

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

SAMUEL HOWARD,

Appellant,

v.

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

Respondents.

Supreme Court Case Nos. 81278,  
81279

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

**JOINT APPENDIX**

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

**VOLUME 2 of 3**

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## **CERTIFICATE OF SERVICE**

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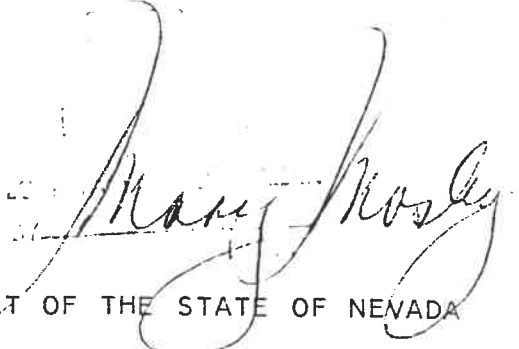
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# EXHIBIT B

# EXHIBIT B

1 CASE NO. C53867  
2 DEPARTMENT NO. V  
3 DOCKET H  
4  
5



6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF CLARK  
8

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

15 REPORTER'S TRANSCRIPT OF  
16 PENALTY HEARING  
17

18 BEFORE THE HONORABLE JOHN F. MENDOZA, DISTRICT JUDGE  
19 MONDAY, MAY 2, 1983, AT 11:10 A.M.  
20

21 APPEARANCES:

22 FOR THE STATE: MELVIN T. HARMON, ESQUIRE  
23 DANIEL M. SEATON, ESQUIRE  
24 200 SOUTH THIRD STREET  
LAS VEGAS, NV 89101  
DEPUTY DISTRICT ATTORNEYS

25 FOR THE DEFENDANT: MARCUS D. COOPER, ESQUIRE  
26 GEORGE E. FRANZEN, ESQUIRE  
27 309 SOUTH THIRD STREET  
LAS VEGAS, NV 89101  
DEPUTY PUBLIC DEFENDERS

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

32 VOLUME X

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I N D E X

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STATE'S WITNESSES:

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
1. LYNN KENNINGTON	1431	1440	1440
2. DOROTHY WEISBAND	1464		
3. JOHN F. MCNICHOLAS	1481 1491	1488 1492	1492

DEFENDANT'S WITNESSES:

1. SAMUEL HOWARD	1512	1524
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E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ADMITTED</u>
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1 LAS VEGAS, NEVADA, MONDAY, MAY 2, 1983, AT 11:10 A.M.

2 \* \* \* \* \*

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

5 MR. HARMON: THE STATE DOES, YOUR HONOR.

6 MR. COOPER: YES, YOUR HONOR.

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

12 SO I AM GOING TO CONTINUE THIS UNTIL  
13 1:45 THIS AFTERNOON. SO I WILL HAVE TO ADMONISH YOU AT THIS  
14 TIME AND WE WILL BE PROCEEDING SOME TIME AFTER 1:45, BECAUSE  
15 I'M ASKING THE ATTORNEYS TO COME BACK AND ARGUE AT THAT TIME.

16 DURING THIS RECESS YOU  
17 ARE ADMONISHED NOT TO CONVERSE  
18 AMONG YOURSELVES OR WITH ANYONE  
19 ELSE ON ANY SUBJECT CONNECTED  
20 WITH THIS TRIAL, OR READ, WATCH  
21 OR LISTEN TO ANY REPORT OF OR  
22 COMMENTARY ON THIS TRIAL WITH  
23 ANY PERSON CONNECTED WITH THIS  
24 TRIAL BY ANY MEDIUM OF INFORMATION,  
25 INCLUDING WITHOUT LIMITATION, NEWS-  
26 PAPER, TELEVISION OR RADIO OR FORM  
27 OR EXPRESS ANY OPINION ON ANY  
28 SUBJECT CONNECTED WITH THIS TRIAL  
29 UNTIL THE CASE IS FINALLY  
30 SUBMITTED TO YOU.

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

-1413-

2161

1 BACK AT 1:45.

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

3 THE COURT: YES.

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

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

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

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

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

16 THE COURT: WE WILL BE IN RECESS.

17 (WHEREUPON, FROM 11:12 A.M.  
18 UNTIL 2:00 P.M., THE NOON  
19 RECESS WAS HAD IN THE PROCEED-  
20 INGS, AT THE CONCLUSION OF  
21 WHICH THE FOLLOWING PROCEED-  
22 INGS WERE HAD OUTSIDE THE  
23 PRESENCE OF THE JURY:)

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

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

32 I DID, OVER THE WEEK INSTRUCT MY LAW



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

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

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

18 COUNSEL?

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

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

32 WE BELIEVE THAT SINCE THERE HAS BEEN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 DEFENDANT HOWARD: EXCUSE ME, YOUR HONOR.

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

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

11 THE COURT: ALL RIGHT. YOU ARE AWARE OF THE  
12 FACT THAT THOSE MITIGATING FACTORS MAY POSSIBLY BE OF ASSIS-  
13 TANCE TO YOU IN THIS MATTER?

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

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

17 DEFENDANT HOWARD: EXACTLY.

18 THE COURT: THANK YOU. YOU MAY BE SEATED.

19 THE STATE.

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

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

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

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

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

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

20 BUT THE MOTION IS UNTIMELY. MR.  
21 HOWARD HAS BEEN ABLY REPRESENTED BY COUNSEL UP TO THIS POINT,  
22 AND WE MOST CERTAINLY THINK THAT THEY SHOULD CONTINUE TO  
23 REPRESENT HIM IN THE FRUIT OF THE REMAINDER OF THESE PROCEED-  
24 INGS.

25 THE COURT: ANYTHING FURTHER, COUNSEL?

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

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

32 THE COURT HAS HAD AN OPPORTUNITY TO SIT

1 AND OBSERVE COUNSEL AND THE DEFENDANT THROUGHOUT THESE PRO-  
2 CEEDINGS, AND I THINK THAT THE DEFENDANT HAS CLEARLY SHOWN  
3 THAT HIS STATE OF MIND IS CLEAR, ELUSIVE, THAT HE IS INTELLI-  
4 GENT, FOR I HEARD HIM TESTIFY AND I HEARD HIM STATE HIS  
5 POSITIONS ON A NUMBER OF ISSUES THROUGHOUT AND I HAVE FOUND  
6 THAT HE IS COMPETENT TO STAND TRIAL AND TO ASSIST IN HIS  
7 DEFENSE. IT IS OBVIOUS TO ME THAT HE IS AND HAS BEEN COMPETENT.  
8 HE HAS, ON MANY OCCASIONS, CONFERRED WITH COUNSEL AND HE HAS  
9 RECEIVED COMPETENT AND ABLE REPRESENTATION IN THESE PROCEEDINGS.

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

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

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

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

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

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

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

31 THE COURT: ALL RIGHT.

32 MR. FRANZEN: AS STATED PREVIOUSLY IN CHAMBERS

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

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

10 WE BELIEVE THAT BY -- WELL, FIRST OFF,  
11 THE JUROR WAS UNDER THE ADMONITION OF THE COURT, UNDER N.R.S. .  
12 17.141, NOT TO DISCUSS THE CASE. THE DISTRICT ATTORNEY WAS  
13 PRESENT, AS WELL AS YOURSELF.

14 UNDER STATE V. LEWIS, 59 NEVADA 262,  
15 275, THAT STATUTE AND THE WORDS OF THAT CASE SHOULD HAVE BEEN  
16 AND ALWAYS OUGHT TO BE STRICTLY COMPLIED WITH. IT HAS NOT BEEN  
17 COMPLIED WITH BY THE DISTRICT ATTORNEY DISCUSSING WITH THE JURY  
18 COMMISSIONER, NOR HAS IT BEEN COMPLIED WITH BY THE JUROR DIS-  
19 CUSSING IT WITH THE JURY COMMISSIONER OR WITH ANYONE ELSE AS IT  
20 DEVELOPS.

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

32 WE BELIEVE THAT A HEARING OF THIS JUROR



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

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

8 MR. FRANZEN: WHY SHOULDN'T THEY?

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

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

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

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

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

26 THE COURT SHALL NOT PERMIT  
27 ANY COMMUNICATION TO BE MADE TO  
28 THEM, MEANING THE JURORS, OR MAKE  
29 ANY HIMSELF, UNLESS BY ORDER OF  
30 THE COURT, EXCEPT TO ASK THEM IF  
31 THEY HAVE AGREED UPON THEIR  
32 VERDICT.

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

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

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

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

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

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

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

31                  MR. FRANZEN: OKAY. CLEARLY, YOUR HONOR, THE  
32                  ..

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

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

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

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

11 MR. FRANZEN: YES, YOUR HONOR.

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

16 THE COURT: THE STATE.

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

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

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

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

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

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

9 AT WHICH TIME I SAID, "YOU MUST SEE  
10 THE JURY COMMISSIONER THEN BECAUSE I CAN'T HAVE ANY CONVERSA-  
11 TION WITH YOU."

12 THERE WAS NO DISCUSSION ABOUT THE CASE.  
13 THERE'S NO INDICATION THAT THE DEFENSE IS SUGGESTING THAT SOME-  
14 HOW AN INDICATION HAS BEEN GIVEN OF A NUMERICAL IN TERMS OF HOW  
15 THIS JUROR STANDS. THAT'S PREPOSTEROUS. THERE WAS NO DISCUS-  
16 SION ON JURY DELIBERATION, NO DISCUSSION ABOUT THIS CASE.

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

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

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

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

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

11 THE COURT: ANYTHING FURTHER?

12 MR. FRANZEN: YES, YOUR HONOR.

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

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

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

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

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

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

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

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

24 THE COURT: ALL RIGHT.

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

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

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

11 NOW, DOES ANYONE FIND ANY PROBLEM WITH  
12 THAT APPROACH?

13 MR. HARMON: THE STATE HAS NO PROBLEM.

14 THE COURT: COUNSEL?

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

17 THE COURT: WHAT?

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

20 THE COURT: YES. IT WILL BE.

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

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

26 MR. FRANZEN: VERY WELL.

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

32 COME FORWARD.

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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.

..  
..



1 DIRECT EXAMINATION

2  
3 BY MR. FRANZEN:

4  
5 Q IS IT MISS KENNINGTON?

6 A MRS.

7 Q MRS. KENNINGTON?

8 A YES.

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

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

14 Q WHEN DID YOU NEXT SEE HER?

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

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

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

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

26 A NO. ABSOLUTELY NOT.

27 Q (CONTINUING) -- SHE WAS COMING?

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

1 TO YOU.

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

4 A SUSAN GRIFFIN.

5 Q DID SHE RELATE TO YOU WHAT THE PROBLEM WAS?

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

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

11 A NO.

12 Q LET ME FINISH THE QUESTION.

13 A OH. SORRY.

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

17 A I RECEIVED NO COMMUNICATION FROM THE  
18 DISTRICT ATTORNEYS OFFICE.

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

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

24 Q BUT DID SHE EVER EXPLAIN WHO SENT HER?

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

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

1 A NO.

2 Q AT THE DISTRICT ATTORNEYS OFFICE?

3 A NO. I THINK TO THE BEST OF MY RECOLLECTION

4 SHE SAID THE DISTRICT ATTORNEYS OFFICE.

5 Q AT THAT TIME WERE YOU AWARE THAT THE -- A

6 GUILTY VERDICT HAD COME BACK ON THE TRIAL PRESENTLY BEFORE

7 JUDGE MENDOZA INVOLVING THAT JURY?

8 A THAT'S REALLY HARD TO ANSWER. I KNEW THAT

9 THEY WERE OUT DELIBERATING, AND I HAD CHECKED. I KNEW THAT THEY

10 HAD BEEN OUT DELIBERATING, YES; BUT I, NO, I CAN'T HONESTLY SAY

11 I KNEW. WE HAD NINE TRIALS THAT WEEK.

12 Q WHAT DID YOU ADVISE HER REGARDING THE

13 PENALTY HEARING, IF ANYTHING?

14 A OKAY. WHEN SHE -- SHE CAME INTO SEE ME

15 AND SHE SAID SHE HAD A PROBLEM, THE FIRST THING I DID WAS

16 ADMONISH HER. I SAID, PLEASE DO NOT DISCUSS ANYTHING.

17 Q WHAT DID YOU --

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

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

20 WHAT DID YOU TELL HER, IF ANYTHING,

21 ABOUT THE PENALTY PHASE?

22 A I DON'T REALLY UNDERSTAND YOUR QUESTION.

23 Q DID YOU TELL HER HOW THE PENALTY PHASE

24 WORKS OR DID YOU TELL HER --

25 A OH, ABSOLUTELY NOT.

26 Q (CONTINUING) -- ADDITIONAL EVIDENCE WOULD

27 COME IN?

28 A ABSOLUTE- -- WELL, I DID MAKE THE STATE-

29 MENT -- OKAY. WE TALKED A LITTLE BIT ABOUT IT AND I SAID, I

30 MADE THE STATEMENT TO HER, I SAID, ARE YOU AWARE OF THE FACT

31 THAT THERE WILL BE OTHER EVIDENCE PRESENTED TO YOU? AND THAT'S

32 ALL I SAID.

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

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

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

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

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

17 Q OKAY. LET ME ASK THE QUESTION AGAIN.

18 A OKAY.

19 Q DID SHE ASK TO BE EXCUSED?

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

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

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

32 Q DID YOU ADVISE HER OF THE INCONVENIENCE OF

1 A MISTRIAL?

2 A I DON'T THINK SO.

3 Q OR ANYTHING ABOUT --

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

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

7 A HEAVENS NO.

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

10 A NO, I DIDN'T.

11 Q SHE SAID SHE WANTED TO AVOID A MISTRIAL?

12 A THAT'S RIGHT.

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

15 A YES.

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

19 A NO.

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

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

28 Q BUT IT WOULD BE EASIER TO RETURN A VERDICT  
29 --

30 A I DIDN'T SAY "EASIER".

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

1                   A        OKAY.

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

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

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

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

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

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

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

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

26                  A        OKAY. I'M SORRY.

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

30                  A        YES.

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

1 TELL HER THAT THERE WOULD BE ADDITIONAL EVIDENCE?

2 A YES.

3 Q AND THAT IT WOULD TAKE A UNANIMOUS VOTE?

4 A YES. I SAID THAT.

5 Q AND THAT YOU WISHED TO AVOID A MISTRIAL?

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

8 Q AFTER THE CONVERSATION WITH JUROR  
9 CAPASSO --

10 A UH-HUH.

11 Q (CONTINUING) -- WHAT DID YOU DO?

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

15 I WAS TOLD -- I CALLED THE CLERK'S  
16 OFFICE, FOR ROBERTA. SHE WAS ON VACATION. FINALLY I CALLED  
17 DEPARTMENT SIX, AND I SAID, IF YOU SEE THE LAW CLERK FROM  
18 DEPARTMENT FIVE, WILL YOU HAVE HIM CALL ME. HE CALLED ME ABOUT  
19 1:30 THAT DAY.

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

22 A NO.

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

25 A NO.

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

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

30 THEN THE NEXT MORNING I TALKED TO  
31 AGAIN HIS LAW CLERK AND WE HAD NOT BEEN ABLE TO GET THE INFOR-  
32 MATION TO JUDGE MENDOZA.

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

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

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

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

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

13 Q WAIT A MINUTE. WAIT A MINUTE. WAIT A  
14 MINUTE.

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

17 A OKAY.

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

22 A I -- I PERSONALLY? NO.

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

26 A NO.

27 Q IN YOUR CONVERSATIONS WITH JUROR CAPASSO,  
28 DID SHE EVER MENTION WHETHER SHE HAD A CONVERSATION OR DISCUS-  
29 SION REGARDING THE CASE WITH ANYONE ELSE?

30 A NO.

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



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

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

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

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

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

12 A NO, I DON'T.

13 Q WOULD YOU LIKE TO SEE IT?

14 A THANK YOU, YOUR HONOR.

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

17 A UH-HUH.

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

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

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

25 A NO, SIR. I DID NOT.

26 MR. FRANZEN: NOTHING FURTHER, YOUR HONOR.

27 THE COURT: THE STATE.

28 MR. HARMON: VERY BRIEFLY, YOUR HONOR.

29 MAY I APPROACH THE WITNESS, YOUR HONOR?

30 THE COURT: YOU MAY.

31 ..

32 ..

1 CROSS EXAMINATION

2  
3 BY MR. HARMON:

4  
5 Q IS IT LYNN KENNINGTON, FOR THE RECORD?

6 A YES.

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

9 A UH-HUH.

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

12 A YES, IT IS.

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

15 A YES.

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

18 A YES, IT DOES.

19 MR. HARMON: THANK YOU.

20 WE HAVE NOTHING FURTHER, YOUR HONOR.

21  
22 REDIRECT EXAMINATION

23  
24 BY MR. FRANZEN:

25  
26 Q MA'AM, WHAT CAUSED YOU TO MAKE THE STATE-  
27 MENT --

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

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

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

1 HE HAD DISCUSSED THE MATTER WITH JUDGE MENDOZA BY PHONE, THAT  
2 JUDGE MENDOZA WANTED MY STATEMENT ON HIS DESK BY SUNDAY MORNING.  
3 I CAME TO THE COURTHOUSE ON SATURDAY AND PREPARED IT.  
4

5 BY MR. FRANZEN:

6  
7 Q SO APRIL 30TH WOULD BE THE SATURDAY  
8 FOLLOWING THE PHONE CALL?

9 A YES, SIR.

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

11 MR. HARMON: NOTHING FURTHER, YOUR HONOR.

12 THE COURT: YOU'RE EXCUSED.

13 THE WITNESS: THANK YOU, JUDGE.

14 (WHEREUPON, THE WITNESS WAS  
15 EXCUSED.)

16 THE COURT: ANY FURTHER WITNESSES?

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

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

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

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

28 MR. FRANZEN: VERY WELL, YOUR HONOR.

29 COULD THIS BE MARKED AS AN EXHIBIT, YOUR  
30 HONOR?

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

1 MR. HARMON: THANK YOU.

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

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

9 I'VE ALREADY TRIED TO ANSWER THAT  
10 QUESTION. I'LL REPEAT IT. SHE SAID SHE HAD A PROBLEM. SHE  
11 SAID THAT IT COULDN'T WAIT UNTIL NEXT MONDAY. SHE INDICATED SHE  
12 TRIED TO GET AHOLD OF THE COURT PERSONNEL AND NO ONE WAS AVAIL-  
13 ABLE.

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

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

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

26 THE COURT: YOU'RE WRITING ONE MORE?

27 IS THIS GOING TO BE YOUR LAST QUESTION?

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

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

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

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

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

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

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

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

16 MR. FRANZEN: NO, SIR.

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

20 WE'LL BE IN RECESS FOR ABOUT TEN MINUTES.

21 (WHEREUPON, FROM 3:00 P.M.

22 UNTIL 3:20 P.M., A RECESS WAS

23 HAD IN THE PROCEEDINGS, AT

24 THE CONCLUSION OF WHICH THE

25 FOLLOWING WAS HAD OUTSIDE THE

26 PRESENCE OF THE JURY:)

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

29 JUROR NUMBER TEN, MS. CAPASSO: CAPASSO.

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

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

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

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

13 THE COURT: THE DATE SET FOR THE HEARING?

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

15 THE COURT: OKAY.

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

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

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

21 JUROR NUMBER TEN, MS. CAPASSO: EXCUSE ME.

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

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

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

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

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

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

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

1 KNOW WHO HE WAS.

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

3 JUROR NUMBER TEN, MS. CAPASSO: YES.

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

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

7 THE COURT: THEN WHAT DID YOU DO?

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

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

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

18 THE COURT: WHAT SPECIFICALLY DID YOU TELL HER?

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

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

22 THE COURT: WHAT DID SHE RESPOND TO YOU?

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

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

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

32 JUROR NUMBER TEN, MS. CAPASSO: YES.

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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.

..  
..  
..



1 (WHEREUPON, SIDE BAR CONFERENCE  
2 WAS HELD AT THE BENCH; NOT  
3 REPORTED. AT THE CONCLUSION OF  
4 WHICH THE FOLLOWING WAS HAD:)  
5 THE COURT: YOU HEARD THE THREE POSSIBLE PUNISH-  
6 MENTS FOR MURDER IN THE FIRST DEGREE, DID YOU NOT?  
7 JUROR NUMBER TEN, MS. CAPASSO: UH-HUH.  
8 THE COURT: YOU WILL HAVE TO SPEAK UP.  
9 JUROR NUMBER TEN, MS. CAPASSO: YES.  
10 THE COURT: CAN YOU CONSIDER THEM EQUALLY AT  
11 THIS TIME?  
12 JUROR NUMBER TEN, MS. CAPASSO: I CAN CONSIDER  
13 THEM BUT I DON'T PARTICULARLY WANT TO IMPOSE THEM.  
14 THE COURT: YOUR ANSWER TO THAT QUESTION WOULD  
15 BE --  
16 JUROR NUMBER TEN, MS. CAPASSO: WHOA (INDICATING).  
17 YES.  
18 THE COURT: IS THERE ANYTHING IN THE DISCUSSION  
19 THAT YOU HAD WITH THE JURY COMMISSIONER THAT WOULD CAUSE YOU TO  
20 CHANGE YOUR FEELING WITH REGARD TO THOSE QUESTIONS THAT I'VE  
21 PREVIOUSLY ASKED?  
22 JUROR NUMBER TEN, MS. CAPASSO: IN REGARDS TO  
23 THOSE QUESTIONS?  
24 THE COURT: YES.  
25 JUROR NUMBER TEN, MS. CAPASSO: NO.  
26 THE COURT: OR IN REGARDS TO ANY QUESTION?  
27 JUROR NUMBER TEN, MS. CAPASSO: NO.  
28 THE COURT: ALL RIGHT.  
29 THE STATE?  
30 MR. HARMON: NOTHING.  
31 THE COURT: DEFENSE?  
32 MR. FRANZEN: NOTHING, YOUR HONOR.

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

3 JUROR NUMBER TEN, MS. CAPASSO: OKAY.

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

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

9 MR. FRANZEN: NO, YOUR HONOR, NOT TO MY KNOW-  
10 LEDGE.

11 THE COURT: THE STATE?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 THE COURT: ALL RIGHT.

23 MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUM-  
24 STANCES LISTED IN THE STATE'S NOTICE AND SUPPLEMENT.

25 THE COURT: COUNSEL.

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

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

6 GOING TO THE SPECIFIC -- STRIKE THAT.

7 ONE OTHER ASPECT OF REQUIRING A STRICT  
8 INTERPRETATION OF THE STATUTES ARE OUR NEVADA CASES INTERPRET-  
9 ING THE DEATH PENALTY STATUTE AND REQUIRING A STRICT APPLICA-  
10 TION: SMITH V. STATE; AND THEN YET ANOTHER ASPECT OF THIS SAME  
11 PROBLEM REQUIRED STRICT APPLICATION IS THE WELL KNOWN RULE OF  
12 CONSTRUING PENAL STATUTES STRICTLY AGAINST THE STATE AND IN  
13 FAVOR OF THE ACCUSED WITH DOUBTS AS TO ITS APPLICABILITY BEING  
14 GIVEN TO THE DEFENDANT.

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

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

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

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

1 STORE. BUT PERHAPS --

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

5 THE COURT: IT'S ALREADY IN?

6 MR. HARMON: YES.

7 THE COURT: AND HE HAS SO ADMITTED?

8 MR. HARMON: RIGHT.

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

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

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

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

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

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

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

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

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

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

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

24 THE REASON FOR THAT, AND I'LL JUST BRIEFLY  
25 ELUDE TO IT HERE BECAUSE IT IS COUNSEL'S ARGUMENT AT THIS TIME,  
26 BUT OUR REASON FOR THAT IS BECAUSE THE STATUTE 175.554 CAUSES  
27 THE STATE TO HAVE THE BURDEN OF PROVING THESE AGGRAVATING CIR-  
28 CUMSTANCES BEYOND A REASONABLE DOUBT. AND IN ADDITION TO THAT,  
29 THAT PARTICULAR AGGRAVATING CIRCUMSTANCE HAS TO DO WITH THE  
30 USE OF FORCE OR VIOLENCE. AND THE MERE RECITATION OF WHAT THE  
31 CONVICTION WAS FOR IS NOT, IN THE STATE'S MIND, ADEQUATE TO  
32 COMPLY WITH THAT BURDEN OF PROOF.

1 THE COURT: ALL RIGHT.

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

7 THE COURT: DO YOU HAVE WITNESSES?

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

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

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

22 THE COURT: YOU MERELY INTEND TO ARGUE?

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

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

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

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

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



1 THE COURT: AND WHAT SECTION ARE THE FIRST TWO?

2 MR. SEATON: SUBSECTION.

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

6 THE COURT: ALL RIGHT. COUNSEL, PROCEED.

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

10 THE COURT: ALL RIGHT.

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

16 THE COURT: A NEW TRIAL?

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

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

29 THE COURT: DOESN'T ONE JUST MERELY GO TO CORROB-  
30 ORATING THE OTHER?

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

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

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

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

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

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

22 THANK YOU, YOUR HONOR.

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

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

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

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

4 THE MURDER WAS COMMITTED  
5 BY A PERSON WHO WAS PREVIOUSLY  
6 CONVICTED OF ANOTHER MURDER OR  
7 A FELONY, AND THIS IS THE IMPOR-  
8 TANT LANGUAGE, INVOLVING USE OR  
9 THREAT OF VIOLENCE TO THE PERSON  
10 OF ANOTHER.

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

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

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

27 MR. SEATON: COURT'S INDULGENCE.

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

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

32 MR. SEATON: YES. THE AGGRAVATING CIRCUMSTANCES

1 ARE ENUMERATED IN THAT PARTICULAR DOCUMENT.

2 THE COURT: ALL RIGHT. THE DATE AGAIN?

3 MR. SEATON: JANUARY 7TH, 1983.

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

7 THE COURT: ALL RIGHT.

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

10 THE COURT: I HAVE THAT HERE. PROCEED.

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

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

15 THE COURT: GOOD. DO IT.

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

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

21 DOES THE COURT WISH ME TO PROCEED?

22 THE COURT: PROCEED.

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

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

1 MR. SEATON: YOUR HONOR?  
2 THE COURT: I DON'T HAVE TO GET INTO THAT.  
3 MR. SEATON: THANK YOU.  
4 THEN THE STATE WOULD HAVE NOTHING FURTHER  
5 TO ADD.  
6 MR. FRANZEN: SUBMITTED, YOUR HONOR.  
7 THE COURT: ALL RIGHT.  
8 YOUR MOTION TO PROHIBIT THE USE OF  
9 ALLEGED AGGRAVATING CIRCUMSTANCES IS DENIED.  
10 IT DOES APPEAR THAT THE STATE IS  
11 ENTITLED TO BRING FORTH CIRCUMSTANCES IN BOTH TWO AND FOUR,  
12 SUBSECTIONS TWO AND FOUR OF 175.554 -- PARDON ME. THAT WOULD  
13 NOT BE THE STATUTE. THE STATUTE OF AGGRAVATION, YOU GAVE ME  
14 THE WRONG CITATION, COUNSEL.  
15 WHAT IS THE STATUTE OF AGGRAVATION  
16 NUMBER?  
17 MR. FRANZEN: IT'S 200.020, I BELIEVE, YOUR  
18 HONOR.  
19 THE COURT: 200.020?  
20 MR. SEATON: IT'S .033, YOUR HONOR.  
21 MR. HARMON: IT'S .033.  
22 THE COURT: SUBSECTION TWO SAYS THAT:  
23 MURDER WAS COMMITTED BY A  
24 PERSON WHO WAS PREVIOUSLY CON-  
25 VICTED OF ANOTHER MURDER OR A  
26 FELONY INVOLVING THE USE OR  
27 THREAT OF VIOLENCE TO THE  
28 PERSON OF ANOTHER ...  
29 IT WOULD APPEAR THAT THIS EVIDENCE IS  
30 SUPPLEMENTAL AND SUPPLEMENTARY TO THE ADMISSION OF THE CONVIC-  
31 TION IN SAN BERNARDINO.  
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... 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 CON-  
VICTION. IS THAT WHAT YOU'RE GOING TO USE, OR AS AN EXEM-  
PLIFIED 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.

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

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

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

10 THE COURT: YES, COUNSEL.

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

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

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

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

23 MR. FRANZEN: THANK YOU, YOUR HONOR.

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

27 MR. HARMON: THANK YOU.

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

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

3 MR. HARMON: THE STATE DOES, YOUR HONOR.

4 MR. FRANZEN: YES, YOUR HONOR.

5 THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE.

6 (WHEREUPON, SIDE BAR CONFERENCE

7 WAS HELD AT THE BENCH; NOT

8 REPORTED. AT THE CONCLUSION

9 OF WHICH THE FOLLOWING WAS HAD:)

10 THE COURT: YOU MAY PROCEED, COUNSEL.

11 MR. HARMON: THANK YOU, YOUR HONOR.

12  
13 (OPENING STATEMENT)

14 BY MR. HARMON:

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

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

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

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

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



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

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

13 THE STATE OF NEVADA ALSO INTENDS TO  
14 OFFER, IN CONNECTION WITH THIS SAME AGGRAVATING CIRCUMSTANCE,  
15 EVIDENCE TO SHOW THAT IN SAN BERNARDINO, CALIFORNIA, ON MARCH 29,  
16 1980, THE DEFENDANT ALSO COMMITTED ROBBERY BY USE OF A WEAPON.  
17 THE VICTIM WILL BE IDENTIFIED AS JAMES DAVID HILYER, H-I-L-Y-  
18 E-R. THE EVIDENCE WOULD SHOW IN THAT CASE THAT ON OR ABOUT  
19 MAY THE 27TH, 1982, THE DEFENDANT WAS CONVICTED OF THE OFFENSE  
20 OF ROBBERY WITH USE OF A WEAPON. AND THE STATE OF NEVADA WILL  
21 OFFER THE TESTIMONY OF SANDEE LOFGREN, L-O-F-G-R-E-N, A POLICE  
22 OFFICER WITH THE SAN BERNARDINO POLICE DEPARTMENT; AND PERHAPS  
23 EVIDENCE FROM ANOTHER OFFICER; BOTH PERSONS BEING INVOLVED IN  
24 THE INVESTIGATION OF THAT CASE.

25 ADDITIONALLY, THERE WILL BE DOCUMEN-  
26 TARY EVIDENCE OFFERED TO ESTABLISH THE COMMISSION OF THESE TWO  
27 PRIOR FELONIES OF VIOLENCE BY THE DEFENDANT MR. HOWARD.

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

1 IN THE COMMISSION OF A ROBBERY.

2 LADIES AND GENTLEMEN, THOSE ARE THE

3 AREAS THAT YOU WILL BE CONSIDERING IN THIS PHASE OF THE PRO-

4 CEEDINGS IN CONNECTION WITH YOUR DECISION TO IMPOSE THE

5 APPROPRIATE PUNISHMENT. THANK YOU.

6 THE COURT: DOES COUNSEL DESIRE TO MAKE ANY

7 STATEMENT TO THE COURT AT THIS TIME?

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

9 THE COURT: CALL YOUR FIRST WITNESS.

10 MR. SEATON: DOROTHY WEISBAND.

11 THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

12

13 WHEREUPON,

14

15 DOROTHY WEISBAND,

16

17 CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,

18 EXAMINED AND TESTIFIED AS FOLLOWS:

19

20 THE COURT: BE SEATED, PLEASE.

21 PROCEED.

22

23 DIRECT EXAMINATION

24

25 BY MR. SEATON:

26

27 Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL

28 YOUR LAST NAME FOR THE RECORD.

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

30 Q IS IT MISS OR MRS.?

31 A MRS.

32 Q MRS. WEISBAND, WHERE DO YOU PRESENTLY

1 RESIDE?

2 A IN BAYSIDE, NEW YORK.

3 Q WHERE IS THAT?

4 A BAYSIDE?

5 Q BAYSIDE.

6 A NEW YORK.

7 Q THAT'S IN THE STATE OF NEW YORK?

8 A YES, IN THE COUNTY OF QUEENS.

9 Q WHERE IS THAT IN NEW YORK?

10 A NEW YORK CITY, PART OF NEW YORK CITY.

11 Q I SEE.

12 HOW LONG HAVE YOU RESIDED IN THAT AREA?

13 A IN THE SAME HOUSE, 28 YEARS.

14 Q WHAT IS YOUR OCCUPATION?

15 A I'M A REGISTERED NURSE.

16 Q AND FOR WHOM ARE YOU EMPLOYED?

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

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

21 A ELEVEN YEARS. JUNE WILL BE ELEVEN YEARS.

22 Q JUNE WILL BE ELEVEN YEARS.

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

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

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

1 A WELL, IF THERE'S A WEAK ANKLE OR WEAK  
2 ELBOW OR A WEAK KNEE, I HELP TAPE IT BEFORE THEY START THE GAME  
3 --

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

6 MR. SEATON: WELL --

7 THE COURT: ALL RIGHT.

8 COUNSEL, I BELIEVE YOU ARE FAR AFIELD.

9  
10 BY MR. SEATON:

11  
12 Q MRS. WEISBAND, HAVE YOU WORKED WITH ANY  
13 OF THE BOXERS AT QUEENS COLLEGE?

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

16 Q AND WERE YOU FAMILIAR -- STRIKE THAT.  
17 HAVE YOU EVER KNOWN AN INDIVIDUAL  
18 NAMED SAM HOWARD?

19 A YES.

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

22 A YES.

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

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

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

29 THE COURT: THE RECORD MAY SO SHOW.

30 ..

31 ..

32 ..

1 BY MR. SEATON:

2

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

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

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

11 A SOMEWHERE AROUND '75 OR '76.

12 Q 1975 OR '76?

13 A RIGHT.

14 Q AND WAS THAT THERE AT QUEENS COLLEGE?

15 A YES.

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

18 A YES.

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

21 A FOR ABOUT A YEAR AND A HALF OR TWO.

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

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

26 Q LET ME CALL YOUR ATTENTION TO MAY THE 24TH,  
27 1978. DO YOU RECALL THAT PARTICULAR DAY?

28 A YES. I CERTAINLY DO.

29 Q AND WERE YOU WORKING ON THAT PARTICULAR  
30 DAY?

31 A YES, I WAS.

32 Q WHERE WERE YOU?

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

6                   Q       ABOUT WHAT TIME IS IT THAT YOU ARE REFER-  
7 RING TO NOW?

8                   A       IN THE EVENING, IN THE EARLY EVENING.

9                   Q       OKAY.

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

14                  Q       AND YOU WERE IN YOUR OFFICE DOING CLERICAL  
15 WORK?

16                  A       YES.

17                  Q       OKAY.

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

20                  A       NO.

21                  Q       YOU WERE ALONE THERE?

22                  A       YES.

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

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

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

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

32                           AND I ASKED HIM IF I COULD LOOK AT THE

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

5 Q NOW, LET ME STOP YOU FOR A MOMENT.

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

8 A HE WAS WEARING A KNIT STOCKING CAP PULLED  
9 DOWN ON HIS HEAD (INDICATING), BUT HIS FACE WAS CLEARLY IDEN-  
10 TIFIABLE.

11 Q WHEN YOU SAY --

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

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

15 A OVER HIS EARS, YES.

16 Q OKAY.

17 A AND HE WAS WEARING AN ARMY FATIGUE JACKET.

18 Q DID HE HAVE PANTS ON?

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

21 Q OKAY.

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

24 A IT WAS RIGHT ON THE SIDE.

25 Q ON THE SIDE AS HE WORE THE JACKET?

26 A ON THE SIDE, RIGHT.

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

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

31 Q CAN YOU DESCRIBE THE GUN FOR US?

32 A IT WAS A SHORT SNOUTED GUN. I HAD NEVER

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

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

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

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

9 Q OKAY.

10 CAN YOU RECALL THE COLOR OF IT?

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

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

19 Q WHOSE --

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

22 Q THANK YOU.

23 AND WHO WAS THE DETECTIVE TO WHOM YOU  
24 REFER?

25 A DETECTIVE JOHN MCNICHOLAS.

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

28 A YES, IT IS.

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

31 A YES.

32 Q AND YOU WERE ABLE TO LOOK AT IT THEN?



1 A YES.

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

4 A RIGHT.

5 Q THEN THE DEFENDANT'S GUN?

6 A EXCEPT FOR THE DIFFERENCE IN COLOR.

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

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

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

13 AND HE BECAME VERBALLY VERY ABUSIVE.

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

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

20 Q I SEE.

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

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

25 Q TO CRAWL TO WHERE YOU HAD YOUR PURSE?

26 A TO CRAWL TO WHERE I HAD MY PURSE. I  
27 TOLD HIM THAT THE PURSE WAS LOCKED  
28 UP.

29 Q WHERE WAS THE PURSE LOCKED UP?

30 A IN A CLOSET IN OUR OFFICE.

31 Q IN THE OFFICE THAT YOU WERE PRESENTLY IN?

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

1 ANOTHER ROOM, BUT IT WAS IN THE SAME OFFICE.

2 Q I SEE.

3 A IT WAS JUST IN ANOTHER ROOM.

4 Q WHERE WERE YOU AND SAM HOWARD FROM THAT  
5 CLOSET?

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

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

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

13 Q YOU COULD HAVE REACHED OUT AND TOUCHED  
14 HIM?

15 A OH, YES.

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

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

21 Q HOW WERE YOU DRESSED AT THAT TIME?

22 A I WAS WEARING MY NURSE'S UNIFORM.

23 Q WHITE?

24 A WHITE UNIFORM, WHITE SHOES AND STOCKINGS.

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

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

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

32 A MOTHER FUCKER, WHITE BITCH, OVER AND OVER.

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

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

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

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

11                  A       YES, AS NORMAL AS IT HAS ALWAYS BEEN.

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

16                  A       VIOLENT.

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

19                  A       AS SOON AS HE BROUGHT THE GUN OUT.

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

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

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

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

1 MY PURSE.

2 Q DID HE COME WITH YOU AS YOU CRAWLED?

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

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

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

9 Q AND WHAT HAPPENED THEN?

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

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

17 HE SAID, I'M GOING TO SHOOT YOU.

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

20 Q DID HE SAY ANYTHING ELSE ABOUT THIS?

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

24 Q AND WHERE WAS THE GUN AT THIS TIME?

25 A IN HIS HAND ALL THE TIME.

26 Q AND WHERE WAS IT POINTED?

27 A AT ME.

28 Q DID YOU TAKE YOUR CLOTHES OFF?

29 A NO, I DID NOT.

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

32 A PROBABLY AS --

1  
2  
3  
4  
5  
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32

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?

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

3                   Q       WHAT YEAR WAS IT?

4                   A       A 1977.

5                   Q       SO IT WAS NEW AT THAT TIME?

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

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

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

17                   A       RIGHT.

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

20                   A       YES.

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

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

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

29                               AND I SAID NO, THAT IT WASN'T.

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

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

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

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

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

10 Q HOW DID HE LOCK YOU IN THE CLOSET?

11 A WITH THE KEYS.

12 Q HAD YOU ALSO GIVEN THE KEYS TO HIM?

13 A WELL, HE TOOK THE KEYS.

14 Q AFTER YOU --

15 A RIGHT.

16 Q AFTER YOU HAD UNLOCKED THE CLOSET?

17 A RIGHT.

18 Q OKAY.

19 HE TOOK THE KEYS.

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

23 Q WERE YOU INSIDE THE CLOSET WHEN HE LOCKED  
24 IT?

25 A AND I WAS INSIDE THE CLOSET.

26 Q AND HOW DID YOU --

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

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

31 A YES, I DID.

32 Q I DO HAVE ANOTHER RATHER TECHNICAL

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

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

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

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

13 A YES.

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

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

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

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

24 MR. SEATON: YES.

25 THE COURT: THE OBJECTION IS OVERRULED.

26 MR. SEATON: IT WILL BE VERY BRIEF.

27

28 BY MR. SEATON:

29

30 Q DID YOU SEE THE 1977 CADILLAC AGAIN?

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



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

4 Q BY "PROPERTY" DID HE MEAN THE AUTOMOBILE?

5 A YES.

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

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

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

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

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

19 Q DO YOU REMEMBER WHERE IN TEXAS?

20 A NO, I REALLY DON'T.

21 Q OKAY.

22 TELL US WHAT THE POLICE OFFICER SAID.

23 A HE ASKED ME IF I WAS DOROTHY WEISBAND.

24 AND I SAID, YES.

25 AND HE SAID --

26 MR. FRANZEN: YOUR HONOR, WE WOULD OBJECT.

27 THE WITNESS: HERE'S THE CADILLAC.

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

30 THE COURT: SUSTAINED.

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

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

1 YOUR HONOR, IF HE WISHES TO.

2 THE COURT: APPROACH THE BENCH.

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

7 THE COURT: PROCEED.

8  
9 BY MR. SEATON:

10  
11 Q MRS. WEISBAND, DID THERE COME A TIME WHEN  
12 YOU TESTIFIED IN COURT IN NEW YORK REGARDING THESE MATTERS?

13 A YES.

14 Q AND WHAT KIND OF A PROCEEDING WAS THAT?

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

18 Q SO --

19 A IT WAS A TRIAL.

20 Q THE SAME --

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

23 Q AND DID YOU TESTIFY IN THAT TRIAL?

24 A YES, I DID.

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

27 A NO, HE WASN'T.

28 Q WERE YOU CROSS EXAMINED BY HIS DEFENSE  
29 ATTORNEY?

30 A YES, I WAS.

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

1 THE COURT: CROSS?  
2 MR. FRANZEN: NO QUESTIONS, YOUR HONOR.  
3 THE COURT: YOU'RE EXCUSED.  
4 (WHEREUPON, THE WITNESS WAS  
5 EXCUSED.)  
6 THE COURT: CALL YOUR NEXT WITNESS.  
7 MR. SEATON: JOHN MCNICHOLAS.  
8 THE CLERK: PLEASE REMAIN STANDING AND RAISE  
9 YOUR RIGHT HAND.  
10  
11 WHEREUPON,  
12  
13 JOHN F. MCNICHOLAS,  
14  
15 CALLED AS A WITNESS HEREIN BY THE PLAINTIFF WAS FIRST DULY SWORN,  
16 EXAMINED AND TESTIFIED AS FOLLOWS:  
17  
18 THE CLERK: PLEASE BE SEATED.  
19 THE COURT: PROCEED.  
20 MR. SEATON: THANK YOU, YOUR HONOR.  
21  
22 DIRECT EXAMINATION  
23  
24 BY MR. SEATON:  
25  
26 Q WOULD YOU PLEASE STATE YOUR NAME AND SPELL  
27 YOUR LAST NAME FOR THE RECORD?  
28 A DETECTIVE JOHN F. MCNICHOLAS, CAP M-C- CAP  
29 N-I-C-H-O-L-A-S.  
30 Q DETECTIVE MCNICHOLAS, WHERE ARE YOU  
31 EMPLOYED?  
32 A NEW YORK CITY POLICE DEPARTMENT, 1113

1       PRECINCT, DETECTIVE UNIT.

2                   Q       AND WHAT ARE YOUR DUTIES?

3                   A       I INVESTIGATE CRIMES IN THAT IMMEDIATE  
4       AREA.

5                   Q       ANY PARTICULAR KINDS OF CRIMES?

6                   A       ALL KINDS OF CRIMES.

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

9                   A       I'VE BEEN WITH THEM 13 YEARS.

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

12                  A       I AM.

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

15                  A       HE IS.

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

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

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

22                         THE COURT:  THE RECORD MAY SO SHOW.

23

24       BY MR. SEATON:

25

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

28                   A       I AM.

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

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

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

4 Q NOW, DID YOU INTERVIEW MS. WEISBAND?

5 A I DID.

6 Q AND WHEN AND WHERE DID YOU DO THAT?

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

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

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

18 Q DID YOU ASK HER TO DESCRIBE THE GUN?

19 A I DID.

20 Q WAS SHE ABLE TO?

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

25 Q WHAT KIND OF GUN DO YOU HAVE?

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

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

29 A YES, IT IS.

30 Q ARE YOU FAMILIAR WITH A SMITH AND WESSON  
31 .357 MAGNUM --

32 A I AM FAMILIAR.

1 Q (CONTINUING) -- REVOLVER?  
2 A YES.  
3 Q HOW SIMILAR IS THAT KIND OF A GUN TO THE  
4 WEAPON THAT YOU CARRIED ON THAT DAY?  
5 A OH, VERY -- IT'S THE SAME MAKE, BUT IT'S  
6 COMPLETELY DIFFERENT. IT'S A MUCH BIGGER GUN, THE MAGNUM.  
7 Q THE MAGNUM IS A --  
8 A WELL --  
9 Q YOUR GUN IS SMALLER?  
10 A IT'S THE GUN THAT I CARRY IN CIVILIAN  
11 CLOTHES WHEN I'M OFF DUTY.  
12 Q DID YOU TALK ABOUT, OR WERE YOU ABLE TO  
13 LOCATE, THE ADDRESS OF THE DEFENDANT, SAM HOWARD?  
14 A YES, I WAS. I LOCATED IT.  
15 Q PLEASE GO AHEAD.  
16 A I WENT TO THIS SCHOOL, QUEENS COLLEGE, AND  
17 THEY GAVE ME INFORMATION ON MR. HOWARD.  
18 I WENT TO HIS RESIDENCE ON FOTCH  
19 BOULEVARD AND AT THAT TIME INTERVIEWED WITH A WOMAN THERE, I  
20 BELIEVE SHE IDENTIFIED HERSELF AS HIS GRANDMOTHER, AND SAID  
21 THAT SAM DID NOT LIVE THERE AT THAT TIME.  
22 Q AND SUBSEQUENT TO THAT DISCUSSION WERE  
23 YOU ABLE TO OBTAIN A PHOTOGRAPH?  
24 A I WAS.  
25 Q OF SAM HOWARD?  
26 A I -- I DID. I OBTAINED A PHOTOGRAPH FROM  
27 QUEENS COLLEGE.  
28 Q AND DID YOU HAVE AN OPPORTUNITY AGAIN TO  
29 TALK WITH DOROTHY WEISBAND REGARDING ANY PHONE CALLS THAT SHE  
30 MAY HAVE RECEIVED?  
31 A YES. THE NEXT -- THE 25TH, IN THE EVENING,  
32 SHE CALLED AND SHE SAID THAT SAM HOWARD HAD CALLED HER HOUSE

1 AND THAT HE HAD THREATENED HER.

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

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

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

10 Q WHAT IS A "WANTED CARD"?

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

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

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

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

20 THE COURT: YOU MAY.

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

25  
26 BY MR. SEATON:

27  
28 Q LET'S CLARIFY WHERE WE WERE WHEN WE  
29 INTERRUPTED OURSELVES JUST NOW, DETECTIVE.

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

1 A THAT'S CORRECT.

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

4 A THEY HAVE -- THEY ARE PUT IN A COMMUNICA-  
5 TIONS DIVISION OF THE NEW YORK CITY POLICE DEPARTMENT.

6 Q AND DO THEY GO COUNTRY WIDE?

7 A COUNTRY WIDE.

8 Q IN EVERY STATE IN THE UNION?

9 A WELL, THAT'S RIGHT.

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

14 A AFTER I SENT OUT A WANTED CARD?

15 Q YES, AT ANYTIME?

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

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

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

22 Q ALL RIGHT.

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

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

26 Q AND YOU SAY YOU BROUGHT THE DEFENDANT BACK?

27 A I DID.

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

30 A YES, THERE WAS.

31 Q AND SAM HOWARD WAS THE DEFENDANT?

32 A HE WAS.



1 Q WERE YOU A PART OF THAT TRIAL AS A  
2 WITNESS?  
3 A I TESTIFIED.  
4 Q WHEN THE TRIAL PHASE FIRST BEGAN, TO YOUR  
5 KNOWLEDGE, WAS SAM HOWARD PRESENT?  
6 A I WAS TOLD HE WAS PRESENT THE FIRST --  
7 MR. FRANZEN: I OBJECT AS TO HEARSAY, YOUR HONOR.  
8 THE COURT: SUSTAINED.  
9  
10 BY MR. SEATON:  
11  
12 Q WHEN DID YOU TESTIFY IN THE TRIAL?  
13 A IT WAS THE SECOND DAY.  
14 Q AND WHEN YOU TOOK THE STAND WAS SAM  
15 HOWARD PRESENT?  
16 A HE WAS NOT.  
17 Q DO YOU KNOW OF YOUR OWN KNOWLEDGE WHAT THE  
18 OUTCOME OF THAT TRIAL WAS?  
19 A HE WAS CONVICTED.  
20 Q AND WHAT WAS HE CONVICTED OF?  
21 A HE WAS CONVICTED OF ROBBERY ONE.  
22 Q DOES ROBBERY ONE IMPLY ANYTHING TO DO WITH  
23 THE WEAPON?  
24 A WEAPON OR USE OF FORCE.  
25 MR. SEATON: THAT CONCLUDES THE STATE'S  
26 QUESTIONS.  
27 THE COURT: CROSS.  
28 ..  
29 ..  
30 ..  
31 ..  
32 ..

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

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

3 THE COURT: YOUR REQUEST IS DENIED.

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

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

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

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

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

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

28 THE CLERK: SIXTY NINE.

29 THE COURT: IT'S NUMBER 69.

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

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

1 IF THAT HAS BEEN PREVIOUSLY MARKED.

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

4 THE COURT: SIXTY NINE.

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

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

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

13 THE COURT: COUNSEL?

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

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

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

26 THE OBJECTION IS OVERRULED. THE SAME  
27 WILL BE RECEIVED.

28 MR. SEATON: THANK YOU, YOUR HONOR.

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

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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.

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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

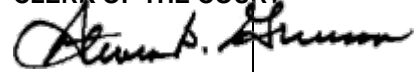
1 ARE GOING TO TAKE OUR AFTERNOON RECESS AT THIS TIME. WE WILL  
2 BE IN RECESS UNTIL 10:00 O'CLOCK TOMORROW MORNING. AT THE RATE  
3 IN WHICH WE ARE PROGRESSING NOW, IT APPEARS THAT THIS MATTER  
4 WILL BE SUBMITTED TO YOU TOMORROW.

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

10 DURING THIS RECESS YOU ARE  
11 ADMONISHED NOT TO CONVERSE AMONG  
12 YOURSELVES OR WITH ANYONE ELSE ON  
13 ANY SUBJECT CONNECTED WITH THIS  
14 TRIAL, OR READ, WATCH OR LISTEN  
15 TO ANY REPORT OF OR COMMENTARY ON  
16 THIS TRIAL WITH ANY PERSON  
17 CONNECTED WITH THIS TRIAL BY ANY  
18 MEDIUM OF INFORMATION, INCLUDING  
19 WITHOUT LIMITATION, NEWSPAPER,  
20 TELEVISION OR RADIO, OR FORM OR  
21 EXPRESS ANY OPINION ON ANY SUBJECT  
22 CONNECTED WITH THIS TRIAL UNTIL THE  
23 CASE IS FINALLY SUBMITTED TO YOU.

24 WE WILL BE IN RECESS UNTIL 10:00  
25 O'CLOCK TOMORROW MORNING. MAY I SEE COUNSEL IN CHAMBERS.

26 (WHEREUPON, AT THE HOUR OF  
27 5:00 P.M. THE EVENING RECESS  
28 WAS HAD IN THE PROCEEDINGS.)  
29  
30  
31  
32



**RPLY**

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

SAMUEL HOWARD,

Petitioner,

vs.

WILLIAM GITTERE, Warden, and  
AARON D. FORD,<sup>1</sup> Attorney General for  
the State of Nevada,

Respondents.

Case Nos. 81C053867; A-18-780434-W<sup>2</sup>  
Dept. No. XVII

Date of Hearing: February 7, 2020

Time of Hearing: 10 AM

(Death Penalty Case)

<sup>1</sup> Aaron D. Ford is now Nevada Attorney General. As such, he should be substituted in for his predecessor. See NRCP 25(d).

<sup>2</sup> 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 AND RESPONSE TO MOTION TO DISMISS - 1



**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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/s/ *Jonah J. Horwitz*

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Boise, Idaho 83702

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

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

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

11           **I.       The Petition Is Not Procedurally Barred**

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

16           **A.       The Petition Is Not Time Barred**

17           First, the State contends that Mr. Howard’s petition is untimely under NRS 34.726(1).  
18 *See* MTD at 15. Typically, a post-conviction petition must be filed within one year from when  
19 the Nevada Supreme Court issues its remittitur in the direct appeal, *see* NRS 34.726(1), which  
20 has not happened here. However, the statute does not defeat merits review where a petitioner  
21 can show good cause and prejudice. *See, e.g., State v. Boston*, 131 Nev. 981, 984, 363 P.3d 453,  
22 455 (2015) (en banc); *Wilson v. State (Wilson II)*, 127 Nev. 740, 744, 267 P.3d 58, 60 (2011) (en  
23 banc). Mr. Howard can show both.

24           **1.       Mr. Howard Has Good Cause**

25           Under unambiguous Nevada law, there is good cause for missing the one-year deadline  
26 codified in NRS 34.726(1) if the claim was raised “within a reasonable time after it became  
27 available.” *Wilson II*, 127 Nev. at 745, 267 P.3d at 61; *accord Boston*, 131 Nev. at 985, 363 P.3d  
28

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

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

12 Hoping to complicate this clear picture, the State strives to create confusion about what  
13 exactly made Mr. Howard’s claim “available.” In particular, the State homes in on the length of  
14 time that elapsed after his sentencing and before he litigated his robbery conviction in New York.  
15 *See, e.g.*, MTD at 17 (insisting that Mr. Howard “should have raised that issue *with the New York*  
16 *courts*” earlier). The State misapprehends the meaning of the word “available.” According to  
17 the first definition in a preeminent dictionary, the term signifies “present or ready *for immediate*  
18 *use*.” *See* <https://www.merriam-webster.com/dictionary/available> [[https://perma.cc/YJ6S-](https://perma.cc/YJ6S-89G6)  
19 [89G6](https://perma.cc/YJ6S-89G6)].<sup>4</sup> A claim based on a conviction being invalidated is obviously not “ready for immediate  
20 use” when the conviction has not yet been invalidated. Following the plain language of the  
21 Nevada Supreme Court, Mr. Howard’s claim was undeniably brought within a year of it being  
22 available, and it is thus timely.

23 Aside from having no foothold in binding precedent, the State’s test is unworkable. The  
24 State insinuates that Mr. Howard’s campaign against his robbery conviction in New York was  
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26 <sup>3</sup> In this reply, unless otherwise noted, all internal quotation marks, footnotes, and citations are  
27 omitted and all emphasis is added.

28 <sup>4</sup> 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.

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

14         In the cases mentioned by the State, the Nevada Supreme Court has characterized claims  
15 as previously “available” because the facts allowing them to be brought existed before the  
16 limitations period closed, which is not true here. For instance, in *Hathaway v. State*, 119 Nev.  
17 248, 253–54, 71 P.3d 503, 507 (2003) (per curiam), the Court used, as examples of claims that  
18 are immediately available, situations where “counsel failed to inform the petitioner of the right to  
19 appeal,” where the defendant “received misinformation about the right to appeal,” or where  
20 “counsel refused to file an appeal after the petitioner requested.” Similarly, in *Pellegrini v. State*,  
21 117 Nev. 860, 889–90, 34 P.3d 519, 538–39 (2001) (en banc) (per curiam), the Nevada Supreme  
22 Court considered a claim available earlier when it was based on the defendant’s mental health at  
23 the time of the offense. These are all facts that arise before the conviction is final. That is,  
24 information about a defendant’s mental state when the crime occurred is by definition  
25 information that has already come into being by the time of post-conviction. Likewise, a  
26 defendant who has been misled or defied by a lawyer about his appeal is aware of that shortly  
27 after trial. The lesson of such cases is that a claim is available when the factual basis for it is out  
28

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

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

6 Rather than the State's preferred authorities, the more instructive cases here are those in  
7 which petitions were deemed timely because they were properly founded on changes in the law.  
8 *See Bejarano v. State*, 122 Nev. 1066, 1071, 146 P.3d 265, 269 (2006) (en banc) (involving a  
9 new case about double-counting felony aggravators in capital cases); *Boston*, 131 Nev. at 984,  
10 363 P.3d at 455 (concerning a new case about juvenile life sentences). When the Nevada  
11 Supreme Court has regarded such petitions as timely, it is because the prisoner raised his claim  
12 within a year of the favorable precedent appearing. *See Bejarano*, 122 Nev. at 1071, 146 P.3d at  
13 269 (explaining that "a claim pursuant to [a new] decision was not reasonably available to  
14 Bejarano" until the decision was published.); *Boston*, 131 Nev. at 985, 363 P.3d at 455 (noting  
15 that the "Supreme Court did not decide" the favorable new case until 2010, and "Boston filed his  
16 petition within one year of the Court's decision," which constituted "good cause for the late  
17 filing" assuming that he was correct about the meaning of the new case.

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

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

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

5 Admittedly, *Bejarano* and *Boston* deal with good cause in the context of an unavailable  
6 “legal basis,” in the sense that the caselaw was not yet there to substantiate the claim. *Boston*,  
7 131 Nev. at 984, 363 P.3d at 455; accord *Bejarano*, 122 Nev. at 1072, 146 P.3d at 270. But the  
8 Nevada Supreme Court has said that good cause “may be established where *the factual or* legal  
9 basis for the claim was not reasonably available.” *Bejarano*, 122 Nev. at 1073, 146 P.3d at 270.  
10 There is no reason to treat the two differently, and good cause is present.

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

## 16 **2. Mr. Howard Can Show Prejudice**

17 Once good cause has been established, prejudice becomes the next hurdle. See *Wilson II*,  
18 127 Nev. at 745, 267 P.3d at 61. Mr. Howard surmounts it with ease.

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

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25  
26 <sup>5</sup> For the Court’s convenience, the verdict form reflecting the two aggravators found by the jury  
27 is appended to this reply as Exhibit 1, Attachment A. As noted in the petition, it is also available  
28 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).

1 (1988); NRS 200.033. Consequently, once the New York aggravator is removed from the  
2 equation, there is nothing to support the death penalty. As a result, Mr. Howard was actually  
3 prejudiced.

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

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

16 In its opening statement, the prosecution made sure to inform the jury that Mr. Howard  
17 had been "*convicted* in absentia in the Queens Supreme Court on July 13, 1979, in the State of  
18 New York." MTD, Ex. B at 1463<sup>6</sup> ("He was thereafter *convicted* in absentia in the Queens  
19 Supreme Court on July 13, 1979, in the State of New York."). In examining the detective from  
20 the New York case, the prosecution took care to elicit the same fact through his testimony. *See*  
21 *id.* at 1487 ("Q. Do you know of your own knowledge what the outcome of that trial was? A.  
22 He was *convicted*. Q. And what was he *convicted* of? A. He was *convicted* of Robbery One.");  
23 *id.* at 1491 ("Q. And again for the record, do you know of the fact of whether or not he was  
24 *convicted*? A. Yes, he was."). And finally, at closing argument, the prosecution hammered  
25

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26 <sup>6</sup> Exhibit B to the State's Motion to Dismiss is a transcript from Mr. Howard's capital sentencing  
27 in Nevada. The documents appended to Exhibit 1 to this reply as Attachments D and E are  
28 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.

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

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

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

#### 24       **B.       The Petition Is Not Barred As Successive Or Waived**

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

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



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

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

6 A second or successive petition must be dismissed if the judge or justice determines  
7 [1] that it fails to allege new or different grounds for relief and that the prior  
8 determination was on the merits or, [2] if new and different grounds are alleged,  
9 the judge or justice finds that the failure of the petitioner to assert those grounds in  
10 a prior petition constituted an abuse of the writ.

11 Mr. Howard’s claim does not fall within either prong of the provision. It does “allege  
12 new or different grounds” for relief and thus escapes the first prong. On the second prong, a  
13 claim is an abuse of the writ if it “could . . . have been raised earlier.” *Bejarano*, 122 Nev. at  
14 1072, 146 P.3d at 269. Based as it was on the recent New York order, Mr. Howard’s claim could  
15 not have been. Given the statute’s plain language, Mr. Howard’s petition is not barred by  
16 NRS 34.810(2).

17 In the Motion to Dismiss, the State alludes to the Nevada Supreme Court’s 2014 denial of  
18 a claim challenging the prior-conviction aggravator. *See* MTD at 21. It is not evident what  
19 significance the State gleans from it. To the extent the State is implying that Mr. Howard’s  
20 current petition is precluded by NRS 34.810 because he either did contest the aggravator on the  
21 same ground he uses now, or that he could have, it is mistaken. As relevant here, the Nevada  
22 Supreme Court in 2014 rejected a claim that the aggravator was invalid because there was no  
23 judgment and sentence in New York, which were—Mr. Howard posited—necessary for a  
24 conviction as a matter of Nevada law. *See Howard v. State (Howard I)*, No. 57469, 2014 WL  
25 3784121, at \*5 (Nev. 2014) (per curiam) (unpublished disposition).<sup>7</sup> That is quite distinct from  
26 the present claim, which is that the conviction has definitively been *vacated* by the New York

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27 <sup>7</sup> Mr. Howard is now challenging his death sentence in federal habeas on the ground noted  
28 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.

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

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

### 12 **C. The Provision Is Not Barred By Laches**

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

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

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

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

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

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

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

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

#### 24       **D.     There Is No Problem With The New York Order**

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

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

1 stamp—is patently inadequate. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566  
2 (2010) (en banc) (declining to consider an appellate issue because it was “not supported by  
3 cogent argument and citation to relevant authority”).

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

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

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

19 In cryptic fashion, the State disputes the propriety of judicial notice. Its only explication  
20 is the following quotation from *Rippo*: “Even if some of the documents were filed in the federal  
21 case while the direct appeal was pending, appellate counsel could not have expanded the record  
22 before this court to include evidence that was not part of the trial record.” MTD at 26 n.9. From  
23 that language, the State somehow infers that “the Nevada Supreme Court has rejected [Mr.  
24 Howard’s] view of judicial notice.” *Id.* Mr. Howard does not follow the State’s logic. The  
25 referenced opinion does not analyze judicial notice at all. In fact, the phrase “judicial notice”  
26 does not even appear in *Rippo*. Moreover, the facts at issue in the paragraph focused on by the  
27 State have no similarity to Mr. Howard’s case. The excerpted sentence from *Rippo* was written  
28 to refute a claim that appellate counsel was ineffective, on the reasoning that the attorney could

1 not have been deficient for omitting an argument based on material outside the trial record, since  
2 he was limited to that record in his briefing before the Nevada Supreme Court. *See Rippo*, 134  
3 Nev. at 429, 423 P.3d at 1102. What any of that has to do with Mr. Howard's situation is  
4 anyone's guess, for the State does not connect the dots. Mr. Howard is *not* here alleging  
5 ineffective assistance and he is *not* on appeal. Consequently, he is *not* restricted to the facts  
6 available at some prior stage of the case and he *is* permitted to introduce new evidence. *See* NRS  
7 34.370(4) (contemplating the consideration of new evidence in post-conviction proceedings).

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

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

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

<sup>9</sup> 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

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

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

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

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

25 The State is unpersuaded of Mr. Howard’s actual innocence, *see* MTD at 22–25, but its  
26 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.

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

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

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

1 503, 814 P.2d 1008, 1010 (1991) (“Kirksey correctly asserts that he must be given notice prior to  
2 the penalty hearing of each aggravating circumstance that the state will seek to prove at the  
3 penalty hearing.”); *Wilson v. State (Wilson I)*, 99 Nev. 362, 370 n.4, 664 P.2d 328, 332 n.4  
4 (1983) (quoting a statute from the time of Mr. Howard’s sentencing that allowed the prosecution  
5 to assert an aggravator, “other than the aggravated nature of the offense itself, only if it has been  
6 disclosed to the defendant before the commencement of the penalty hearing”).

7 Furthermore, although the State is right that the prosecutor “argued that the jury needed  
8 to make its own independent judgment regarding the existence of the prior violent felony  
9 aggravating circumstance,” MTD at 24, he certainly did not make the implausible suggestion that  
10 it could do so without a valid conviction. The prosecutor’s perspective was that “the mere  
11 recitation of what the conviction was for is not, in the state’s mind, *adequate* to comply with” its  
12 “burden of proof.” *Id.* Stated differently, the prosecutor felt he needed *more* than just the  
13 conviction. That does not signify the nonsensical proposition that the conviction itself was  
14 unnecessary to prove that Mr. Howard had a conviction. *See, e.g., State v. Autry*, 103 Nev. 552,  
15 556, 746 P.2d 637, 640 (1987) (per curiam) (explaining what it means for an element to be  
16 “necessary but not sufficient”).

17 The State had good reason to proffer evidence to the jury about the facts underlying the  
18 New York robbery. Under the controlling statute, it was required to prove that Mr. Howard had  
19 been “convicted of . . . a felony *involving the use or threat of violence.*” *Howard II*, 2016 WL  
20 7173763, at \*1 (quoting NRS 200.033(2) (1979)); *accord* NRS 200.033(2)(b); MTD, Ex. B at  
21 1459 (containing the Court’s quotation of the statute, which provided that the “murder was  
22 committed by a person who was previously convicted of another murder or a felony involving  
23 the use or threat of violence”); *id.* at 1462 (including the prosecutor’s characterization to the jury  
24 of the aggravator as requiring a showing “that the murder was committed by a person who was  
25 previously convicted of a felony involving the use or threat of violence”); Ex. 1, Att. D at 1539–  
26 40 (establishing that the jury was told by the trial court that the aggravator required that the  
27 murder be “committed by a defendant who was previously convicted of a felony involving the  
28 use or threat of violence”). Testimony about the offense was relevant because it went to that



1 second element—the presence of violence. In the prosecutor’s own words, the testimony, “as  
2 opposed to any documentation,” was “to show the jury beyond a reasonable doubt that the use of  
3 force and/or violence was used in the commission of that particular robbery.” MTD, Ex. B at  
4 1454; *see id.* at 1457 (reflecting that the prosecutor later added, in support of the same argument,  
5 that the bare fact of the charge and conviction did not “tell[] the jury enough about the nature of  
6 those acts to allow them to come to the conclusion that beyond a reasonable doubt the State has  
7 shown that there is a threat or use of violence”). The trial judge allowed the testimony over the  
8 defense’s objection on that very ground, to wit, because “[t]he particulars of the case” and “the  
9 evidence would go to the question of use of force or violence.” *Id.* at 1460.

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

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

21 The State’s substantive analysis of actual innocence revolves around four cases. *See*  
22 MTD at 22–24. Not one of those opinions even uses the phrase “actual innocence”—let alone  
23 interprets it. *See Johnson v. Mississippi*, 486 U.S. 578 (1988); *Spivey v. Head*, 207 F.3d 1263  
24 (11th Cir. 2000); *Gibbs v. Johnson*, 154 F.3d 253 (5th Cir. 1998); *Gardner v. State*, 764 S.W.2d  
25 416 (Ark. 1989) (per curiam). The cases do nothing to bolster the State’s counterintuitive  
26 position that a prisoner whose death sentence is supported by a single aggravating conviction that  
27 has been vacated is somehow still “eligible for the death penalty.” *Lisle*, 131 Nev. at 362, 351  
28

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

## 3 **II. The Petition Is Meritorious**

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

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

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

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

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

1 By virtue of the other two aggravators, the State would have been permitted at Mr.  
2 Johnson's sentencing to present evidence regarding the prior offense, even if the conviction had  
3 already been invalidated. *See Hodges v. State*, 912 So. 2d 730, 756 (Miss. 2005) (en banc)  
4 (clarifying that Mississippi law "does not limit the evidence that can be presented at the  
5 sentencing phase" to aggravators, and that evidence of unadjudicated bad acts can still be  
6 relevant at such a proceeding), *disagreed with on other grounds by Ross v. State*, 954 So. 2d 968,  
7 987–88 (Miss. 2007). That being so, the U.S. Supreme Court in *Johnson* was operating in a  
8 context in which the submission of evidence about the underlying conduct in New York, apart  
9 from the proof of the conviction itself, was possible. It made sense, then, for the Court to rely  
10 upon the fact that no such evidence was offered. The Court was in essence rejecting one  
11 conceivable defense for the opinion below: that other equally aggravating evidence about the  
12 prior offense might have led the jury to impose death even if there had been no conviction.

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

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

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

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

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

22 *Gibbs*, the State’s second citation, is dealt with even more easily. The claim there was  
23 that the prosecution “relied upon inaccurate evidence of a prior offense,” i.e., evidence that was  
24 presumably inaccurate *at the time of trial*. *Gibbs*, 154 F.3d at 258. There is no indication in  
25 *Gibbs* that a court subsequently reversed the aggravating conviction. Needless to say, that is the  
26 soul of Mr. Howard’s claim. When inaccuracy is the issue, a court can logically emphasize “the  
27 testimony at trial of the victim,” as *Gibbs* did. *Id.* When the validity of a conviction is the issue,  
28

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

3 In the State’s final cited case, the claim failed because of a lack of prejudice. *See Spivey*,  
4 207 F.3d at 1282 (denying the claim on the reasoning that “the error was harmless because the  
5 effect was neither substantial nor injurious”). The defendant before the Eleventh Circuit had  
6 multiple aggravators still in place at the time he asserted his *Johnson* claim. *See Spivey v. State*,  
7 319 S.E.2d 420, 438 (Ga. 1984) (indicating that the jury had found a robbery-murder aggravator  
8 in addition to the prior-conviction aggravator). Georgia permits both statutory and non-statutory  
9 aggravation. *See Tharpe v. Head*, 533 S.E.2d 368, 370 (Ga. 2000). Under that scheme, at least  
10 one statutory aggravator must be present to render a defendant eligible for capital punishment.  
11 *See Arrington v. State*, 687 S.E.2d 438, 445 (Ga. 2009); *Hall v. Terrell*, 679 S.E.2d 17, 22 (Ga.  
12 2009). Once a statutory aggravator has been established and the defendant is death-eligible, the  
13 jury can consider non-statutory aggravation “in its deliberations on the ultimate question of  
14 whether to impose the death sentence.” *Ross v. State*, 326 S.E.2d 194, 203 (Ga. 1985), *overruled*  
15 *on other grounds by O’Kelley v. State*, 604 S.E.2d 509, 511–12 (Ga. 2004). Conduct connected  
16 to prior crimes is admissible as non-statutory aggravation, even when it does not lead to a  
17 conviction. *See Pace v. State*, 524 S.E.2d 490, 505 (Ga. 1999).

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

24 That rationale cannot be utilized in Mr. Howard’s case. The prior conviction is the only  
25 aggravator remaining. Because the *Johnson* claim eliminates it, there is no death eligibility, and  
26 the inquiry does not get to the weighing stage. Hence, there is no room for the consideration of  
27 non-statutory mitigation. The conduct with which Mr. Howard was charged in New York is  
28

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

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

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

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

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

14 In the alternative, if the Court agrees with the State that *Johnson* does not apply to Mr.  
15 Howard's fact pattern and that the Eighth Amendment does not compel relief, it should vacate  
16 his death sentence under the cruel-and-unusual-punishment and due process clauses of the  
17 Nevada Constitution. *See* Nevada Const. art. I, secs. 6 & 8. "A state court is entirely free to read  
18 its own State's constitution more broadly than [the U.S. Supreme Court] reads the Federal  
19 Constitution." *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 283, 293 (1982); *accord*  
20 *Oregon v. Hass*, 420 U.S. 714, 719 (1975). *Johnson* was animated by the idea that "[t]he  
21 fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel  
22 and unusual punishment gives rise to a special need for reliability in the determination that death  
23 is the appropriate punishment." 486 U.S. at 584. It was further motivated by the notion that  
24 capital "decisions cannot be predicated on mere caprice or on factors that are constitutionally  
25 impermissible or totally irrelevant to the sentencing process." *Id.* at 585. Even if the facts of  
26 *Johnson* differ from the present case in any meaningful respect, those principles have equal force  
27 here, where a death sentence now hinges on a single conviction that is no longer a conviction. In  
28

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

3 **III. Conclusion**

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

8 DATED this 2nd day of December 2019.

9 Respectfully submitted,

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# 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@clarkcountynv.gov](mailto:Jonathan.VanBoskerck@clarkcountynv.gov)

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/s/ L. Hollis Ruggieri

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L. Hollis Ruggieri

## Paralegal

Federal Defender Services of Idaho

# **Exhibit 1**

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

1                                   **DECLARATION OF JONAH J. HORWITZ**

2           I, Jonah J. Horwitz, declare as follows:

- 3           1. I am an attorney with Federal Defender Services of Idaho.
- 4           2. I represent Petitioner Samuel Howard in his federal habeas proceedings and in this
- 5                 state post-conviction action.
- 6           3. The document appended to this declaration as Attachment A is a true and correct
- 7                 copy of the special verdict in Mr. Howard's capital case in Nevada, signed on May 4,
- 8                 1983, and reflecting the aggravating circumstances found by the jury.
- 9           4. The document appended to this declaration as Attachment B is a true and correct copy
- 10                 of the order by the Queens County Supreme Court in Mr. Howard's robbery case,
- 11                 dated May 22, 2019. Attachment B bears the certification and seal of the Queens
- 12                 County Clerk.
- 13           5. The document appended to this declaration as Attachment C is a true and correct copy
- 14                 of a Certificate of Disposition from the Queens County Supreme Court. Attachment
- 15                 C bears the certification and seal of the Queens County Clerk.
- 16           6. The document appended to this declaration as Attachment D is a true and correct
- 17                 copy of the transcript of the proceedings held at Mr. Howard's capital sentencing in
- 18                 Nevada on May 3, 1983.
- 19           7. The document appended to this declaration as Attachment E is a true and correct copy
- 20                 of the transcript of the proceedings held at Mr. Howard's capital sentencing in
- 21                 Nevada on May 4, 1983.
- 22           8. The document appended to this declaration as Attachment F is a true and correct copy
- 23                 of the minutes of the Queens County, New York robbery case against Mr. Howard in
- 24                 Indictment Number 1227-78, which were introduced into evidence by the prosecution
- 25                 at his capital sentencing in Nevada on May 2, 1983 and marked at that time as State's
- 26                 Proposed Exhibit 1.
- 27           9. I declare under penalty of perjury under the law of the State of Nevada that the
- 28                 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)**

1 CASE NO. C53867  
2 DEPT. NO. V

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

3  
4  
5  
6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
7 IN AND FOR THE COUNTY OF CLARK.

8  
9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 -vs- )  
12 SAMUEL HOWARD, )  
13 Defendant. )  
14

15 SPECIAL VERDICT

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

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

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

27 We, the Jury, state there are no mitigating circumstance  
28 or circumstances sufficient to outweigh the aggravating circum-  
29 stance or circumstances designated.

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

31  
32  
FOREMAN LEO GATES

(R)

Samuel Howard v. William Gittere, Case No. 81C053867, A-18-780434-W  
Filed in Support of Reply in Support of Petition and  
Response to Motion to Dismiss

# **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

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

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)

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

*Dudrey D. Heffer*  
**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

P R E S E N T:

HON. RONALD D. HOLLIE,  
JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK:

-against-

SAMUEL HOWARD,

Defendant

X

The following papers numbered  
1 to 5 submitted on this motion

Ind. No. 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)

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**

I hereby certify the foregoing  
pages to a true copy of the original  
thereof, filed in my office.

*Ludrey Heffer*  
**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

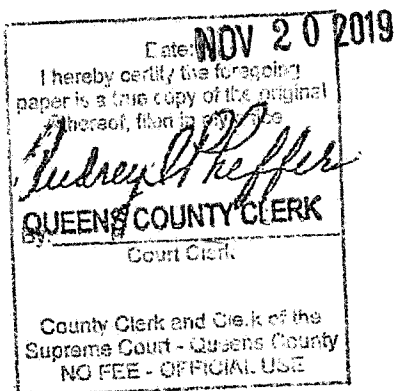
SAMUEL HOWARD, : IND. NO.: 1227/78

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.



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 for sentence on his New York conviction.

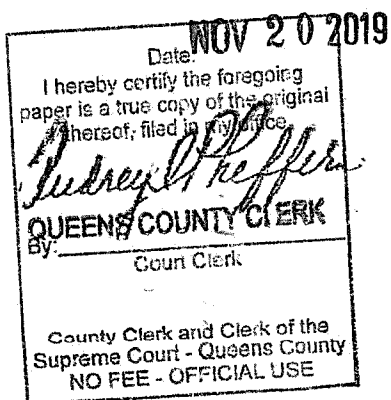
It is the People position that if a Defendant absconds from New York and is arrested and incarcerated on an unrelated matter in another state, People have no obligation to make reasonable efforts to produce the Defendant for sentencing in this state, even if they know where he was incarcerated.

The New York rule assumes the defendant has been prejudiced by unreasonable delay, so the burden is on the State and its agents to show the delay was reasonable (*People v. Drake*, 61 NY2d 359). It is this Court's opinion that once a convicted defendant has absconded from New York, is incarcerated in another jurisdiction and New York is aware of said incarceration, the minimal obligation by the State and its agents is to attempt to produce that defendant for sentence. That attempt would be sufficient to satisfy the State's obligation under *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





# **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.

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

HOWARD, SAMUEL

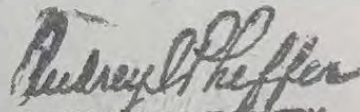
DEFENDANT

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.

  
QUEENS COUNTY CLERK  
COURT CLERK

# **Attachment D**

**(Capital Sentencing Transcript, May 3, 1983)**

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

2 \* \* \* \* \*

3 (WHEREUPON, FROM 12:13 A.M.  
4 UNTIL 3:30 P.M., A RECESS WAS  
5 HAD IN THE PROCEEDINGS, AT THE  
6 CONCLUSION OF WHICH THE FOLLOW-  
7 ING PROCEEDINGS WERE HAD OUT-  
8 SIDE THE PRESENCE OF THE JURY:)

9 THE COURT: LET THE RECORD REFLECT THIS IS OUT-  
10 SIDE THE PRESENCE OF THE JURY.

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

15 THE CLERK: I HAVE 5.

16 THE COURT: THIS WILL BE 6.

17 THE CLERK: OKAY.

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

20 MR. COOPER: YES, YOUR HONOR.

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

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

32 AFTER DISCUSSING WITH HIM LESS THAN

1 15 MINUTES AGO WHETHER IT'S STILL HIS DESIRE THAT WE NOT ARGUE  
2 IN THIS CASE, HE HAS EQUIVOCATED AND INDICATED THAT HE WOULD  
3 LEAVE IT UP TO HIS COUNSEL. I WOULD REQUEST THAT THE COURT  
4 CANVAS MR. HOWARD SO HE CAN BE PERFECTLY CLEAR ON THIS MATTER  
5 AS TO WHAT HIS WISHES ARE.

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

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

10 YOU HAVE HEARD THE STATEMENTS OF YOUR  
11 ATTORNEY. DO YOU DESIRE THEM TO ARGUE OR NOT AT THESE PROCEED-  
12 INGS, SIR?

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

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

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

25 DEFENDANT HOWARD: YES, YOUR HONOR. I UNDER-  
26 STAND THAT.

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

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

32 NOW, AS FAR AS THE CONTENTS OF THEIR

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

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

9 THE COURT: WELL, DO YOU OPPOSE THEIR ARGUING OR  
10 NOT?

11 YESTERDAY YOU WERE OPPOSED TO THEIR  
12 ARGUING. ARE YOU OPPOSING THAT THEY ARGUE AT THIS TIME?

13 DEFENDANT HOWARD: WELL, I DIDN'T UNDERSTAND,  
14 YOUR HONOR. THE BAILIFF --

15 THE COURT: WELL, ARE YOU? JUST ANSWER THE  
16 QUESTION.

17 DEFENDANT HOWARD: OPPOSE WHAT, YOUR HONOR? I  
18 DON'T UNDERSTAND WHAT YOU MEAN. OPPOSE WHAT?

19 THE COURT: MR. HOWARD, I'M GOING TO TELL YOU  
20 ONE MORE TIME AS CLEARLY AS I CAN, SIR, AND THEN I'M GOING TO  
21 LEAVE IT TO YOU TO DECIDE WHETHER YOU'RE GOING TO INSTRUCT YOUR  
22 LAWYERS TO ARGUE OR NOT.

23 IN THE HEARING THAT IS ABOUT TO BE HELD,  
24 THE PENALTY PHASE OF THIS CASE, THE STATE HAS NOW PRESENTED  
25 EVIDENCE AND YOU HAVE NOW PRESENTED EVIDENCE.

26 THIS IS VERY SIMILAR TO THE TRIAL OF  
27 THE CASE IN WHICH THE STATE PRESENTED EVIDENCE AND YOU PRESENTED  
28 EVIDENCE. AT THAT TIME THE STATE ARGUED THEIR CASE TO THE  
29 JURY AND THAT IS AND THAT MEANS THAT THEY SUMMARIZE THE  
30 EVIDENCE TO THE JURY AND ARGUED HOW THE LAW APPLIES TO THE  
31 EVIDENCE THAT'S SUBMITTED.

32 YOUR ATTORNEYS DID THE VERY SAME THING.

1 NOW YOUR ATTORNEYS ARE GOING TO HAVE THE SAME OPPORTUNITY AS  
2 THEY HAD IN THE CASE ON THE ISSUE OF GUILT OR INNOCENCE.

3 THE STATE WILL ARGUE. THEY HAVE THE  
4 RIGHT TO OPEN AND CLOSE. THEY WILL AGAIN ARGUE THE FACTS OF  
5 THIS CASE AND THEY WILL ALSO ARGUE HOW THE LAW APPLIES. YOUR  
6 ATTORNEYS WILL ALSO HAVE THAT OPPORTUNITY.

7 DO YOU UNDERSTAND WHAT I HAVE SAID  
8 TO YOU, SIR?

9 DEFENDANT HOWARD: YES. YES, YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 DO YOU HAVE ANY -- THE ONLY QUESTION THEN  
12 IS, IN VIEW OF YOUR PREVIOUS STATEMENT THAT YOU DID NOT WANT  
13 YOUR ATTORNEYS TO ARGUE THE CASE TO THE JURY, THE ONLY DECISION  
14 FOR YOU TO MAKE NOW IS WHETHER OR NOT YOU WANT THEM TO OR NOT.

15 YOU CAN BE SEATED AND YOU MAY CONFER  
16 WITH YOUR ATTORNEYS AND WHEN I CALL AND ASK IF THE DEFENSE  
17 DESIRES TO ARGUE, THEN WE SHALL HAVE A DECISION FROM YOU ONE  
18 WAY OR THE OTHER, SIR.

19 YOU MAY BE SEATED.

20 ANYTHING FURTHER OUTSIDE OF THE  
21 PRESENCE OF THE JURY?

22 MR. HARMON: NO, YOUR HONOR.

23 THE COURT: ALL RIGHT. CALL THE JURY.

24 MR. FRANZEN: YOUR HONOR, MIGHT WE CONFER WITH  
25 THE DEFENDANT BEFORE THE JURY IS BROUGHT IN?

26 THE COURT: ALL RIGHT. GO AHEAD.

27 MR. COOPER: YOUR HONOR, AFTER FURTHER DISCUS-  
28 SION WITH MR. HOWARD, IT'S HIS DECISION THAT WE ARGUE THE CASE.

29 IN LIGHT OF THAT DECISION, YOUR HONOR, I  
30 FEEL COMPELLED AT THIS TIME TO MOVE THE COURT FOR A CONTINUANCE  
31 OF ONE DAY TO GIVE US THE OPPORTUNITY TO MORE FULLY PREPARE  
32 FOR CLOSING ARGUMENT. BASED ON MR. HOWARD'S DECISION YESTERDAY,

1 IT WAS OUR IMPRESSION THAT THERE WOULD BE NO ARGUMENT BY THE  
2 DEFENSE COUNSEL.

3 I MADE SOME NOTES DURING THE LUNCH  
4 HOUR, HOWEVER, I FEEL THAT GIVEN ADDITIONAL TIME, A MORE BETTER  
5 ARGUMENT COULD BE PREPARED, SOLELY IF THE COURT WOULD DEEM US  
6 A MATTER OF ONE DAY TO GIVE US THAT OPPORTUNITY.

7 THE COURT: THE STATE?

8 MR. HARMON: YOUR HONOR, WE LEAVE THAT TO THE  
9 COURT. WE ARE PREPARED TO GO THIS AFTERNOON. WE CAN ALSO  
10 ARGUE TOMORROW.

11 THE COURT: WELL, IT'S OBVIOUS THAT EVEN IF WE  
12 STARTED ARGUING TODAY WE PROBABLY WOULDN'T FINISH UNTIL WELL  
13 AFTER 5:00 O'CLOCK.

14 MR. HARMON: WE WOULD GO WELL PAST 5:00, YOUR  
15 HONOR.

16 THE COURT: ALL RIGHT.

17 WE WILL CALL THE JURY BACK IN AND INSTRUCT  
18 THEM AND THEN WE WILL COMMENCE WITH THE ARGUMENTS TOMORROW  
19 MORNING. THE STATE COMMENCES AT 10:00 AND YOU FOLLOW AT THAT  
20 TIME.

21 MR. HARMON: FINE.

22 THE COURT: CALL THE JURY.

23 (WHEREUPON, AT THE HOUR OF  
24 3:40 P.M., THE JURY ENTERED  
25 THE COURTROOM AND THE FOLLOW-  
26 ING PROCEEDINGS WERE HAD:)

27 THE COURT: COUNSEL, STIPULATE TO THE PRESENCE  
28 OF THE JURY?

29 MR. FRANZEN: YES, YOUR HONOR.

30 MR. SEATON: YES, YOUR HONOR.

31 THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
32 IT HAS NOW BECOME MY DUTY TO INSTRUCT YOU AS TO THE LAW IN THIS

1 PENALTY HEARING. AND AS I HAVE PREVIOUSLY MENTIONED TO YOU  
2 WHEN WE WERE INVOLVED IN THE GUILT PHASE, THESE INSTRUCTIONS  
3 ARE IN WRITING AND THEY WILL BE GIVEN TO YOU. YOU WILL BE ABLE  
4 TO TAKE THEM BACK TO THE JURY ROOM WITH YOU TO DISCUSS AND TO  
5 CONSIDER AT THE TIME THAT YOU ARE DELIBERATING IN THIS MATTER.

6  
7 IT IS NOW MY DUTY AS JUDGE  
8 TO INSTRUCT YOU IN THE LAW THAT  
9 APPLIES TO THIS PENALTY HEARING.

10 IT IS YOUR DUTY AS JURORS TO  
11 FOLLOW THESE INSTRUCTIONS AND TO  
12 APPLY THE RULES OF LAW TO THE  
13 FACTS AS YOU FIND THEM FROM THE  
14 EVIDENCE.

15  
16 YOU MUST NOT BE CONCERNED  
17 WITH THE WISDOM OF ANY RULE OF  
18 LAW STATED IN THESE INSTRUCTIONS.  
19 REGARDLESS OF ANY OPINION YOU MAY  
20 HAVE AS TO WHAT THE LAW OUGHT TO  
21 BE, IT WOULD BE A VIOLATION OF  
22 YOUR OATH TO BASE A VERDICT UPON  
23 ANY OTHER VIEW OF THE LAW THAN  
24 THAT GIVEN IN THE INSTRUCTIONS  
25 OF THE COURT.

26  
27 IF, IN THESE INSTRUCTIONS,  
28 A RULE, DIRECTION OR IDEA IS  
29 REPEATED OR STATED IN DIFFERENT  
30 WAYS, NO EMPHASIS THEREON IS  
31 INTENDED BY ME AND NONE MUST BE  
32 INFERRED BY YOU. FOR THAT



1 REASON, YOU ARE NOT TO  
2 SINGLE OUT ANY CERTAIN  
3 SENTENCE OR ANY INDIVIDUAL  
4 POINT OR INSTRUCTION AND  
5 IGNORE THE OTHERS, BUT YOU  
6 ARE TO CONSIDER ALL THE IN-  
7 STRUCTIONS AS A WHOLE AND  
8 REGARD EACH IN THE LIGHT OF  
9 ALL THE OTHERS.

10  
11 THE ORDER IN WHICH THE IN-  
12 STRUCTIONS ARE GIVEN HAS NO SIG-  
13 NIFICANCE AS TO THEIR RELATIVE  
14 IMPORTANCE.

15  
16 THE TRIAL JURY SHALL FIX THE  
17 PUNISHMENT FOR EVERY PERSON CON-  
18 VICTED OF MURDER OF THE FIRST  
19 DEGREE.

20  
21 THE JURY SHALL FIX THE PUNISH-  
22 MENT AT:

- 23 1. DEATH, OR  
24 2. LIFE IMPRISONMENT WITHOUT  
25 THE POSSIBILITY OF PAROLE,  
26 OR,  
27 3. LIFE IMPRISONMENT WITH THE  
28 POSSIBILITY OF PAROLE.

29  
30 YOU ARE INSTRUCTED THAT THE  
31 LIFE IMPRISONMENT WITH THE POSSIBIL-  
32 ITY OF PAROLE DOES NOT EXCLUDE EXECU-

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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 CIRCUM-  
STANCES ARE FOUND TO  
EXIST;
- B. WHETHER A MITIGATING CIR-  
CUMSTANCE OR CIRCUMSTANCES  
ARE FOUND TO EXIST; AND
- C. BASED UPON THESE FINDINGS,  
WHETHER THE DEFENDANT SHOULD  
BE SENTENCED TO LIFE IMPRISON-  
MENT 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

1 BE IMPRISONMENT IN THE STATE  
2 PRISON FOR LIFE WITH OR WITHOUT  
3 THE POSSIBILITY OF PAROLE.  
4

5 THE BURDEN RESTS UPON THE  
6 PROSECUTION TO ESTABLISH ANY  
7 AGGRAVATING CIRCUMSTANCE BEYOND  
8 A REASONABLE DOUBT.  
9

10 A REASONABLE DOUBT IS ONE  
11 BASED ON REASON. IT IS NOT  
12 MERE POSSIBLE DOUBT, BUT IS  
13 SUCH A DOUBT AS WOULD GOVERN  
14 OR CONTROL A PERSON IN THE MORE  
15 WEIGHTY AFFAIRS OF LIFE. IF THE  
16 MINDS OF THE JURORS, AFTER THE  
17 ENTIRE COMPARISON AND CONSIDERA-  
18 TION OF ALL THE EVIDENCE, ARE IN  
19 SUCH A CONDITION THAT THEY CAN  
20 SAY THEY FEEL AN ABIDING CONVIC-  
21 TION OF THE TRUTH OF THE CHARGE,  
22 THERE IS NOT A REASONABLE DOUBT.  
23 DOUBT TO BE REASONABLE MUST BE  
24 ACTUAL AND SUBSTANTIAL, NOT MERE  
25 POSSIBILITY OR SPECULATION.  
26

27 YOU ARE INSTRUCTED THAT THE  
28 FOLLOWING FACTORS ARE CIRCUMSTANCES  
29 BY WHICH MURDER OF THE FIRST DEGREE  
30 MAY BE AGGRAVATED:

- 31 1. THE MURDER WAS COMMITTED  
32 BY A DEFENDANT WHO WAS

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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 PRE-  
VENT 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.

1 THE OFFENSE OF ROBBERY IS  
2 A FELONY UNDER THE LAWS OF THE  
3 STATE OF NEVADA.  
4

5 MURDER OF THE FIRST DEGREE  
6 MAY BE MITIGATED BY ANY OF THE  
7 FOLLOWING CIRCUMSTANCES, EVEN  
8 THOUGH THE MITIGATING CIRCUMSTANCE  
9 IS NOT SUFFICIENT TO CONSTITUTE  
10 A DEFENSE OR REDUCE THE DEGREE OF  
11 THE CRIME:

- 12 1. ANY OTHER MITIGATING  
13 CIRCUMSTANCES.  
14

15 THE JURY IS INSTRUCTED THAT  
16 IN DETERMINING THE APPROPRIATE  
17 PENALTY TO BE IMPOSED IN THIS CASE  
18 THAT IT MAY CONSIDER ALL EVIDENCE  
19 INTRODUCED AT BOTH THE PENALTY  
20 HEARING PHASE OF THESE PROCEEDINGS  
21 AND AT THE TRIAL OF THIS MATTER.  
22

23 THE LAW RECOGNIZES TWO CLASSES  
24 OF EVIDENCE. ONE IS DIRECT EVIDENCE  
25 AND THE OTHER IS CIRCUMSTANTIAL  
26 EVIDENCE.  
27

28 DIRECT EVIDENCE IS THE TESTI-  
29 MONY OF A PERSON WHO CLAIMS TO  
30 HAVE KNOWLEDGE OF THE COMMISSION  
31 OF THE CRIME WHICH HAS BEEN COMMIT-  
32 TED, SUCH AS AN EYE-WITNESS.

1 CIRCUMSTANTIAL EVIDENCE IS THE  
2 PROOF OF A CHAIN OF FACTS AND  
3 CIRCUMSTANCES WHICH TEND TO SHOW  
4 WHETHER THE DEFENDANT IS GUILTY  
5 OR NOT GUILTY. THE LAW MAKES NO  
6 DISTINCTIONS BETWEEN THE WEIGHT  
7 TO BE GIVEN EITHER DIRECT OR  
8 CIRCUMSTANTIAL EVIDENCE. THERE-  
9 FORE, ALL OF THE EVIDENCE IN THE  
10 CASE, INCLUDING THE CIRCUMSTANTIAL  
11 EVIDENCE, SHOULD BE CONSIDERED BY  
12 YOU IN ARRIVING AT YOUR VERDICT.

13  
14 ALTHOUGH YOU ARE TO CONSIDER  
15 ONLY THE EVIDENCE IN THE CASE IN  
16 REACHING A VERDICT, YOU MUST BRING  
17 TO THE CONSIDERATION OF THE EVIDENCE  
18 YOUR EVERYDAY COMMON SENSE AND  
19 JUDGMENT AS REASONABLE MEN AND  
20 WOMEN. THUS, YOU ARE NOT LIMITED  
21 SOLELY TO WHAT YOU SEE AND HEAR AS  
22 THE WITNESSES TESTIFY. YOU MAY DRAW  
23 REASONABLE INFERENCES FROM THE  
24 EVIDENCE WHICH YOU FEEL ARE JUSTI-  
25 FIED IN THE LIGHT OF COMMON EXPER-  
26 IENCE, KEEPING IN MIND THAT INFERENCES  
27 SHOULD NOT BE BASED ON SPECULATION OR  
28 GUESS.

29  
30 THE VERDICT MAY NEVER BE  
31 INFLUENCED BY SYMPATHY, PREJUDICE  
32 OR PUBLIC OPINION. YOUR DECISION

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1 SHOULD BE THE PRODUCE OF SINCERE  
2 JUDGMENT AND SOUND DISCRETION IN  
3 ACCORDANCE WITH THESE RULES OF LAW.  
4

5 THE COURT HAS SUBMITTED TWO SETS  
6 OF VERDICTS TO YOU. ONE SET OF  
7 VERDICTS REFLECTS THE THREE POSSIBLE  
8 PUNISHMENTS WHICH MAY BE IMPOSED.  
9 THE OTHER SET OF VERDICTS ARE  
10 SPECIAL VERDICTS. THEY ARE TO REFLECT  
11 YOUR FINDINGS WITH RESPECT TO THE  
12 PRESENCE OR ABSENCE AND WEIGHT TO BE  
13 GIVEN ANY AGGRAVATING CIRCUMSTANCE AND  
14 ANY MITIGATING CIRCUMSTANCES.  
15

16 IT WILL BE THE JURY'S DUTY TO  
17 SELECT ONE APPROPRIATE VERDICT PER-  
18 TAINING TO THE PUNISHMENT WHICH IS  
19 TO BE IMPOSED AND ONE APPROPRIATE  
20 SPECIAL VERDICT PERTAINING TO THE  
21 JURY'S FINDINGS WITH RESPECT TO  
22 AGGRAVATING AND MITIGATING CIRCUM-  
23 STANCES.  
24

25 DURING YOUR DELIBERATION YOU  
26 WILL HAVE ALL THE EXHIBITS WHICH  
27 WERE ADMITTED INTO EVIDENCE, THESE  
28 WRITTEN INSTRUCTIONS AND FORMS OF  
29 VERDICT, WHICH HAVE BEEN PREPARED  
30 FOR YOUR CONVENIENCE.  
31

32 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, TELE-  
VISION 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 INSTRU-  
CTIONS AT THIS TIME?

MR. HARMON: NO, YOUR HONOR.

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1 THE COURT: AND IT'S A MATTER OF TRIAL STRATEGY  
2 THAT YOU OFFER NO FURTHER INSTRUCTIONS AT THIS TIME?

3 MR. HARMON: IT IS, YOUR HONOR.

4 THE COURT: THANK YOU.

5 COUNSEL, DO YOU HAVE ANY OBJECTION TO ANY  
6 OF THE INSTRUCTIONS GIVEN?

7 MR. FRANZEN: YES, YOUR HONOR.

8 THE COURT: ALL RIGHT. STATE THE NUMBER AND  
9 YOUR OBJECTION.

10 MR. FRANZEN: INSTRUCTION NUMBER FIVE, YOUR  
11 HONOR, WHICH INSTRUCTS THE JURY THAT THE SENTENCE OF LIFE  
12 IMPRISONMENT --

13 THE COURT: COUNSEL, STAND, PLEASE.

14 MR. FRANZEN: I'M SORRY, YOUR HONOR.

15 IT INSTRUCTS THE JURORS THAT:

16 THE SENTENCE OF LIFE IMPRISON-  
17 MENT WITHOUT THE POSSIBILITY OF  
18 PAROLE DOES NOT EXCLUDE EXECUTIVE  
19 CLEMENCY.

20 WE REALIZE THAT N.R.S. 175.161, SUB-  
21 PARAGRAPH 7, ALLOWS THE GIVING OF SOME INSTRUCTIONS WHEN THE  
22 POSSIBILITY OF SUCH A SENTENCE EXISTS. HOWEVER, I BELIEVE THE  
23 STATUTE WAS ENACTED IN THE LATE 1960'S. IT WAS ENACTED PRIOR  
24 TO THE RECENT DEVELOPMENT OF CAPITAL PUNISHMENT LAW BY THE  
25 UNITED STATES SUPREME COURT: THE FURMAN, THE GEORGIA, THE  
26 PROFFITT, AND OTHER DISCUSSIONS THAT WE HAVE PREVIOUSLY MENTION-  
27 ED IN OUR DISCUSSION OF WHAT TYPE OF AGGRAVATING CIRCUMSTANCE  
28 COULD BE GIVEN TO A SENTENCING JURY AND THAT THEIR SENTENCING  
29 DISCRETION MUST BE A CHANNELED DISCRETION, STRICTLY CONTROLLED.  
30 WE BELIEVE THAT THIS TYPE OF -- THIS TYPE OF INSTRUCTION  
31 DEMEANS THE JURY'S OWN DUTY IN THE JURY'S OWN MIND, AND  
32 ENCOURAGES THEM TO GIVE LESS -- GIVE LESS THAN THEIR COMPLETE

1 ATTENTION AND CONCERN TO THE SENTENCING OF MR. HOWARD, AND THAT  
2 THEY WILL BELIEVE THAT ANY MISTAKE THEY MAKE WILL BE CURED BY  
3 THE EXECUTIVE DEPARTMENT OF OUR STATE.

4 WE WOULD ALSO OBJECT BECAUSE THERE  
5 HAVE BEEN NO EVIDENCE PRESENTED BEFORE THIS COURT TO BE  
6 PRESENTED TO THE JURY AS TO HOW THIS EXECUTIVE CLEMENCY PROGRAM  
7 WORKS. WE BELIEVE THAT EVIDENCE WILL BE PRESENTED, IF IT WAS  
8 PREVENTED, MR. HOWARD, GIVEN HIS RECORD HAS ADMITTED ON THE  
9 STAND, WOULD NEVER GET EXECUTIVE CLEMENCY.

10 THE CURRENT GOVERNOR, OF COURSE, NEVER --  
11 THE CURRENT GOVERNOR OF COURSE DID NOT GRANT EXECUTIVE CLEMENCY.  
12 OR URGE IT WHEN HE WAS A MEMBER OF THE PARDONS BOARD WHEN HE  
13 WAS WITH THE NEVADA ATTORNEY GENERAL.

14 THE COURT: COUNSEL, LET'S STAY OFF POLITICS,  
15 PLEASE.

16 MR. FRANZEN: THE OTHER OBJECTION, YOUR HONOR,  
17 WAS AS WHEN WE APPROACHED THE BENCH WE OBJECTED TO THE REPEATING  
18 OF THE -- THE REPEATING OF THIS PARTICULAR INSTRUCTION BECAUSE  
19 OF THE UNDUE EMPHASIS SUCH A REPEATING OF IT WOULD HAVE ON THAT  
20 LANGUAGE REGARDING EXECUTIVE CLEMENCY.

21 WE REALIZE THAT THE COURT REPORTER REFLECTS  
22 THAT YOUR HONOR MISSPOKE HIMSELF REGARDING THIS INSTRUCTION,  
23 PARTICULARLY IF I RECALL CORRECTLY, YOUR HONOR INSTRUCTED THEM,  
24 "YOU ARE INSTRUCTED THAT THE SENTENCE OF LIFE IMPRISONMENT WITH  
25 THE POSSIBILITY OF PAROLE," RATHER THAN WITHOUT THE POSSIBILITY  
26 OF PAROLE, "DOES NOT EXCLUDE EXECUTIVE CLEMENCY."

27 WE BELIEVE THAT THE ERROR OR THE  
28 MISTAKE WOULD HAVE BEEN CURED BY THE PRESENTATION OF THIS  
29 INSTRUCTION TO THE JURY WHEN THEY WENT BACK FOR THEIR DELIBERA-  
30 TIONS.

31 THE COURT: COUNSEL.

32 MR. HARMON: YOUR HONOR, N.R.S. 175.176, SUB-

1 HEADING 7, MAKES IT INCUMBENT UPON THE COURT TO GIVE THIS  
2 INSTRUCTION IF IT'S REQUESTED BY EITHER PARTY. THE STATE HAS  
3 REQUESTED IT, THEREFORE THE STATUTORY LANGUAGE THAT IT SHALL BE  
4 GIVEN TAKES EFFECT.

5 THE COURT: COUNSEL, THE STATUTE VERY CLEARLY  
6 STATES THAT IT MUST BE GIVEN IF REQUESTED BY COUNSEL. THE  
7 STATE REQUESTED IT. I GAVE IT.

8 WITH REGARDS TO THE REPEATING OF THE  
9 INSTRUCTION, THIS COURT IS INTERESTED IN REVEALING THE TRUTH,  
10 RATHER THAN OBSCURING IT. FOR THAT REASON, I READ IT.

11 NOW, ARE THERE ANY OTHER INSTRUCTIONS  
12 THAT YOU OBJECT TO?

13 MR. FRANZEN: FORGIVE ME. INSTRUCTION NUMBER  
14 NINE, YOUR HONOR.

15 THE COURT: NUMBER NINE?

16 MR. FRANZEN: REGARDING THE AGGRAVATING CIRCUM-  
17 STANCES BY WHICH MURDER IN THE FIRST DEGREE MAY BE AGGRAVATED.  
18 WE DO NOT BELIEVE THAT THE STATE HAS PROVED BEYOND A REASONABLE  
19 DOUBT THE PRIOR FELONY CONVICTION IN SAN BERNARDINO.

20 THE COURT: WELL, THAT'S AN ISSUE TO BE DETER-  
21 MINED BY THE JURY, NOT BY THIS COURT OR BY THE DISTRICT  
22 ATTORNEY.

23 MR. FRANZEN: WELL, I BELIEVE, YOUR HONOR, WE  
24 HAVE A STATEMENT GIVEN BY MR. HOWARD ON DIRECT EXAMINATION AND  
25 NO CORPUS.

26 THE COURT: WELL, WE WILL LET THE JURY DECIDE  
27 THAT ISSUE.

28 ALL RIGHT. ANYTHING FURTHER?

29 MR. FRANZEN: YES, YOUR HONOR.

30 THE COURT: YES.

31 MR. FRANZEN: INSTRUCTION NUMBER TWELVE,  
32 REGARDING MITIGATING CIRCUMSTANCES, OUR OBJECTION TO THIS TIES

1 INTO THE PREVIOUSLY REJECTED INSTRUCTION. WOULD THE COURT  
2 PREFER THAT I WAIT TO PROFFER THE PROPOSED INSTRUCTION OR  
3 DISCUSS IT AT THIS TIME?

4 THE COURT: WELL, YOU CAN DISCUSS IT, I BELIEVE,  
5 AT THIS TIME.

6 MR. FRANZEN: YOUR HONOR, INSTRUCTION NUMBER  
7 TWELVE FAILS TO LIST ANY OF THE MITIGATING CIRCUMSTANCES WHICH  
8 WE BELIEVE THE JURY'S ATTENTION SHOULD BE DIRECTED TO.

9 THE COURT: CAN YOU TELL ME OF ANY CASE,  
10 STATUTE OR AUTHORITY WHERE IT CLEARLY SETS FORTH AND DEFINES  
11 ADDITIONAL MITIGATING CIRCUMSTANCES?

12 MR. FRANZEN: YOUR HONOR, THE --

13 THE COURT: IN THE STATE OF NEVADA, SIR.

14 MR. FRANZEN: I CANNOT STATE OR IDENTIFY A  
15 NEVADA SUPREME COURT DECISION ON THE ISSUE.

16 THE COURT: DO YOU KNOW WHERE THE LEGISLATURE  
17 HAS FURTHER CLARIFIED WHAT THEY MEAN BY ANY OTHER MITIGATING  
18 CIRCUMSTANCE?

19 MR. FRANZEN: I KNOW THAT AT THE TIME THE NEVADA  
20 LEGISLATURE WAS CREATING OUR NEVADA DEATH PENALTY STATUTE, I  
21 BELIEVE IN 1977, THEY WERE CONCERNED WITH A VARIETY OF SUPREME  
22 COURT DECISIONS: FURMAN, GREGG, AND THE OTHER ONE. IF I MAY  
23 HAVE THE COURT'S INDULGENCE FOR JUST ONE MOMENT.

24 THE COURT: WELL, THIS IS NEW INFORMATION THAT  
25 YOU ARE IMPARTING TO THE COURT AT THIS TIME; IS THAT CORRECT?  
26 YOU HAVE NEVER IMPARTED THIS TO ME AT ANYTIME.

27 MR. FRANZEN: WELL, I HAVE IMPARTED TO YOUR  
28 HONOR THAT WE BELIEVE WE ARE ENTITLED TO HAVE A LISTING OF THE  
29 AGGRAVATING -- OR THE MITIGATING CIRCUMSTANCES TO BRING TO THE  
30 ATTENTION OF THE --

31 THE COURT: BUT YOU HAVE NEVER STATED BEFORE  
32 THAT THERE IS ANY STATUTORY OR CASE SUPPORT FOR IT.

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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 CIRCUM-  
STANCES. YOU MAY HAVE THOUGHT --

MR. FRANZEN: I'M NOT ARGUING ADDITIONAL MITI-  
GATING 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 BACK-  
GROUND, 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

1 DIRECT YOUR HONOR TO LIST THESE MITIGATING CIRCUMSTANCES WHICH  
2 WE BELIEVE HAVE BEEN PROVEN THROUGH MR. HOWARD'S TESTIMONY.

3 THE COURT: WHERE ARE THEY, BECAUSE THIS IS  
4 THE FIRST TIME I HAVE EVER HEARD OF SUCH A PROPOSAL.

5 MR. FRANZEN: THEY'RE IN THE PROPOSED INSTRUCTIONS  
6 IN WHICH WE DISCUSSED WITH YOUR HONOR THAT THE DEFENDANT  
7 -- THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE  
8 INFLUENCE OF EXTREME MENTAL AND EMOTIONAL DISTURBANCE, WHICH  
9 WAS SUB-PARAGRAPH 2 OF N.R.S. 200.033.

10 WE ALSO WISH THAT THE JURY BE INSTRUCTED  
11 THAT A MITIGATING CIRCUMSTANCE THAT COULD BE CONSIDERED WOULD  
12 BE THAT THE DEFENDANT HAS A HISTORY OF MENTAL ILLNESS. SUB-  
13 PARAGRAPH 3 IN OUR PROPOSED INSTRUCTIONS WAS THAT THE DEFENDANT  
14 HAS BEEN IN THE PAST, IN MENTAL OR PSYCHIATRIC WARDS OR  
15 HOSPITALS. AND SUB-PARAGRAPH 4 WAS THAT THE DEFENDANT HAS  
16 HONORABLY SERVED HIS COUNTRY IN THE MILITARY. AND SUB-PARA-  
17 GRAPH 5 WAS THAT THE DEFENDANT WAS PRESENT AND OBSERVED THE  
18 MURDER OF HIS MOTHER AND HIS SISTER BY HIS FATHER.

19 THE COURT: ALL RIGHT.

20 MAY I SEE THAT PROPOSED INSTRUCTION,  
21 COUNSEL.

22 MR. FRANZEN: YES, YOUR HONOR.

23 MAY THE RECORD REFLECT I AM PROVIDING  
24 COUNSEL FOR THE STATE WITH A COPY.

25 THE COURT: ALL RIGHT.

26 MR. HARMON: THANK YOU.

27 THE COURT: I WILL MARK THIS DEFENDANT'S  
28 PROPOSED "A", NOT GIVEN, AND SIGNED THIS DATE.

29 MR. FRANZEN: THANK YOU, YOUR HONOR.

30 YOUR HONOR, TO MAKE THE RECORD CLEAR,  
31 THIS WAS ONE OF THE PROPOSED INSTRUCTIONS THAT YOUR HONOR  
32 ALLOWED US TO SEND MR. COOPER TO HAVE TYPED.

1 THE COURT: I'M AWARE OF THAT. THAT ISN'T WHAT  
2 I WAS RAISING. I WAS RAISING THE FACT THAT YOU SAID THAT YOU  
3 HAD A LIST AT YOUR OFFICE OF THESE WITH SUPPORTING CASE  
4 AUTHORITY.

5 MR. FRANZEN: NO. NO. THAT WAS NOT WHAT I  
6 INTENDED TO SAY.

7 THE COURT: OKAY. ALL RIGHT.

8 IF YOU INTENDED TO SAY THAT YOU WERE JUST  
9 GOING TO GO OVER AND GET THEIR LIST TYPED, THEN I CONCUR THAT'S  
10 WHAT YOU ASKED ME FOR AND THAT'S WHAT I DID.

11 MR. FRANZEN: IF I -- I MISSPOKE MYSELF, IF  
12 THAT'S WHAT YOUR HONOR --

13 THE COURT: THAT'S WHAT YOU SAID.

14 MR. FRANZEN: OKAY.

15 THE COURT: NOW, DO YOU WANT ANOTHER -- DO YOU  
16 HAVE --

17 MR. FRANZEN: THAT'S OUR OBJECTION TO PROPOSED  
18 12 AND OUR PROPOSED "A", YOUR HONOR. I HAVE OTHER OBJECTIONS,  
19 IF YOU WISH ME TO.

20 THE COURT: ALL RIGHT.

21 THE STATE'S RESPONSE.

22 MR. HARMON: AS TO PROPOSED "A", YOUR HONOR?

23 THE COURT: AS TO PROPOSED "A" AND THE GIVING  
24 OF INSTRUCTION TWELVE.

25 MR. HARMON: YOUR HONOR, PROPOSED "A" IS  
26 CLEARLY A JUDICIAL COMMENT ON THE EVIDENCE. WE THINK, SINCE  
27 NO AUTHORITY WHATSOEVER HAS BEEN OFFERED, IT CERTAINLY WOULD  
28 BE UNFAIR FOR THE COURT IN EFFECT TO BE TELLING THIS JURY,  
29 FOR EXAMPLE, TO HAVE SERVED IN THE MILITARY MITIGATES MURDER  
30 IN THE FIRST DEGREE. WHILE IN THE MILITARY SERVICE, EVEN BY  
31 THE DEFENDANT'S TESTIMONY, WAS ABOUT 13 YEARS AGO. I CAN'T  
32 IMAGINE THAT THERE IS ANY AUTHORITY THAT WOULD SUGGEST AS A



1 MATTER OF LAW THAT MITIGATES MURDER IN THE FIRST DEGREE. THE  
2 SAME APPLIES TO ALL OF THESE.

3 NUMBER FIVE, THE DEFENDANT SAID HE WAS TWO  
4 YEARS OLD. WELL, PERHAPS HIS MEMORY IS BETTER THAN MINE, BUT  
5 I'M NOT COGNIZANT OF VERY MUCH THAT HAPPENED WHEN I WAS TWO.  
6 AND CERTAINLY THERE IS NONE, THERE COULD BE NO AUTHORITY WHICH  
7 WOULD-SAY AS A MATTER OF LAW THAT TYPE OF SITUATION WOULD  
8 MITIGATE A MURDER BY A 31-YEAR-OLD MAN.

9 YOUR HONOR, IT'S ALL A MATTER OF  
10 ARGUMENT. INSTRUCTION NUMBER TWELVE, WHICH INCORPORATES INTO IT  
11 THE ONLY MITIGATING CIRCUMSTANCE SET FORTH IN N.R.S. 200.035  
12 WHICH COULD POSSIBLY BE APPLICABLE; ANY OTHER MITIGATING CIR-  
13 CUMSTANCE HAS BEEN READ TO THE JURY.

14 AFTER THAT, NOW THE DEFENSE MAY  
15 ARGUE THAT EACH OF THESE FIVE CATEGORIES FALLS WITHIN THAT  
16 CIRCUMSTANCE. SO WE'RE COVERED. AND TO DO OTHERWISE WOULD BE  
17 UNFAIR TO THE STATE AND I THINK WOULD CONFUSE AND MISLEAD THE  
18 JURY.

19 THE COURT: THE LAW I THINK IS RATHER CLEAR  
20 WITH REGARDS TO THE ISSUE OF MITIGATING OFFENSES FROM A HIGHER  
21 OFFENSE TO A LOWER OFFENSE. OUR STATUTES HAVE FOR YEARS SET  
22 FORTH THE CERTAIN TYPES OF MITIGATING CIRCUMSTANCES, SUCH AS  
23 IN THE KILLING OF A HUMAN AND THE KILLING IS WITHOUT INTENT IS  
24 SECOND DEGREE RATHER THAN FIRST DEGREE. IT IS NOTED, HOWEVER,  
25 THAT ACCIDENTAL KILLING OF ANOTHER HUMAN BEING, WHEN AN  
26 ACCIDENT OCCURS, IS NOT MURDER; FOR THE LAW SAYS THAT THE ACT  
27 CLEARLY IS INNOCENT RATHER THAN CRIMINAL IN NATURE.

28 THE REASON I MENTION THESE IS BECAUSE OF  
29 THE FACT THAT THE FOCUS OF ANY MITIGATING STATUTE SHOULD BE,  
30 AND IS, IN OUR PRESENT LAW, BASED UPON THE STATE OF MIND OR  
31 THE CIRCUMSTANCES AT THE TIME OF THE COMMISSION OF THE  
32 OFFENSE, NOT IN SOME OTHER FAR AND DISTANT TIME, AS THESE

1 EXPRESSIONS OF MITIGATING CIRCUMSTANCES WOULD DICTATE.

2 THE STATUTE 200.035 SAYS THAT MURDER  
3 IN THE FIRST DEGREE MAY BE MITIGATED BY ANY OF THE FOLLOWING  
4 CIRCUMSTANCES, EVEN THOUGH THE MITIGATING CIRCUMSTANCE IS NOT  
5 SUFFICIENT TO CONSTITUTE A DEFENSE OR REDUCE THE DEGREE OF THE  
6 CRIME.

7 IF YOU WANT TO STEP OUTSIDE, WHY DON'T  
8 YOU DO THAT.

9 THE CLERK: THANK YOU.

10 THE COURT: THE DEFENDANT HAS NO SIGNIFICANT  
11 HISTORY OF PRIOR CRIMINAL ACTIVITIES, AND THEN IT GOES ON DOWN  
12 THE LINE.

13 THESE OFFENSES OR STATEMENTS THAT ARE  
14 DEFINED HERE, THAT IF MURDER WAS COMMITTED WHILE THE DEFENDANT  
15 WAS UNDER THE INFLUENCE OF EXTREME OR EMOTIONAL DISTURBANCE,  
16 THERE IS NO EVIDENCE IN THIS RECORD, EXCEPT THE DEFENDANT'S  
17 OWN STATEMENT, THAT HE HAS HAD MENTAL PROBLEMS IN THE PAST,  
18 NOT EVEN THE DEFENDANT'S STATEMENTS, TO INDICATE THAT HE EVER  
19 HAD -- WAS MENTALLY ILL OR EMOTIONALLY DISTURBED AT THE TIME  
20 OF THE KILLING OF THE VICTIM IN THIS CASE. THE REASON VERY  
21 OBVIOUSLY HE DENIES IT.

22 FURTHER, THERE IS NO PSYCHIATRIC  
23 TESTIMONY IN THIS RECORD WHICH TIES THE DEFENDANT TO THAT  
24 EVENT AND STATES THAT AT THE TIME OF THAT EVENT HE WAS EMOTION-  
25 ALLY AND MENTALLY ILL OR DISTURBED; FOR IT IS OBVIOUS THAT HE  
26 COULD HAVE BEEN MENTALLY ILL AT ANY OTHER TIME AND STILL NOT  
27 BE A MITIGATING CIRCUMSTANCE IN THIS CASE. THAT'S WHAT WE  
28 HAVE HERE. IT SAYS THE DEFENDANT HAS A HISTORY OF MENTAL  
29 ILLNESS OR THAT THE DEFENDANT HAS IN THE PAST BEEN IN MENTAL  
30 AND PSYCHIATRIC WARDS OR THAT HE SERVED HONORABLY IN THE UNITED  
31 STATES SERVICE OR THAT HE OBSERVED THE MURDER OF HIS MOTHER  
32 AND SISTER. I DON'T THINK THE LAW HAS GONE YET TO THE POINT OF

1 SAYING THAT MERELY BECAUSE I FOUGHT FOR MY FLAG I AM ENTITLED  
2 TO HAVE MY FIRST DEGREE MURDER CONSIDERED SECOND OR MANSLAUGH-  
3 TER, OR THE FACT THAT I WAS MENTALLY ILL AT THE AGE OF 16, THAT  
4 AT THE AGE OF 30, I AM ENTITLED TO HAVE MY MURDER OF THE FIRST  
5 DEGREE CONSIDERED MANSLAUGHTER.

6 THE ISSUE I THINK IN ANY OTHER MITI-  
7 GATING CIRCUMSTANCE MUST FOCUS, PARTICULARLY IN THESE AREAS  
8 WHEN WE ARE TALKING ABOUT A MENTAL STATE OF THIS DEFENDANT,  
9 MUST FOCUS UPON THE TIME OF THE KILLING. THERE WAS NEVER A  
10 DEFENSE OF INSANITY RAISED IN THIS CASE. THIS IS MERELY, IT  
11 LOOKS TO ME LIKE, AN ATTEMPT TO RAISE AN INSANITY DEFENSE AT  
12 THIS LATE DATE UNDER SOME KIND OF LIMITED LIABILITY THEORY OR  
13 APPROACH. I FIND NONE STATED IN THE STATUTE EXCEPT TWO, AND  
14 THAT IS CLEAR THAT THERE HAS TO BE SOME EVIDENCE IN THE RECORD.  
15 AND THERE ISN'T ANY EVIDENCE IN THE RECORD THAT AT THE TIME OF  
16 THE KILLING OF THE VICTIM THE DEFENDANT WAS MENTALLY ILL OR  
17 EMOTIONALLY DISTURBED.

18 FOR THOSE REASONS, COUNSEL, THE COURT  
19 DID NOT GIVE IT, BUT DID GIVE INSTRUCTION TWELVE. I HAVE NO  
20 IDEA WHAT THE LEGISLATURE MEANT OR MEANS BY, "ANY OTHER MITIGA-  
21 TING CIRCUMSTANCE" AND I KNOW OF NO COURT, NOR DO I KNOW OF ANY  
22 LEGISLATURE -- LEGISLATOR, THAT HAS DEFINED WHAT THAT MEANS.  
23 IT'S THERE AND IT'S FOR THAT REASON I THINK YOU ARE ENTITLED  
24 AT LEAST TO ARGUE THAT THE TESTIMONY HE GAVE MAY FALL UNDER  
25 THIS CATEGORY. BUT FOR ME TO RULE, AS A MATTER OF FACT, THAT  
26 IT IS A MITIGATING CIRCUMSTANCE IS BEYOND, I BELIEVE, MY CALL.  
27 IT IS A MATTER FOR THE JURY TO MAKE THAT CONSIDERATION AND THAT  
28 DECISION. AND FOR THOSE REASONS, COUNSEL, I REFUSED TO GIVE  
29 THE INSTRUCTION. AND MAYBE SOME SUPREME COURT DOWN THE LINE  
30 MAY DEFINE THAT FOR US, BUT AS OF THE MOMENT, THAT'S THE LAW.

31 COUNSEL?

32 MR. FRANZEN: OUR NEXT OBJECTION, YOUR HONOR,

1 INSTRUCTION FIFTEEN, THE SECOND PARAGRAPH, WHICH DIRECTS THE  
2 SENTENCING AUTHORITY, IN THIS CASE THE JURY, TO HAVE NO  
3 SYMPATHY IN THE SENTENCING PROCESS. WE BELIEVE THAT THE  
4 SENTENCING PROCESS ALWAYS HAS ROOM FOR SYMPATHY AND MERCY. AND  
5 INDEED WHEN YOUR HONOR IS ENGAGED IN THE SENTENCING PROCESS  
6 HIMSELF, I'M SURE HE HEARS MANY SUCH PLEAS. WE BELIEVE THAT  
7 THE JURY SHOULD NOT BE PRECLUDED FROM EXPRESSING MERCY OR  
8 SYMPATHY FOR THE DEFENDANT.

9 THE COURT: THE STATE.

10 MR. HARMON: YOUR HONOR, I THINK THAT COUNSEL  
11 IS ASKING THE JURY TO IGNORE THE OATH THEY'VE ALREADY TAKEN,  
12 WHICH IS TO DECIDE THIS CASE ON THE FACTS AND THE LAW WHICH  
13 THE COURT GIVES THEM.

14 WE ARE IN THE PENALTY PHASE NOW, BUT WE  
15 STILL DON'T THINK THE VERDICT SHOULD BE BASED ON SYMPATHY,  
16 PREJUDICE OR PUBLIC OPINION. IT SHOULD BE BASED ON THE LAW  
17 AND THE EVIDENCE.

18 THE COURT: YOU TREEGED MY INTELLECTUAL CURIOS-  
19 ITY, COUNSEL.

20 MR. FRANZEN: THANK YOU.

21 THE COURT: SO I HAVE LOOKED AT THE AMERICAN  
22 HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE TO SEE WHAT SYMPA-  
23 THY IS. ONE OF ITS DEFINITIONS SAYS:

24 A FEELING OR EXPRESSION  
25 OF PITY OR SORROW FOR THE  
26 DISTRESS OF ANOTHER.

27 I DON'T THINK THAT'S THE FUNCTION OF  
28 THE JURY. AND I THINK THE LAW HAS BEEN VERY CLEARLY STATED  
29 OVER THE YEARS THAT WHILE WE KNOW THAT EVERYONE MUST USE THEIR  
30 COMMON SENSE IN ARRIVING AT A VERDICT, I DON'T THINK WE'LL EVER  
31 TAKE THE HUMAN EMOTION OR THE HUMAN ASPECT OUT OF IT, AND  
32 PROBABLY MORE VERDICTS ARE DECIDED BY SYMPATHY THAN THE OTHER.

1 BUT THE FACT REMAINS THAT THE LAW IS CLEAR THAT AS A MATTER OF  
2 LAW, WE ASK JURORS TO SET ASIDE THEIR PERSONAL FEELINGS AND  
3 DECIDE THE CASE UPON THE LAW AND THE FACTS AS PRESENTED TO  
4 THEM AND HOPEFULLY APPROACHING IT VERY OBJECTIVELY. WHETHER  
5 THEY DO OR NOT IS ENTIRELY THEIR OWN DECISION. HOWEVER, YOUR  
6 OBJECTION IS NOTED AND RECORDED.

7 ANYTHING FURTHER?

8 MR. FRANZEN: YES, YOUR HONOR. WE ALSO OBJECT,  
9 BECAUSE OF THE FORM OF INSTRUCTION 12 AND THE OBJECTION OF OUR  
10 PROPOSED INSTRUCTION "A", THE FORM OF THE VERDICTS IN WHICH THE  
11 CHECKLIST OF CIRCUMSTANCES GIVEN TO THE JURY REGARDING MITIGA-  
12 TING CIRCUMSTANCES DOES NOT INCLUDE THOSE THAT WE THINK SHOULD  
13 HAVE BEEN LISTED IN PROPOSED "A".

14 THE COURT: THE STATE?

15 MR. HARMON: YOUR HONOR, OUR OBJECTION IS  
16 ALREADY A MATTER OF RECORD AS IT PERTAINS TO PROPOSED "A", AND  
17 WE WOULD LIKE TO INCORPORATE THE SAME ARGUMENT AGAIN.

18 THE COURT: ALL RIGHT.

19 ANYTHING FURTHER, GENTLEMEN?

20 MR. HARMON: NOT FROM THE STATE, YOUR HONOR.

21 THE COURT: FILE THIS IN THE FILE, PLEASE.

22 MR. FRANZEN: YOUR HONOR, DOES THE SPECIAL  
23 VERDICT LISTING THE AGGRAVATING CIRCUMSTANCES, DOES THAT  
24 INCLUDE ALL OF THOSE THAT ARE IN THE STATUTE?

25 THE COURT: NO.

26 MR. FRANZEN: JUST THE TWO THAT THE STATE --

27 THE COURT: JUST THE TWO. THE VERDICTS MERELY  
28 CONTAIN THAT MURDER WAS COMMITTED BY THE DEFENDANT WHEN HE WAS  
29 PREVIOUSLY CONVICTED OF A FELONY AND THE MURDER WAS COMMITTED  
30 WHEN THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY.

31 ANYTHING FURTHER, GENTLEMEN?

32 MR. FRANZEN: YES, YOUR HONOR. THERE IS ONE

1 MORE PROPOSED INSTRUCTION. I APOLOGIZE, THE LAST PORTION OF IT  
2 SHOULD PROBABLY BE STRICKEN. WHEN MR. COOPER TOOK IT OVER HE  
3 WAS GOING FROM SOME SCRATCH NOTES THAT I HAD DONE.

4 MAY I APPROACH THE BENCH, YOUR HONOR?

5 MAY THE RECORD REFLECT I HAVE PROVIDED  
6 COUNSEL FOR THE STATE WITH A COPY.

7 THIS PROPOSED INSTRUCTION, YOUR HONOR,  
8 SHOULD END AT "BEYOND A REASONABLE DOUBT" PERIOD, AND SHOULD  
9 READ THAT "MITIGATING CIRCUMSTANCES DO NOT HAVE TO BE PROVEN  
10 BEYOND A REASONABLE DOUBT" AND THE LANGUAGE THAT FOLLOWS IT  
11 SHOULD BE STRICKEN, TO-WIT: "BUT ARE CIRCUMSTANCES RELATING TO  
12 HIS CHARACTER."

13 THE COURT: COUNSEL, I THINK WE CAN ERASE ALL OF  
14 THAT.

15 MR. FRANZEN: THANK YOU.

16 MR. HARMON: THIS IS PROPOSED "B", YOUR HONOR?

17 THE COURT: YES.

18 MR. HARMON: WE OBJECT TO THE GIVING OF THE  
19 INSTRUCTION, YOUR HONOR. WE THINK THAT THE JURY HAS ALREADY  
20 BEEN PROPERLY INSTRUCTED.

21 YOUR HONOR, INSTRUCTION SEVEN EXPLAINS  
22 THAT THE PROSECUTION HAS A BURDEN OF ESTABLISHING ANY MITIGATING  
23 CIRCUMSTANCE BEYOND A REASONABLE DOUBT. IN CONNECTION WITH  
24 THAT, INSTRUCTION SIX HAS CLEARLY SPELLED OUT THAT BEFORE, AND  
25 I READ NOW, BEGINNING AT LINE 13:

26 THE JURY MAY IMPOSE A  
27 SENTENCE OF DEATH ONLY IF IT  
28 FINDS AT LEAST ONE AGGRAVATING  
29 CIRCUMSTANCE HAS BEEN ESTABLISHED  
30 BEYOND A REASONABLE DOUBT AND  
31 FURTHER FINDS THAT THERE ARE NO  
32 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 CIRCUM-  
STANCE PROVEN BEYOND A REASONABLE DOUBT THEN IT'S A MATTER OF  
BALANCING THE WEIGHT BETWEEN THAT CIRCUMSTANCE AND ANY MITIGA-  
TING 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 AGGRA-  
VATING CIRCUMSTANCE OR CIRCUMSTANCES  
WHICH ARE FOUND BEYOND A REASONABLE  
DOUBT AND SHALL STATE THAT THERE  
ARE NO MITIGATING CIRCUMSTANCES  
SUFFICIENT TO OUTWEIGH THE AGGRAVA-  
TING CIRCUMSTANCE OR CIRCUMSTANCES  
FOUND.

1 IT IS OBVIOUS THAT THE STATE LEGIS-  
2 LATURE HAS DETERMINED THE STANDARD OF PROOF AND THE WEIGHT OF  
3 PROOF AND GIVING THIS WOULD BE CONTRARY TO THAT SECTION. IT  
4 IS MARKED "B", NOT GIVEN.

5 MR. FRANZEN: YOUR HONOR, DOES THAT -- I DON'T  
6 HAVE A COPY OF THAT STATUTE WITH ME. DOES THAT MEAN THAT THE  
7 DEFENDANT HAS THE BURDEN OF PROOF REGARDING MITIGATING CIRCUM-  
8 STANCES?

9 THE COURT: WELL, I DON'T KNOW WHAT INTERPRETA-  
10 TION YOU GIVE IT, BUT THAT'S THE LANGUAGE OF THE STATUTE:

11 THE FINDING OR VERDICT  
12 SHALL DESIGNATE THE AGGRAVATING  
13 CIRCUMSTANCE OR CIRCUMSTANCES  
14 WHICH WERE FOUND BEYOND A REASON-  
15 ABLE DOUBT, AND SHALL STATE THAT  
16 THERE ARE NO MITIGATING CIRCUM-  
17 STANCES SUFFICIENT TO OUTWEIGH  
18 THE AGGRAVATING CIRCUMSTANCE OR  
19 CIRCUMSTANCES FOUND.

20 THAT'S THE LANGUAGE OF THE STATUTE.

21 MR. FRANZEN: FOR THE RECORD THEN, YOUR HONOR,  
22 I THINK I SHOULD MAKE THE OBJECTION THAT ON RELIANCE ON THIS  
23 STATUTE I THINK WOULD BE MISPLACED, BUT THAT STATUTE, IF  
24 APPLIED, IS A BURDEN OF PROOF FOR THE DEFENDANT, THE OUTWEIGH-  
25 ING OF BEYOND A REASONABLE DOUBT OR AT LEAST EQUAL AND BEYOND  
26 A REASONABLE DOUBT OF MITIGATING CIRCUMSTANCES AND IT WOULD  
27 PLACE A BURDEN UPON THE DEFENDANT.

28 THE COURT: WELL, THAT'S A NICE LEGAL POINT YOU  
29 CAN RAISE LATER, COUNSEL.

30 FURTHER, IN 175.554, IT SAYS THAT:

31 A PANEL OF JUDGES SHALL DETERMINE,  
32 AND THEN IT GOES ON, THE JURY OR THE



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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 CIR-  
CUMSTANCE 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)**

1 LAS VEGAS, NEVADA, WEDNESDAY, MAY 4, 1983, AT 10:10 A.M.

2 \* \* \* \* \*

3 (WHEREUPON, THE FOLLOWING  
4 PROCEEDINGS WERE HAD OUTSIDE  
5 THE PRESENCE OF THE JURY:)

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

8 YOU MAY PROCEED.

9 MR. FRANZEN: YOUR HONOR, THERE'S TWO MATTERS.

10 FIRST, ALTHOUGH THE DEFENDANT HAS  
11 INSTRUCTED US NOT TO PRESENT THIS EVIDENCE, AND YOU HAVE  
12 INSTRUCTED US TO FOLLOW HIS INSTRUCTIONS, WE HAVE --

13 THE COURT: I HAVEN'T INSTRUCTED YOU ANY SUCH  
14 THING. I JUST ADVISED YOU. I JUST ADVISED YOU TO FOLLOW THE  
15 CANNONS OF ETHICS, AND THE CANNONS OF ETHICS TELL YOU WHAT YOUR  
16 POSITION IS.

17 YOU MAY PROCEED.

18 MR. FRANZEN: WE ARE IN POSSESSION OF CERTIFIED  
19 COPIES OF JUDGMENTS OF CONVICTION OF THE DEFENDANT'S FATHER,  
20 REFLECTING THE 1952 MURDER OF TWO INDIVIDUALS AND AN ATTEMPT  
21 MURDER ON ANOTHER INDIVIDUAL. WE THINK THAT THAT, TOGETHER  
22 WITH THE TESTIMONY OF MR. MIKE KIDD, OUR INVESTIGATOR WHO  
23 SPOKE WITH THE ALABAMA PRISON AUTHORITIES, WHO DESCRIBED THAT  
24 THE DEFENDANT -- THAT ONE SAM HOWARD IS IN THEIR CUSTODY AT  
25 THE MOMENT ON A 1975 MURDER. AND THEY HAVE IN THEIR POSSESSION  
26 A DOCUMENT DESCRIBING THE 1952 MURDER, IN WHICH IT IS STATED  
27 THAT MR. HOWARD, THE PRESENT DEFENDANT'S FATHER, MURDERED HIS  
28 WIFE, HIS DAUGHTER AND ATTEMPTED TO MURDER A THIRD INDIVIDUAL.  
29 WE THINK THAT THAT SHOULD BE INTRODUCED BEFORE THE JURY. I  
30 WOULD REQUEST PERMISSION TO REOPEN FOR THAT LIMITED PURPOSE.

31 IF YOUR HONOR IS NOT INCLINED TO ALLOW  
32 THAT, WE WOULD REQUEST PERMISSION TO FILE THAT WITH THE COURT

1 AT THIS TIME AND ALLOW MR. KIDD TO DESCRIBE THE CONVERSATION  
2 HE HAD WITH THE ALABAMA PRISON AUTHORITIES.

3 THE COURT: COUNSEL, YESTERDAY ALL DAY WE HAD  
4 YOU OBJECTING VOCIFEROUSLY ABOUT ANY HEARSAY AT ALL AND NOW  
5 YOU WANT YOUR MAN TO COME IN AND TESTIFY. IT'S ALL RIGHT FOR  
6 YOUR HEARSAY BUT NOT FOR THE STATE'S HEARSAY.

7 MR. FRANZEN: IF THE COURT WILL RECALL, N.R.S.  
8 200.033 (SIC) STATES, IN ITS CONCLUDING PARAGRAPH, THAT:

9 ANY EVIDENCE DEEMED MITI-  
10 GATING AND AGGRAVATING OR  
11 ANY OTHER EVIDENCE MAY COME IN.  
12 WE THINK THIS IS RELIABLE.

13 THE COURT: WHAT HAS CHANGED BETWEEN THE STATE'S  
14 HEARSAY AND YOUR HEARSAY? YOU OBJECTED VOCIFEROUSLY WHEN THE  
15 STATE WAS GOING TO BRING IN EVIDENCE ABOUT THE SAN BERNARDINO  
16 DETECTIVE WITH A CONVERSATION WITH ONE OF THE VICTIMS.

17 MR. FRANZEN: THAT IS THE DIFFERENCE, YOUR HONOR.

18 THE COURT: NOW YOU'RE NOT OBJECTING TO ALLOW  
19 YOUR MAN TO COME INTO NEVADA AS TO HEARSAY WITH SOMEONE BACK  
20 IN THE STATE, WHATEVER IT IS.

21 MR. FRANZEN: WELL, THAT --

22 THE COURT: I FAIL TO SEE ANY DIFFERENCE,  
23 COUNSEL, IN THE QUALITY OF TESTIMONY.

24 MR. FRANZEN: MAY WE ALLOW MR. KIDD TO TESTIFY,  
25 YOUR HONOR, TO PROFFER PROOF?

26 THE COURT: WELL, IF IT'S GOING TO BE HEARSAY,  
27 COUNSEL, I DIDN'T ALLOW THE STATE TO DO IT. YOU CAN MAKE A  
28 REPRESENTATION AS TO WHAT HE WOULD SAY. THAT'S APPROPRIATE.

29 MR. FRANZEN: WELL, I THINK I HAVE THAT, YOUR  
30 HONOR.

31 THE COURT: ALL RIGHT.

32 THEN BY WAY OF AN OFFER OF PROOF; IS THAT

1 RIGHT?

2 MR. FRANZEN: YOUR HONOR, MAY WE FILE THE  
3 CERTIFIED COPIES OF JUDGMENTS OF CONVICTION AS TO THE  
4 DEFENDANT'S INVOLVMENT --

5 THE COURT: ANY OBJECTION?

6 MR. HARMON: YOUR HONOR, FOR WHAT PURPOSE ARE  
7 THEY BEING FILED, JUST FOR THE RECORD?

8 THE COURT: WELL, WE WILL FILE IT JUST SO WE CAN  
9 DISCUSS IT.

10 MR. HARMON: WELL, THAT'S FINE.

11 MR. FRANZEN: MAY THE RECORD REFLECT, YOUR  
12 HONOR, I'M PROVIDING COUNSEL FOR THE STATE WITH A COPY.

13 MR. HARMON: THANK YOU.

14 MR. FRANZEN: WE DID REQUEST THAT THE PRISON --  
15 OR OUR INVESTIGATOR RATHER REQUESTED THAT THE PRISON SEND TO  
16 US THE DOCUMENTS REFLECTING INFORMATION I HAVE JUST RELATED.  
17 THE PRISON INITIALLY AGREED AND WE WERE EXPECTING TO HAVE IT  
18 AS CERTIFIED DOCUMENTS, HOWEVER, SUBSEQUENTLY THEY NOTIFIED  
19 MR. KIDD, MY INVESTIGATOR, THAT THEY WOULD NOT SEND IT TO US  
20 BECAUSE WE WERE NOT A CRIMINAL JUSTICE AGENCY.

21 THE COURT: IS THIS THE FIRST TIME YOU HAVE HAD  
22 AN OPPORTUNITY TO VIEW IT?

23 MR. HARMON: YES, IT IS, YOUR HONOR. WE VIEWED  
24 IT THOUGH. NOW WE HAVEN'T SEE THE ORIGINAL.

25 THE COURT: COUNSEL, THE STATE?

26 MR. HARMON: YOUR HONOR, WASN'T THIS MATTER  
27 SUBMITTED YESTERDAY? THEY PUT ON THEIR CASE AND WE CONSIDERED  
28 WHETHER WE WOULD OFFER ANY REBUTTAL AND WE CONCLUDED WE WOULD  
29 NOT. WE CAME TO COURT THIS MORNING PREPARED TO ARGUE THE  
30 MATTER TO THE JURY, NOT TO CONSIDER --

31 THE COURT: THE MATTER HAS BEEN SUBMITTED,  
32 COUNSEL. THAT'S TRUE.

1 MR. HARMON: NOW, IN REGARDS TO EVIDENCE CON-  
2 CERNING THE CONVICTION IN 1952, YESTERDAY DURING THE SETTLEMENT  
3 OF INSTRUCTIONS THE DEFENSE WAS ASKING THAT THE COURT INSTRUCT  
4 THE JURY AS TO PARTICULAR ALLEGED MITIGATING CIRCUMSTANCES,  
5 SAYING THAT THEY WERE PROVEN, THEY WERE UNREBUTTED. WELL, THE  
6 FACT IS MR. HOWARD HAS ALREADY TESTIFIED TO THESE CIRCUMSTANCES.  
7 HE SAID WHEN HE WAS TWO YEARS OLD HIS FATHER MURDERED HIS  
8 SISTER AND HIS MOTHER AND HE WAS AN EYE-WITNESS. THAT IS NOT  
9 REBUTTAL. IT'S A MATTER OF RECORD. IT'S ALREADY BEFORE THE  
10 JURY FOR WHATEVER WEIGHT IT HAS.

11 NOW, COUNSEL HAS INCORRECTLY CITED THE  
12 PERTINENT STATUTE. IT'S NOT 200.033. IT'S N.R.S. 175.552.  
13 THAT SECTION DOES SAY:

14 THE COURT MAY ADMIT ANY  
15 EVIDENCE WHICH IS DEEMED  
16 RELEVANT TO SENTENCE, WHETHER  
17 OR NOT THE EVIDENCE IS  
18 ORDINARILY ADMISSIBLE.

19 NOW, WE ARE NOT OBJECTING TO THE  
20 ADMISSIBILITY OF THESE DOCUMENTS BECAUSE THEY'RE HEARSAY, NOR  
21 DO WE OBJECT TO THE TESTIMONY OF MIKE KITT BECAUSE IT'S HEAR-  
22 SAY. WE STILL MAINTAIN THAT AT THIS TYPE OF HEARING HEARSAY  
23 IS ADMISSIBLE. WE ARE SAYING, YOUR HONOR, IT'S NOT 1952.  
24 IT'S NOT RELEVANT TO THE SENTENCE IN THIS CASE. IT'S NOT  
25 RELEVANT THAT A TWO-YEAR-OLD IS EXPOSED TO THIS SORT OF THING,  
26 BECAUSE I THINK WE CAN RELY ON OUR COMMON SENSE, WHICH SAYS  
27 THIS TYPE OF THING IS HIGHLY UNLIKELY TO MAKE ANY TYPE OF  
28 IMPRESSION ON SOMEONE OF YEARS THAT TENDER. IF WE WERE TALKING  
29 ABOUT FOUR OR FIVE OR NINE OR TEN OR ELEVEN, THAT'S DIFFERENT;  
30 BUT NOT A TWO-YEAR-OLD.

31 SO IT WOULD BE UNFAIR AT THIS POINT  
32 TO REOPEN THE CASE TO PUT UNDUE EMPHASIS ON SOMETHING THAT

1 HAPPENED IN 1952. IT'S TOO REMOTE. IT'S NOT RELEVANT AND THE  
2 COURT SHOULD DENY ANY MOTION TO REOPEN.

3 THE COURT: ANYTHING FURTHER TO COME BEFORE THE  
4 COURT?

5 MR. FRANZEN: ON THIS ISSUE, SUBMITTED, YOUR  
6 HONOR.

7 THE COURT: YOUR OFFER IS DENIED. IT MAY BE  
8 FILED.

9 AND THE REASONS THAT COUNSEL HAS STATED  
10 I THINK ARE VERY CLEAR. THE EVIDENCE FROM YESTERDAY AND THE  
11 EVIDENCE AS IT NOW STANDS, MR. HOWARD'S ASSERTIONS TO THE FACT  
12 THAT HIS PARENTS OR HIS MOTHER WAS KILLED AND HIS SISTER WAS  
13 KILLED IS IN THE RECORD AND UNCONTROVERTED. AS I MENTIONED TO  
14 COUNSEL, YOU CAN ARGUE IT.

15 HOWEVER, THE REAL QUESTION THAT I  
16 STATED TO YOU YESTERDAY ON THE SETTLEMENT OF INSTRUCTIONS WAS:  
17 WHAT'S THE CONNECTION? AND THERE HAS BEEN NONE. THERE IS NO  
18 MEDICAL CONNECTION OR PSYCHIATRIC CONNECTION AND IT DOES NOT  
19 APPEAR THAT THIS WOULD IN ANYWAY BE RELEVANT OR ANYWAY ASSIST  
20 THE JURY IN THIS MATTER. SO YOUR OFFER IS DENIED.

21 MR. FRANZEN: YOUR HONOR, WILL THE STATE BE  
22 PRECLUDED, HOWEVER, FROM ARGUING THAT THAT DID NOT HAPPEN?

23 MR. HARMON: WE'RE NOT GOING TO ARGUE THAT IT  
24 DIDN'T HAPPEN, YOUR HONOR.

25 THE COURT: I THINK THAT THE EVIDENCE CLEARLY  
26 SHOWS THAT THERE'S ONLY ONE VERSION OF WHAT HAPPENED.

27 MR. FRANZEN: THANK YOU, YOUR HONOR.

28 THE COURT: THERE WAS NOTHING TO BE CONTRO-  
29 VERTED --

30 MR. FRANZEN: ONE OTHER --

31 THE COURT: (CONTINUING) -- UNLESS THEY'RE  
32 GOING TO DISREGARD THE TESTIMONY ENTIRELY, AND THE JURY CAN DO

1 THAT IF THEY WANTED TO.

2 MR. FRANZEN: VERY WELL, YOUR HONOR.

3 ONE OTHER MATTER THAT CAME TO MY ATTENTION  
4 WHEN I GOT BACK TO THE OFFICE AT THE CONCLUSION OF YESTERDAY  
5 EVENING'S TRIAL PROCEEDINGS, THERE WAS AN ARTICLE IN THE MAY  
6 3RD, 1983, LAS VEGAS REVIEW JOURNAL REGARDING THE JUROR WHOM  
7 WE HAD THE HEARING WITH, JUROR MARILYN CAPASSO, IN WHICH THE  
8 ARTICLE STATES THAT MYSELF AND MR. COOPER ATTEMPTED TO DIS-  
9 QUALIFY HER AND REMOVE HER FROM THE JURY. WE WOULD LIKE THE  
10 PANEL INQUIRED OF IT, WITHOUT SINGLING OUT MS. CAPASSO, IF  
11 THEY HAVE READ ANY ARTICLES OR HEARD ANY PUBLICITY REGARDING  
12 THIS. WE DO NOT WISH TO ALIENATE MS. CAPASSO IN THE LIGHT OF  
13 THE NEXT JUROR. SHE IS NOT THAT --

14 THE COURT: WELL, EVERY INDICATION IT SEEMS IS  
15 DEEMING YOUR WAY, SIR.

16 MR. FRANZEN: THAT WAS PRIOR TO THE ARTICLE IN  
17 THE NEWSPAPER.

18 THE COURT: ALL RIGHT.

19 DOES THE STATE HAVE ANY OBJECTION?

20 MR. HARMON: NO, YOUR HONOR.

21 MR. FRANZEN: MAY WE FILE THE ARTICLE, YOUR  
22 HONOR? I HAVE THE ORIGINAL OR XEROX.

23 THE COURT: WELL, WE WILL WAIT AND SEE WHETHER  
24 OR NOT THERE IS ANY RESPONSE TO IT, COUNSEL. IF THERE IS, THEN  
25 YOU MAY FILE IT.

26 CALL THE JURY.

27 (WHEREUPON, THE JURY ENTERED  
28 THE COURTROOM AND THE FOLLOW-  
29 ING PROCEEDINGS WERE HAD:)

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

32 MR. HARMON: THE STATE DOES, YOUR HONOR.



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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

1 REFLECTION, A CONSIDERATION OF THE EVIDENCE IN THIS CASE, OF  
2 HIS BACKGROUND, AND THE LAW WHICH THE COURT HAS GIVEN TO YOU.

3 I CONFESS THAT I HAVE A PREJUDICE. I  
4 LOATHE MURDER AND I DESPISE THOSE WHO MURDER. I BELIEVE IN  
5 THE RULE OF LAW, AND I BELIEVE THAT THOSE WHO COMMIT CRIMES,  
6 PARTICULARLY CRIMES OF ROBBERY AND MURDER, DESERVE TO BE  
7 PUNISHED. AND I BELIEVE THEIR PUNISHMENT SHOULD FIT THEIR  
8 CRIME. AND IT IS THE POSITION OF THE STATE OF NEVADA THAT THE  
9 MAN WHO KILLED GEORGE MONAHAN, SAMUEL HOWARD, HAS FORFEITED  
10 HIS PRIVILEGE TO CONTINUE TO LIVE.

11 EVEN IF GIVEN A LIFE SENTENCE, EVEN  
12 IF PERMITTED TO LIVE, CERTAINLY IN THE RESTRICTIVE EXISTENCE OF  
13 INCARCERATION, MR. HOWARD WOULD HAVE MANY BLESSINGS ASSOCIATED  
14 WITH MORTALITY. HE COULD EAT AND SLEEP AND READ, IN MORTALITY  
15 AT LEAST.

16 GEORGE MONAHAN ISN'T EVER GOING TO  
17 READ ANOTHER BOOK. HE'S NOT GOING TO ENJOY THE BLESSINGS EVEN  
18 OF CONSIDERING WHAT HIS SENSES PROVIDE FOR HIM. AND EVERY  
19 INSTINCT I FEEL AS A CITIZEN AND AS A PROSECUTOR TELLS ME THAT  
20 THE FATE OF HIS KILLER SHOULD NOT BE BETTER THAN HIM. IT IS  
21 SAM HOWARD WHO BRUTALLY TOOK FROM GEORGE MONAHAN THE PRIVILEGE  
22 TO ENJOY LIFE.

23 MR. HOWARD, FOR THE MOST PART IN THIS  
24 COURTROOM, HAS BEEN A MODEL OF DECORUM. HE STANDS WHEN THE  
25 JUDGE COMES INTO COURT. HE SHOWS RESPECT. HE TOOK THE  
26 WITNESS STAND AND EXHIBITED CERTAINLY SOME FEELING FOR HIS  
27 FAMILY. HOW DIFFERENT HIS MANNER MUST HAVE BEEN ON MARCH THE  
28 27TH, 1980, WHEN HE CONFRONTED GEORGE MONAHAN WITH A GUN.

29 NOW, WHEN WE GET CAUGHT UP IN THE  
30 TESTIMONY OF VARIOUS WITNESSES AND WHEN IT'S ONE-TO-ONE WITH  
31 THE DEFENDANT, SOMETIMES THERE'S A TEMPTATION TO BE SYMPATHETIC  
32 SOMETIMES THERE'S A TEMPTATION TO FORGET THAT THE PERSON ON

1 TRIAL HAS COMMITTED A MURDER. IN THIS COURTROOM THERE IS SOME-  
2 ONE WHO HAS KILLED ANOTHER HUMAN BEING.

3 NOW THAT THOUGHT IN AND OF ITSELF IS  
4 PRETTY AWESOME TO ME. IT'S ALMOST TOO GREAT TO EVEN CONTEM-  
5 PLATE. IT'S HARD FOR ME TO FIGURE OUT THE MENTALITY OF SOMEONE  
6 WITHOUT PROVOCATION. NOW IF WE'RE TALKING ABOUT PROVOCATION  
7 OR SELF-DEFENSE OR SOMEONE WHO HAS GONE TO VIET NAM WHO KILLED,  
8 I CAN BEGIN TO UNDERSTAND THAT. WHAT IS THE MENTALITY OF  
9 SOMEONE WHO WILL TAKE A GUN, LIKE STATE'S EXHIBIT 31-B, AND  
10 OPEN IT AND PUT BULLETS INSIDE AND THEN POINT THAT GUN AT THE  
11 BACK OF SOMEBODY'S HEAD AND PULL THE TRIGGER?

12 WELL, IT'S A PERSON OF THAT MENTALITY  
13 WHO IS PRESENT IN THIS COURTROOM. AND THE EVIDENCE IN THIS  
14 CASE HAS EXHIBITED HOW RAPIDLY HIS MOOD SWINGS CAN CHANGE. HE  
15 CAN BE POLITE AND A GENTLEMAN AT ONE MOMENT AND THEN IN THE  
16 NEXT MOMENT HE'S A MAN WHO IS SHOUTING PROFANITIES, WHO IS  
17 VIOLENT AND BOISTEROUS AND LOUD. AND THAT'S BEEN ILLUSTRATED  
18 BY THE TESTIMONY OF KEITH KINSEY, THE SECURITY GUARD FROM  
19 SEARS, AND MIKE CONNELLY, THE MAN WHO PLACED MR. HOWARD UNDER  
20 ARREST IN DOWNEY, CALIFORNIA, APRIL THE 1ST, 1980.

21 BEFORE MR. KINSEY TRIED TO PUT THE  
22 CUFFS ON HIM, THERE WAS NO GUN PRODUCED. BUT SOMETHING TRIG-  
23 GERS A MECHANISM IN THIS MAN THAT BRINGS ABOUT AN ANIMAL  
24 INSTINCT AND THEN HE'S DANGEROUS.

25 OFFICER CONNELLY SAID THE FELLOW  
26 WASN'T DOING THAT MUCH UNTIL HE TRIED TO CUFF HIM AND THEN HE  
27 WAS BOISTEROUS AND LOUD AND VIOLENT.

28 MR. HOWARD TOOK THE WITNESS STAND  
29 YESTERDAY AND ALTHOUGH HE DENIES THAT HE IS MENTALLY ILL, AND  
30 HE TOLD YOU THAT HE KNEW WHAT HE WAS DOING IN MARCH 1980, IN  
31 FACT, HE SAID HE ALWAYS KNOWS WHAT HE'S DOING, AND THAT  
32 INCLUDED WHAT HE WAS DOING ON THE WITNESS STAND YESTERDAY.

1 HE DID TELL YOU THAT HE HAD BEEN IN  
2 AND OUT OF A NUMBER OF MENTAL FACILITIES, AND HE LISTED  
3 CREEDMORE HOSPITAL IN NEW YORK, BELLEVIEW, AND THE V.A.  
4 HOSPITAL IN NEW YORK. HE SAID HE'D BEEN IN ATASCADERO, PATTEN  
5 STATE HOSPITAL, IN THE STATE OF CALIFORNIA. HE SAID HE'D BEEN  
6 IN WARD B IN SAN BERNARDINO AND VACAVILLE IN THE STATE OF  
7 CALIFORNIA. IN FACT, INTERESTINGLY ENOUGH, HE SAID, REGARDING  
8 VACAVILLE, THEY PUT ME WITH CHARLIE MANSON BECAUSE THEY SAY I'M  
9 THE SAME TYPE OF PERSON.

10 WELL, LADIES AND GENTLEMEN, IF THE  
11 TESTIMONY YESTERDAY WAS MEANT TO SUGGEST TO YOU THAT RATHER  
12 THAN PUNISHMENT THE MAN NEEDS HELP, I WOULD SAY, IF WE TAKE HIS  
13 TESTIMONY AT FACE VALUE, SAM HOWARD HAS BEEN THROUGH A SERIES  
14 OF MENTAL HOSPITALS FOR MANY YEARS. WHAT IS SOCIETY TO DO  
15 WITH HIM? AND WHAT RIGHTS DO INNOCENT, DECENT, LAW-ABIDING  
16 PEOPLE HAVE IN TERMS OF PROTECTING THEIR PRIVILEGE TO LIVE?

17 DURING OUR OPENING STATEMENTS, WE  
18 ADVISED YOU THAT THE STATE OF NEVADA IN THIS CASE, CONSISTENT  
19 WITH GUIDELINES PROVIDED US BY THE LEGISLATURE, HAS ALLEGED  
20 THAT THERE ARE FACTORS IN THIS CASE WHICH AGGRAVATE MURDER IN  
21 THE FIRST DEGREE. THE COURT HAS ADDRESSED THAT SUBJECT IN ITS  
22 INSTRUCTIONS.

23 AS YOU KNOW, YOU WERE ADVISED AT THE  
24 OUTSET IN THESE PROCEEDINGS THAT FIRST DEGREE MURDER CARRIES  
25 THREE POSSIBLE PUNISHMENTS IN THIS STATE. THEY ARE THE DEATH  
26 PENALTY AND THEY ARE LIFE WITHOUT AND LIFE WITH THE POSSIBILITY  
27 OF PAROLE. AND IT IS YOUR PROVINCE, AS AWESOME AS THE RESPON-  
28 SIBILITY IS, TO SELECT THE PROPER PUNISHMENT. I'M NOT STANDING  
29 BEFORE YOU SUGGESTING THAT IT'S PLEASANT. I DO SUGGEST THAT  
30 YOUR CHOICE IS CLEAR.

31 IN INSTRUCTION NUMBER SIX THE COURT  
32 INFORMS YOU THAT:

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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 CIRCUM-  
STANCE 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

1 MAY THE 24TH, 1978, SOMETIME AFTER 7:00 O'CLOCK P.M., SHE WAS  
 2 IN HER OFFICE ALONE IN THE GYMNASIUM ON THE CAMPUS OF QUEENS  
 3 COLLEGE IN NEW YORK, AND AN INDIVIDUAL SHE'D KNOWN FOR PERHAPS  
 4 A YEAR AND A HALF CAME IN AND HE ASKED HER WHERE THE OTHER  
 5 NURSE WAS THAT WAS USUALLY THERE. SHE TOLD HIM THAT THE OTHER  
 6 NURSE WASN'T IN THE AREA. HE THEN SAID THAT HE INJURED HIS  
 7 FINGER WHILE BOXING. AND BECAUSE THAT WAS HER DUTY, SHE ASKED  
 8 HIM TO SHOW HER THE FINGER. AND THEN HE REACHED TO HIS RIGHT  
 9 SIDE, AS I REMEMBER HER ILLUSTRATING, AND PRODUCED A GUN AND  
 10 SAID, "WHAT I REALLY WANT IS YOUR MONEY."

11 WELL, I THINK THE EVIDENCE CLEARLY  
 12 ESTABLISHES WHAT SAMUEL HOWARD CLEARLY WANTED WAS HER AUTOMO-  
 13 BILE. AND HE TOOK IT. AND HE TOOK IT AT GUNPOINT. AND HE  
 14 TERRIFIED THIS LADY IN THE PROCESS. DO YOU REMEMBER HER  
 15 TESTIMONY: IT WAS A TREMENDOUS TRAUMA. I STILL HAVE NIGHTMARES  
 16 ABOUT IT. NOW, WHY DOES SHE STILL HAVE NIGHTMARES? BECAUSE  
 17 SHE KNEW THAT HE KNEW THAT SHE COULD RECOGNIZE HIM AGAIN. AND  
 18 SHE TOLD YOU IN COURT SHE DIDN'T THINK HE WOULD LET HER LIVE  
 19 TO IDENTIFY HIM. CAN YOU IMAGINE THE IMPACT SAMUEL HOWARD HAS  
 20 HAD ON THE LIFE OF A DECENT HUMAN BEING, DOROTHY WEISBAND?

21 NOW, PARKED OUTSIDE, BECAUSE IT WAS A  
 22 RAINY DAY AND CONTRARY TO HER USUAL CUSTOM, WAS A 1977 SILVER  
 23 CADILLAC. MR. HOWARD HAD SEEN THAT BEFORE. THERE IS NO DOUBT  
 24 HE SAW IT THAT NIGHT AND DETERMINED HE WAS GOING TO HAVE IT.  
 25 THAT VEHICLE WAS DISCOVERED A MONTH LATER IN TEXAS. AND MR.  
 26 HOWARD TOOK THE KEYS AND WHATEVER VALUABLES MRS. WEISBAND HAD  
 27 AT GUNPOINT, AND THEN HE LEFT IN HER CAR AND FLED THAT JURIS-  
 28 DICTION. AND THEN WHEN HE WAS BROUGHT BACK AND TRIED, HE  
 29 DIDN'T WAIT AROUND FOR THE VERDICT EITHER. HE WAS CONVICTED  
 30 IN ABSENTIA OF ROBBERY WITH USE OF A WEAPON AND OF THEFT OF A  
 31 MOTOR VEHICLE.

32 MRS. WEISBAND SAID HE WAS USUALLY

1 POLITE BUT, QUOTE, HE BECAME VERY ABUSIVE AND VIOLENT AS SOON  
2 AS HE BROUGHT OUT THE GUN. AND HE STARTED TO USE THE WORDS,  
3 "MOTHER FUCKER", AND IT WAS "WHITE MOTHER FUCKER", AND "WHITE  
4 BITCH". AND HE KEPT TELLING ME NOT TO LOOK AT HIM. AND THEN  
5 HE TOLD HER TO CRAWL ON ALL FOURS OVER TO THE CLOSET, WHERE SHE  
6 HAD HER PURSE LOCKED INSIDE THE CLOSET. AND PERHAPS ONE OF THE  
7 ULTIMATE INDIGNITIES TO A WOMAN, HE TOLD HER AT GUNPOINT TO  
8 TAKE OFF HER CLOTHES. AND SHE TOLD HIM SHE WOULDN'T. AND HE  
9 KEPT REPEATING THAT AND TOLD HER SHE BETTER OR HE WOULD KILL  
10 HER.

11 WELL, IT WASN'T ENOUGH TO TERRORIZE  
12 HER THAT NIGHT. THIS MAN CALLED HER A WEEK LATER. HE WANTED  
13 TO CONTINUE TO HARASS HER LIFE AND TO PROJECT HIMSELF INTO THE  
14 PSYCHE OF DOROTHY WEISBAND. AND HE SAID, HOW MUCH IS THE  
15 PROPERTY WORTH?

16 WHAT'S SHE GOING TO SAY WITH THE SHOCK  
17 AT BEING CONFRONTED WITH THE ROBBER AGAIN? NOTHING.

18 AND THEN HE SAID, HOW MUCH IS YOUR  
19 LIFE WORTH TO YOUR HUSBAND?

20 THINK ABOUT THAT. THINK ABOUT BEING  
21 ON THE RECEIVING END OF THAT KIND OF TALK.

22 MR. HOWARD, HOW MUCH IS YOUR LIFE  
23 WORTH TO SOCIETY?

24 LADIES AND GENTLEMEN, COURT MINUTES  
25 ARE IN EVIDENCE AS STATE'S EXHIBIT 69. YOU HEARD THE TESTIMONY  
26 OF DETECTIVE JOHN MCNICHOLAS, THAT THE DEFENDANT WAS CONVICTED  
27 OF THESE CRIMES. THERE IS NO DOUBT THEY OCCURRED MAY 24, 1978.  
28 MR. HOWARD HAD PREVIOUSLY BEEN CONVICTED OF A CRIME INVOLVING  
29 THE USE OF VIOLENCE EVEN BEFORE HE CAME TO LAS VEGAS IN 1980,  
30 AND THAT IS THE CIRCUMSTANCE THAT AGGRAVATES MURDER IN THE  
31 FIRST DEGREE, AND THAT'S BEEN PROVEN BEYOND A REASONABLE DOUBT.

32 CIRCUMSTANCE NUMBER TWO ALLEGED IS

1 SET FORTH IN INSTRUCTION NINE AS FOLLOWS:

2 THE MURDER WAS COMMITTED  
3 WHILE THE DEFENDANT WAS ENGAGED  
4 IN THE COMMISSION OF ANY ROBBERY.

5 WELL, OUR LEGISLATURE, THE PEOPLE WE  
6 PUT IN OFFICE, HAS MADE CERTAIN JUDGMENTS IN TERMS OF WHAT  
7 CIRCUMSTANCES AGGRAVATE A FIRST DEGREE MURDER.

8 ROBBERY, AS YOU HAVE BEEN INSTRUCTED,  
9 IS A CRIME OF VIOLENCE. IT INVOLVES THREAT. IT INVOLVES  
10 FORCE. MANY TIMES IT INVOLVES THE USE OF A GUN. IT'S AN  
11 APPARENTLY DANGEROUS FELONY. YOU KNOW, IT'S BAD ENOUGH TO  
12 DECIDE YOU'RE GOING TO KILL ANYONE, BUT TO INCLUDE ALSO THE  
13 NOTION YOU'RE GOING TO ROB AND KILL THEM, AND MAYBE MURDER IS  
14 VERY PROBABLY THE LIKELY OUTGROWTH OF ANY ROBBERY. THE LAW IN  
15 THIS STATE SAYS IF YOU ROB AND MURDER, THAT AGGRAVATES MURDER  
16 IN THE FIRST DEGREE. I'VE ALREADY MADE A FINDING IN CONNECTION  
17 WITH THIS CASE. BUT MR. HOWARD NOT ONLY MURDERED GEORGE  
18 MONAHAN, HE ROBBED HIM. SO CERTAINLY THAT AGGRAVATING CIRCUM-  
19 STANCE HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

20 THERE'S LITTLE DOUBT THAT MR. HOWARD  
21 TOOK THE SEIKO WRISTWATCH FROM GEORGE MONAHAN. THERE'S LITTLE  
22 DOUBT THAT THE C.B. RADIO HE CARRIED INTO THE MOTEL 6 WITH  
23 WIRES HANGING OUT OF IT HAD BEEN TAKEN FROM GEORGE MONAHAN'S  
24 VAN. DAWANA THOMAS SAW CREDIT CARDS AND PHOTOGRAPHS OF  
25 CHILDREN, FAMILY-TYPE PICTURES, SOON AFTER HE CAME BACK AFTER  
26 A 45-MINUTE ABSENCE TO THE MOTEL. BOTH THOSE AGGRAVATING  
27 CIRCUMSTANCES HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT. THIS  
28 IS A ROBBERY/MURDER. AND IT'S A ROBBERY/MURDER COMMITTED BY A  
29 DEFENDANT WHO HAS ALREADY COMMITTED AND BEEN CONVICTED OF A  
30 PRIOR CRIME OF ROBBERY.

31 I SUGGEST FROM THOSE FACTS BEING  
32 PROVEN THAT INSTRUCTION SIX TAKES EFFECT. YOU CERTAINLY ARE



1 NOW JUSTIFIED IN CONSIDERING THE IMPOSITION OF THE DEATH  
2 PENALTY IN THIS CASE. AND IT'S RATHER JUST A QUESTION THEN OF  
3 WHAT KIND OF MITIGATING CIRCUMSTANCES THERE ARE AND WHAT OTHER  
4 FACTORS YOU ALSO MAY CONSIDER IN DETERMINING WHETHER OR NOT THE  
5 AGGRAVATING CIRCUMSTANCES OUTWEIGH ANY MITIGATING CIRCUMSTANCE.

6 WELL, LADIES AND GENTLEMEN, WITHOUT  
7 FURTHER COMMENT ON MITIGATION, THE DEFENDANT HAS NOT TALKED  
8 ABOUT ANYTHING THAT WOULD SUGGEST THAT HE WAS UNDER ANY TYPE  
9 OF EXTREME MENTAL PRESSURE OR EMOTIONAL PRESSURE IN MARCH OF  
10 1980. THERE IS NOTHING TO SUGGEST, BY THE TESTIMONY EITHER OF  
11 SAMUEL HOWARD OR DAWANA THOMAS, WHO KNEW HIM VERY WELL IN  
12 MARCH 1980, THAT ON THE DAY HE KILLED GEORGE MONAHAN THERE WAS  
13 ANYTHING TO MITIGATE THE CRIME.

14 WHAT WE HAVE IS MURDER IN COLD BLOOD.  
15 WHAT WE HAVE IS AN EXECUTION. WHAT WE HAVE IS SAM HOWARD AT  
16 SOME POINT DECIDING, AND I CAN'T TELL YOU WHAT THE TRICK  
17 MECHANISM WAS, WHETHER IT WAS REFUSAL BY DOCTOR MONAHAN TO  
18 REMOVE HIS SHOES OR AN ARTICLE OF CLOTHING OR WHETHER HE  
19 RESISTED IN SOME WAY THE TAKING OF THE C.B. RADIO OUT OF HIS  
20 VAN. I ONLY KNOW WHAT THE EVIDENCE AND THE PHOTOGRAPHS PHOTO-  
21 GRAPHICALLY SHOW, THAT AT SOME POINT HE WAS MADE TO LAY FACE  
22 DOWN AND HE WAS SHOT IN THE BACK OF THE HEAD. IT'S NOT A  
23 ROBBERY. IT'S MURDER BY PREMEDITATION. THERE IS NO JUSTIFI-  
24 CATION FOR WHAT HAPPENED AND THERE'S CERTAINLY NOTHING BEEN  
25 OFFERED IN MITIGATION.

26 ARE WE GOING TO SAY, AS COMMENDABLE AS  
27 IT IS, THAT SOMEONE WHO SERVES IN THIS COUNTRY IN THE MILITARY  
28 HAS A RIGHT TO COME BACK TO THIS COUNTRY AND MURDER? WELL,  
29 THAT WOULD DO A DISSERVICE TO EVERY HONORABLE SERVICEMAN WHO  
30 HAS COME HOME FROM VIET NAM OR ANYWHERE OR ANY OTHER PLACE AND  
31 HAS A JOB AND HAS A FAMILY AND BEHAVES HIMSELF RESPONSIBLY.

32 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 CONNELLY 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 CONNELLY, LAW ENFORCEMENT OFFICERS IN THE STATE OF CALIFORNIA. HE'S CARRYING A CONCEALED

1 WEAPON, THAT SUSPECT. I CHILL RIGHT TO THE BOTTOM OF MY FEET;  
2 AND WE ALSO KNOW, BECAUSE THE  
3 DEFENDANT ADMITTED THIS ON THE WITNESS STAND, THAT IN MAY 1982  
4 HE WAS CONVICTED IN THE STATE OF CALIFORNIA OF STILL ANOTHER  
5 ROBBERY WITH THE USE OF A WEAPON AND THE UNLAWFUL TAKING AND  
6 USING OF A MOTOR VEHICLE. THE PATTERN IS CLEARLY ESTABLISHED.

7 SO WHEN YOU CONSIDER THE FACT THAT  
8 TWO AGGRAVATING CIRCUMSTANCES HAVE BEEN ESTABLISHED BEYOND A  
9 REASONABLE DOUBT, AND WHEN YOU CONSIDER THE APPROPRIATE PUNISH-  
10 MENT FOR SAMUEL HOWARD, CONSIDER THOSE FACTORS IN DECIDING  
11 WHETHER THE AGGRAVATION OUTWEIGHS ANY MITIGATING CIRCUMSTANCE.

12 THE DEFENDANT HAS MANIFESTED A RECKLESS  
13 DISREGARD OF CONSEQUENCE AND SOCIAL DUTY.

14 WELL, I SUBMIT, LADIES AND GENTLEMEN,  
15 IN VIEW OF THIS EVIDENCE AS A JUROR YOU HAVE A LEGAL DUTY. YOU  
16 KNOW WHAT THE EVIDENCE IS. YOU KNOW WHAT THE BACKGROUND IS OF  
17 THIS DEFENDANT. THE COURT HAS EXPLAINED TO YOU THE CIRCUM-  
18 STANCES THAT AGGRAVATE FIRST DEGREE MURDER, AND I SUGGEST YOU  
19 HAVE A LEGAL DUTY TO IMPOSE THE DEATH PENALTY. I ALSO SUGGEST,  
20 AS REPRESENTATIVES OF THIS COMMUNITY, THAT YOU HAVE A SOCIAL  
21 DUTY.

22 HOW OFTEN IS IT THAT WE HEAR PEOPLE,  
23 WHEN THEY'RE OUT ON THE STREETS, TALK ABOUT WHAT IS WRONG WITH  
24 THE SYSTEM OF CRIMINAL JUSTICE, WHO SUGGEST THAT THEY COULD  
25 IMPOSE THIS AND IMPOSE THAT. THIS IS YOUR CHANCE TO DO SOME-  
26 THING. ARE YOU GOING TO GIVE SAMUEL HOWARD ANOTHER CHANCE TO  
27 TERRORIZE PEOPLE LIKE KEITH KINSEY, DOROTHY WEISBAND, TOM MAJOR  
28 AND ED SCHWARTZ, AND STEVE HOUCHEN, WITH A LOADED GUN?

29 WELL, YOU HAVE YOUR POWER TODAY TO  
30 MAKE SURE THAT THAT NEVER HAPPENS. DON'T LET YOUR CHANCE SLIP  
31 AWAY. SEND AN UNMISTAKABLE MESSAGE OUT TO THIS COMMUNITY --

32 MR. FRANZEN: YOUR HONOR, I'M GOING TO OBJECT TO

1 UNMISTAKABLE MESSAGES TO THE COMMUNITY. THIS IS NOT --

2 THE COURT: SUSTAINED.

3 MR. FRANZEN: I REQUEST THE JURY BE ADMONISHED  
4 TO DISREGARD THAT.

5 THE COURT: THE JURY IS SO ADMONISHED.

6 PROCEED.

7 MR. HARMON: LADIES AND GENTLEMEN, WHEN WE CON-  
8 sider THE PURPOSE OF PUNISHMENT THERE ARE A NUMBER OF FACTORS  
9 TO BE TAKEN INTO CONSIDERATION. I WOULD SUBMIT TWO OF THE  
10 PRIMARY FACTORS ARE PUNISHMENT AND DETERRENTS.

11 MR. HOWARD, BY THE EVIDENCE IN THIS CASE,  
12 HAS SHOWN AN INCLINATION TO USE A GUN. HE HAS SHOWN A RECKLESS  
13 DISREGARD OF HIS SOCIAL DUTY.

14 AS I BEGAN TO SAY, YOU HAVE IT WITHIN  
15 YOUR POWER TODAY TO SEE TO IT THAT HE NEVER COCKS ANOTHER GUN,  
16 THAT HE NEVER PULLS THE TRIGGER ON ANOTHER GUN, THAT HE NEVER  
17 TERRORIZES OR THREATENS DECENT CITIZENS AGAIN.

18 TO QUOTE PERCY SHELLEY IN HIS POEM,  
19 "WHEN THE LAMP IS SHATTERED", HE STATED AS FOLLOWS:

20 WHEN THE LAMP IS SHATTERED  
21 THE LIGHT IN THE DUST LIES DEAD.

22 THE LIFE OF GEORGE MONAHAN WAS  
23 SHATTERED BY A BULLET TO THE BACK OF HIS HEAD ON MARCH THE 27TH,  
24 1980. LIKE THE SHATTERED LAMP THE POET SPEAKS OF, HIS LIGHT  
25 WENT OUT ON DESERT INN ROAD ON THAT SAME DAY. THE STATE OF  
26 NEVADA IS ASKING YOU TO LET THE LIGHT GO OUT OF MR. SAMUEL  
27 HOWARD.

28 MANY YEARS AGO ANOTHER POET SAID:  
29 A WORD ONCE SENT ABROAD FLIES  
30 IRREVOCABLY...

31 AND I WANT TO SUBSTITUTE THE WORD  
32 "BULLET". THE BULLET OF SAMUEL HOWARD SENT ABROAD, ONCE FIRED

1 INTO THE BODY OF GEORGE MONAHAN, GEORGE MONAHAN'S LIFE IS  
2 IRREVOCABLE. AND I AM ASKING YOU, AS A REPRESENTATIVE OF THE  
3 STATE OF NEVADA IN ALL SINCERITY, AND YET WITH THE IMPARTIALITY  
4 I TOLD YOU I HAD, TO SEE TO IT THAT THE PUNISHMENT YOU IMPOSE  
5 TODAY WILL BE AS IRREVOCABLE, AS FINAL AND AS DEADLY AS SAMUEL  
6 HOWARD'S BULLET. THANK YOU.

7 THE COURT: COUNSEL.

8 MR. COOPER: THANK YOU.

9  
10 (CLOSING ARGUMENT)

11  
12 BY MR. COOPER:

13 LADIES AND GENTLEMEN, IF I SEEM NERVOUS  
14 AND TENTATIVE AND UNSURE, IT'S BECAUSE I AM.

15 I'VE REPRESENTED ALOT OF CRIMINAL  
16 DEFENDANTS. I'VE ARGUED BEFORE JURIES ON MANY OCCASIONS. BUT  
17 I'VE NEVER BEEN IN A POSITION OF HAVING TO ARGUE FOR A MAN'S  
18 LIFE OR TRYING TO PERSUADE A JURY OR ANYONE TO SPARE THE  
19 LIFE OF A FELLOW HUMAN BEING. AND IT'S NOT AN EASY TASK. IT'S  
20 NOT A TASK THAT I WELCOME OR ONE THAT I RELISH.

21 I HAVE GIVEN THIS CASE A GREAT DEAL OF  
22 THOUGHT, AND, YOU KNOW, LIKE MR. HARMON, I DON'T HAVE THE  
23 ANSWERS HERE. I DON'T KNOW WHAT THE ANSWERS ARE. I FEEL A  
24 VERY AWESOME, VERY HEAVY RESPONSIBILITY. I'M SURE IT'S NOWHERE  
25 NEAR THE RESPONSIBILITY THAT YOU MUST FEEL.

26 I'VE TRIED ANALYZING THIS. I'VE GONE  
27 OVER IN MY MIND TIME AND AGAIN THIS CASE. I'VE TRIED PUTTING  
28 MYSELF IN SAMUEL HOWARD'S POSITION. I'VE TRIED PUTTING MYSELF  
29 IN THE POSITION OF DOCTOR MONAHAN'S FRIENDS AND HIS RELATIVES.  
30 I'VE -- I HAVE SEVEN BROTHERS AND I WONDER WHAT MY FEELINGS  
31 WOULD BE IF MY BROTHER HAD BEEN KILLED. MY HEART GOES OUT TO  
32 DOCTOR MONAHAN'S RELATIVES AND HIS FRIENDS. I'M SURE HE WAS A

1 GOVERNMENT ADDED AN INGREDIENT TO THAT POTION WHEN THEY SENT  
2 SAMUEL HOWARD TO FIGHT IN VIET NAM.

3 IT SEEMS THAT SAMUEL HOWARD HAS BEEN  
4 EXPOSED TO VIOLENCE ALL OF HIS LIFE. I'M NOT TRYING TO JUSTIFY  
5 WHAT HE DID. I'M NOT TRYING TO MAKE EXCUSES FOR WHAT HE DID.  
6 BUT I DON'T KNOW THAT KILLING HIM IS THE RIGHT THING TO DO.

7 AFTER HAVING BEEN EXPOSED TO VIOLENCE  
8 IN HIS -- IN VIOLENCE, THAT WITHOUT HAVING EXPERIENCED THAT, I  
9 DON'T THINK WE CAN SIT HERE TODAY AND SAY WHAT THAT MUST HAVE  
10 BEEN LIKE.

11 THE STATE HAS THE GUN THAT WAS USED  
12 TO KILL DOCTOR MONAHAN. THEY HAVE PICTURES OF DOCTOR MONAHAN  
13 LYING DEAD IN HIS VAN. I -- I WISH THAT I HAD PICTURES TO  
14 PRESENT TO YOU OF SAMUEL HOWARD WHEN HE WITNESSED THE TRAGIC  
15 EVENT EARLY IN HIS CHILDHOOD, OR PICTURES TO PRESENT TO YOU  
16 THE HORRIFYING EXPERIENCES HE MUST HAVE EXPERIENCED WHILE IN  
17 VIET NAM. HE WAS TRAINED TO KILL. HE WAS ASKED TO KILL. HE  
18 WAS GIVEN THE MEANS BY WHICH TO KILL. NOW THE STATE IS ASKING  
19 YOU TO KILL HIM.

20 I PLANNED TO RECITE HIS MENTAL HISTORY.  
21 I DON'T KNOW THAT THAT'S NECESSARY. I THINK IT'S CLEAR THAT  
22 SAMUEL HOWARD IS NOT A REMOTE- -- A MENTALLY DISABLED INDIVI-  
23 DUAL. HE'S BEEN IN AND OUT OF MENTAL INSTITUTIONS PRACTICALLY  
24 ALL OF HIS LIFE. HE'S BEEN DIAGNOSED AS SCHIZOPHRENIC, WHICH  
25 DOVETAILS WITH THE PROSECUTION'S THEORY OF HIS PERSONALITY, A  
26 MAN WHO HAS ATTEMPTED TO COMMIT SUICIDE, HAS EXPRESSED A DESIRE  
27 TO DIE, TO JOIN HIS MOTHER AND HIS SISTER, WHO HAS PLEADED FOR  
28 PSYCHIATRIC TREATMENT.

29 I -- I WANT TO BELIEVE THAT BEFORE YOU  
30 CAN TAKE A MAN'S LIFE YOU HAVE TO BE CERTAIN OF HIS GUILT. YOU  
31 HAVE TO BE ABSOLUTELY CERTAIN. I KNOW THAT IN DECIDING THE  
32 GUILT OR INNOCENCE OF A DEFENDANT THAT THAT'S NOT THE BURDEN OF

1 PROOF. THAT IS PROOF BEYOND A REASONABLE DOUBT. BUT IT SEEMS  
2 TO ME THAT WHEN YOU ARE ASKED TO TAKE THE LIFE OF SOMEONE THAT  
3 EVERYTHING THAT'S RIGHT AND MORAL WITHIN YOU TELLS YOU THAT YOU  
4 HAVE TO BE ABSOLUTELY CERTAIN.

5 NOW, I KNOW THAT BASED UPON YOUR  
6 VERDICT, YOU MORE OR LESS PLACE YOUR STAMP OF APPROVAL ON MR.  
7 HARMON'S AND MR. SEATON'S THEORY THAT THE WITNESSES PRESENTED  
8 WERE EITHER MISTAKEN OR THEIR STATEMENTS WERE MISINTERPRETED OR  
9 THAT THEY LIED OR WHATEVER. CAN YOU BE SO CERTAIN TO THE POINT  
10 THAT YOU WILL SEND SAMUEL HOWARD TO THE EXECUTIONER'S CHAMBER?

11 MR. HARMON MADE REFERENCE TO THE FACT  
12 THAT -- THE FACT THAT SAMUEL HOWARD SERVED IN VIET NAM SHOULD  
13 NOT SERVE AS A MITIGATING FACTOR IN THIS CASE. HE MAY BE RIGHT.  
14 I DON'T KNOW THE ANSWER TO THAT. I KNOW THAT THERE ARE  
15 THOUSANDS OF MEN WHO RETURNED FROM THAT TRAGEDY THAT WERE NEVER  
16 THE SAME. I KNOW THAT, AND AGAIN I'M NOT SUGGESTING THAT THAT'S  
17 AN EXCUSE, BUT I CAN ONLY HOPE THAT YOU WOULD TAKE THAT INTO  
18 CONSIDERATION. WE AREN'T ALL EQUALLY STRONG. ALOT OF MEN  
19 RETURNED FROM THAT WAR TO LEAD NORMAL LIVES, AND THEY RETURNED  
20 TO THEIR FAMILIES AND THEIR JOBS AND TO THEIR PROFESSIONS AS  
21 DOCTORS OR LAWYERS OR DENTISTS OR ANY NUMBER OF HONORABLE  
22 PROFESSIONS. I WONDER WHAT SAMUEL HOWARD RETURNED TO.

23 I'VE ASKED MYSELF WHAT PURPOSE IS TO  
24 BE ACCOMPLISHED BY KILLING HIM? MR. HARMON SUGGESTS THAT IT  
25 SERVES AS A DETERRENT. THERE HAVE BEEN PEOPLE EXECUTED IN THIS  
26 COUNTRY FOR CENTURIES AND THE KILLINGS GO ON. I DON'T THINK  
27 THAT ORDERING SAMUEL HOWARD TO DIE IS GOING TO SERVE AS A  
28 DETERRENT TO ANYONE. IF THERE'S A DETERRENT, IT'S IN THE  
29 CERTAINTY OF PUNISHMENT AND NOT IN THE SEVERITY OF PUNISHMENT.

30 MR. HARMON SUGGESTED THAT BY KILLING  
31 HIM YOU PUNISH HIM. WHAT CAN BE ACCOMPLISHED BY KILLING SAMUEL  
32 HOWARD THAT COULD NOT BE ACCOMPLISHED BY PUTTING HIM IN PRISON



1 FOR THE REST OF HIS LIFE?

2 MR. SEATON MAY SUGGEST TO YOU THAT,  
3 WELL, THERE'S A POSSIBILITY THAT HE WILL RECEIVE EXECUTIVE  
4 CLEMENCY SOMEDAY. WHEN WAS THE LAST TIME THAT YOU HEARD OF A  
5 GOVERNOR OF THIS STATE GRANTING EXECUTIVE CLEMENCY TO AN INDIVIDUAL  
6 CONVICTED OF FIRST DEGREE MURDER AND SENTENCED TO PRISON  
7 FOR THE REST OF HIS LIFE?

8 WE CAN PUT MEN ON THE MOON. WE CAN  
9 PERFORM ALL KINDS OF SUPER HUMAN FEATS. CERTAINLY WE CAN PUT  
10 SAMUEL HOWARD AWAY FOR THE REST OF HIS LIFE SO THAT HE DOES NOT  
11 HARM MEMBERS OF SOCIETY.

12 MR. HARMON SEEMS TO INFER THAT BY  
13 DOING THAT, THAT MR. HOWARD WILL CONTINUE TO ENJOY LIFE: HE'LL  
14 EAT AND HE'LL SLEEP AND HE'LL READ. I PERSONALLY CAN'T IMAGINE  
15 A FATE MORE HORRIFYING THAN SPENDING THE REST OF MY LIFE IN  
16 MAXIMUM SECURITY IN THE NEVADA STATE PRISON. HAVING TOURED  
17 THAT FACILITY MYSELF, I CAN TELL YOU IT LEAVES A VERY, VERY  
18 DEEP IMPRESSION ON YOU. IT'S GROTESQUE. IT'S A FATE WORSE  
19 THAN DEATH. IT'S A VIOLENT AND DEMORALIZING ENVIRONMENT IN  
20 THAT PRISON.

21 I THINK THAT THE ONLY -- THE ONLY  
22 REASON THAT THE STATE CAN REALLY OFFER YOU TO JUSTIFY THE KILL-  
23 ING OF SAMUEL HOWARD, IF IT'S A JUSTIFICATION, IS FOR VENGEANCE  
24 AND VENGEANCE ALONE. I HAVE THOUGHT ABOUT THAT AND I HAVE  
25 THOUGHT ABOUT IT AND I CAN COME UP WITH NO LEGITIMATE REASON  
26 FOR TAKING THIS MAN'S LIFE, EXCEPT THAT YOU HATE WHAT HE DID.  
27 AND THAT'S THE ONLY REASON THAT ANYONE, I THINK, COULD HAVE FOR  
28 KILLING HIM, AND THAT'S BECAUSE THEY HATE HIM. DOES THAT MAKE  
29 -- DOES THAT MAKE US ANY BETTER THAN SAMUEL HOWARD? IS THAT  
30 THE MARK OF A TRULY CIVILIZED SOCIETY?

31 I THINK IT WAS CLAREANCE DARRELL WHO  
32 ONCE SAID, IN ONE OF HIS FAMOUS CASES, THAT WE'RE MADE MORE THAN

1 WE MAKE, THAT WE'RE AFFECTED BY THE THINGS AROUND US.

2 I AM WHAT I AM BECAUSE -- BECAUSE OF  
3 MY HEREDITY AND BECAUSE OF THE ENVIRONMENT THAT I WAS BROUGHT  
4 UP IN. YOU ARE WHAT YOU ARE BECAUSE OF YOUR HEREDITY AND YOUR  
5 ENVIRONMENT. AND SAMUEL HOWARD IS WHAT HE IS BECAUSE OF HIS  
6 HEREDITY AND BECAUSE OF HIS ENVIRONMENT, AND HE HAS NO CONTROL  
7 OVER HIS HEREDITY AND HE HAS NO CONTROL OVER HIS ENVIRONMENT.  
8 THOSE ARE THE THINGS THAT HAVE SHAPED HIM.

9 I WANT SO MUCH FOR YOU TO TRY AND  
10 UNDERSTAND HIM, TRY AND UNDERSTAND THE EVENTS THAT HAVE MADE  
11 HIM, THAT HAVE SHAPED HIM. IF YOU DO THAT I THINK THAT'S ALL  
12 THAT'S NECESSARY.

13 MR. HARMON ASKS THAT YOU KILL SAMUEL  
14 HOWARD BECAUSE HE KILLED DOCTOR MONAHAN. THAT'S ALL. WITHOUT  
15 THE SLIGHTEST LOGIC, WITHOUT THE SLIGHTEST APPLICATION TO LIFE,  
16 SIMPLY FROM ANGER AND NOTHING ELSE. IS THAT WHAT JUSTICE IS  
17 ALL ABOUT? I DON'T THINK SO.

18 I DON'T THINK THAT THERE'S ANY JUSTI-  
19 FICATION FOR TAKING THE LIFE OF SAMUEL HOWARD. THE PITIFUL  
20 CREATURE THAT HE IS, THERE'S NO WORTHWHILE PURPOSE IN KILLING  
21 HIM.

22 I KNOW THAT WE DIDN'T -- WE DIDN'T  
23 TRY AND CONVINCE YOU, OR PRESENT EVIDENCE, THAT SAMUEL HOWARD  
24 WAS LEGALLY INSANE AT THE TIME THAT HE KILLED DOCTOR MONAHAN.  
25 BUT IF YOU TAKE A CAREFUL LOOK AT THE INSTRUCTIONS, PARTICULARLY  
26 INSTRUCTION NUMBER TWELVE, YOU WILL FIND THAT IN CONSIDERING  
27 MITIGATING CIRCUMSTANCES, IF YOU FIND THAT THERE ARE MITIGATING  
28 CIRCUMSTANCES, THAT IT'S NOT NECESSARY TO SHOW THAT THOSE  
29 MITIGATING CIRCUMSTANCES WOULD HAVE CONSTITUTED A DEFENSE TO  
30 THIS CRIME OR THAT IT WOULD HAVE REDUCED THE DEGREE OF THE  
31 CRIME.

32 THE TEST FOR LEGAL INSANITY IS: DID

1 THE DEFENDANT KNOW THE DIFFERENCE BETWEEN RIGHT AND WRONG? I  
2 PERSONALLY HAVE PROBLEMS WITH THAT. I THINK IT'S AN ANTIQUATED  
3 TEST. IT'S DEVELOPED IN THE DAYS OF QUEEN VICTORIA, CENTURIES  
4 AGO. AND DESPITE THE MANY STRIDES THAT HAVE BEEN MADE IN THE  
5 AREA OF PSYCHIATRY IN TRYING TO UNDERSTAND HUMAN BEINGS, WE  
6 STILL ADHERE TO THAT TEST. WE'RE GOING TO KILL HIM BECAUSE HE'S  
7 MENTALLY DISTURBED. HE'S OBVIOUSLY DISTURBED.

8 I WANT HIS MILITARY SERVICE, HIS  
9 HONORABLE DISCHARGE FROM VIET NAM, HIS PURPLE HEART AND HIS  
10 OTHER MEDALS, TO STAND FOR SOMETHING. WHETHER IT WILL OR NOT,  
11 I DON'T KNOW.

12 I WANT TO KNOW WHY -- WHY IT SEEMS  
13 THAT IN THIS COUNTRY THE POOR AND THE OPPRESSED AND THE IMPOV-  
14 ERISHED ARE THE ONES WHO GO TO THE EXECUTIONER'S CHAMBER.  
15 WHEN WAS THE LAST TIME YOU HEARD OF A RICH MAN, A PERSON WHO'S  
16 WELL OFF, BEING EXECUTED IN THIS COUNTRY? IT SEEMS -- IT SEEMS  
17 AS IF WE'VE RESERVED THAT FATE FOR PEOPLE LIKE SAMUEL HOWARD.

18 I PUT IT IN YOUR HANDS AND I ASK THAT  
19 YOU BE KIND AND CONSIDERATE TO THE LIVING AND TO THE DEAD.  
20 THANK YOU.

21 THE COURT: THE STATE.

22 MR. SEATON: THANK YOU.

23  
24 (CLOSING ARGUMENT)

25  
26 BY MR. SEATON:

27 YOUR HONOR, COUNSEL, LADIES AND GENTLEMEN  
28 OF THE JURY:

29 I DON'T KNOW THAT I CAN BE AS ELOQUENT  
30 AS MR. HARMON, NOR AS EMOTIONAL AS MR. COOPER. BOTH OF WHOM  
31 YOU HAVE HEARD THIS MORNING I THINK ARE SPEAKING TO YOU FROM  
32 THEIR HEART, FROM THE VERY DEPTH OF THEIR SOULS. I SHALL AT

1 LEAST TRY TO DO THAT WITH YOU.

2 I FIRST WANT TO DIRECT SOME OF MY  
3 REMARKS TO SOME OF THE THINGS THAT MR. COOPER SAID. HE SAID  
4 WHAT HE SAID BECAUSE HE FELT IT AND HE MEANT IT, NOT BECAUSE  
5 HE WAS ATTEMPTING TO GENERATE ANY SORT OF SYMPATHY OR GOOD  
6 FEELING ON YOUR PART ON BEHALF OF THE DEFENDANT SAM HOWARD, BUT  
7 BECAUSE TRULY HE FELT THOSE THINGS. BUT WE'VE GOT TO BE CARE-  
8 FUL IN PROCEEDINGS SUCH AS THIS THAT WE DO NOT LET THE EMOTIONS  
9 OVERRIDE. THERE ARE TWO SIDES TO EVERY COIN.

10 MR. COOPER, FOR EXAMPLE, MENTIONS TO  
11 YOU THAT SAMUEL HOWARD IS A PRODUCT OF HIS ENVIRONMENT. HE IS  
12 WHAT HE IS TODAY BECAUSE OF THE THINGS THAT HAPPENED THROUGH  
13 HIS LIFE. AND THAT'S PROBABLY TRUE.

14 ISN'T IT BECAUSE OF THE ENVIRONMENT  
15 THAT HE WAS IN THAT GEORGE MONAHAN IS WHAT HE IS TODAY, WHICH  
16 IS DEAD? SAMUEL HOWARD CREATED A FALSE ENVIRONMENT IN THE  
17 WORLD OF THIS HEALTHY, ACTIVE, YOUNG, SUCCESSFUL DENTIST WITH  
18 A FAMILY.

19 HE HAD A NICE VAN. YOU'VE SEEN THE  
20 PICTURES OF IT. IT'S A NICE VAN, SOMETHING THAT ALL OF US  
21 WOULD WANT TO OWN. THE INTERIOR OF IT WAS DESIGNED NICELY.  
22 IT HAD A C.B. RADIO. IT HAD A FOUR-TRACK STEREO. IT HAD ALL  
23 THE NICETIES THAT YOU WOULD WANT IN A VAN. AND IT WAS A GREAT  
24 ENVIRONMENT.

25 SAMUEL HOWARD GOT IN THAT VAN AND HE  
26 DID, IN FACT, HAVE AN IMPACT UPON THE ENVIRONMENT OF DOCTOR  
27 MONAHAN. AND BECAUSE OF THAT ENVIRONMENT, THE ONLY PERSON IN  
28 THIS CASE WHO HASN'T BEEN IN THIS COURTROOM TO TELL YOU ANYTHING  
29 ABOUT IT IS DOCTOR GEORGE MONAHAN, AND THAT'S BECAUSE OF ONE  
30 PERSON AND ONE PERSON ONLY. SO BEFORE YOU START THINKING TOO  
31 SYMPATHETICALLY ABOUT THE ENVIRONMENT IN WHICH SAMUEL HOWARD WAS  
32 RAISED, THINK ALONG WITH THAT ABOUT THE ENVIRONMENT IN WHICH

1 CAUSED THE DEATH, THE ENDING OF THE LIFE, OF DOCTOR GEORGE  
2 MONAHAN.

3 ALONG THE SAME LINES, MR. COOPER CANNOT  
4 IMAGINE A FATE WORSE THAN SPENDING THE REST OF YOUR LIFE IN  
5 PRISON. WELL, I CAN. I'VE JUST TALKED ABOUT IT. THAT FATE  
6 HAS OCCURRED ALREADY IN THIS CASE. IT'S SOMETHING THAT NO ONE  
7 CAN DO ANYTHING ABOUT. THE FATE OF DOCTOR MONAHAN. IF YOU'VE  
8 GOT THE CHOICE YOURSELF OF SPENDING THE REST OF YOUR LIFE IN  
9 PRISON OR DYING AT THIS MOMENT, IS THERE ANY QUESTION AS TO  
10 WHAT THAT CHOICE WOULD BE?

11 AS MR. HARMON SO ABLY POINTED OUT,  
12 WOULD YOU PREFER THE CONFINES OF THE GRAVE AND WHATEVER THERE  
13 IS BEYOND THIS LIFE TO THE ABILITY, AS WE CHOOSE TO HAVE IT  
14 TODAY, TO READ, TO EAT, TO TALK TO OTHER PEOPLE, TO MOVE ABOUT,  
15 EVEN THOUGH IT'S A RESTRICTED SOCIETY, WITHIN A SOCIETY FORM?  
16 I CAN'T IMAGINE, EXCEPT A SUICIDAL PERSON, ANYONE MAKING A  
17 DIFFERENT CHOICE THAN THE ONE THAT SAMUEL HOWARD HAS ALREADY  
18 MADE FOR BOTH HE AND DOCTOR MONAHAN.

19 SAMUEL HOWARD CHOSE FOR DOCTOR MONAHAN  
20 TO HAVE HIM DIE AND TO CURTAIL HIS LIFE FOR HIMSELF AND FOR  
21 THOSE FRIENDS AND RELATIVES AND LOVED ONES AROUND HIM. AND  
22 SAMUEL HOWARD CHOSE TO LIVE, AND HE STANDS BEFORE YOU TODAY,  
23 THROUGH MR. COOPER, BEGGING FOR HIS LIFE. I WONDER IF DOCTOR  
24 MONAHAN BEGGED FOR HIS LIFE. I WONDER IF HE HAD THE OPPORTUNITY  
25 TO SAY TO SAM HOWARD: DON'T SHOOT ME, TAKE MY CAR, TAKE MY  
26 WALLET, TAKE ANYTHING I'VE GOT BUT PLEASE DON'T SHOOT ME. AND  
27 IF HE DIDN'T SAY THAT, DID HE AT LEAST THINK IT FOR THAT SPLIT  
28 SECOND OR MAYBE A MATTER OF MINUTES THAT HE KNEW HE WAS GOING  
29 TO DIE?

30 AND WHAT WAS SAM HOWARD'S RESPONSE TO  
31 THAT PLEA FOR LIFE THAT SAM HOWARD SITS BEFORE YOU TODAY MAKING  
32 FOR HIMSELF? AS EASILY AS PULLING THE TRIGGER OF THAT PISTOL,

1 HE MADE HIS DECISION.

2 ARE WE TO HAVE MERCY FOR SAM HOWARD?  
3 THAT'S ONE OF THE QUESTIONS BEFORE YOU TODAY, OR ONE OF THE  
4 WAYS TO PUT THE QUESTION THAT'S BEFORE YOU.

5 LET'S THINK ABOUT MERCY FOR A MOMENT.  
6 NOW, WE KNOW WHAT MERCY IS. YOU GIVE IT TO SOMEONE. YOU DON'T  
7 TREAT THEM AS HARSHLY AS YOU OTHERWISE COULD. BUT THINK FOR A  
8 MOMENT OF THE PURPOSE OF MERCY. MERCY IS DESIGNED TO SET AN  
9 EXAMPLE, TO CREATE STANDARDS. MERCY IS USEFUL IF IT IS NOT  
10 GIVEN DISCRIMINATELY. IF YOU GIVE MERCY TO EVERYONE, THEN  
11 THERE IS NO REASON FOR THEM TO DO ANYTHING TO BENEFIT THAT  
12 MERCY. THEY CAN GO OUT AND ACT AS TERRIBLY AS THEY WISH AND  
13 KNOW THAT YOU, THE GENTLE JURY, IS GOING TO GIVE THEM MERCY.

14 NO. THAT'S WHY MERCY IS GIVEN TO SOME  
15 AND WITHHELD FROM OTHERS. WHAT HAPPENS WHEN WE GIVE MERCY TO  
16 SOMEONE? LET'S TAKE A KILLING SITUATION. SOMEONE KILLS AND  
17 COMES BEFORE THE JURY AND THE JURY SAYS TO THEM, YOU'VE KILLED,  
18 YOU'VE COMMITTED THE HIGHEST CRIME KNOWN TO MAN AND GOD, BUT  
19 THERE WERE EXTENUATING CIRCUMSTANCES. THERE WERE SUBSTANTIAL  
20 MITIGATING CIRCUMSTANCES THAT OUTWEIGH THE AGGRAVATING CIRCUM-  
21 STANCES. PERHAPS IT'S A HUSBAND OR WIFE WHO KILLS THE OTHER  
22 ONE BECAUSE THERE IS A FAMILY ARGUMENT AND EMOTIONS RUN HIGH  
23 AND THERE'S A KITCHEN KNIFE LYING CLOSE BY AND IT'S PICKED UP  
24 IN A, JUST IN A FIT OF RAGE, AND USED; OR PERHAPS IT'S A BAR-  
25 ROOM BRAWL THAT STARTS OUT AS A FRIENDLY POOL GAME BETWEEN TWO  
26 PEOPLE HAVING HAD TOO MUCH TO DRINK AND THEY ARGUE ABOUT THE  
27 NATURE OF THE GAME AND ONE SWINGS THE POOL CUE AT THE OTHER AND  
28 KILLS HIM. THESE ARE REASONS TO TREAT THOSE KINDS OF CASES  
29 AND OTHERS LIKE THEM DIFFERENTLY FROM THIS KIND OF CASE. YOU  
30 GIVE MERCY IN THAT KIND OF CASE. WHERE THERE ARE NO EXTENUATING  
31 CIRCUMSTANCES FOR THE KILLING, WHERE THERE IS NO REASON FOR  
32 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

1 I CAN SPEAK FOR MR. HARMON, BUT CERTAINLY FOR MYSELF, WE ARE  
2 NOT HERE ADVOCATING THAT THE DEATH PENALTY BE IMPOSED UPON SAM  
3 HOWARD MAINLY BECAUSE WE THINK HE OUGHT TO BE PUNISHED. THAT  
4 IS SIMPLY MENTIONED BECAUSE IT IS ONE OF THE REASONS THAT MANY  
5 PEOPLE WOULD UTILIZE, ALONG WITH THE OTHER DETERRENT REASONS.  
6 IT'S NOT A FORBIDDEN OBJECTIVE OF OUR SOCIETY. AND IT IS  
7 CERTAINLY NOT INCONSISTENT WITH OUR RESPECT FOR THE DIGNITY OF  
8 OTHER HUMAN BEINGS. AND EVEN THOUGH IT IS THE LESSER OF THE  
9 THREE REASONS, AS I POSED THEM TO YOU, IT IS A REASON WHICH MAY  
10 BE CONSIDERED FOR GIVING THE DEATH PENALTY TO SAM HOWARD.

11 THE OTHER REASON THAT HAS BEEN TALKED  
12 ABOUT IS TO DETER PEOPLE FROM KILLING WE SET AN EXAMPLE. IF  
13 YOU IMPOSE THE DEATH PENALTY UPON SAM HOWARD, MAYBE OTHER  
14 KILLERS WILL LOOK AT THAT AND DECIDE THAT, YES, INDEED THE  
15 DEATH PENALTY IS WORKING AND I DON'T WANT TO DO THAT.

16 NOW, PROOF OF DETERRENTS IS DIFFICULT.  
17 WE DON'T HAVE MANY CRIMINALS WHO WALK INTO THE CHIEF OF POLICE  
18 AND SAY, YOU KNOW, I WAS THINKING ABOUT KILLING SOMEBODY BUT I  
19 READ THE OTHER DAY THAT THE DEATH PENALTY IS IN EFFECT AND SO  
20 THAT DETERRED ME. WE DON'T HAVE THAT SORT OF STATISTICAL  
21 ANALYSIS.

22 WE DO HAVE STATISTICAL ANALYSIS, HOW-  
23 EVER, IN MANY, MANY STUDIES THAT HAVE BEEN MADE OF THE TEN-YEAR  
24 PERIOD THAT THERE WAS NO DEATH PENALTY, AND THE NUMBER OF  
25 KILLINGS DOUBLED FROM TEN THOUSAND ANNUALLY TO TWENTY THOUSAND  
26 ANNUALLY, OR THEREABOUTS, DEPENDING ON THE STATISTICS THAT YOU  
27 WANT TO BELIEVE. WE KNOW THAT WITHOUT A DEATH PENALTY BEING  
28 UTILIZED IN THIS COUNTRY THAT MURDERS SKYROCKET. DOESN'T LOGIC  
29 TELL US, DOESN'T LOGIC SAY TO US THAT IF THERE IS A DEATH  
30 PENALTY THAT MURDER WOULD DECREASE, OR AT LEAST IF THEY  
31 INCREASE THEY WOULD INCREASE MORE SLOWLY THAN THEY WOULD WITH-  
32 OUT THE DEATH PENALTY?



1                   YOU CAN'T DETER ALL MURDERERS. THE  
2 IRRATIONAL, EMOTIONAL KIND THAT I SPOKE OF BEFORE, THEY'RE NOT  
3 GOING TO BE DETERRED. YOU CAN DETER THE PREMEDITATORS THOUGH,  
4 THE PEOPLE LIKE SAM HOWARD, THE PEOPLE WHO DO MURDER FOR  
5 ECONOMIC GAIN. AND SAM HOWARD DID MURDER FOR ECONOMIC GAIN,  
6 ALTHOUGH HE WASN'T REALLY SUCCESSFUL. I CAN REMEMBER \$2 THAT  
7 DOCTOR MONAHAN HAD AND \$2 THAT DOROTHY WEISBAND HAD. BUT IF  
8 YOU CAN -- IF YOU CAN ALTER THEIR BUSINESS DECISION, THAT IS  
9 THAT OF THE BUSINESS DECISION OF THE CRIMINAL, IF YOU CAN MAKE  
10 HIM WEIGH THE COST OF THE CRIME VERSUS THE POTENTIAL GAIN OF  
11 THE CRIME, AND IF YOU ARE ABLE TO IMPOSE A HIGHER COST, YOU ARE  
12 GOING TO DETER OTHER PEOPLE FROM KILLING.

13                   I THINK THAT IF YOU WERE TO IMPOSE THE  
14 DEATH PENALTY IN THIS CASE, AS MR. HARMON HAS SUGGESTED, THAT  
15 IT WOULD BE A VERY STRONG POSSIBILITY THAT THE LIFE OF SOME  
16 FUTURE VICTIM OF SOME OTHER MURDERER MAY BE SAVED.

17                   NOW, THE THIRD REASON FOR IMPOSING THE  
18 DEATH PENALTY, AND THIS IS THE ONE I THINK WE HAVEN'T TALKED  
19 TOO MUCH ABOUT, AND IT'S THE ONE THAT I MOST STRONGLY BELIEVE  
20 APPLIES IN THIS CASE, IS THIS: TO IMPOSE THE DEATH PENALTY  
21 AGAINST SAM HOWARD IN THIS CASE IS TO MAKE ABSOLUTELY SURE THAT  
22 HE NEVER KILLS AGAIN. NOW, THAT'S OUR GOAL, TO MAKE SURE THAT  
23 SAM HOWARD NEVER KILLS AGAIN. I ALSO DON'T WANT HIM TO ROB  
24 AGAIN AND TO PUT PEOPLE INTO FEAR OF THEIR LIVES AGAIN.

25                   BUT LET'S FACE THE QUESTION THAT MR.  
26 COOPER TALKED ABOUT: ARE THERE WAYS TO KEEP HIM FROM KILLING  
27 AGAIN WITHOUT GIVING HIM THE DEATH PENALTY? IT WOULD APPEAR  
28 TO ME THAT THERE ARE ONLY TWO -- TWO POSSIBILITIES: ONE IS  
29 REHABILITATION AND ONE IS PUTTING HIM IN PRISON FOR THE REST  
30 OF HIS LIFE.

31                   NOW, THE REHABILITATION SOUNDS PRETTY  
32 GOOD. YOU TAKE A PERSON LIKE SAM, WHO'S HAD A TERRIBLE LIFE,

1 HE'S A BAD, EVIL PERSON, AND YOU MOLD HIM. YOU TAKE THE  
2 PSYCHIATRISTS, WELL WE KNOW THEY DON'T WORK, BUT YOU TAKE THE  
3 PSYCHIATRISTS AND THE SOCIAL WORKERS AND THE PEOPLE UP IN THE  
4 PRISON, MOST OF WHOM ARE OTHER PRISONERS WHO ARE OF THE SAME  
5 MOLD THAT HE IS, AND SOMEHOW IN THAT ENVIRONMENT YOU REHABILI-  
6 TATE SAM HOWARD, MAKE HIM A USEFUL CITIZEN.

7 WELL, PROBABLY 65 PERCENT OR SO OF  
8 THE CRIMINALS THAT APPEAR IN OUR COURTS APPEAR THERE AGAIN.  
9 THAT'S CALLED RECIDIVISM. IT'S AT AN ALL-TIME HIGH AND IT  
10 ISN'T STOPPING. AND FORGET ABOUT THE STATISTICS, SAM HOWARD IS  
11 A RECIDIVIST. HOW MANY TIMES DID MR. HARMON TIP OFF THAT SAM  
12 HOWARD HAD BEEN IN OUR JUDICIAL SYSTEM OR SHOULD HAVE BEEN IN  
13 OUR JUDICIAL SYSTEM BECAUSE OF THE CRIMES HE COMMITTED. HE IS  
14 A RECIDIVIST OF THE FIRST MAGNITUDE. HE IS INCAPABLE OF REHAB-  
15 ILITATION. HE'S 34 YEARS OLD. HE IS WHAT HE IS. HE'S A  
16 PRODUCT, AS MR. COOPER SUGGESTS, OF HIS ENVIRONMENT. AND WHAT-  
17 EVER HE IS TODAY IS WHAT HE'S GOING TO BE FOR THE REST OF HIS  
18 LIFE AND NO AMOUNT OF WORK ON HIM BY ANY SOCIAL WORKER OR  
19 PSYCHIATRIST IS GOING TO CHANGE THAT.

20 THINK ABOUT THAT FOR A MINUTE, THE  
21 PSYCHIATRIC TREATMENT. THAT WAS BROUGHT ON AS A SORT OF A BACK  
22 DOOR METHOD OF GETTING THIS INSANITY BUSINESS BEFORE US. AND  
23 IT'S A LITTLE HARD FOR THE STATE TO REBUT THAT WHEN IT COMES IN  
24 THE WAY IT DOES. WE DON'T HAVE AN OPPORTUNITY TO BRING IN THE  
25 PSYCHIATRISTS WHO HAVE EXAMINED HIM.

26 MR. FRANZEN: YOUR HONOR, I'M GOING TO OBJECT.  
27 THEY HAVE HAD AN OPPORTUNITY TO HAVE A REBUTTAL OR SURREBUTTAL.

28 THE COURT: THE JURY CAN DETERMINE THAT. THE  
29 OBJECTION IS NOTED AND OVERRULED.

30 MR. SEATON: THANK YOU, YOUR HONOR.

31 THE COURT: PROCEED.

32 MR. SEATON: BUT THE TESTIMONY FROM THE

1 DEFENDANT HIMSELF PROBABLY DOES A BETTER JOB OF TELLING US  
2 ABOUT THE MENTAL STATUS OF SAMUEL HOWARD THAN ANY GROUP OF  
3 PSYCHIATRISTS COULD POSSIBLY DO.

4 REMEMBER THIS: SAM SAT UP ON THE STAND  
5 AND HE TOLD YOU ALL OF THE MENTAL INSTITUTIONS THAT HE'S BEEN  
6 TO AND ALL OF THE PSYCHIATRISTS THAT HE'S BEEN TO AND ALL THE  
7 TREATMENT THAT HE'S GOTTEN. BUT HE DIDN'T TELL YOU THE END OF  
8 THE STORY OR THE END OF EACH ONE OF THOSE STORIES. THE END OF  
9 EACH ONE OF THOSE STORIES IS THAT HE LEFT THOSE INSTITUTIONS.  
10 NOW, THEY'RE GOING TO LET HIM OUT EITHER ONLY IF HE'S CURED OF  
11 WHATEVER AILS HIM OR IF THEY DETERMINE THAT THEY CAN'T DO HIM  
12 ANY GOOD. AND THAT'S THE KIND OF HUMAN BEING THAT WE'VE GOT  
13 HERE IN FRONT OF US TODAY. IT HAS NOTHING TO DO WITH CURE. HE  
14 DOESN'T NEED TO BE -- HE CAN'T BE CURED. HE'S GOT ANTI-SOCIAL  
15 BEHAVIOR. THAT'S WHAT CAME OUT ON THE EXAMINATION OF SAM  
16 HOWARD. WHAT DOES THAT MEAN? HE'S MEAN. I DON'T HAVE TO  
17 PROVE THAT TO YOU. YOU ALL KNOW HOW MEAN SAM HOWARD IS. MEAN  
18 IS PERHAPS ONE OF THE KINDEST WORDS I CAN USE ABOUT SAM HOWARD.  
19 NO REHABILITATION -- THE REHABILITATION OF SAM HOWARD COULD  
20 NEVER TAKE PLACE.

21 NOW, THE OTHER METHOD BY WHICH WE  
22 KEEP SAM HOWARD FROM KILLING SOMEONE ELSE IN THE FUTURE IS TO  
23 PUT HIM IN PRISON FOR LIFE, SUGGESTS MR. COOPER. DOES MR.  
24 COOPER THINK THAT SAM HOWARD, WHILE IN PRISON FOR LIFE, WOULD  
25 BE INCAPABLE OF HARMING OTHER PRISONERS, OR HOW ABOUT ANOTHER  
26 GUARD? I'VE BEEN UP TO THE NEVADA STATE PRISON TOO, AND THEY  
27 ALL INTERMINGLE, GUARDS AND PRISONERS ALIKE. AND HOW MANY  
28 CASES HAVE YOU READ ABOUT IN THE PAPERS OF THE RIOTS AND THINGS  
29 OF THAT NATURE?

30 HOW ABOUT AN ESCAPE? COULD HE ESCAPE  
31 FROM PRISON? WELL, HOPEFULLY NOT, BUT IT'S POSSIBLE. IF HE  
32 EVER ESCAPED AND WAS IN THAT KIND OF POSTURE, WOULD HE KILL

1 AGAIN? WELL, IF ANYBODY WANTS TO SUGGEST TO ME THAT, WELL,  
2 MAYBE HE WOULDN'T, WE HOPE HE WOULDN'T, I THINK YOU'RE NOT  
3 THINKING ALONG THE RIGHT LINES. OF COURSE HE'S GOING TO. NOW  
4 HE FINDS HIMSELF IN THE DEEPEST, DARKEST CORNER HE'S EVER BEEN  
5 IN IN HIS LIFE AND HE'D DO ANYTHING TO GET OUT OF IT.

6 HOW ABOUT RELEASE? ARE YOU GOING TO  
7 GIVE SAM HOWARD LIFE WITH THE POSSIBILITY OF PAROLE? DO YOU  
8 THINK MAYBE SAM HOWARD MIGHT KILL AGAIN IF HE WERE PAROLED AND  
9 OUT ON THE STREETS? DO YOU THINK HE'D GO BACK TO USING ALL  
10 THOSE GUNS THAT HE LOVES: THE THOMPSON MACHINE GUN, THE  
11 PISTOLS? WOULD HE FIND ANOTHER DOROTHY WEISBAND, A FRIEND FOR  
12 A YEAR AND A HALF, AND STICK HER UP AND PUT HIMSELF IN THE  
13 POSITION AGAIN OF WHATEVER HAPPENED TO DOCTOR MONAHAN AGAIN?  
14 MIGHT HE DO THAT?

15 AND, YES, I AM GOING TO TELL YOU, AS  
16 MR. COOPER SUGGESTS THAT I WOULD, THAT AS THE INSTRUCTION TELLS  
17 YOU, AND IT WOULDN'T BE THERE IF IT WEREN'T A POSSIBILITY OF  
18 REALITY, LIFE WITHOUT THE POSSIBILITY OF PAROLE DOES NOT  
19 EXCLUDE EXECUTIVE CLEMENCY. THAT MEANS SOMEBODY COULD LET HIM  
20 LOOSE, EVEN THOUGH THE JURY HAS GIVEN HIM LIFE WITHOUT THE  
21 POSSIBILITY OF PAROLE, EVEN THOUGH THAT'S YOUR VERDICT AND YOU  
22 SAY, SAM, YOU'VE GOT TO STAY IN JAIL THE REST OF YOUR LIFE,  
23 SOMEONE CAN TURN THAT DECISION AROUND.

24 AND THERE ARE SO MANY CASES WHERE NON-  
25 EXECUTED MURDERERS WHO HAVE BEEN SENT TO PRISON HAVE KILLED  
26 AGAIN IN ANY ONE OF THESE SITUATIONS THAT I HAVE JUST ENUMERATED.

27 AND NOW ANOTHER QUESTION THAT HAS TO  
28 BE ANSWERED IN DETERMINING HOW WE CAN KEEP SAM HOWARD FROM  
29 MURDERING AGAIN IS: WOULD HE MURDER AGAIN? IS IT POSSIBLE  
30 THAT HE WOULD? I'M NOT GOING TO GO INTO DETAILS, BUT I'M  
31 GOING TO REMIND YOU THE NAMES OF DOROTHY WEISBAND, ED SCHWARTZ,  
32 KEITH KINSEY, TOM MAJOR, DELAN SCHIEFEISTEIN, STEVE HOUCHEN,

1 THE GENTLEMAN DOWN IN SAN BERNARDINO FOR WHOM SAM WAS CONVICTED  
2 OF ROBBING AND WITH A WEAPON, AND GEORGE MONAHAN.

3 CAN YOU SEE THE PATTERN OVER THE  
4 YEARS THAT DEVELOPED WITH SAM? AND WE SEE IT WITH SO MANY  
5 CRIMINALS ON DIFFERENT LEVELS. IT'S A ROBBERY WITH A GUN, HE  
6 LIKES CARS, HE LIKES TO GET PEOPLE IN PRIVATE PLACES. HE'S  
7 DONE THIS ON WHAT DO WE HAVE HERE? SIX -- AT LEAST SIX SITU-  
8 ATIONS. THAT WE KNOW OF.

9 HAS HE BEEN CAUGHT EVERY TIME HE'S  
10 DONE CRIMES LIKE THIS? I DON'T KNOW THE ANSWER TO THAT. YOU  
11 DON'T KNOW THE ANSWER TO THAT. THERE'S ONLY ONE MAN IN THIS  
12 COURT THAT KNOWS THE ANSWER TO THAT. BUT GIVEN HIS HISTORY,  
13 GIVEN HIS PROPENSITY FOR VIOLENCE, HIS LOVE FOR GUNS -- IN FACT,  
14 HE TOLD US THE ANSWER TO IT NOW THAT I THINK ABOUT IT. HE  
15 STOOD ON THE STAND AND HE SAID SOMETHING ABOUT LIKING TO GO  
16 INTO SHOPPING CENTERS BECAUSE, AND I CAN'T REMEMBER THE EXACT  
17 TERMINOLOGY, BUT SOMETHING ABOUT HE LIKED TO DO HUSTLES OR  
18 SOMETHING LIKE THAT. HE'S DONE THAT SEARS SORT OF THING WHICH  
19 TURNED INTO A ROBBERY ON A NUMBER OF OCCASIONS, PROBABLY SO  
20 NUMEROUS THAT IF HE WERE ASKED TO SIT DOWN AND WRITE THEM OUT  
21 HE COULDN'T DO IT.

22 EVERY TIME THAT HE'S HAD A VICTIM IN  
23 HIS CLUTCHES HE'S THREATENED THEM. HE'S EITHER SAID, DO WHAT  
24 I TELL YOU TO DO OR I'M GOING TO KILL YOU, OR HE'S POINTED A  
25 GUN AT THEM. THE MOST HARMLESS OF ALL IS PERHAPS STEVE HOUCHEN.  
26 CAN YOU IMAGINE BEING IN YOUR AUTOMOBILE, JUST HAVING BEEN HIT  
27 FROM BEHIND, AND YOU GET UP ALONGSIDE THE OTHER CAR AND YOU  
28 WANT TO TALK TO THE OTHER PERSON ABOUT IT, AND EVEN IF YOU'RE  
29 ANGRY, HAVING A GUN COME OUT AND STUCK IN YOUR FACE? CAN YOU  
30 IMAGINE THE FEAR THAT YOU WOULD HAVE? DOES HE AND THE OTHERS  
31 HAVE THE SAME BAD DREAMS, THE SAME FEELINGS THAT DOROTHY  
32 WEISBAND HAS? I DON'T KNOW. I WOULD ASSUME SO.

1 AND I THINK THERE IS THIS THIRD MOST  
2 IMPORTANT REASON FOR IMPOSING THE DEATH PENALTY IN THIS CASE,  
3 AND THAT IS TO MAKE SURE THAT SAM HOWARD NEVER HAS THE OPPOR-  
4 TUNITY, NO POSSIBILITY OF BEING ABLE TO GO OUT AND KILL SOMEONE  
5 ELSE.

6 YOU KNOW, THERE ARE TWO KINDS OF  
7 VICTIMS IN THIS CASE, AND IT ALWAYS STRIKES ME AS A PITY, AND  
8 I GUESS I'M AS GUILTY OF IT AS ANYONE ELSE, BUT THE WHOLE  
9 EMPHASIS IN THIS COURTROOM HAS BEEN ON SAM HOWARD.

10 LET'S TALK ABOUT THE COURTROOM FOR  
11 JUST A MOMENT. TAKE A LOOK ABOUT. IT'S WELL LIT, IT'S QUIET.  
12 GOOD SOUND IS PROVIDED FOR WITH MICROPHONES OR ACOUSTICS. WE  
13 HAVE A JUDGE TO KEEP ORDER. THE ATTORNEYS STAND UP AND SIT  
14 DOWN WHEN THEY'RE SUPPOSED TO. EVEN THE DEFENDANT DOES ALL  
15 THESE THINGS THAT HE'S SUPPOSED TO. YOU SIT AND DO YOUR DUTIES  
16 AS YOU'RE SUPPOSED TO. WE HAVE A NICE, STERILE LABORATORY HERE  
17 IN WHICH WE DETERMINE THE GUILT OR INNOCENCE AND ULTIMATELY IN  
18 THIS CASE THE PENALTY OF THE DEFENDANT SAM HOWARD. AND WHY IS  
19 THAT? WELL I SUBMIT TO YOU IT'S PART AND PARTIAL OF THIS  
20 BUSINESS OF, AND I DON'T MEAN TO GIVE IT SHORTSHIP, OF GIVING  
21 THE DEFENDANT HIS CONSTITUTIONAL RIGHTS. AND I BELIEVE IN THAT  
22 AS STRONGLY AS I STAND HERE TODAY AS I ASK YOU TO IMPOSE THE  
23 DEATH PENALTY. I BELIEVE IN BOTH OF THOSE THINGS EQUALLY  
24 STRONG. AND I WOULD NEVER WANT TO SEE ANY LESSENING OF THE  
25 CONSTITUTIONAL RIGHTS.

26 WE MAKE SURE THAT SAM HOWARD GETS HIS  
27 DAY OR DAYS IN THIS COURTROOM. WE MAKE SURE THAT HE HAS  
28 ATTORNEYS TO REPRESENT HIM. WE MAKE SURE THAT HE CAN EITHER  
29 TESTIFY OR NOT TESTIFY, WHATEVER HE CHOOSES TO DO. WE MAKE SURE  
30 THAT HE CAN CROSS EXAMINE ALL OF THE WITNESSES. THESE AND MANY  
31 OTHER RIGHTS ARE AFFORDED TO SAM HOWARD. AND HE HAS GREAT  
32 REPRESENTATION. AND MR. HARMON AND I REPRESENT THE STATE AND

1 ITS CITIZENS.

2 AND WHO REPRESENTS THE VICTIM? WHO?  
3 WELL, PROBABLY YOU'RE THINKING AS I AM RIGHT NOW THAT THE ONLY  
4 PEOPLE TO DO THAT ARE MR. HARMON AND MYSELF. AND IN THIS CASE,  
5 IN A LITTLE DIFFERENT SORT OF A FASHION, MR. COOPER ALLUDED TO  
6 THE FACT THAT IT WAS TOO BAD ABOUT THE VICTIMS, AND IT IS, AND  
7 WE HAVE TO REMEMBER THEM CAREFULLY. WE HAVE TO REMEMBER GEORGE  
8 MONAHAN AND HIS FAMILY. AND THIS IS AS IMPORTANT, THEY AREN'T  
9 THE ONLY VICTIMS IN THIS CASE. THEY AREN'T THE ONLY -- HE  
10 ISN'T THE ONLY VICTIM THAT I CONCERN MYSELF WITH IN THIS CASE.  
11 AND HE ISN'T THE ONLY VICTIM WHO YOU SHOULD CONCERN YOURSELF  
12 WITH. THE OTHER VICTIM OR VICTIMS ARE THOSE UNNAMED AND  
13 UNCERTAIN VICTIMS OF EITHER FUTURE MURDERS, WHO WILL REACT TO  
14 YOUR DECISION OR TO SAM HOWARD, SHOULD HE EVER GET OUT OF  
15 PRISON, WERE YOU TO PUT HIM THERE. THOSE ARE THE PEOPLE THAT  
16 I WANT TO TURN MY ATTENTION TO NOW. I'M GOING TO SAY A FEW  
17 THINGS ABOUT THEM, BUT YOU AND NO ONE ELSE ARE THEIR REPRESENTATIVE.  
18

19 YOU KNOW, YOU HAVE TO TAKE SIDES.  
20 LIFE IS TOUGH. THERE COMES A TIME WHEN YOU'VE GOT TO MAKE A  
21 DECISION THAT I'VE GOT TO GO THIS WAY OR I'VE GOT TO GO THAT  
22 WAY. IN THIS CASE, AS I SEE IT, YOU'RE EITHER FOR THE DEFENDANT  
23 OR YOU'RE FOR THESE UNNAMED, UNCERTAIN VICTIMS THAT I'M  
24 REFERRING TO.

25 THE DEFENSE WILL TELL YOU, AND THEY  
26 DIDN'T IN THIS CASE, BUT THE TYPICAL THOUGHT PROCESS THAT THEY  
27 WANT YOU TO UNDERSTAND IS TO FORGET ABOUT DOCTOR MONAHAN, HE'S  
28 DEAD. WE CAN'T BRING HIM BACK TO LIFE. IN FACT, MR. COOPER  
29 DID TALK ABOUT THAT. HE SAID, WHAT CAN BE ACCOMPLISHED BY  
30 EXECUTING SAM HOWARD? AND THEN HE ALLUDED TO OUR VENGEANCE  
31 FACTOR. AND AS YOU CAN SEE, VENGEANCE IS NOT IMPORTANT TO ME  
32 IN THIS SITUATION. IT'S THE DETERRENTS. IT'S THOSE PEOPLE OUT

1 THERE IN THE STREET SOMEPLACE IN THIS CITY OR SOME OTHER THAT  
2 I'M CONCERNED ABOUT, AND I WANT YOU TO BE CONCERNED ABOUT.

3 AND HAD MR. COOPER THOUGHT ABOUT THIS,  
4 HE WOULD PROBABLY SAY -- AND I'LL HELP HIM HERE BECAUSE I KNOW  
5 HE'S PROBABLY THINKING, FOR GOODNESS SAKE, THINK ABOUT WHAT MR.  
6 SEATON IS SAYING. THIS IS SPECULATIVE, AND IT IS. I CAN'T  
7 GO OUT AND POINT TO THE INDIVIDUAL THAT'S GOING TO BE KILLED,  
8 BUT I THINK IT'S GOING TO HAPPEN. I THINK THERE'S GOING TO BE  
9 A MURDER TOMORROW OR THE NEXT DAY OR A YEAR FROM NOW, AND IT MAY  
10 HAVE BEEN CAUSED BY SOMEONE WHO WAS AWARE OF THIS CASE AND IT  
11 MAY BE SAM HOWARD MAYBE YEARS DOWN THE ROAD. IT'S THAT POTEN-  
12 TIAL VICTIM THAT I'M CONCERNED ABOUT.

13 NOW, VICTIM OR DEFENDANT, HOW DO YOU  
14 DECIDE? AND YOU ARE GOING TO SUPPOSE THAT THE ANSWER IS EASY  
15 WITHOUT GIVING IT TOO MUCH THOUGHT. AND THE ANSWER IS EASY.  
16 BUT NOW I WANT YOU TO GIVE IT SOME CAREFUL, LOGICAL THOUGHT  
17 ABOUT THE DECISION THAT FACES YOU HERE TODAY. I WANT YOU TO  
18 LOOK AT THE ALTERNATIVE CHOICES YOU'VE GOT AND THE PROBABLE  
19 RESULTS THAT WOULD EMANATE FROM THOSE CHOICES.

20 NOW, WE START OUT WITH THIS HYPOTHESIS:  
21 CAPITAL PUNISHMENT EITHER WORKS AS A DETERRENT OR IT DOESN'T.  
22 NOW, WE'LL JUST LEAVE THAT UP IN THE AIR RIGHT NOW. WE DON'T  
23 KNOW IF IT WORKS. I SUGGEST TO YOU THAT IT DOES AND I'VE  
24 SUGGESTED THAT EARLIER. BUT LET'S SAY FOR THE PURPOSE OF YOUR  
25 OBJECTIVE DETERMINATION OF THIS DECISION THAT YOU DON'T KNOW IF  
26 IT WORKS OR NOT. IT MAY AND IT MAY NOT. NOW, GIVEN THOSE  
27 GUIDELINES, WHAT CAN YOU DO IN THIS CASE?

28 WELL, LET'S SAY THAT THE DEATH PENALTY  
29 IS NOT A DETERRENT AND YOU IMPOSE IT. WELL, YOU HAVEN'T SAVED  
30 ANY FUTURE VICTIMS BECAUSE THE PENALTY WASN'T GOING TO BE A  
31 DETERRENT ANYWAY, AND YOU TOOK THE LIFE OF A CONVICTED MURDERER.  
32 THIS MAY BE ONE OF A FEW AREAS WHERE YOUR ONLY JUSTIFICATION



1 IN THAT SITUATION WOULD BE THAT OF PUNISHMENT. THAT IS IF  
2 THERE IS NO DETERRENTS.

3 NOW, LET'S SAY THAT THERE IS  
4 DETERRENTS AND YOU IMPOSE THE DEATH PENALTY. WHAT HAVE YOU  
5 DONE? WHAT IS THE RESULT OF YOUR ACT? WELL, YOU'VE TAKEN THE  
6 LIFE OF THE DEFENDANT, A CONVICTED MURDERER, AND YOU'VE SAVED  
7 THE LIFE OF SOME POTENTIAL VICTIM.

8 REMEMBER, IT EITHER WORKS OR IT  
9 DOESN'T WORK. AND IN THIS CASE IT WORKS. SO WHEN YOU TAKE  
10 SAM HOWARD'S LIFE, SOME OTHER MURDERER OR SAM HOWARD WILL NEVER  
11 KILL BECAUSE OF WHAT YOU'VE DONE.

12 ON THE OTHER SIDE OF THE COIN,  
13 THERE'S NO DETERRENT AND YOU DON'T IMPOSE THE DEATH PENALTY.  
14 WHAT HAPPENS? NO LIVES ARE LOST AT ALL, AND THAT'S GOOD. BUT  
15 NOW WHAT'S THE OTHER SIDE OF THAT COIN? THERE IS A DETERRENT  
16 AFFECT GOING AND YOU AGAIN DON'T IMPOSE THE DEATH PENALTY AND  
17 WHAT HAPPENS? YOU SAVED THE LIFE OF A MURDERER, SAM HOWARD,  
18 YOU DIDN'T IMPOSE THE DEATH PENALTY. BECAUSE YOU DIDN'T AND  
19 BECAUSE THERE'S A DETERRENT AFFECT ON THE DEATH PENALTY, SOME-  
20 ONE'S LIFE, SOME INNOCENT VICTIM, A KEITH KINSEY, A DOCTOR  
21 MONAHAN, A DOROTHY WEISBAND, SOMEBODY'S LIFE IS GOING TO BE  
22 LOST. SO YOUR CHOICE HAS LIMITS OF RISK IN IT. YOU CAN COME  
23 BACK HERE AND SAY THAT THE DEFENDANT SHOULD HAVE THE DEATH  
24 PENALTY AND IF YOU'VE DONE THAT YOU MIGHT SAVE THE LIVES OF  
25 SOME FUTURE VICTIMS. THE WORST THING THAT YOU WILL HAVE DONE --  
26 THE WORST THING THAT YOU WILL HAVE DONE IS TO HAVE TAKEN THE  
27 LIFE OF SAM HOWARD. I SUBMIT TO YOU, JUXTAPOSE NEXT TO DOCTOR  
28 MONAHAN'S LIFE, HE HAS NO RIGHT WHATSOEVER TO LIVE ANY LONGER.

29 YOU COULD CHOOSE LIFE FOR THE  
30 DEFENDANT. YOU COULD GIVE HIM LIFE WITH OR WITHOUT THE POSSI-  
31 BILITY OF PAROLE. AND WHAT HAVE YOU DONE THEN? YOU'VE SAVED  
32 THE DEFENDANT'S LIFE, AND IN THE ABSTRACT, THAT'S A NICE THING,

1 THAT YOU SAVED SOMEBODY'S LIFE. BUT IF THE DEATH PENALTY IS  
2 IN FACT A DETERRENT TO ANY DEGREE, YOU MIGHT HAVE COST THE LIFE  
3 OF SOME FUTURE UNKNOWN VICTIM. IT WOULD SEEM TO ME, GIVEN THAT  
4 CHOICE, GIVEN THE CHOICE BETWEEN THE LIFE OF AN INNOCENT VICTIM  
5 AND SAM HOWARD, THERE SHOULD BE NO CHOICE. IT SHOULD BE EASY.

6 AND I -- I HESITATE SO MUCH TO SAY  
7 THAT BECAUSE THIS ISN'T EASY. THIS IS THE HARDEST THING  
8 OBVIOUSLY THAT MARCUS COOPER DOES. IT'S THE HARDEST THING THAT  
9 MR. HARMON AND I DO. AND CERTAINLY I SYMPATHIZE WITH ALL OF  
10 YOU THAT IT'S PROBABLY THE HARDEST THING THAT YOU ARE GOING TO  
11 HAVE TO DO IN YOUR LIVES. THE POINT OF MATTER IS THOUGH THAT  
12 THERE IS A DEGREE OF ACCOUNTABILITY THAT HAS TO TAKE PLACE.  
13 WE ALL HAVE TO BE ACCOUNTABLE FOR OUR ACTIONS.

14 MR. HARMON SUGGESTED TO YOU THAT WE'VE  
15 ALL HEARD THE ARGUMENTS ABOUT HOW BAD OUR SOCIETY IS GETTING  
16 AND THE FACT THAT WE SHOULD DO SOMETHING ABOUT IT. YOU YOUR-  
17 SELF AT SOMETIME MAY HAVE MADE THE COMMENT, HARSH THOUGH IT  
18 MAY SEEM TODAY, THAT WE OUGHT TO JUST GET RID OF THOSE GUYS,  
19 SPEAKING IN GENERAL ABOUT CHARLIE MANSON OR SOMEBODY LIKE THAT.  
20 YOU ALSO CAME IN HERE AND YOU TOOK AN OATH AND THAT OATH WAS  
21 THAT YOU WOULD FOLLOW THE LAW. PRIOR TO THAT YOU WERE ASKED  
22 ABOUT BEING ABLE TO IMPOSE THE DEATH PENALTY AND ALL OF YOU  
23 SAID THAT YOU COULD IMPOSE THE DEATH PENALTY. THAT DOESN'T  
24 MEAN THAT YOU DON'T HAVE A HARD TIME WITH IT. THAT'S UNDER-  
25 STANDABLE. NOW IS THE TIME, AS FAR AS ACCOUNTABILITY IS CON-  
26 CERNED, IT IS THE TIME TO BACK UP THOSE WORDS THAT YOU HAVE  
27 SAID OR YOU HAVE PRIVATELY THOUGHT IN YOUR MINDS.

28 NOW, THAT'S A TOUGH BURDEN THAT I PUT  
29 ON YOU, AND I DON'T MEAN TO DO THAT. IT'S THERE AND IT'S  
30 REAL AND I'M NOT GOING TO BACK AWAY FROM IT. BUT I'M GOING TO  
31 TELL YOU HOW IT'S MADE ALOT EASIER, THIS ACCOUNTABILITY OF  
32 YOURS THAT YOU HAVE GOT TO BE RESPONSIBLE FOR NOW, AND THAT IS

1 WHAT I CALL THE SHARING OF RESPONSIBILITY. YOU ALONE ARE NOT  
2 RESPONSIBLE FOR THIS DECISION THAT YOU ARE MAKING TODAY. THINK  
3 ABOUT THE WHOLE CASE. THINK ABOUT THE POLICE OFFICERS WHO  
4 ARRESTED SAM HOWARD. THEY STARTED THIS LEGAL PROCESS. THEY  
5 ARE TO SOME DEGREE RESPONSIBLE FOR WHAT'S GOING ON.

6 MR. HARMON AND I -- WELL, BEFORE THAT  
7 EVEN OTHER PROSECUTORS IN OUR OFFICE HAD TO OKAY THIS CASE FOR  
8 PROSECUTION. MR. HARMON AND I THEN COME IN AND WE HAVE TO DO  
9 WHAT WE HAVE DONE OVER THE PAST SEVERAL WEEKS. WE HAVE TO  
10 TELL YOU THAT WE BELIEVE IN WHAT WE'RE TELLING YOU, THAT SAM  
11 HOWARD SHOULD BE PUT TO DEATH, AND WE DO BELIEVE THAT. WE  
12 HAVE A RESPONSIBILITY. MR. COOPER AND MR. FRANZEN HAVE A  
13 RESPONSIBILITY IN THAT THEY ARE REPRESENTING THE DEFENDANT AND  
14 DOING THE BEST, AND A GOOD A JOB IT IS, THAT THEY CAN FOR HIM.  
15 THE NEVADA LEGISLATURE HAS A PART IN THIS BECAUSE THEY PASSED  
16 THE LAW THAT ALLOWS FOR THE DEATH PENALTY. THE PEOPLE WHO  
17 VOTED THE LEGISLATURE IN HAVE A ROLE IN THIS. THEY'VE MAN-  
18 DATED THAT SORT OF THING HAPPEN. THE NEVADA SUPREME COURT,  
19 THE UNITED STATES SUPREME COURT, THEY HAVE ALL PUT THEIR STAMP  
20 OF APPROVAL ON WHAT WE'RE HERE DOING TODAY.

21 AND REMEMBER, THERE ARE 12 OF YOU.  
22 WHILE SOMETIMES THAT MAKES IT DIFFICULT FOR PROSECUTORS, THAT'S  
23 PROBABLY THE BEAUTY OF THE SYSTEM. YOU HAVE TO BE UNANIMOUS.  
24 YOU HAVE TO ALL AGREE. YOU ALL HAVE TO SAY TOGETHER UNANIMOUSLY  
25 THAT THE DEATH PENALTY IS THE APPROPRIATE THING. SO DO YOU  
26 SEE HOW THE RESPONSIBILITY IS SHARED BY SO MANY PEOPLE? IT'S  
27 GOT TO BE A GROUP EFFORT OF SORTS.

28 AND REALLY EVERYTHING THAT I'VE SAID  
29 DOESN'T MEAN A WHOLE HECK OF A LOT. THERE'S ONLY ONE PERSON,  
30 ONE HUMAN BEING, WHO IS REALLY RESPONSIBLE FOR WHATEVER  
31 HAPPENS TO SAM HOWARD, AND THAT'S SAM HOWARD HIMSELF. NO ONE  
32 FORCED HIM TO DO THE THINGS THAT HE DID. NO ONE CAUSED HIM TO

1 BE SITTING IN THAT CHAIR RIGHT THERE (INDICATING) THROUGHOUT  
2 THIS TRIAL, HAVING ALL THESE TERRIBLE THINGS SAID ABOUT HIM;  
3 NO ONE BUT SAM HOWARD. HE'S RESPONSIBLE. HE IS THE MASTER OF  
4 HIS OWN FUTURE.

5 WHEN YOU WEIGH THE AGGRAVATING CIRCUM-  
6 STANCES AGAINST THE MITIGATING CIRCUMSTANCES AND FIND THAT THE  
7 AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES  
8 AND THUS YOU ARE CAPABLE AND ALLOWED TO CONSIDER THE DEATH  
9 PENALTY, THAT'S NOT YOUR FAULT. THAT'S NOT DOCTOR MONAHAN'S  
10 FAULT. IT'S NOT MR. HARMON'S FAULT OR MINE. IT'S SAM HOWARD'S  
11 FAULT AND ONLY SAM HOWARD'S. HE IS THE RESPONSIBLE PERSON.  
12 DON'T EVER FOR A MOMENT WALK INTO THAT DELIBERATION ROOM WITH  
13 A HEAVY BURDEN ON YOUR SHOULDERS THAT YOU ARE SOMEHOW CAUSING  
14 THE DEATH OF A HUMAN BEING. YOU ARE SIMPLY ANOTHER STEP IN  
15 THE PROCESS.

16 NOW, FOR THE FIRST TIME WE ARE ABLE TO  
17 SAY SOMETHING ABOUT REASONABLE DOUBT. THAT DOESN'T BENEFIT  
18 THE DEFENDANT. REASONABLE DOUBT IS A GREAT CONCEPT AND I  
19 LIKE IT. IT MAKES US PROVE A CASE TO THAT EXTENT, AND WE'VE  
20 DONE THAT. YOU HAVE FOUND THAT IN A MATTER OF HOURS, IN THE  
21 GUILT PHASE, THAT WE HAD PROVEN OUR CASE BEYOND A REASONABLE  
22 DOUBT, THAT SAM HOWARD ACTUALLY HAD SHOWN US, HE GAVE US ALL  
23 THE EVIDENCE WE HAD. WE DIDN'T GO OUT AND GET IT SOMEPLACE.  
24 THAT BURDEN WAS MET.

25 AS MR. HARMON EXPLAINED TO YOU IN THE  
26 OPENING ARGUMENT, OUR BURDEN IN THIS HEARING HAS EASILY BEEN  
27 MET, THAT THE AGGRAVATING CIRCUMSTANCES HAS BEEN SHOWN AND THAT  
28 THEY OUTWEIGH THE MITIGATING CIRCUMSTANCE. THAT REASONABLE  
29 DOUBT HAS BEEN USED THROUGHOUT THIS ENTIRE TRIAL TO BENEFIT  
30 SAM HOWARD. AND NOW I ASK YOU, LET THAT REASONABLE DOUBT  
31 BENEFIT SOCIETY. LET IT BENEFIT THE CITIZENS OF LAS VEGAS AND  
32 YOURSELVES AND YOUR FAMILY AND YOUR LOVED ONES, AS IT DID NOT

1 BENEFIT DOCTOR MONAHAN.

2 GO INTO YOUR DELIBERATION ROOM AND  
3 TALK ABOUT THIS CASE. AND THEN I ASK YOU, ON BEHALF OF THOSE  
4 SAME CITIZENS OF THE STATE OF NEVADA, TO COME BACK INTO THIS  
5 COURTROOM AND TELL US BEYOND A REASONABLE DOUBT THAT YOU WON'T  
6 STAND FOR THE POSSIBILITY OF ANY FUTURE VICTIM AT THE HANDS OF  
7 SAM HOWARD. THANK YOU.

8 THE COURT: COUNSEL, ANYTHING FURTHER TO COME  
9 BEFORE THE JURY BEFORE THIS MATTER IS SUBMITTED TO THEM?

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

11 MR. FRANZEN: NO, YOUR HONOR.

12 THE COURT: LADIES AND GENTLEMEN OF THE JURY,  
13 THE MATTER NOW STANDS SUBMITTED TO YOU. AT THIS TIME YOU WILL  
14 GO WITH THE FOREMAN TO COMMENCE YOUR DELIBERATIONS. YOU ARE  
15 EXCUSED AND MAY LEAVE THE COURTROOM AT THIS TIME.

16 (WHEREUPON, AT THE HOUR OF  
17 11:55 A.M., THE JURY LEFT THE  
18 COURTROOM AND THE FOLLOWING  
19 PROCEEDINGS WERE HAD OUTSIDE  
20 OF THEIR PRESENCE:)

21 THE COURT: COUNSEL, IS THERE ANYTHING TO COME  
22 BEFORE THE COURT OUTSIDE THE PRESENCE OF THE JURY?

23 MR. HARMON: NO, YOUR HONOR.

24 MR. FRANZEN: NO, SIR.

25 THE COURT: ALL RIGHT. WE WILL STAND IN RECESS.

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1 LAS VEGAS, NEVADA, WEDNESDAY, MAY 4, 1983, AT 4:07 P.M.

2 \* \* \* \* \*

3 (WHEREUPON, FROM 11:56 A.M.  
4 UNTIL 4:07 P.M., A RECESS WAS  
5 HAD IN THE PROCEEDINGS, AT THE  
6 CONCLUSION OF WHICH THE FOLLOW-  
7 ING WAS HAD:)

8 THE COURT: COUNSEL STIPULATE TO THE PRESENCE OF  
9 THE JURY?

10 MR. HARMON: THE STATE DOES, YOUR HONOR.

11 MR. FRANZEN: YES, YOUR HONOR.

12 THE COURT: MR. FOREMAN, HAVE YOU REACHED YOUR  
13 VERDICT?

14 THE FOREMAN: YES, WE HAVE.

15 THE COURT: HAND IT TO THE BAILIFF, PLEASE.

16 ALL RIGHT. MR. FOREMAN, WOULD YOU READ  
17 THE SPECIAL VERDICT AND VERDICT, PLEASE.

18 THE FOREMAN: YES.

19 WE, THE JURY IN THE ABOVE-  
20 ENTITLED CASE, HAVING FOUND THE  
21 DEFENDANT, SAMUEL HOWARD, GUILTY  
22 OF MURDER IN THE FIRST DEGREE,  
23 DESIGNATE THAT THE AGGRAVATING  
24 CIRCUMSTANCE OR CIRCUMSTANCES  
25 WHICH ARE CHECKED BELOW HAVE BEEN  
26 ESTABLISHED BEYOND A REASONABLE  
27 DOUBT.

28 THE MURDER WAS COMMITTED  
29 BY A DEFENDANT WHO WAS PREVIOUSLY  
30 CONVICTED OF A FELONY INVOLVING  
31 THE USE OR THREAT OF VIOLENCE TO  
32 THE PERSON OF ANOTHER.

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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 REASON-  
ABLE 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?

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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?

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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

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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 DEPART-  
MENT 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.

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(WHEREUPON, FROM 4:18 P.M.  
UNTIL 4:34 P.M., A RECESS WAS  
HAD IN THE PROCEEDINGS, AT THE  
CONCLUSION OF WHICH THE FOLLOW-  
ING 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 TRIPLI-  
CATE 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,

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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)**

**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 1979*

**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.

FILED FOR IDENTIFICATION  
Signed & Indexed Exhibit 1

A TRUE EXTRACT FROM THE MINUTES. 4/26/83

*John J. Durante*

*Clerk.*

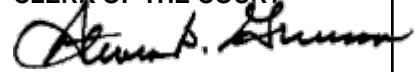
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**RPLY**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
JONATHAN E. VANBOSKERCK  
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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,	)	CASE NO: 81C053867 /
	)	
-vs-	)	A-18-780434-W
	)	
THE STATE OF NEVADA,	)	DEPT NO: XVII
	)	
Respondent.	)	

**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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Homicide detectives were aware of the Sears robbery that had occurred

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

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

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

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

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

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

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

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

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

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

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

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

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

Howard testified regarding his military, family and mental health  
histories. Howard discussed his military service and stated he had suffered a  
concussion and received a purple heart.<sup>2</sup> Howard also stated he was on  
veteran's disability in New York.<sup>3</sup> 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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<sup>1</sup> This evidence was admitted to show identity and motive for the Monahan murder.

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

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

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

### 3 **STATEMENT OF THE CASE**

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

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

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 10<sup>th</sup> 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,

1 given the issues involved, with only six weeks to prepare. After extensive  
2 argument and a recess so that counsel could discuss the issue with Howard, the  
3 district court granted the continuance over Howard's objections.

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

13 Defense counsel made an oral motion to withdraw indicating they had  
14 irreconcilable differences with Howard over the conduct of the penalty phase.  
15 Counsel indicated they had documents and witnesses in mitigation, but that  
16 Howard had instructed them not to present any mitigation evidence. Howard  
17 also instructed them not to argue mitigation and they would not follow that  
18 directive, but would argue mitigation. Counsel also indicated that Howard told  
19 them he wished to testify, but would not tell them the substance of his  
20 testimony. Finally, counsel indicated they had attempted to get military and  
21 mental health records but were unsuccessful because the agencies possessing  
22 the records would not send copies without a release signed by Howard and  
23 Howard refused to sign the releases. The district court canvassed Howard if  
24 this was correct and Howard confirmed it was true and that he did not want  
25 any mitigation presented. The district court found Howard understood the  
26 consequences of his decision and denied the motion to withdraw concluding  
27 defense counsel's disagreement with Howard's decision was not a valid basis  
28 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 felony - a 1978 New York conviction in  
absentia for robbery with use of a deadly weapon; and 3) the murder occurred  
in the commission of a robbery. Howard moved to strike the California  
conviction because the conviction occurred after the Monahan murder and the  
New York conviction because it was not supported by a judgment of  
conviction. The district court struck the California conviction but denied the  
motion as to the New York conviction, noting that the records reflected a jury  
had convicted Howard and the lack of a formal judgment was the result of  
Howard's absconding in the middle of trial.

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

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

1 hearing on a motion to suppress Howard's statements and evidence derived  
2 therefrom; 4) refusal to instruct the jury that accomplice testimony should be  
3 viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was  
4 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.

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

27 On October 28, 1987, Howard filed his first State petition for post-  
28 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.

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



1 on, was competent and was trying to manipulate the proceedings and that there  
2 was no evidence to support an insanity defense, therefore counsel were not  
3 ineffective in this regard.

4 On the issue of failure to object to prosecutorial misconduct, the district  
5 court found that defense counsel did object where appropriate and the  
6 arguments that were not objected to did not amount to misconduct and were a  
7 fair comment on the evidence. Even if some of the comments were improper,  
8 the district court concluded that they would not have succeeded on appeal as  
9 they were harmless beyond a reasonable doubt. Formal findings of fact and  
10 conclusions of law were filed on July 5, 1989.<sup>4</sup>

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

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

28 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.

<sup>4</sup>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.

<sup>5</sup> Collier was decided two years after Howard's trial.

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

1 The district court denied the petition on July 7, 1992. The district court  
2 found that the claims of prosecutorial misconduct and ineffective assistance of  
3 counsel relating thereto as well as the claims relating to mitigation evidence  
4 had been heard and found to be without merit or failed to demonstrate  
5 prejudice. Such claims were therefore barred by the law of the case. The  
6 district court further concluded that any claim of cumulative error and any  
7 issues not raised in previous proceedings were procedurally barred. Finally,  
8 the district court found the speedy trial violation was a naked allegation,  
9 frivolous and procedurally barred.

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

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

25 Howard filed his third State petition for post-conviction relief on  
26 December 20, 2002. Patricia Erickson represented him on this petition. The  
27 petition asserted the following claims, phrased generally as denial of a  
28 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,

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

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

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

28 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.<sup>7</sup>

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 (9<sup>th</sup> Cir. 2007).

The United States District Court denied Howard's 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.<sup>8</sup> 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

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

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

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

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

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

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

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

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

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

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

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

### 6 ARGUMENT

7 Petitioner's believes his due diligence obligation begins and end with the filing date  
8 of the order invalidating his New York conviction. This is contrary to longstanding Nevada  
9 public policy and recently enacted legislation. Habeas litigants must always demonstrate  
10 that they have acted with due diligence. The failure to exercise due diligence is fatal to post-  
11 conviction relief in Nevada. As such Petitioner's decision to wait nearly four decades to  
12 challenge his New York conviction precludes habeas relief.

13 Initially, Petitioner's claims of actual innocence should be summarily denied since,  
14 even if this Court assumes that factual innocence has been established based on the  
15 invalidation of his New York conviction, he still has not identified a constitutional violation  
16 related to the New York conviction. Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861  
17 (1995). Indeed, Petitioner's New York conviction was valid at the time of his sentence and  
18 thus he cannot establish that a constitutional violation existed to the time of sentencing. See,  
19 Clem v. State, 119 Nev. 615, 621-26, 81 P.3d 521, 526-29 (2003) (judicial interpretation of a  
20 statute after conviction such that Petitioner could not have been guilty of the deadly weapon  
21 enhancement does not amount to a constitutional violation for purposes of actual innocence  
22 since Petitioner was guilty under the law as it existed to the time of conviction).

23 Summary denial of Petitioner's actual innocence claim is additionally warranted by  
24 his failure to establish factual innocence as opposed to a legal defect in his New York  
25 conviction. Actual innocence means factual innocence not mere legal insufficiency.  
26 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v.  
27 Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). As such, Petitioner's actual  
28

1 innocence claim must fail since he secured reversal of his New York conviction on an issue  
2 of legal sufficiency and not factual innocence.

3       Regardless, Petitioner’s failure to demonstrate due diligence in challenging his New  
4 York conviction bars habeas relief. In Witter v. State, 135 Nev. \_\_\_, \_\_\_, 452 P.3d 406, 408  
5 (2019), the Nevada Supreme Court addressed an Appellant contending that “because of the  
6 indeterminate restitution provision in the 1995 judgment, his conviction was not final until  
7 entry of the third amended judgment of conviction in 2017” and that as a consequence, “the  
8 direct appeal decided in 1996 and the subsequent postconviction proceedings were null and  
9 void for lack of jurisdiction and therefore he should be allowed to raise any issues stemming  
10 from the 1995 trial [.]” Instead, the Court concluded that Witter’s appeal was “limited in  
11 scope to issues stemming from the amendment.” Id. at \_\_\_. 452 P.3d at 407. The Court gave  
12 two reasons for this holding. Id. The Court noted that the more important of those was that  
13 “Witter treated the 1995 judgment of conviction as final for more than two decades,  
14 litigating a direct appeal and various postconviction proceedings in state and federal court.”  
15 Id.

16       In distinguishing its precedents overturning judgments of conviction containing  
17 indeterminate restitution amounts from Witter’s situation, the Court noted that the  
18 defendants in those cases “raised the error regarding the indeterminate restitution provision  
19 during the first proceeding in which they challenged the validity of their judgments of  
20 conviction[.]” Id. at \_\_\_, 453 P.3d at 409. Witter’s failure to do the same implicated the  
21 compelling consideration of finality. Id. The Court pointed out that “[a] challenge to a  
22 conviction made years after the conviction is a burden on the parties and the courts because  
23 ‘[m]emories of the crime may diminish and become attenuated,’ and the record may not be  
24 sufficiently preserved.” Id. (quoting, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d  
25 1268, 1269 (1984)). Ultimately, “Witter treated the judgment of conviction as a final  
26 judgment. He is estopped from now arguing that the judgment was not final and that the  
27 subsequent proceedings were null and void for lack of jurisdiction.” Id. at \_\_\_, 453 P.3d at  
28 410 (footnote omitted).

1 Witter's failure to exercise due diligence in challenging his judgment of conviction is  
2 indistinguishable from Petitioner's failure of diligence in attacking his New York conviction.  
3 Petitioner treated his New York conviction as final for nearly four decades. He filed petition  
4 after petition and appeal after appeal all treating his New York conviction as final. Just as in  
5 Witter, Petitioner should be estopped from only now alleging that his New York conviction  
6 is null and void.

7 The requirement of due diligence is fundamental in Nevada habeas law. Nevada's  
8 statutory laches provision requires a petitioner to demonstrate reasonable diligence in order  
9 to avoid a dismissal. NRS 34.800(1)(a) ("A petition may be dismissed if delay in the filing  
10 of the petition ... [p]rejudices the respondent ... in responding to the petition, unless the  
11 petitioner shows that the petition is based upon grounds of which the petitioner could not  
12 have had knowledge by the exercise of reasonable diligence before the circumstances  
13 prejudicial to the State occurred"). The time bar of NRS 34.726 may only be waived if a  
14 petitioner demonstrates that "the delay is not the fault of the petitioner[.]" NRS  
15 34.726(1)(a). The bar against successive and abusive petitions may be waived upon a  
16 showing of "[g]ood cause for the failure to present the claim or for presenting the claim  
17 again[.]" NRS 34.810(3)(a). Notably, *the Nevada Legislature just last session extended the*  
18 *necessity of demonstrating due diligence to claims of factual innocence.* NRS 34.960(3)(a)  
19 ("... the evidence could not have been discovered by the petitioner or the petitioner's  
20 counsel through the exercise of reasonable diligence").<sup>9</sup>

21 <sup>9</sup> Federal law appears to diverge from Nevada law on this point. Federal law does not preclude a claim of actual  
22 innocence for failing to exercise due diligence; instead, "[u]nexplained delay in presenting new evidence bears on the  
23 determination whether the petitioner has made the requisite showing" and on the credibility of a claim. McQuiggin v.  
24 Perkins, 569 U.S. 383, 399, 133 S. Ct. 1924, 1935, 185 L. Ed. 2d 1019 (2013). However, McQuiggin is limited to  
25 federal post-conviction relief and does not apply to state habeas proceedings. Com. v. Brown, 2016 PA Super 148, 143  
26 A.3d 418, 420–21 (2016) ("While McQuiggin represents a further development in federal habeas corpus law, as was the  
27 case in Saunders, this change in federal law is irrelevant to the time restrictions of our PCRA"); State v. Edwards, 164  
28 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



1 Summary dismissal is warranted because Petitioner has failed to establish good cause  
2 or actual innocence. The New York conviction was invalidated because “[s]ince 1980, the  
3 New York State authorities had actual knowledge that the defendant was arrested and in  
4 continued custody by both California and Nevada” and “[i]n 37 years, the People have not  
5 attempted to extradite the defendant to New York or make any other reasonable effort to  
6 produce the defendant for sentencing.” (New York v. Howard, Queens County Supreme  
7 Court Case Number 1227178, dated May 22, 2018, p. 2-3, attached as Exhibit 2 to Petition  
8 for Writ of Habeas Corpus (Post-Conviction), filed September 4, 2018). The very words of  
9 the New York Court apply equally to Petitioner. Just like New York, Petitioner did nothing  
10 to enforce or protect his interests for over 30 years. Just like New York, Petitioner should not  
11 profit from his lack of due diligence. Thus, Petitioner cannot establish good cause. As for  
12 actual innocence, Petitioner’s jury found the prior violent felony aggravating circumstance  
13 because it heard the facts of the New York case. That Petitioner’s New York conviction was  
14 invalidated on a technicality after more than 30 years does nothing to undermine the factual  
15 truth of what he did to the victim in the New York case.

16 Alternatively, if this Court is not willing to dismiss Petitioner’s sixth attempt at  
17 securing habeas relief outright, it should order an evidentiary hearing. NRS 34.770(1). The  
18 hearing should be limited to determining whether Petitioner exercised due diligence in  
19 pursuing the invalidation of his New York conviction. Further, Respondent should be  
20 permitted discovery related to Petitioner’s due diligence in challenging his New York  
21 conviction. NRS 34.780(2).

## 22 CONCLUSION

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

24 ///

25 ///

26  
27 Petitioner since it was published decades after Petitioner’s conviction and there is no indication that the case applies  
28 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).

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DATED this 19th day of December, 2019.

Respectfully submitted,

STEVEN WOLFSON  
Clark County District Attorney  
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

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A-18-780434-W

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**May 04, 2020**

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A-18-780434-W Samuel Howard, Plaintiff(s)  
vs.  
William Gittere, Defendant(s)

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**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 hearing 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

PRINT DATE: 05/04/2020

Page 1 of 2

Minutes Date: May 04, 2020

**App. 465**

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey  
File & Serve /SR 05/04/2020