IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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Robert Ybarra, Jr.,

Appellant,

vs.

Terry Royal, Warden[1],

Respondent.

SUPREME COURT NO. 89824

DISTRICT COURT CASE NOS. CR-0001511, HC-2410004

Appellant's Reply Appendix Volume 1 of 1

CAPITAL CASE

[1] Because Mr. Ybarra has been transferred to Ely State Prison, Warden Terry Royal is "automatically substituted as a party." NRAP 43(c)(1).

CASE NO. 1511

COPY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT YOUNG, JR.,

Defendant.

REPORTER'S TRANSCRIPT

OF

PENALTY HEARING

BEFORE THE HONORABLE MERLYN H. HOYT, DISTRICT JUDGE

Friday, June 26, 1981

Reported by: RENEE SILVAGGIO, C.S.R. 122
Official Court Reporter

APPEARANCES:

For the State:

ROBERT J. JOHNSTON, ESQUIRE
District Attorney
White Pine County Courthouse
Ely, Nevada 89301

and

GARY D. FAIRMAN, ESQUIRE
Deputy District Attorney
WhitePPine County Courthouse
Ely, Nevada 89301

For the Defendant:

NORMAN Y. HERRING, ESQUIRE
Nevada State Public Defender
1937 North Carson
Carson City, Nevada 89701

and

STEVEN G. McGUIRE, ESQUIRE
Deputy State Public Defender
420 Campton Street
Ely, Nevada 89301

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,
Plaintiff,
-vs-
ROBERT YBARRA, JR.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

PENALTY HEARING

BE IT REMEMBERED, the above-entitled matter came on duly and regularly for hearing before a Jury in the above entitled Court on Friday, the 26th day of June, 1981, at the hour of 10:00 o'clock a.m., before the HONORABLE MERLYN H. [illegible], Judge of said Court, presiding.

The State of Nevada was represented by ROBERT J. JOHNSTON, ESQUIRE, District Attorney, Ely, White Pine County, Nevada, and GARY D. FAIRMAN, ESQUIRE, Deputy District Attorney, Ely, White Pine County, Nevada.

The Defendant was personally present in Court and represented by NORMAN Y. HERRING, ESQUIRE, Nevada State Public Defender, Carson City, Nevada and STEVEN G. McGUIRE, ESQUIRE, Deputy State Public Defendant, Ely, Nevada.

RENEE SILVAGGIO, C.S.R. Official Court Reporter of said Court, was present and acting as such;

Whereupon, the following proceedings were had:

BY THE COURT: Let the record reflect the continuation of our case of the State of Nevada vs. Robert Ybarra, Jr.; the presence of Mr. Ybarra and his counsel, Mr. McGuire; and Mr. Johnston is here.

(Outside the presence of the jury)

I understand, gentlemen, before we begin this morning there is an Offer of Proof, or an objection, which is it, to some of the evidence?

BY MR. JOHNSTON: I believe it should be characterized as an objection at this point, Your Honor.

BY MR. McGUIRE: Yes, Your Honor.

BY MR. JOHNSTON: Basically, what it involves, is the State intends to produce additional evidence, one of aggravating circumstances, found in N.R.S. 200.033, Subsection 8, that continuing aggravating circumstances stated that "the murder involved torture, depravity of mind or the mutilitation of the victim."

In regard to that particular one, we would like to present more evidence and we have agreed with the Defense that, in fact, a letter could be used, rather than having a doctor appear from the University of Utah Burn Center. But, prior to any agreement or admission of that, the Defense, I suppose, would like to interpose their objection to any further evidence as to that element.

BY THE COURT: Mr. McGuire?

BY MR. McGUIRE: Yes, Your Honor.

We have agreed that if the information contained in the letter is admissible under the Court's ruling, that the letter be read in by the Court's Law Clerk, Mr. Barclay. Your Honor, we would object to this evidence on several grounds.

We would submit that the factor of torture, depravity of mind, or mutilitation of the victim is not present in this case. Torture, Your Honor, requires the infliction of the deliberate intention to inflict the pain on the victim. The State's only theory of the

case in their argument in chief is that the victim was unconscious at the time burned. Certainly there is no evidence beyond a reasonable doubt.

BY MR. JOHNSTON: Excuse me, Your Honor, that is not an accurate excerptation.

BY THE COURT: Well, this is kind of in the way of argument, you will be able to respond in a minute.

BY MR. JOHNSTON: All right.

BY THE COURT: Let Mr. McGuire complete his sentence.

BY MR. McGUIRE: Your Honor, it is my recollection that the argument was that the victim was battered into a "lifelessness" I think was the word that was used, then doused with the fluid and ignited, although there was perhaps some speculation in the argument that the victim may have become conscious during the ignition, but certainly there is no evidence that would support a conclusion beyond a reasonable doubt that when the fire was set the victim was conscious. There is considerable evidence that would support the proposition she was not.

Similarly, we would submit, Your Honor, that the only purpose that can be proposed for the burning, other than, of course, the account that has been given by Mr. Ybarra, is an effort, after the victim had been rendered apparently lifeless or unconscious to conceal the identity of the body.

Your Honor, we would submit that any mutilitation, while, in fact, occurred while the victim was alive from the evidence, would appear to have been from the point of view of the perpetrator of something that happened, after the victim was rendered apparently lifeless.

In any event, even if the Court finds, that this factor is present and available to the State in this case, Your Honor, it is conceded that Nancy Griffith suffered a great deal of pain. We have never presented any evidence opposed to that. We have never argued or suggested that is not the fact. We have, in fact, conceded it.

The jury heard from two fisherman, they heard from the E.M.T.'s, they heard from Officer Romero, they have had Dr. Sander testify as to his examination and they have seen several photographs of Nancy Griffith. This is cumulative evidence, it does not justify the time to read it to the jury.

Furthermore, Your Honor, the only possible effect it could have on him would be inflamatory. It cannot further inform them about the injuries that Nancy Griffith suffered. They are very well aware of that and we have never disputed it.

BY THE COURT: Any response, Mr. Johnson?

BY MR. JOHNSTON: Yes, Your Honor.

As to the facts, like Mr. McGuire cleared that up, it was based on the testimony of Dr. Sander. Apparently either after being doused or in the course of being doused, or when the burn was taking place, she was standing or at least sitting and her legs curled up and she was sitting up because of the nature of the burns.

Your Honor, the State believes that this particular factor in our statute is described exactly for this type of a case. We would refer the Court to Godfrey vs. Georgia, we do not have the U. S. citation, but it's 84 S. Ct. 398, and there's a Supreme Court case, and we don't have the page on it, it's a 1980 case in which the U. S. Supreme Court grapled with the problem

of a comparable statute from the State of Georgia and whether or not it had been applied properly in a case. In that particular case the U. S. Supreme Court reversed and sent it back. The case involved, I believe, a shooting of one or two people, and the Court said it was not an adequate showing of torture, depravity of mind, and further that the jury needed further instruction.

We believe in this case the instructions are clear in the matter, which will be settled later, but it is appropriate for us to offer in this hearing additional evidence of that factor if the Court believes, as we do, that there is a showing that it exists in this case. Submit the matter.

BY THE COURT: Do you have anything further, Mr. McGuire?

BY MR. McGUIRE: We will submit it, Your Honor.

BY THE COURT: The Court believes that the evidence in this case would support this construction and this type of additional evidence.

It is true to some extent this letter is cumulative and that it may be to some extent prejudicial, but I believe the value of it, in view of the testimony of the pathologist that we have heard already, that the victim of this offense was seated, at least seated up, and that the burning was in an upward way, would seem to support that theory and surely you can argue in opposition to that, Mr. McGuire, that that did not occur and that that is not a correct assumption, but it seems clear to me that there is evidence that would support the application of consideration by the jury--

consideration by the jury of torture, depravity of mind and mutilation --- all three in this case.

Still, I think the letter is still probably, without the Doctor here, since he's agreed, the letter will be admitted without the presence of the Doctor.

There are a number of medical terms, and how they are every going to understand it is beyond me, but the letter will just speak for itself. I think it should go in.

BY MR. McGUIRE: Your Honor?

BY THE COURT: Anything further?

BY MR. McGUIRE:q If I might, it is my understanding in the Stipulation that the letter would not be admitted as an exhibit, but rather it would be read to the jury by the Court's Law Clerk.

BY THE COURT: Alright. Is that your agreement?

BY MR. JOHNSTON: Yes, Your Honor.

The Stipulation is that the State and the Defense agree to have that read into the record, but not to actually be carried to the jury room or admitted as an exhibit. It's marked with a number for purposes of identification only.

BY THE COURT: Alright. Then it's number 58.

It is the order of the Court that number 58 can be read aloud to the jury and you have agreed that my Law Clerk will read that aloud; is that your agreement?

BY MR. McGUIRE: Yes, Your Honor.

BY MR. JOHNSTON: That is fine, Your Honor.

BY THE COURT: Alright. Mr. Barclay will

read that aloud now.

Is there other evidence that needs to be considered before we get into the testimony before the jury?

Are there any objections?

BY MR. JOHNSTON: We have given to the Clerk copies of the documentation of the conviction in California of a crime involving violence or threat of violence, that will be the only other item of evidence that the State intends to produce for purposes of this hearing.

BY THE COURT: Alright.

BY MR. JOHNSTON: For purposes of this hearing, we will ask that the jury consider all other evidence of the trial itself.

BY THE COURT: Alright. If that is everything. Then that will conclude everything.

BY MR. McGUIRE: Your honor, at this time while we are on the record we would move for a mistrial at this point on the basis of certain events which occurred yesterday.

Yesterday morning at approximately 10:00 o'clock I requested of Nancy Griffith's mother, Mrs. Griffith, that she meet with myself and Mr. and Mrs. Ybarra, the parents of Robert Ybarra, Jr. Mrs. Griffith agreed that she would meet with us at 11:00 o'clock. About twenty minutes or so later I had a telephone call from Barbara Baker, Mrs. Griffith's daughter, advising me that her mother would like to postpone that meeting until the afternoon, which we agreed would happen, and that Mrs. Ybarra would call me that afternoon at sometime between 12:00 Noon and 1:00 o'clock at the Nevada Hotel in Ely, Nevada, and I was informed by my Deputy District Attorney, Gary Fairman,

that the Griffiths would not meet with myself or the Deputies this Saturday and, of course, that is tomorrow, the day after this hearing, and I was informed that was according to BOB's instructions, by which I understand him to mean BOB Johnston, the District Attorney of White Pine County.

Your Honor, it is clear that the Defense is entitled to develop evidence of mitigation, not merely as to the crime of the Defendant, but also as to the victim. I submit that it would have been extremely relevant, and certainly quite useful in mitigation to show that the mother of the victim or the Defendant no ill will, does not seek his life, and, in fact, has forgiven him.

Based on conversations between Mrs. Griffith and Ms. Viveca's mother, we have reason to believe that she might not be willing to do that. I am not making an offer of proof since she has refused to matter with us and has not returned my phone call.

The information I have, of course, is that it was according to the District Attorney's instructions, as that was conveyed to me by the Deputy District Attorney.

Your Honor, we would move at this time for a mistrial or in the alternative that the jury be directed to return a verdict on the Count I of life in prison with the possibility of parole.

BY THE COURT: Mr. Johnston, do you want to be heard in response?

BY MR. JOHNSTON: Yes, Your Honor.

I am unfamiliar with either motion at this

point - a mistrial or a directed verdict of life with the possibility of parole.

As to the factual events that occurred yesterday, I can only speak as to basically a third party. I was out of town. I was contacted by my office and also by the Sheriff's office. They were so upset that I was located at the University library in order to get in touch with me about the matter.

I do not have any history as to what happened in the early morning hours, Apparently Mrs. Griffith had been contacted by the Defense, I don't know if it was Mr. McGuire or who it was, to meet with them regarding the penalty phase, as I understand it, of this hearing. She expressed concern apparently to the Sheriff's office that she was not interested in meeting with them at that time and would like to remain at home and not have them visit her home. I advised the Sheriff's office that if that was her wish, that that's her decision, and if they want to subpoena her they could.

So, based on the information I have, I gave them the information to relay back to her. She is not mandated to meet with them if she does not want to, and to the best of my knowledge, these are the facts as they existed.

BY THE COURT: Anything further, Mr. McQuire?

BY MR. McGUIRE: Your Honor, we would just call Mr. Fairman briefly to the stand.

BY THE COURT: Alright. If he is involved.

BY MR. McGUIRE: He will testify to the conversations that he had at the Hotel Nevada.

BY MR. JOHNSTON. Your Honor, we will stipulate to whatever he says Mr. Fairman said in order to expedite

this matter for this hearing.

I think if the Judge believes this is a legitimate basis to go forward on this, Mrs. Griffith needs to be called as a witness at this time for purposes of the hearing on the motion.

BY THE COURT: Will you stipulate or do you want to call?

BY MR. McGUIRE: We will stipulate.

BY THE COURT: You have the right to call anyone.

BY MR. McGUIRE: We will accept the stipulation.

BY THE COURT: Alright.

BY MR. McGUIRE: Your Honor, we would submit that even pursuant to the account, which Mr. Johnston has given, that our motion should be granted.

The White Pine County District Attorney's office is an advocate in this case. They have a position and they should not be advising witnesses of the question of whether or not they should be talking to other counsel. I would submit that they should. If Mrs. Griffith had a question about her rights and obligations, of course she could have advised me she wanted to talk to me or she could have advised that she should seek independent legal counsel on whether or not she needed to talk to me, but any advise to Mrs. Griffith, which implied she should not talk to me, and I would submit there was an indication there, we would suggest is inappropriate. She should have have been referred to the neutral counsel.

We would submit that based on the account, which has been by Mr. Johnston, that the motion either

for a mistrial or a directed verdict should be granted.

BY THE COURT: Anything further on the part of anyone?

BY MR. JOHNSTON: Nothing on behalf of the State, Your Honor.

BY THE COURT: For the benefit of the record, and both parties, the Courts have access to the witnesses available in the case with the exception of the Defendant, which, of course, the State would not have access to, but any other witnesses, and neither party should keep any of the witnesses from anyone else, and to support that proposition, the Court subpoena power is available should there be any problem of any kind.

In addition to that, I offer to the Defense additional time, if they need additional time, as a result of the development to meet with Mrs. Griffith and call her as a witness if they want to in this case.

This case is not concluded by any means and that can be done today. She can be called forward immediately, if the Defense wishes to exercise their authority under the subpoena power and see what she has to say, if anything, that may be relevant for consideration in this case.

All of that, of course, is in conjunction with the fact that this whole circumstance is a terrible circumstance for her, a terrible circumstance for the Ybarra family, a terrible circumstance for everyone involved, and that is not unusual. It seems unusual for people to have to even be here in the courtroom at all during any of this, but all of that can be candid. There's adequate time.

So far as the motion to direct a verdict in a certain way, that motion is denied.

The motion for a mistrial is denied.

As I have indicated, I will provide additional time, if this case has to go into Monday, to see that every side is represented and has the opportunity to see the witnesses and call them forward.

So, now, Mr. McGuire, it's your decision as to what you want to do and the Court will support your decision with the power of the Court to bring the witnesses forward.

BY MR. HERRING: Your Honor, could I just make one comment for the record?

BY THE COURT: You certainly may.

BY MR. HERRING: At this time this is not advancing anything further.

I would like the record to show that Mrs. Griffith was present throughout these procedures, during the trial in this case ever since it was open to the public.

BY THE COURT: Alright. Would the State have any objection to that being placed on the record?

BY MR. JOHNSTON: None whatsoever, Your Honor.

BY THE COURT: Alright. Do you request anything of the Court with respect to this matter?

BY MR. McGUIRE: Yes, we would.

BY THE COURT: Alright.

BY MR. McGUIRE: We would request time to meet with Mrs. Griffith, Your Honor.

BY THE COURT: Alright.

We can go forward then this morning as far as we can and then bring in Mrs. Griffith later on, or do you want to continue it until this afternoon,and meet with Mrs.

this morning?

BY MR. McGUIRE: Yes, we can, but we would request that the Court's secretary call her at this time and ask her if she would meet with us.

BY THE COURT: I think we should issue a subpoena and have a subpoena served upon her. The Court will issue a subpoena for her and ask an officer to serve the subpoena so that she will be under the control of the Court and have her come forward as soon as possible here in the courthouse and meet with you.

Now, is there anything further? Can we call the jury in and proceed with the hearing?

BY MR. JOHNSTON: The State is prepared.

BY THE COURT: Alright, let's do that.

At the same time will you see that the subpoena issues and is given in the hands of the officers and executed immediately?

BY THE CLERK: Yes.

BY THE COURT: We will get the jury back in here.

(Whereupon the jury reconvened in the courtroom.)

BY THE COURT: Let the record reflect that the Court is back in session now, that the Defendant is personally present with his counsel, the District Attorney is present and the jury and the alternate are present.

We are in the second phase of the case, the penalty phase of the case. We are ready to go forward now on the penalty phase.

The burden of proof is upon the State to prove factors in this case and they can proceed.

BY MR. JOHNSTON: Your Honor, at this time,

we would ask that pursuant to our stipulation the letter by the Doctor has to be read into the record as our first item of proof.

BY THE COURT: Right.

There is a stipulation between the parties that a certain letter will be read into evidence at this time and will be considered by you and it will be read by the Law Clerk. The letter itself will not be available to you, but simply the reading of it at this time. So, please listen to the reading of this letter.

Mr. Barclay.

BY THE BAILIFF:

"The University of Utah

"William B. Kirey Hospital

"Ely, Nevada 89315

"Dear Mr. Wicker:

"I am writing to update you on the demise of the patient that you transferred to the Intermountain Burn Unit, Nancy Griffity.

"As you know, Ms. Griffith had an overwhelming thermal injury which we estimated on arrival here to be 76% body surface area, of which 64.5% we thought to be third degree. Specifically, the burns on her hands and arms were among the deepest that I have ever seen, and the burns on her hands and fingers obviously were very much fourth degree in nature, by which I mean that they involved all of the tissues of her hands and fingers down to the bone. She had

complete third degree burns of her entire face and neck, her chest and abdomen, and the upper aspects of her thighs. In addition, I am certain that she had a considerable inhalation injury as evidenced by the profuse secretions which she produced after transfer here and carbonaceous nature of the sputum. This, and the obvious head and facial burns, make a significant inhalation almost certain, and this was further confirmed by autopsy evidence, which I will discuss further.

"She had a rather uneventful transport to the University Hospital. During the transport here she was given about 7000 cc. of lactated ringers and produced about 150 cc. of very dark colored urine. On arrival at the Intermountain Burn Unit she underwent escharotomies of her chest which were done to aid her ventilation because of the high airway pressure she was requiring on a mechanical ventilator. In addition, she has escharotomies medially and laterally on both forearms and arms. This revealed necrosis of all of the tissue down to and including her muscle fascia, thrombosis of all the veins in her arms and forearms, and thrombosis of the vessels surrounding the radial nerve on the right hand. Significantly, her excharotomies on her hands and arms

did not bleed whatsoever.

"Following her admission here she rapidly began loosing her urine output despite large quantities of fluid. We gave her, all-in-all, a total of about 20,000 cc. of lactated ringers during the four hours after her arrival here, but were unable to maintain her urine output. The possibility arose that she may have suffered renal failure, but we were unable to make this diagnosis based on urine electrolytes and other tests. Her lungs became increasingly stiff, and she was increasingly difficult to ventilate, although she retained adequate oxygenation. Four hours after her arrival her hematocrit, which had been 37, dropped to a level of 15, indicating massive intravascular hemolysis as a result of her thermal injury. We sent urgently for blood and continued infusing large quantities of crystaloid but we were unable to maintain her blood pressure with this, and it slowly declined, causing her to arrest. Resuscitative efforts were unsuccessful and she was pronounced dead at 8:46 p.m.

"I attended her post mortum examination held at the Medical Examiner's office the following day. I had been concerned that she may have suffered some significant abdominal trauma, but

there were no findings in her abdomed other than some serous fluid. Significantly, she had a considerable amount of edema and epithelial loss of her tracheal-bronchial tree, carbonaceous deposits in the upper part of her trachea, and considerable pulmonary congestion, which was unquestionably the rapidly developing picture of ARDS seen in thermal injuries. She was without other significant trauma, though I thought her to have a basilar skull fracture

"In summary, it appears that her demise was caused almost entirely from burn shock which was unresponsive to our resuscitative efforts. Considering the length of time that she probably went before receiving significant resuscitation and the enormous inhalation injury that she suffered, I think that she would have had a mortality rate approaching 100% under any circumstances. In addition, the very, very deep nature of the burns on her hands, arms, and face, would have most assured that, had she lived, she would have undergone finger and possible forearm amputations, and had a face that would have been very difficult to reconstruct. All-in-all she would have had a very bleak outlook, at best.

"We are grateful to you for referring

this patient to us and apologize, once again, for any delay that we might have caused in getting to your facility. If you have any further questions or problems concerning this patient, please do not hesitate to contact me. Thank you.

Sincerely,

Jeffrey F. Saffle, M.D.
Fellow in Burns
for
Glenn D. Warden, M.D.
Director
Intermountain Burn Unit."

BY THE COURT: Mr. Johnston, you can proceed.

BY MR. JOHNSTON: Yes, Your Honor.

At this time we would ask for the Court to admit into evidence our exhibit next in order, which is a minute order, an order of probation regarding a conviction of California Penal Code Section 245(a) which is aggravated assault.

BY THE COURT: Mr. McGuire, do you have opposition?

BY MR. McGUIRE: No objection, Your Honor.

BY THE COURT: Alright. State's exhibit No. 57 -- is that the exhibit, Mr. Johnston?

BY MR. JOHNSTON: Yes, I believe. I do not have the number here on mine.

BY THE COURT: State's exhibit No. 57 is admitted without objection.

BY MR. JOHNSTON: And then finally, Your Honor, the State would ask that the jury be allowed to consider the evidence that has preceded this hearing in the trial in chief, including up to the verdicts, which were rendered by the jury previously.

BY THE COURT: Mr. McGuire?

BY MR. McGUIRE: No objection, Your Honor.

BY THE COURT: Alright. The jury can consider all of that evidence that has already appeared before them in consideration of this phase of the case.

Anything further?

BY MR. JOHNSTON: The State would rest then.

BY THE COURT: The State rests in the penalty phase then having offered that evidence.

Does the Defense have evidence it wishes to offer at this time?

BY MR. McGUIRE: Your Honor, the Defense will call Reverend Carlos Hall.

BY THE COURT: The Defense may.

Please come forward and be sworn and take the stand.

(WITNESS SWORN)

REVEREND CARLOS B. HALL

having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

BY THE COURT: Please be seated.

DIRECT EXAMINATION

BY MR. McGUIRE:

Q. Will you tell us your full name, please?

A. Carlos B. Hall.

Q. What is your occupation?

A. I am a Minister of the Gospel.

Q. And for what denomination?

A. The Assembly of God.

Q. How long have you been a Minister?

A. Three years.

Q. And how did you become a Minister with the Assembly of God Church?

A. Through completing the prescribed studies program by that denomination and then meeting with the credentials interviewing committee and after being approved was awarded a license.

Q. And where is your congregation?

A. I am Pastor of the Calvary Assembly of God Church on the Pioche Highway and Avenue M locally.

Q. And that is here in Ely, Nevada?

A. Yes.

Q. Do you know Robert Ybarra, Jr.?

A. Yes, I do.

Q. Do you see him here in the courtroom today?

A. Yes, I do.

Q. Would you point him out for us?

A. To your right, seated with you at the table.

BY THE COURT: The record will reflect that the witness has identified the Defendant in open Court.

DIRECT EXAMINATION CONTINUED

BY MR. [illegible]:

Q. Will you tell us where and how you became acquainted with Mr. Ybarra?

A. I don't recall the exact date, but it was shortly after his arrest in the fall of 1979. It was about the same time that I made efforts to establish a regular jail ministry to the inmates at White Pine County Jail, and I was accepted by the Sheriff's Department, the jail personnel, to minister there on a regular basis to anyone who wanted to visit with me. It was a completely voluntary thing, and that's how I met him and other individuals who were being held there and on a regular weekly basis, whenever they wanted to, I met with them and just talked with them.

Q. Do you know if he was raised in your faith?

A. No, he wasn't to my knowledge.

Q. Was he receptive to the program you offered?

A. At the beginning he seemed very reluctant to [illegible] to visit with me, and I think [illegible] because of the difference of religious upbringing.

Q. Did he subsequently meet with you on a regular basis?

A. Yes, he did.

Q. How often have you met with him and over what period of time?

A. Well, as I stated earlier, it began -- I believe it was early October 1979 and after establishing a visiting relationship with Robert, except for the time he was in -- well, out of town -- I met with him on a regular weekly basis on usually Tuesday afternoons at about 1:00 or 1:30.

Q. And for how long would you meet with him on each occasion?

A. It would vary, sometimes depending on the time that I had available, time that was spent for the jail personnel, and sometimes visits just wouldn't last very long and sometimes they would last longer periods.

I would say an average of about an hour.

Q. What would be the subject of these meetings?

A. For the most part, spiritual matters. We would discuss the Bible, God, Jesus -- spiritual matters for the most part.

Q. Is Robert engaged in any course of study with you or under your supervision?

A. I offered to him, and once again, I don't really record the dates as to when this started, but I offered to him, as I did other individuals at the jail that I visited, copies of bible study, one was called the Great Questions of Life and the other was the Introductory Course to Christian worker's course, Christian Living, and I offered these to him and he completed several of them.

MR. McGIMSEY: May I approach the Court and the Clerk and the witness, Your Honor?

BY THE COURT: You may.

DIRECT EXAMINATION CONTINUED

BY MR. McGIMSEY:

Q. Examining these five documents which have been marked as Defendant's Exhibit U through Y do you recognize them?

(Whereupon the witness examined the exhibits)

A. Yes, sir, I do. These are the courses of study that I had offered to Robert while visiting him and it's my handwriting at the top of each one of

these sheets with his name so that the jail personnel would know who to give them to after we would visit.

Q. Were these completed by Robert Ybarra?

A. Yes, they were.

Q. Over what period of time did you complete them?

A. As I recall, these particular ones were completed in rather short order. I would leave one with him on Tuesday when I would visit him and then I would receive it in the mail by the end of the week and the following Tuesday I would take the next one to him.

Q. Have they been with you since they were returned to you completed?

A. Yes, they have.

Q. And showing you this sheet of paper, which has been marked as Defendant's Exhibit F, will you tell me what that is?

(Whereupon the witness examined the Exhibits)

A. This is a note that Robert enclosed with one of those pamphlets in returning them to me in the mail concerning his brother's parole, that he wanted me to send them, if I would, the same bible study material that he was now working on.

Q. This has also been in your possession since it was returned by Robert?

A. Yes, it has.

Q. This note?

A. Yes.

Q. Reverend Hall, did Robert ever express any interest in making Bible study material available to anyone else?

A. Oh, yes. Well, as the note itself there shows, in at least some of those five pamphlets on the inside back cover there is a place where it says "Send us the names and addresses of your friends and we will send them lesson one of the Great Questions of Life," which is the title of the entire course; and there were names and addresses of various people, some of his family members, that he wanted me to send these materials to them so that they could be involved in this type of Bible study.

Q. Did you ever give him a course in the Christian Worker Bible Study Series?

A. Yes.

Q. Did he complete that?

A. Yes, he did.

Q. How did he do it?

A. He did it very well. I received it back in the mail in the same way that I did these and I corrected it, using the answer key that comes with the course, and I can't be absolutely certain of the score, but I know it was an A that I gave him on the course and I believe it was a 94% correct --

Q. What was Robert --

A. -- in this Bible course

Q. -- what was Robert's reaction to that?

He was very pleased.

When I first took the course back to the jail to visit with him on the following Tuesday and share with him the results of his test, well, his eyes lit up with joy. It was [illegible] in the year and one-half, close to two years that I have known him, the happiest that I have ever seen him. It was just one of being pleased.

Q. In your jail ministry have you ever counseled other prisoners who were facing the possibility of a death penalty?

A. Yes, I have.

Q. Who was that?

A. Dennis Bean.

Q. Was that here in White Pine County?

A. Yes, it was.

Q. Do you know what he is now?

A. He is in the maximum security prison in Carson City.

Q. Do you know how he is adjusting over there?

A. At my last contact with him he was doing very well. He's made efforts to improve himself, to learn, he's been very much to my knowledge involved in courses of Bible study. He attends regular Bible study services that are held by people that come outside the prison and I don't know who they are, who conducts the religious services with in the prison.

Q. Were you present when he was sentenced?

A. Yes, I was.

Q. Do you know if he is under the sentence of death.

A. No, sir, he wasn't.

Q. He was charged with murder, wasn't he?

A. Yes.

Q. Does the Assembly of God Church have an opinion or position on capital punishment, Reverend Hall.

A. To my knowledge, no, I don't believe they do.

Q. Do you yourself have an opinion as to the

appropriateness of punishment?

A. I do believe that in our less-than-perfect society that capital punishment has a place, a proper place.

Q. Have you considered its appropriateness for Robert for the crimes that he has been convicted of, the crime of murder in this case?

A. Yes. I have given it considerable thought.

Q. Do you think it is an appropriate penalty here?

A. No, sir, I don't.

Q. Why is that?

A. Because I see in Robert a capacity to do good, and not only do I see a capacity to do good, but I see what I perceive to be a genuine desire to do good and to do good.

Q. When did you and I first discuss this case and this penalty hearing?

A. Yesterday morning.

BY MR. McGUIRE: I have no other questions.

BY THE COURT: Cross examination, Mr. Johnston?

BY MR. JOHNSTON: Yes, Your Honor.

CROSS EXAMINATION

BY MR. JOHNSTON:

Q. Reverend Hall, the course that was done by the defendant, when was that done?

A. I believe these were done during the early part of 1980 and unfortunately I don't have them here, but they would be post marked when they were returned to me and they are dated February, March and

April, I believe, of 1980.

Q. Okay.

A. The last course that was mentioned was done sometime later and I really do not recall when it was.

Q. One other thing. There is five booklets here, but doesn't that set really include six?

A. This particular course does and -- well, as far as that goes, it goes far beyond that into different titled courses?

Q. Yes, sir, but this particular one just includes six.

A. Yes.

Q. You did not do number six?

A. I don't have it, and once again I don't really recall whether I had offered it to him or not. I think probably why I didn't, if I may say --

Q. Certainly, go ahead.

A. -- is that his being moved back and forth a couple of times, between here and the Reno area, that I dropped -- at that point and I believe that's when it happened, and it was sometime after he had come back that I had obtained the first course and then offered it to him because I felt like it was more in depth than these and would require more from him.

BY MR. JOHNSTON: No further questions, Your Honor.

BY MR. GOFF: Redirect?

BY MR. MCGUIRE: We have no further questions, Your Honor.

At this time I would move for the admission of Defendant's Exhibits T through Y.

BY THE COURT: Mr. Johnston?

BY MR. JOHNSTON: No objection, Your Honor.

BY THE COURT: Defendant's Exhibits T through Y are admitted without objection.

Thank you, Reverend Hall.

Can he be excused, gentlemen, from the case?

BY MR. JOHNSTON: He may, Your Honor.

BY MR. McGUIRE: Yes, Your Honor.

BY THE COURT: Thank you, Reverend Hall.

(Whereupon the witness was excused)

BY MR. HERRING: We will call Mrs. Colleen Ybarra, please.

BY THE COURT: Come forward and be sworn.

(WITNESS SWORN)

MRS. COLLEEN YBARRA

having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified on her oath as follows:

BY THE COURT: Please be seated.

DIRECT EXAMINATION

BY MR. HERRING:

Q. Will you state your name for the record?

A. Colleen Ybarra.

Q. You are going to have to speak up the best you can, Mr. Ybarra, and hold that microphone a little bit closer.

You testified previously in this case, haven't you, Mrs. Ybarra?

A. Yes.

Q. Have we talked at all about your testimony here this morning?

A. You and me?

Q. To me.

A. No.

BY THE COURT: Can the jury hear? Can you just get a little closer to the microphone? It is important that they hear what you say.

BY THE WITNESS: No. I have not talked to you this morning.

DIRECT EXAMINATION CONTINUED

BY MR. HERRING:

Q. This is your son, Robert, over here, right?

A. Yes.

Q. You understand what the purpose of this hearing is, don't you, Mrs. Ybarra?

A. Yes.

Q. Mrs. Ybarra, and I know you are his mother, in your opinion, is Robert a mean person?

A. No.

Q. Has he ever been a cruel person?

A. No.

Q. Was he ever a mean child?

A. No.

Q. How did he treat you and your husband, Mrs. Ybarra?

A. He was very devoted to both of us.

Q. Respectful?

A. Yes.

Q. Did he honor his father and mother?

A. Yes.

Q. Mrs. Ybarra, during the course of this trial did you have an occasion to meet with Mrs. Griffith?

A. Yes, after she had gone to us and said she would like to meet with us.

Q. Did she talk to you?

A. Yes, but in the hallway.

Q. Did she talk to your husband?

A. Yes, we were both there.

Q. Did Mrs. Griffith ever indicate to you that she wanted Robert's death pursuant to this trial?

A. We never discussed Robert. We just -- just knew that, you know, hard feelings, that there heart went out to us, that they were suffering for us.

Q. Was there any indication that she had forgiven [illegible]?

A. We didn't discuss Robert.

Q. Mrs. Ybarra, do you believe Robert would have [illegible] that he is accused of in this case if he [illegible] emotionally or mentally disturbed?

A. (No audible response)

BY THE COURT: Do you want to get Mrs. Ybarra some water, please?

BY THE WITNESS: I am sorry.

BY THE COURT: Please take time to pull yourself together.

BY THE WITNESS: I'm sorry.

BY THE COURT: That's fine. Just take your time.

DIRECT EXAMINATION CONTINUED

BY MR. HERRING:

Q. You alright now?

A. (No audible response)

BY MR. HERRING: I have no further questions. Thank you.

BY THE COURT: Mr. Johnston?

BY MR. JOHNSTON: No questions, Your Honor.

BY THE COURT: Is Mrs. Ybarra excused now from the case?

BY MR. HERRING: Yes, she is.

BY MR. JOHNSTON: She may be.

BY THE COURT: Thank you, Mrs. Ybarra. She can stay in the courtroom. She is excused.

BY MR. HERRING: Yes, she may.

BY THE COURT: Mr. McGuire?

BY MR. McGUIRE: We have no other witnesses. We would, of course, request that the jury consider the evidence that has been presented up to this point prior to the close of the case.

BY THE COURT: Well, there may be another witness available, so we will take a recess and there may be a possibility that there is another witness that will appear in this case. So, this will be an appropriate time period, we will have to take that recess and see if that other witness appears. We do not know.

During the recess we ask you to not converse among yourselves or with anyone else on any subject connected with the trial. Do not read, watch or listen to reports of or commentary concerning the trial, including without limitation the media, radio, newspaper, and television, should there be such coverage, particularly reports about persons in the trial. Do not form or express any opinion on this final area of the case until it is finally submitted to you.

We will be in recess and then it may be a little longer recess that we have usually had for reasons that we need to be sure that we have all the witnesses available.

The Court will be in recess.

(Whereupon the witness was excused.)

(Whereupon at the hour of 10:37 a.m. a recess was had in the proceedings.)

(Thereupon at the hour of 11:13 a.m. the recess was concluded and the following proceedings had outside the presence of the jury.)

BY THE COURT: Let the record reflect the continuation of the case, the presence of the Defendant, his counsel, and the presence of the District Attorney.

I think we want to make a record on the status of the additional witness.

Mr. McGuire or Mr. Herring?

BY MR. HERRING: Yes, Your Honor.

With the Court's permission I would ask to have this marked as Court's Exhibit at this time and allow me to read into the record a medical note from the Eastern Nevada Medical Group dated 6-26-81, the one I previously mentioned and cited to the Court in chambers concerning Mrs. Ybarra.

BY THE COURT: Mr. Johnston, do you have any objection to that?

BY MR. JOHNSTON: None, Your Honor.

BY THE COURT: Alright it will be admitted in evidence to be read aloud at this time.

BY MR. HERRING: Thank you.

It is dated 6-26-81. Edna Griffith had severe emotional and physical problems. I feel that to testify may well precipitate emotional and mental breakdown with possible psychiatric results. I submit that her overall status would suffer immeasurably and the Court should not require her to testify or if so they should be held liable for any untoward results. It is signed by J. Kendall Jones, M. D. and dated once

[illegible] the back 6-26-81.

THE COURT: Alright. The document is admitted in evidence as part of the record in this case.

BY MR. PERKINS: Pursuant to the information [illegible] by the Doctor and our brief conversation with Ms. Griffith and her obvious emotional state at the time a request for physical problems which may result from calling her as a witness, the Defense would, at this time, rest that we are also rested.

THE COURT: The Defense rests and does not have with the additional witness that they have [illegible] to conclude the presentation of both sides. Is that correct?

MR. [illegible]: That is correct, Your Honor.

THE COURT: Yes, Your Honor.

THE COURT: Alright. Now, if we begin [illegible] those settled, [illegible] back in and to call on the [illegible] and presentation of the instructions.

[illegible] will be recess.

(Thereupon, at the hour of 11:15 a.m. a recess was had in the proceedings.)

[illegible] at the hour of 1:10 p.m. the following proceedings were had in chambers.)

BY THE COURT: We will go on the record with the counsel from both sides present in the State of Nevada vs. Robert Ybarra.

We have worked on 1 through 36 jury instructions in this case. There's two special verdicts.

First of all do you have any objections to 1 through 36 as the changes that have been made? Do you have any comments, Mr. McGuire or Mr. Herring?

BY MR. McGUIRE: Yes, Your Honor. We would object to Instruction Number 16.

BY THE COURT: Alright.

BY MR. McGUIRE: Which instructs the jury "An aggravating circumstance of Murder in the First Degree is that the murder involved torture, depravity of mind or mutilation of the victim." And in its place or in addition, Defense instruction -- which is now numbered I believe Instruction Number 4, "You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder involved mutilation of the victim." and, Your Honor, I would submit that the evidence in the case would not support the conclusion that there was torture and depravity of mind. The only that is shown is the mutilitation.

BY THE COURT: Have you got your Number 4 in there for -- [illegible], which we can use?

BY MR. McGUIRE: Yes.

[illegible] written all over mine. I don't think you ought to have it.

On the record, Mr. Johnston, do you want to state your position as to that?

BY MR. JOHNSTON: Yes. We would oppose that. We think that there is adequate evidence in this case to establish that there could also be torture or depravity of the mind present, that it's a factual determination that the jury has to make beyond a reasonable doubt, and inasmuch as some evidence is present, they should be given the opportunity to make the factual determination. We would oppose it.

BY THE COURT: Alright. The Court rejects it on the same basis, the Court believes there is evidence that the Court has the instruction on all theories of the case the Court believes that there is evidence that would support this instruction as to all of the elements of this proposed instruction.

So, instruction 4 is rejected as a replacement instruction for existing instruction No. 16. The Court accepts it.

BY MR. MCGIRE: On the same grounds, Your Honor, we would object to instructions Number 17 and 18, respectively, defining torture and depravity of mind.

BY THE COURT: Alright. Mr. Johnston is your position the same?

BY MR. JOHNSTON: The same, Your Honor.

BY THE COURT: The Court's rule is the same on it and is.

BY MR. MCGIRE: We would object, Your Honor, to the special verdict form -- well, no, we will withdraw that objection, Your Honor. We have settled that issue.

Your Honor, we would object to the last part of the special verdict form stating "We, the jury state

that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances designated," and I know this follows the statute 175.554, I believe it is, but nevertheless I would submit that this improperly places the burden on the Defendant and that the appropriate language which should be there is "We, the jury, state that the aggravating circumstances are not outweighed by the mitigating circumstances" -- let me rephrase that.

It should state "We, the jury, state that the aggravating circumstances outweigh mitigating circumstances." So that it would be clear that where aggravation and mitigation are evenly balanced the decision should be for life rather death.

BY THE COURT: Mr. Johnston?

BY MR. JOHNSTON: Yes. We would oppose that, Your Honor. We believe that the language of the statute is really what the legislature intended. It's a subtle distinction, but what the Court has really said is when you prove the aggravating circumstances beyond a reasonable doubt and any evidence of mitigation comes out to be equal, they are saying that the aggravating ones are of an increased value and that death is the proper penalty.

BY THE COURT: Alright. The Court will support that position and give that special verdict and believes that it is covered also by other instructions, and that the Court intends to give Instructions 1 through 36.

Now, that is the package. Are there any other objections, Mr. McGuire?

BY MR. MCGUIRE: No, Your Honor.

BY THE COURT: Mr. Johnston, do you have any objection?

BY MR. JOHNSTON: Not on behalf of the State.

BY THE COURT: Now, additional instructions that you would offer?

BY MR. McGUIRE: Yes, Your Honor.

BY THE COURT: Besides, the ones you have already offered?

BY MR. McGUIRE: Yes. We would offer the proposed Defense Instruction No. 2.

BY THE COURT: Alright.

BY MR. JOHNSTON: Again, we would submit that it should be the requirement that not only must the aggravating circumstances each be found beyond a reasonable doubt, but the jury should include beyond a reasonable doubt that the aggravating circumstance or circumstances before they impose [illegible]

BY THE COURT: Mr. Johnston, what is your position?

BY MR. JOHNSTON: We oppose that, Your Honor, on the statutes themselves, 200.030, sub-section 4, 175.554, subsection (3).

BY THE COURT: Alright. The Court rejects [illegible] on the law and also on the basis of [illegible] it's already given. It feels that [illegible] with the instructions that we are giving, it already covered that.

BY MR. McGUIRE: If I might just have a moment.

BY THE COURT: Certainly. Take your time. [illegible] you will file these after the settlement here.

BY MR. McGUIRE: Possibly while Mr. McGuire

is [illegible] his instructions, are there 36 or 37 instructions, because I have number 37? We inserted one at [illegible].

BY THE COURT: I believe you are right. I believe there are now 37. I had not had a chance to renumber them when we added two more, but I believe the numbers should be 1 through 37. Thank you, Mr. Herring.

BY MR. HERRING: Okay.

BY MR. McGUIRE: That is all of our proposed instructions, Your Honor.

BY THE COURT: Alright. You did have a motion to the arguments and I think you should get that on the record as to how you want to argue. Do you want to make a motion in that area?

BY MR. McGUIRE: Yes. The order or argument is not precisely defined by the statute, however, it is our position that the order of argument should follow [illegible], of course, N.R.S. 175.552 [illegible] in the hearing, evidence must be [illegible] aggravating and mitigating circumstances [illegible] submit that the order of argument [illegible] order of evidence.

In other words, the prosecution should argue [illegible] should close, and I would note while that [illegible] normal order of argument, this is not a normal hearing. It is a penalty hearing in a capital [illegible] State bears the burden of proof, [illegible] bears the lesser burden, the [illegible] not prevail and [illegible] circumstance that should be taken into consideration and would support that [illegible] argument.

BY THE COURT: Response, Mr. Johnston:

BY MR. JOHNSTON: Just that we believe it should be the standard order of argument, Your Honor, with the State arguing first, then the Defense and then the State having the opportunity to close.

Again, our burden of proof in this area is beyond a reasonable doubt and should we fail to meet that burden of proof then it is automatically to the advantage of the Defense, and we believe that is the historical justification for allowing the State opposing argument.

BY THE COURT: Alright. The Court agrees and believes that the argument ought to follow its normal course and the reason that the State has two opportunities, as the Court understands, historically has always been because the burden is entirely on the State to prove beyond a reasonable doubt, and that is always true the Court believes with respect to aggravated circumstances.

So, the order will be that the State will open, the Defense will have the second argument and both defense counsel are free to argue, and the State will close.

Now, we have very little time left until your hearing. I am sure you want some time for lunch and can we make it at2:00 o'clock still or what?

BY MR. McGUIRE: Sure. It is my understanding, Your Honor, that the Defendant will directly address the jury prior to our arguments.

BY THE COURT: Mr. Johnston do you want to make any position on that?

BY MR. JOHNSTON: Where is the authority for that?

BY THE COURT: I believe the authority is the

common authority of a Defendant always having a right at the time of sentencing to make a remark.

BY MR. McGUIRE: That is the authority on which we rely, Your Honor.

BY THE COURT: There is a statute on that.

BY MR. HERRING: Yes.

BY MR. JOHNSTON: Have you got that statute available?

BY THE COURT: Why don't we put it on the record?

BY MR. McGUIRE: It is 176.015.2. "Before imposing sentence the Court shall afford counsel an opportunity to speak on behalf of the Defendant, and shall address the Defendant personally and ask him if he wishes to make a statement in his own behalf and to present any evidence in mitigation of punishment."

BY THE COURT: And the Court will certainly allow it on that basis.

Does that settle everything for you? There is still some time period left, perhaps we should recess and have lunch.

(Whereupon at the hour of 1:20 p.m. a recess was had in the proceedings.)

(Whereupon at the hour of 2:13 p.m. the recess was concluded and the following proceedings had.)

BY THE COURT: Let the record reflect the continuation of the case of the State of Nevada, Plaintiff, vs. Robert Ybarra, Jr.; his presence; his counsel; and the District Attorneys; the presence of the jurors and the alternate in the box.

We are at the time and the place for the giving of instructions and closing arguments. Correct, gentlemen?

BY MR. JOHNSTON: Correct, Your Honor.

BY THE COURT: I assume the parties want me to instruct before argument?

BY MR. HERRING: That is correct, Your Honor.

BY MR. JOHNSTON: Please.

BY THE COURT: Alright. That being the case, I will proceed by reading you the instructions and then you will hear argument by Mr. Johnston and argument in between by Defense and then closing argument by Mr. Johnston.

The instructions in this area of the case are these:

The instructions given to the Jury by the Court must be accepted by them as the law governing this penalty hearing. The Jury is not justified in imposing a sentence contrary to the law, as laid down by the Court. The instructions should be regarded as a whole and not disconnectedly, though there are a considerable number in the series. It is always well when you are applying an instruction to the facts of the case to ascertain whether

there are one or more other instructions having a bearing on the instruction under consideration. The law of this hearing is not all embodied in any one instruction.

You are instructed that if in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. You are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Two classes of issues or questions have arisen for determination and decision in this case; first are questions of law, and second are questions of fact. It is the duty and exclusive province of the Court to decide these questions of law which are raised during the progress of this hearing and determined by the Court. But, as to the second class of issues or questions, that is, questions of fact, it is the exclusive province of the Jury to decide and determine. The Court is not to decide or determine these issues or questions of fact, because this is not the province of the Court, but it is the exclusive province of the Jury.

The trial Jury shall fix the punishment

for every person convicted of Murder of the First Degree.

You must determine which of the following punishments is appropriate to impose.

(1) Death, or

(2) Life Imprisonment Without the Possibility of Parole, or

(3) Life Imprisonment with the Possibility of Parole.

The punishment of death may be imposed only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

The burden rests upon the prosecution to establish any aggravating circumstance or circumstances beyond a reasonable doubt.

You must consider any evidence of mitigating circumstances. However, you cannot consider any aggravating factors not specifically mentioned.

It is not the number of aggravating or mitigating circumstances which make one more weighty than the other. The Jury should consider the nature and quality of the circumstances in weighing their relative value.

You are instructed that an aggravating circumstance of Murder in the First Degree is where 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 are instructed that an aggravating circumstance of Murder in the First Degree is where the murder was committed while the defendant was engaged in the commission of Sexual Assault (forcible Rape).

A person who wilfully and unlawfully subjects another person to sexual penetration against the victim's will is guilty of Sexual Assault.

When the killing occurs during the perpetration of Sexual Assault (forcible Rape), and is an emanation thereof, it is committed in the perpetration of the Sexual Assault (forcible Rape).

The crime of Sexual Assault (forcible Rape) embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality part of the occurrence.

You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder was committed while the defendant was engaged in the commission of

Kidnapping of the First Degree.

You are instructed that every person who wilfully leads, takes, entices, or carries away, or detains any minor with the intent to perpetrate upon the person of such minor sexual assault, is guilty of Kidnapping in the First Degree.

When the killing occurs during the perpetration of First Degree Kidnapping, and is an emanation thereof, it is committed in the perpetration of the First Degree Kidnapping.

The crime of First Degree Kidnapping embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality part of the occurrence.

You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder involved torture, depravity of mind, or the mutilation of the victim.

The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge,

persuasion or for any other sadistic purpose.

The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased, nor does it necessarily require any proof that the deceased suffered pain.

The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent, which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect.

You are instructed that a mitigating circumstance is where the defendant has no significant history of prior criminal activity.

You are instructed that a mitigating circumstance of Murder in the First Degree is where the offense was committed while the defendant was under the influence of extreme disturbance even though the influence of such mental disturbance was not sufficient to constitute a defense to the crime or

reduce the degree of the crime.

You are instructed that a mitigating circumstance of Murder in the First Degree is where at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of intoxication even though that impairment was insufficient to constitute a defense to the crime or reduce the degree of the crime.

You are instructed that a mitigating circumstance of Murder in the First Degree is where at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of mental defect even though that impairment was insufficient to constitute a defense to the crime or to reduce the degree of the crime.

You are instructed that a mitigating circumstance of Murder in the First Degree is where at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of mental disease even though that impairment was insufficient to constitute a defense to the crime or reduce the degree of the crime.

You are instructed that a mitigating circumstance of Murder in the First Degree

is the youth of the defendant at the time of the crime.

You are instructed that you may consider any other mitigating circumstance or circumstances even though that mitigating circumstance or circumstances is not sufficient to constitute a defense or reduce the degree of the crime.

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the Jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

It is the province of the Jury to award to the statements of the various witnesses the credence and weight to which in your judgment they may be entitled. In determining the credibility of any witness examined, it is your right to take into consideration his interest or feelings in regard to the outcome of the trial; his appearance or deportment while being examined; the possibility or probability of the truth of the statements of such witnesses as compared with other testimony given or fact established; his opportunities for observation or knowledge

of the matter of which he testified; his friendly or unfriendly feeling toward either side, and generally those rules or ordinary experience and general observation by which intelligent men decide as to controverted propositions of fact. It is a general principle of law that if a witness has wilfully sworn falsely with respect to a material matter, the Jury is at liberty to disregard the entire testimony of such witness, or if they find any part worthy of belief, either because of its inherent probability, or because it is corroborated by other credible testimony, they may accept such part and disregard the rest.

Duly qualified experts may give their opinions on questions in controversy at this trial to assist you in deciding such questions. You may consider the opinion and the reasons stated therefor, if any, of the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

Two classes of evidence are recognized as admitted in Courts of Justice, upon either of both of which, if adequately supported, Juries may lawfully find the

Evidence of aggravating circumstances or mitigating circumstance. One is direct evidence and the other is circumstantial. Direct evidence consists of the testimony of every witness who, with any of his own physical senses perceived any of the conduct constituting the aggravating circumstances, or mitigating circumstance, and which testimony relates what thus was perceived. All other evidence admitted is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove an aggravating circumstance or mitigating circumstance in question or tending to connect the defendant with the commission of an aggravating circumstance or mitigating circumstance, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict if it carries the convincing quality required by law as stated in my instructions.

The Court has already instructed you that you are made the sole judges of the testimony, and of the weight to be given the same. In determining questions of

fact presented in this case, you should be governed solely by the evidence introduced and admitted before you. You are to bring to the consideration of the evidence before you, your everyday common sense and judgment as reasonable men and women and those just and reasonable inferences and deductions which you as men and women could ordinarily draw from facts and circumstances proven in the case, you should act on as jurors. You are not to fancy situations or circumstances which you would not draw from the evidence, but you are to make those just and reasonable inferences from the circumstances proven which the guarded judgment of reasonable men and women would ordinarily make under like circumstances.

Upon retiring for deliberation, the jury may take with them all the evidence, the written instructions given and notes of testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

After the Jury has retired for deliberation, if there is any disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into Court. Upon their being brought into Court, the information sought by the Jury shall be given them in the presence of, and after

notice to, the District Attorney and the Defendant and his counsel.

It will require the unanimous consent of the Jury to agree upon the verdicts. When you have agreed upon your verdict they should be signed and dated by your foreman.

The Court has submitted one set of Special Verdicts to you. They are to reflect your findings with respect to the presence or absence and weight to be given any aggravating circumstance or circumstances and any mitigating circumstances.

It will be the Jury's duty to select one appropriate Special Verdict pertaining to the Jury's finding with respect to aggravating and mitigating circumstances, and thereupon determine the appropriate punishment which is to be imposed.

Those are the instructions, ladies and gentlemen. Anything further with respect to the instructions?

BY MR. JOHNSTON: Nothing on behalf of the State.

BY THE COURT: Alright. The State can go forward.

CLOSING ARGUMENT

BY MR. JOHNSTON: May it please the Court, Mr. McGuire, Mr. Herring, Mr. Fairman and Ladies and Gentlemen:

I brought my glass of water with me today.

I think I talked too long the other day, at least that is what my wife tells me. But there are many things that I have to say to you today, and many things that the Defense counsel will want to say to you. So, I guess we just want to try and get your attention again and bear with us and bear with the temperature in here and to continue your responsibility.

Unlike most jurors who, after the end of a major felony case, render a decision of guilty or not guilty, go home. We find ourselves in the unusual position of a first degree murder charge where your responsibility, your additional responsibility, involves setting the actual penalty.

Now, I would like to do some penalty setting in the other portion of the case because of the severity of the circumstances because the law required it. The law now requires you to take a look at the possible penalty for first degree murder.

I would like to, if I could, do something that I did when I started a couple of days ago with my closing there. I would like to give you a little outline of what I intend to talk about so you will have a feel for where I am going. The first thing I would like to do is share a few thoughts with you about the death penalty and then I would like to talk about the law of this state, the State of Nevada, the County of White Pine. Then I would like to talk to you about aggravating circumstances and mitigating circumstances. Then last I will talk to you about the weighing process that takes place between them in this type of a hearing.

Now, Mr. Herring, the other day, got up and at the beginning of his argument said that he really did not

like the word "argument" and that this was not a debate. None of these procedures are. If there is anything that can generate into a debate its a discussion about the death penalty, but that is not why we are here. We are not here today to discuss why the State of Nevada should have the death penalty. That is not the issue. The legislature has made that decision. It is our responsibility now and yours in particular. After we have finished discussing this with you you have to make the decision to apply the law given to you by the State.

Now, the thing to do probably in the beginning is something that all of us have to do. You have to separate your personal opinion about the death penalty, about capital punishment from this particular case because, as I said, this is not a debate about the death penalty. You are applying the law just like when we came to the end of the case in chief. It was not an issue to debate whether we believed in kidnapping or not or whether that ought to be a crime. Well, likewise the issue now is not should we have or should we not have the death penalty. That decision is made. We now have to apply it.

You know, it is interesting, even in the short penalty hearing that we had, you heard a witness on behalf of the Defendant, Reverend Hall, express his personal concern about the death penalty. That is not the issue. I suspect that from Defense counsel you will hear more readings from the Bible today and they will probably discuss the old law and the new law and where they think the law ought to be and where they believe maybe the Bible has the law placed. That is not the issue. The issue before you today is to look

at the law of the State of Nevada and apply it to the case, a specific case involving the Defendant, Robert Ybarra. That is your only obligation.

Let's look at the law. There is a couple of instructions that you will receive right near the front of the package that the Judge read to you, Instruction No. 4 says, "The trial Jury shall fix the punishment for every person convicted of Murder of the First Degree". Now, there is no question about murder. You have already made that decision. You have found it beyond a reasonable doubt. Your deliberations have already covered that subject. Now it is penalty time.

The instruction that follows that is Instruction No. 5, for law the choices are, and I would like to share it with you more time, "You must determine which of the following punishments is appropriate to impose. (1) Death, or (2) Life Imprisonment Without the Possibility of Parole, or (3) Life Imprisonment with the Possibility of Parole." There is three choices. You need to come to a conclusion as to one of those three. It must be unanimous. Failure to reach a unanimous decision is no decision.

Now, under the law of the State of Nevada what happens is, first, and according to the instructions that you have received from the Court, you have to find out if there are any aggravating circumstances, and the law has provided a description of what those are and I would like to talk about those in just a minute. Now, once you do that you then look to see if there is any evidence of mitigating circumstances. Then to put it briefly and simply, you are going to take the two, so long as you find some aggravating ones, and balance them and see

which carries the more weight, the aggravating circumstances or the mitigating circumstances? And in summary that is what happens under our law because once you do the balancing if it comes out in favor of aggravating circumstances then you are looking at the death penalty and if it comes out in favor of the mitigating circumstances then it's life in prison and you do get that second choice that you have exerted before between life with the possibility of parole and life without, in the state prison.

The aggravating circumstances themselves, that is the burden of proof and the obligation that the state has to bear, proving to you that aggravating circumstances do, in fact, exist in the particular case.

The first one we have alleged is Instruction No. 10. And these have to be proved beyond a reasonable doubt. Now, remember that is a standard that you have grappled with before. It is nothing new. It is nothing impossible. You will look at each of these factors and say did the state prove it beyond a reasonable doubt and if they did then that is one aggravating circumstance. Now, the first one is Instruction No. 10. It says, "You are instructed that an aggravating circumstance of Murder in the First Degree is where 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." That the murder was committed by a defendant who was previously convicted of a felony involving the use or threat of violence to the person or another -- "or violence to another." During the penalty hearing, and it may have happened so fast you did not see it, there was an Exhibit entered, Exhibit

No. 57. That Exhibit by itself proves the aggravating circumstances beyond a reasonable doubt. It's a copy of the judgment from the California courts of a violation of California Penal Code, Section No. 245(a), Aggravated Assault the defendant who was convicted in that case is the Defendant, Robert Ybarra, Jr., that's aggravating assault number one beyond a reasonable doubt.

Number two, and in Instruction No. 11, "You are instructed that an aggravating circumstance of Murder in the First Degree is when the murder was committed while the Defendant was engaged in the commission of sexual assault, (forcible Rape)." Now, when you brought back your verdicts, one of those verdicts said "We find the Defendant guilty of sexual assault." You found him guilty beyond a reasonable doubt.

An instruction that you might want to look at in conjunction with that is probably No. 12, which gives a little bit of an explanation as to when the killing had to occur in relation to the kidnapping. When you look at that you will find that it fits perfectly and your verdict that you have already made proves beyond a reasonable doubt as to number two spelled out in Instruction 11.

Next, Instruction No. 14 says, "You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder was committed while the defendant was engaged in the commission of Kidnapping of the First Degree." The murder was part of or followed kidnapping in the first degree. Does that sound familiar? You had a verdict on Kidnapping in the First Degree and beyond a reasonable doubt you found the defendant guilty of kidnapping in the first

degree. Now, this is circumstance number three proved beyond a reasonable doubt.

Instruction No. 17, aggravating circumstance number four, "You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder involved torture, depravity of mind, or the mutilation of the victim." On this particular one, the only one we have alleged, you have made no decision yet as to whether or not it is proof beyond a reasonable doubt in this case. I would like to, if I could, take a look at the instructions, the three that follow after it, the ones numbered 18 and 19 and 20. Number 18 talks about torture, and it says, "The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree or probability of death, ..." The pouring of gas on Nancy Griffith and lighting it on fire, what could have had a higher probability of death than that?

" (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose..." committed the acts to cause cruel pain and suffering. What other reason could there be, particularly when at some point during the sequence of events in that little wash he realized what he did in the beginning that Nancy Griffith was alive and, in fact, by Dr. Sander's testimony, the fluid had to have been enough to still be wet and running when she was standing or sitting up in order to roll down the legs and create the pattern that it did.

The second one, "... depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt, perverted

intent which is devoid of regard for human dignity and which is indifferent to human life..." I will submit that one of the things that you are going to hear a lot about will come out of the words similar to these, "human dignity with regard for human life," and you are going to be asked to have regard for human life, the life of the defendant. Depravity of human mind consists of evil and corrupt and perverted intent, which is devoid of regard to human dignity, and is devoid to human life.

The third one under that category Mutilation, "You are instructed that the term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body," Now, Nancy Griffith did not live a long period but if you will remember the letter that was read from Dr. Saffle at the University of Utah Burn Center, had she lived her forearms would have been amputated and fingers that were burned to the bone. We would submit to you that on all three items -- torture, depravity of mind and mutilation -- which make up aggravating circumstance number four, there is clear evidence if you look at Dr. Sander's testimony, Dr. Saffle and the people who saw Nancy that day, that Saturday morning, Dee Norheins, Don Banner, Bernie Romero, the E.M.T.'s, look at the photographs that are in evidence, there can be no question that the evidence shows beyond a reasonable doubt aggravating circumstance number four.

Having found the fourth aggravating circumstance it is then necessary to look at the other side of the coin. This is not a one sided event. Our system was not designed to be that. There is two sides

and you are entitled to look at both sides of the question to deliberate fairly while looking at them.

Now, on the other side there are factors of mitigation. These do not have to be proved beyond a reasonable doubt and that is an important distinction. You see the State carries a higher burden. It is our responsibility to prove each element -- each of the four circumstances we have alleged -- beyond a reasonable doubt to even consider it. All the Defense has to do is show you any evidence of any of the factors and that establishes the facts.

Now, they have alleged about eight different items for you. The first one being that the Defendant has no significant history of criminal activity. Well, I do not know what you consider significant history of criminal activity. Maybe it's there and maybe it's not. What is? One crime, two crimes, is it ten crimes, is it a lifetime in prison? I don't. Perhaps the Defense will answer that for you as to what is a significant history -- prior history -- of crime.

Then there are several items we read into the state of mind of the Defendant on the night in question, that is really what they come down to, and his state of mind now as he presently exists. They talked about mental disturbance, emotional disturbance, intoxication, mental conflict, mental disease, half a dozen items. Look at each one and ask them when they talk, where is it? Show it to us. We want to see it.

Then item number seven on their list of mitigating factors is theyouth of the Defendant, the youth of the Defendant. That is a tough one. It really is because when you say that Robert Ybarra should be given a break

because of his youth, what about the youth of the victim? Shouldn't she have had a break, also? And where does the responsibility really start? We give the right to vote to people who are eighteen, when you are twenty-one you can gamble, you can drink, and the Defendant was, beyond a reasonable doubt, all of those. Are you responsible for a tragic and serious murder when you are twenty-one, twenty-two? Where is the line at? Where does he become so old that that no longer becomes a factor? Is it thirty? Thirty-five? Where is the line? Make them draw a line for you.

The last item that we have alleged under mitigating factors, is anything else -- anything else -- ladies and gentlemen that can include anything, just like it says. If you are hit by sympathy for the Defendant, you are hit by sympathy for his mother or his family, that is something you can consider. That is a legitimate factor, and anything else that they might suggest. The fact that he is taking a Bible class, that he is trying to help himself out, that is what they are going to tell you. He is improving himself. Rehabilitation is a responsibility. It is a factor to consider.

Now, once you look at all the facts, the aggravating on one hand and the mitigating on the other, then comes the process of weighing them. It is just that. You stack them up on each side, give to each factor the weight you feel it deserves, then find out which one is the stronger.

Now, there is an instruction in there, Number 9, that says, "It is not the number of aggravating or mitigating circumstances which make one more weighty

than the other. The jury should consider the nature and quality of the circumstances in weighing their relative value." It is not the number of factors that makes the difference. You are to look at the quality of the factor, the persuasive weight of each of the factors, and the evidence of each factor. When you do that, balance them. Balance them.

As I mentioned so often in the earlier argument, you will see and hear that instruction again about common sense. The defense is going to be talking about several things, you know, the youth of the defendant, emotional disturbance, intoxication. You are going to have to go back and remember a lot of evidence that is very important to proving each of those items. Use common sense when you look at that, your everyday experience. Where does a person begin to lose the trappings of youth and become responsible as an adult? Do that with each of those items.

I will submit that we believe the evidence you will find is definitely more persuasive and of a heavier value and in the favor of aggravating circumstances in this case.

Is it an appropriate case for the death penalty or capital punishment? I can remember back to the voir direing of the jury over a year ago, back to March 31st, in fact, of 1980, when we first started. Do you remember we asked questions about the death penalty and how people felt about it?

I remember asking some people, "Do you feel that the death penalty is appropriate in any case?"

Someone saying, "Yes, I suppose there's a case," and if it were a couple that we would ask, "could

you give us an example of what you think is an appropriate case?"

And they would say, at least some of them, "Well I don't really know that I've ever seen one, but if there were one I'd know it."

You know, it is interesting. It is interesting within the last week or so a Justice of our U. S. Supreme Court, Potter Stewart, decided to retire. Potter Stewart, some years ago, wrote an opinion on obscenity and he's familiar with the reasons that he gave in his opinion when he said "I know when I see it," referring to obscenity and pornography, that was not proper. When you look at this case and decide whether the death penalty is appropriate we believe that the evidence will help you decide that you will know it when you see it. This is that case. What is known as the death penalty is appropriate. Thank you.

BY THE COURT: Mr. Herring and Mr. McGuire do you want to speak first?

BY MR. MCGUIRE: Your Honor, Mr. Ybarra will address the jury first.

BY THE COURT: Alright. Mr. Ybarra has the right to address the jury on his own behalf as well as counsel and he will speak now.

BY DEFENDANT YBARRA: Ladies and Gentlemen:

I hope you find it in your heart to forgive me. I'm very sorry for what I've done. I truly regret the great wrong done by sacrificing Nancy to satan.

You know, when I was a little boy I was hit in the head with a beam that my father used to make a swing for me and my little brothers and my sister. My head hurt so much. I didn't know what to do, I didn't

know what was wrong with me. I cried and cried for help. I said "Somebody please help me."

The doctors didn't know what was wrong with me, they couldn't give me anything to stop the pain. So, I started using alcohol. It didn't work too well so, I started using drugs with the alcohol and it helped but it made my head sicker.

I'm crying for help now. Please don't give me the death penalty, give me life in prison so that maybe I'll have the chance to become a good and happy human being that I've struggled so long and so hard to become.

I want very badly to make up all the pain and suffering heartache that I've caused my family and all my loved ones. I wish to God I could do something to make it up to Nancy or her mother and father and brothers and sisters, but all I can do is tell them how truly sorry I am for what I've done.

If you give me life in prison I'll have a chance to be better, I'll have a chance to further my education, I can get involved with the church like I used to be, I can study and become a priest like I've wanted to since I was little.

Please give me life in prison. I would be so -- please don't give me the death penalty.

BY THE COURT: Mr. McGuire and Mr. Herring?

BY MR. HERRING: Yes, Your Honor.

CLOSING ARGUMENT

BY MR. HERRING:

I think there are peculiar circumstances that make

me capable of arguing this case to you and

discussing it with you.

First of all I have killed another man before. A lot of us my age group have. We were sent for better or for worse to another country and because the government said this is what is right, you go over there and kill people. This is right, because it's right, that's what I did.

I distinctly remember instances where people were killed as a direct result of something I did, waiting for them to walk into an ambush in front of Claymore Mound, two pounds of explosives and one hundred fifty steel balls, fifteen of them cut down just like that, (indicating) when I pulled the trigger.

I came back, however, some time later and found out that my government and my country said, well, maybe that wasn't so not an idea. Maybe that wasn't right for us to do that. Maybe it wasn't such a good idea to send all our boys over there and have 38,000 killed in Vietnam, but I did it because they told me it was right and because I have always been brought up to do what was right. All my brothers went into the service and did their duty. But I'm not sure now. You know, it's a real big problem for us who come back and are told by other peers who did not go, who resisted, who did other things, that wasn't right. You were wrong. You killed people in their homeland. I have a peculiar interest in cases involving death, when people tell you you have to do what the State tells you to do because it's right.

Secondly, I have a peculiar interest in this case because in 1977 I was employed by the Attorney General's office of the State of Nevada, and that was the time when the first death penalty statute was adopted.

Along with a number of other people who worked on that death penalty statute, I drafted, redrafted it, worked with the legislature, testified, studied the constitution, studied the principles of the United States Supreme Court, and worked with the legislature to develop the current penalty statute because they told me that was my job. This is what we want you to do, Mr. Herring, we want you to research the death penalty and find out how to do it and do it right.

Now, the statutes that are in the book is one of the drafts that I submitted to the Attorney General's office and was subsequently adopted by the legislature. I have a peculiar interest in cases involving death and particularly death in Nevada because it hits home to me. So, I have done a lot of study on death and the death penalty and let me tell you some things. Seventy-two years ago in a bleak, barren, God-forsaken building called the Nevada State Prison in Carson City, a building built until the 1960's as a territorial prison, on May 23rd, 1929, a little after midnight, Charley Keizer, a man that was made in God's own image, became the first person in our state to become legally murdered by the gas chamber.

Now, that was a new mode of execution. It was considered to be highly sophisticated and humane. Prior to that there had been three hangings, one person had been executed by a firing squad -- legally, and I don't know how many lynches we had in the State of Nevada before we started keeping track. Before 1909 it was pretty much a county's option and there were no specific records how many people were executed in the State before that day.

They stopped hanging people when people were

repulsed by the hanging and sometimes the heads became separated from the body because they dropped them too far and they certainly did not want to have the people who viewed the execution become nauseated, so they took up the firing squad, and one person was executed by the firing squad.

Utah still uses the firing squad. Most of us probably will remember about Gary Gilmore being executed by the firing squad not too long ago. The gentlemen that was executed in Utah before Gary Gilmore had one of those little hearts pinned over his shirt about where his heart was and the marksman were instructed to shoot into the heart. Five of them -- all five of them missed. The gentlemen hung on a post and bled to death in Utah State Prison.

Thirty-six times Nevada has turned its back upon the command of the decalogue, "Thou shall not kill."

Thirty-six times now we have arrogated to ourselves the right to destroy the image of God on earth.

Thirty-six times we have disputed the sacred idea that no man is beyond redemption.

Thirty-six times we have reverted to our primitive and savage origin bred in generations in the jungle.

Thirty-six times we have closed the door on a man's life and sent him to his Maker with a crime on his soul and guilt in his heart and denied him his God-given right to repentence, redemption and forgiveness.

Thirty-six times we have usurped God's authority to judge our fellow man.

Thirty-six times we have proclaimed that the State of Nevada has no duty to be civilized by killing

his fellow ...

Mr. Johnston says that the death penalty is not the issue. I submit to you that as you sit there today you have to decide upon the death penalty in your own heart and determine whether, in fact, it's an appropriate punishment for this case. But somewhere along the line in your heart and your mortal soul you are going to have to deal with that.

Six men and six women on this jury professed your belief in Christianity. Some of you, even if reluctantly, have expressed your belief in the death penalty as ... appropriate punishment. I ask, as you sit there ... and you follow my argument, that you search yo... in an effort to arrive at a rational and Christ... conclusion based upon a fresh look at the evidence. I ask you to erase from your mind any opinion that you may have on capital punishment until I have ma... case against capital punishment.

... statement relating to the essentials of punish... the appeals ... courts have said time and time again is, "punishment or treatment of offenders is directe... to one or more of the three ends: (1) to discourage the act as a deterrent upon future criminal ... (2) to confine the offender so that he may not ... society; and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or ...struction."

We are not here to try and get back for the wrongs that have been done. We are here to simply decide what is fair ... just in the wake of punishment. That leaves a ... on: Does the death penalty serve as a

deterrent to others? Are we sending a message out to this community? Are we sending it out to America saying don't kill because you are going to end up killed yourself?

There are those who indicate that we are living in an age that is probably the most barbaric and brutal since Christ walked upon the earth. There is more slaughter than in any other time in history. That is probably why we did not worry about the death of one man. We have become inoculated to brutality and immune to human suffering.

I submit to you, however, each generation throughout humanity has become successively better and upon rungs of progress we are steadily climbing those, philosophically and medically and from a humanitarian point of view.

Men of good will incontestably will tell you that we are our brothers' keeper and cannot be thrown into the ocean without destroying the balance between every drop of water into the ocean. We all got together. We made good progress. Throughout time man has made a various number of attempts in finding a way to punish his fellow man because of infractions of good order and as a dilator of the community. Our progress has been praiseworthy.

There was a time when society thought that criminals should be beheaded; burned at the stake; boiled or buried alive; strangled; stoned; skinned alive; starved to death; when they were torn asunder by trees fastened to their limbs; or devoured by wild beasts, like Daniel in the lions den, that was his punishment; forced to drink poison, like Socrates; crucified, like

Christ; drowned; chopped in two while they're still alive; eaten alive by insects; or sewn in a bag with snakes -- all in the name of justice and all because it was the law of the land. That's what they said you had to do because that was the way you were supposed to punish people -- the law of the land.

As odious and distasteful as these practices may be, let's take a look in the future. A hundred years from now I think we are all pretty much in agreement that probably capital punishment will be considered no longer a viable solution to the problem of criminality. You will look back upon the gas chamber in Nevada and consider it, along with the things I have just discussed with you as methods of punishment, suitable provisions for the imposition of the death penalty.

A time was when pigs, horses and cattle were all executed, traded and executed, for crimes because it was the law of the state.

In 1474 a rooster was tried and convicted for the horrible crime of laying an egg. This was in our mother country of England. Both the rooster and the egg were tied to the stake and burned alive. It was the law of the state. That's makes it right, doesn't it?

There is another case, in 1831, a little British child was hanged for stealing a spoon. It was the law of the state.

There is a recorded case in England of a nine-year-old girl being hanged for stealing two pennies' worth of salt. It was the law of the state.

There is another case, in 1748, of a U.S. boy, ten years old, was executed for murder. It was the law of the state.

It is repulsive every time a Prosecutor approaches you and tells you to kill another human being because it's the law of the state.

In England during the reign of Henry the VIII, there was over twohundred crimes ranging from shooting rabbits to associating with gypsies, for which the death penalty was enacted and during this time to the shame and disgrace of our mother country, 72,000 Englishmen were executed. This, however, did not seem to deter Englishmen from committing crimes.

During the reign Queen Elizabeth I, 19,000 Englishmen were executed, but the crime rate continued to rise.

Peter I, a British czar of Russia, issued an edict against men wearing beards, and in order to enforce it in 1728, one year alone, he put to death 8,000 Russians for wearing beards, because this was the law of the State. And, yet, we can hardly think of a Russian during the czar era who didn't have a beard.

Then there was the time in England when the pickpockets were hanged in public and the spectacle was an opportunity for the other pickpockets to come and apply their trade.

Now, you are going to tell me that the death penalty is a deterrent, but the death penalty in Nevada is not a deterrent because in 1979 it did not stop one hundred and six homicides from being committed in this state.

Crime has a tendency to beget crime. It is a bizarre phenomena that people are outraged when the death penalty is imposed and the crime rate proportionately rises during that period of time.

One of the most famous of all English hangman was John Price, a guy who was supposed to uphold the law and follow the law of the state and execute on behalf of the state, he himself was hanged for murder, as was Hangman Dennis and Mr. Hespel.

Common sense should tell us if execution is going to serve as a deterrent of crime, how should they be performed? We should put them on the TV and all the criminals in the prisons should be given front row seats so they will find out what is going to happen to them if they commit some dastardly crime. Let's make it as brutal as possible to make an impression upon those persons that we are supposed to be deterring from crime. Make it stark terror into them. But you will find out in a minute that it is not how executions occur because I am going to tell you what happens in an execution at the Nevada State Prison.

Non-justifiable murders can take only two forms; first, those in the heat of passion and, second, those which are premediated and planned. Neither one of those are justifiable. In the first group the murderer loses all reason and control of his faculties and the consequences of his deeds do not enter his mind. It isn't because he's angry or wild or for some retribution, heat of passion.

In the second group thinks he has planned the perfect crime, will not be apprehended and he gives no thought to punishment. Again, where is the deterrent for those types of crimes?

Now, the State of Delaware was the 6th state to outlaw capital punishment. Among the reasons assigned by the State of Delaware for outlawing capital punishment were:

"1. The evidence clearly shows that execution does not act as a deterrent to capital offenses.

"2. The serious offenses are committed, except in rare instances, by those suffering from mental disturbances; are impulsive in nature; and are not the acts of the 'criminal' class.

"3. More convictions with less delays are obtained because the reluctance of juries to convict where the death sentence is involved is removed as a factor.

"4. Unequal application of the laws takes place because those executed are the poor, the ignorant, and the unfortunate without resources."

A guy who's probably escorted more prople to the gas chamber than anyone else in the history of America was a guy by the name of Gordon Lewis. He was warden of Sing Sing Prison, probably one of the toughest institutions ever devised, maybe except for Alcatraz. He wrote a book called Life and Death in Sing Sing. Gordon Lewis says "Not only does capital punishment fail in his justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and poor. The defendant of wealth and position never goes to the electric chair or the galleys. Juries do not intentionally favor the rich. The law is theoretically impartial. But the defendant, with ample means, is able to have

his case presented with every favorable aspect while the poor defendant often has a lawyer assigned by the Court. I don't need to tell you that I have been assigned by this Court.

This case is probably going to bother me for some period of time. There are some things that I have never been able to resolve in my mind. The mysterious team, Nancy Griffith's insistence upon "they did it to me." The insistence upon that, I have not been able to resolve that to my satisfaction.

Conviction of the innocent does occur, and death minimizes courage of justice. Irrevocable human judgment cannot be infallible. God only knows how many times I have wondered if I have made a mistake during the presentation of this case because I know I am fallible.

The State sets a bad example when it takes lives. Immitative crimes and murder are stimulated by execution. The State of Delaware found this to be a fact that crime rates rise due to execution. Legally taking a life is useless and demoralizing to the general public, it is also demoralizing to the public official who is dedicated to rehabilitating individuals rather than uselessly putting a man to death.

Probably one of the most illuminating studies on the death penalty was done by the British Royal Commission on Capital Punishment during the period 1949 to 1953. After a four year study, and hearing expert witnesses from all over the world, they came to this interesting conclusion:

"The general conclusion which we have reached is that there is no clear

evidence in any of the figures we have examined that the abolition of capital punishment had led to an increase in the homicide rate or that its reintroduction has lead to its fail."

Let's take a look at the record. Forty countries polled, as far as I have been able to determine, have abolished capital punishment or have retained it for exceptional crimes, such as treason against their country during time of war. That is the general acceptance. In fact that is one of the few crimes that is punishable as a federal crime. But the death penalty in Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Britain, Canada, Columbia, Costa Rica, Denmark, Dominican Republic, Equador, Israel, Italy, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, Netherlands Antilles, New Zealand, Nicaragua, Norway, Panama, Portugal, San Marino, Surinam, Sweden, Switzerland, Uruguay, Vatical City and Venezuela. In all of the foreign countries which I have been able to research and for which I have figures, the murder rate in those countries went down after the abolition of the death penalty.

In the United States the death penalty has been abolished in Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

The states without the death penalty are by and large those with the fewest homicides. In 1969 the three states with the lowest homicide rates and five of the lowest seven were states that did not have the death penalty.

I tried to find a state which had a population

base fairly close to Nevada that did not have the death penalty and I came up with Maine. Maine has a homicide rate of 1.2% per 100,000 population. 1.2. Nevada, with the death penalty as a deterrent to crime, nearly ten times higher. So much for that argument that capital serves as a deterrent to crime and because it's the law of the state that you have to do it.

Your Honor, may we have a break?

BY THE COURT: We have gone well over an hour and it is difficult to remember and to listen to everything and it is very difficult to sit. Let's take a short recess and then we will continue to hear the argument.

During your recess do not converse among yourselves or with anyone else on any subject with the case. Do not read, watch or listen to any report or commentary, including without limitation radio, newspaper, television, and that includes coverage from the media of the case or people involved in the case. Do not form or express any opinion on the case until it is finally submitted to you. We will be in recess for about ten minutes.

(Whereupon at the hour of 3:25 p.m. a recess was held in the proceedings)

(Whereupon at the hour of 3:43 p.m. the recess was concluded and the following proceedings had.)

BY THE COURT: Let the record reflect the continuation of our case, the presence of the Defendant, his counsel, the presence of the counsel for the State, the presence of the jury and the alternate in the box.

We are, of course, in the middle of argument and you can continue, Mr. Herring.

BY MR. HERRING: Thank you, Your Honor.

CLOSING ARGUMENT CONTINUED

BY MR. HERRING:

It is very difficult for me to be so somber. Those of you who have seen me over the last couple of weeks know that I am a fairly jovial guy and light hearted. My Mama used to say, "There's a little devil in you, Norm." This is an occasion where I do not think there is any way I can be jovial or light hearted because what we are considering here is so important, so vitally important to our own human dignity, the well being of each of us, in determining how our society is to function.

Now, I mentioned earlier the comments by Warden Lewis, and Warden Lewis took 150 men escorted them to the electric chair, and he took one woman. His observations as I indicated were that the death penalty in his application is almost uniquely disproportionate from rich to poor.

> "In 1973, the Nevada Legislative Counsel Bureau's office of research asked the prison to supply information concerning the economic status of persons executed in Nevada."

And I read you from the Legislative History of Death Penalty Statute. The list the prison supplied showed all poor or upper working- level people.

According to the author of the response, Edwin T. Pogue, then Deputy Warden of the prison, "it would be safe to generalize that no one of any substantial financial means has ever been executed."

Now, there is some great cases in the court history -- bibical and otherwise. Even though there was a law, the death penalty was a law, it was not inflicted.

Now, who set the first precedent for this particular thing? God did. He looked down at the first people to populate the world, Cain and Able. He saw Cain standing over the battered and bloody body of his brother, Cain expected to find vengeance at every hand. God did not visit capital punishment on him. He banished him from society. He placed a mark on him -- a mark of his crime, but also a mark that would warn the rest of mankind. That was the judgment of God in dealing with the first murderer and I submit that it is judgment beyond error. Who amongst us is going to question that?

Then there is the case of David? The Old Testament and David the King? What did he do? He sent Uriah up the Hittite to a certain death and the first waive of an army of salt. Why? So that David could have Uriah's wife. What was Uriah's chances of survival? They were 100% that he was going to be killed because David knew that those people in that first assault were all going to get killed. What happened to David? In spite of his heinous crime, he continued

to grow the favor of God, and as is described by the scripture he became "A man after God's own heart."

How about Moses? Does anyone remember Moses? He is a murdered. He killed. He killed an Egyptian in a fit of rage, fled Egypt and became a fugitive from justice. God sought him out, however, from the burning brush to the height Pisgah, from the Red Sea to the mountain peak and he took Moses up to the mountain peak to survey the Promised Land. Moses, the murderer, was the right hand of God in delivering the Jews from Israel or from Egypt. What if David and Moses had been executed because it was the law of the land, the State says you got to execute them?

Those who urge capital punishment tend to cite some scriptural passages and they do so from the book of Genesis which said, "Whoever sheddeth man's blood by man shall his blood be shed."

Now, what was going on during that time? The world had become so evil, so vile, that God repented that he had ever even made man. He said in Genesis 6:6 I'm sorry I did this and he created a great flood and destroyed mankind and when all their laws and customs had been swept away, who was left? Noah and his little family, and he received and passed on what were referred to as the seven precepts, they were few in number and they were temporary in nature because they were the seed that was to germinate the world because they would not bear a single one.

Two of the seven laws were related to "Be ye [illegible] carefully." And the little family of Noah [illegible] to you there has been no divine or

direct authority from God such as the precepts given to the State of Nevada.

I wish I could delve more deeply into this but it could take days and longer than to study why we are doing what we are doing, what our precepts stand for. But I submit to you centuries after Moses brought down the tablets from the mountain there was another law, the law laid down by Christ about two thousand years ago, solitary wayfarer working the land healing the sick and casting out demons that possessed the mentally ill. He was persecuted by the mighty Roman Empire, crucified by the edict of the courtcomposed of his own countrymen. He was denied thriceby one of his trusted disciples in his hour of greatest need. He was betrayed by one of his disciples, mocked, spat upon, given a crown of thorns, pierced in the side [illegible], ridiculed, and as he breathed his last breath it was the most horrible death known in his time -- crucifiction -- but he wasn't deterred in his preachings of love, charity and compassion and redemption of the human soul and do you remember his last words on the cross? When he cried out after all the ridicule and hate had been thrown at him -- forgive them, for they know not what they do.

When they quote the Bible as a sanction for the death penalty, they pervert the Holy Spirit in the New Testament of forgiveness of redemption of the human soul.

Now, we spent about two weeks discussing how Robert Ybarra killed Nancy Griffith a great deal at length. I am going to tell you how the State of Nevada will kill Robert because they are asking you to kill

him. It will be your decision.

Each man who is on death row receives a numbered file. There are ten waiting there. Robert will join them in the old section of the Nevada State Prison referred to as Death Row.

Unlike other inmates in the Nevada State Prison those on death row are not released to the prison yard for exercise, daily walks, they are kept in their cells in their vow of confinement day after day and occassionally taken outside in a small group. They become a society unto themselves -- convicted killers -- day after day waiting for their day to die a thousand deaths. They know their time is to come. Their food is brought to them in the cellhouse area.

The gas chamber is located presently in an area of the old Nevada State Prison now used as a medical service area. It's a windowed chamber about seven or eight feet in diameter. This is the gas chair right here (indicating). The windows start about three feet high and run to about six and one-half feet high. All the way around there is a rail, as indicated there, for the people who have to witness the executions to stand.

The chair is white procelain and is built by the inmates of the Nevada State Prison. There is a metal bowl sitting under the chair with the sulphuric acid. There is a little mechanical contraption right above the bowl with a little gauze bag that holds the cyanide eggs. They are released by an executioner, who stands back over here (indicating), not to be seen by anyone doing his deed.

Now, executioners out at the Nevada State Prison

there are several of them, they are paid an extra fee monthly because they may be called upon from time to time to perform their duty and to do what the state tells them to. Considering Robert's mental condition he will invariably be admitted to the medical section and will be treated by the prison physician, Dr. Robert Freeman, whose offices are in the same room with the gas chamber.

The gas chamber is separated by a flimsy white curtain which looks like a shower curtain. Anybody entering that room has a full view of the gas chamber. When an execution is to take place all the windows in that room are opened, the door to the outside is left open lest the chamber leak and the poisonous gas leak out in the room and do harm to any of the witnesses.

The Director of the Department of Prisons will be present and by statute he must invite a competent physician and not less than six reputable citizens over the age of 21. All are warned when they enter the chamber of the dangers should the chamber leak and told to leave immediately should they smell anything that smells like rotten eggs.

As they stand behind the rail they are about seven to eight feet away from the condemned person.

Now, the day before an execution out at the Nevada State Prison is different than the rest. Unusually somber, there's not much joviality, a lot of tension. They usually don't eat on those days. The chow line is unusually very short. Inmates pretty much stay to theirselves.

The scene on death row where the other inmates are housed is one of unbelieveable quietness and solitude.

Now, the tension is occasionally broken by a visit from a priest or a pastor and the family members for the last visit. There's quite a bit of crying. Sometimes during the day the prison director comes to the condemned man's cell and reads them the Court Order demanding execution. The physician checks the condemned to determine if he is in good health.

The law says that no one who is ill or insane may be executed and must understand what the State is doing to them.

About twelve hours before the execution, the smell of rotten eggs hangs over the prison as the executioner tests the gas chamber for the last time.

Sometime between 6 and 8 p.m. in the evening the condemned person receives his last meal. Sometimes its eaten, generally not. The last minute visits are allowed for family members.

Shortly after midnight, when the prison population supposedly has gone to bed, the prison is quiet, the Director of the Department of Prisons comes to the condemned man's cell and informs him this is the time period. He takes him outside, out of death row, for the first time in maybe quite some time, crosses the prison yard, goes up a set of stairs -- an exterior metal staircase -- to the medical facility.

The gas chamber is not sound proof. The witnesses can hear the condemned man breathing, hearing the last words that he may have.

Upon reaching the gas chamber he would have a monitor attached to his heart and a blood pressure cuff attached to his arm and he's seated in the chair and strapped in. The guards leave the chamber, shut the

door, and the witnesses crowd around the rail. They are only a few feet now from the condemned man.

The Director of the Department of Prisons gives some unknown signal, some nod of the head, and the cyanide eggs drop into the sulphuric acid. It takes about ten seconds for the gas to rise from under the seat up to around the mouth and nose of the condemned man. If he holds his breath it takes about ninety seconds for the gas to be inhaled. It's very strange how many people, in fact, do hold their breaths, clinging onto the last few seconds of life.

In 1934 a man by the name of John Hall was executed in the Nevada State Prison gas chamber. The prison physician made a detailed account of the times. 6:26 a.m. prisoner enters chamber, heartbeat - 186. 6:27:15 a.m. doors closed. 6:28:25 a.m. cyanide eggs enter solution of hydro sulphuric acid. 6:28:37 a.m., twelve seconds later, the gas reached his face. 6:28:52 a.m. deep convulsive respirations. 6:29:02 head falls forward, then backward, heartbeat only 114. 6:29:22 a.m. head falls forward again, eyes still open. 6:29:30 a.m. convulsive contraction of the neck. 6:29:45 head now back again. 6:30 a.m. heart very low, about 30. 6:30:15 head falls slowly forward for the last time. 6:30:45 a.m. one convulsive respiration. 6:31:30 one convulsive respiration. 6:31:45 two convulsive respirations. 6:31:45 a.m. one convulsive respiration growing weaker, heartbeat 22, respiration stopped. 6:37:45 heartbeat about gone. 6:38 heartbeat barely. 6:38:15 heart stopped. 6:40 blower turns on to clear chamber. 6:48:15 ammonia drawn into chamber, blower turned off. 7:04:44 a.m. chamber doors open. 7:09:15 a.m. body removed from chamber.

7:10.10 pronounced dead.

The scene of our era does not change from year to year. If I were inclined to support my opinion that the death penalty is not appropriate in this case, I would draw from my religious teachings, the whole New Testament, for if it teaches anything it teaches forgiveness of sin and a system of reform rather than extermination.

In certain churches that announce their opinions or doctrines, accepted beliefs, with respect to the death penalty, the Methodist church has stated that we stand for the application of redemptive principle to the treatment for offenders against the law and for this reason we deplore the use of capital punishment.

The Baptists at the American Baptist Convention in Cincinnatti, Ohio, stated that because human agencies and legal justice are fallible, and innocent men have been put to death, and because the Christian believes in the inherently sacred quality of all life as a gift of God, and because the deterrent effects of capital punishment are not clearly supported by the available evidence, and because the emphasis in modern penology is upon the process of creative, redemptive rehabilitation rather than primitive retribution, we, therefore, recommend the abolition of capital punishment in those states which still practice it.

The Protestant Episcopal Church, in the 59th General Convention, stated whereas the church, following of our Lord Jesus Christ, holds that each individual is sacred as a child of God and object of his redemptive love and that to legalize the killing of a child who is a criminal offender conflicts with the basic Christian

concept and the conscience of many church people has been aroused by the condemnation to death of individuals who may be innocent and there is a growing body of public opinion which believes that capital punishment is archaic and ineffective to protect society and as a deterrent to crime and whereas the death penalty appears to fall for the most part on oscure, impoverished, friendless or defective individuals, and whereas the resolutions urging abolition of the death penalty have been recently adopted by six dioceses, one missionary district and the synod of the eight provinces, and now, therefore, be it resolved, the House of Baptist concurring that the 59th General Convention of Protestant Episcopal Church in the United States of America record its conviction that the death penalty ought to be abolished.

The prosecutor wants to argue that we must be like blind cattle, following the law of the State, and in our hearts and in our souls we cannot make an individual decision as to what is true and what is correct and what is prominent. I submit to you that this will be one of the most endearing experiences of your life. It won't be over today. In your souls and in your heart you must look to tomorrow. I plead with you don't kill Robert.

BY THE COURT: Mr. McGuire do you want to be heart now?

BY MR. McGUIRE: Yes, Your Honor.

CLOSING ARGUMENT

BY MR. McGUIRE:

Mr. Herring has talked to you about the death penalty. I have thoughts on it too, but I will not cover that ground twice.

You have been told by the Prosecution that the death penalty is the law in this state and that you are not here to think about it, you just have to apply it. Well, you have to apply the law in this case, but you don't have to apply the death penalty. You know, the death penalty and the death penalty as it's applied are different things.

For the brief period that I have been involved in the State Public Defender's office, brief in terms of my career, I have been involved in three murder cases where the death penalty was an issue. The State of Nevada asked for the life of my client Jose Hyman Aguilar down in Lincoln County and they didn't get it. They are here today asking for the life of Robert Ybarra, I don't know if they will get that or not.

Then there was my client, Dennis Lyndon Dean. There has been a lot of talk about reasonable inferences in this case. There has been a lot of talk about patterns. Just from that little amount of information I think there is a reasonable inference we can draw. I think there is a pattern in the application of the death penalty, a pattern that exists all over our country. You see it in the south. You can also see it in the north and in the west.

You probably do not remember the trial of Dennis Lyndon Dean. He killed a woman in White Pine County. I do not remember any requests for his life by the prosecution or arguments about aggravating circumstances, past criminal record involving crimes of violence, mitigating factors, because nobody -- nobody asked for his life. In the final analysis he was offered a deal and he took it. You heard now from Mr. Reverend Hall what

his life is like, life in prison, but a productive, worthwhile life. I would submit there is a pattern there when the State asks for the life of Mr. Aguilar and Mr. Ybarra and let Mr. Dean take the easy way out.

You have also been told that there is a case which is appropriate for the death penalty and that you will know it when you see it. That is not the standard. You are not allowed to come in here and look at the facts in this case and know when you see it. These instructions tell you how we calculate, how we deliberate on whether or not death is appropriate. That is the standard to which you are held.

In Instruction No. 6 it points out that the death penalty may only be imposed if you find one or more aggravating circumstances and mitigating circumstances do not outweigh the aggravating circumstance or circumstances. So, it is not a question of looking at the case and knowing it if you see it.

Let's look at the aggravating circumstances. Instruction No. 9 tells you that an aggravating circumstance of murder in the first degree is when the murder was committed by the defendant who was previously convicted of a felony involving the use or threat of violence to another person. You will have with you two documents that the State introduced into evidence that show that Robert was convicted in California about five years ago of such a crime. You will notice that he was twenty-two years old at the time that it happened. You won't know a lot more about it but you will know that whatever happened, the judge in that case, after considering the appropriate penalty, gave Robert probation.

A mitigating circumstance that I would like to

mention now is the absence of a significant history of prior criminal activity. I would like to suggest to you that that is what we really have here.

The question has been raised, well, how do we know what is significant? Is it one conviction, two convictions, three convictions? Well, I think we know that it is not one conviction because the legislature, when we set forth the factors to consider mitigation, they could have said a mitigating circumstance is no history of prior criminal activity or conviction. They could have said that only those of us who have crystalline records and who have never had a brush with the law are entitled to have that considered in mitigation. But they did not say no history of prior criminal convictions, they said no significant history. I would submit to you they did not mean the early brush of a twenty-two year old man, a charge that ultimately was evaluated as being worthy of probation. I do not think there is a serious aggravating factor there, in fact, what you have is a mitigating factor under our statutes.

You have another instruction that tells you an aggravating circumstance of murder in the first degree is where the murder was committed while the defendant is engaged in the commission of sexual assault and another one indicating where it was committed in the commission of kidnapping in the first degree. You have deliberated on those charges of sexual assault and kidnapping in the first degree and found beyond a reasonable doubt that they were committed and I don't have any argument with your verdict. I am not here to argue with you on that. But I would submit to you that these should be considered as one aggravating circumstance.

What happened that evening was one transaction, one bad act, one lapse from self control, observation of duty as a citizen I would submit to you that you should put that on a scale as one aggravating circumstance.

Then we have a troubling instruction here, Instruction No. 17, that I know you will spend some time with, "You are instructed that an aggravating circumstance of Murder in the First Degree is where the murder involved torture, depravity of mind or the mutilation of the victim". Nancy was burned and what happened to her comes well within the mutilation. That's there.

Ladies and gentlemen, you are going to be required to consider whether the evidence shows part of these aggravating circumstances beyond a reasonable doubt, and I ask you to think very carefully as you deliberate about Instruction No. 17 that discusses murder by means of torture because there are a couple of parts of it.

We know that Nancy suffered a lot of pain as a result of what was done to her, but I do not think anyone knows what really went on out there that night, I include Mr. Ybarra when I say that I don't think anyone knows.

Before you can find that this aggravating circumstance of torture is present you are going to have to know from the evidence that has been presented to you what happened out there in some detail beyond a reasonable doubt. You are going to have to know such things I would submit as whether Nancy was conscious at the time that that fluid was poured on her.

Now, you have heard one version, one piecing together of the events of that evening, a reasonable

version based on the evidence that suggested that after the sexual assault Robert somehow became enraged, inflamed, possibly by a remark that was made to him, possibly by a threat to turn him in, to report him, somehow he became enraged and he battered Nancy, he struck her and kicked her and knocked her unconscious, and that it was on her "lifeless body" -- and I quote from the words in the argument of the Prosecutor -- on her "lifeless body he poured that fluid." Now the Prosecutor would suggest that she recovered consciousness before the match was struck. I don't know where that comes from.

We know that she became conscious. We know that she suffered a lot of pain. We do not have any more reason to believe she was conscious when that was ignited or that she was unconscious and, in fact, apparently dead, if you accept one theory of what happened.

As far as motive, was it for revenge? Was it for persuasion? It was not for persuasion, you know that. Was it for a sadistic purpose? It may have been the pathetic, futile, stupid efforts of a panic-stricken young man to cover up an impulsive crime of rape, and perhaps he felt murder in striking her dead committed in a moment of passion, that is as likely as any other account and again I do not know what happened out there.

I do know that in all the testimony you have heard, and much of it came from Robert's mother and father and his brothers and cousins, there was nothing to indicate a sadistic nature in this boy, a boy with poor control, a boy who sometimes flew off the handle

but not sadistic. It hasn't been there.

Ladies and gentlemen, you are going to have to find beyond a reasonable doubt that Robert Ybarra lit Nancy Griffity on fire with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion, or a sadistic purpose to consider torture as an aggravating factor and you have to find that beyond a reasonable doubt and you have to know that much about what happened out there that night.

You will consider Instruction No. 18, which defines depravity of mind, and again consider the various ways it might have happened out there. If Robert did burn Nancy's body, some stupid effort to cover up what he might have though then have been the crime of murder, certainly the crime of rape or kidnapping by your verdict, we cannot condone that. We cannot approve of it. But I would submit to you it falls far short of depravity of mind, characterized by an inherent deficiency of moral sense and rectitude.

You will see Instruction 20 on mutilation, that happened, put that on the aggravating side of the scale for what it's worth. It's worth something. Those are the aggravating circumstances that you have been instructed on and that there is such evidence for.

You are also given a number of instructions on mitigating circumstances. Why do we even have mitigating circumstances in our statute? Why are we even prepared to think about the possibility that a crime like this can be mitigated and that somehow it can be a lesson.

I suggest that we recognize the possibility of mitigation because we are weak. We know that our brothers and our friends and our neighbors are weak

and that is why our legislature puts into our statute the directive that in a case like this, after we have considered whether the aggravating circumstance is there, whether this is a case where we can even contemplate the death penalty, that we then look for mitigation to see if it's there. It's a right to have mitigating factors considered that we have given to ourselves through our elected representatives.

You are being asked to do something very difficult. You are being asked to weigh aggravating circumstances and mitigating circumstances and juries do it. Juries have done it before. I am sure you will. What a terrible thing to contemplate. You cannot put it on a scale and read off a dial. How can we even contemplate what these things should weigh? What does mutilation of the victim weigh? What does emotional disturbance weigh? How can we compare them?

I suppose a certain weight is given in a case like this to aggravating circumstances. But it is natural when we hear about something like this, the death of Nancy Griffith, you may think suppose that had been my daughter, my sister, a friend of mine, my neighbor, how would I feel? There is a tendency to give some weight to the wrong that's been done in there and we should out of sympathy for our fellow human being. I submit that that is an appropriate context also in which to weigh the mitigating factors.

I said a moment ago that we are directed to look at mitigating factors. We have a law that provides for the possibility of mitigation because we recognize the fact that life is hard and people are weak. I submit that we should look at this in the context as if

our own respectful, dutiful son had suddenly done something unthinkable; the boy next door who had always been a polite and said yes, mam', no mam', made a good appearance; the hard working boy who suddenly went over the edge; I think that we should weigh these also in the context that there is a defendant here who is a person as well as a victim.

Instruction No. 21 tells you, "You are instructed that a mitigating circumstance is where the defendant has no significant history of prior criminal activity." You know that he does not have no history of prior criminal activity. Look at those papers carefully and decide your own mind how significant they are. It is not a significant history of prior criminal activity.

You are also instructed, in Instruction No. 22, that a mitigating circumstance is where the offense was committed while the defendant was under the influence of extreme mental disturbance, even though the influence of such mental disturbance was not sufficient to constitute a defense of a crime or reduce the degree of the crime. The prosecution says we should show it to you. I submit we have.

You have considered, in your deliberations the testimony of Drs. Richnak, Chappel, Gerow, Molde and Gutride and at that time you were considering whether we had met a very high standard, the standard of the McNaughtin test for legal sanity and lack of responsibility due to mental disturbance under the law in this state, and you found that we did meet that test. You found that legal insanity was not there. But, something was there, the history of Robert Ybarra's

illness and depression and inability to cope, the loss of his wife, his suicidal response to that, his coming to Ely, his drinking, that mental disturbance was there. Mixed Organic Brain Syndrome was there. I submit that that was there, not of a severity you found to excuse his act under the law, but the history of mental problems, mental defects, that came through that stand, that should be put on the scale as a mitigating circumstance.

Is the emotional disturbance also the emotional disturbance from the loss of his wife and the futile efforts to get her back and the emotional disturbance that was revealed in the events of the evening of September 28, 1979, that is just written all over that evening?

Your Honor, perhaps it would be appropriate to take a break at this time.

BY THE COURT: Certainly.

Again we have gone over an hour and it is always a good idea to take a break if we can find an appropriate place.

Ladies and gentlemen, do not converse among yourself or with anyone else on any subject connected with the trial. Do not read, watch or listen to reports of or commentary of the trial or people connected in the trial, including without limitation the radio, newspaper and television. Do not form or express any opinion on any subject until it is finally submitted to you.

We will be in recess for ten minutes.

(Whereupon at the hour of 4:35 p.m. a recess was held in the proceedings.)

(Whereupon at the hour of 4:50 p.m. the recess was concluded and the following proceedings had.)

BY THE COURT: Let the record reflect the continuation of our case of the State of Nevada, Plaintiff, vs. Robert Ybarra, Defendant; the presence of the Defendant; his counsel; the District Attorneys; the presence of the jury and of the alternate in the box.

We are ready to hear continued argument on behalf of Mr. McGuire. Please continue.

BY MR. McGUIRE: Thank you, Your Honor.

Ladies and gentlemen, Instruction No. 27 tells you that "A mitigating circumstance of Murder in the First Degree is the youth of the defendant at the time of the crime."

You know that at the time of the crime Robert, who is now 27, would have been 25. Our legislature, which provided that this has to be considered as a mitigating circumstance did not draw any line. They didn't say, well, the defendants 25 or under were not on the scale or if the defendant is over 30 that is an aggravating factor. They just state the youth of the defendant at the time of the crime. How young do you have to be to be youthful? What is the standard for comparison there?

When you consider that a mitigating factor, whether it is even a mitigating factor and when you weigh it in your hands to see how heavy it is and to see if it is entitled to any weight or how much weight, I hope that you will consider it in the light of what you know about Robert because Robert was 25 calendar years old, some people are younger than others, consider it in light of the fact that he is dull-normal

intelligence. Now, that is not so bad, 16% of us are dull-normal intelligence and the other 84% are something else. Most of them are probably a little brighter than dull-normal. That is something that has to be considered, I think.

In weighing the youth of the Defendant, consider those report cards too, for what they are worth. I think they may add a little heft, not much, but they might, and Robert is entitled to it. Think about all that you know from this case about Robert's level of maturity, development, growth as a human being to this point through the year 1979.

We talked a few minutes ago about the weight to be given to these circumstances. They're all on separate sheets of paper. They are all about the same length. They are all about the same amount there, some of them are bricks and others are feathers, but I think the instructions tell you even these mitigating factors that are feathers, even if they are just feather weight, Robert is entitled to have them assessed and put in his side of the scale.

Ultimately you are going to come to a balancing point and decide whether they are aggravating factors. You have already decided that from your verdict on kidnapping and sexual assault. So, they're there. So, you are going to have to go to that next step. You are going to have to compare them and see whether the mitigating circumstances outweigh the aggravating circumstances. When that balancing is done you are going to come to a verdict one way or the other. It is going to be an all-or-nothing thing.

Mr. Herring and I will be as pleased if the

mitigating circumstances outweigh the aggravating circumstances by a featherweight as if it's by a ton of bricks. If the aggravating outweighs the mitigating by a feathers weight, I don't know how we will feel.

So, anyway for what Robert's youth is worth, access it carefully and if it's there put it on because if it's there he is entitled to it.

There are some other mitigating circumstances set forth here but I am not going to go over all of them in detail because there is one that stands out and that I am asking you to give a lot of thought to when you go into deliberation on the penalty in this case and that is Instruction No. 24, "You are instructed that a mitigating circumstance of Murder in the First Degree is where at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of intoxication even though that impairment was insufficient to constitute a defense to the crime or reduce the degree of the crime."

Was Robert intoxicated that evening? You know he was. You heard the testimony of Rodney Smoger. You heard the testimony of David Glenn, Joanna Glenn. You heard the testimony of Dr. Martin Gutride after he sat here through the testimony of Rodney Smoger. He was not Robert's father or brother or cousin. He was just a guy who worked with him for a couple of days. After Dr. Gutride had listened to Rodney Smoger's account of the drinking that Robert had drunk that evening, he said "A guy who drank that much would be wacked out of his mind."

You were told that there was a beer can in

Robert's trailer with a fingerprint on it of Nancy Griffith. From that there is a reasonable inference that Nancy Griffity was in Robert's trailer that evening. There is also another reasonable inference that after Robert and Nancy went to his trailer he continued drinking. He probably drank later on in his truck. Robert was intoxicated that evening. How does intoxication stack up as a mitigating circumstance? I submit to you that it is an interesting mitigating circumstance. We probably have a lot more experience with intoxication, a mitigating circumstance in our own lives and in our own minds than any other that has been mentioned. Most of us probably do not know anybody who has been diagnosed as having mixed organic brain syndrome and may not know anybody who is dull-normal or at least we may not know that they are dull-normal. You may not know anybody that is emotionally disturbed. We probably all know people that drink. We probably all extend the people who drink around us a lot of mitigation on a lot of occassions.

There has been some talk about what the law is in Nevada and what it is in White Pine County. It is a little hard to argue intoxication out here as mitigation. We tend to be pretty hard drinkers. I am not impressed by somebody who just has a six-pack of beer, but on the other hand we accept fairly hard drinking and make allowances for it. Sometimes other fellow citizens, as a result of intoxication, fail to appreicate the criminality of their conduct. They fail to conform their conduct to requirements of law.

Let's take a hypothetical example. Take one of our friends or neighbors, a long-time White Pine

County resident, somebody who maybe has a problem with drinking, maybe started drinking at fifteen, like Robert did, maybe he has a few DUI's, but a few DUI's, let's say three, have not taught him anything about drinking, they haven't made him think he has a drinking problem. He gets tanked up one evening, goes out on the highway, the Pioche Highway, maybe Highway 50 between here and Ruth, for example, has blood alcohol of .15, .18, 12 or more, weaves across the yellow line and kills a couple of people. In a case like that with two people deceased instead of one, and I would suggest that having two people deceased instead of one would be an aggravating circumstance -- heavy aggravating circumstance. Does anyone take that man into court and ask for death in the gas chamber? What would the bodies of two people killed in a head-on collision look like? Mutilated. They would be all mutilated, wouldn't they? Would anyone go into court and show the jury photographs of their autopsies? Present the extensive testimony from a forensic pathologist? Would a letter be read from a doctor who treated one of them about their suffering and their final moments, if they were killed instantly? I don't think so, because we recognize that drinking is a heavy, heavy, mitigating factor.

Certainly this is not a felony DUI case that I am arguing to you, no. We have, as you found, deliberate pre-meditated, willful, first degree murder here, but there is still something else going on in that case. The hypothetical case or hypothetical problem drinker that kills two people and that is the weight that we give to the mitigating factor of alcohol abuse, a very heavy weight, a weight that the evidence shows that Robert is

entitled to.

You know, speaking of the difference between these two cases, the case of the felony DUI I just discussed and the case of first degree murder that we have here, committing first degree murder is not an aggravating factor. You are not entitled to weigh that on the scales against Robert. You have to find something more. The fact that this is a first degree murder case does not come under our law to justify the death penalty.

You have already considered those elements of deliberation and premeditation and willfulness. You probably have those pretty well settled in your minds. Of course, the instructions that you have received told you that deliberation could be there at a time between suggestive thoughts in the human mind and the premeditation could be there at the same time does not require thinking about it for days or weeks. You must have come to some conclusion as to how Robert premeditated and deliberated.

You know yourself at this point whether you think that he was premeditating or deliberating on murder when he showed Johnna and Nancy where he lived, when he let Johnna off at her sister's house. How much deliberation and premeditation went into his act when he left behind fingerprints and tire tracks and footprints, -- beer cans with fingerprints on them. All of that will have to be weighed again in assessing these mitigating factors.

Well, that is the problem in weighing and calculating and that is going to be before you, but I would like to talk about the context of which that deliberation should be done.

This case has been talked about from the beginning as a death penalty case. It could also be a life penalty case. There is a debate going on in our country between people who label themselves pro-life and the other who get labeled as non pro-life and I hope as you begin your deliberations that each of you labels yourself a pro-life because that is what this case is about at this point -- life and death.

I think it is better to be alive than to be dead. Nancy Griffith thought that and struggled for life with an energy so tenacious that few of us could equal. We cannot bring her back. She should have gotten that break D. A. suggested, but she didn't and we cannot do anything about that. But we can decide now whether or not we are going to be pro-life or pro-death. I think it is better even for Robert Ybarra to be alive than to be dead.

The J. C.'s are a local young man's organization. They have a creed. They believe a lot of things. One of the things they believe is that earth's great treasure lies in the human personality. We lost a part of that great treasure on September 29, 1979, when Nancy died. But now you are being asked to throw a bit more of it away, perhaps not as large a piece, perhaps not as fine a piece, but you are being asked to take a little bit more of that treasure and just waste it and throw it away.

I would like to read a little thing that was written by John Donne, part of it you are probably all familiar with in his meditation of the toll of the bells. He was apparently ill one time, when you look back in the sixteen or seventeen hundreds, and he heard a bell tolling. Back then it was the custom to toll a church

bell when someone was very ill and close to death. In his meditation, he speculates that perhaps the person for whom that bell was tolling was so sick that he didn't know that the bell was being tolled because of his illness and expected death. Then he went on to think perhaps I am the one who is so sick and I don't realize that they're tolling the bell for me. And then he went, in a little less than two pages, and wrote at some length about the human community that we are all a part of and the interest that we all have in one another if only we realize it. He said this:

"No man is an island, entire of itself.
Every man is a piece of the continent,
A part of the main;
If a clod be washed away by the sea,
Europe is the less;
As well as if a promontory were,
As well as if a manor of thy friends of
of thine own were;
Any man's death diminishes me,
Because I am involved in mankind;
And, therefore, never send to know for
whom the bell tolls,
It tolls for thee."

He was talking about the diminishment we suffer when we lose even the smallest part of our human community as well as when we lose a more prominent or perhaps the more worthwhile parts.

A man once said, and I will paraphrase it because I do not want to read a great deal to you, he said "Even as its done onto the rest, So it's done unto me." He was talking about the least of them.

He was talking about people like Robert Ybarra.

What I am asking you to do at the conclusion of your deliberations is to take this special verdict, it's at the bottom of my stack, I think it's probably at the bottom of yours, and it says:

"We the Jury in the above-entitled case, having found the Defendant, Robert Ybarra, Jr. guilty of MURDER IN THE FIRST DEGREE, designate that the mitigating circumstances outweigh aggravating circumstances. Therefore, the Jury, fix the penalty for the crime MURDER IN THE FIRST DEGREE as:..."

There are two little boxes there, check the top one, it says "Life without the possibility of parole." Date and sign it. It will not be any slap of the wrist and it will not be any green light to murder or any license to kill. And it will be just in this case.

BY THE COURT: Mr. Johnston are you prepared to close at this time?

BY MR. JOHNSTON: Yes, Your Honor.

BY THE COURT: Please go forward.

CLOSING ARGUMENT

BY MR. JOHNSTON:

May it please the Court, counsel and ladies and gentlemen:

I think I have to apologize to you at the beginning, because, well, I feel that my thoughts at this time are rather random. My comments in closing will be that way. They are not organized. They are not typed out in any format. I have heard and have felt many things which I want to respond to.

I appreciate your patience. I promise that I

will not be unduly long. I will keep it brief. One of the first things that you probably know as you listen to the argument, as you listen to the discussion of the attorney's involved, is that I have a different feeling and a different approach to man's inhumanity to man than the Defense attorneys do. It's a real feeling.

I would like to touch on some of the things that Mr. McGuire and Mr. Herring talked about. I regret that Mr. Herring is not here any longer to share in some of these comments.

Mr. Herring spent a long period of time telling you what it is like for someone to die, what the process is like in the last hours at the State penitentiary, what the rooms looks like, where the executioner stands, how the death occurs. It was simply attempt not only to open your eyes to what would happen, but also to make a guilt transfer, to convert you people into the executioner today so that when you deliberate the feeling in you would be am I the one killing him? Can I reconcile that? That is not the issue.

You know, speaking of our role in something like that, do you eat beef? Do you ever eat chicken? Do you want to be the butcher? Do you want to be the chicken farmer? Same difference.

I am here to administer the law, and there was a lot of harping about the law, as he said it, the law of the state, and the incriminating finger went toward that chair (indicating). The law of the state is that it is something you are to consider. That is what I ask you to do. I am asking you to consider.

There was a mention of capital punishment being legal murder. That is not true. Society has had to

come up with ways to try to control certain elements of it. If capital punishment is legal murder, then is an arrest legal kidnapping? It doesn't fit. It doesn't work.

There was talk of Gilmore from Utah. An interesting story of the fellow that died before Gary Gilmore died, how the fellow was shot up and then lived for a period of time and bled to death. You are to understand though that we do not shoot them in Nevada. Also you are to understand that the executioner, the five men that handled the rifles in that case, purposedly missed, and that after that the State of Utah only used police officers to do it again.

Now, Gary Gilmore -- you know, it is interesting to talk about some of these notorious criminals. Oh, they make great reading and many, many volumes have been sold of Gilmore's story now.

Norman Mailer's book "The Executioner's Song" tells in great detail the story of Gary Gilmore and his death as well as all the facts leading up to that death.

The think what he Defense counsel did not mention when they talked about Gary Gilmore was they did not mention the night in July, July, 1976, when a young man by the name of Max David Jenson(ph), a student, was working, and after a robbery was taken into the bathroom with his young daughter, told to kneel down, and then shot in the back of the head. There was no mention of Bennie Bushnell, the young man who was shot in the same fashion the very next night. You see, we have a tendency to focus on different things, to look at life, to look at crime, from a different perspective. I suppose that is why some are in one business and others

of us are in another.

It is interesting, I think I mentioned in my opening that I suspected much of what you would be faced with today was the death penalty, and the elaborate and well written argument of counsel only verified that. The detailed studies on the death penalty. How effective it is or is not. Where it is being used and where it hasn't been used. It was interesting. One of the comments that came from Mr. Herring was that he said "I have made the argument against the death penalty," and then he plead that you not apply it in this case. The argument was against the death penalty. It is interesting that a man who helped draft our law now feels that the law is not appropriate. My suggestion is that the place to change the law is where the law was made, in the legislature. Tell these facts and figures that were placed on the board to them.

Speaking of facts and figure, you know, it was interesting, the comparison between the State of Maine and the State of Nevada for murder rates. I would submit that it is not our size, but maybe some things about our State -- our culture and our business -- would tend to inflate our murder rate compared to Maine's.

The states that had low death rates or murder rates because they had the death penalty, but the question was never answered which came first, the low murder rates, or the death penalty? I would submit that it would generally be the low death rate existed before doing away with the death penalty.

There was a lot of talk about deterrents. Mr. Herring stated that one of the largest arguments in favor of the death penalty is that it is a deterrent to crime

and to murder -- a deterrent. It discourages other people. Well, let me tell you it is a deterrent. It is an absolute deterrent, it is a deterrent who is convicted and sentenced under the death penalty, that person won't murder again.

The death penalty also is a little bit like some other things that we can compare it to when you are talking about deterrents and how effective they are. How do you measure that? Picture a coastline and a lighthouse sitting on it. That lighthouse operates sending out a signal, warning ships. How often does it save a ship from crashing into the rocks? We don't know, but do we do away with lighthouses?

How often does the death penalty deter someone from killing another person? We don't know. Should we do away with the death penalty?

There has been a lot of talk about the Bible, scriptures, Christ, churches. For some two thousand years, Christianity has been on this earth to do away with sin. Has it happened? Using the same argument, should we do away with the churches, the Bible, Christianity? I would submit we should not.

Regarding the Bible, you know there has been a lot of use of it, particularly by Mr. Herring. I read the Bible from time to time, not a lot, but a little bit. It is disturbing to see it misused. And I believe it has. I believe it's been misquoted. It's been misimplied.

It was interesting in the closing of the trial that Mr. Herring read some scriptures about Christ talking with devil after forty days in the wilderness, about another time of chasing devils out, making the

comparison to Robert, and yet the defense was delusions and insinuations, not the real devil. Did Christ hallucinate and see a delusion or did Robert really see the devil? Misused, misapplied.

He said it would be a perversion for anyone to take the New Testament, the new law, and use it to support the death penalty, but it can be done. Christ was tempted by some of the pharacies in the 22nd chapter of Matthew. They had a coin. They were challenging him about whether or not the tribute should be paid to Caesar, hoping that they could trip him up, that he might say, no, don't pay it, thus taking him against the government or, yes, do pay it, undermining his committment to the Lord; and what was his response? The response was render unto Caesar that this is Caesar's and render unto God that which is God's.

After Christ established that church and left a great apostle named Paul came along. He wrote a letter to Titus and said to follow the law of the land in the first verse of the third chapter of Titus, and obey and be subject to kings and rulers.

There is freedom taught in the New Testament, but that freedom is not without responsibility. It is impossible to have that.

There is mention of some local murder cases, a case involving a defendant by the name of Aguilar and another one named Dennis Dean. The Aguilar case, I really cannot speak on. See that happened in Lincoln County and was prosecuted by another District Attorney, not our office, not myself.

The Dennis Dean case I can speak about. This case occurred about five or six weeks after the murder

in this case. That particular case I made the decision not to seek the death penalty. I made that decision based on the same kind of aggravating circumstances that appeared before you in this case. You see each case has to be weighed separately. Each case has to be evaluated on its own merits. Certainly every case is not appropriate, but some cases are appropriate for the death penalty.

There was mention of the mitigating circumstance of the youth. The question was posed what is the standard? The standard was posed by me. It was posed, backed by McGuire. What is the appropriate standard? Maybe the standard ought to be this: How does the age of the murderer compare to the age of the victim? Mitigating circumstance? I would suggest it's not. Twenty-five is more than an adequate age to take responsibility.

Mr. Herring made mention of the deterrent effect also of the death penalty, and said if you talk to people in prison they would tell you that the death penalty would have no effect on what they did. I would submit that if you were to go to death row and talk to ten people and say had you known the death penalty was in existence would it have stopped what you did? Probably not. But what if you talked to the people who did not end on death row?

You know you hear these stories of people who go in and hold up the gas station with their finger in their coat like this (indicating) or the toy gun and what do they say? I didn't use a real gun, I didn't want to hurt anybody. I didn't want the death penalty. It's a deterrent. It works.

There is not much mention of punishment. You know, if you had to say that there was something that is unpopular, maybe it is the death penalty as a punishment. But I would submit that punishment is a legitimate use of the death penalty. There's nothing wrong with it.

You know, I have three small children. It sometimes becomes necessary to discipline them. We tried to make the discipline, my wife and I, fit what they have done. I do not feel that punishment is that wrong. There is a time and a place and a use for it.

Back in Voir Dire in March and April one of the things I asked many people was do you think the punishment should fit the crime? I believe that in this case the evidence cries for it.

The mitigating circumstance here, too, I disagree with the defense. I am of the opinion that if we want to we can always find something to blame a bad result on. We can blame it on any number of things, but we as individuals need to be responsible. It is time to rid society of a problem.

You know, cancer is a problem. How is cancer taken out of the body? How do we cure it? Can we take a pill? Can we drink some medicine from a bottle and get rid of cancer? No. Science and medicine have not reached that point. Likewise certain people are no longer fit to be a part of society. They reach a point by their conduct where they need to be cut out, eliminated. So, the choice becomes life in prison or the death penalty. There is no question which alternative the defense prefers. Which alternative will serve the best interest of society?

I would like to take you back, if I could, to a dark night in the City of New York. The night was

March the 13th, 1964. On that particular evening a young lady by the name of Kathleen Genevici, known among her friends as Kitty, drove her car into the train station right near her home and began the one hundred foot walk toward her house. As she walked among the streets she saw in the shadows ahead of her and off to the side a man standing. Kitty became worried. He was between her and her door. So, she changed her course from the parking lot and headed up the street to a police call box to call for help. She didn't get more than about twenty feet when the man caught up with her and he stabbed her in the back. She began to scream "Oh my God, don't kill me."

A window across the street opened and a man yelled "Stop that" and the attacker fled.

Kitty struggled a little ways and a few minutes later the man came back and attacked her again, stabbing her several times more with the knife. Again someone looked out, a bus went by, a cry to "Stop it" and the attacker went and got into a white sedan and drove away.

Kitty struggled from out on the street side-walk back to the door next to her house and the attacker came back, parked his car, and stabbed her several more times before killing her.

The next day, March the 14th, a little short column in the New York Times noted that she had died and screams of her death had been heard but nothing had happened.

Then a new reporter on the beat followed up on the story and met with the Police Commissioner. A couple of days later, two weeks later, March the 27th the New York Times ran a story that shocked the world

[redacted]

when they told the story of Kathleen Genevici, stabbed 17 times over a period of 35 minutes, and 38 people witnessed at least part or all of the incident and not one called the police until she was dead.

On the night of September 28th, 1979, Nancy Griffith died. There weren't 38 people there to watch, but by sitting for two weeks through this trial, you, ladies and gentlemen, become the witnesses to a serious crime. The question now is how you respond? What will you do about it?

As I walked down from the terrace recently, coming down Campton just a couple of days ago, I looked over to my right and across the buildings, the motels down here, I could see the Silver State Cafe and the laundry and the place where Nancy Griffith and Johnna Cordova first met Robert Ybarra, Jr., and it gave me a chill to think how things might have been if there had not been that one chance meeting, that one chance way between them. What a difference it might have been to her life, to her family, to the community.

I would like to close with one last thought. It is a little saying that I enjoy and it goes like this: "The saddest words of tongue and pen, are these four words: 'It might have been.'" What a difference it might have been.

This is the appropriate case, ladies and gentlemen, and the State is asking you to reach a unanimous decision that Robert Ybarra should receive the death penalty.

BY THE COURT: That concludes the arguments of counsel, ladies and gentlemen.

The Clerk should have the Bailiff come forward

now to be sworn and to take custody of the Jury.

(Whereupon the Bailiff's were sworn to take charge of the jury.)

BY THE COURT: The Clerk will turn over the appropriate materials that will go with you. They will be in the hands of the Bailiff now.

We will ask everyone in the Courtroom to stand while the jury retires in the hands of the Bailiff. The alternate will be kept separate and will not be deliberating with the jury. Please retire.

(Whereupon the jury retired to commence their deliberations.)

BY THE COURT: Anyone that has anything to do with the case must be in contact with the Clerk's office.

(Whereupon at the hour of 5:45 the Court recessed.)

(Whereupon at the hour of 6:25 the recess was concluded and the following proceedings had outside the presence of the jury.)

BY THE COURT: Let the record reflect that we have received a question from the jury, and the question reads as follows:

"Violation of Section 245A of the Penal Code and related offense to the crime of Section 288A(b)(2)(c) of the Penal Code. What was the charge? What is aggravated assault?"

It is signed by David Kerry Green, the Foreman of the jury, I guess. This has already been delivered to us in chambers and counsel for each side have had an opportunity to see the question, correct, gentlemen?

BY MR. McGUIRE: That is correct, Your Honor.

BY MR. JOHNSTON: Yes, Your Honor.

BY THE COURT: Of course we are here in open Court now with only Mr. Ybarra present and the two attorneys. The jury is in the Jury Room.

There has been a typed response prepared. It is agreeable to the parties. The response reads as follows:

"Violation of Section 245A of the Penal Code and related offense to the crime of Section 288A(b)(2)(c) of the Penal Code is a felony involving the use or threat of violence to the person of another.

"Dated this 26th day of June, 1981."

It is to be signed by the District Judge and delivered to the jury. Is that agreeable with the parties.

as an answer to their question?

BY MR. McGUIRE: Yes, it is, Your Honor.

BY MR. JOHNSTON: It is fine with the State, Your Honor.

BY THE COURT: Alright. I will ask the Court to see that the answer is received.

The jurors should be told that this is a permanent record. This document that is signed by the Court, and after they read it we should have it back because it is filed and made a part of the record, the question and answer.

Mr. Clerk will you take the question and see that that is filed and it will be delivered to the jury immediately.

BY MR. JOHNSTON: If they could just be advised to keep them with the other documents.

BY THE COURT: Rather than bringing them up-stairs it is agreeable to handle it in this way. Is that correct?

BY MR. McGUIRE: It is, Your Honor.

BY MR. JOHNSTON: That is fine, Your Honor.

BY THE COURT: Alright. The Court will be in recess then and we will see what happens next.

(Whereupon at the hour of 6:28 the Court recessed the proceedings.)

STATE OF NEVADA)
: ss.
COUNTY OF WHITE PINE)

I, RENEE SILVAGGIO, CSR, Official Court Reporter of the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, do hereby certify that I was present in Court during all the proceedings had and testimony given in the above-entitled Court heard in Ely, Nevada, on the 26th day of June, 1981, and took verbatim stenographic notes thereof, and that the foregoing three pages contain a full, true, and correct transcription of my stenographic notes taken as aforesaid, and a full, true and correct copy of all proceedings had and testimony given to the best of my ability.

RENEE SILVAGGIO, C.S.R. 122
Official Court Reporter

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CASE NO. 1511

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA,
Plaintiff,
-vs-
ROBERT YBARRA, JR.,
Defendant.

REPORTER'S TRANSCRIPT
OF
PENALTY HEARING
BEFORE THE HONORABLE MERLYN H. LOYT, DISTRICT JUDGE
Saturday, June 27, 1981

Reported by: RENEE SILVAGGIO, C.S.R. 122
Official Court Reporter

-oOo-

APPEARANCES:

FOR THE STATE: ROBERT J. JOHNSTON, ESQUIRE
District Attorney
White Pine County Courthouse
Ely, Nevada 89301

and

GARY D. FAIRMAN, ESQUIRE
Deputy District Attorney
White Pine County Courthouse

FOR THE DEFENDANT: STEVEN G. McGUIRE, ESQUIRE
Deputy State Public Defender
420 Campton Street
Ely, Nevada 89301

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

THE STATE OF NEVADA)
Plaintiff,)
-vs-)
ROBERT YBARRA, JR.,)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

PENALTY HEARING

BY THE COURT: Let the record reflect the continuation of the case of the State of Nevada vs. Robert Ybarra, Jr.; the presence of Mr. Ybarra; his counsel, Mr. McGuire; the presence of the District Attorneys; the presence of the jury and the alternate in the box.

We are now in the penalty phase of the case and I ask the jury if they have reached a verdict in this phase of the case?

(All respond affirmatively.)

BY THE COURT: Alright. I will ask the Clerk of theCourt to go forward and pick up the verdict.

I ask the Clerk of the Court to read aloud the verdict in this case.

BY THE CLERK:

"We the Jury in the above-entitled case having found the Defendant, ROBERT YBARRA, Jr., guilty of murder in the first degree, designate that the aggravating circumstances which have been checked below have been established

beyond a reasonable doubt.

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

"The murder was committed while the defendant was engaged in the commission of forcible rape, (sexual assault).

"The murder was committed while the defendant was engaged in the commission of kidnapping in the first degree.

"The murder involved torture, depravity of mind, or the mutilation of the victim.

"We the Jury, stated that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances designated.

"Therefore, we the Jury fix the penalty of the crime of Murder in the First Degree as DEATH.

Dated in Ely, Nevada, this 27th day of June, 1981."

Signed David K. Green, Foreman.

BY THE COURT: Mr. McGuire, would you like to have the Jury polled?

BY MR. McGUIRE: We would, Your Honor.

BY THE COURT: The Clerk will poll the Jurors individually. Each of you must respond whether or not it is your verdict.

BY THE CLERK: Ivan Wright, is this your verdict?

BY JUROR NO. 1, MR. WRIGHT: Yes.

BY THE CLERK: David Green, is this your verdict?

BY JUROR NO. 2, MR. GREEN: Yes.

BY THE CLERK: Donald Adams, is this your verdict?

BY JUROR NO. 3, MR. ADAMS: Yes.

BY THE CLERK: Donna Swallow, is this your verdict?

BY JUROR NO. 4, MS. SWALLOW: Yes.

BY THE CLERK: Joyce Christiansen, is this your verdict?

BY JUROR NO. 5, MS. CHRISTIANSEN: Yes.

BY THE CLERK: Joseph Christiansen, is this your verdict?

BY JUROR NO. 6, MR. CHRISTIANSEN: Yes.

BY THE CLERK: Sydney Hayward, is this your verdict?

BY JUROR NO. 7, MS. HAYWARD: Yes.

BY THE CLERK: Leo Nuwall, is this your verdict?

BY JUROR NO. 8, MR. NUWALL: Yes.

BY THE CLERK: Ellis Peterson, is this your verdict?

BY JUROR NO. 9, MR. PETERSON: Yes.

BY THE CLERK: Sarah Bowler, is this your verdict?

BY JUROR NO. 10, MR. BOWLIN: Yes.

BY THE CLERK: Patricia Williams, is this your verdict?

BY JUROR NO. 11, MS. WILLIAMS: Yes.

BY THE CLERK: Joseph Anderson, is this your verdict?

BY JUROR NO. 12, MR. ANDERSON: Yes.

BY THE COURT: The Jurors have been polled. The verdicts have been recorded by the Clerk of the Court.

The Court at this time thanks the jurors for the responsible efforts on their part that was extended over fifteen months. It is probably an historical effort in this State. It is the longest effort has this Court has ever known the jury to sit and perhaps the longest in the history of the State and a long, difficult, and I know full well how difficult your responsibilities were in this case.

I thank you for your job. And I assure you that your services are a benefit to society and that you have completed your services. In effect your panel was excused a year ago. So, I excuse you all from further jury service and I ask those in the Courtroom to stand and let the jury retire.

(Whereupon the jury retired from the Courtroom.)

BY THE COURT: In accordance with the statute of the State, the Court sets this matter forward, as it is required to do, to the Nevada State Department of Parole and Probation to conduct the investigation that is required by the laws of the State of Nevada to return a report to this Court in order that the matter can go forward for sentencing.

If counsel are agreeable I will fix July 23rd,

which is approximately a month from today, as an appropriate time for the formal entry of judgment and the passing of sentence in this case. Is that agreeable with the parties?

BY MR. JOHNSTON: That is fine with me.

BY MR. McGUIRE: Yes, Your Honor.

BY THE COURT: Alright. We fix the sentencing in this case at 10:00 o'clock on July 23rd, Thursday, 1981. The Court is in recess.

(Whereupon at the hour of 1:22 a.m. the proceedings were concluded.)

STATE OF NEVADA :
) ss.
COUNTY OF WHITE PINE :

I, RENEE SILVAGGIO, CSR, Official Court Reporter of the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, do hereby certify that I was present in Court during all the proceedings had and testimony given in the above-entitled Court heard in Ely, Nevada, on the 27th day of June, 1981, and took verbatim stenographic notes thereof, and that the foregoing three pages contain a full, true and correct transcription of my stenographic notes taken as aforesaid and a full, true, and correct copy of all proceedings had and testimony given to the best of my ability.

RENEE SILVAGGIO, C.S.R. 122
Official Court Reporter

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