ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 40248

FILED

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APPELLANT'S OPENING BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

DAVID ROGER
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

BRIAN SANDOVAL
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

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DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

DAVID ROGER
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

BRIAN SANDOVAL
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATUTES

OTHER

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MARLO THOMAS, Appellant,	)	
vs.	)	
THE STATE OF NEVADA, Respondent.	)	Case No. 40248

STATEMENT OF ISSUES

1. WHETHER THOMAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

2. WAS IT AN ABUSE OF DISCRETION TO DENY THOMAS A FULL EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION HABEAS CORPUS

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF THE CASE

THOMAS was charged by way of Information with Conspiracy to Commit Murder and/or Robbery; Murder with Use of a Deadly Weapon (two counts); Robbery with Use of a Deadly Weapon; Burglary While in Possession of a Firearm; and First Degree Kidnapping with Use of a Deadly Weapon. The case arose out of the stabbing deaths of Matthew Gianakis and Carl Dixon at the Lone Star restaurant at Cheyenne and Rainbow in Las Vegas, Nevada. (1 APP 1-7)

The State filed a Notice of Intent to Seek the Death Penalty setting forth six aggravating circumstances: two prior violent felony convictions; during commission of robbery; during commission of burglary; to avoid lawful arrest; and conviction of more than one murder. (1 APP 8-10)

Trial commence on June 16, 1997, Lee Elizabeth McMahon and Peter LaPorta of the Special Public Defender's Office represented THOMAS. THOMAS was convicted of Count I - Conspiracy to Commit Murder and/or Robbery; Count II - Murder of the First Degree with Use of a Deadly Weapon; Count III - Murder of the First Degree with Use of a Deadly Weapon; Count IV - Robbery with the Use of a Deadly Weapon; Count V - Burglary While in Possession of a Firearm; Count VI - First Degree Kidnapping with Use of a Deadly Weapon. (1 APP 274)

The penalty hearing took place on June 25, 1997 and the jury began deliberations at 1:40 PM and returned verdicts at 6:40 PM. (1 APP 275) The jury found in it's special verdict

the existence of all six (6) charged aggravating circumstances and found no mitigating circumstances and based thereon returned two verdicts of death. (1 APP 275)

THOMAS appealed the conviction and sentence of death to the Nevada Supreme Court. Appellate counsel was Mark Bailus, Esq. THOMAS' direct appeal was denied on November 25, 1998 and his conviction and sentence of death affirmed. Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998). A Petition for Writ of Certiorari was filed with the United States Supreme Court and denied on October 4, 1999. (1 APP 38)

Thereafter THOMAS timely filed a Petition for Writ of Habeas Corpus (Post Conviction) on January 6, 2000 alleging, inter alia, that he had been denied the effective assistance of counsel at district court and on direct appeal. (1 APP 36-70) On July 16, 2001 THOMAS filed a Supplemental Petition for Writ of Habeas Corpus and Points and Authorities in Support Thereof. (1 APP 71-147) After hearing argument on the issues raised, the Court granted THOMAS a limited evidentiary hearing. (1 APP 283-84) The evidentiary hearing was bifurcated due to scheduling problems and occurred on January 22, 2002 and March 15, 2002. (1202-21; 222-33) Post Hearing Briefs were submitted by THOMAS and the State. (1 APP 185-94; 195-201)

On August 21, 2002 the Court entered it's decision on the record (1 APP 252-54) and on September 10, 2002 the Notice of Entry of Order and Decision was served on THOMAS (1 APP 234-249). The Notice of Appeal was timely filed (1 APP 250-51).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

STATEMENT OF FACTS

A. TRIAL TESTIMONY

For purposes of this Brief THOMAS will incorporate the Facts from the decision of this Court on the direct appeal, with the caveat that THOMAS has consistently maintained that no proper investigation was conducted before the trial or penalty hearing and therefore the testimony presented was virtually unopposed at trial and penalty hearing and does not accurately portray the facts of the case. (See e.g. Buffalo v. State, 111 Nev. 1145, 901 P.2d 647 (1995) wherein the Court found that the overwhelming evidence that appeared after trial was entirely different from the evidence that came to light after post-conviction pleadings).

> "In March, 1996, Thomas worked at the Lone Star Steakhouse in Las Vegas as a dishwasher until he was laid off from his job. Apparently Thomas had trouble showing up for work because he lived some distance away in Hawthorne with his wife, Angela Love Thomas.
>
> On Sunday, April 14, 1996, Thomas, Angela, and Angela's fifteen-year-old brother, Kenya Hall, drove from Hawthorne to Las Vegas and arrive at the house of Thomas' aunt, Emma Nash, and cousin Barbara Smith. At about 7:30 a.m. on Monday, April 15, 1996, the three travelers drove to the Lone Star Steakhouse in order for Thomas to try to get his job back. The restaurant was closed to the public that early in the day. Angela waited in the car while Thomas, accompanied by Hall, entered the Lone Star. No discussion about robbery occurred at any time between Thomas and Hall. According to Thomas, he possessed a loaded 9-millimeter weapon. As they were walking toward the building from the parking lot, a delivery truck arrived nearby. Thomas expressed dismay and returned to the car to retrieve another loaded gun before approaching the building again. At this time, Thomas possessed both a loaded .32-caliber revolver and a loaded 9-millimeter weapon.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

The two went to the back door where employees usually enter. Stephen Hemmes, a Lone Star employee, was leaving temporarily because he did not have work appropriate shoes. Thomas and Hemmes spoke for a few minutes, and Thomas inquired as to who was acting as manager that morning. Hemmes replied that the manager was Vincent Oddo, and Thomas stated that he did not like Oddo. Thomas further asked when Hemmes would return, Hemmes answered that he would return in approximately twenty minutes, and he left. Thomas then knocked on the back door, and another employee, Matthew Gianakis, opened the door for them to enter.

Thomas and Hall walked through the kitchen toward the manager's office. Thomas knocked on the office door, and Oddo, who was on the phone, let them in. In Thomas' videotaped confession, (FOOTNOTE OMITTED) Thomas stated that he and Oddo discussed Thomas' job, which led to an argument, and that Thomas left the office. Thomas further stated that he had no intent to commit robbery; however, he admitted that he returned to the office with Hall a minute later and pulled out his .32-caliber revolver. Thomas stated that Oddo became frightened and told Thomas and Hall to take whatever money they wanted. Despite the fact that Thomas admitted pointing the gun directly at Oddo, Thomas claimed that Oddo initiated the robbery by giving them money.

Both Hall and Oddo testified that upon Thomas' arrival at the manager's office, Thomas immediately snatched the phone from Oddo's hand, hung it up, and pulled out his .32-caliber revolver. Thomas pointed it directly at Oddo's face and demanded that Oddo open the safe and give them the money. Oddo complied, and Thomas handed the gun to Hall and requested that Hall retrieve the money from Oddo. It is disputed whether Thomas told Hall to shoot Oddo. Although frightened and confused, Hall took the gun from Thomas, remained in the office with Oddo, took two or three bank bags of money from Oddo, allowed Oddo to run out of the building, and left to return to the car.

After Thomas gave Hall the gun, but before any money exchanged hands, Thomas left the office because he knew that two employees and former co-workers, twenty-one year old Gianakis and twenty-four year old Carl Dixon, were 'circling around.' According to Thomas' videotaped confession, Thomas went to the men's restroom, which was also a hangout for the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

employees, to find the two men. Upon entering the bathroom, Thomas saw Gianakis at the sink and Dixon in a stall. Thomas also observed that Gianakis had laid a meat-carving knife with a five- to seven- inch blade on the bathroom counter. Thomas blocked the door to prevent the two from leaving the bathroom while the robbery was taking place in the manager's office. A struggle ensued between the three men, and Thomas picked up the knife and stabbed Dixon several times until Dixon fell to the floor. Meanwhile, Gianakis ran from the bathroom, and Thomas ran after him, stabbing him once in the front and once in the back.

Evidence was also presented at trial that Thomas specifically enticed or attempted to entice the two victims into the bathroom. Hall's testimony revealed that Thomas explained that he told Dixon he needed to talk in the bathroom. Once Dixon entered the bathroom with Thomas, Thomas began stabbing him. Thomas told Hall that he then called to Gianakis to join him in the bathroom, but Gianakis refused to enter. Then, according to Hall, Thomas chased Gianakis around the comer and stabbed him twice.

After returning to the car, Thomas asked Hall if Hall had killed Oddo. Upon learning that Hall had not, Thomas stated that Hall should have done so because 'you're not supposed to leave witnesses.' At some point, the money from Oddo's office was transferred from the bank bags to a dark blue pillowcase.

Oddo, who had escaped after giving Hall the money, ran across the street to call for help. Gianakis, who had just been stabbed twice, stumbled next door to a gas station/mini-mart and collapsed, dying shortly thereafter. Dixon's dead body remained on the bathroom floor.

The medical examiner testified at trial that Dixon suffered fifteen defensive stab wounds on his extremities and three to five severe stab wounds on his right chest about six inches deep, penetrating his heart, lungs, pulmonary artery, and aorta. The cause of Dixon's death was multiple stab wounds. The medical examiner further testified that Gianakis suffered two fatal stab wounds, one to his chest and one to his back, penetrating both his heart and left lung. The cause of Gianakis' death also was stab wounds.

Thomas, Hall, and Angela returned to Nash and Smith's house. Thomas told both Nash and Smith that

if anyone asked, they should state that they had not seen him. Smith noticed that Thomas' clothes and shoes were bloody. The blood on the clothes and shoes was later determined to be consistent with Dixon's blood. Thomas gave Smith the money-filled pillowcase, and she started counting the contents. Thomas told her that "I did it" and that he had to take care of something and get rid of two people. He also stated to Nash that one of the two men got away (referring to Gianakis) and Thomas hoped that he (Gianakis) died. Thomas gave $1,000.00 to Smith to give to his mother, and he gave the .32-caliber revolver to Nash to give to her son. Thomas then changed his attire and took his bloody clothes and shoes, the knife used in the Lone Star bathroom, and the 9-millimeter gun into the desert beyond the house's backyard. The police recovered all the items except for the 9-millimeter gun, which was never found.

Thomas, Hall, and Angela packed the pillowcase containing the rest of the money into the car trunk and drove back to Hawthorne, where they were arrested. . . ." (1 APP 78-81)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

B. EVIDENTIARY HEARING

On July 16, 2001 THOMAS filed a Supplemental Petition for Writ of Habeas Corpus and Points and Authorities in Support Thereof. (1 APP 71-147) After hearing argument on the issues raised, the District Court granted THOMAS an evidentiary hearing on only three of the issues raised in his Petition and Supplement. Those issues were designated by the Court in it's ruling as issues Eight, Nine and Ten (1 APP 252-54). Issue Eight was failure to object to prosecutorial misconduct at the penalty hearing, Issue Nine was improper argument by trial counsel, and Issue Ten was failure to adequately prepare for trial.

The evidentiary hearing was bifurcated due to scheduling problems and occurred on January 22, 2002 (1 APP 202-21) and March 15, 2002 (1 APP 222-233). As the hearing was limited to only three issues THOMAS provides a summary of the testimony as it relates to each specific issue. As THOMAS has cited many of

the arguments and testimony throughout the Supplemental Points and Authorities the validity of which was not challenged by the State or the District Court THOMAS cites to said Supplement for the verbatim quotes. The alternative would require a voluminous appendix encompassing the entire trial and penalty hearing.

Number 8: Failure to Object to Improper Closing Argument

THOMAS specifically described the improper arguments made at the penalty hearing in his Supplemental Petition. (1 APP 114-121) During the evidentiary hearing trial counsel Peter LaPorta and Lee Elizabeth McMahon were asked about the arguments and failure to object. The first argument challenged by THOMAS was one that urged the jury to show THOMAS the same mercy that he showed the victims as follows:

> "The defendant is deserving of the same sympathy and compassion and mercy that he extended to Carl Dixon and Matt Gianakis. Don't let justice be robbed in the name of mercy." (1 APP 114)

Ms. McMahon testified that THOMAS was the first capital penalty hearing that she had ever handled (1 APP 208), and that the argument seemed objectionable and that she had no tactical or strategic reason for not objecting at the penalty hearing (1 APP 210). Likewise LaPorta admitted that the argument was objectionable and he had no reason not to object other than he "missed it." (1 APP 225)

The next group of improper arguments were grouped under the category of "sending a message to the community" and included the following:

> "By your verdict you will be sending a message to the community. You will be sending a message to other people who might consider going into establishments to rob at gunpoint, at knife point. You will send a message to other criminals that when you go out to commit crimes, you do it at your own risk, and that if you kill during your crimes, the community is

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> looking at the most absolute and final punishment you can receive. Punishment is an appropriate objective of the criminal justice system. Punishment is society's sense of moral outrage at people who commit crimes. And in this case, deadly crimes." (1 APP 117-18)

Upon reviewing this argument McMahon stated that it was "certainly objectionable" and that she knew of no tactical or strategic reason for not objecting. (1 APP 210) LaPorta also had no strategic reason for his failure to object. (1 APP 225)

The answers from LaPorta and McMahon were basically the same for all of the remaining improper arguments in this area, that they should have objected and had no tactical or strategic reason for having failed to do so. The remainder of the statements are discussed hereinbelow in the argument section.

THOMAS also raised on direct appeal the failure to object to the improper arguments that contained facts not in evidence. When confronted with these arguments and failure to object McMahon could not recall any evidence being presented concerning programs to rehabilitate or about the number of persons on death row that had killed once or more than once (1 APP 211). She could also not recall any strategic or tactical reason for not objecting to the arguments at the penalty hearing (1 APP 211-12). Just as with all of the other improper closing arguments, LaPorta could recall no strategic reason for his failure to object (1 APP 227).

Number 9: Improper Remarks by Trial Counsel Toward THOMAS

The second issue the court allowed to be litigated at an evidentiary hearing concerned disparaging remarks about THOMAS made by LaPorta in his arguments to the jury. (1 APP 121-23)

When questioned at the evidentiary hearing about the comments, LaPorta stated that he made the arguments for a strategic reason and explained that:

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ARGUMENT

I.

THOMAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees that a person accused of a crime receive effective assistance of counsel for his defense. The right extends from the time the accused is charged up to and through his direct appeal and includes effective assistance for any arguable legal points. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State Supreme Court has consistently recognized that the right to counsel is necessary to protect the fundamental right to a fair trial, guaranteed under the Fourteenth Amendment's Due Process Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill the constitutional requirement. The right to counsel is the right to effective counsel, that is, "an attorney who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v. Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763 (1970).

Pre-trial investigation is a critical area in any criminal case and failure to accomplish same has been held to constitute ineffective assistance of counsel. The Nevada Supreme Court in Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

> "It is still recognized that a primary requirement is that counsel...conduct careful factual and legal investigations and inquiries with a view toward developing matters of defense in order that he make informed decisions on his client's behalf both at the pleading stage...and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

are in accord that pre-trial investigation and preparation for trial are a key to effective representation of counsel. U.S. v. Tucker, 716 F.2d 576 (1983). A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999). See also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988) holding that a failure to investigate possible evidence could not be deemed a trial tactic where the lawyer did not view relevant documents that were available.

In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in language applicable to this case, stated:

> "Defense counsel, whether appointed or retained is obligated to inquire thoroughly into all potential exculpatory defenses and evidence, mere possibility that investigation might have produced nothing of consequences for the defense could not serve as justification for trial defense counsel's failure to perform such investigations in the first place. Fact that defense counsel may have performed impressively at trial would not have excused failure to investigate defense that might have led to complete exoneration of the Defendant."

In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the Nevada Supreme Court found that trial counsel was ineffective where counsel failed to conduct adequate pre-trial investigation, failed to properly utilize the Public Defender's full time investigator, neglected to consult with other attorneys although urged to do so, and failed to prepare for the testimony of defense witnesses. See also, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

To establish ineffective assistance of trial counsel, a defendant must satisfy the two prongs set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under

Strickland, a defendant must first show that his counsel's performance was deficient. To be deficient, counsel's performance must be "outside the wide range of professionally competent assistance" Strickland, 466 U.S. at 690. Upon establishing deficient performance, a defendant must then show that this deficient performance prejudiced his defense. The defendant need not show that the deficient performance more likely than not altered the outcome of the case, but must demonstrate only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694.

THOMAS'S conviction and death sentence are invalid under the State and Federal guarantee of effective assistance of counsel, due process of law, equal protection of the laws, cross-examination and confrontation and a reliable sentence due to the failure of trial and appellate counsel to provide reasonably effective assistance of counsel. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

THOMAS filed an extensive Petition for Writ of Habeas Corpus (1 APP 36-70) and Supplemental Petition for Writ of Habeas Corpus (Post Conviction) and Points and Authorities in Support Thereof (1 APP 71-147) that contained numerous specific areas of deficient performance by trial and appellate counsel, but the District Court refused to grant THOMAS an evidentiary hearing on the majority of the issues. (1 APP 264) Not only should the District Court have granted an evidentiary hearing, THOMAS was entitled to relief. THOMAS will note those issues

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

wherein the Court granted an evidentiary hearing. The following grounds mandated that his conviction and sentence be set aside:

1. ***Trial counsel failed to make contemporaneous objections on valid issues thereby precluding meaningful appellate review of the case in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.***

A simple review of the decision of this Court on direct appeal identifies fives issues that were not the subject of contemporaneous objection at trial and thus were not considered by the Court on appeal, except for a brief canvas for errors that could be classified as "plain" or "patently prejudicial" errors. Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998). If the issues had been properly preserved at trial they would have been fully reviewed on direct appeal, as all issues which were the subject of contemporaneous objection were discussed by the Court. THOMAS submits that trial counsel was per se ineffective in not preserving these appellate issues and that therefore only the prejudice prong of the Strickland test remains to be considered. The issues which were raised on direct appeal but not preserved by trial counsel were the following:

(A) The trial court erred in allowing cumulative and otherwise inadmissible evidence of prior bad acts during the penalty phase of appellant's trial.

The District Court refused to allow an evidentiary hearing on this issue finding that there was no merit to the issue and therefore trial counsel was not ineffective for failing to

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

object (1 APP 283). The Court did not address the fact that appellate counsel raised the issue on direct appeal and therefore must have believed there was merit and that trial counsel should have objected.

There are competing and irreconcilable principle at work in the current capital sentencing procedures in Nevada. Specifically, NRS 175.552 provides that at a penalty hearing virtually everything is admissible:

> "In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced."

This is to be contrasted to the plain meaning of the holdings in a number of cases that:

> "Evidence of unrelated crimes for which a defendant has not been convicted is inadmissible during the penalty phase if it is dubious or tenuous, or if its probative value is outweighed by danger of unfair prejudice, confusion or issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence"

Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179 (1991). *See also*, Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983) and Hollaway v. State, 116 Nev. Ad. Op. 83 (2000).

The evidence to which THOMAS complained in his direct appeal was comprised of "...of what amounted to the entire history of Appellant's contacts with the criminal justice system since the age of 12. This evidence spanned a time frame of approximately 12 years, and continued beyond Appellant's incarceration pending the instant offenses. In sum, the State offered 20 witnesses during the penalty phase of Appellant's trial." Of these 20, only three offered "victim-impact"

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

statements. The remaining 17 witnesses related many of the same instances of prior bad acts of the THOMAS. Further, there were multiple listing and re-listing by the State during closing arguments of these same offenses. (1 APP 88)

Officer Charles Hank testified about arresting THOMAS for possession of a stolen vehicle in 1990. Officer Alyse Hill with the Division of Family Youth Services testified about THOMAS being arrested for a possession of the same stolen vehicle in 1990. Loletha Jackson testified that THOMAS attacked her. Officer Mike Rodrigues testified that Loletha Jackson told him that THOMAS attacked her. Officer Jeff Carlson testified that in 1984, when the THOMAS was twelve-years of age, he got in trouble for battery on a teacher. Parole Officer Michael Compton testified about that same 1984 event. Officer Michael Holly testified that THOMAS was arrested for robbery in 1990. Parole Officer Michael Compton referenced that same event. Correctional officer Roger Edwards testified that THOMAS allegedly threw urine on a pregnant correctional officer. Correctional officer Gina Morris was called to testify about the same urine incident. (1 APP 88-89)

These incidents, most of which were uncharged criminal acts, ranged from improper, verbal comments to allegedly inciting other prisons, and the aforementioned urine incident. Of particular note, however, is the multitude of witness, many of whom, in their duplicative efforts, were testifying as to events of which they had no personal knowledge over hearsay and authenticity objections. (1 APP 89) It is apparent that the State desired to bolster their position that THOMAS was deserving of death by placing a parade of law enforcement people with the indicia of authority in front of the jury.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Certainly, since the Court allowed unauthenticated, hearsay evidence, the State should have been limited on the number of witnesses. Instead, and in the unbridled enthusiasm to achieve a conviction of death, the State reached back to THOMAS'S pre-teen days and hit the jury with a barrage of authority figures who all concurred that THOMAS was and will always be a bad person. This was literally -- overkill without any discernible limits under Nevada existing precedent. This type of cumulative and questionably relevant testimony was clearly designed mislead the jury and beat them into submission to return a sentence of death. In their zeal for death, the State clearly went too far and presented their case in an improper way. As such, the death sentence must be reversed.

It must also be noted that all of the "character" evidence was admitted and then the jury was not properly instructed on the use of the evidence in the death qualification procedure. Thus the prejudicial and unconstitutional impact of the evidence was magnified by the lack of proper instruction to the jury.

(B) <u>The statutory scheme adopted by Nevada fails to properly limit victim impact statements.</u>

The District Court refused to allow an evidentiary hearing on this issue finding no merit to the claim that trial counsel was not ineffective for not objecting. (1 APP 283) The Court did not address specifically whether the statutory scheme meets constitutional standards.

At the penalty hearing in the case at bar the State presented testimony from Fred Dixon, who also read a prepared statement of Phyllis Dixon and Matthew Gianakis. (1 APP 90) The Nevada capital statutory scheme imposes no limits on the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

presentation of victim impact testimony and as such can result in the arbitrary and capricious imposition of the death penalty.

This Court has held that due process requirements apply to a penalty hearing. In Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991) the Court held that due process requires notice of evidence to be presented at a penalty hearing and that one day's notice is not adequate. In the context of a penalty hearing to determine whether the defendant should be adjudged a habitual criminal the court has found that the interests of justice should guide the exercise of discretion by the trial court. Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990). In Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), the United State Supreme Court held that state laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. The procedures established by the Nevada statutory scheme and interpreted by this Court have therefore created a liberty interest in complying with the procedures and are protected by the Due Process clause.

The Eighth Amendment to the United States Constitution requires that the sentence of death not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153 (1976). The fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Woodson v. North Carolina, 428 U.S. 280 (1976). Evidence that is of a

dubious or tenuous nature should not be introduced at a penalty hearing, and character evidence whose probative value is outweighed by the danger of unfair prejudice, of confusion of the issues or misleading the jury should not be introduced. Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

The United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) held that the Eighth Amendment erects no per se bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Court did acknowledge that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violate the Due Process Clause of the Fourteenth Amendment. Payne, 111 S.Ct at 2608, 115 L.Ed.2d at 735. In Homick v. State, 108 Nev. 127, 136-137, 825 P.2d 600, 606 (1992) this Court embraced the holding in Payne, and found that it comported fully with the intendment of the Nevada Constitution and declined to search for loftier heights in the Nevada Constitution. In cases subsequent to Homick, the Court has reaffirmed its position, finding that questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of trial court. Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649 (1994). The Court has not, however, addressed the issue of presentation of cumulative victim impact evidence or been presented with a situation where the prosecution went beyond the scope of the order of the District Court restricting the presentation of the evidence.

Some State courts have voiced disapproval over the admission of any victim impact evidence at a capital sentencing hearing finding that such evidence is not relevant to prove any

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

fact at issue or to establish the existence of an aggravating circumstance. State v. Guzek, 906 P.2d (Or. 1995). In considering a claim that victim impact testimony violated due process and resulting in a sentence imposed under the influence of passion, prejudice or other arbitrary factors, the Kansas Supreme Court in State v. Gideon, 894 P.2d 850, 864 (Kan. 1995) issued the following warning while affirming the sentence:

> "When victims' statements are presented to a jury, the trial court should exercise control. Control can be exercised, for example, by requiring the victims' statements to be in question and answer form or submitted in writing in advance. The victims' statements should be directed toward information concerning the victim and the impact the crime has on the victim and the victims' family. Allowing the statement to range far afield may result in reversible error."

Trial counsel was ineffective for not properly raising and preserving this issue and by not doing so prejudiced THOMAS' chance of success on appeal.

(C) The prosecutor committed misconduct during the closing argument of the penalty phase of appellant's trial by appealing to the passions and prejudice of the jurors and by denigrating the proper consideration of mitigating factors.

This District Court did not allow an evidentiary hearing on this issue finding that the comments made by the prosecutor and defense counsel were fair comments in asking the jury to make a decision. (1 APP 283)

The direct appeal addressed several improper arguments made by the prosecutors at the penalty hearing. Due to the failure of trial counsel to make contemporaneous objection, this Court, on direct appeal, did not address the merits as to any of the improper arguments or the cumulative effect of the prejudicial arguments. (1 APP 93) The arguments challenged on

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

direct appeal which were found to be barred from appellate review were as follow:

The following remarks were made by the State during the course of their closing argument at the penalty hearing:

> "MR. ROGER: It is terrible when one human being is killed, and killed in the fashion in which this defendant chose to kill. But when you kill two people, you've crossed the line."
>
> "MR ROGER: And then there are fact-specific, **alleged by the defense.** The murders were committed by a person with an IQ of 79. The murders were committed by a person who had suffered as a child and young adult with learning disabilities. The murders were committed by a person who had bladder incontinent until age 12. I don't mean to belittle these problems. But the fact of the matter is that many people in society come from broken homes, they come from homes where perhaps they have been neglected. They have learning disabilities. **But is that sufficient to mitigate a double murder?**" (emphasis added).
>
> "MR. ROGER: By your verdict you will be sending a message to the community."
>
> "MR. SCHWARTZ: With regards to mitigating circumstances or mitigating factors that have been alleged by the defense, as you heard about half of those mitigating factors come from our statutes. But the ones that seem to deal with this particular case, like **IQ, mercy, bladder control, bladder difficulties, those were submitted by defense counsel. They are not statutory mitigating circumstances.**" (emphasis added).
>
> "MR. SCHWARTZ: His bladder condition, the fact that he may have been teased as a child, which many of us probably were exposed to growing up, that can **serve as no excuse** for what he did on April the 15th." (emphasis added).
>
> (1 APP 93)
>
> "MR. SCHWARTZ: The defendant took the lives of two innocent men in a horrific manner. Where does he go from there? What does he do for an encore? The shorter the sentence, the sooner this community will find out." (1 APP 93-94)
>
> "MR. SCHWARTZ: The return of a death sentence is society's way of -- or act of self-defense. A return of a death verdict is the enforcement of society's right to be free from murder." (1 APP 94)

The most disturbing arguments made by the prosecution were

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

those that minimized the existence and utilization of mitigating circumstances in the weighing process. Recently in Hollaway v. State, 116 Nev. Ad. Op. 83 (2000) this Court reversed a death penalty based in part on the argument of the prosecution against the existence of mitigation. In Hollaway the Court stated:

> "The United States Supreme Court has held that to ensure that jurors have reliably determined death to be the appropriate punishment for a defendant, 'the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.' *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). In *Penry*, the absence of instructions informing the jury that it could consider and give effect to certain mitigating evidence caused the Court to conclude that
>
> > 'the jury was not provided with a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision. Our reasoning in [Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982),] thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Hollaway, 116 Nev. Ad. Op. 83 at page 10. The Court then went on to command that a jury instruction be given in all capital cases directing the jury to make an independent and objective analysis of all relevant evidence and that arguments of counsel do not relieve the jurors of this responsibility.

Courts of other states have made clear that it is improper for prosecutors to argue statutory mitigating circumstances not raised by the defense. State v. Bey, 709 N.E.2d 484 (Ohio 1999). The trial court should instruct and counsel should comment only on mitigating factors specifically raised by an accused. State v. Mills, 582 N.E.2d 972, 986 (Ohio 1992). The prosecutors herein argued against all of the statutory mitigating circumstances even though most of them were not

raised by the defense and were totally inappropriate to the facts of the case.

In the case at bar the arguments of the prosecutors directly violated that which this Court has announced as the proper use of mitigation evidence by the jury. If this issue had been preserved by trial counsel it could have formed the basis for the Court to have vacated the death penalty on direct appeal. In reviewing the issue under the standard of ineffectiveness of counsel, this Court should now determine the merits of each of the claims, both individually and cumulatively.

(D) The trial court erred in using a set of jury instructions during the guilt and penalty phases which violated the due process rights of the appellant.

The District Court did not allow an evidentiary hearing on this issue finding that trial counsel was not ineffective for not being able to predict what the Supreme Court would do in the future with respect to jury instructions. (1 APP 283)

THOMAS challenged a variety of jury instructions on direct appeal despite the failure of trial counsel to object at the time instructions were settled. (1 APP 96) The denial of appellate review was extremely prejudicial to THOMAS in that this Court has found merit to similar claims in other cases. Trial counsel made an attempt to preserve an objection to the jury instructions, although without any substance, and the effort was not accepted by this Court. The objection by trial counsel was as follows:

> "THE COURT: Does the defense object to any of the instructions the Court has indicated will be given?
>
> MR. LaPORTA: Your Honor, the defense objects to the instructions as a package, based upon the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

defendant's constitutional rights that we believe, that as a whole, the instructions violate the defendant's due process rights under the United States and the State of Nevada's constitution. That's the only objection we'll make, Your Honor.

THE COURT: Does the State want to respond to that?

MR. ROGER: I don't know how, Judge. No, no response.

THE COURT: Yeah, again, I -- I respect your right to object to that and it's a matter of record, but I don't quite understand it so your motion is denied." (1 APP 96-97)

Apparently based on nothing more than the vague objection at trial, appellate counsel attempted to challenge the following instruction in the direct appeal:

(i) The premeditation and deliberation instruction.

THOMAS argued on direct appeal that the stock "instantaneous as successive thoughts of the mind" instruction violated the constitutional guarantees of due process and equal protection, was vague and relieved the State of it's burden of proof on every element of the crime. (1 APP 97) The challenged instruction was modified by the Court in Byford v. State, 116 Nev. Ad. Op. 23 (2000). In Byford, the Court rejected the argument as a basis for relief for Byford, but recognized that the erroneous instruction raised "a legitimate concern" that the Court should address. The Court went on to find that the evidence in the case was clearly sufficient to establish premeditation and deliberation.

Subsequent to the decision in Byford, supra, further challenges have been made to the instruction with no success. In Garner v. State, 116 Nev. Ad. Op. 85 (2000), the Court discussed at length the future treatment of challenges to what has been deemed the "Kazalyn" instruction. Garner was essentially in the same posture on appeal as was THOMAS, to

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

wit; the issue was being raised on direct appeal without having been preserved at the trial court level. In denying relief to Garner, the Court stated:

> "...To the extent that our criticism of the *Kazalyn* instruction in *Byford* means that the instruction was in effect to some degree erroneous, the error was not plain.....
>
> Therefore, under *Byford*, no plain or constitutional error occurred here. Independently of *Byford*, however, Garner argues that the *Kazalyn* instruction caused constitutional error. We are unpersuaded by his arguments and conclude that giving the *Kazalyn* instruction was not constitutional error.....
>
> ...Therefore, the required use of the *Byford* instruction applies only prospectively. Thus, with convictions predating *Byford*, neither the use of the *Kazalyn* instruction nor the failure to give instructions equivalent to those set forth in *Byford* provides grounds for relief."

Garner, 116 Nev. Ad. Op. 85 at 15.

The State, during closing argument took full advantage of the unconstitutional instruction, arguing to the jury, inter alia:

> "If at this very moment I decide to grab that knife and kill somebody right here and right now, this very moment, I'm guilty of first degree murder, premeditated killing because I made a conscious decision to take a weapon and stab it into the flesh of a living human being. That's first degree murder, that's premeditated murder. It doesn't matter how quickly you to decide to kill somebody as long as you made that conscious decision to take a life, that's first degree murder under the premeditation theory." (1 APP 98)

It is respectfully urged that trial counsel was ineffective in failing to object to the premeditation and deliberation instruction and that THOMAS was prejudiced by the failure as the error was only reviewed for plain or constitutional error on direct appeal.

(ii) The "felony murder" instruction.

The direct appeal did not specify a certain instruction in

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

this challenge but rather argued that the felony-murder rule should not apply to cases where there is not relationship between the felony and the homicide. Basically, THOMAS asserted in his direct appeal that the robbery was an afterthought to the homicide and that as the intent to rob was not formed until after the deaths, then the felony murder rule could not provide a basis for finding first degree murder. (1 APP 98-99)

At the settling of jury instructions THOMAS did not specifically object to instruction number 11 as failing to specify that in order to commit the crime of robbery, the intent to commit the crime must be formed prior to the death of the victim. (1 APP 99)

Robbery is defined in NRS 200.380 as follows:

> "1. Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear."

The question that must be answered is whether there must be proof that the intent to commit robbery was formed before or after the death of the victim. The State of Arizona has considered this issue in cases similar to the one before the Court. In State v. Comer, 799 P.2d 333 (Ariz. 1990) the Supreme Court of Arizona on direct appeal from convictions of, inter alia, first degree murder and armed robbery upheld the conviction, but only on an express finding that the evidence

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

supported a finding that the defendant formulated the intent to steal property before the killing . Comer, 799 P.2d at 341. The Comer Court quoted with approval the statement of the Court in State v. Lopez, 762 P.2d 545, 551 (AZ 1988) that:

> "Obviously, we are not saying that a defendant immunizes himself from a robbery conviction by killing the victim. What we are saying is that the robbery statute requires the coexistence of an intent to commit a robbery with the use of force. If a murder is committed with no intent to commit a robbery, it is still murder but it is not armed robbery. If a theft is conceived of, and executed after a murder, it is a theft but it is not an armed robbery." Comer, 799 P.2d at 340. (emphasis added)

In Lopez, supra, the Court set aside an armed robbery conviction and a felony-murder conviction based on a failure of evidence to establish that the intent to rob was formed prior to or at the time of the killing, stating in relevant portion:

> "Clearly, force was used on the victim and, just as clearly, property was later taken from him. However, the State failed to prove that the force was inflicted in the course of taking the property. The statutory definition of `in the course of committing' contained in A.R.S. §13-1901(2) avails the State of nothing because it presupposes a robbery has been committed. When the use of force and the taking of the property are not contemporaneous, there may be a theft, but there is not a robbery."

Lopez, 762 P.2d at 551.

In Norman v. Sheriff, 92 Nev. 695, 558 P.2d 541 (1976) the Court reviewed a robbery and battery charge on appeal from pre-trial petition for habeas corpus, and found sufficient evidence existed to hold the defendant for trial. In Norman two men, armed with a shotgun and pistol broke into an apartment looking for the whereabouts of a roommate. A struggle ensued and the assailants fled taking a portable television set and several Christmas presents. The Court found that:

> "Thus, although the acts of violence and intimidation preceded the actual taking of the property, and may have been primarily intended for another purpose, it is enough, to support the charges

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> in the indictment, that appellants, taking advantage of the terrifying situation they created, fled with Gaynos' property."

92 Nev. at 697.

Similarly, in Sheriff v. Jefferson, 98 Nev. 392, 649 P.2d 1305 (1982), the Court considered a robbery charge on review of a pre-trial Writ of Habeas Corpus. In Jefferson, the defendant argued that the victim had left the scene before her purse was taken and therefore it could not have been robbery. The Court mirrored the rationale of Norman that:

> "...it is enough to support the robbery charge if the accused, taking advantage of the terrifying situation he created, fled with the victim's property [citation] In the matter before us it is undisputed that when Cloonan's car window was smashed, she fled in fear, leaving her purse behind, and that when she returned moments later, the purse was gone...[T]hese facts, along with the other evidence adduced at the preliminary hearing, were sufficient to support the robbery charge."

Jefferson, 98 Nev. at 394.

Both Jefferson and Norman involved pre-trial habeas review of the factual issues and the Court ruled that sufficient evidence existed to hold the respective defendants for trial. Both cases also involved situations where the victims were still alive when the items of property were taken. These are significant differences from the facts before this Court. Most importantly, the defendants in Jefferson and Norman took advantage of the continuing acts of terror when the robbery was committed, i.e., there was the intent to rob formed during the course of activities of force or fear. The instructions in this regard create a virtual guarantee of a first degree murder conviction.

Instruction number 25 exacerbated the problem, by stating in part that

"Therefore, a killing which is committed in the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> perpetration or attempted perpetration of Burglary, Robbery, and Kidnapping is deemed to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder rule." (1 APP 102)

This Court needs to seriously consider the ramifications of such an extension of the felony murder rule and is so doing look at the reasoning that gave rise to the principle. This Court has recognized that in felony murder cases, the malice required to make a killing murder is supplied by the intent to commit an enumerated felony. Collman v. State, 116 Nev. Ad. Op. 82 at page 34 (2000).

Based on the foregoing arguments and authorities, it is respectfully asserted that the court erred in the instructions to the jury on the robbery charge and therefore on the felony-murder allegations and trial counsel was deficient in not objecting thereto to preserve the issue for appellate review.

(iii) The "equal and exact justice" instruction.

On direct appeal, a challenge was made to Instruction Number 45 which provided that:

> "Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds th evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada." (1 APP 102)

The argument put forth on direct appeal was that the instruction created a reasonable likelihood that the jury would not apply the presumption of innocence in favor of THOMAS, and would convict and sentence based on a lesser standard of proof than the Constitution requires. (1 APP 102-3) Phillips v. State, 86 Nev. 720, 475 P.2d 671 (1970). THOMAS now

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

respectfully submits that the instruction violated his rights under the Constitution to be presumed innocent and to only be convicted on evidence of guilt being presented beyond a reasonable doubt.

(iv) The "anti-sympathy" instruction.

Without any objection from trial counsel the Court gave Instruction No. 19 at the penalty hearing, the second paragraph of which provides:

> "A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgement and sound discretion in accordance with these rules of law." (Emphasis added) (1 APP 29)

It was error to give an anti-sympathy instruction. Sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses. Death penalty statutes must be structured to prevent the penalty being imposed in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2126, 33 L.Ed.2d 346 (1972). However, a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character and record and circumstance of the offense. Woodson v. North Carolina, 428 U.S. 280,96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The anti-sympathy instruction given violated THOMAS' Eighth Amendment rights because it undermined the jury's constitutionally mandated consideration of mitigating evidence. An alleged error in jury instructions in the sentencing phase of a capital case requires a determination of how a reasonable juror could construe the instruction in such ways to make its sentencing decision improper, the reviewing court should

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

reverse the sentencing decision. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

In California v. Brown, 479 U.S. 541, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the United States Supreme Court reviewed a jury instruction which a Defendant challenged on the ground that the "simply" portion of the instruction interfered with the jury's consideration of mitigating evidence. The challenged instruction informed the jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The court, upheld the instruction, as not being violative of the Eighth and Fourteenth Amendments, in reliance upon the inclusion of the word "mere". According to the court, a reasonable juror would understand the instruction not to rely on "mere sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.

In the instant case, the language of the instruction at issue, is not modified by the word "mere" which was crucial in the decision to uphold the instruction in California v. Brown, supra. The instant instruction is comparable to the instruction that was struck down in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), which was as follows: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." In reaching this conclusion, the 10th Circuit found the instruction precluded any consideration of sympathy and thus created an impermissible risk that a reasonable juror might disregard mitigating evidence.

Although the jury was instructed to consider any

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

mitigating circumstance, it was also instructed that its verdict may never be influenced by sympathy. The mitigating instruction did not cure the constitutionally defective anti-sympathy instruction. At best, the jury received conflicting instructions. In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Court stated:

> "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

A capital defendant has a constitutional right to have the jury give "individualized" consideration to the mitigating circumstances of his character, record and the circumstances of the crime. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

(v) The "reasonable doubt" instruction.

On direct appeal, appellate counsel challenged the reasonable doubt instruction given at both the guilt and penalty phases of the trial. (1 APP 105) The instruction given was the definition contained in NRS 175.211. The argument asserted on THOMAS' behalf stated that:

> "A formulation which essentially equates the standard of reasonable doubt with the standard of proof beyond a reasonable doubt necessarily violated due process by 'suggesting a higher degree of doubt than is required for acquittal under the reasonable doubt standard.' See, *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); cf. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991).
>
> The language in the reasonable doubt instruction given in this case, *sub judice*, imposes an impermissibly high standard for the quantum of doubt required for acquittal. The 'govern or control' language especially exceeds the 'common sense benchmark' for doubt expounded upon by the United States Supreme Court. See, *Victor v. Nebraska*, 511U.S. 1, 114 S.Ct. 1239, 1250, 127 L.Ed.2d 583 (1994).

The Supreme Court refused to address the merits of this

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

argument on direct appeal due to the failure of trial counsel to object to the instruction. Trial counsel's performance was deficient in that respect and the issue must be reviewed to determine if prejudice occurred from the ineffective assistance of counsel. (1 APP 106)

(vi) The "unanimous" instruction.

The final instruction which was challenged on direct appeal but ruled to be waived by failure of objection by trial counsel was Instruction Number 26 which allowed the jury to convict THOMAS of first degree murder without being unanimous as to the theory of guilt. (1 APP 106) THOMAS urges that the subject jury instruction violated his constitutional right to due process of law, presumption of innocence and improperly relieved the State of it's burden of proof, as it allowed THOMAS be convicted by a jury that did not have to agree unanimously as the facts proven by the State.

2. Trial counsel failed to make contemporaneous objections on valid issues during trial and appellate counsel failed to raise these issues on direct appeal, both failures being in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial. (The District Court only allowed a limited evidentiary on some of the issues raised in this area). (1 APP 284)

As discussed above there were issues that were raised on direct appeal despite the absence of contemporaneous objection. In addition to these issues there were other objections and motions that trial counsel failed to make at trial and were not raised on direct appeal. THOMAS asserts that appellate counsel was ineffective in failing to raise the issues set forth below

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

and that if they had been raised, THOMAS would have been successful on his direct appeal in having his conviction and sentence overturned. Appellate counsel could have shown that THOMAS' conviction and sentence were invalid under the State and Federal Constitutional guarantees of due process, equal protection of the laws, effective assistance of counsel and reliable sentence. THOMAS was not afforded effective assistance of counsel on direct appeal as numerous meritorious issues were not raised. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

(A) Trial counsel failed to ask that the jury be admonished concerning the "back in jail" comment of witness Nash.

The District Court did not allow an evidentiary hearing on this issue that counsel was not ineffective in not asking that the jury be admonished, but without stating any basis for so finding. (1 APP 293)

During the testimony of THOMAS' aunt, Emma Nash referred to a conversation that she had with THOMAS wherein she asked him if he had done something to put him "back into jail". Although trial counsel did object and make a motion for mistrial outside of the presence of the jury that was unsuccessful, there was no request for an admonishment even though the trial court was clearly willing to admonish the jury. (1 APP 107) Appellate counsel essentially conceded that the failure to request an admonishment rendered the error moot, by stating, inter alia:

> "Inasmuch as the jury, *sub judice*, never received an admonishment, there is no limit to the improper inferences which were drawn from being presented this inadmissible evidence"

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

. . .

> "When the witness referred to Appellant's past experience in jail, the only inference is that he was in jail for a serious crime such as the crimes he was presently being charged with. Absent a mistrial or an immediate admonishment by the trial court, error occurs" (supp)

This Court was not unmindful of the failure to request an admonishment and used same as a factor in denying relief, stating:

> "While the comment constituted error, it was harmless because the evidence against Thomas was overwhelming, the comment was unsolicited by the prosecutor and inadvertently made, **and Thomas declined the court's offer to admonish the jury.**" (1 APP 108)

Thus once again the actions of trial counsel contributed to the lack of meaningful appellate review. The record is barren of any statement of reasoning for trial counsel to refuse the offer of the trial court to provide the admonishment due to the refusal of the District Court to grant THOMAS a full and meaningful evidentiary hearing. Likewise appellate counsel failed to even argue that the admonishment would not have made a difference as you cannot unring the bell of error.

(B) Trial counsel failed to object and move to strike overlapping aggravating circumstances and appellate counsel failed to raise the issue on direct appeal.

The District Court did not allow an evidentiary hearing on this issue noting that existing precedent from the Nevada Supreme Court allows the overlapping of three aggravating circumstances and that the issue was preserved for further review in federal court. (1 APP 283)

THOMAS asserts that overlapping and multiple use of the same facts as separate aggravating circumstances resulted in the arbitrary and capricious imposition of the death penalty.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Trial counsel failed to file any pretrial motion challenging the aggravating circumstances, failed to object at trial, failed to offer any jury instruction on the matter, and the issue was not raised on direct appeal. (1 APP 108)

The original notice of intent to seek the death penalty filed by the State on July 3, 1996, alleged the presence of six (6) aggravating circumstances, i.e., two instances of previous conviction of felony involving use or threat of violence; committed during the commission a burglary, committed during the commission of a robbery, committed in the commission of a robbery; the murder was committed to avoid or prevent a lawful arrest and convicted of more than one offense of murder in the first or second degree. (1 APP 8-10)

After the penalty hearing the jury found that all six (6) of the aggravating circumstances existed and found that there were no mitigating circumstances. (1 APP 109)

In essence the State was allowed to double count the same conduct in accumulating three of the aggravating circumstances. The robbery, burglary and avoiding lawful arrest aggravating circumstances are all based upon the same set of operative facts and unfairly accumulated to compel the jury toward the death penalty. The use of the same set of operative facts to multiply aggravating circumstances in a State that uses a weighing process, such as Nevada does, violates principles of Double Jeopardy and deprived THOMAS of Due Process of Law. United States Constitution, Amendments V, VII, XIV; Nevada Constitution, Article I, Section 8.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The

traditional test of the "same offense" for double jeopardy purposes is whether one offense requires proof of an element which the other does not. See, Bockburger v. U.S., 284 U.S. 299, 304 (1932). This test does not apply, however, when one offense is an incident of another; that is, when one of the offenses is a lesser included of the other. U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2857 (1993); Illinois v. Vitale, 447 U.S. 410, 420 100 S.Ct. 2260 (1980).

Courts of other jurisdictions have found the use of such overlapping aggravating circumstances to be improper. In Randolph v. State, 463 So.2d 186 (Fla. 1984) the court found that the aggravating circumstances of murder while engaged in the crime of robbery and murder for pecuniary gain to be overlapping and constituted only a single aggravating circumstance. See also Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

The California Supreme Court in People v. Harris, 679 P.2d 433 (Cal. 1984) found that evidence showed that the defendant traveled to Long Beach for the purpose of robbing the victim and committed a burglary and two murders to facilitate the robbery. In determining that the use of both robbery and burglary as special circumstances at the penalty hearing was improper the court stated:

> "The use in the penalty phase of both of these special circumstances allegation thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty' (Godfrey v. Georgia, (1980) 446 U.S. 420 at P.28, 100 S.Ct 1759 at p. 1764, 64 L.Ed.2d 398. The United States Supreme Court requires that the capital - sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> the individual offense and the individual offender before it can impose a sentence of death.' (Jurek v. Texas (1976) 428 U.S. 262 at pp. 273-74, 96 S.Ct. 2950 at pp 2956-2957), 49 L.Ed.2d 929). That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance."

Harris, 679 P.2d at 449.

Other States that prohibit a "stacking" or "overlapping" of aggravating circumstances include Alabama (Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978) disallowing use of robbery and pecuniary gain) and North Carolina (State v. Goodman, 257 S.E.2d 569, 587 (N.C. 1979) disallowing using both avoiding lawful arrest and disrupting of lawful government function as aggravating circumstances).

This Court should not reweigh the aggravating circumstances against the mitigating circumstances or examine same under a harmless error standard. The Nevada statutory scheme has two components that would seem to foreclose the existence of harmless error at a penalty hearing. First the jury is required to proceed through a weighing process of aggravation versus mitigation and second, the jury has the discretion, even in the absence of mitigation to return with a life sentence irregardless of the number of aggravating circumstances.

> "When there is a 'reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify the imposition of the death penalty,' the test for prejudicial error has been met. (citation omitted) Because the jury arrived at a sentence of death based upon weighing . . . and it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating circumstances to be harmless."

State v. Quisenberry, 354 S.E.2d 446 (N.C. 1987).

Justice Gunderson in his concurring opinion in Moses v.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

State, 91 Nev. 809, 815, 544 P.2d 424 (1975) stated with respect to harmless error that:

> "...judicial resort to the harmless error rule, as in this case, erodes confidence in the court system, since calling clear misconduct [or error] 'harmless' will always be viewed by some as 'sweeping it under the rug.' (We can at best, make a debatable judgment call.)"

The stacking of aggravating circumstances based on the same conduct results in the arbitrary and capricious imposition of the death penalty, and allows the State to seek the death penalty based on arbitrary legal technicalities and artful pleading. This violates the commands of the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and violates the Eighth Amendment to the United States Constitution and the prohibition in the Nevada Constitution against cruel and unusual punishment and that which guarantees due process of law.

Trial counsel was deficient in failing to move to strike the duplicate and overlapping aggravating circumstances and appellate counsel should have raised the issue on direct appeal and urged plain error, even in the absence of contemporaneous objection at trial.

(C) Trial counsel failed to object to prejudicial and inflammatory comments during the Opening Statement of the prosecution and appellate counsel failed to raise the issue on direct appeal.

The District Court did not allow an evidentiary hearing on this issue, however, found that there should have been objection by trial counsel, but the error was not of such a magnitude as to warrant relief. (1 APP 283-84)

During the Opening Statement the prosecutor made the following improper argument, with no objection from trial

counsel, to the jury:

> "Little did these two young men know that something evil was lurking out in the parking lot, this evil person who is the defendant, Marlo Thomas." (1 APP 112)

The duty of a prosecutor was expressed by the United States Supreme Court in Berger v. State, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed, 1314 and adopted by this Court in Garner v. State, 78 Nev. 366, 370, 374 P.2d 525 (1962):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The duty of the prosecutor during the opening statement was also described by the Court in Garner, supra.

> "After the jury has been selected and sworn, every criminal trial has three general phases--the opening statement, the proof and the summation. In the case at bar, the prosecutor struck 'foul blows' during each phase. The purpose of the opening statement is to acquaint the jury and the court with the nature of the case. It is proper for the prosecutor to outline his theory of the case and to propose those facts he intends to prove. State v. Olivieri, 49 Nev. 75, 236 P. 1100. However, it is his duty to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove."

Garner, 78 Nev. at 370-371.

This Court has long condemned improper argument by the prosecution. Collier v. State, 101 Nev. 474, 705 P.2d 1126 (1985); Flanagan v. State, 104 Nev. 105, 754 P.2d 830 (1988). Having been repeatedly condemned for improper closing arguments, prosecutors have now turned to misconduct during

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

opening statement. If the very same arguments had been made during closing argument they would have also have been objectionable and were even more so having been made during opening statement to the jury. With respect to improper closing arguments this Court has stated:

> "Thus, once again, we regretfully turn to consider the problem of prosecutorial misconduct: a burden to the judicial system that is totally unnecessary and, so far as the prosecution is concerned, often self-defeating."

Collier, supra, 101 Nev. at 477.

In the case at bar, the prosecutor engaged in prejudicial and improper argument to the jury under the guise of an opening statement, even referring to THOMAS directly as an evil person. (1 APP 114) The impact of this argument infected the entire proceeding and violated THOMAS' right to due process and a fair trial under the United States Constitution and the Constitution of the State of Nevada. It was ineffective for counsel to fail to object at trial and to raise the issue on appeal.

(D) Trial counsel failed to object to numerous instances of improper closing argument at the penalty hearing and appellate counsel failed to raise the issue on direct appeal and argue that the prosecutorial misconduct was plain error.

The District Court did allow an evidentiary hearing on this issue, and the testimony is summarized above in the Statement of Facts. The improper arguments were as follows:

(i) Trial counsel failed to object to the closing argument at the penalty hearing that urged the jury to show THOMAS the same mercy that he showed the victims.

The prosecutor improperly argued that the jurors should show THOMAS the same mercy he showed the victims:

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

"The defendant is deserving of the same sympathy and compassion and mercy that he extended to Carl Dixon and Matt Gianakis. Don't let justice be robbed in the name of mercy." (1 APP 114)

A prosecutor may not suggest that jurors show the defendant the same mercy he showed the victim. Exhorting the jurors to act in the same way that the perpetrator of a criminal homicide would act is the antithesis of generating a "reasoned moral response" to the defendant and his crime. In Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991) the Court held that it was impermissible for the prosecutor to argue that jurors should make their decision about whether the defendant should receive the death penalty in the "cruel and malevolent manner shown by the defendant when they tortured and drowned William Nicholls and shot Leonard Miller," which the Court characterized as an attempt to "incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence". In an argument similar to the one in the case at bar, Florida held that the prosecutor's argument that jury show the defendant same mercy he showed the victim "was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation." Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (per curiam) (holding cert. denied, 513 U.S. 1046 (1994).

This Court has not been consistent in adhering to the federal constitutional rule prohibiting prosecutors from suggesting that sentencers show the defendant the same sympathy or mercy he showed the victim. In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 444-45 (1997), the prosecutor argued that the jury should show the defendant the same sympathy he had shown the victim. Even though the case fell squarely under the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

federal constitutional rule enunciated in Lesko, supra, this Court nonetheless held that the prosecutor's argument was not improper because the defense had first raised the issue of mercy. The issue of mercy, however, is a proper consideration by sentencers. There is no rule which permits prosecutors to violate the Constitution in response to proper argument by the defense. The court in Williams appears to have misconstrued and misapplied the United States Supreme Court's holding in U.S. v. Young , 470 U.S. 1, 11 (1985), which upheld in certain circumstances the "invited response" rule, under which appellate courts can consider improper arguments by prosecutors in response to *improper* arguments by the defense to determine on *appeal* whether the prosecutor's misconduct amounts to reversible error. The decision in Williams, by contrast, is not limited to the determination of prejudice, but rather, allows prosecutors to respond improperly to *proper* arguments by defense counsel. The decision contravenes well-established federal law holding that it is a federal constitutional violation for a prosecutor to argue either that jurors show no mercy to the defendant or that they show the same mercy the defendant showed the victim.

Arguing that the jury should act in the same manner as the perpetrator of a criminal homicide is also inconsistent with the Nevada Supreme Court's own jurisprudence. In Collier v. State, 101 Nev. 473, 481, 705 P.2d 1126 (1985), the Nevada Supreme Court held that it is improper to "blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' the jury must approach their duties in anger and give the community what it needs.'" Urging the jury to show the defendant the same mercy he showed the victim

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

similarly asks the jury to "approach their duties in anger."

(ii) Send a message to the community.

Since Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985) the Nevada Supreme Court has denounced improper argument as prosecutorial misconduct. One of the instances of misconduct addressed in Collier, was an appeal to the jury to impose the death penalty based on community standards or moral. Collier, 101 Nev. at 479. Not only has Nevada condemned such argument courts of other states have specifically disapproved of arguments of counsel that a message should be sent to the community in order to protect society from crime. State v. Ramseur, 524 A.2d 188 (NJ 1987); State v. Rose, 548 A.2d 1058, 1092 (NJ 1988).

The arguments of the prosecutor's herein were penalty hearing arguments where a heightened standard of review is mandated.

> "At the sentencing phase, it is most important that the jury not be influenced by passion, prejudice, or any other arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983) 'With a man's life at stake, a prosecutor should not play on the passion of the jury'. Id."

Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836 (1988).

The Court in Flanagan, supra, went on to express strong disapproval of statements concerning society's view of the penalty citing to Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). In language extremely relevant to the actions and arguments of the prosecutor's in the case at bar, the Flanagan court remarked that:

> "...a prosecutor could not blatantly attempt to inflame the jurors by urging that if they wished to be deemed 'moral' and 'caring' then they must approach their duties in anger and give the community what it needs. We observe that the prosecutor's remark in the instant case serves no other purpose than to raise the specter of public ridicule and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

arouse prejudice against Flanagan.

We are compelled to conclude that the cumulative effect of the prosecutor's extensive misconduct was of such a magnitude as to render Flanagan's sentencing hearing fundamentally unfair. Given the uncontroverted evidence of guilt, there is simply no justification for such outrageous behavior."

Flanagan, 104 Nev. at 112.

The argument by the prosecutors in the case at bar included the following:

"By your verdict you will be sending a message to the community. You will be sending a message to other people who might consider going into establishments to rob at gunpoint, at knife point. You will send a message to other criminals that when you go out to commit crimes, you do it at your own risk, and that if you kill during your crimes, the community is looking at the most absolute and final punishment you can receive. Punishment is an appropriate objective of the criminal justice system. Punishment is society's sense of moral outrage at people who commit crimes. And in this case, deadly crimes." (1 APP 117-18)

. . .

"The defendant took the lives of two innocent young men in a horrific manner. Where does he go from there? What does he do for an encore? The shorter the sentence, the sooner this community will find out."

. . .

"People believe that an organized society is unwilling or unable to impose on criminal offenders the punishment that they truly deserve for the most horrible crimes. Law and order deteriorate, become demoralized, and society becomes defeated. A free society requires of its jurors vigilance and courage and strength to resolve and resolve in making the decisions that you have to make today."

. . .

"Those who are against the death penalty say nothing is ever gained by killing a killer. Well, what is gained by taking the life of a killer is that society -- society in saying that it respects human life, and it cannot overlook the cruel and brutal acts of a person, like the defendant, who senselessly kills two innocent people.

. . .

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

The return of a death sentence is society's way of -- or act of self defense. A return of a death verdict is the enforcement of society's right to be free from murder"

(1 APP 118)

Trial counsel failed to object to these arguments and the issue was not raised on direct appeal by appellate counsel. Both rendered inadequate representation in failing to properly object and appeal any denial of said objection.

It is respectfully urged that THOMAS was denied the effective assistance of trial and appellate counsel by the failure of trial counsel to object and failure of appellate counsel to raise the improper argument on appeal and therefore THOMAS was denied his rights under the Sixth and Fourteenth Amendments to the Constitution.

(iii) Arguing facts not in evidence.

Trial counsel failed to object failed to improper closing argument that referred to facts outside of the record and which completely misled the jury as to appropriateness of the death penalty. (1 APP 118-19)

In Donnelly v. DeChrisoforo, 416 U.S. 637, 645, the Supreme Court explained "[i]t is totally improper for a prosecutor to argue facts not in evidence..." Such arguments also violate the right to confrontation and cross-examination, in the same way that a prosecutor's expression of personal opinion puts unsworn "testimony" before the jury. In Agard v. Portuondo, 117 F.3d 696, 711 (2d Cir. 1997) the Court held that alluding to facts that are not in evidence is "prejudicial and not at all probative.", cert. granted on other grounds, 119 S.Ct. 1248 (1999). See also People v. Adcox, 47 Cal.3d 207, 236, 763 P.2d 906, 919 (Cal. 1988) wherein the California Supreme Court reaffirmed that "'statements of fact not in

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

evidence by the prosecuting attorney in his argument to the jury constitute misconduct.'") (quoting People v. Kirkes, 39 Cal.2d 719, 724, 249 P.2d 1 (Cal. 1952)), cert. denied, 494 U.S. 1038 (1990).

This Court has also condemned arguments that refer to facts not in evidence. In Leonard v. State, 108 Nev. 79, 82, 824 P.2d 287, 290 (1992) the Court held that it is improper for a prosecutor to state that defendant committed crime because he "liked it" with no supporting evidence, cert. denied, 505 U.S. 1224 (1992). Similarly in Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) the Court found that was improper to argue that defendant purchased alibi testimony based on facts outside record.

Arguments by the prosecution included the following:

> "This is not a rehabilitation hearing. There is no program that we know of that rehabilitates killers. It's a special kind of mentality, a special type of person who can plunge a knife into a human being thirty-four, thirty-six times." (1 APP 119)
>
> . . .
>
> "And he indicates to you that the defendant belongs somewhere below that. I submit to you, ladies and gentlemen, the vast -- the vast majority of people who are on death row in the state of Nevada, these worst of the worst, have killed one -- one single human being. Where does the defendant go, Marlo Thomas, who has committed two, two brutal murders of the first degree?"
>
> . . .
>
> "As I mentioned earlier, Mr. LaPorta talked about a secured prison environment, the most secure way in which an individual can be housed in the prison system in the State of Nevada. The vast majority of those individuals, as I said earlier, who are on death row, have killed only once, not twice, such as this defendant."
>
> (1 APP 120)

A review of the entire record at the penalty hearing shows that there was no evidence whatsoever that would show the

composition of death row or how many people had been killed by the respective death row inhabitants. If asked the prosecutor most likely would not be able to recite the information either, yet, without objection, he was able to argue such information to the jury.

(iv) Equating the death penalty with self-defense

It is improper and a violation of the right to due process and a fair trial for a prosecutor to equate the death penalty with an act of self defense. Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984). In Kirkpatrick v. Blackburn, 777 F.2d 272, 283-284 (5th Cir. 1985) the Court considered an argument by the prosecutor that the death sentence was appropriate because the defendant could have been killed in self-defense at the time of the crime. In holding that the argument was improper, the Court stated that such an argument was improper because it distracted the jury from it's proper concern, which was the consideration of the aggravating and mitigating circumstances.

In the case at bar the prosecutor argued without objection and without appellate review being conducted on the direct appeal as follows:

> "The return of a death sentence is society's way -- or act of self-defense. A return of a death verdict is the enforcement of society's right to be free from murder. By denying Matt Gianakis and Carl Dixon their right to live, he has forfeited his right to live." (1 APP 121)

It is respectfully urged that THOMAS was denied the effective assistance of trial and appellate counsel by the failure of trial counsel to object and failure of appellate counsel to raise the improper argument on appeal and therefore THOMAS was denied his rights under the Sixth and Fourteenth Amendments to the Constitution.

(E) Trial counsel disparaged THOMAS during his Opening

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Statement and Closing argument during the penalty hearing.

The District Court did allow an evidentiary hearing on this issue and the testimony is summarized above in the Statement of Facts.

During the Opening Statement at the Penalty Hearing, trial counsel was more an advocate for the State than for his client, stating, inter alia:

> "My client stands convicted of a terrible, awful, senseless and brutal crime; two murders. This is an unforgivable crime, and we're not asking for forgiveness."
>
> . . .
>
> "I'm not going to sit here and pretend that Marlo is a good guy, because he certainly is not. We wouldn't be standing here, or I wouldn't be standing here talking to you if he didn't have a lot of significant bad things that he did in his life. That's a foregone conclusion."
>
> . . .
>
> "He has, as I've already alluded to, severe emotional disabilities or disturbances. He's always had those, since day one. He had trouble controlling his behavior. You're going to hear evidence of a young man that's totally out of control, from early on."
>
> (1 APP 121)
>
> . . .
>
> "You're not going to hear a lot of psycho babble, you're going to hear about a defective human being. His wiring is different than everybody else's."
>
> . . .
>
> "This was a horrible crime. A crime that Marlo needs to be severely punished for. He needs to be removed from society permanently, make no doubt about that. But this big guy over here you see behaves as a 14-year-old because of this defective wiring."
>
> . . .
>
> "When all is said and done here, we're going to ask you to severely punish this defective human being. We're going to ask you to imprison him for the rest of his life and not to kill him."

(1 APP 122)

At the conclusion of the penalty hearing the comments of counsel concerning his client carried the same distasteful flavor:

> "He can't control his behavior. It's very difficult for him to. His wiring is different. He functions as a 14-year-old emotionally. He's a dangerous man, make no mistake about that. As diagnosed by the doctor, he has an antisocial personality. He's not a true sociopath. There is a glimmer, there is a glimmer of humanity."
>
> . . .
>
> "This is a good juncture or point for me to address why I'm talking to you about this. You say to me, what does this have to do with this adult crime? Well, that's just it, it's unforgivable. And it's inexcusable. And I don't offer you this stuff in asking forgiveness to the point where you spare his life. I offer this to you not to justify these crimes, because nothing can justify them. I want you to know what forces shaped Marlo's life as he grew up, what brought him to this point in his life where the State is now asking you to kill him."
>
> (1 APP 122)

Courts have consistently treated behavior of defense counsel showing animosity toward the client as an abandonment of the duty of loyalty, or as a conflict of interest. *See* United States v. Swanson, 943 F.2d 1070, 1074-75 (9th Cir. 1991) and Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988). The argument by trial counsel in the instant case were in many ways more helpful to the prosecution than to THOMAS, and constituted an abandonment of the client and should be deemed per se ineffective. Trial counsel did testify at the evidentiary hearing that his argument was strategic makes little sense and cannot be characterized as a reasonable and tactical decision.

3. Trial counsel was not prepared for critical stages of the proceedings and failed to conduct proper investigation

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

prior to trial in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

The District Court did allow an evidentiary hearing on this issue and the testimony is summarized above in the Statement of Facts.

A review of the record in the instant case demonstrates that trial counsel was not prepared to proceed to trial and had not adequately prepared for critical stages of the proceedings, contrary to the testimony at the evidentiary hearing. For instance, counsel was unprepared for the preliminary hearing as shown by a record of that proceeding. During the re-direct examination of Kenya Hall, the following took place:

> "MR. LaPorta: Well, your Honor, just for some housekeeping purposes, I have many things from Mineral County and law enforcement agencies in that area, but I do not have a copy of this [Hall's taped statement transcript]. If I could review this for a moment before I recross, and then if the D.A.'s office could provide me with a copy.
>
> MR. HARMON: We certainly will, Your Honor. I thought he had it.
>
> MR. LaPorta: I've gone through everything, and I have everything else, but I just don't have this." (1 APP 123)

The failure of trial counsel to be prepared to adequately cross-examine the State's star witness at the preliminary hearing was even more damaging when Hall refused to testify at trial and therefore was never subjected to competent cross-examination. Such cross-examination would have revealed that Hall had been threatened and coerced into testifying and was not telling the truth. After the preliminary hearing, Hall wrote to THOMAS and admitted that he had not told the truth during the penalty hearing and THOMAS supplied his attorneys

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

with the letters, but they were not used during the trial. (1 APP 144).

THOMAS attempted to bring the failings of trial counsel to the attention of the court and sought unsuccessfully to have replacement counsel appointed. THOMAS filed written attempts to remove counsel from the case. On September 4, 1996 THOMAS filed a handwritten Motion to Dismiss Counsel and/or Appointment of co-counsel. In the Motion THOMAS spelled out the following concerns:

> "1. Counsel of record has failed to retain or consult with counsel outside of his office to help in the preparations of this case. As the Defendant should be represented by at least two (2) counsels of record.
>
> 2. The defendant has lost all faith and trust in appointed counsel, or his ability to adequately represent the Defendant.
>
> 3. Counsel has not thoroughly investigated his case, nor interviewed any witnesses personally in this case.
>
> 4. Appointed counsel has failed to communicate with the defendant, as all attorney/client conversations have been at the court proceedings, to a minimum.
>
> 5. Counsel has failed to discuss any defenses with defendant, nor has he established a factual basis as to why defendant was charged initially, as to the information lodged in this case.
>
> 6. Counsel has failed to file any pretrial motions to mitigate or reduce charges against the defendant." (1 APP 124)

At the first hearing on THOMAS' Motion to Dismiss Counsel, on October 2, 1996, trial counsel made the following representations:

> "MR. LAPORTA: Judge, this is all resolved. He's at Indian Springs right now, but we need him to come down here in a couple of weeks and take up residence at the county jail simply because we're getting into the crux, getting into the meat of the investigation now. We need him accessible to us." (1 APP 125)

When LaPorta went on to tell the Court that he believed THOMAS

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

wanted to withdraw the Motion, THOMAS responded by stating that "I need to talk to Mr. LaPorta. I need to talk to him and see if --I filed that motion for a reason. I'm still upset behind that". (1 APP 125) LaPorta then told the Court:

> MR. LAPORTA: Judge, for the record I explained to Mr. Thomas and to his family back in late July, early August, that I was going into a period of time where I was doing two death penalties, which are all done now. I was in trial for over five weeks, and we finished up the last one last Wednesday. And that's why he hasn't seen me.
>
> THE COURT: I know that myself. I know you're in court.
>
> MR. LAPORTA: I just wanted to make sure that he knew that once again. And he's my next death penalty case.
>
> THE COURT: And now you can devote your full time and attention to Mr. Thomas and his very serious case?
>
> MR. LAPORTA: Exactly. He has my 100 percent attention." (1 APP 125)

The motion was then placed on calendar for a status check in two weeks.

When the case was before the Court on October 21, 1996 THOMAS again complained to the Court with no success:

> "THE DEFENDANT: I talked to Mr. LaPorta at the institution, and me and Mr. Porter [sic] ain't get along. I still want to go through with my motion. I will have a conflict of interest between me and Mr. LaPorta.
>
> . . .
>
> THE DEFENDANT: Based on me and him not getting along, Mr. Boneventure, that should be on my case, period. Each time we talk we ain't get nowhere with my case. He want to go this way and I want to go this way with it. That's going to be inadequate. I'm not saying I want to run your courtroom.
>
> THE COURT: I understand that.
>
> THE DEFENDANT: I'm just saying I'm not going to go to trial facing the crime charged that I do got with this man. It's impossible." (1 APP 125-26)

With no further record or inquiry as to the nature or specifics

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

of the complaints aired by THOMAS in court and in his handwritten motion, the Court thereafter denied the Motion. (1 APP 267)

Visiting cards from the from the Clark County Detention Center demonstrate that counsel was not conferring with THOMAS during this period of time. The cards show that one or the other of assigned counsel saw THOMAS three times in December, 1996, once in February, 1997, and then did not see him again until the end of May, 1997. (1 APP 126)

The fact that counsel was not ready for the preliminary hearing and was not preparing for trial or meeting with THOMAS, despite his written complaints, did not deter the effort to move the case through the system. On January 29, 1997 trial counsel filed a Motion to Reset Trial date and requested, due to scheduling conflicts that the May trial date be moved up to April. THOMAS voiced great disapproval of the proposition and told the Court:

> "THE DEFENDANT: You know, I don't -- I think -- May was fine. I ain't even sit and discuss my strategies with my attorneys. Neither one of them. You know, I told you the first time we had a conflict of interest -- you denied that. But I'm saying -- I'm stating that I don't want to do that. You know, they ain't talk to me enough." (1 APP 126)

Based on the concerns voiced by THOMAS, the Court decided to move the trial date back one month instead of forward one month. Defense counsel explained the problem of scheduling, telling the Court:

> "MS. McMAHON: The reason I'm asking for the additional time is, one, so we can discuss Mr. Thomas' concerns with him, also I don't know Mr. Roger's schedule. And I don't know Mr. LaPorta's. I do know that we have approximately fifteen murder cases scheduled between Mr. LaPorta and myself. And I believe Mr. Roger has an equal number." (1 APP 127)

Thus the record establishes that even though the client was

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

complaining about a lack of preparation for trial, and despite having fourteen other murder cases pending being handled by trial counsel, they sought to accelerate the trial date for THOMAS. This request to accelerate the trial date was also made after counsel told Court that THOMAS was his "next death penalty case" and that THOMAS had his "100 percent attention".

The record of the proceedings corroborates the concerns expressed by THOMAS as early as September, 1996. The case proceeded to trial in June, 1997, and even though THOMAS had filed a written complaint over the failure to file pretrial motions, there were only two motions filed, to wit: Motion to Allow Jury Questionnaire on May 23, 1997 and a Motion to Prevent Kenya Hall from being called to testify and invoke his Fifth Amendment rights on June 11, 1997. (1 APP 127)

As set forth in the affidavit of THOMAS attached to the Supplemental Points and Authorities to the Petition, trial counsel had done virtually nothing to prepare for the penalty hearing until the weekend that separated the trial and the penalty hearing. The investigator had not interviewed any character or family witnesses and the THOMAS'S mother had to gather all of the witnesses before trial counsel even attempted to interview them. (1 APP 143-46) The record in the case thus verifies that THOMAS received ineffective assistance of counsel from attorneys that had 14 other pending murder cases and did not prepare the case for trial or penalty hearing.

4. Trial counsel failed to adequately represent THOMAS during the course of the trial proceedings by failing to properly prepare jury instructions, cross-examine witnesses, and present evidence at both the trial and penalty stages of the proceedings in violation of THOMAS' rights under the Sixth

Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

(A) Trial counsel failed to offer a jury instruction that properly set forth the theory of mitigation for the defense and excluded non-applicable statutory aggravating circumstances and failed to object to argument by the prosecutor that minimized the concept of mitigation by highlighting non-applicable statutory mitigating circumstances.

The Court did not grant an evidentiary hearing on this issue, but nonetheless found that there was not ineffective assistance of trial counsel. (1 APP 284)

Instruction Number 13 given to the jury at the penalty hearing set forth the first six statutory mitigating circumstances that were clearly not applicable in the case at bar and then set forth the six mitigating circumstances that apparently comprised the theory of defense at the penalty hearing. (1 APP 23) It is THOMAS' position that it was improper to instruct the jury on mitigating circumstances that did not apply to the facts of the instant case.

An example of the prejudicial effect of the instruction is the argument of the prosecutor as follows:

> "I want to take a few minutes and talk about some of these mitigating circumstances. Some of these circumstances are statutory in nature. Others have been alleged by the defense. As you can see, they're fact specific. Anything that you might consider can be a mitigating circumstance.
>
> Number one, the defendant has no significant history of prior criminal activity. That certainly doesn't apply. You've heard from numerous witnesses about his criminal activity, which started from age 11 and was nonstop throughout his criminal career." (1 APP 128)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

In every criminal case a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

In Lockett v. Ohio, 438 US 586, 98 S.Ct 2954, 57 L.Ed. 2d 973 (1978) the Court held that in order to meet constitutional muster a penalty hearing scheme must allow consideration as a mitigating circumstance any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. See also Hitchcock v. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Parker v. Dugger, 498 US 308, 111 S.Ct 731, 112 L.Ed.2d 812 (1991).

NRS 175.554(1) provides that in a capital penalty hearing before a jury, the court shall instruct the jury on the relevant aggravating circumstances and "shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing". See, Byford v. State, 116 Nev. Ad. Op. 23 (2000). It was a violation of the 14th and 8th Amendments to fail to instruct the jury on the defense mitigators and further a 6th Amendment violation for counsel at trial not to submit a proper instruction and special verdict form to the jury.

It was ridiculous for trial counsel to allow a jury instruction that alleged that a mitigating circumstance in the case was that THOMAS had no significant prior criminal history. Just the opposite was true and allowed the prosecutor to lambast the concept of mitigating circumstances. In essence the prosecution was thus able to argue that the absence of the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

statutory mitigating circumstance was an aggravating factor in the case. The prejudicial effect of such an argument is proven by the fact that the jury found no mitigating circumstances in the case even though they did not have to be proven beyond a reasonable doubt and did not have to be found unanimously.

(B) Trial counsel failed to object to the jury at the penalty hearing being instructed that the sentence could be commuted.

The District Court did not allow an evidentiary hearing on this matter and determined that it was not ineffective assistance of trial counsel to not object to the instruction. (1 APP 284)

Jury instruction number 5 from the penalty hearing told the jury in relevant portion:

> "...Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date." (1 APP 15)

In Sonner v. State, 114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998) the Nevada Supreme Court determined that all references to modification of sentences must be eliminated from capital jury instructions. The Court stated:

> "In regard to offenses committed on or after July 1, 1995, the Pardons Board no longer has the power to commute a sentence of death or of life imprisonment without the possibility of parole to a sentence allowing parole [citations omitted]. Given this definite limit on the Pardon's Board's power and the possibility that a jury can occasionally be mislead in circumstances like those in *Geary*, we conclude that it is best to eliminate all language in the *Petrocelli* instruction which discusses modification of sentences by the Pardons Board. Therefore, we direct the district courts to no longer give the final paragraph of the *Petrocelli* instruction to juries in capital penalty phases"

Sonner, 114 Nev. at 326-327.

The jury in the instant case could have been misled into believing that they either had to impose the death penalty or choose a sentence that could be commuted to a possibility of parole. Trial counsel should have been aware of the provisions of NRS 213.1099(4) and objected to the instruction.

(C) Trial counsel failed to request an instruction during the penalty phase that correctly defined the use of "character" evidence for the jury.

The District Court did not allow an evidentiary hearing on this issue and determined that it was not ineffective assistance of counsel to fail to request the instruction. (2 APP 284)

NRS 200.030 provides the basic scheme for the determination of whether an individual convicted of first degree murder can be sentenced to death and provides in relevant portion:

> "4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> (a) By death, 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; or
>
> (b) By imprisonment in the state prison..."

In the case at bar, in addition to the alleged aggravating circumstances there was a great deal of "character evidence" offered by the State that was used to urge the jury to return a verdict of death. The jury, however, was never instructed that the "character evidence" or evidence of other bad acts that were not statutory aggravating circumstances could not be used in the weighing process. (1 APP 130)

The instructions that were given to the jury spelled out

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

the process as follows:

> "The State has alleged that aggravating circumstances are present in this case.
>
> The defendants have alleged that certain mitigating circumstances are present in this case.
>
> It shall be your duty to determine:
>
> (a) Whether an aggravating circumstance or circumstances are found to exist; and
>
> (b) Whether a mitigating circumstance or circumstances are found to exist; and
>
> (c) Based upon these findings, whether a defendant should be sentenced to a definite term of 100 years imprisonment, life imprisonment or death.
>
> The jury may impose a sentence of death only if (1) the jurors find unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances....." (1 APP 17)

The jury was never instructed that such evidence was not to be part of the weighing process to determine death eligibility.

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) the Court described the procedure that must be followed by a sentencing jury under a statutory scheme similar to Nevada:

> "After a conviction of murder, a capital sentencing hearing may be held. The jury hears evidence and argument and is then instructed about statutory aggravating circumstances. The Court explained this instruction as follows:
>
> > The purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the fact finder's discretion. Unless at least one of the ten

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> statutory aggravating circumstances exist, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the fact finder has a discretion to decline to do so without giving any reason ...[citation omitted]. In making the decision as to the penalty, the fact finder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phase of the trial. The circumstances relate to both the offense and the defendant.
>
> [citation omitted]. The United States Supreme Court upheld the constitutionality of structuring the sentencing jury's discretion in such a manner. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)."

Brooks, 762 F.2d at 1405.

This interpretation of the statutory scheme had been rejected by this Court in Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997) wherein the defendant offered a jury instruction, which THOMAS asserts is necessary to comport a constitutional interpretation of the Nevada statutory scheme. The instruction which was not approved in Lisle stated:

> "Evidence has been presented concerning other arrests, convictions, or other circumstances. This evidence can be considered by you for character purposes only.
>
> You are instructed that this evidence can only be considered by you after you have determined whether or not the state has proved an aggravating circumstance or circumstances beyond a reasonable doubt, whether mitigating circumstance have been shown to exist and whether or not mitigating circumstances have been shown to outweigh one or more of the aggravating circumstances...."

Lisle, 113 Nev. at 556-557.

Despite the rejection in Lisle of the above instruction, this Court had included language in other opinions that support the position herein urged. In Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) the Court stated:

> "Under NRS 175.552, the trial court is given broad

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> discretion on questions concerning the admissibility of evidence at a penalty hearing. *Guy*, 108 Nev. 770, 839 P.2d 578. In Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990), *cert. denied*, 499 U.S. 970 (1991), this court held that evidence of uncharged crimes is admissible at a penalty hearing once any aggravating circumstance has been proven beyond a reasonable doubt."

Witter, 112 Nev. at 916.

Additionally in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1995) the court in discussing the procedure in death penalty cases stated:

> "If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence NRS 175.552. Whether such additional evidence will be admitted is a determination reposited in the sound discretion of the trial judge."

Gallego, at 791.

This line of authority eventually lead to the Nevada Supreme Court decision in Byford v. State, 116 Nev. Ad. Op 23 (2000) that the proper use of character evidence is that the jury may not consider character evidence until the jury has first determined that a defendant is death eligible, to wit; by finding that at least one aggravator exists; and second, that any aggravators are not outweighed by any mitigators.

More recently the Court made crystal clear the manner to properly instruct the jury on use of character evidence:

> "To determine that a death sentence is warranted, a jury considers three types of evidence: 'evidence relating to aggravating circumstances, mitigating circumstances and 'any other matter which the court deems relevant to sentence'. The evidence at issue here was the third type, 'other matter' evidence. In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death-eligible, i.e., after is has found unanimously at least one enumerated aggravator and each juror has found that any mitigators do not outweigh the aggravators. Of course, if the jury decides that death is not appropriate, it can still consider 'other matter' evidence in deciding on another sentence."

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Evans v. State, 117 Nev. Ad. Op. 50 (2001).

As the court failed to properly instruct the jury at the penalty hearing the sentence imposed was arbitrary and capricious and violated THOMAS' rights under the Eighth Amendment to be free from cruel and unusual punishment and to Due Process under the Fourteenth Amendment and must be set aside.

(D) Trial counsel made no opening statement and called no witnesses at trial.

As set forth above in Section 2, THOMAS complained months prior to the trial that his attorneys were not preparing for trial and had not interviewed any of the witnesses that he wanted called to testify. The trial record supports this allegation as trial counsel waived opening statement and then called no witnesses in defense of the charges against THOMAS. (1 app 133)

The affidavit of THOMAS attached to the Supplemental Petition spells out the witnesses that should have been called and who, for the most part were not even interviewed by counsel. (1 APP 144-45) The failure to present a defense is tantamount to ineffective assistance of counsel.

5. Appellate counsel failed to file a complete record on appeal as required by Supreme Court Rule 250 and failed to raise meritorious issues on direct appeal in violation of THOMAS' rights under the Sixth Amendment to effective counsel and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

The record on appeal filed with the Nevada Supreme Court did not contain a complete record of the proceedings below, and appellate counsel failed to supplement the record or otherwise

insure that the all transcripts had been prepared and filed by the Clerk of the Court with the Nevada Supreme Court. Most notably missing from the record are transcripts from the hearing of the handwritten Motion of THOMAS to dismiss his attorneys. (1 APP 134) Said transcripts would have substantiated the record made by THOMAS that he was not receiving effective assistance of counsel and thus understandably not brought to the attention of the Nevada Supreme Court on the direct appeal.

Appellate counsel failed to raise the following meritorious issues on direct appeal:

A. The malice instruction given to the jury contained an unconstitutional presumption that relieved the State of it's burden of proof and violated THOMAS' presumption of innocence.

The District Court did not allow an evidentiary hearing on this issue and determined it was not ineffective assistance of counsel to raise the issue on appeal. (1 APP 284)

Instruction number 21 given during the trial phase stated as follows:

> "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (1 APP 134)

The instruction in no uncertain terms defines what express malice is without issuing a directive as to when express malice may be found. The distinction is obvious, express malice is merely defined whereas the jury is directed that it may find implied malice "when no considerable provocation appears".

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

The State of California having recognized the problem has altered its instruction to read "Malice is express when...; and malice is implied when...." California Jury Instructions, Criminal, Section 8.11.

The Eleventh Circuit Court of Appeals in reviewing a Georgia case that incorporated the similar statutory language as used in Instruction No. 21 ("shall be implied") found that the statutory language is constitutionally infirm as it is a directive instruction and shifts the burden of proof by giving the prosecution a presumption of malice. Fulgham v. Ford, 850 F.2d 1529 (11th C.A. 1988). The objectionable language imposes an impermissible mandatory presumption. See, Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534 (1988); Hill v. Maloney, 927 F.2d 644, 646, 651 (1st Cir. 1990).

Although this Court has upheld the validity of the instruction as correctly informing the jury of the distinction between express and implied malice under NRS 200.020, Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), THOMAS still urges that the presumption language is improper.

Second, the instruction violates due process because the facts on which the presumption are based do not rationally support the element presumed and are in themselves unconstitutionally vague. The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S. 1, 11, 13-14 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). They are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe

the defendant is a "bad man." In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966), the California Supreme Court analyzed the element of implied malice, and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. __, 7 P.3d. 426 (2000).

> "Nevada statutes and this court have apparently never employed the phrase "depraved heart," but that phrase and "abandoned and malignant heart" both refer to the same "essential concept ... one of extreme recklessness regarding homicidal risk." Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes "general malignant recklessness of others' lives and safety or disregard of social duty")".

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as superfluous and misleading:

> "Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.

. . .

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter."

414 at 363-364 (footnotes omitted). Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart" conveys anything rational to a juror. No reasonable juror today would understand that phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result.

B. The improper and misleading instruction Number 5 which informed the jury that the Pardon's Board could commute the sentence when such was not correct with respect to a sentence of life without the possibility of parole.

The District Court did not allow an evidentiary hearing on this issue and ruled it was not ineffective assistance of counsel to fail to raise the issue on direct appeal. (1 APP 284)

THOMAS set forth hereinabove the legal arguments on this issue with respect to the failure of trial counsel to object to the instruction. Said authorities are also relevant to the failure of appellate counsel to raise the claim on direct appeal.

6. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, and reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

adequate appellate review. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

The District Court did not allow an evidentiary hearing on this independent constitutional claim and denied relief. (1 APP 284)

The Nevada Supreme Court's review of cases in which the death penalty has been imposed is constitutionally inadequate. The opinions rendered by the Court have been consistently arbitrary, unprincipled and result oriented. Under Nevada law, the Nevada Supreme Court had a duty to review THOMAS' sentence to determine (a) whether the evidence supported the finding of aggravating circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor; whether the sentence of death was excessive considering both the crime and the defendant. NRS 177.055(2) Such appellate review was also required as a matter of constitutional law to ensure the fairness and reliability of THOMAS' sentence.

The opinion affirming THOMAS' conviction and sentence provides no indication that the mandatory review was fully and properly conducted in this case. The statutory mechanism for review is also faulty in that the Court is not required to consider the existence of mitigating circumstances and engage in the necessary weighing process with aggravating circumstances to determine if the death penalty in appropriate.

THOMAS hereby adopts and incorporates each and every claim and issue raised in his direct appeal as a substantive basis for relief in the Post Conviction Writ of Habeas Corpus as he did not receive adequate review of the claims during the direct

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

appeal process.

7. THOMAS' conviction and sentence are invalid under the State and Federal Constitutional guarantees of due process, equal protection, impartial jury from cross-section of the community, and reliable determination due to the trial, conviction and sentence being imposed by a jury from which African Americans and other minorities were systematically excluded and under-represented. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

The District Court did not allow an evidentiary hearing on this issue and ruled that there is not systematic exclusion of anyone in Clark County and that the jury selection is random selection through several methods by the jury commissioner. (1 APP 284)

THOMAS is an African American and was tried by a jury that was under-represented of African Americans. (1 APP 139) Clark County has systematically excluded from and under-represented African Americans on criminal jury pools. According to the 1990 census, African Americans -- a distinctive group for purposes of constitutional analysis -- made up approximately 8.3 percent of the population of Clark County, Nevada. A representative jury would be expected to contain a similar proportion of African Americans. A prima facie case of systematic under-representation is established as an all-white jury and all white venire in a community with 8.3 percent African American cannot be said to be reasonably representative of the community.

The jury selection process in Clark County is subject to abuse and is not racially neutral in the manner in which the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

jury pool is selected. Use of a computer database compiled by the Department of Motor Vehicles and/or the election department results in exclusion of those persons that do not drive or vote, often members of the community of lesser income and minority status. The computer list from which the jury pool is drawn therefore excludes lower income individuals and does not represent a fair cross section of the community and systematically discriminates.

The selection process for the jury pool is further discriminatory in that no attempt is made to follow up on those jury summons that are returned as undeliverable or are delivered and generate no response. Thus individuals that move fairly frequently or are too busy trying to earn a living and fail to respond to the summons and thus are not included withing the venire. The failure of County to follow up on these individuals results in a jury pool that does not represent a fair cross section of the community and systematically discriminates.

THOMAS was denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community, his right to an impartial jury as guaranteed by the Sixth Amendment, and his right to equal protection under the 14th Amendment. The arbitrary exclusion of groups of citizens from jury service, moreover, violates equal protection under the state and federal constitution. The reliability of the jurors' fact finding process was compromised. Finally, the process used to select THOMAS' jury violated Nevada's mandatory statutory and decisional laws concerning jury selection and THOMAS' right to a jury drawn from a fair cross-section of the community, and thereby deprived THOMAS of a state created liberty interest and

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

due process of law under the 14th Amendment.

The violation of THOMAS' constitutional rights was further exacerbated by the exclusion of African-Americans by the prosecutor during the selection of the jury. This issue was raised at the trial court level and on direct appeal, however is reiterated herein by reference as if fully set forth. Trial counsel explained the situation to the Court:

> "MR. LaPorta: Yes. Your Honor, this is a motion for a mistrial, and it's based upon two different things, all right.
>
> The first thing I want to address is, first of all, there are absolutely no African-Americans on the jury panel. There is one alternate that is sitting on that -- is sitting as an alternate. Judge, I understand the status of the Supreme Court law that we must demonstrate that the Jury Commissioner's selection process is unfair and biased. I'm privy to some of the most recent studies done here in Clark County, and I understand that we're not able to do that.
>
> But considering the fact that sometime in the future the present selection process may be considered biased or prejudiced, what I want to do is preserve for the record Mr. Thomas' rights to claim that he didn't get a jury of his peers based upon any future unfairness that could be determined...." (1 APP 140-41)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

II.

IT WAS AN ABUSE OF DISCRETION TO DENY THOMAS A FULL EVIDENTIARY HEARING ON HIS PETITION FOR POST CONVICTION HABEAS CORPUS

It has long been the holding of this Court that, if a petition for post-conviction relief contains allegations of facts outside the record, which, if true, would entitle the petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975). The Petition of THOMAS satisfied both requirements, it contained facts outside the record, and if true, any number of the allegations would have entitled THOMAS to relief.

Oft times in denying requests for post conviction evidentiary hearings the trial court merely bases its decision on the perceived strength of the State's case at trial without considering the allegations of the Petition. Allegations concerning failure to oppose a State's motion have been found sufficient to mandate an evidentiary hearing. For instance in Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary over the State's objection where counsel had not adequately opposed a Motion in Limine filed by State. The purpose of such a hearing was to determine if counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-28.

The allegations of ineffective trial counsel are discussed specifically above. The allegations are not bare, but rather supported by numerous affidavits and exhibits. The instant case presents an extremely serious capital murder case, wherein it appears that trial and appellate counsel failed to preserve

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

and raise significant legal issues. Instead of limiting the hearing to three issues and the testimony of the trial attorneys the District Court should have allowed THOMAS full and complete hearing to make his record.

The District Court abused it's discretion and failed to follow the established guidelines of this Court in only granting THOMAS a very limited evidentiary hearing. It is respectfully urged that this Court remand the case with direction that a full and complete hearing be held on the allegations of THOMAS' Petition and Supplement.

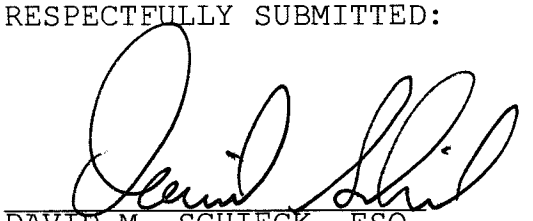
David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of MARLO THOMAS and remand the matter to District Court for a new trial.

Dated this 27 day of March, 2003.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, Ste. 600
Las Vegas NV 89101
702-382-1844
Attorney for Appellant

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 27, 2003

BY _____
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
The Law Office of David M. Schieck
302 East Carson, Suite 600
Las Vegas, Nevada 89101
702-382-1844

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 28 day of March, 2003, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

District Attorney's Office
200 S. Third Street
Las Vegas NV 89101

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

Kathleen Fitzgerald
KATHLEEN FITZGERALD, an employee
of David M. Schieck

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844