ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 45456

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APPELLANT'S OPENING BRIEF

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

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STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY A PANEL OF IMPARTIAL, INDIFFERENT JURORS WHEN IT ALLOWED THE PROSECUTOR TO ASK "STAKE-OUT" QUESTIONS DURING VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS

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

3. WHETHER 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

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

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

6. WAS IT IMPROPER FOR THE PROSECUTOR TO MISSTATE FACTS IN REBUTTAL ARGUMENT

7. WHETHER 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 DONTE 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 KNOW 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.

8. WHETHER APPELLANT 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

9. WHETHER 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

STATEMENT OF THE CASE

On December 18, 2002 this Court affirmed Appellant DONTE JOHNSON'S conviction pursuant to a jury verdict of four counts each of First Degree Murder with use of a Deadly Weapon; Robbery with the use of a Deadly Weapon; and First Degree Kidnapping with the use of a Deadly Weapon; one count of Burglary with use of a Deadly Weapon; but reversed the death sentence and remanded the case for a new penalty hearing before a new jury.

On February 21, 2003 the Honorable Lee A. Gates set the matter for a penalty hearing. (32 ROA, CRIMINAL COURT MINUTES PAGE 045)

On April 12, 2004, following statements of the parties the Court granted the prosecution's motion to admit former testimony. (32 ROA, CRIMINAL COURT MINUTES PAGE 047)

On April 28, 2004, at motion calendar the trial court ruled that the juvenile records of DONTE JOHNSON would be excluded finding them to be more prejudicial than probative. (32 ROA, CRIMINAL COURT MINUTES PAGE 048)

On May 3, 2004 the trial court reversed its prior ruling on juvenile records stating it would allow the juvenile records to be used. On May 3, 2004, the State having no opposition, the trial court granted DONTE JOHNSON'S Motion in Limine to Preclude the State from referring to the victims as "boys". (32 ROA, CRIMINAL COURT MINUTES PAGE 050-052)

On or about April 6, 2004 the State filed a Second Amended Notice of Evidence in Support of Aggravating Circumstances. (19 ROA 4677-84) The Motion listed 18 separate evidentiary items. The trial court scheduled an evidentiary hearing regarding item 15: allegations that Appellant, while in the Clark County Detention Center, with another

inmate threw a third individual over a railing.

On May 17, 2004 following the evidentiary hearing, the trial court held that the State had presented clear and convincing evidence that a crime had been committed and that DONTE JOHNSON acted in it. The incident would be allowed into evidence. (32 ROA, CRIMINAL COURT MINUTES PAGE 053)

On April 7, 2005 the trial court granted DONTE JOHNSON'S Motion to Strike Aggravator Number 4. The Court also ruled that it would allow information to be given to the jury regarding the death of Derrick Simpton regarding whom DONTE JOHNSON had pled to Battery with use of a Deadly Weapon in a separate case. (32 ROA, CRIMINAL COURT MINUTES PAGE 056)

On April 18, 2005 the trial court granted DONTE JOHNSON'S Motion to bifurcate penalty phase of trial. (32 ROA, CRIMINAL COURT MINUTES PAGE 059)

Jury trial commenced on April 19, 2005. (32 ROA, CRIMINAL COURT MINUTES PAGE 059) On April 28, 2005 the jury returned with the following verdicts:

> Aggravating circumstance or circumstances have been established unanimously and beyond a reasonable doubt as to Counts XI, XII, XIII, and XIV (4 verdict forms):
>
> > That the Defendant has been convicted of more than one offense of murder in the first or second degree.
>
> Mitigating circumstance or circumstances which have been established as to Counts XI, XII, XIII and XIV (4 verdict forms):
>
> > The youth of the Defendant at the time of crime;
> >
> > Instruction #10: Mitigators #3, #5, #6, #7, #8, and #10.
>
> As to Counts XI, XII, XIII, and XIV (4 verdict forms):
>
> > The Aggravating circumstances outweigh any

mitigating circumstance or circumstances.

(32 ROA, CRIMINAL COURT MINUTES PAGE 064-064)

On May 5, 2005 the jury returned a verdict of death on all four counts. (32 ROA, CRIMINAL COURT MINUTES PAGE 068)

On June 6, 2005 DONTE JOHNSON was sentenced to death on each of the four counts. (32 ROA, CRIMINAL COURT MINUTES PAGE 070) The Warrant and Order of Execution were signed and filed in open court as was the Order to Stay Execution. (32 ROA 7911-14; 7909-10; 7919-20)

On June 8, 2005 DONTE JOHNSON filed a Motion for New Trial, Motion for In-Camera Review of Potential Juror Misconduct, Request for Evidentiary Hearing, and Request for an Order Preserving Evidence. (16 ROA 3853-80)

On June 14, 2005 the Court held an Evidentiary Hearing on DONTE JOHNSON'S Motion. Following the hearing the Court denied the Motion for New Trial. (32 ROA, CRIMINAL COURT MINUTES PAGE 071-072)

On June 22, 2005 DONTE JOHNSON filed Post-Evidentiary Hearing Supplemental Points and Authorities seeking a new trial. (32 ROA 8029-8048) There is nothing in the record that indicates the Court took any action in response to this pleading.

The Judgement of Conviction was filed on June 6, 2005 (32 ROA 7915-18) and the Notice of Appeal was timely filed on June 30, 2005. (32 ROA 8055-56)

STATEMENT OF FACTS

NATURE OF THE CASE

This is DONTE JOHNSON'S direct appeal from the four (4) sentences of death, pursuant to a jury verdict as to Counts XI, XII, XIII, XIV, in the third penalty hearing in his case. (31 ROA 7747; 32 ROA 7875-76, 7874)

PRE-TRIAL MOTIONS IN ISSUE

A.

On April 28, 2004 Appellant DONTE JOHNSON filed a Motion in Limine requesting the trial court enter an order precluding the prosecutor from repeatedly referring to victims in the case as boys; noting that in the previous two penalty hearings the Court and the prosecutor referred to the victims in the case as "boys" in excess of twenty (20) times. That allegedly one of the victims, Peter Talamantez, was under the age of eighteen (18), the three (3) other victims were young men and that the use of the term "boys" conjured up a 10 to 12 year old playing. Further, that such a usage arose juror passions, citing Evans v. State, 28 P.2d 498, 117 Nev. 609 (2001). On May 04, 2004. Then the prosecution filed a response which stated it had no opposition to the Motion in Limine. (20 ROA 4824-26, 4942-43) In open court on May 3, 2004 Prosecutor Guyman advised the Court that they agreed to the Motion and would refer to the victims as young men. Prosecutor Stanton was present. (20 ROA 5002) However in rebuttal Stanton argued:

> "...He may have been the one who said what these boys had and it may have been the triggering event. Are we going to blame Todd Armstrong for this? Did he suggest that they go over and execute these kids,.....
>
> MS. JACKSON: Your Honor, I'm going to object. Counsel has referenced to these decedents as kids and as boys. We made

a specific ruling on that before we started.

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

Again the Prosecutor referred to the victims as boys:

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

. . .

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

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

B.

On April 7, 2004 the State filed its Second Amended Notice of Evidence in Support of Aggravating Circumstances. Item Number Eleven (11) was the juvenile records of DONTE JOHNSON. DONTE JOHNSON filed an opposition on April 20, 2004. On April 28, 2004 the trial court ruled that it would exclude the juvenile record as more prejudicial than probative. On May 3, 2004 the trial court reversed its decision and held that the juvenile record would be admitted. (19 ROA 4677-84; 4701-64; 20 ROA 4973; 5032)

JURY SELECTION

On April 18, 2005 the trial court granted DONTE JOHNSON'S Motion to Bifurcate the Penalty Phase. On April 19, 2005 jury selection

began. (minute order p. 059)

In voir dire examination of prospective juror no. 001 and the prosecutor asked and the prospective juror answered as follows:

> "There is also a process that is involved in a capital case where other than just a generalized jury instruction that is given by the court, there is no other instructions about who is selected as a foreperson of the jury. You have no additional duties as far as votes go, but they have one duty that's very important and that is they are actually the person that signs the verdict form in this case.
>
> If you were selected the foreperson of this case and you believed under the law and the facts that the death penalty was appropriate could you sign your name as foreperson?
>
> No." (22 ROA 5431)

Defense counsel objected to the questions arguing the law only required that she consider the four different forms, not could she sign the verdict form. In response to the objection the prosecutor stated:

> "The form of my questions 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."
>
> The Court overruled the objection. (22 ROA 5431)

The prosecutor continued:

> "Prosecutor: Let me back up again.
>
> If you are selected as the foreperson of this jury and under the laws and facts, you believed 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 5431)

Thereafter the prosecutors asked fifteen prospective jurors that same question. (No. 25, 22 ROA 5592; No. 46, 24 ROA 6057; No. 59, 24 ROA 6082; No. 97, 23 ROA 5734; No. 108, 23 ROA 5754; No. 113, 23 ROA 5796; No. 132, 23 ROA 5846; No. 230, 24 ROA 5929; No. 242, 24 ROA 5961; No. 249, 24 ROA 5979; No. 262, 24 ROA 6014-6015; No. 278, 24 ROA

6036-6037; No. 296, 25 ROA 6141; No. 305, 25 ROA 6173-6174; No. 309, 25 ROA 6198-6199; No. 311, 25 ROA 6221).

FACTS ADDUCED TO JURY FROM TESTIMONY
AT PRIOR TRIAL RESULTING IN VERDICTS OF GUILT

The prosecutor called Justin Perkins to testify regarding his discovery of the bodies of Matthew Mowen, Jeff Biddle, and Tracey Gorringer at the Terra Linda residence around 6:00 p.m. or August 14, 1998. He learned a fourth body was also found in the home, that of Peter Talamantez. The bodies were lying on the floor face down, tied with duct tape at the wrists and ankles. (25 ROA 6268-6271)

Homicide Detective Tom Thowsen was called by the State to summerize the testimony of the trial witnesses. He had been assigned to the case and had responded to the crime scene at the 4825 Terra Linda address on August 14, 1998. The neighbors after being contacted by Jason Perkins called 911 and the paramedics LVMPD officers responded and cleared the residence. They found a total of four bodies. A number of items found at the scene were impounded including four cartridge casings, cigarette butts, empty wallets, a black and mild cigar box next to one of the bodies. The house had been ransacked. There was no sign of forced entry. (25 ROA 6286-6305)

On August 18, 1998 police were called to the home of a Bryan Johnson and learned that he had information concerning the homicide. Todd Armstrong and Ace Hart were present. The officers immediately separated the three (3) young men and took them to the homicide office. Thowsen interviewed Todd Armstrong who later testified at trial. In summarizing the testimony of Armstrong Thowsen said that Armstrong, Ace Hart, Bryan Johnson were all friends. In August of 1998 Todd Armstrong lived in a house owned by his mother at 4815

Everman. Ace Hart lived with him. In early August DONTE JOHNSON, Terrell Young, and DONTE JOHNSON's girlfriend Charla Severs moved into the house and began living there. Thowsen said after interviewing Armstrong they obtained a consent to search the Everman house from him. They, with the SWAT unit, went to the Everman house. (25 ROA 6300-6310)

Armstrong told Thowsen that he had met DONTE JOHNSON through Ace Hart who brought DONTE JOHNSON to the house. He didn't recall how long DONTE JOHNSON had told them he was going to stay, only that it was a very brief period, 2 or 3 days. He said that DONTE JOHNSON and Charla Severs were occupying the master bedroom. Todd Armstrong was occupying a different bedroom and Ace Hart had a bedroom. Terrell Young was in the living room. Four or five days after DONTE JOHNSON moved in Armstrong saw firearms. There was a .380 caliber pistol, a medium sized six-shot revolver, a .22 caliber rifle and a sawed off shotgun with a folding stock and a banana clip. DONTE JOHNSON kept the weapons in a black and green duffle bag that was found at the Everman residence during the search. A roll of duct tape was also found. (25 ROA 6310-6313, 627)

The play station and VCR from the Terra Linda residence were also found in the search of the Everman residence. A search of the yard at Everman resulted in the location of 2 keys from the Thunderbird motel and the blue pager that had belonged to Peter Talamantez. Todd Armstrong told Thowsen that DONTE JOHNSON smoked black and mild cigars all the time. (25 ROA 6313-6319)

Armstrong testified that he had told DONTE JOHNSON he would have to leave because his mother was returning from Hawaii to the house. DONTE JOHNSON did not leave. Armstrong had the only key to the house.

There was a broken window in the bathroom that DONTE JOHNSON could climb through to get into the house. (25 ROA 6319-6321)

Armstrong testified that somewhere between the 7th and the 10th of August Matt Mowen came to the house. Armstrong, DONTE JOHNSON, Terrell Young and Charla Severs were present. Mowen said he had been following the Phish tour (musical group) and that he had made a lot of money selling acid. Armstrong said that DONTE JOHNSON kind of looked around at the others. The next couple of days after Mowen made the statement DONTE JOHNSON asked Armstrong, probably a dozen times, where Matt Mowen lived. Armstrong said he did not know where Mowen lived. At some point thereafter Armstrong and DONTE JOHNSON were in an automobile with Ace Hart. Hart pointed out the house where Mowen lived. This occurred between August 10th and 12th. (25 ROA 6321-6325)

Todd Armstrong testified that he and Charla Severs were at home when DONTE JOHNSON and Terrell Young left the house on the evening of August 13. Armstrong awoke early the next morning when DONTE JOHNSON and Young came home. DONTE JOHNSON was carrying the duffel bag containing the guns and duct tape, Terrell Young was carrying a duffel bag that had a VCR and a play station in it. DONTE JOHNSON went into the master bedroom and came back out a short time later with Charla. Everyone was in the living room and DONTE JOHNSON said they went over there and he ended up killing one of the guys because he was mouthing off, being obnoxious. He said he shot him in the head. DONTE JOHNSON then said that since he killed one he had to kill everyone else. He was high. He didn't want to kill Tracey but he just shot them all. Armstrong said that DONTE JOHNSON said one of them made a grunt type noise as he shot him. DONTE JOHNSON was laughing as he was telling

these things. Armstrong believed what DONTE JOHNSON said was true. (25 ROA 6337-6340)

A pair of black pants were impounded from the bedroom of the Everman house. DNA testing was done. (25 ROA 6341-6342)

Bryan Johnson, the friend of Ace Hart and Todd Armstrong, also testified at trial. He had lived at the Everman house for a brief time; October 1997 to June 1998. Johnson went to the Everman house 3 or 4 times a week after he moved out. He knew DONTE JOHNSON, Terrell Young, and Charla Severs. He saw DONTE JOHNSON smoking black and mild cigars. On Saturday August 15, 1998 Johnson went to the Everman house to meet Armstrong and Hart. The three were going to go the Stallion Mountain golf course for job interviews. (25 ROA 6344-6347)

At the Everman house that morning DONTE JOHNSON said that they drove to the Mowen residence on Terra Linda for money and drugs. He said that when they got there a young man was outside. They told him, at gunpoint, to go inside. Once inside the house they found two other individuals and started to duct tape them asking where the money was. Someone knocked at the door, was brought inside, and duct taped. DONTE JOHNSON and Terrell Young both had guns. DONTE JOHNSON said he took the last young man who came to the house into the back room and shot him in the head. He said one of the individuals he shot made a loud noise. He said blood squirted up, it looked like Niagra Falls. Johnson believed DONTE JOHNSON. Further, DONTE JOHNSON said he got blood on his pants. (25 ROA 6348-6353)

LaShawnya Wright, the girlfriend of Sikia Smith, testified that when DONTE JOHNSON left the apartment with Terrell Young that day he had with a duffle bag containing a rifle, some duct tape and some

brown gloves. In her apartment they had been talking about doing a robbery. When the 3 returned the next afternoon they had a VCR and a Nintendo. Smith had a .38 caliber automatic handgun out, later sold it. Thowsen said that based upon the autopsy results and the crime scene they believed the weapon used was a .380 caliber semi-automatic handgun. Wright also testified that DONTE JOHNSON bought the Las Vegas Review Journal and said, "we made the front page". He was excited. (25 ROA 6365-6363)

The transcript of Charla Severs' testimony from the trial was read to the jury. The testimony corroborated that of Todd Armstrong and LaShawnya Wright. (27 ROA 6753-6845)

Berch Henry, LVMPD DNA laboratory manager reviewed the DNA analysis in the case performed by analyst Thomas Wahl in 1998. the sperm on the black jeans matched the DNA of DONTE JOHNSON as did that of the cigarette butt frm the crime scene. The blood on the black jeans matched the DNA of Tracy Gorringe. (26 ROA 6482, 6492, 6496)

Gary Telgenoff M.D. from the Coroner office reviewed the report of the autopsies performed by Robert Bucklin M.D. on Jeff Biddle, Tracey Gorringe, Matthew Mowen, Peter Talmantez. All 4 had sustained a gunshot wound to the back of the head. All four had there wrists and ankles taped with duct tape. Bucklin classified all four deaths as homicides. (26 ROA 6501-16; 6518-21; 6522-26; 6527-34).

DEFENSE CASE IN MITIGATION

Moises Zamora, DONTE JOHNSON'S brother-in-law by marriage to DONTE JOHNSON'S sister Johnnisha grew up in Los Angeles. He had a good relationship with DONTE JOHNSON, loved him like a family member. DONTE JOHNSON'S son Allen lived with Zamora and his family. Zamora was the boy's legal guardian. (26 ROA 6540-42; 6547; 6550)

Arthur Cain, uncle of DONTE JOHNSON, was one of seven children. He was four years older than his sister Eunice, who was DONTE JOHNSON'S mother. Eunice was "slow", she was in Special Ed classes. People called her names: dumb, retarded, stupid. She had difficulty speaking. She married John White, DONTE JOHNSON'S father who was abusive to her. Eunice had a lung problem from birth, which was exacerbated when she began to smoke, drink, and use drugs. This was before DONTE JOHNSON was born. She smoked cocaine which further affected her lungs. Her children were taken away and stayed with his mother, their grandmother. Four of his sisters had serious drug and alcohol problems and his mother took all their children into her home. (26 ROA 6554-55; 6561; 6565-68; 6573)

Eunice Cain, DONTE JOHNSON'S mother, testified that she drank alcohol while pregnant with him. She had problems when she was born and received a check because of the problems. She said she was a little slow and had trouble speaking at times. She has asthma and breathing problems. In school she was in special ed classes and had problems with kids making fun of her. She met DONTE JOHNSON'S father John White in the neighborhood. She was 16 or 17 at the time. He was ten years older. He had to wait to marry her until she was old enough. After the marriage he would beat her. (26 ROA 6574-79)

He beat her in front of the children. DONTE JOHNSON would try to defend her but he was too little. DONTE JOHNSON is her only son, her two other children are girls. White knocked her teeth out. He tried to throw her out a window. He made a molotov cocktail, homemade bomb. He came through the window and threw it on her. He would beat her to get her to say her youngest daughter wasn't his. She started

smoking pcp and could not care for her children. It made her even slower. She would get high with her sister Pam. Their children were taken away from her and Pam. She never got them back, her mother raised them. (26 ROA 6579-86)

Johnnisha Zamora, DONTE JOHNSON'S sister, testified to their life as children. Their mother was on drugs and would leave them sometimes. Her mother smoked drugs in front of them. Her father would hit her mother in front of them. Her mother would see ghosts and lock the children in a closet without light. They would hear her screaming. Their mother would come and go. When was five or six they lived in a shed. There were six children living in the shed, no carpet, no furniture. The social services report stated that their father would beat DONTE JOHNSON who did not know what he had done wrong. DONTE JOHNSON missed the first year and a half of school. They were placed temporarily in a foster home and then with their grandmother. There were ten children in the grandmother's house. (26 ROA 6587-6606)

She described scenes of violence and shooting that she and DONTE JOHNSON witnesses and how every day, to and from school they would get beat up or have rocks thrown at them. There was no one to help them. There were vacant, abandoned cars in the neighborhood occupied by homeless drug addicts the children called "base heads". She, herself, was shot in the leg by a drive-by shooter. She was also stabbed in the head by an unknown person. (26 ROA 6605-6610)

Eunisha White, DONTE JOHNSON'S sister, Keona Atkins, DONTE JOHNSON'S cousin, Jane Edwards, DONTE JOHNSON'S grandmother, Allen White, DONTE JOHNSON'S son, were also called as witnesses and testified to their affection for DONTE JOHNSON and the violence,

abuse, neglect, drug abuse of DONTE JOHNSON'S mother, that marred his growing up. (27 ROA 6848-6863; 6863-6906; 6907-6915; 6917-6921)

DONTE JOHNSON'S sister Johnnisha was recalled to clarify the time period the children were kept in the shed and although she did not recall the length of time they spent there, she testified it occurred over a period of months. (27 ROA 6915-17)

Following the mitigation testimony, Instructions were settled outside the presence of the jury. Back in session the Court read the instructions to the jury. In closing argument, the prosecutor stated:

> "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 --"

Defense counsel objected and a sidebar conference was held outside the presence of the Court Reporter. (27 ROA 6656-6657) Following the sidebar, the prosecutor continued his argument. There was a disturbance in the courtroom and the Court declared a recess. Outside the presence of the jury the Court asked defense counsel if she wanted to put something on the record. Defense counsel said she did, however, before she could address the Court the prosecutor interrupted to inform the Court that during his argument Nick Gorringe, brother of victim Tracey Gorringe, was in the Courtroom, in the second row, during his argument when a photo of the crime scene was displayed and Gorringe either passed out or fell over. The prosecutor also stated that it was the first time Nick Gorringe had been present in the courtroom, that he had seen him earlier, downstairs, for the first time. (27 ROA 6659-60, 6663)

Defense counsel advised the Court that Gorringe had made a groaning sound as he fell and was crying as Matthew Mowens' father and the bailiff assisted him in leaving the courtroom. This occurred in the presence of the jurors. Further, counsel argued to the Court that the courtroom was clearly divided into 2 sides. DONTE JOHNSON'S family, predominatingly African-American, were on the right side of the courtroom. The families of the victims (Caucasians) were on the left side of the courtroom. Under the circumstances counsel asserted Appellant found it impossible to receive a fair trial and compared the occurrence of what happened in Holloway. The Court disagreed but noted the objection. (27 ROA 6660-64)

The jury was recalled and the Court stated:

> THE COURT: Ladies and gentlemen - let the record reflect the presence of all the parties, all the attorneys and all members of the jury.
>
> Right before we broke, there was a little commotion over there. Anyway, the jury is ordered to disregard that. As I told you before, you are to base your decision on the evidence adduced here in trial from the witnesses, the stipulation of the attorneys and the exhibits, and it is not to be based on anything you see in or outside the room that's not evidence adduced here from the witnesses or the exhibits of the stipulation of the parties.
>
> Proceed." (27 ROA 6664-65)

The following day, the prosecutor requested that Nick Gorringe be allowed back in the courtroom. (28 ROA 7037)

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

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

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

The prosecutor then stated:

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

On April 28, 2005 the jury returned the following verdicts: aggravating circumstance or circumstances established unanimously and beyond a reasonable doubt as to Counts XI, XII, XIII, and XIV. That defendant has been convicted of more than one offense of murder in the first or second degree. Mitigating circumstance or circumstances which had been established as to Counts XI, XII, XIII and XIV: The youth of the Defendant at the time of crime; Instruction #10, Mitigators #3, #5, #6, #7, #8, and #10. As to Counts XI, XII, XIII, and XIV, the aggravating circumstances outweigh any mitigating circumstance or circumstances.

Following return of the verdict the prosecutor gave his Opening Statement in the sentencing trial: beginning with DONTE JOHNSON'S juvenile arrest at age 14 in 1992 for armed robbery; his placement in a youth camp;, his release the same year; probation violation; his January 1993 possession of a handgun on school property; his 1993 arrest for taking a vehicle without the owner's consent; and at 16 in June 1993 his arrest for armed bank robbery and subsequent incarceration in the California Youth Authority. (28 ROA 6959-6961)

The prosecutor also told the jury:

> "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)

Defense counsel objected and a discussion at bench followed. (28 ROA 6965)

Following Opening Statements, outside the presence of the jury, the Court invited defense counsel to place her objection on the record. Defense counsel stated that she had not been noticed of the evidence that while in the detention center DONTE JOHNSON allegedly put a contract to kill out on a man named Scale, or the female that was also threatened. She had investigated everything on the Amended Notice of Evidence in Support of Aggravation; and was not prepared to meet this evidence which had not been noticed. (28 ROA 6984-6986)

The prosecutor stated to the Court that it was an Amended Notice, not superceding; that Amended meant in addition to any other evidence they intended to introduce. The Court did not agree. The prosecution then stated that in the original notice they clearly referenced they would use DONTE JOHNSON'S infractions at the Detention Center. That was in 1998 and that they provided copies to the original defense lawyer and the new defense lawyers. Defense counsel stated that ths was the first time she was made aware of the allegations. In previous conversations with former prosecutor Guyman she understood that new pleadings were being filed, she could be prepared to meet the evidence. The Court asked to see the Amended Notice and recessed.

(28 ROA 6984-6987)

Back on the record, the prosecutor advised they had pulled the original Notice of Evidence filed June 11, 1999 as well as the specific Amended Notice filed April 7, 2004. he read item 15, page 6 from the original record as follows:

> "'Testimony, records of corrections officers jail personnel from the Clark County detention center pertaining to Donte Johnson's conduct while incarcerated at the Clark County Detention Center.' All copies have been provided to Defense counsel, names of the witnesses are provided in the records.
>
> That's 1-2, the notice, amended notice you wanted specifically item 15 states, as follows:
>
> > 'Testimony, records of corrections officers slash jail personnel slash prison personnel from the Clark County Detention Center and Nevada Department of Prisons while Donte Johnson was incarcerated at the Clark county Detention Center and within the Nevada Department of Corrections. This evidence will include but is not limited to a (sic) incident that occurred February 24, 2001, wherein Defendant, along with another inmate, threw Oscar Arias over a railing at the Clark County Detention Center.'
>
> . . .
>
> There is a second one dated November 2nd, 1999, nearly six years ago, Judge, in which there was a detailed explanations from a corrections officer that the Defendant Johnson and another inmate were involved in putting a hit out on another inmate. That's Scale, I referred to. There is evidence about Scale in this trial.
>
> . . .
>
> I am representing to this Court the older incident I mentioned, threatening a female civilian. Certainly showed a good faith basis as bore out by two notices of evidence we provided to defense that it was admissible." (28 ROA 6988-90)

The prosecutor then argued that they had provided notice six years ago and that last year they made it clear; it was not limited to the Oscar Arias' incident, but it would include others. Defense

counsel advised that the current prosecutor had not been on the case when she was told by prosecutor Guyman that she would not need to review 40 cartons of records; that they would use what was in the Amended Notice of Aggravation. The Court stated it thought the Amended Notice replaced the original. In the Amended Notice the State said defense would get the records. Looking at the Notice one would not be aware of the incidents complained of by the defense. The defense should have been on notice and given a chance to defend. The Court accepted the agreement of the parties that the State would not use the incidents and the defense would not allege that the prosecutors were doing anything underhanded. (28 ROA 6990-6992)

After the prosecutor's Opening Statement, and before the Opening Statement of DONTE JOHNSON, the Court cautioned the jury that Opening Statements and Closing Arguments were not evidence and should not be given evidentiary value. (28 ROA 6967)

The State called Jimmy Grayson, a Los Angeles Police Department Lieutenant, to testify in detail regarding the 1993 bank robbery committed by DONTE JOHNSON and others when DONTE JOHNSON was 16 years old. (28 ROA 6994-7014)

The State called Sandra Gatlin, who was the assistant manager of the bank robbed by DONTE JOHNSON and others in 1993 to describe the robbery. (28 ROA 7014-7019)

The State also called a California Parole Officer, Robert Hoffman, who had received DONTE JOHNSON'S case from the California Youth Authority ("CYA"). He testified about the documents in DONTE JOHNSON'S file which were introduced into evidence. (28 ROA 7053-7069)

Corrections Officer Alex Gonzalez testified to an incident at the

detention center where he said DONTE JOHNSON and inmate Reginald Johnson pushed an inmate Oscar Arias over a railing on the top tier. LVMPD Detective Jim Buczek was called to testify regarding the testimony of Nevada Highway Patrol Trooper Sergeant Robert Honea from DONTE JOHNSON'S trial. Honea had conducted a traffic stop on DONTE JOHNSON for speeding on August 17, 1998. In searching the car he located a short-barreled shotgun. DONTE JOHNSON and Terrell Young fled from the car. (29 ROA 7104-7112).

Outside the presence of the jury, defense counsel advised the Court that the defense objected to the introduction into evidence of DONTE JOHNSON'S Clark County Detention Center records under Crawford v. Washington, 541 U.S. 36, 69 (2004) as a violation of DONTE JOHNSON'S due process right to confront and cross-examine witnesses.

Counsel also advised the Court that if the Court was inclined to allow the documents into evidence the defense, at the least, wanted the opportunity to cross-examine Officer Young about an occurrence. The prosecutor responded that Crawford was inapplicable as the evidence issues were business records of the type previously admitted by DONTE JOHNSON and "what's good for the goose is good for the gander." If the defense could introduce such records so could the State.

The Court observed that was not true; the issue was whether Crawford applies to a penalty hearing. Specifically is the evidence testimonial; second, did it apply to a penalty hearing. (29 ROA 7114-17)

Defense counsel believed the evidence to be testimonial. The Court held that Crawford did not say that hearsay couldn't be used in a penalty hearing for sentencing purposes and denied the motion. (29

ROA 7119-7120)

The State then presented its victim impact witnesses and rested. DONTE JOHNSON presented witnesses in mitigation. the parties agreed upon jury instructions. (29 ROA 7122-7156; 7157-7269; 7272-7545; 31 ROA 7550-7681; 7752-53)

On May 5, 2005 the jury returned a sentence of death on each of the 4 counts. The Court directed the jury be polled. All jurors affirmed their verdicts. (32 ROA 7892-7895)

On May 12, 2005, the date set for sentencing defense counsel moved for a continuance to complete their review of several issues that may be needed to complete the record. The Court granted the three weeks requested. (32 ROA 7900-7906)

On June 8, 2005 DONTE JOHNSON filed a Motion for New Trial, Motion for In-Camera Review of Potential Jury Misconduct, Request for Evidentiary Hearing, and Request for an Order Preserving Evidence (Filed Under Seal). (32 ROA 7923 - 7926)

On June 14, 2005 the Court entertained an Evidentiary Hearing on DONTE JOHNSON'S Motion, DONTE JOHNSON'S presence was waived by counsel. Following the hearing the motion was denied. (32 ROA 7952-8027)

ARGUMENT

I.

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

The prosecutor's question to prospective jurors, that if they were selected as foreperson, could they sign the verdict of death that would put DONTE JOHNSON to death was an impermissible "stake-out question" designed to cause prospective jurors to pledge themselves to a future course of action and indoctrinate them regarding potential issues before the evidence had been presented and before being given instructions on the law. The trial court deprived DONTE JOHNSON of his due process right to a fair trial by a panel of impartial, indifferent jurors by allowing "stake out" questions. The death verdict should be set aside and a new penalty trial given.

The Fourteenth Amendment denies the State the power to deprive any person of life, liberty, or property without due process of law. It also guarantees a right to a jury trial on all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. See, Duncan v. Louisiana, 391 U.S. 145 (1968). The Sixth and Fourteenth Amendment guarantee a defendant on trial for his life the right to an impartial jury. Morgan v. Illinois, 504 U.S. 719, 728 (1992). This right extends to the sentencing phase, where a capital defendant has the right to be sentenced by jurors who do not believe that "death should be imposed ipso facto upon conviction of a capital offense." Id. at 735. The principle of juror impartiality should be applied equally to the

penalty phase as well as the guilt phase. Id. at 729.

Voir Dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. See, Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

In U.S. v. Fell, 372 F.Supp.2d 766 (Vermont 2005) a capital case, defense counsel sought to include case-specific questions during voir dire. The Court held that defendant was entitled to ask prospective jurors, in addition to the requisite general life-qualifying questions, proposed case-specific questions provided the primary purpose was to ensure jury impartiality guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution as opposed to committing jurors to particular findings. The Court found the proposed case-specific questions permissible as long as they were not stake-out questions and would help identify various forms of juror bias regarding their consideration of any aggravating and mitigating factors as required by the Federal Death Penalty Act. The Court found that the proposed case-specific questions were permissible as long as they were not "stake-out" questions. The issue before the Court was what case-specific questions should be allowed with respect to aggravating and mitigating factors. In resolving the issue, the Court followed the reasoning of U.S. v. Johnson, 366 F.Supp.2d 822 (N.D. Iowa 2005).

In Johnson, supra, Chief Judge Bennett throughly discussed the question. The Fell court agreed that case-specific questions were permissible if they were not "stake-out" questions. The Court also agreed with Johnson, id., that "stake-out" questions are those that "ask a juror to speculate or pre-commit to how they juror might vote

based on any particular facts." Fell, id. at 770 citing Johnson (internal citations omitted). See also, U.S. v. McVeigh, 153 F.3d 1166, 1207 (1998) where the court said "when a defendant seeks to ask a juror to speculate or pre-commit to how that juror might vote based on any particular facts, the question strays beyond the purpose and protection of Morgan."

In the present case, the prosecutor sought to ask prospective juror 001 the following questions at voir dire:

> "There is also a process that is involved in a capital case where other than just a generalized jury instruction that is given by the Court, there is no other instruction about who is selected as a foreperson of the jury. You have no additional duties as far as votes go, but they have one duty that's very important and that is they are actually the person that signs the verdict form in this case.
>
> If you were selected the foreperson of this case and you believed under the law and the facts that the death penalty was appropriate could you sign your name as foreperson?"

Defense counsel objected stating that the law only required the prospective juror to consider the four forms {of punishment]; not that she can sign the verdict form.

The prosecutor responded:

> "The form of my questions 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."

The trial court overruled the objection; and the prosecutor then said:

> Prosecutor: Let me back up again.
>
> If you are selected as the foreperson of this jury and under the laws and facts, you believe 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 APP 5431)

Thereafter the prosecutors asked fifteen (15) additional prospective jurors the same question. (No. 25, 22 ROA 5592; No. 46, 24 ROA 6057;

No. 59, 24 ROA 6082; No. 97, 23 ROA 5734; No. 108, 23 ROA 5754; No. 113, 23 ROA 5796; No. 132, 23 ROA 5846; No. 230, 24 ROA 5929; No. 242, 24 ROA 5961; No. 249, 24 ROA 5979; No. 262, 24 ROA 6014-6015; No. 278, 24 ROA 6036-6037; No. 296, 25 ROA 6141; No. 305, 25 ROA 6173-6174; No. 309, 25 ROA 6198-6199; No. 311, 25 ROA 6221)

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

The Court erred in allowing the prosecutors to question sixteen prospective jurors by asking them in effect if they could sign the verdict that would put DONTE JOHNSON to death. The question was used to empanel a pro-death jury rather than the constitutionally guaranteed panel of impartial, indifferent jurors to which DONTE JOHNSON was entitled. The death verdict should be set aside and a new penalty trial given.

II.

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

The prosecutors evident purpose in contravening the District Court's order was to conjure up, in the minds of the jurors, images of the victims as children. This Court should find the intentional misconduct of the prosecutor created prejudice in the minds of the jury against DONTE JOHNSON.

The law is well settled that a prosecutor may not improperly appeal to the jury to act in ways other than as dispassionate arbitrators of the facts. See, U.S. v. Young, 470 U.S. 1, 10 (1985).

Here, prior to trial defense counsel filed a motion in limine to preclude the prosecution from referring to the victims in the case as boys. In the motion, counsel noted that at the previous penalty hearing, in front of the jury, the victims were referred to as "boys" over twenty (20) times. That such a reference conjured visions of a ten (10) to twelve (12) year old child. That the use of "boys" was a subtle means to inflame the jury. (20 ROA 4824-26)

On May 3, 2004, the State having no opposition, the trial court granted DONTE JOHNSON'S motion in limine to preclude the State from referring to the victims as "boys". The instant prosecutor was present. (20 ROA 4961; 5002)

The prosecutors deliberate contravention of the district court's order by referring the four (4) young men as "boys" or "kids" was a calculated effort to evoke sympathetic responses from jurors to the prejudice of DONTE JOHNSON.

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.

In Krause, Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001) this Court in discussing the weighing of probative and prejudicial value of evidence 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, citing Fed.R.Evid. 403 advisory committee's note. In the case at bar, the prejudicial effect of DONTE JOHNSON'S convictions so outweighed the probative value their admission constituted a clear abuse of discretion. See, Lucas v. State, 96 Nev. 428, 610 P.2d 235 (1984). The 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). Here the trial court's initial decision was to exclude the juvenile convictions on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. The trial court abused its discretion in allowing the evidence to be adduced at trial.

The prejudicial impact of the juvenile convictions and their appeal to the emotional tendencies of jurors rather than the intellectual ability to evaluate evidence is best explained by reference to the decision of the Court in Roper v. Simmons, 543 U.S. 551 (2005) wherein the Court held that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders under 18.

In Roper, supra, the Court noted three general differences between juveniles under 18 and adults:

> "...First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' (citations omitted)
>
> . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115, 71 L.Ed.2d 1, 102 S. Ct. 869 ('[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage'). This is explained in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment. (citations omitted)
>
> . . .
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identify: Youth and

Crisis (1968).

> These differences render suspect any conclusion that a juvenile falls among the worst offenders....." (citations omitted)

The Court found that juvenile offenders are less culpable than adults. However, it cannot be said that a jury in a capital case, or specifically the jury herein, could evaluate DONTE JOHNSON'S juvenile record from the perspective articulated by the Court.

The admission of testimony and exhibits regarding DONTE JOHNSON'S juvenile convictions was so highly prejudicial as to deprive DONTE JOHNSON of a fair penalty hearing.

IV.

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

The proper purpose of the jury in a sentencing hearing is the determination of the proper sentence for the defendant before them based on his own past conduct. Here, the prosecutor improperly compared DONTE JOHNSON to others and attempted to inflame the jury and invoke social pressure. The argument was improper and designed to prejudice and coerce the jury into finding that the mitigating circumstances did not outweigh the aggravating circumstances; that a sentence of death would later become apparent.

In Collier v. State, 101 Nev. 473; 705 P.23 1126 (1988) this Court reversed the defendant's sentence of death, in great part, on the ground of prosecutorial misconduct. In Collier, Id. the prosecutor in arguing to the jury, improperly argued facts outside the record by comparing the defendant to one of Nevada's most notorious criminals. Further, the prosecutor argued community standards to the jury.

Here, the prosecutor argued:

> "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 6656-57)

thus comparing DONTE JOHNSON unfavorably to others and attempting to impose social pressure.

The argument by invoking facts outside the record and improper

comparisons deprived DONTE JOHNSON on the individual consideration essential in capital cases. See, Lockett v. Ohio, 438 U.S. 586 (1978).

The prosecutor has a duty to confine argument to the jury within proper bounds. See, United States v. Young, 470 U.S. 1, 8 (1985). Here, the prosecutor failed to meet this requirement and his misconduct was prejudicial to DONTE JOHNSON.

V.

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

The killings occurred in August 1998; almost 7 years prior to this third penalty hearing; thus raising serious questions of dissembling or planned theatrics on the part of the brother. Genuine or spurious, the extreme behavior demonstrated to the jury requires reversal of the sentence of death.

NRS 177.055(2)(c) requires this Court to review every death sentence and consider in addition to any issues raised on appeal whether the sentence of death was imposed under the passion, prejudice or any arbitrary factor. DONTE JOHNSON contends that the jury's sentence of death was improperly influenced by the actions/reactions of Nick Gorringe and must be set aside and the case remanded for a new penalty hearing.

In Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) during closing argument, an electronic stun belt that the defendant was wearing was activated and shocked him, completely disrupting the proceedings. The jury was excused. When the jury returned, the trial court explained that Hollaway was wearing a stub belt and had done nothing to warrant its activation. In reversing the sentence of death, this Court found that the incident remained an arbitrary and prejudicial factor which required reversal of the defendant's sentence. In the case at bar, like the Hollaway case, the prosecutor was delivering his closing argument when Gorringe groaned and fell.

This completely disrupted the proceedings, requiring the jurors to leave the courtroom. When they returned, as in Hollaway, supra, the Court admonished the jury to disregard the commotion. The prosecutor then finished his argument. As in Hollaway, supra, the jury returned a sentence of death. The incident was an arbitrary and prejudicial factor which requires reversal of DONTE JOHNSON'S sentence.

VI.

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

In rebuttal argument the prosecutor both argued facts not adduced at trial and discounted the defense objection and the Court's opinion statement when he told the jury he would leave it to its collective memory. This misconduct was prejudicial.

It is black letter law that it is misconduct for a prosecutor to argue facts not in evidence. See, Witherspoon v. State, 104 Nev. 721, 765 P.2d 1153 (1988); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). Here, the prosecutor in argument informed the jury that victim Matthew Mowen stated in the presence of DONTE JOHNSON and Terrell Young that they made selling pizzas and drugs following the band Phish. This was false. There was no testimony that Mowen's money was obtained from any source other than the sale of "acid".

The misconduct in arguing facts not in evidence was exacerbated by the prosecutor's response following the defense objection and the Court's statement that it did not recall pizza when the prosecutor then stated:

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

In effect, demonstrating a lack of respect or courteous regard for the Court and by implication suggesting to the jury the correctness of his argument.

A prosecutor's primary duty is not to convict but to see that justice is done; and lawyers (including prosecutors) may not state facts which are not in evidence, or use inflammatory argument. See, Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, citing SCR 181(3) 1985, SCR 195(3), 198(2) 1985. The improper rebuttal argument of the

prosecutor, portraying the victims in a more positive light, and the cavalier response of the prosecutor to the challenge of that argument prejudiced DONTE JOHNSON in the eye of the jury.

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 DONTE 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 KNOW 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.

You can't unring a bell. The jury had been told that DONTE JOHNSON threatened to kill a young woman and put out a contract on a man while incarcerated.

The prosecutor in the present case exceeded the permissible scope of an opening statement by referring to criminal acts alleged to have been committed by DONTE JOHNSON where the prosecution failed to properly notice the defense in violation of NRS 174.233 - NRS 174.295, NRS 48.045, and Nevada case law. As a consequence, he stated facts to the jury in his Opening Statement that he could not prove at trial. See, Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997). The allegations in the prosecution's Opening Statement were highly prejudicial.

The trial court's single instruction to the jury that Opening Statements and Closing Arguments were not evidence was insufficient to cure the prejudice resulting from the prosecution's Opening Statement. It cannot be said that the prejudice caused by the prosecutor's assertions did not contribute to the death sentence imposed.

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 Russeau v. Texas, 171 S.W.3d 871 [Tx.Crim.App] (2005), a capital murder case, the court of criminal appeals of Texas affirmed the defendants conviction but reversed as to punishment, remanding for a new punishment hearing on the ground that "incident reports' and "disciplinary reports" admitted under the business records exception to the hearsay rule; contained statements which appeared to have been written by correction officers and which purported to document numerous and repeated disciplinary offenses on the part of Russeau

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

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

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

In the instant case, defense counsel objected to the admission of the detention center records, citing Crawford. The prosecutor argued that Crawford was inapplicable as the evidence in issue were business records as in Russeau, Id. The Court allowed the documents into evidence. (29 ROA 7114-7120)

Inmate reports and disciplinary reports are testimonial. Therefore, this Court should find that their admission into evidence violative of the confrontation clause and reverse DONTE JOHNSON'S sentence of death and remand the case to the District Court.

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

Death is different. And one of the ways in which death penalty trials are different in this jurisdiction is that they are prosecuted by experienced attorneys knowledgeable in substantive and procedural law, capable of litigating a case without crossing the bright line of misconduct if they so choose. Evidently in this case they did not choose to use proper methods.

Therefore, this Court should reverse DONTE JOHNSON'S sentence of death and remand the case to the District Court for a new penalty trial free of prejudicial error.

The prosecutor's duty in a criminal prosecution is to seek justice. Berger v. U.S., 295 U.S. 78, 88 (1935), overruled on other grounds, by Stirone v. United States, 361 U.S. 212 (1960), Darden v. Wainwright, 477 U.S. 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). A death sentence may be reversed if the jury imposing the sentence was influenced or misled by improper evidence, arguments or instructions. See, Dawson v. Delaware, 503 U.S. 159, 163 (1992). Here, the State introduced both improper evidence and argument.

This Court has held that the constitutional right to a fair trial can be violated by the cumulative effect of errors even when the errors are harmless individually. Cf. Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002); Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

"An accused, whether guilty or innocent, is entitled to a fair trial; and it is the duty of the court and prosecutor to see that he gets it." See, Garner v. State, 78 Nev. 366, 373, 374 P.2d 525 (1962). In the case at bar, review of the proceedings demonstrates misconduct, inadmissible evidence, improper rulings, and prejudicial jury instructions. Quantity of error is significant, and accumulation of error prejudiced Appellant's right to a fair penalty hearing. See, Garner at 375; see also, State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948). The misconduct of the prosecutor was so prejudicial and/or the error of the trial court was so extensive, DONTE JOHNSON did not receive a fair trial. See, McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984); see also, Sipsas v. State, 102 Nev. 119, 716 P.12d 231 (1986). The sentence of JOHNSON should be reversed.

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 20 day of January, 2006.

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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 the 25 day of January, 2006.

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 27 day of January, 2006, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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