

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 45456

FILED

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APPELLANT'S REPLY BRIEF

(Appeal from Remanded Penalty Hearing and Sentence
of Death in the Eighth Judicial District Court)

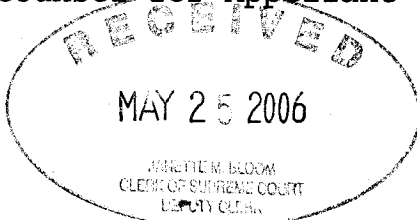
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- 2. SENT A LETTER ORDERING A HIT ON A MAN
KNOW AS SCALES, WHEN,
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1 ARGUMENT

2 I.

3 THE TRIAL COURT DEPRIVED APPELLANT
4 OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL
5 BY A PANEL OF IMPARTIAL, INDIFFERENT JURORS
6 WHEN IT ALLOWED THE PROSECUTOR TO ASK
7 "STAKE-OUT" QUESTIONS DURING VOIR DIRE
8 EXAMINATION OF PROSPECTIVE JURORS

9 The trial court deprived DONTE JOHNSON of his due process right
10 to a fair trial by a panel of impartial, indifferent jurors when it
11 allowed the prosecutor to ask "stake-out" questions during voir dire.
12 The death verdict should be set aside and a new penalty trial ordered.

13 One of the most important aspects of any criminal trial is
14 selection. The Sixth and Fourteenth Amendments guarantees of the
15 right to an impartial jury applies to the penalty phase of a capital
16 case as well as the guilty phase. See, Morgan v. Illinois, 504 U.S.
17 719, 728-29 (1992). In the present case the prosecutor was allowed
18 to ask prospective jurors:

19 "If you are selected as the foreperson of this jury and
20 under the laws and facts, you believe the death penalty was
21 appropriate could you sign your name as the foreperson of
22 this jury to the verdict of death that would put Donte
23 Johnson to death?" (22 APP 5431)

24 This question was an improper "stake-out" questions designed to
25 both discover how a juror might vote and cause prospective jurors to
26 pledge themselves to a future course of action. The allowing of this
27 improper voir dire questioning allowed the prosecutor to empanel a
28 pro-death jury rather than a panel of impartial, indifferent jurors
to which DONTE JOHNSON was entitled.

In U.S. v. Fell, 372 F.Supp.2d 766 (D.Vt. 2005) the Vermont Court
referred to U.S. v. Johnson, 366 F.Supp.2d 822 (N.D. Iowa 2005) with
approval in its detailed discussion of both case-specific questions

1 and "stake-out" questions. The Fell Court noted:

2 "There is a crucial different between questions that seek
3 to discover how a juror might vote and those that ask
4 whether a juror will be able to fairly consider potential
5 aggravating and mitigating evidence." (at 771)

6 Here, the prosecutor's question to 17 prospective jurors was not asked
7 for any legitimate or allowable purpose. Instead, the question was
8 a blatant attempt to determine the kind of verdict the jurors would
9 return, and to cause the jurors to commit themselves to a future
10 course of action.

11 DONTE JOHNSON has noted that the question challenged here does
12 not have the same form as case-specific questions. Rather, the
13 prosecutor's question asked the prospective jurors to speculate on
14 their actions should they be selected as foreperson of the jury if,
15 "under the laws and facts", they believed the death penalty was
16 appropriate, "could you sign your name as the foreperson of this jury
17 to the verdict of death that would put Donte Johnson to death." (22
18 ROA 5431)

19 The prosecutor's question was an improper "stake-out" question
20 seeking to cause prospective jurors to pledge themselves to a future
21 course of action and "indoctrinate them regarding potential issues
22 before the evidence has been presented and they have been instructed
23 on the law." See, Richmond v. Polk, 375 F.3d 309, 330 (2005); citing
24 State v. Richmond, 495 S.E.2d 677, 683 (1998).

25 There can be no argument that this question, repeated over and
26 over, was a "stake-out" question asked for the purpose of empaneling
27 a pro-death jury rather than the constitutionally mandated panel of
28 impartial, indifferent jurors DONTE JOHNSON was entitled to have
determine his sentence. The death verdict should be set aside.

1 II.

2 IT WAS INTENTIONAL MISCONDUCT FOR THE
3 PROSECUTOR TO REFER TO THE VICTIMS AS "BOYS"
4 AND "KIDS" WHEN HE WAS EXPRESSLY PROHIBITED
5 FROM DOING SO BY THE DISTRICT COURT'S PRE-TRIAL RULING

6 The prosecutor intentionally and deliberately violated the
7 District Court's pre-trial ruling precluding him from referring to the
8 victims as "boys" when in rebuttal he argued:

9 "...He may have been the one who said what these boys had
10 and it may have been the triggering event. Are we going to
11 blame Todd Armstrong for this? Did he suggest that they go
12 over and execute these kids,.....

13 MS. JACKSON: Your Honor, I'm going to object. Counsel has
14 referenced to these decedents as kids and as boys. We made
15 a specific ruling on that before we started.

16 MR. STANTON: I will refer to them as 'young men', Your
17 Honor. All right. Sustained." (27 ROA 6715-16)

18 Again the Prosecutor referred to the victims as boys:

19 "...walk that videotape back beyond the four walls of Terra
20 Linda where the young boys or young man is watering his
21 lawn. (27 ROA 6719)

22 Again,...not sympathy, compassion he goes over and
23 systematically executes, bending down to each one of these
24 boys....." (27 ROA 6720)

25 In the Opening Brief, DONTÉ JOHNSON argued to this Court that the
26 actions of the prosecutor were intentional misconduct that created
27 prejudice in the minds of the jury against him. He cited, U.S. v.
28 Young, 470 U.S. 1, 10 (1985) for the principle that a prosecutor may
not improperly appeal to a jury to act in ways other than as
dispassionate arbitrators of the facts. (Opening Brief, page 28, lns
9-13)

The State argues that JOHNSON waived the issue as to the second
improper reference to the victims as boys as he did not object.
(Answering Brief, page 5).

1 The record reflects the following:

2 Again the Prosecutor referred to the victims as boys:

3 "...walk that videotape back beyond the four walls of Terra
4 Linda where the young boys or young man is watering his
lawn. (27 ROA 6719)

5

6 Again,...not sympathy, compassion he goes over and
7 systematically executes, bending down to each one of these
boys....." (27 ROA 6720)

8 After the jury left the Courtroom defense counsel asked to put
9 on the record that there had been an Order by the Court that the
10 victims not be referred to as "boys" or "kids". The Court admonished
11 the Prosecutor who, after the admonishment, did it two more times.
12 The Court observed that defense counsel did not object and she
13 responded that she had not wanted to draw attention to it, which was
14 why the Motion was filed in advance of trial. (27 ROA 6723)

15 To believe the prosecutor's repeated reference to the victims as
16 boys or kids was an inadvertent slip requires an assumption that his
17 rebuttal argument was not prepared prior to being given to the jury,
18 but was contemporaneously composed. Possible, of course, but
19 unlikely.

20 In addition, the prosecutor argues the improper reference did not
21 violate DONTE JOHNSON'S constitutional rights, there was no bad faith,
22 and no prejudice. DONTE JOHNSON would point out to this Court that
23 there was also no authority cited by the State in support of its
24 arguments. This Court should not consider the State's argument as the
25 State failed to cite authority to support it. See, Senegal v. IGT,
26 116 Nev. 565, 2 P.3d 258 (2000); Cunningham v. State, 94 Nev. 128,
27 139, 579 P.2d 936, 937 (1978).

28 The prosecutor's deliberate contravention of the District Court's

1 Order was a calculated effort to evoke sympathetic responses from
2 jurors to the prejudice of DONTE JOHNSON.

3 JOHNSON notes that the State's conclusion: "contrary to
4 Defendant's assertions, the jury sentenced him to death because he is
5 a cold-blooded murderer" is without citation to the record, or
6 authority. See, Senegal, supra.

7 In Rose v. Clark, 478 U.S. 570 (1988), Justice Stevens in
8 concurring wrote:

9 "An automatic application of the harmless error review in
10 case after case, and for error after error, can only encourage
11 prosecutors to subordinate the interest in respecting the
12 constitution to the ever present and always powerful interest in
13 obtaining a conviction in a particular case."
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III.

THE DECISION OF THE TRIAL COURT TO ALLOW THE
STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE
REGARDING APPELLANT'S JUVENILE CONVICTIONS
DEPRIVED APPELLANT OF A FAIR PENALTY HEARING

The first decision of the Trial Court to exclude DONTE JOHNSON'S juvenile records as being more prejudicial than probative was sound. When the Court later decided to allow the State to adduce testimony and records of DONTE JOHNSON'S juvenile conviction it erred. As a consequence of the admission of these records. DONTE JOHNSON was denied due process of law as guaranteed by the United States and Nevada Constitution, Sixth Amendment, Fourteenth Amendment.

NRS 175.522(3) allows the introduction of "other matter" evidence at a penalty hearing in the sound discretion of the trial judge. The evidence must be relevant and must be more probative than prejudicial. See, NRS 48.035(1). Here, the Judge's change of mind allowing the introduction of evidence regarding DONTE JOHNSON'S juvenile convictions was unreasonable.

A trial court is at liberty to exclude relevant evidence if it determines that its probative value is substantially outweighed by the danger of unfair prejudice. See, Halbower v. State, 93 Nev. 212, 562 P.2d 485 (1977).

In Krause, Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001) this Court stated that to merit exclusion the evidence must unfairly prejudice an opponent typically by appealing to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. (at 935, citation omitted.) In Roper v. Simmons, 543 U.S. 551 (2005) the Court found that juvenile offenders were less culpable than adults. However, it cannot be said

1 that the jury herein could intellectually evaluate DONTE JOHNSON'S
2 juvenile record without the emotional evaluation. The admission of
3 testimony and exhibits regarding DONTE JOHNSON'S juvenile record was
4 so highly prejudicial as to deprive DONTE JOHNSON of a fair penalty
5 hearing.

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IV.

DONTE JOHNSON'S DUE PROCESS RIGHT TO A
FAIR TRIAL WAS IMPAIRED BY THE
PROSECUTION'S IMPROPER CLOSING ARGUMENT

Contrary to the State's position in its Answering Brief (page 9) it was not fair comment for the prosecutor to argue to the jury:

"I would submit to you that if you find that his upbringing outweighs this quadruple homicide, that is disrespectful to members of South Central L.A. who didn't commit a quadruple homicide. Common sense tells us that many, many, many people in a similar upbringing haven't done what Donte Johnson has done. If you were to find that his childhood is entitled to a greater wait (sic) of this quadruple homicide, it's like telling people --" (27 ROA 6656-6657)

and this Court should so find.

The argument was designed to inflame the jury, invoke social pressure, and coerce the jury into imposing a sentence of death.

A jury, in a sentencing hearing, is to determine the proper sentence for the defendant before them based upon his past conduct. Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985). Here, however, the prosecutor, as in Collier, Id., improperly compared DONTE JOHNSON and his actions to others as well as improperly discussing matters not in evidence. The prosecutors invocation of facts outside the record and improper comparison of DONTE JOHNSON to others deprived him of the individual consideration essential in capital case. Lockett v. Ohio, 438 U.S. 586 (1978).

In its Answering Brief, the State cites 14 cases as support for its position that before this Court could reverse because of prosecutorial misconduct JOHNSON must prove the errors were of constitutional dimension and so egregious that they denied him his fundamental right to a fair jury trial. This argument lacks both validity and force. The authorities cited by the State, with the

1 exception of Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) are
2 inapplicable to the facts herein.

3 First, the cases cited by the State are relevant only to
4 challenges on convictions on the ground of prosecutorial misconduct.
5 The case at bar does not involve a conviction, but a challenge to a
6 sentence of death. Secondly, unlike the cases cited by the State,
7 defense counsel here did object to the prosecutors improper argument,
8 a sidebar conference was held outside the presence of the court
9 reporter. (27 ROA 6656-6657)

10 Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) was cited
11 by the State for its holding by this Court that when a guilty verdict
12 is free from doubt, even aggravated prosecutorial remarks will not
13 justify reversal. (Ans. Brf. p. 11) Clearly this ruling is not
14 applicable to a sentencing hearing. However, Flanagan, Id. is
15 applicable to the case at bar as this Court noted therein

16 "At the sentencing phase, it is most important that the
17 jury not be influenced by passion, prejudice, or any other
18 arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th
19 Cir. 1983). 'With a man's life at stake, a prosecutor
20 should not play on the passions of the jury.' Id." (at
21 107, 754 P.2d 837)

22 The prosecutor has a duty to confine argument to the jury within
23 proper bounds. See, United States v. Young, 470 U.S. 1, 8 (1985).
24 Here, the misconduct of the prosecutor rendered the sentencing hearing
25 fundamentally unfair. This case should be remanded for a new penalty
26 hearing.
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1 V.

2 APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER
3 PREJUDICE AND ARBITRARY FACTORS WHEN, AT
4 THE PENALTY HEARING, IN THE PRESENCE OF THE
5 JURY, THE BROTHER OF TRACY GORRINGE, UPON
6 VIEWING THE PHOTO OF THE CRIME SCENE
7 DISPLAYED ON A SCREEN DURING THE
8 PROSECUTOR'S CLOSING ARGUMENT, GROANED,
9 PASSED OUT ON TO THE FLOOR, AND WAS
10 HELPED, CRYING FROM THE COURTROOM

11 The fact that the District Court Judge did not see Nick Gorringer
12 crying or visibly upset is not the crucial fact. The crucial fact is
13 that the jury saw Gorringer fall, saw him crying, and being helped from
14 the courtroom after the display of the enlarged crime scene photo.
15 Genuine or spurious, the extreme behavior demonstrated to the jury
16 requires reversal of the sentence of death. As in Holloway v. State,
17 116 Nev. 732, 6 P.3d 987 (2000) the startling occurrence was a
18 prejudicial and arbitrary factor requiring reversal of the death
19 sentence.

20 The State claims that Lisle v. State, 113 Nev. 540, 558, 937 P.2d
21 473, 484 (1997) supports the presumption that juries follow jury
22 instructions and the District Court Judge gave the jury a cautionary
23 instruction to disregard the commotion. The District Court in
24 Holloway, Id., also addressed the jury about the activation of the
25 stun belt to no avail.

26 Here, when Gorringer groaned and fell after the prosecutor, in his
27 closing argument, displayed an enlarged crime scene photograph on the
28 screen the courtroom audience was divided into two distinctly
different groups. On the left side, all Caucasian, were the families
of the victims. This is where Gorringer was seated. On the right
side, almost all Afro-Americans, was the family of DONTÉ JOHNSON. (27
ROA 6663)

1 After the fall/collapse Gorringer was crying as he was helped out
2 of the courtroom by Matthew Mowen's father and the bailiff. This also
3 was in the presence of the jury. The District Court declared a
4 recess. (27 ROA 6663-6664)

5 Simply logic compels an assumption that the jury panel that
6 observed the actions of Gorringer had no confusion regarding his
7 affiliation with the victims.

8 The commotion/interruption/incident was an arbitrary and
9 prejudicial factor which requires reversal of DONTE JOHNSON'S
10 sentence.

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1 VI.

2 IT WAS IMPROPER FOR THE PROSECUTOR TO
3 MISSTATE FACTS IN REBUTTAL ARGUMENT

4 In rebuttal argument the prosecutor argued facts not in evidence,
5 discounted the defense objection and the Court's statement of opinion.
6 This was misconduct as well as lack of respect to the Court.

7 In the State's rebuttal closing argument the prosecutor stated
8 that he wished to talk about a couple of sets of facts regarding the
9 murders and thereafter stated:

10 "The fatal - the ultimately fatal conversation when Matt
11 Mowen comes over and in the presence of the defendant and
12 Terrell Young, makes the statement that they have lots of
13 money that they made selling pizzas and drugs following the
14 band Phish....." (27 ROA 6713)

15 Defense counsel objected stating that the only mention of "pizza"
16 was made by the prosecutors. The detective said "acid". The money
17 was made selling acid. There was no evidence at all that pizzas were
18 sold. The Court stated that it did not recall pizza. (27 ROA 6712-
19 6713)

20 The prosecutor then stated:

21 "I'll leave it to the collective memory of you as the jury
22 of what occurred." (27 ROA at 6713)

23 In the Opening Brief (page 36) JOHNSON asserted that it was
24 misconduct for a prosecutor to argue facts not in evidence citing
25 Witherspoon v. State, 104 Nev. 721, 765 P.2d 1153 (1988); Collier v.
26 State, 101 Nev. 473, 705 P.2d 1126 (1985); and Williams v. State, 103
27 Nev. 106, 110, 734 P.2d 700, citing SCR 181(3) 1985, SCR 195(3),
28 198(2) 1985.

29 The State in its Answering Brief denies any merit to JOHNSON'S
30 argument. However, it cites no authority in support of its position.
31 See, Senegal v. IGT, 116 Nev. 565, 2 P.3d 258 (2000).

1 The prosecutor, in misstating the fact, sought to portray the
2 victims in a more positive light and his response to the challenge was
3 prejudicial to DONTE JOHNSON.

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VII.

APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL
WAS COMPROMISED BY THE PROSECUTORS WHO IN
OPENING ARGUMENT OF THE SENTENCING PHASE:

1. TOLD THE JURY THAT WHILE INCARCERATED DONTÉ JOHNSON DID NOT STOP HIS CRIMINAL CONDUCT AND, IN FACT, MADE A TELEPHONE CALL TO A YOUNG WOMAN IN WHICH HE THREATENED TO KILL HER, AND FURTHER,
2. SENT A LETTER ORDERING A HIT ON A MAN KNOWN AS SCALES, WHEN,
3. HE COULD NOT, THEREAFTER ADDUCE EVIDENCE TO SUPPORT THE ALLEGATIONS DUE TO THE PROSECUTORS FAILURE TO PROVIDE ADEQUATE NOTICE TO THE DEFENSE.

The prosecutor did not notice JOHNSON that he would argue that JOHNSON, while incarcerated, had threatened to kill a young woman and put out a contract to kill a man named Scale. (28 ROA 6984-90) Clearly, when, in opening statement to the jury he argued:

"Eventually, in prison, while incarcerated, his criminal conduct still didn't stop. You will hear about his behavior since his incarceration, how he can't comply with the rules and how rules are terribly important when you are a corrections officer at the detention center or at Ely State Prison. It's imperative that the inmates comply with the rules.

You will hear about a phone call he made, threatening to kill a young woman, a civilian.

You will hear about a letter he wrote where he put a hit out on Scale. You heard that name in the trial, Mr. Anderson, named Scale." (emphasis added) (28 ROA 6965)

The prosecutor has a duty to refrain from stating facts in his opening statement that he cannot prove at trial. Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991) cert. denied, 514 U.S. 1052, 115 S.Ct. 1431, 131 L.Ed.2d 312 (1995).

Evidence of other offenses is universally regarded as prejudicial and is therefore admitted into evidence only for certain specified purposes, NRS 48.045(2), and only then when its probative value

1 outweighs its prejudicial effects." Theriault v. State, 92 Nev. 185,
2 189, 547 P.2d 668, 671 (1976).

3 Here, the prosecutor told the jury that JOHNSON threatened to
4 kill a young woman and ordered a "hit" on a man named Scales.
5 Clearly, these statements were highly prejudiced, exacerbating any
6 fears the jury might have about future violence should it not impose
7 a sentence of death. It cannot be said that the prejudice caused by
8 the prosecutor's assertions did not contribute to the death sentence
9 imposed.

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VIII.

DONTE JOHNSON WAS DEPRIVED OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY BOTH THE UNITED STATES AND NEVADA CONSTITUTIONS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO ADDUCE INTO EVIDENCE JOHNSON'S INMATE REPORTS FROM THE CLARK COUNTY DETENTION CENTER WITHOUT FIRST DEMONSTRATING THAT THE WITNESSES WERE UNAVAILABLE TO TESTIFY AND THAT JOHNSON HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THEM

The detention center inmate reports, containing testimonial statements, were inadmissible under the confrontation clause, as the State did not show that the declarants were unavailable to testify and DONTE JOHNSON never had an opportunity to cross-examine them. DONTE JOHNSON'S sentence of death should be reversed.

In Crawford v. Washington, 541 U.S. 36, 69 (2004) the Court held "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation. The Court stated: "we leave for another day any effort to spell out a comprehensive definition of testimonial."

The Court did note that a statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. Id. at 51.

In King v. State, 2006 Tex.App. Lexis 2100 (March 16, 2006) the Court stated:

The legal ruling of whether a statement is testimonial under Crawford is determined by the standard of an objectively reasonable declarant standing in the shoes of the actual declarant. Generally speaking, a statement is 'testimonial' if it is a solemn declaration made for the purpose of establishing some fact. Rousseau, 171 S.W.3d 871, 880 (Tx.Crim.App 2005) (citing Crawford, 541 U.S. 36, 51 (2004)). (at 21)

In Rousseau v. Texas, 171 S.W.3d 871 [Tx.Crim.App] (2005), a

1 capital murder case, the court of criminal appeals of Texas affirmed
2 the defendants conviction but reversed as to punishment, remanding for
3 a new punishment hearing on the ground that "incident reports" and
4 "disciplinary reports" admitted under the business records exception
5 to the hearsay rule; contained statements which appeared to have been
6 written by correction officers and which purported to document
7 numerous and repeated disciplinary offenses on the part of Russeau
8 while incarcerated.

9 Further, in writing the statements, the corrections officers
10 relied upon their own observation or the observation of others. The
11 individuals who supposedly observed the offenses did not testify at
12 trial.

13 The Texas Court held that the reports were testimonial statements
14 and, as such, were inadmissible under the confrontation clause,
15 because the State did not show that the declarants were unavailable
16 to testify and Russeau never had an opportunity to cross-examine any
17 of them. The Texas Court stated that

18 "Indeed, the statements in the reports amounted to
19 unsworn, ex parte affidavits of government employees and
20 were the very type of evidence the clause was intended to
21 prohibit." (at 881)

22 The State cited United States v. Chau, 426 F.3d 1318, 1323 (11th
23 Cir. 2005), citing United States v. Roche, 415 F.3d 614, 618 (7th Cir.
24 2005), and Gaxiola v. State, 119 P.3d 1225 (Nev. 2005) for support of
25 its position that inmate reports are not testimonial. These cases are
26 completely inapplicable on their facts. The rulings of the Courts
27 therein cannot be applied here.

28 In both Chau and Roche the defendants were charged with drug-
related crimes. Both pled guilty. Both challenged the sentence

1 imposed by the Court. Both alleged confrontation clause violations
2 during the sentencing hearing before the respective courts. Both
3 appeals were denied. Neither decision is applicable to the instant
4 matter.

5 In Gaxiola, Id., this Court held that the admission of the child
6 victim's statements to third parties did not violate the defendant's
7 right to confrontation since the child testified at trial. Plainly,
8 neither the facts nor the holdings of this Court therein has any
9 applicability to this case.

10 Here, the detention center inmate reports at issue contained
11 written statements made by correction officers of their own
12 observations, or the observations of others. Clearly they are
13 "testimonial; made for the purpose of establishing some fact."

14 The State also argues that when business records are at issue
15 confrontation clause analysis is inapplicable; citing, People v.
16 Brown, 801 N.Y.S.2d 709 (2005); Commonwealth v. Verde, 827 N.E.2d 701
17 (2005); and People v. Hinojos-Mendoza, ___ P.3d ___, 2005, Colo.App.
18 Lexis 1206, 2005 WL 256 1391 (Colo.App. 2005).

19 In Brown, Verde, and Hinojos-Mendoza, the reviewing courts held
20 that Crawford, Id., did not apply to technicians that analyzed DNA
21 (Brown) or drugs (Verde, Hinojos-Mendoza). In fact, in Verde and
22 Hinojos-Mendoza the courts criticized this Court's holding in City of
23 Las Vegas v. Walsh, 121 Nev.Adv.Op. 85, 124 P.3d 203 (12-15-2005).

24 In Walsh, this Court found that affidavits under NRS 50.315 are
25 testimonial. This Court should find the inmate reports challenged
26 here are testimonial statements; and that their admission into
27 evidence violated the confrontation clause. This case should be
28 reversed and remanded.

IX.

THE CUMULATIVE EFFECT OF PREJUDICIAL ERROR CREATED
IN LARGE PART, BY PROSECUTOR MISCONDUCT,
AS WELL AS THE RECEPTION OF INADMISSIBLE
EVIDENCE, AND ERRONEOUS RULINGS OF
THE DISTRICT COURT DEPRIVED JOHNSON OF HIS
CONSTITUTIONAL RIGHT TO A FAIR PENALTY HEARING

DONTE JOHNSON asserted that misconduct by the prosecutor, inadmissible evidence, and erroneous rulings by the trial court deprived him of a fair trial citing: Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002); Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Garner v. State, 78 Nev. 366, 373, 374 P.2d 525 (1962); State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948); McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984); Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986). The State in response says there were no prejudicial errors and that "the death penalty was designed for cold-blooded murderers with a calloused heart such as defendant." (Answering Brief, page 18)

As in previous arguments 2 and 6 the State failed to cite any authority for its positions. The State's opinion, without supporting authority, that there were no prejudicial errors should be disregarded and not considered by this Court. The State's opinion that the death penalty was designed for cold-blooded murderers with a calloused heart is also without supporting authority and should also be disregarded by this Court; as should the State's description of DONTE JOHNSON as such. See, Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000).

Further, and even more offensive, is the State's slant on death penalty jurisprudence, i.e., "while death may be different, reviewing courts should not place the bar so high that achieving a valid death

1 verdict becomes impossible." (Answering Brief at page 18) JOHNSON
2 suggests that when a man's life is at stake, a prosecutor should not
3 "play on the passions of the jury." Flanagan v. State, 104 Nev. 105,
4 107, 754 P.2d 836 (1988). A prosecutor's duty in a criminal
5 prosecution is to seek justice; Berger v. U.S., 295 U.S. 78, 88
6 (1935); not to achieve a death verdict. DONTE JOHNSON'S penalty
7 hearing was fatally flawed. The sentence should be reversed.

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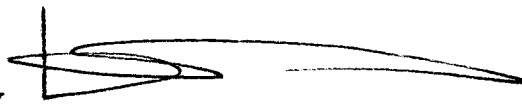
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CONCLUSION

Wherefore, it is respectfully requested that the Court reverse the sentence of DONTE JOHNSON and remand the matter to District Court for a new penalty hearing.

Dated this 23rd day of May, 2006.

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1 CERTIFICATE OF COMPLIANCE

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


12 DATED the 23rd day of May, 2006.

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