DONTE JOHNSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 45456

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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RESPONDENT'S ANSWERING BRIEF

Appeal from Sentence of Death
Eighth Judicial Court, Clark County

STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling that the prosecutor did not ask "stake-out" questions during voire dire.

2. Whether the prosecutor committed prejudicial misconduct by referring to the victims as boys and kids in part, but not all, of closing argument.

3. Whether the trial court erred by allowing the State to adduce testimony and physical evidence regarding Defendant's juvenile convictions in the penalty hearing.

4. Whether Defendant's due process right to a fair trial was impaired by the prosecution's closing argument.

5. Whether Defendant's death sentence was imposed under prejudice and arbitrary factors when, at the penalty hearing, the brother of victim Tracy Gorringe, upon viewing the photograph of the crime scene displayed on a screen during the prosecution's closing argument, groaned, passed out on to the floor, and was helped from the courtroom.

6. Whether the prosecutor misstated facts in rebuttal argument and whether it was prejudicial to Defendant.

7. Whether Defendant's due process right was compromised by the prosecution in its opening statement.

8. Whether Defendant was deprived of his constitutional right to confront witnesses against him when the trial court allowed the State to introduce into evidence Defendant's inmate reports during the penalty phase.

9. Whether Defendant was denied a fair penalty hearing by the cumulative effect of alleged errors.

STATEMENT OF THE CASE

On December 18, 2002, this Honorable Court Affirmed Donte Johnson's (hereinafter "Defendant") convictions, pursuant to a jury verdict, of four counts each of first degree murder with use of a deadly weapon, robbery with use of a deadly weapon, and first degree kidnapping with use of a deadly weapon, and one count of burglary with use of a deadly weapon, but reversed the death sentence because it was imposed by a three-judge panel of district court judges and not a jury. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002).

On April 12, 2005, the district court granted the State's motion to admit former testimony. 32 Record on Appeal ("ROA"), Criminal Court Minutes p. 56.

On April 18, 2005, the district court granted Defendant's motion to bifurcate the penalty phase of the penalty hearing. 32 ROA, Criminal Court Minutes p. 59.

Defendant's Jury trial commenced on April 19, 2005. On April 28, 2005, the jury returned with the verdict that the aggravating circumstance outweighs any mitigating circumstance or circumstances in all four (4) murder counts. 28 ROA, p. 6946, 6949, 6955; 32 ROA, Criminal Court Minutes p. 63-64.

On May 5, 2005, the jury returned a verdict of death on all four (4) murder counts. 32 ROA, p. 7892-7893, 7874-7876; 31 ROA, p. 7747.

On June 6, 2005, Defendant was sentenced to death on each of the four (4) murder counts. 32 ROA, Criminal Court Minutes p. 70. The Warrant and Order of

Execution were signed and filed in open court as was the Order to Stay Execution. 32 ROA, p. 7911-14, 7909-10, 7919-20.

The Judgment of Conviction was filed on June 6, 2005. 32 ROA, 7915-18. Defendant filed a timely Notice of Appeal on June 30, 2005. 32 ROA, p. 8055-56.

STATEMENT OF THE FACTS

> The State presented overwhelming evidence: several witnesses, including his former girlfriend, testified that Johnson bragged about the killings; he possessed items taken from the victim's home where the crimes occurred; and DNA evidence connected him to the crime.

Johnson v. State, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002).

Defendant's summation, in his Statement of Facts, of the testimony of the execution-style quadruple murders presented in the 2005 penalty hearing is substantially accurate.

ARGUMENT

I

THE TRIAL COURT CORRECTLY RULED THAT THE PROSECUTOR DID NOT ASK "STAKE-OUT" QUESTIONS DURING VOIRE DIRE

Defendant erroneously claims that the State's generalized voir dire, containing no specific facts from Defendant's case, constituted impermissible "stake-out" questions. Defendant cites United States v. Fell, 372 F.Supp. 2d 766, 770 (Vermont 2005) in which that court determined "stake-out" questions as those that "ask a juror to speculate or pre-commit to how that juror might vote *based on particular facts*." (emphasis added). Defendant also cites United States v. McVeigh, 153 F.3d 1166, 1207 (1998) where that court determined "when a defendant seeks to ask a juror to speculate or pre-commit to how that juror might vote *based on particular facts*, the question strays beyond the purpose and protection of Morgan." (emphasis added).

However, the questions asked by the State were not based on any particular facts about Defendant's case. The State asked the following generalized voir dire questions:

> If you were selected the foreperson of this jury and under the laws and the facts, you believe that the death penalty was appropriate, could you sign your name as the foreperson of this jury to the verdict of death that would put Donte Johnson to death?

22 ROA, p. 5431.

> If you were selected as a juror in this case, the facts and circumstances presented to you, the instructions of law that Judge Gates would give you regarding the penalty phase, if you and the entire deliberative body of the jury were of the minds that the death penalty was the appropriate punishment in this case and you were selected the foreperson, could you sign your name to the verdict form that puts the defendant Donte Johnson to death?

22 ROA, p. 5592.

Defense counsel objected on grounds that the law only requires the juror consider the four forms of punishment. 22 ROA, p. 5431. The judge overruled the objection after the State explained as follows:

> The form of my question wasn't put in whether or not she could consider it. The question presupposes in the form of the question that based upon the law and facts she thought the death penalty was appropriate *could she carry out her function.*

22 ROA, p. 5431.

The scope of jury voir dire is within the sound discretion of the trial court and will be given considerable deference by this court. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996); Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). The State's voir dire was reasonably designed to question whether the prospective jurors were capable of carrying out their duty in a death penalty case. This duty may include service as a jury foreman and almost always includes individual polling of the jurors. Notably, the Defense does not contend that any juror was stricken or excused because of their

failure to answer the State's question properly.[1] The State's questions regarding service as foreman and signing the verdict form did not pledge the prospective jurors to any particular course of action nor did it indoctrinate them regarding potential issues in the case. Such inquiry does not qualify as "stake-out" questions because nothing is based on any particular facts from Defendant's case. There is no merit to Defendant's contentions.

II

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT BY REFERRING TO THE VICTIMS AS BOYS AND KIDS IN PART, BUT NOT ALL, OF CLOSING ARGUMENT

The Defense filed a motion in limine to preclude the court and the prosecutors from referring to the victims as "boys" or "kids" as apparently had been the repeated practice at two prior penalty hearings. 20 ROA, p. 4824-26. The State did not oppose the request (20 ROA, p. 4942-43) and the court so ordered. 20 ROA, p. 5002. Defendant raised an objection to the State's reference to the victims as kids and boys and the district court sustained the objection. 27 ROA, p. 6716. Defendant waived this issue as to the subsequent brief reference to the victims as kids or boys as he did not object. 27 ROA, p. 6723.

In a brief introduction of the case to the prospective jurors, the prosecutor respected the pre-trial order by referring to the victims as "young men" and correctly reciting their ages as being seventeen, nineteen and twenty years old. 25 ROA, p. 6118-19; 6234. During opening statement, the prosecutor numerous times correctly referred to the victims as "young men" and again stated their actual ages. 26 ROA pp. 6386, 6387, 6392, 6394, 6396, 6398, 6403. Only in rebuttal argument did a prosecutor slip up and inadvertently refer to the victims as "boys" or "kids." Such

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[1] For example, Juror 001 was ultimately excused for cause, not because she refused to serve as foreman or sign her name to the verdict form, but because the State's line of questioning made her realize that she could not consider the death penalty under any circumstances at all. 22 ROA, p. 5431

terms are not deceiving or prejudicial in nature, but are accurate descriptions relative to the age of most other adults. While even inadvertent use of such terminology was a technical violation of the agreed-upon pre-trial order, it did not violate defendant's constitutional rights.

When the defense objected, the prosecutor acknowledged the mistake and said he would refer to them as "young men." 27 ROA, p. 6716. Although the error was later repeated the prosecutor appears to correct himself mid-sentence: ". . . where the young boys or young man is watering his lawn . . . ." 27 ROA, p. 6719. In the very same argument, the prosecutor also refers to the victims as "folks," "individuals," "young man," and "people." 27 ROA 6715, 6719.

The passing references to the victims as "boys" or "kids" was not intentional; nor was it an attempt to appeal to the passions of the jury. The photographs of the victims and the testimony clearly indicated to the jury that three (3) of the victims were young men (just over 18 years old) and one (1) of the victims was just under 18 years old. The jury was not confused into believing that the victims were merely ten (10) years old as Defendant argues. There was no bad faith on the part of the prosecutor and the Defense has failed to demonstrate any prejudice. The jury did not sentence Defendant to death because of brief references to the victims as boys or kids. Contrary to Defendant's assertions, the jury sentenced him to death because he is a cold-blooded murderer.

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III

THE TRIAL COURT DID NOT ERR BY ALLOWING THE STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE REGARDING DEFENDANT'S JUVENILE CONVICTIONS IN THE PENALTY HEARING

The decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996), cert. denied, 520 U.S. 1126, 117 S.Ct. 1268 (1997). Evidence of the defendant's character and specific instances of conduct is admissible in the penalty phase of a capital case, but the evidence must be relevant and the danger of unfair prejudice must not substantially outweigh its probative value. Pellegrini v. State, 104 Nev. 625, 630-1, 764 P.2d 484, 488 (1988); see NRS 48.035(1), 175.552(3). In addition, a defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime. Id.

> During 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. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of penalty hearing.

NRS 175.552(3). (emphasis added).

> In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), we held that evidence that a defendant had committed an unrelated homicide for which he had not been convicted may be admitted during the penalty phase of the defendant's trial, not to establish the existence of an aggravating circumstance, NRS 200.033(2), but rather as "other matter which the court deems relevant to sentence." NRS 175.552.

Crump v. State, 102 Nev. 158, 161, 716 P.2d 1387, 1388 (1986). (citations omitted).

> This statute clearly indicates and we so hold that NRS 175.552 is not limited to those nine aggravating circumstances outlined in NRS 200.033. Furthermore, the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), ruled that the relevant factors to be considered by a jury in imposing a penalty for a capital crime are "the character

> and record of the individual offender and the circumstances of the particular offense." Therefore, we conclude that the district court did not err in admitting evidence of the appellant's character even though such evidence did not consist of aggravating circumstances.

Hardison v. State, 104 Nev. 530, 535, 763 P.2d 52, 56 (1988) (citing Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983)).

"The evidence of prior felony convictions admitted against Rogers fell within the hearsay exception of prior convictions. NRS 51.295. As such, it was admissible regardless of NRS 175.552." Rogers v. State, 101 Nev. 457, 466, 705 P.2d 664, 670 (1985).

Defendant's request to bifurcate the penalty hearing was granted. Evidence of Defendant's juvenile record was not introduced until after the jury had already determined that the aggravating circumstances outweighed the mitigating circumstances. Essentially, the jury was in the position of a sentencing judge that has access to a presentence report and prior convictions in the second part of the bifurcated penalty hearing. Defendant's prior violent behavior clearly falls within "any other matter which the court deems relevant to sentence" of NRS 175.552(3). Although the trial court permitted introduction of defendant's juvenile record, the court did not permit the State to introduce evidence of defendant's involvement in the murder of Darnell "Snoop" Johnson at the Thunderbird hotel or the shootout at the Super 8 hotel at the Longhorn Casino as had been admitted at the first penalty hearing. In making such evidentiary rulings, the exercise of judicial discretion clearly worked to defendant's advantage.

This Court has previously sanctioned the admission of juvenile bad acts in a penalty hearing. In Domingues, the juvenile incidents of squeezing a girlfriend's breasts with so much force that fingers touched and throwing a basketball with full force into the girlfriend's face were properly admitted at a penalty hearing to show the defendant's propensity to commit violent acts. Domingues v. State, 112 Nev. 683, 697, 917 P.2d 1364, 1374 (1996). Likewise, in Domingues evidence was properly admitted that the defendant caused problems at his high school and was eventually

expelled, that he was arrested for trespassing on school grounds, that he ignored and fled from an officer's attempt to arrest him pursuant to a juvenile detention order, and that he frequently walked the streets in violation of curfew. Id.

Defendant's reliance on Roper v. Simmons, 543 U.S. 551 (2005) is misplaced. Roper simply held that it is unconstitutional to impose the death penalty on murderers under the age of eighteen, and says nothing about the admissibility of a juvenile conviction at a penalty hearing. To the extent that Roper relied upon studies indicating juveniles lack maturity and are less culpable, such argument potentially goes only to weight and not the admissibility of such evidence. Defendant fails to cite to any authority that juvenile convictions cannot be admitted at a penalty hearing. The district court did not abuse its discretion in admitting Defendant's juvenile convictions in the penalty hearing.

IV

DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS NOT IMPAIRED BY THE PROSECUTION'S CLOSING ARGUMENT

Defendant's sister, Johnnisha Zamora, testified that she and Defendant grew up in South Central Los Angeles. 26 ROA, p. 6621. She, as well as other family members, testified about how difficult life was growing up in South Central Los Angeles. Ms. Zamora testified that she is now doing fairly well and she made it out of the neighborhood. 26 ROA, p. 6621-6622.

Defendant's assertions that the State argued facts outside the record is belied by the record. The theory of the defense was that Defendant should not be given the death sentence because of his horrible childhood. It was fair comment by the State to say that others in Defendant's situation did not commit a quadruple homicide.

The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109

Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). The defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby v. State, 109 Nev. at 911, 859 P.2d at 1054. "The level of misconduct necessary to reverse a conviction depends on how strong and convincing is the evidence of guilt." Rowland v. State, 118 Nev. at 38, 39 P.2d at 118 (2002). In determining whether a defendant has been deprived of a fair trial as a result of prosecutorial misconduct, this Court will inquire as to "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), overruled in part on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). "Furthermore, a defendant is entitled to a fair trial, not a perfect one, and accordingly, '[a] criminal conviction is not to be overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context.'" Rudin v. State, 120 Nev. 121, 86 P.3d 572, 582 (2004) (quoting Greene, supra, and United States v. Young, 470 U.S. 1, 11 (1985)).

In this case, the prosecutor's remarks clearly do not justify overturning the conviction. As the United States Supreme Court has noted, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Should this Court determine that improper comments were made by the prosecutor, "it must be...determined whether the errors were harmless beyond a reasonable doubt."

Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). It is not enough that the prosecutor's remarks are merely undesirable. See Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. Darden v. Wainwright, 477 U.S. at 181.

In addition, before this Court could reverse this case because of prosecutorial misconduct, defendant must prove that the errors were of constitutional dimension and so egregious that they denied the defendant his fundamental right to a fair jury trial. Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997); see also Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990).

In Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), this Court reasoned that if a guilty verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal. Id. at 107, 754 P.2d at 837. In order for prosecutorial misconduct to constitute reversible error, it must be prejudicial and not merely harmless. Id. Error is harmless if this Court concludes, "without reservation that the verdict would have been the same in absence of error." Witherow v. State, 104 Nev. at 724, 765 P.2d at 1156.

The State's comments regarding South Central Los Angeles do not rise to the level of prosecutorial misconduct.

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V

DEFENDANT'S DEATH SENTENCE WAS NOT IMPOSED UNDER PREJUDICE AND ARBITRARY FACTORS WHEN, AT THE PENALTY HEARING, THE BROTHER OF VICTIM TRACY GORRINGE, UPON VIEWING THE PHOTOGRAPH OF THE CRIME SCENE DISPLAYED ON A SCREEN DURING THE PROSECUTION'S CLOSING ARGUMENT, GROANED, PASSED OUT ON TO THE FLOOR, AND WAS HELPED FROM THE COURTROOM

The district court clarified for the record that it did not see Nick Gorringe crying or visibly upset. 27 ROA, p. 6664. There was no evidence that the jury knew who Nick Gorringe was or who he was related to because he did not testify. 27 ROA, p. 6660. There was no evidence that the jury even saw Nick Gorringe fall down. In a hearing outside the jury's presence the judge commented that, "All I know is some guy fell off the seat over there and he was picked up by some guards and taken out . . ." 27 ROA, p. 6664.

The district court gave a cautionary instruction to the jury to disregard the commotion. 27 ROA, p. 6665. "There is a presumption that jurors follow jury instructions." Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997). The situation is unlike the Defendant in Holloway who was shocked by a stun belt in front of the jury even though he had done nothing to warrant it. Holloway v. State, 116 Nev. 732, 6 P.3d 987 (2000). Activation of the belt during the prosecutor's argument reinforced the image of defendant as an extremely violent man with whom authorities had to take exceptional security precautions. Id. No such inference would have been drawn by the jury in the present case just because an observer in the courtroom unknown to the jury fell off the bench and had to be assisted out. Defendant has failed to demonstrate that his sentence of death was imposed under the passion, prejudice or any arbitrary factor.

VI

THE PROSECUTOR DID NOT MISSTATE FACTS IN REBUTTAL ARGUMENT AND HIS STATEMENTS WERE NOT PREJUDICIAL TO DEFENDANT

During argument, the prosecutor stated that the victims had made lots of money from "selling pizzas and drugs." 27 ROA, p. 6713. This statement was immediately objected to by defense counsel who challenged the accuracy of any evidence about pizza. Id. Even the judge commented, "I don't recall pizza, Counsel" in front of the jury. 27 ROA, p. 6713. The prosecutor did not press the point but left it to the collective memory of the jury of what the testimony had been. Id. The actual testimony appears to have been only that the victims made money selling "acid."[2] 25 ROA, p. 6321-25. From this apparently mistaken reference to pizza, the Defense argues that the prosecutor was arguing facts not in evidence and was trying to portray the victims in a more favorable light.

Defendant's contention would be more credible if the prosecutor had merely stated that Matthew Mowen had made money selling pizzas. However, the prosecutor clearly included the prejudicial portion that victim Matthew Mowen made money selling drugs. Additionally, the jury was instructed that arguments of counsel are not evidence:

> 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 the 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 . . . .

28 ROA, p. 6943.

There is no suggestion that the jury was misled by the prosecutor's comment. Any reference to pizza was of no significance considering the undisputed testimony that

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[2] The reference to selling pizzas apparently came from the trial although it may not have been repeated for the new jury who heard the second penalty hearing. 7 ROA, p. 1749.

the victims sold drugs. Defendant's contention lacks merit as there was not a material misstatement of fact that prejudiced Defendant.

VII

DEFENDANT'S DUE PROCESS RIGHT WAS NOT COMPROMISED BY THE PROSECUTION IN ITS OPENING STATEMENT

A prosecutor has a duty to refrain from stating facts in opening statement that he cannot prove at trial. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991); Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991); Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962). If a prosecutor overstates in his opening statement what he is able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith. Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997).

During opening statements the prosecutor made a one-sentence reference about a telephone threat against a young woman, and a one-sentence reference about a contract to kill someone named "Scale":

> 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.

28 ROA, p. 6965.

Defense counsel immediately asked to approach the bench and no other mention was ever made of the two alleged incidents in front of the jury. These brief references came in the midst of a nine-page opening statement detailing numerous incidents of bad conduct of the defendant including his first armed robbery at age fourteen, possessing a handgun on school property, an armed robbery of a bank at age sixteen, selling crack cocaine, a felony conviction for shooting Derrick Simpson in the face and the back which later resulted in his death, and throwing a fellow inmate off a second floor tier at the jail. 28 ROA, pp. 6958-6967.

At the close of the prosecutor's opening statement, the district court gave a cautionary instruction to the jury that statements made by attorneys in their opening statements are not evidence:

> Ladies and gentlemen I want to caution you that opening statements, as well as closing statements of the attorneys, are intended to help you in understanding the evidence and applying the law. I want to emphasize to you that the statements that the attorneys make in their opening statements is not evidence and should not be given evidentiary value.

28 ROA, p. 6967. "There is a presumption that jurors follow jury instructions." Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

Outside the presence of the jury, a discussion was held about notice to the defense of the two incidents at the jail regarding the telephone threat and the contract to kill Scale. 28 ROA, pp. 6984-6993. Defense counsel admitted knowing about some of the bad acts that occurred during defendant's incarceration, but denied knowledge about the two incidents in question. The prosecutor quoted from both the original notice of evidence in aggravation as well as an amended notice that advised the State would use evidence of defendant's conduct while incarcerated. Id. A detailed description of the incidents appeared in the disciplinary records found in the possession of defense counsel. 28 ROA, p. 6989. To settle the dispute, the parties came to an agreement that the prosecution would err on the side of caution and not use the evidence and in exchange the defense would not allege the prosecutor was being underhanded or acting in bad faith. 28 ROA, p. 6992.

The State had a good faith basis for believing that evidence of the telephone threat and hit on Scale would be presented as evidence. The references were brief and harmless in light of the numerous other bad acts and criminal conduct of the defendant which the jury heard. Defendant was not prejudiced and the district court gave a satisfactory cautionary instruction.

VIII

DEFENDANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE INTO EVIDENCE DEFENDANT'S INMATE REPORTS DURING THE PENALTY PHASE

The State notified the defense in 1999 and again in 2004 that it intended to admit the records in question at the penalty hearing. 29 ROA, 7116. The State even redacted some of the infractions objected to by the defense because they were not prepared to address them, including any mention of the telephone threat or hit on Scale as addressed in the argument above. Id. Nonetheless, the defense still made a Crawford objection to admission of the records. 29 ROA, 7114. Notably, the defense does not identify any particular testimonial statement or reported infraction found within the jail records that would violate Crawford. Aside from admission of the records as an exhibit, the defense does not identify any prejudicial testimony or argument made to the jury that referred to the contents of the jail records.

Courts have held that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), in which the Supreme Court held that admission of testimonial hearsay *at trial* violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, "does not alter the pre-Crawford law that the admission of hearsay testimony *at sentencing* does not violate confrontation rights." United States v. Chau, 426 F. 3d 1318, 1323 (11th Cir. 2005), citing United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005), cert. denied, --- U.S. ---, 126 S.Ct. 671 (2005); see also Gaxiola v. State, 119 P.3d 1225 (Nev. 2005).

The State also submits that the inmate reports do not fall under the requisite *testimonial* definition to fall within Confrontation Clause protection. The reports are nontestimonial hearsay and therefore exempt from Confrontation Clause scrutiny altogether.

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford v Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374 (2004).

> Most of the hearsay exceptions covered statements that by their nature *were not testimonial* – for example, *business records* or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony.

Crawford v. Washington, 541 U.S. 36, 56, 124 S.Ct. 1354, 1367 (2004). (emphasis added).

Thus, the Confrontation clause Crawford analysis is inapplicable when business records such as the inmate reports herein are at issue. See People v. Brown, 9 Misc.3d 420, 801 N.Y.S.2d 709 (2005); Commonwealth v. Verde, 444 Mass. 279, 827 N.E.2d 701 (2005); People v. Hinojos-Mendoza, -- P.3d --, 2005 WL 2561391 (Colo. App. 2005).

Furthermore, as the district court pointed out (29 ROA, p. 7119-7120), it is not reasonable to believe that the inmate reports were made for the purpose of use in a later trial and this bifurcated hearing was essentially a sentencing hearing wherein hearsay has always been allowed.

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IX

DEFENDANT WAS NOT DENIED A FAIR PENALTY HEARING BY THE CUMULATIVE EFFECT OF ALLEGED ERRORS

There were no prejudicial errors in the penalty hearing as argued above. Clearly, nothing prejudicial enough to overturn the sentence of death occurred during the penalty hearing. Defendant is not entitled to a perfect penalty hearing, only a fair one which he received. While death may be "different," reviewing courts should not place the bar so high that achieving a valid death verdict becomes impossible. Defendant laughed about the murders and bragged about them. 25 ROA, p. 6340. The death penalty was designed for cold-blooded murderers with a calloused heart such as Defendant.

While the first death verdict by a three-judge panel had to be reversed based on subsequent changes in the law, a jury of the defendant's peers has now also heard the evidence and returned a death verdict against defendant. This was achieved even though the trial judge ignored the law in bifurcating the penalty hearing at the defense request where the defendant's family testified in the first half but the victims' family were not permitted to testify until the second half. In an effort to be extra cautious in his rulings and ensure the case would not be reversed on appeal, the trial judge excluded testimony about defendant's involvement in the "Snoop" Johnson murder and a related shooting at the Longhorn casino and also restricted the State's victim impact testimony. Any errors in defendant's second penalty hearing are harmless in light of the many evidentiary rulings in his favor.

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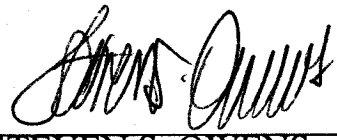
CONCLUSION

For the foregoing reasons, this Honorable Court should deny Defendant's appeal and affirm his sentence of death.

Dated this 4th day of April, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
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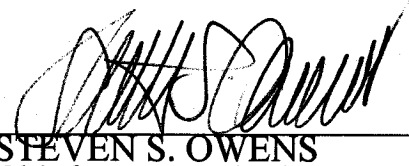
CERTIFICATE OF COMPLIANCE

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 this 4th day of April, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 4th day of April, 2006.

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