT TERMINOLOGY, BUT SOMETHING ABOUT HE LIKED TO DO HUSTLES OR SOMETHING LIKE THAT. HE'S DONE THAT SEARS SORT OF THING WHICH TURNED INTO A ROBBERY ON A NUMBER OF OCCASIONS, PROBABLY SO NUMEROUS THAT IF HE WERE ASKED TO SIT DOWN AND WRITE THEM OUT HE COULDN'T DO IT.

EVERY TIME THAT HE'S HAD A VICTIM IN HIS CLUTCHES HE'S THREATENED THEM. HE'S EITHER SAID, DO WHAT I TELL YOU TO DO OR I'M GOING TO KILL YOU, OR HE'S POINTED A GUN AT THEM. THE MOST HARMLESS OF ALL IS PERHAPS STEVE HOUCHEN. CAN YOU IMAGINE BEING IN YOUR AUTOMOBILE, JUST HAVING BEEN HIT FROM BEHIND, AND YOU GET UP ALONGSIDE THE OTHER CAR AND YOU WANT TO TALK TO THE OTHER PERSON ABOUT IT, AND EVEN IF YOU'RE ANGRY, HAVING A GUN COME OUT AND STUCK IN YOUR FACE? CAN YOU IMAGINE THE FEAR THAT YOU WOULD HAVE? DOES HE AND THE OTHERS HAVE THE SAME BAD DREAMS, THE SAME FEELINGS THAT DOROTHY WEISBAND HAS? I DON'T KNOW. I WOULD ASSUME SO.

AND I THINK THERE IS THIS THIRD MOST IMPORTANT REASON FOR IMPOSING THE DEATH PENALTY IN THIS CASE, AND THAT IS TO MAKE SURE THAT SAM HOWARD NEVER HAS THE OPPORTUNITY, NO POSSIBILITY OF BEING ABLE TO GO OUT AND KILL SOMEONE ELSE.

YOU KNOW, THERE ARE TWO KINDS OF VICTIMS IN THIS CASE, AND IT ALWAYS STRIKES ME AS A PITY, AND I GUESS I'M AS GUILTY OF IT AS ANYONE ELSE, BUT THE WHOLE EMPHASIS IN THIS COURTROOM HAS BEEN ON SAM HOWARD.

LET'S TALK ABOUT THE COURTROOM FOR JUST A MOMENT. TAKE A LOOK ABOUT. IT'S WELL LIT, IT'S QUIET. GOOD SOUND IS PROVIDED FOR WITH MICROPHONES OR ACOUSTICS. WE HAVE A JUDGE TO KEEP ORDER. THE ATTORNEYS STAND UP AND SIT DOWN WHEN THEY'RE SUPPOSED TO. EVEN THE DEFENDANT DOES ALL THESE THINGS THAT HE'S SUPPOSED TO. YOU SIT AND DO YOUR DUTIES AS YOU'RE SUPPOSED TO. WE HAVE A NICE, STERILE LABORATORY HERE IN WHICH WE DETERMINE THE GUILT OR INNOCENCE AND ULTIMATELY IN THIS CASE THE PENALTY OF THE DEFENDANT SAM HOWARD. AND WHY IS THAT? WELL I SUBMIT TO YOU IT'S PART AND PARTIAL OF THIS BUSINESS OF, AND I DON'T MEAN TO GIVE IT SHORTSHIP, OF GIVING THE DEFENDANT HIS CONSTITUTIONAL RIGHTS. AND I BELIEVE IN THAT AS STRONGLY AS I STAND HERE TODAY AS I ASK YOU TO IMPOSE THE DEATH PENALTY. I BELIEVE IN BOTH OF THOSE THINGS EQUALLY STRONG. AND I WOULD NEVER WANT TO SEE ANY LESSENING OF THE CONSTITUTIONAL RIGHTS.

WE MAKE SURE THAT SAM HOWARD GETS HIS DAY OR DAYS IN THIS COURTROOM. WE MAKE SURE THAT HE HAS ATTORNEYS TO REPRESENT HIM. WE MAKE SURE THAT HE CAN EITHER TESTIFY OR NOT TESTIFY, WHATEVER HE CHOOSES TO DO. WE MAKE SURE THAT HE CAN CROSS EXAMINE ALL OF THE WITNESSES. THESE AND MANY OTHER RIGHTS ARE AFFORDED TO SAM HOWARD. AND HE HAS GREAT REPRESENTATION. AND MR. HARMON AND I REPRESENT THE STATE AND

ITS CITIZENS.

AND WHO REPRESENTS THE VICTIM? WHO? WELL, PROBABLY YOU'RE THINKING AS I AM RIGHT NOW THAT THE ONLY PEOPLE TO DO THAT ARE MR. HARMON AND MYSELF. AND IN THIS CASE, IN A LITTLE DIFFERENT SORT OF A FASHION, MR. COOPER ALLUDED TO THE FACT THAT IT WAS TOO BAD ABOUT THE VICTIMS, AND IT IS, AND WE HAVE TO REMEMBER THEM CAREFULLY. WE HAVE TO REMEMBER GEORGE MONAHAN AND HIS FAMILY. AND THIS IS AS IMPORTANT, THEY AREN'T THE ONLY VICTIMS IN THIS CASE. THEY AREN'T THE ONLY -- HE ISN'T THE ONLY VICTIM THAT I CONCERN MYSELF WITH IN THIS CASE. AND HE ISN'T THE ONLY VICTIM WHO YOU SHOULD CONCERN YOURSELF WITH. THE OTHER VICTIM OR VICTIMS ARE THOSE UNNAMED AND UNCERTAIN VICTIMS OF EITHER FUTURE MURDERS, WHO WILL REACT TO YOUR DECISION OR TO SAM HOWARD, SHOULD HE EVER GET OUT OF PRISON, WERE YOU TO PUT HIM THERE. THOSE ARE THE PEOPLE THAT I WANT TO TURN MY ATTENTION TO NOW. I'M GOING TO SAY A FEW THINGS ABOUT THEM, BUT YOU AND NO ONE ELSE ARE THEIR REPRESENTATIVE.

YOU KNOW, YOU HAVE TO TAKE SIDES. LIFE IS TOUGH. THERE COMES A TIME WHEN YOU'VE GOT TO MAKE A DECISION THAT I'VE GOT TO GO THIS WAY OR I'VE GOT TO GO THAT WAY. IN THIS CASE, AS I SEE IT, YOU'RE EITHER FOR THE DEFENDANT OR YOU'RE FOR THESE UNNAMED, UNCERTAIN VICTIMS THAT I'M REFERRING TO.

THE DEFENSE WILL TELL YOU, AND THEY DIDN'T IN THIS CASE, BUT THE TYPICAL THOUGHT PROCESS THAT THEY WANT YOU TO UNDERSTAND IS TO FORGET ABOUT DOCTOR MONAHAN, HE'S DEAD. WE CAN'T BRING HIM BACK TO LIFE. IN FACT, MR. COOPER DID TALK ABOUT THAT. HE SAID, WHAT CAN BE ACCOMPLISHED BY EXECUTING SAM HOWARD? AND THEN HE ALLUDED TO OUR VENGEANCE FACTOR. AND AS YOU CAN SEE, VENGEANCE IS NOT IMPORTANT TO ME IN THIS SITUATION. IT'S THE DETERRENTS. IT'S THOSE PEOPLE OUT

THERE IN THE STREET SOMEPLACE IN THIS CITY OR SOME OTHER THAT I'M CONCERNED ABOUT, AND I WANT YOU TO BE CONCERNED ABOUT.

AND HAD MR. COOPER THOUGHT ABOUT THIS, HE WOULD PROBABLY SAY -- AND I'LL HELP HIM HERE BECAUSE I KNOW HE'S PROBABLY THINKING, FOR GOODNESS SAKE, THINK ABOUT WHAT MR. SEATON IS SAYING. THIS IS SPECULATIVE, AND IT IS. I CAN'T GO OUT AND POINT TO THE INDIVIDUAL THAT'S GOING TO BE KILLED, BUT I THINK IT'S GOING TO HAPPEN. I THINK THERE'S GOING TO BE A MURDER TOMORROW OR THE NEXT DAY OR A YEAR FROM NOW, AND IT MAY HAVE BEEN CAUSED BY SOMEONE WHO WAS AWARE OF THIS CASE AND IT MAY BE SAM HOWARD MAYBE YEARS DOWN THE ROAD. IT'S THAT POTENTIAL VICTIM THAT I'M CONCERNED ABOUT.

NOW, VICTIM OR DEFENDANT, HOW DO YOU DECIDE? AND YOU ARE GOING TO SUPPOSE THAT THE ANSWER IS EASY WITHOUT GIVING IT TOO MUCH THOUGHT. AND THE ANSWER IS EASY. BUT NOW I WANT YOU TO GIVE IT SOME CAREFUL, LOGICAL THOUGHT ABOUT THE DECISION THAT FACES YOU HERE TODAY. I WANT YOU TO LOOK AT THE ALTERNATIVE CHOICES YOU'VE GOT AND THE PROBABLE RESULTS THAT WOULD EMINATE FROM THOSE CHOICES.

NOW, WE START OUT WITH THIS HYPOTHESIS: CAPITAL PUNISHMENT EITHER WORKS AS A DETERRENT OR IT DOESN'T. NOW, WE'LL JUST LEAVE THAT UP IN THE AIR RIGHT NOW. WE DON'T KNOW IF IT WORKS. I SUGGEST TO YOU THAT IT DOES AND I'VE SUGGESTED THAT EARLIER. BUT LET'S SAY FOR THE PURPOSE OF YOUR OBJECTIVE DETERMINATION OF THIS DECISION THAT YOU DON'T KNOW IF IT WORKS OR NOT. IT MAY AND IT MAY NOT. NOW, GIVEN THOSE GUIDELINES, WHAT CAN YOU DO IN THIS CASE?

WELL, LET'S SAY THAT THE DEATH PENALTY IS NOT A DETERRENT AND YOU IMPOSE IT. WELL, YOU HAVEN'T SAVED ANY FUTURE VICTIMS BECAUSE THE PENALTY WASN'T GOING TO BE A DETERRENT ANYWAY, AND YOU TOOK THE LIFE OF A CONVICTED MURDERER. THIS MAY BE ONE OF A FEW AREAS WHERE YOUR ONLY JUSTIFICATION

IN THAT SITUATION WOULD BE THAT OF PUNISHMENT. THAT IS IF THERE IS NO DETERRENTS.

NOW, LET'S SAY THAT THERE IS DETERRENTS AND YOU IMPOSE THE DEATH PENALTY. WHAT HAVE YOU DONE? WHAT IS THE RESULT OF YOUR ACT? WELL, YOU'VE TAKEN THE LIFE OF THE DEFENDANT, A CONVICTED MURDERER, AND YOU'VE SAVED THE LIFE OF SOME POTENTIAL VICTIM.

REMEMBER, IT EITHER WORKS OR IT DOESN'T WORK. AND IN THIS CASE IT WORKS. SO WHEN YOU TAKE SAM HOWARD'S LIFE, SOME OTHER MURDERER OR SAM HOWARD WILL NEVER KILL BECAUSE OF WHAT YOU'VE DONE.

ON THE OTHER SIDE OF THE COIN, THERE'S NO DETERRENT AND YOU DON'T IMPOSE THE DEATH PENALTY. WHAT HAPPENS? NO LIVES ARE LOST AT ALL, AND THAT'S GOOD. BUT NOW WHAT'S THE OTHER SIDE OF THAT COIN? THERE IS A DETERRENT AFFECT GOING AND YOU AGAIN DON'T IMPOSE THE DEATH PENALTY AND WHAT HAPPENS? YOU SAVED THE LIFE OF A MURDERER, SAM HOWARD, YOU DIDN'T IMPOSE THE DEATH PENALTY. BECAUSE YOU DIDN'T AND BECAUSE THERE'S A DETERRENT AFFECT ON THE DEATH PENALTY, SOMEONE'S LIFE, SOME INNOCENT VICTIM, A KEITH KINSEY, A DOCTOR MONAHAN, A DOROTHY WEISBAND, SOMEBODY'S LIFE IS GOING TO BE LOST. SO YOUR CHOICE HAS LIMITS OF RISK IN IT. YOU CAN COME BACK HERE AND SAY THAT THE DEFENDANT SHOULD HAVE THE DEATH PENALTY AND IF YOU'VE DONE THAT YOU MIGHT SAVE THE LIVES OF SOME FUTURE VICTIMS. THE WORST THING THAT YOU WILL HAVE DONE -- THE WORST THING THAT YOU WILL HAVE DONE IS TO HAVE TAKEN THE LIFE OF SAM HOWARD. I SUBMIT TO YOU, JUXTAPOSE NEXT TO DOCTOR MONAHAN'S LIFE, HE HAS NO RIGHT WHATSOEVER TO LIVE ANY LONGER.

YOU COULD CHOOSE LIFE FOR THE DEFENDANT. YOU COULD GIVE HIM LIFE WITH OR WITHOUT THE POSSIBILITY OF PAROLE. AND WHAT HAVE YOU DONE THEN? YOU'VE SAVED THE DEFENDANT'S LIFE, AND IN THE ABSTRACT, THAT'S A NICE THING,

THAT YOU SAVED SOMEBODY'S LIFE. BUT IF THE DEATH PENALTY IS IN FACT A DETERRENT TO ANY DEGREE, YOU MIGHT HAVE COST THE LIFE OF SOME FUTURE UNKNOWN VICTIM. IT WOULD SEEM TO ME, GIVEN THAT CHOICE, GIVEN THE CHOICE BETWEEN THE LIFE OF AN INNOCENT VICTIM AND SAM HOWARD, THERE SHOULD BE NO CHOICE. IT SHOULD BE EASY.

AND I -- I HESITATE SO MUCH TO SAY THAT BECAUSE THIS ISN'T EASY. THIS IS THE HARDEST THING OBVIOUSLY THAT MARCUS COOPER DOES. IT'S THE HARDEST THING THAT MR. HARMON AND I DO. AND CERTAINLY I SYMPATHIZE WITH ALL OF YOU THAT IT'S PROBABLY THE HARDEST THING THAT YOU ARE GOING TO HAVE TO DO IN YOUR LIVES. THE POINT OF MATTER IS THOUGH THAT THERE IS A DEGREE OF ACCOUNTABILITY THAT HAS TO TAKE PLACE. WE ALL HAVE TO BE ACCOUNTABLE FOR OUR ACTIONS.

MR. HARMON SUGGESTED TO YOU THAT WE'VE ALL HEARD THE ARGUMENTS ABOUT HOW BAD OUR SOCIETY IS GETTING AND THE FACT THAT WE SHOULD DO SOMETHING ABOUT IT. YOU YOURSELF AT SOMETIME MAY HAVE MADE THE COMMENT, HARSH THOUGH IT MAY SEEM TODAY, THAT WE OUGHT TO JUST GET RID OF THOSE GUYS, SPEAKING IN GENERAL ABOUT CHARLIE MANSON OR SOMEBODY LIKE THAT. YOU ALSO CAME IN HERE AND YOU TOOK AN OATH AND THAT OATH WAS THAT YOU WOULD FOLLOW THE LAW. PRIOR TO THAT YOU WERE ASKED ABOUT BEING ABLE TO IMPOSE THE DEATH PENALTY AND ALL OF YOU SAID THAT YOU COULD IMPOSE THE DEATH PENALTY. THAT DOESN'T MEAN THAT YOU DON'T HAVE A HARD TIME WITH IT. THAT'S UNDERSTANDABLE. NOW IS THE TIME, AS FAR AS ACCOUNTABILITY IS CONCERNED, IT IS THE TIME TO BACK UP THOSE WORDS THAT YOU HAVE SAID OR YOU HAVE PRIVATELY THOUGHT IN YOUR MINDS.

NOW, THAT'S A TOUGH BURDEN THAT I PUT ON YOU, AND I DON'T MEAN TO DO THAT. IT'S THERE AND IT'S REAL AND I'M NOT GOING TO BACK AWAY FROM IT. BUT I'M GOING TO TELL YOU HOW IT'S MADE ALOT EASIER, THIS ACCOUNTABILITY OF YOURS THAT YOU HAVE GOT TO BE RESPONSIBLE FOR NOW, AND THAT IS

WHAT I CALL THE SHARING OF RESPONSIBILITY. YOU ALONE ARE NOT RESPONSIBLE FOR THIS DECISION THAT YOU ARE MAKING TODAY. THINK ABOUT THE WHOLE CASE. THINK ABOUT THE POLICE OFFICERS WHO ARRESTED SAM HOWARD. THEY STARTED THIS LEGAL PROCESS. THEY ARE TO SOME DEGREE RESPONSIBLE FOR WHAT'S GOING ON.

MR. HARMON AND I -- WELL, BEFORE THAT EVEN OTHER PROSECUTORS IN OUR OFFICE HAD TO OKAY THIS CASE FOR PROSECUTION. MR. HARMON AND I THEN COME IN AND WE HAVE TO DO WHAT WE HAVE DONE OVER THE PAST SEVERAL WEEKS. WE HAVE TO TELL YOU THAT WE BELIEVE IN WHAT WE'RE TELLING YOU, THAT SAM HOWARD SHOULD BE PUT TO DEATH, AND WE DO BELIEVE THAT. WE HAVE A RESPONSIBILITY. MR. COOPER AND MR. FRANZEN HAVE A RESPONSIBILITY IN THAT THEY ARE REPRESENTING THE DEFENDANT AND DOING THE BEST, AND A GOOD A JOB IT IS, THAT THEY CAN FOR HIM. THE NEVADA LEGISLATURE HAS A PART IN THIS BECAUSE THEY PASSED THE LAW THAT ALLOWS FOR THE DEATH PENALTY. THE PEOPLE WHO VOTED THE LEGISLATURE IN HAVE A ROLE IN THIS. THEY'VE MANDATED THAT SORT OF THING HAPPEN. THE NEVADA SUPREME COURT, THE UNITED STATES SUPREME COURT, THEY HAVE ALL PUT THEIR STAMP OF APPROVAL ON WHAT WE'RE HERE DOING TODAY.

AND REMEMBER, THERE ARE 12 OF YOU. WHILE SOMETIMES THAT MAKES IT DIFFICULT FOR PROSECUTORS, THAT'S PROBABLY THE BEAUTY OF THE SYSTEM. YOU HAVE TO BE UNANIMOUS. YOU HAVE TO ALL AGREE. YOU ALL HAVE TO SAY TOGETHER UNANIMOUSLY THAT THE DEATH PENALTY IS THE APPROPRIATE THING. SO DO YOU SEE HOW THE RESPONSIBILITY IS SHARED BY SO MANY PEOPLE? IT'S GOT TO BE A GROUP EFFORT OF SORTS.

AND REALLY EVERYTHING THAT I'VE SAID DOESN'T MEAN A WHOLE HECK OF ALOT. THERE'S ONLY ONE PERSON, ONE HUMAN BEING, WHO IS REALLY RESPONSIBLE FOR WHATEVER HAPPENS TO SAM HOWARD, AND THAT'S SAM HOWARD HIMSELF. NO ONE FORCED HIM TO DO THE THINGS THAT HE DID. NO ONE CAUSED HIM TO

BE SITTING IN THAT CHAIR RIGHT THERE (INDICATING) THROUGHOUT THIS TRIAL, HAVING ALL THESE TERRIBLE THINGS SAID ABOUT HIM; NO ONE BUT SAM HOWARD. HE'S RESPONSIBLE. HE IS THE MASTER OF HIS OWN FUTURE.

WHEN YOU WEIGH THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES AND FIND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES AND THUS YOU ARE CAPABLE AND ALLOWED TO CONSIDER THE DEATH PENALTY, THAT'S NOT YOUR FAULT. THAT'S NOT DOCTOR MONAHAN'S FAULT. IT'S NOT MR. HARMON'S FAULT OR MINE. IT'S SAM HOWARD'S FAULT AND ONLY SAM HOWARD'S. HE IS THE RESPONSIBLE PERSON. DON'T EVER FOR A MOMENT WALK INTO THAT DELIBERATION ROOM WITH A HEAVY BURDEN ON YOUR SHOULDERS THAT YOU ARE SOMEHOW CAUSING THE DEATH OF A HUMAN BEING. YOU ARE SIMPLY ANOTHER STEP IN THE PROCESS.

NOW, FOR THE FIRST TIME WE ARE ABLE TO SAY SOMETHING ABOUT REASONABLE DOUBT. THAT DOESN'T BENEFIT THE DEFENDANT. REASONABLE DOUBT IS A GREAT CONCEPT AND I LIKE IT. IT MAKES US PROVE A CASE TO THAT EXTENT, AND WE'VE DONE THAT. YOU HAVE FOUND THAT IN A MATTER OF HOURS, IN THE GUILT PHASE, THAT WE HAD PROVEN OUR CASE BEYOND A REASONABLE DOUBT, THAT SAM HOWARD ACTUALLY HAD SHOWN US, HE GAVE US ALL THE EVIDENCE WE HAD. WE DIDN'T GO OUT AND GET IT SOMEPLACE. THAT BURDEN WAS MET.

AS MR. HARMON EXPLAINED TO YOU IN THE OPENING ARGUMENT, OUR BURDEN IN THIS HEARING HAS EASILY BEEN MET, THAT THE AGGRAVATING CIRCUMSTANCES HAS BEEN SHOWN AND THAT THEY OUTWEIGH THE MITIGATING CIRCUMSTANCE. THAT REASONABLE DOUBT HAS BEEN USED THROUGHOUT THIS ENTIRE TRIAL TO BENEFIT SAM HOWARD. AND NOW I ASK YOU, LET THAT REASONABLE DOUBT BENEFIT SOCIETY. LET IT BENEFIT THE CITIZENS OF LAS VEGAS AND YOURSELVES AND YOUR FAMILY AND YOUR LOVED ONES, AS IT DID NOT

BENEFIT DOCTOR MONAHAN.

GO INTO YOUR DELIBERATION ROOM AND TALK ABOUT THIS CASE. AND THEN I ASK YOU, ON BEHALF OF THOSE SAME CITIZENS OF THE STATE OF NEVADA, TO COME BACK INTO THIS COURTROOM AND TELL US BEYOND A REASONABLE DOUBT THAT YOU WON'T STAND FOR THE POSSIBILITY OF ANY FUTURE VICTIM AT THE HANDS OF SAM HOWARD. THANK YOU.

THE COURT: COUNSEL, ANYTHING FURTHER TO COME BEFORE THE JURY BEFORE THIS MATTER IS SUBMITTED TO THEM?

MR. HARMON: NOT BY THE STATE, YOUR HONOR.

MR. FRANZEN: NO, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, THE MATTER NOW STANDS SUBMITTED TO YOU. AT THIS TIME YOU WILL GO WITH THE FOREMAN TO COMMENCE YOUR DELIBERATIONS. YOU ARE EXCUSED AND MAY LEAVE THE COURTROOM AT THIS TIME.

(WHEREUPON, AT THE HOUR OF 11:55 A.M., THE JURY LEFT THE COURTROOM AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE OF THEIR PRESENCE:)

THE COURT: COUNSEL, IS THERE ANYTHING TO COME BEFORE THE COURT OUTSIDE THE PRESENCE OF THE JURY?

MR. HARMON: NO, YOUR HONOR.

MR. FRANZEN: NO, SIR.

THE COURT: ALL RIGHT. WE WILL STAND IN RECESS.

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LAS VEGAS, NEVADA, WEDNESDAY, MAY 4, 1983, AT 4:07 P.M.

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(WHEREUPON, FROM 11:56 A.M. UNTIL 4:07 P.M., A RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: COUNSEL STIPULATE TO THE PRESENCE OF THE JURY?

MR. HARMON: THE STATE DOES, YOUR HONOR.

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: MR. FOREMAN, HAVE YOU REACHED YOUR VERDICT?

THE FOREMAN: YES, WE HAVE.

THE COURT: HAND IT TO THE BAILIFF, PLEASE.

ALL RIGHT. MR. FOREMAN, WOULD YOU READ THE SPECIAL VERDICT AND VERDICT, PLEASE.

THE FOREMAN: YES.

WE, THE JURY IN THE ABOVE-ENTITLED CASE, HAVING FOUND THE DEFENDANT, SAMUEL HOWARD, GUILTY OF MURDER IN THE FIRST DEGREE, DESIGNATE THAT THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH ARE CHECKED BELOW HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT.

THE MURDER WAS COMMITTED BY A DEFENDANT WHO WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF ANY ROBBERY.

WE, THE JURY, STATE THERE ARE NO MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES DESIGNATED.

WE, THE JURY, IN THE ABOVE-ENTITLED CASE, HAVING FOUND THE DEFENDANT, SAMUEL HOWARD, GUILTY OF MURDER IN THE FIRST DEGREE, IMPOSE A SENTENCE OF DEATH.

THE COURT: NOW HAND THE VERDICT TO THE BAILIFF.

MR. BAILIFF, WOULD YOU HAND THE VERDICT TO THE CLERK.

MISS CLERK, WOULD YOU READ BOTH OF THE VERDICTS AND THEN INQUIRE OF EACH OF THE JURORS IF THAT IS THEIR VERDICT.

THE CLERK: YES, SIR.

CASE NUMBER C53867, DEPARTMENT NUMBER FIVE.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA, PLAINTIFF, VERSUS SAMUEL HOWARD, DEFENDANT.

SPECIAL VERDICT.

WE, THE JURY, IN THE ABOVE-ENTITLED CASE, HAVING FOUND THE DEFENDANT, SAMUEL HOWARD, GUILTY OF MURDER IN THE FIRST DEGREE, DESIGNATE THAT THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH ARE CHECKED BELOW HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT.

THE MURDER WAS COMMITTED BY A DEFENDANT WHO WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON OF ANOTHER.

THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF ANY ROBBERY.

WE, THE JURY, STATE THERE ARE NO MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES SUFFICIENT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES DESIGNATED.

DATED AT LAS VEGAS, NEVADA, THIS 4TH DAY OF MAY, 1983. LEO GATES, FOREMAN.

LADIES AND GENTLEMEN OF THE JURY, IS THAT YOUR VERDICT AS READ?

(WHEREUPON, AFFIRMATIVE RESPONSE FROM JURY.)

THE COURT: YOU MAY PROCEED ON.

THE CLERK: YES, SIR.

CASE NUMBER C53867, DEPARTMENT NUMBER FIVE.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA, PLAINTIFF, VERSUS SAMUEL HOWARD, DEFENDANT.

VERDICT.

WE, THE JURY, IN THE ABOVE-ENTITLED CASE, HAVING FOUND THE DEFENDANT, SAMUEL HOWARD, GUILTY OF MURDER IN THE FIRST DEGREE, IMPOSE A SENTENCE OF DEATH.

DATED AT LAS VEGAS, NEVADA, THIS 4TH DAY OF MAY, 1983. LEO GATES, FOREMAN.

LADIES AND GENTLEMEN OF THE JURY, IS THAT YOUR VERDICT AS READ SO SAY --

(WHEREUPON, AFFIRMATIVE RESPONSE FROM JURY.)

THE COURT: DO EITHER OF COUNSEL DESIRE THAT THE JURY BE POLLED?

MR. HARMON: THE STATE DOES NOT, YOUR HONOR.

MR. FRANZEN: YES, YOUR HONOR.

THE COURT: POLL THE JURY.

THE CLERK: TERRI LEE SOUKUP, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER ONE, MS. SOUKUP: YES.

THE CLERK: SALLY BOURGEOIS BRINKMANN, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER THREE, MS. BRINKMANN: YES.

THE CLERK: THOMAS FRANCIS CAROLAN, III, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER FOUR, MR. CAROLAN: YES.

THE CLERK: ANGELINA PEREZ, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER FIVE, MS. PEREZ: YES.

THE CLERK: LARRY STEVEN WILLIAMS, JR., IS THAT YOUR VERDICT AS READ?

JUROR NUMBER SIX, MR. WILLIAMS: YES.

THE CLERK: CHARLENE MOCK JENSEN, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER SEVEN, MS. JENSEN: YES.

THE CLERK: MICHELLE A. PAPPAS, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER EIGHT, MS. PAPPAS: YES.

THE CLERK: BONNIE JEAN SNOUFFER, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER NINE, MS. SNOUFFER: YES.

THE CLERK: MARILYN CAPASSO, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER TEN, MS. CAPASSO: YES.

THE CLERK: ESTEBAN CRUZ NOVERO, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER ELEVEN, MR. NOVERO: YES.

THE CLERK: LEO ZACHARY GATES, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER TWELVE, MR. GATES: YES.

THE CLERK: JAMES KENNETH FRANCIS BRADLEY, IS THAT YOUR VERDICT AS READ?

JUROR NUMBER TWO, MR. BRADLEY: YES.

THE COURT: IS THERE ANYTHING FURTHER TO COME BEFORE THE COURT BEFORE THE COURT EXCUSES THEM AT THIS TIME?

MR. HARMON: NOT BY THE STATE, YOUR HONOR.

MR. FRANZEN: NO, YOUR HONOR.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, THE COURT WISHES TO THANK YOU FOR PERFORMING YOUR CIVIC AND YOUR PUBLIC DUTY AS YOU SAW FIT.

THIS HAS BEEN A RATHER LONG CASE, A VERY DIFFICULT CASE, AND A RATHER INVOLVED CASE. I WISH TO COMMEND YOU FOR YOUR PATIENCE AND YOUR DILIGENCE IN APPLYING YOURSELF TO YOUR PUBLIC AND CIVIC DUTY.

WHEN YOU LEAVE THE COURTROOM, YOU WILL UNDOUBTEDLY BE ASKED BY THE ATTORNEYS, OR THEIR REPRESENTATIVES, ABOUT THE CASE. UNDER THE CANNONS OF ETHICS, YOU MAY, IF YOU SO DESIRE, TALK TO THEM. YOU ARE NOT, HOWEVER, REQUIRED TO TALK TO THEM. IF YOU FEEL THAT FOR ANY REASON THAT THEY ARE UNDULY HARASSING YOU, PLEASE FEEL FREE TO CONTACT THE COURT AND WE CAN STOP THAT IF THAT SHOULD OCCUR. I DON'T EXPECT IT TO OCCUR, BUT SOMETIMES JURORS DO CALL.

SO ONCE AGAIN, THE COURT WISHES TO THANK YOU FOR PERFORMING YOUR CIVIC AND PUBLIC DUTY. YOU ARE NOW EXCUSED AND MAY LEAVE THE COURTROOM.

(WHEREUPON, THE JURY WAS EXCUSED AND LEFT THE COURTROOM AND THE FOLLOWING PROCEEDINGS

WERE HAD OUTSIDE OF THEIR PRESENCE:)

THE COURT: COUNSEL, APPROACH THE BENCH FOR JUST A MOMENT.

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: I WILL NEED A SENTENCING DATE ON THE TWO ROBBERIES AND ALSO SET THE DATE OF DEATH.

THE CLERK: DO YOU WANT THE SENTENCING DATE FOR FOUR WEEKS FROM TODAY?

THE COURT: WHAT DATE IS THAT?

THE CLERK: IT WOULD BE THE FIRST DAY OF JUNE.

THE COURT: WELL, SET THE SENTENCING AT 1:45 ON JUNE FIRST.

FURTHER THE ORDER WILL BE THAT THE DEPARTMENT OF PAROLE AND PROBATION WILL PREPARE A PRE-SENTENCE REPORT ON THE TWO ROBBERY CASES IN WHICH THE DEFENDANT WAS FOUND GUILTY. AND WE WILL ALSO TAKE CARE OF THE OTHER MATTERS AT THAT TIME.

IS THERE ANYTHING FURTHER TO COME BEFORE THE COURT AT THIS TIME?

MR. HARMON: COULD WE APPROACH THE BENCH AGAIN, YOUR HONOR?

(WHEREUPON, SIDE BAR CONFERENCE WAS HELD AT THE BENCH; NOT REPORTED. AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: WE WILL TAKE ABOUT A TEN MINUTE RECESS IN THE MATTER.

(WHEREUPON, FROM 4:18 P.M. UNTIL 4:34 P.M., A RECESS WAS HAD IN THE PROCEEDINGS, AT THE CONCLUSION OF WHICH THE FOLLOWING WAS HAD:)

THE COURT: COUNSEL, THE STATUTE WITH REGARDS TO THE IMPOSITION OF THE DEATH SENTENCE IS APPARENTLY COVERED BY N.R.S. 176.345, WHICH READS AS FOLLOWS:

> WHEN A JUDGMENT OF DEATH HAS BEEN PRONOUNCED, A CERTIFIED COPY OF THE ENTRY THEREOF IN THE MINUTES OF THE COURT SHALL BE FORTHWITH EXECUTED AND ATTESTED IN TRIPLICATE BY THE CLERK UNDER THE SEAL OF THE COURT. THERE SHALL BE ATTACHED TO THE TRIPLICATE COPIES A WARRANT SIGNED BY THE JUDGE, ATTESTED BY THE CLERK, UNDER THE SEAL OF THE COURT WHICH SHALL RECITE THE FACT OF CONVICTION AND JUDGMENT, AND APPOINT A WEEK WITHIN SUCH JUDGMENT IS TO BE EXECUTED, WHICH MUST NOT BE LESS THAN 60 DAYS NOR MORE THAN 90 DAYS FROM THE DATE OF THE JUDGMENT. IT MUST DIRECT THE SHERIFF TO DELIVER THE PERSON TO SUCH AUTHORIZED PRISON AS THE DIRECTOR OF THE DEPARTMENT OF PRISONS DESIGNATES TO RECEIVE THE PERSON FOR EXECUTION, SUCH PRISON TO BE DESIGNATED IN THE WARRANT.

I'M GOING TO SET THIS MATTER DOWN FOR THE IMPOSITION OF THE SENTENCE AND SETTING FORMALLY THE DATE OF SENTENCE OR DATE OF EXECUTION FOR FRIDAY, JUNE -- PARDON ME,

MAY 6TH, AT THE HOUR OF 10:00 O'CLOCK A.M.

MR. HARMON: THANK YOU, YOUR HONOR.

THE COURT: WE'LL BE IN RECESS IN THIS MATTER.

THE DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF TO BE HELD WITHOUT BAIL UNTIL FURTHER ORDER OF THIS COURT.

(WHEREUPON, AT THE HOUR OF 4:36 P.M. THE PROCEEDINGS CONCLUDED.)

(END OF PROCEEDINGS.)

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS

RENEE SILVAGGIO, C.S.R. NO. 122

Attachment F

(Minutes from Queens County, New York, Indictment No. 1227-78)

8000-118 - 1500 - 411077 (71) 135

At a Criminal Term of the Supreme Court, *held in and for Queens County at the Court House, Kew Gardens, Queens County, N. Y., on the* 13th *day of* July *19*79

PRESENT:

Honorable Vincent F. Naro

Justice of the Supreme Court.

Indictment No. 1227-78

THE PEOPLE OF THE STATE OF NEW YORK

vs.

Samuel Howard

On 7/10/79 Bench Warrant issued for defendant during jury selection.

On 7/13/79 defendant was found guilty in absentia by jury verdict of Robbery 1st degree & Aggravated Harassment.

MARKED FOR IDENTIFICATION
State's Proposed Exhibit 1

A TRUE EXTRACT FROM THE MINUTES. 4/26/83

John J. Durante
Clerk.

RPLY

STEVEN B. 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:	81C053867 / A-18-780434-W
	DEPT NO:	XVII

REPLY TO RESPONSE TO MOTION TO DISMISS

SIXTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: February 7, 2020
TIME OF HEARING: 10:00 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 Reply to Response to 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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/ / /

/ / /

POINTS AND AUTHORITIES

STATEMENT OF FACTS

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

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.
>
> Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his 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

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

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

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

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not 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

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

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

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

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry 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

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

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

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

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including 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.

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[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.

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

STATEMENT OF THE CASE

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

> On May 20, 1981 Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
>
> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
>
> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
>
> Howard's counsel requested a one-week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of 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 argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

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

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

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 felongy - 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. Remitittur 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 remitittur 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 was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

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

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

Howard proceeded to file a second Federal habeas corpus petition on 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.

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[4]During 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.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate 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.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order 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.

On December 8, 1993, Howard returned to federal court and filed a new 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 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 Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

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

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

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

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

On August 20, 2003, Howard filed his opposition to the State's motion 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

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

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

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

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

Petitioner challenged this Court's decision before the Nevada Supreme Court. Prior to ruling on this Court's fourth denial of habeas relief, the Nevada 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).

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

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

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

[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.

> March 17, 2017, and after entertaining argument, struck the Amended Fifth 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.
>
> On April 6, 2017, Petitioner filed a Motion to Amend or Supplement 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.
>
> Howard's Fifth Petition and Motion to Amend or Supplement came before this Court on the April 19, 2017, Chamber Calendar. On May 2, 2017, this Court issued a minute order denying the Fifth Petition and the Motion to 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.

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

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

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

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

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

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

ARGUMENT

Petitioner's believes his due diligence obligation begins and end with the filing date of the order invalidating his New York conviction. This is contrary to longstanding Nevada public policy and recently enacted legislation. Habeas litigants must always demonstrate that they have acted with due diligence. The failure to exercise due diligence is fatal to post-conviction relief in Nevada. As such Petitioner's decision to wait nearly four decades to challenge his New York conviction precludes habeas relief.

Initially, Petitioner's claims of actual innocence should be summarily denied since, even if this Court assumes that factual innocence has been established based on the invalidation of his New York conviction, he still has not identified a constitutional violation related to the New York conviction. Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861 (1995). Indeed, Petitioner's New York conviction was valid at the time of his sentence and thus he cannot establish that a constitutional violation existed to the time of sentencing. See, Clem v. State, 119 Nev. 615, 621-26, 81 P.3d 521, 526-29 (2003) (judicial interpretation of a statute after conviction such that Petitioner could not have been guilty of the deadly weapon enhancement does not amount to a constitutional violation for purposes of actual innocence since Petitioner was guilty under the law as it existed to the time of conviction).

Summary denial of Petitioner's actual innocence claim is additionally warranted by his failure to establish factual innocence as opposed to a legal defect in his New York conviction. Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). As such, Petitioner's actual

innocence claim must fail since he secured reversal of his New York conviction on an issue of legal sufficiency and not factual innocence.

Regardless, Petitioner's failure to demonstrate due diligence in challenging his New York conviction bars habeas relief. In Witter v. State, 135 Nev. __, __, 452 P.3d 406, 408 (2019), the Nevada Supreme Court addressed an Appellant contending that "because of the indeterminate restitution provision in the 1995 judgment, his conviction was not final until entry of the third amended judgment of conviction in 2017" and that as a consequence, "the direct appeal decided in 1996 and the subsequent postconviction proceedings were null and void for lack of jurisdiction and therefore he should be allowed to raise any issues stemming from the 1995 trial [.]" Instead, the Court concluded that Witter's appeal was "limited in scope to issues stemming from the amendment." Id. at __. 452 P.3d at 407. The Court gave two reasons for this holding. Id. The Court noted that the more important of those was that "Witter treated the 1995 judgment of conviction as final for more than two decades, litigating a direct appeal and various postconviction proceedings in state and federal court." Id.

In distinguishing its precedents overturning judgments of conviction containing indeterminate restitution amounts from Witter's situation, the Court noted that the defendants in those cases "raised the error regarding the indeterminate restitution provision during the first proceeding in which they challenged the validity of their judgments of conviction[.]" Id. at __, 453 P.3d at 409. Witter's failure to do the same implicated the compelling consideration of finality. Id. The Court pointed out that "[a] challenge to a conviction made years after the conviction is a burden on the parties and the courts because '[m]emories of the crime may diminish and become attenuated,' and the record may not be sufficiently preserved." Id. (quoting, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984)). Ultimately, "Witter treated the judgment of conviction as a final judgment. He is estopped from now arguing that the judgment was not final and that the subsequent proceedings were null and void for lack of jurisdiction." Id. at __, 453 P.3d at 410 (footnote omitted).

Witter's failure to exercise due diligence in challenging his judgment of conviction is indistinguishable from Petitioner's failure of diligence in attacking his New York conviction. Petitioner treated his New York conviction as final for nearly four decades. He filed petition after petition and appeal after appeal all treating his New York conviction as final. Just as in Witter, Petitioner should be estopped from only now alleging that his New York conviction is null and void.

The requirement of due diligence is fundamental in Nevada habeas law. Nevada's statutory laches provision requires a petitioner to demonstrate reasonable diligence in order to avoid a dismissal. NRS 34.800(1)(a) ("A petition may be dismissed if delay in the filing of the petition … [p]rejudices the respondent … in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred"). The time bar of NRS 34.726 may only be waived if a petitioner demonstrates that "the delay is not the fault of the petitioner[.]" NRS 34.726(1)(a). The bar against successive and abusive petitions may be waived upon a showing of "[g]ood cause for the failure to present the claim or for presenting the claim again[.]" NRS 34.810(3)(a). Notably, *the Nevada Legislature just last session extended the necessity of demonstrating due diligence to claims of factual innocence*. NRS 34.960(3)(a) ("… the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence").[9]

[9] Federal law appears to diverge from Nevada law on this point. Federal law does not preclude a claim of actual innocence for failing to exercise due diligence; instead, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing" and on the credibility of a claim. McQuiggin v. Perkins, 569 U.S. 383, 399, 133 S. Ct. 1924, 1935, 185 L. Ed. 2d 1019 (2013). However, McQuiggin is limited to federal post-conviction relief and does not apply to state habeas proceedings. Com. v. Brown, 2016 PA Super 148, 143 A.3d 418, 420–21 (2016) ("While McQuiggin represents a further development in federal habeas corpus law, as was the case in Saunders, this change in federal law is irrelevant to the time restrictions of our PCRA"); State v. Edwards, 164 So.3d 823, 823-24 (La. 2015) ("McQuiggin does not purport to govern state post-conviction proceedings conducted under state law"); Wayne v. State, 866 N.W.2d 917, 919 (Minn. 2015) ("McQuiggin's holding specifically applies to federal habeas petitions and … does not apply to a postconviction motion that is a creature of state statute … and is governed by its own statutory time bar"); Ex parte Smith, No. 03-17-00628-CR, 2018 WL 2347012, at *3 (Tex. App. May 24, 2018), petition for discretionary review refused (July 25, 2018) ("Smith relies on … McQuiggin … [but] failed to show that the law on federal habeas claims applies to his habeas claim under Texas law"). Further, the Nevada Supreme Court has declined to import other similar equitable remedies from federal habeas law. Brown v. McDaniel, 130 Nev. 565, 569-76, 331 P.3d 867, 870-75 (2014). Regardless, even if applicable McQuiggin would not assist

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

Alternatively, if this Court is not willing to dismiss Petitioner's sixth attempt at securing habeas relief outright, it should order an evidentiary hearing. NRS 34.770(1). The hearing should be limited to determining whether Petitioner exercised due diligence in pursuing the invalidation of his New York conviction. Further, Respondent should be permitted discovery related to Petitioner's due diligence in challenging his New York conviction. NRS 34.780(2).

CONCLUSION

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

/ / /

/ / /

Petitioner since it was published decades after Petitioner's conviction and there is no indication that the case applies retroactively. See, Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989); Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

DATED this 19th day of December, 2019.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
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BY */s/ Jonathan E. VanBoskerck*

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Reply to Response to Motion to Dismiss Sixth Petition for Writ of Habeas Corpus Post-Conviction, was made this 19th day of December, 2019, by Electronic Filing to:

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JEV//ed

A-18-780434-W

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 04, 2020**

A-18-780434-W Samuel Howard, Plaintiff(s)
vs.
William Gittere, Defendant(s)

May 04, 2020 **3:00 AM** **Minute Order**

HEARD BY: Villani, Michael **COURTROOM:** Chambers

COURT CLERK: Shannon Reid

JOURNAL ENTRIES

- Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) was scheduled for hearting on April 3, 2020. Pursuant to Administrative Order 20-01, the Court took the matter under advisement to decide on the pleadings. The Court renders its decision as follows.

Petitioner has failed to establish sufficient good cause to overcome the procedural bars to his 6th Petition. See, NRS 34.726 and 34.800, 34.810. Also, see Order of Affirmance filed July 30, 2014. Petitioner has failed to justify why he waited so long to challenge the New York conviction. The time bars in this matter did not commence when the New York conviction was overturned for technical reasons (no finding of actual innocence or constitutional infirmity) but when Petitioner could have acted with due diligence and sought to overturn the conviction. When Petitioner absconded during his New York trial in 1983 he knew he had not been sentenced and could have attacked the New York conviction when he was sentenced in the present case.

The Court adopts the State's procedural history.

Therefore, Court ORDERED, Petition DENIED. State to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and to distribute a filed copy to all parties involved pursuant to EDCR 7.21. COURT FURTHER ORDERED, Status check SET regarding filing of the order. That date to be vacated if the Court receives the order sooner.

NDC

05/26/2020 8:30 AM STATUS CHECK: ORDER

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve /SR 05/04/2020