

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \*

MARLO THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 40248

**FILED**

SEP 10 2003

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

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FACTUAL MATTERS

THOMAS objects to the State arguing it's position in it's "Statement of Facts" by the captioning "Overwhelming Evidence of Guilt." (Ans. Br. p. 3) THOMAS has no objection to the State making such an argument, but same should be reserved for the argument portion of the State's Answering Brief. The State also in a footnote refers to the Respondent's Appendix and references that the entire trial transcript was not included in the Appellant's Appendix. Apparently the State does not agree with the facts from the direct appeal or does not believe that the direct appeal Record on Appeal is available to the Court. Instead thousands of pages of paper have been wasted unnecessarily.

The State also expends several pages discussing the selection of the all-white jury and notes that defense counsel failed to object to the removal of three African-American prospective jurors before the State pre-empted the sole remaining African-American juror. (Ans. Br. p. 8) This entire discussion by the State only cements that trial counsel was deficient in his trial performance and that the State's goal was to achieve an all-white jury.

With respect to be totally improper arguments made by the prosecutor in what was supposed to be an "Opening Statement" the State admits that the comments were improper but adopts the District Court's determination that the failure to object and prevent such comments did not rise to the "magnitude" of error

1 that would require a new trial. (Ans. Brf. p. 10) The State  
2 seems to want to ignore that the error in this case just kept  
3 accumulating to the point that a new trial is mandated.

4 Similarly when the Court offered a curative instruction as  
5 a result of the "back in jail" comment made by Emma Nash,  
6 defense counsel declined to do so. (Ans. Br. p. 11) This was  
7 after defense counsel had moved for a mistrial claiming that  
8 the prejudicial comment denied THOMAS of a fair trial. (4 RA  
9 667) The failure of defense counsel to correct the prejudicial  
10 impact of the improper comment could be construed as per se  
11 ineffective assistance of counsel. (See Argument below.)

12 The State correctly notes that the District Court was of  
13 the opinion that a blanket objection to jury instructions did  
14 not constitute ineffective assistance of counsel, apparently  
15 under the impression that such an objection preserved federal  
16 constitutional claims. It is still to be determined that such  
17 a non-specific objection preserved any rights for THOMAS. To  
18 the extent that such an objection fails for lack of specificity  
19 trial counsel was clearly ineffective.

20 The State has described in detail the evidence presented  
21 at the penalty hearing that was not the subject of objection by  
22 trial counsel. The nature of the heinous evidence presented  
23 included that THOMAS, during a fight in junior high school, had  
24 kicked a teacher in her leg when she tried to separate the  
25 combatants and that he had stolen bicycles at two different  
26 junior high schools. (Ans. Br. p. 13-14) The State fails to  
27  
28

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1 discuss that trial counsel failed to request a limiting  
2 instruction on the use of this and other evidence by the jury  
3 at the penalty hearing.  
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ARGUMENT

I.

THOMAS RECEIVED INEFFECTIVE  
ASSISTANCE OF COUNSEL

THOMAS respectfully urges that this Court should abandon many of it's earlier opinions concerning appellate review of post-conviction cases and decide that, conclusively, a claim of ineffective assistance of counsel will be independently reviewed as a mixed question of law in fact. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (2000) The deference that has been accorded trial counsel at the District Court level in the face of clear factual presentations requires nothing less. See, Lay v. State, 116 Nev. 1185, 14 P.3d 1256 (2000). Only by performing such a review can this Court reach the proper decision.

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.

The State in it's Answering Brief completely avoids the fact that the failure to object to numerous valid issues precluded appellate review on direct appeal. Instead, for the most part, it appears that the State's position is that if an objection had been made it might not have been sustained. Such



1 speculation is inappropriate in the context of a capital case  
2 such as the one at bar.

3 The error was magnified by the failure to request an  
4 instruction limiting the use of such evidence by the jury in  
5 deciding the penalty (discussed below). The abundance of  
6 cumulative and improper testimony should have been the subject  
7 of objection to preserve the issue for subsequent appellate and  
8 post-conviction review.

9  
10 **A. The Trial Court Erred in Allowing Cumulative and**  
11 **Otherwise Inadmissible Evidence of Prior Bad Acts During the**  
12 **Penalty Phase of Appellant's Trial.**

13 THOMAS set forth in his Opening Brief the unconstitutional  
14 problems with the Nevada capital sentencing scheme. The  
15 failure to provide guidance and rational limits to the  
16 admissibility of "character evidence" renders the statutory  
17 provision unworkable and results in the arbitrary and  
18 capricious imposition of the death penalty. This clearly  
19 violates the Eighth Amendment to the United States Constitution  
20 and mandates the reversal of the death sentence against THOMAS.

21 **B. The Statutory Scheme Adopted by Nevada Fails to**  
22 **Properly Limit Victim Impact Statements.**

23 The record is clear that this Court and the Nevada  
24 Legislature have consistently failed to enact any barriers to  
25 the presentation of victim impact evidence. The failure to  
26 limit this type of evidence violates the Eighth Amendment to  
27 the United States Constitution and results in the arbitrary and  
28

1 capricious imposition of the death penalty. See Gregg v.  
2 Georgia, 428 U.S. 153 (1976).

3 **C. The Prosecutor Committed Misconduct During the Closing**  
4 **Argument of the Penalty Phase of Appellant's Trial by Appealing**  
5 **to the Passions and Prejudice of the Jurors and by Denigrating**  
6 **the Proper Consideration of Mitigating Factors.**

7 The State takes the position in it's Answering Brief that  
8 the District Court correctly determined that trial counsel did  
9 not have a good faith basis to object to the arguments and  
10 therefore was not ineffective in failing to object. (Ans. Brf.  
11 p. 29; AA pg. 242) The problem with this argument and with the  
12 "finding" by the District Court is that the testimony at the  
13 evidentiary hearing was directly to the contrary.

14 Both Lee McMahon and Peter LaPorta testified that they had  
15 no tactical or strategic reason for the failures to object to  
16 the majority of the challenged arguments. It is not  
17 insignificant to remind this Court that the same office that  
18 represented THOMAS at trial handled the direct appeal and  
19 raised the issue of improper closing argument despite the  
20 failure of contemporaneous objection. Trial counsel allowed  
21 the death sentence to be returned based on a totally improper  
22 disparagement of mitigating evidence. See Hollaway v. State,  
23 116 Nev. 732, 9 P.3d 987 (2000).  
24

25 The District Court was clearly erroneous in it's refusal  
26 to grant relief on this issue alone.

27 **D. The Trial Court Erred in Using a Set of Jury**  
28

**Instructions During the Guilt and Penalty Phases Which Violated  
the Due Process Rights of the Appellant.**

As with the majority of the issues that exist in this case, THOMAS is faced with the failure of trial counsel to object and preserve valid claims on appeal. The State correctly points out that the failure to object and preserve an issue for appeal lessens the standard of review of the issue. Hewitt v. State, 113 Nev. 387, 936 P.2d 330 (1997). By making such an argument the State is conceding that trial counsel was ineffective in failing to preserve the issue.

It seems completely disingenuous for the State to first argue that trial counsel was effective and then turn around and argue that the failure of trial counsel presents a procedural bar to review of valid constitutional claims. It seems that the State is more interested in finding loopholes than in discussing the merits of the claims raised by THOMAS.

THOMAS has set forth in the Opening Brief the specific instructions that should have been the subject of objection by trial counsel and, despite the failure of objection, were raised on direct appeal. This Court has the obligation, based on the per se ineffectiveness of trial counsel, to review each of these claims. After doing so the Court will be convinced that THOMAS did not receive effective assistance of counsel and therefore reverse his conviction and sentence.

**2. Trial counsel failed to make contemporaneous  
objections on valid issues during trial and appellate counsel**

1 failed to raise these issues on direct appeal, both failures  
2 being in violation of THOMAS' rights under the sixth amendment  
3 to effective counsel and under the fifth and fourteenth  
4 amendments to due process and a fundamentally fair trial.

5 This Court must be reminded that the District Court in  
6 this capital case refused to grant an evidentiary hearing on  
7 the majority of the claims raised by THOMAS. In the absence of  
8 such an evidentiary hearing, the State invites this Court to  
9 engage in rank speculation as to the possible motives or  
10 strategies of trial counsel. No where is such speculation more  
11 invited than with respect to the issue raised in this section.  
12 There is a reason that the decisions of this Court approve of  
13 evidentiary hearings on claims of ineffective assistance of  
14 counsel: to create a record upon which a proper decision can  
15 be made and reviewed. Such a record does not exist in this  
16 case due to abuse of discretion by the District Court.

17  
18 **A. Trial Counsel Failed to Ask That the Jury Be**  
19 **Admonished Concerning the "Back in Jail" Comment of Witness**  
20 **Nash.**

21 The State argues that there was a "reasonable tactical  
22 reason" for trial counsel not to request a curative  
23 instruction. (Ans. Brf. p. 42). The State must have a crystal  
24 ball in order to make such a statement. THOMAS was denied an  
25 evidentiary hearing on this issue wherein trial counsel could  
26 have been asked about such a tactical reason. The State cites  
27 to Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994), but Riley  
28

1 provides no support. In Riley there was a full evidentiary  
2 hearing and counsel was able to articulate a tactical basis for  
3 the decision not to request an accomplice construction.

4 No such record exists in this case and it would be  
5 improper for this Court to now manufacture such an explanation.

6 **B. Trial Counsel Failed to Object and Move to Strike**  
7 **Overlapping Aggravating Circumstances and Appellate Counsel**  
8 **Failed to Raise the Issue on Direct Appeal.**

9 THOMAS has fully briefed and discussed this issue in the  
10 Opening Brief and will not repeat said arguments. THOMAS will  
11 note that at some point this Court will be required to address  
12 the overly broad and vague statutory scheme created by the  
13 Nevada Legislature and abused by prosecutors throughout the  
14 State. The Court will either do so in response to valid state  
15 claims or by mandate from the federal system. It would seem  
16 more constitutionally reasonable to start now and not wait for  
17 the federal mandate.  
18

19 **C. Trial Counsel Failed to Object to Prejudicial and**  
20 **Inflammatory Comments During the Opening Statement of the**  
21 **Prosecution and Appellate Counsel Failed to Raise the Issue on**  
22 **Direct Appeal.**

23 The District Court found that trial counsel was  
24 ineffective for failing to object to the cited Opening  
25 Statement remarks, but found that such comments did not rise to  
26 the level that a new trial was required. It is respectfully  
27 submitted that the District Court should have examined the  
28

1 other issues and based on the cumulative error granted relief  
2 to THOMAS.

3 Too long have prosecutors been allowed to violate their  
4 ethical bounds and then hide behind harmless error like their  
5 mother's apron. See Garner v. State, 78 Nev. 366, 374 P.2d 525  
6 (1962). At what point does this Court say enough is enough?  
7 It only takes once and the conduct will stop. Until then this  
8 Court is an accomplice to the intentional misconduct.

9 **D. Trial Counsel Failed to Object to Numerous Instances**  
10 **of Improper Closing Argument at the Penalty Hearing and**  
11 **Appellate Counsel Failed to Raise the Issue on Direct Appeal**  
12 **and Argue That the Prosecutorial Misconduct Was Plain Error.**

13 The State and THOMAS obviously have different opinions as  
14 to the latitude given the State to make improper closing  
15 arguments at the penalty hearing in a capital case. The  
16 instances specified by THOMAS are egregious, repetitive, and  
17 intentional. THOMAS can add little to that set forth in his  
18 pleadings and Opening Brief.

19 **3. Trial counsel was not prepared for critical stages of**  
20 **the proceedings and failed to conduct proper investigation**  
21 **prior to trial in violation of THOMAS' rights under the Sixth**  
22 **Amendment to effective counsel and under the Fifth and**  
23 **Fourteenth Amendments to due process and a fundamentally fair**  
24 **trial.**

25 The State asserts that trial counsel effectively cross-  
26  
27  
28

1 examined Kenya Hall at the preliminary hearing despite not even  
2 having a copy of the statement given by Mr. Hall to the police  
3 several weeks before the preliminary hearing. (Ans. Brf. p.  
4 55) This "effective" cross-examination of an accomplice and  
5 co-defendant consumed a grand total of eleven pages. (RA 190-  
6 201) Once Hall refused to testify at trial THOMAS was forced  
7 to accept the reading of the woeful cross-examination from  
8 preliminary hearing before the jury. The virus of ineptness  
9 was thus interjected into the trial.

10 The total lackadaisical attitude of trial counsel is  
11 evident from the record and the District Court erred in failing  
12 to grant relief to THOMAS.

13 **4. Trial counsel failed to adequately represent THOMAS**  
14 **during the course of the trial proceedings by failing to**  
15 **properly prepare jury instructions, cross-examine witnesses,**  
16 **and present evidence at both the trial and penalty stages of**  
17 **the proceedings in violation of THOMAS' rights under the Sixth**  
18 **Amendment to effective counsel and under the Fifth and**  
19 **Fourteenth Amendments to due process and a fundamentally fair**  
20 **trial.**

21  
22 This issue has been fully briefed and discussed by THOMAS  
23 in his Opening Brief and THOMAS therefore relies upon same as  
24 though fully set forth hereat.

25 **5. Appellate counsel failed to file a complete record on**  
26 **appeal as required by Supreme Court Rule 250 and failed to**  
27  
28

1 raise meritorious issues on direct appeal in violation of  
2 THOMAS' rights under the Sixth Amendment to effective counsel  
3 and under the Fifth and Fourteenth Amendments to due process  
4 and a fundamentally fair trial.

5 The State takes the position that appellate counsel in  
6 capital cases is not required to raise all colorable issues  
7 citing to Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).  
8 This, of course, is the same office that will claim that an  
9 issue is procedurally barred from review on post conviction  
10 habeas corpus if the issue is not raised on direct appeal.  
11 Until such time as the District Attorney's Office stops talking  
12 out of both sides of their mouth, capital defendants will  
13 continue to assert that all viable claims should be raised on  
14 direct appeal.  
15

16 6. THOMAS' conviction and sentence are invalid under the  
17 State and Federal Constitutional guarantee of due process,  
18 equal protection of the laws, and reliable sentence due to the  
19 failure of the Nevada Supreme Court to conduct fair and  
20 adequate appellate review. United States Constitution  
21 Amendments 5, 6, 8, and 14; Nevada Constitution Article I,  
22 Sections 3, 6 and 8; Article IV, Section 21.  
23

24 This issue has been fully briefed and discussed by THOMAS  
25 in his Opening Brief and THOMAS therefore respectfully relies  
26 upon the content of such argument and urges that this court  
27 grant appropriate relief.  
28



1           7.    THOMAS' conviction and sentence are invalid under the  
2 State and Federal Constitutional guarantees of due process,  
3 equal protection, impartial jury from cross-section of the  
4 community, and reliable determination due to the trial,  
5 conviction and sentence being imposed by a jury from which  
6 African Americans and other minorities were systematically  
7 excluded and under-represented. United States Constitution  
8 Amendments 5, 6, 8, and 14; Nevada Constitution Article I,  
9 Sections 3, 6 and 8; Article IV, Section 21.  
10

11           This issue with fully briefed and discussed by THOMAS in  
12 his Opening Brief and THOMAS therefore respectfully relies upon  
13 the content of such argument and urges that this court grant  
14 appropriate relief.  
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II.

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

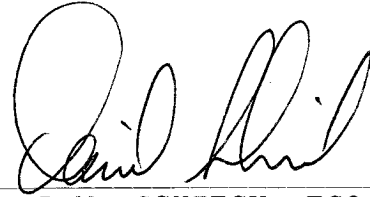
THOMAS respectfully submits this issue based on the  
arguments and authorities contained in the Opening Brief on  
file herein.

CONCLUSION

Based on the authorities contained herein and in the Opening Brief, 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 8 day of September, 2003.

RESPECTFULLY SUBMITTED:



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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: Sept 8, 2003

BY 

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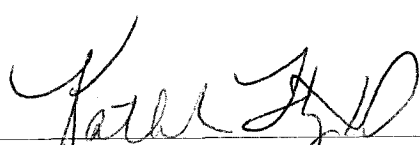
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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply  
Brief was made this 8 day of September, 2003, by depositing  
a copy in the U.S. Mail, postage prepaid, addressed to:

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