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IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK BROWN,

Appellant,

v

THE STATE OF NEVADA,

Respondent.

CASE NO: 47856

FILED

AUG 20 2007

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MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA

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

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Counsel for Erick Brown

IN THE SUPREME COURT OF

THE STATE OF NEVADA

ERICK BROWN,	)	
	)	
Appellant,	)	
	)	
v	)	**CASE NO: 47856**
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	
	)	

MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA

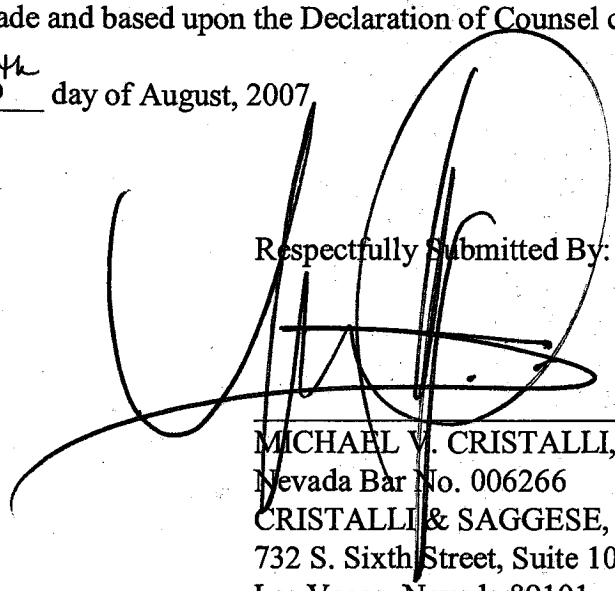
Counsel for Appellant respectfully moves this Honorable Court to receive the instant arguments, written by Defendant/Appellant, and considered but not included in the construction of Appellant's initial Fast Track Appeal. Counsel for Appellant respectfully requests that this Honorable Court receive the attached correspondence pursuant to Anders v. California, 386 U.S. 738. 87 S.Ct. 1396, 18 L.Ed.2d 493.

...

...

This motion is made and based upon the Declaration of Counsel contained herein.

DATED this 16th day of August, 2007.



Respectfully Submitted By:

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Counsel for Erick Brown

DECLARATION OF MICHAEL V. CRISTALLI, ESQ.

MICHAEL V. CRISTALLI, ESQ., makes the following declaration:

1. Counsel has represented Erick Brown at trial and currently before this Honorable Court.

2. Defendant submitted the same issues for Counsel's consideration before the construction of the Appellate brief in this matter, though, it is not the same writing concurrently tendered to this Honorable Court.

3. Counsel did not include these issues for consideration in Appellant's opening brief.

4. Counsel remains convinced that the issues included in the brief are meritorious and should be included.

5. Counsel respectfully submits the other issues pursuant to Anders v. California, 386 U.S. 738. 87 S.Ct. 1396, 18 L.Ed.2d 493. (Please see attached Exhibit "A").

EXECUTED this 16th day of August, 2007.

MICHAEL V. CRISTALLI, ESQ.

CERTIFICATE OF MAILING

I hereby certify that I mailed a foregoing copy of Appellant Erick Brown's **MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA**, on the 16th day of August, 2007, by depositing a copy thereof in the United States Mail, postage prepaid, addressed to:

DAVID ROGER, ESQ.
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

CATHERINE CORTEZ MASTO, ESQ.
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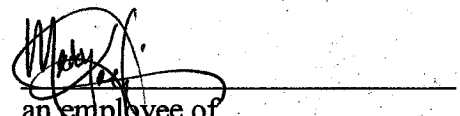
Carson City, Nevada 89701-4717

and that there is regular communication between the place(s) mailed and the place(s) so addressed.



an employee of
CRISTALDI & SAGGESE, LTD.

EXHIBIT "A"

GROUND FOUR: The State used peremptory challenge to exclude black citizen from Appellant's jury, and, despite trial counsel's objection, the District Court allowed the State's discriminatory actions to stand, in violation of Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this Appeal.

1. Appellant Brown is an African American, and therefore a member of an identifiable minority i the United States. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Cour held that a criminal defendant's Fourteenth Amendment right to equal protection of the laws i violated when the government uses peremptory challenges to remove black venire persons from a jury. Batson and it's progeny set forth a three-step process for evaluating race-based objections to peremptory challenges:

   a). The opponent of a peremptory challenge must make a prima facie showing of racial discrimination;

   b). The state must proffer a race-neutral explanation for the challenge; and,

   c). The trial court must determine whether the opponent of the strike has proved that the proffered race-neutral explanation is merely a pretext for purposeful racial discrimination.

See, **Purkett v. Elem**, 514 U.S. 765, 767-68 (1995)(announcing three-step "Batson" process).

2. Ms. Whittle is a black woman, and was a potential juror in Appellant's case.
3. Appellant alleges that Ms. Whittle was excluded from the jury based upon her race.
4. The state's race-neutral explanation for excusing Ms. Whittle, Juror Number 488, was that no other juror was merely as sporadic in terms of job history, and that she wore a T-Shirt to Court which read "Most likely to steal your boyfriend", and that particular statement on it showed a concern lack of maturity on her part. See, trial transcript, June 27, 2006, pages 2-3.
5. Defense counsel noted for the record that seeing anything from her in terms of her past work history that was distinguishable from any other one of the jurors. In fact, juror number 12, Mr. Bracken, who was currently unemployed and living in Laughlin, Nevada, the Court was willing

to put him up at the Golden Nugget for the duration of the trial, rather than have him drive bac and forth. Let's note Mr. Bracken is unemployed with only one prior job in his life which h held for only seven months, selling telephones for Cingular, from August to February of 05 And since February to trial, "he was just enjoying life." See Trial Transcripts, June 26, 2006 pages 109, 111, lines 12-25, 1-25, 1-6.

6. The state's reason for the use of it's challenge was pretext, this juror could not have been excluded pursuant to **Witherspoon v. Illinois**, 391 U.S. 510 (1968), and later case law. Therefore, prong two is not met by the State. Appellant argues that had Ms. Whittle been on the jury panel, his trial could have resulted in a hung jury, or even a not guilty verdict.

7. The state, through its use of peremptory challenges, was allowed to systematically exclude Ms. Whittle from the jury. The State's proffered race-neutral explanation of her job history and T-Shirt was merely a pretext for purposeful racial discrimination. Therefore, the trial court erred in determining a race-neutral reason existed for removing Ms. Whittle from the jury, demonstrating that prong three of the Batson test was not met, thus denying Appellant Brown of equal protection of the law, a fair trial outcome, and violating his Sixth and Fourteenth Amendment Due Process rights to the U.S. Constitution, and the conviction cannot stand.

GROUND FIVE: Appellant was denied his Fourth Amendment rights to the U.S. Constitution, to search and seizure as no search warrant was ever obtained by the arresting officers.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal onto this ground in support hereof.

1. On November 27, 2002, while exiting the elevator of the Hyatt Regency Hotel, in Los Angeles, See, 6/28/06, TT. Pages 99-100-101, 6/29/06, TT. Page 12, lines 6-16. This Appellant was surrounded by approximately Ten (10) law enforcement officials form LAPD and FBI agents.
2. Under oath, FBI special agent Darin McAllister stated that he observed a suspicious package (black backpack), approximately 10 feet or so from the Appellant. See, 6/228/06, TT. Page 101, lines 1-6.
3. That he, McAllister immediately went to move it to find out who it belonged to, and when he asked appellant responded that it was his. That he picked up the backpack, and in doing so, it's contents spilled out because he picked it up from the side, and he observed numerous jewelry pieces in plastic bags, such as chains, bracelets, rings, trinket jewelry anywhere in the amount of three, four hundred pieces of jewelry. See, 6/28/06, TT. Pages 101-102, 103, 121-122.
4. When asked by defense counsel, Michael Cristalli, had he, McAllister, ever sought to execute some type of search warrant in order to look inside the bag, McAllister stated: "No, I did not." See, 6/28/06, TT. Page 122, lines 7-10.
5. LAPD, Michael Woodings, who was part of the surveillance team assumed custody of the backpack once it was brought up to the 15th floor of the hotel. See, 6/28/06, TT. Pages 135-136.
6. FBI special agent, Frank Aimaro, stated under oath that when he introduced himself to the appellant, the appellant had the black backpack on his shoulder. See, 6/29/06, TT. Pages 13, 14, lines 22-25, 1-5.
7. That as he was introducing himself to appellant and begin asking him questions, FBI agent, mark Wolfson, took the bag off of Mr. Brown's shoulder and placed it on the ground, right at

our feet, for safety reasons, and that agent McAllister was present during the whole time, and while questioning Appellant, McAllister picked up the bag, which tumbled onto the floor and this jewelry fell out onto the hotel lobby floor. See, TT., 6/28/06, page 14, lines 8-21.

8. There are no disputed questions as to McAllister's actions as the bag was not 10 feet or so away from the Appellant, as Appellant has always claimed that he never had the bag in his possession. TT, 6/30/06, pages 49, 50, lines 7-25, 1-2, nor gave consent to have the bag searched.

9. No search warrant was ever obtained to search the bag or no consent was ever given or signed by the Hyatt Regency Hotel staff.

10. This is a direct violation of the search and seizure law which is protected by the Fourth Amendment to the U.S. Constitution.

11. Therefore, the black backpack and it's contents were illegally obtained by the FBI Agents and LAPD Law Enforcement Officers, and the evidence of the bag and jewelry used against the Appellant at trial to help obtained his conviction should had never been admitted because his Fourth Amendment rights to the U.S. Constitution were violated.

GROUND SIX: The prosecutor committed forensic biological and physical evidence misconduct, that was exculpatory in nature towards the Appellant's defense, violating his due process rights to a fair trial under the Fourteenth Amendment to the U.S. Constitution.

Supporting Facts:

Petitioner hereby incorporates as if fully stated herein all other grounds of this appeal in support herein.

1. When the Appellant was apprehended in Los Angeles on November 27, 2002; The State of Nevada, Limited their investigation as to the Forensic biological and physical evidence, that was collected by the Crime Scene Analyst, (CSA), M. Weir, from the crime scene and in Los Angeles.
2. Although the Appellant has always maintained his innocence to the crime, and testified at trial denying any involvement or participation, See, TT. 6/30/06, page 48, lines 13-16; the State had an ethical duty to test the collected evidence and eliminate him as a suspect.
3. HPD, CSA, M. Weir, collected the earring from the ultrasound, TT., 6/27/06, pages 160-161, lines 6-25; 1-5. Yet, she failed to perform any DNA testing for comparisons of said evidence, even after the victims stated inter alia that the tall guy took the earring off his ear.
4. Even though, M. Weir found bloody tennis shoes impression at the crime scene, TT., 6/27/06, page 171, lines 8-15; and Appellant voluntarily submitted his tennis shoes to the detective, TT., 6/30/06, page 77, lines 13-20, for comparison testing for the purpose to exclude him as a suspect, **"NO"** such testing were ever performed by the State.
5. Further, M. Weir collected Nine Latent Finger prints from several jewelry cases, TT. 6/27/06, pages 132 through 151; Weir was not able to properly preserve the crime scene, as she and her partner arrived a day later because they were busy on another crime scene.TT. 6/27/06, pages 166-167-68. Thus, No NCIS Report has ever been reported by either the CSA or District Attorney's office.
6. Furthermore, the State placed into evidence the HPD, Criminalistics Bureau Laboratory report as to have been conducted on November 25, 2002, TT. 6/27/06, pages 169 through 171, as

testified by M. Weir, then she further testified that a mistake had occurred as to the actual date tests of the prints, which were tested on January 14, 2003. Id at 171, lines 23-25, not on November 25, 2002.

7. Here, M. Weir testified falsely and the State submitted a false dated document as to when "The suitable Latent Prints were compared to the finger and palm print cards bearing the names Alfred Blackwell (HPD #64113) and Erick Marquis Brown (HPD #64014) were conducted." The results were negative. See Exhibit No. 1, page 1.

> **Special Notice:** On November 25, 2002, the names of Blackwell and Brown, did not even exist as possible suspects with any agency connected to Law Enforcement. **End Special Notice:**

8. The false dated document "caught by the defense" was "meritorious" enough to warrant a mistrial. Yet No mistrial was granted.
9. If the State of Nevada, instead of being deceptive, would had made additional testings of all the above-mentioned evidence collected, and expanded their investigations instead of limiting them to no further than the Appellant and co-defendant Blackwell, it would had eliminated the Appellant as a suspect, and exonerated him beyond a reasonable doubt.
10. Instead the trial Judge, over Appellant counsel's objection would not permit counsel to question CSI, M. Weir about the AFIS or NCIC processing of "Finger Prints" from the crime scene. A comparison of the collected prints determined, that they did not belong to the Appellant. Thus, the victims testified that the suspects were not wearing gloves, and that they touched the glass counter top where CSI Weir removed latent prints. But, these prints were never entered into the AFIS or NCIC data base computer for identification purposes. TT., 12/20/06, pages 165-166.
11. After CSI Weir was confronted about her lab reports containing false information, she quickly admitted to errors in their computer system. See, TT., 12/20/06, pages 169-172.
12. The police had other potential suspects on their list, especially, Martell Williams, who was 6 feet, one inch tall, thin, weighing 187 pounds, short cropped hair and in his twenties, as described by both victims on the night of the crime.

13. Furthermore, on February 2, 2003, Williams was arrested in Los Angeles, for robbery of a liquor store, See TT., 6/29/06, pages 19-20, lines 18-25; 1, and when LAPD searched his residence pursuant to a search warrant, one hundred and twelve pieces of jewelry from the Henderson robbery were found inside the residence he shared with his girlfriend. See, Ground Thirteen, number Six (6).

14. Knowing the above information concerning Martell Williams, the Henderson Police Department Detectives, Price and her subordinates failed to follow up on this crucial evidence and checkout Mr. Williams through the NCIC computer for a possible palm print match, or any other forensic or physical evidence collected from the crime scene. See, Exhibit 1, page 2.

15. The Appellant is six feet, five inches tall, two hundred and sixty-five pounds, "heavy set" looking [NOT THIN]; bald headed; [NOT SHORT CROPPED HAIR]; and does not wear an earring as Mr. Williams does. No testing of the earrings were conducted. See, TT. 6/29/06, page 96.

16. Appellant has a 160 year sentence, a definite death sentence in prison and Henderson Police Department never processed the latent prints from the crime scene into any crime data base computer for comparisons.

17. Appellant alleges, that the Henderson Police and the Prosecutor committed forensic biological and physical misconduct that was exculpatory in nature towards his defense, thus, that he was prejudiced due to the negligent investigations which would have exonerated him as a suspect, and therefore, his due process rights to a fair and impartial trial of the Fourteenth Amendments were violated.

GROUND SEVEN: The State's knowing use of perjured testimony as to material issues of fact, by the alleged eyewitness to the robbery, deprived Appellant of his due process rights, and right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this Appeal onto this ground in support hereof.

1. On November 25, 2002, two men entered the Las Vegas Manufacturing Jewelers (LVMJ) and robbed the facility. Two other men, (the victims), were inside the store, and one by the name of Emmett James Connelly (Connelly), and, the second man was the owner Mike Golsecker). After the robbery Connelly spent a few days in the hospital, and upon his release the Henderson Police Department (HPD) paid him a visit on November 27, 2002, to see if he could identify the perpetrators. See, 6/27/06, TT., page 86, lines 1-8.

   a). During the photographic line-ups, he was able to identify the shorter of the two perpetrators as being Blackwell. See, 6/27/06, TT., page 87, lines 8-18.

   b). But, Connelly was unable to pick out the Appellant from the photographic line-up, See, TT., page 90, lines 5-8.

2. During the trial on 6/27/06, he was questioned on direct examination by the State's prosecutor, Mr. Fattig as to identifying the Appellant, Erick Brown, as being the taller man with the gun. The following exchange took place.

   21. Q. Today, you have testified that you
   22. Recognize the Defendant Erick Brown as being the
   23. taller man with the gun?
   24. A. Yes sir.
   25. Q. When were you able to first recognize

6/27/06, TT., page 90, lines 21-25.

   1. Erick Brown?
   2. A. When I seen him at the first hearing.

6/27/06, TT., page 91, lines 1-2.

3. Connelly could not identify the defendant at the photographic line-up. In fact, when he described that taller man to the HPD, he stated that the taller man as tall and thin, younger than 25, with longer hair than the shorter perpetrator and wore an earring. But, the first time he identified the Appellant was January of 2003 at the Preliminary Hearing held in Justice Court in Henderson, Nevada. Appellant Brown is six feet five inches tall, 250 pounds, bald headed and does not wear an earring. Thus, he was wearing prison garb at the preliminary hearing.

4. During cross-examination the following took place:

Defendant's Exhibit "B", Mr. Connelly's call to 911, tape the dispatcher asked him specifically for a description of the individuals who had just come in and robbed him; he stated that one was about 25, the other was very tall and he was probably a little younger, thin, black hair, and wearing a dark shirt, dark pants. See, 6/27/06, pages 101, 102-103.

a). During his testimony at the Preliminary Hearing he testified that the taller individual had short-cropped hair.

b). That the taller individual's hair was longer than the shorter individual.

c). On the 911 tape Mr. Connelly, said he heard the names Craig, Dean, or Peat.

d). But at the Preliminary Hearing he testified that he read the subpoena and recognized the name Erick Brown. See, 6/27/06, pages 121, 122-123, 124.

5. During re-cross examination, Mr. Fathing actually suborns further testimony from Mr. Connelly by attempting to State the following under oath.

a). That the first time he physically saw Erick brown was at the Preliminary Hearing.

b). That when he described Mr. brown as short cropped hair, that it was probably an eighth to a quarter, tops.

c). That he seen the appearance of him taking off an earring, but never actually saw him wearing it.

d). That he couldn't recall for the life of him the name of the taller individual, but when he seen the name, that was it.

6. Even further, the second victim of LVMS, Michael Gobsecker was unable to identify the Appellant as one of the perpetrators during the photographic line up. See, 6/28/06, TT. Page 42, lines 22-24. In fact, he makes his Id 6/23/06, six months after the preliminary hearing, after appellant's arrest.

7. When Drain McAllister (McAllister) special Agent of the FBI was being questioned under oath at the trial by State prosecutor Mr. Digiamcomo, he testified that when he came in contact with the Appellant at the Hyatt Hotel by the elevators, he observed a black backpack in the area that was not there prior to his prior surveillance, approximately 10 feet or so from the appellant; and as he immediately went to move it to find out who it belonged to, he asked and the Appellant's response was that it was his. See, TT. 6/28/06, pages 100-101, lines 13-25;1-17.

20. Q. Did you touch the backpack?
21. A. Yes, I picked up the backpack.
22. When I was picking it up the contents
23. that were in it .. I didn't see a handle on it .. it
24. spilled out. I picked it up from the side.
25. Again when these items fell out I

TT., 6/28/06, page 101, lines 20-25.

1. observed them to be jewelry, numerous, jewelry,
2. pieces of jewelry in a plastic bag.
3. Q. When you saw these items fall out did
4. you do anything at that point?
5. A. I did. I said you know, are those
6. yours?
7. Spontaneous, he says yeah, that's my
8. stuff.

TT., 6/28/06, page 102, lines 1-8.

8. Agent McAllister further claimed that afterwards he placed the bag next to Appellant and thereafter, went to another area of the hotel. Id at, TT., 6/28/06, page 102, lines 9-18.

9. Frank Aimaro, special agent with the FBI, testified under oath to the following.

a). That when he approached Mr. Brown and identified himself, and asked Brown his name, brown responded who he was.

b). That Brown had a bag that was on his shoulder. TT., 6/29/06, pages 12-14.

c). And as he shook Mr. Brown's hands when introducing himself, and started questioning him, another FBI agent, Mark Wolfson, took the bag off Mr. Brown's shoulder and placed it on the ground, right at our feet. TT. 6/29/06, page 14, lines 8-12.

d). That agent McAllister was also there present during the whole time, but that during questioning of Mr. brown, agent McAllister picked up the bag, which tumbled onto the floor and this jewelry fell out onto the hotel lobby floor. TT., 6/29/06, page 14, lines 16-21.

10. The prosecutor as an agent of the people and the state, has the duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth, to administer justice, and to refrain from improper methods calculated to produce a wrongful conviction. **Berger v. United States,** 295 U.S. 78, 88, , 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

12. Here, not only does the prosecutor learns that Mr. Connelly's testimony is false as to identifying the Appellant, he further learns that agent McAllister has also provided false testimony to the jurors during his examination of the facts of the case, to cover up the Fourth Amendment violations he committed which were addressed in grounds 5 and 11 and incorporated herein as if fully stated herein.

13. The prosecutor may not become an architect of a proceeding that does not comport with the standards of justice. Therefore, the prosecutor violated the due process clause if he knowingly presents false testimony, (as it has been done here); whether it goes to the merits of the case or solely to a witness's credibility. See, **Napue v. Illinois**, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217(1959); **Mooney v. Holoban**, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); **Pyle v. Kansas**, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed 214 (1942); **Alcorte v. Texas**, 355 U.S. 8, 78 S.Ct. 103, 2 L.Ed. 2d 9 (1957). Moreover, the prosecutor has a constitutional duty to correct

evidence he knows is false even if he did not intentionally submit it. **Giles v. Maryland**, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed 2d 737 (1967).

GROUND EIGHT: Whether Jury Instructions _____ and _____, were erroneous, in view of movement of a victim which is merely incidental to the offense of robbery, could not, under Nevada law, satisfy, the asporation element of kidnapping, in violation of the Appellant's due process rights to a fair and impartial trial under the Fourteenth Amendment to the U.S. Constitution

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal onto this ground in support hereof.

1. Appellant asserts, that the trial court erroneously erred in instructing the jury on the elements of kidnapping during the course of a robbery served to deny him due process and equal protection of laws.
2. In Appellant's case, the court gave the following jury instruction regarding the movement required to satisfy the asportation element of kidnapping without ever explaining that the defendant must have forcibly moved the victims or caused them to be moved from one place to another for the purpose of abduction and kidnapping.
3. INSTRUCTION NO._____

In order for you to find the defendant guilty of both first-degree kidnapping (or second-degree kidnapping) and an associated offense of robbery, you must find beyond a reasonable doubt either:

(1) That any movement of the victim was not incidental to the robbery;

(2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery;

(3) That any incidental movement of the victim substantially exceeded that required to complete the robbery;

(4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or

(5) The movement or restraint had an independent purpose or significance. "Physically restrained" includes but is not limited to tying, binding, or taping.

4. INSTRUCTION NO. _____

Every person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for the purposes of killing the person or inflicting substantial bodily harm upon him is guilty of kidnapping in the first degree.

5. Appellant asserts, that under Nevada law, if you commit the act of arm robbery, and or just robbery, and you tie the person down, lay him directly on the floor, and maybe hit or kick him a couple of times in order to obtain the information needed to complete the robbery, in Nevada it also constitutes kidnapping in the first degree.

6. Here, although both victims were physically restrained, the incidental movement to the floor, did not exceed an increased risk of harm to the victims, as one was knocked out and the other, the suspects placed a cover over his victims head in order to complete the robbery. Thereafter, the robbers just simply exited via the back door of the establishment.

7. Neither victim were forcibly moved from one place to another, for the purpose of abduction and kidnapping. This was just a robbery, not a kidnapping. To be charged with first degree kidnapping when the movement required did not satisfy the asportation element of kidnapping; thus; without ever properly explaining to the jurors the elements of the crimes charged.

8. Appellant asserts that instructions 12 and 13 were erroneously given to the jury, and in violation of his due process rights to equal protection of the law, a fair and impartial trial, which is in direct violation of the Fourteenth Amendment to the U.S. Constitution, and the conviction must be set aside.

GROUND NINE: Jury Instruction _____, given by the court did not adequately and/or accurately cover the issue to be determined by the jury, in violation of Appellant's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of the appeal onto this ground in support hereof.

1. Jury Instruction ____ given by the court did not adequately and/or accurately cover the issue of the credibility or believability of a witness on the stand. It states in pertinent part:

2. INSTRUCTION NO._____

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fear, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of the witness or any portion of his testimony, which is not proved by other evidence.

3. On the witness stand, neither Mr. Connelly nor Mr. Golsecker could identify the Appellant during the photographic lineup. Further, only afterwards, when seen in prison garb was Connelly able to point out Appellant.

4. Their credibility or believability should have been in jeopardy, by any of the jurors sitting in the jury panel. Common sense told Connelly that the person being accused of the crime was the Appellant seated at the defense table with his attorney beside. Both Blackwell (the shorter perpetrator), and Appellant, the alleged taller perpetrator was the only person seated at the defense table in prison garb's. And, even further, Connelly only makes identification by way of reading a subpoena. The instruction specifically states that the credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his

fear, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollection.

5. One can determine the facts of the case as it occurred. The record so reflects:

a). Connelly and Golsecker were both inside the facility attending two prospective customers. Connelly was in the front of the store with the shorter perpetrator, trying to save him money on the piece of jewelry he was trying to convert into an earring.

b). Golsecker was in the back part of the facility with the taller perpetrator cleaning an earring in the ultrasound cleaner.

c). Connelly was attacked by and hit in the face by the shorter man. His head was covered during the robbery. When he made the 911 call he gave a different description of the perpetrator, " was tall, thin, younger than 25 years old, with longer hair than the shorter man, wearing black shirt and pants. He described a totally different person than the Appellant to the 911 dispatcher.

d). Golsecker was knocked out and also failed to describe the taller man properly.

6. INSTRUCTION NO._____ states:

In any criminal case, the government must prove beyond a reasonable doubt that the defendant was the perpetrator of the crimes alleged. You have heard testimony of the eyewitness identification. In deciding how much weight to give to this testimony, you may take into account the various factors mentioned in these instructions concerning credibility of witnesses. In addition to those factors, in evaluating eyewitness identification testimony, you may also take into account:

1. The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation;
2. Whether the identification was the product of the witness's own recollection or was the result of subsequent influences or suggestiveness;
3. Any inconsistent identifications made by the eyewitness;

4. Whether the witness had known or observed the offender at earlier times; and

5. The totality of circumstances surrounding the eyewitness's identification.

7. These instructions contradicted each other, thus shifted the burden of proof upon the defense prompting the appellant to give up his Fifth Amendment right to remain silent and defend himself, by taking the stand.

8. Further, these instructions addressed the witness's credibility or believability in a bias form. Appellant was entitled to an instruction that did not shift the burden upon him from a bias or interested witness with a motive to testify falsely to obtain a conviction without ever being positive as to his identification of Appellant.

9. The State's prosecutor knew that Connelly's recollection of the tall perpetrator was not a clear identification. The record so reflects it. Yet, the state wanted a conviction. The district court should have taken it upon itself to give a cautionary instruction which did not quantify the instructions given in 29 and 30, as the two above instructions shifted the burden of proof upon the defendant due process rights to remain silent, violating his Fifth Amendment rights, and his Fourteenth Amendment due process rights to a fair and impartial trial. See, **Sandstrom v. Montana**, 442 U.S. 510, 99 S.Ct. 2450 (1979).

GROUND TEN: The Statutory Reasonable Doubt Instruction is Unconstitutional, violating Appellant Brown's Sixth and Fourteenth Amendment Rights to the U.S. Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal ontc this ground in support hereof.

1. Defense counsel failed to object to Instruction 25, Reasonable Doubt, as being burden shifting and proffered the Ninth Circuit's definition of reasonable doubt as being the proper way to instruct the jury.
2. The statutory reasonable doubt instruction stated:

> The defendant is presumed innocent until the contrary is proved. This presumption places upon the state the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If in the minds of the jurors, after the entire comparison and consideration of all the evidence, are such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty. Id.

3. Concededly, this instruction does not even identify the portions of the reasonable doubt instruction that offend the constitution.
4. Appellant would concede however that the first paragraph is an acceptable definition of reasonable doubt, the offensive language is contained within the second paragraph.

5. The third sentence of the second paragraph states, "if in the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt."

6. By using the term, 'after the entire comparison and consideration of all the evidence', burden shifts to the criminal defendant to place before the jury some evidence to rebut the State's evidence accusing him of the charge[s], otherwise, why would the jury need to make a comparison of evidence? It does not tell them what is to be compared, or how to go about it.

7. The next part of the sentence lowers the State's burden of proof and also burden shifts to the defendant to prove his innocence of the charge[s], 'are in such a condition that they can say they feel an abiding conviction of the truth of the charge', there is not a reasonable doubt.

8. This sentence tells the jury they need to believe that the state is telling the truth, and if they do, then there is no reasonable doubt as to the guilt of the defendant. Rather than describe what a reasonable doubt is, it describes, by lessening the state's burden by requiring the defendant to prove that there is no "truth" to the State's charges and that he is entitled to a verdict of not guilty. If the defendant does not do that, then a jury has no choice but to return a verdict of guilty, as the State claims the defendant is.

9. Reasonable Doubt Instruction is well settled law that a reasonable doubt instruction that is unconstitutional in violation of the Fourteenth Amendment to the U.S. Constitution is per se reversible error. See, **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078 (1993).

10. It is also well settled law that any jury instruction which shifts the burden to a criminal defendant is unconstitutional and requires reversal of the conviction. See, **Sandstrom v. Montana**, 442 U.S. 510, 99 S.Ct. 2450 (1979).

11. Appellant Brown alleges that he was prejudiced when trial counsel failed to identify to the trial court, the unconstitutional language contained in this instruction because it gave the Court and the State no notice of what was offensive in the language for the Court to focus on. Thus, more probable than not, the State Supreme Court must address this issue and stricken the State

Statutory Reasonable Doubt Instruction down as being unconstitutional, and reverse and reman Brown's conviction with instructions for a new trial.

GROUND ELEVEN: Whether the Trial Court erred in not giving a cautionary jury instruction on Appellant's accomplice, sue sponte, depriving Appellant of a fair trial and violating his Fourteenth Amendment rights to the U.S. Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal onto this ground in support hereof.

1. During the course of Appellant's trial, the FBI agents and law enforcement officials paraded Alfred Blackwell (Appellant's accomplice) in front of the jurors.
2. FBI special agent Darin McAllister, LAPD, Michael Woodings, HPD, CSA specialist, Maria Weir, HPD officer Ryan Brightwell, HPD detective Dennis Price, and just about every other person who testified on behalf on the state mentioned Alfred Blackwell as being Appellant's accomplice.
3. Yet, before the commencement of Appellant's trial, the State filed an Amended Information excluding Alfred Blackwell as Appellant's accomplice.
4. An accomplice is a person liable to prosecution for the identical offense charged against another defendants, or who is culpable implicated in, or unlawfully cooperates, aids or abets in the commission of the crimes charged.
5. The Court should have sua sponte, issued a cautionary accomplice jury instruction, as the Judge is there to insure a fair trial occur, and it was only fair that the jury be aware that they were free to disregard all hearsay testimony related to Alfred Blackwell.
6. Such failure of the trial court was highly prejudicial to the Appellant to the extent that the fundamental fairness of the proceedings and the conviction was undermined. Thus, had the jury been properly instructed, there was a "strong probability that the results of the trial would have been different." The failure of the Court to sua sponte and give a cautionary instruction deprived Appellant of a jury that would give appropriate analysis to the evidence presented. The jury would have had a reasonable doubt respecting Appellant's guilt, but also that Appellant was denied a fair trial.

GROUND TWELVE: The Trial Court erred in allowing certain hearsay statements into evidence, in violation of Appellant's due process rights, to the Fourteenth Amendments to the U.S. Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this Appeal onto this ground in support hereof.

1. During the direct examination of FBI special agent Darin McAllister, the State's prosecutor, over defense counsel's objections, the jury heard certain hearsay statements brought into evidence.

15. Q. At some point in time did you go down
16. to the valet area of the Hyatt in order to come into
17. contact with anybody?
18. A. Yes.
19. Q. Can you describe for the ladies and
20. gentlemen of the jury who you came in contact with?
21. A. I came in contact with a caucasion
22. young lady by the name of Brandy, I believe.
23. Q. What was the reason you were coming
24. into contact with Brandy.
25. A. During this time we had notified the

TT., 6/28/06, page 103, lines 15-25.

1. hotel security we had an investigation and
2. surveillance being conducted in the hotel. They had
3. notified me that a car associated - -
4. Mr. CRISTALLI: Objection. Hearsay.
5. By Mr. DIGIACOMO:
6. Q. Without telling us what valet notified
7. you about any vehicle at some point did valet call
8. you and indicate something about a vehicle?
9. A. Yes.
10. Q. Based upon that conversation did you
11. go down stairs?
12. A. Yes.

13. Q. When you went down stairs did you come
14. in contact with anybody associated with that
15. vehicle?
16. A. Yes.
17. Q. And that was Brandy?
18. A. Yes.
19. Q. When you came in contact with Brandy
20. describe what it is you did.
21. A. I identified myself as an agent and
22. asked her if she was waiting for this particular
23. vehicle and she - -
24. Mr. CRISTALLI: Objection. Hearsay.
25. Mr. DIGIACOMO: Do not tell us what she

TT., 6/28/06, page 104, lines 1-25.

1. said.
2. Q. After identifying yourself to her
3. ultimately did you request her to do anything?
4. A. Yes.
5. Q. What did you request her to do?
6. A. I requested her to accompany me
7. upstairs to the room which she was staying in.
8. Q. And the room she was staying in was
9. this a room that was associated with either
10. Mr. Brown or Mr. Blackwell?
11. A. Yes.
12. Q. When you got up to the room did you
13. ever identify her relationship to Mr. Blackwell and
14. Mr. Brown?
15. A. Yes.
16. Q. And what is that?
17. A. She told me she was - -
18. Mr. CRISTALLI: Objection. Hearsay.
19. Mr. DIGIACOMO: Despite what she told
20. you during the course of your investigation did you
21. learn what her relationship was?

22. A. Her relationship was with Mr. Brown.

23. Mr. CRISTALLI: Objection. Hearsay.

24. information.

25. THE COURT: Go ahead. Overruled.

TT., 6/28/06, page 105, lines 1-25.

1. THE WITNESS: The relationship with

2. Mr. Brown was determined to be a boyfriend

3. girlfriend type of relationship.

TT., 6/28/06, page 106, lines 1-3.

2. Prior to the introduction of the above-mentioned testimony, the District Judge failed to make a preliminary determination that the facts relied upon, that Brandy was waiting at the valet for Appellant, and she and Appellant had a girlfriend/boyfriend relationship, which the relevancy of the evidence depended upon. See, NRS 47.070(1).

3. Furthermore. State's Exhibit proposed 104, "The reading of Miranda Rights to the jurors, was nothing more than hearsay, TT., 6/30/06, pages 81 through 84, was nothing more than hearsay, and; Assuming argumendo, that this matter was properly submitted to the jury's alluded to by the District Court Judge; error was still committed by the District Court Judge in not instructing the jury that it may consider the issue but was fulfilled. See, NRS 47.070(2).

4. Therefore, Appellant asserts that by the District Court Judge allowing the above-mentioned hearsay statements into evidence, violated his due process rights protected by the Fourteenth Amendment to the U.S. Constitution.

GROUND THIRTEEN: Whether the District Court Judge committed reversible error in allowing Appellant's co-defendant, Alfred Blackwell by the jury, for the mere purposes of a physical piece of evidence, and summit Martell Williams stipulation and Brandy into evidence, in violation of Appellant's rights under the Confrontation Clause of the State and Federal Constitutions, Concomitantly, this error was caused by the State's failure to secure the witnesses testimonies at trial.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this Appeal onto this ground in support hereof.

1. On June 26, 2006, the State's prosecutor, Mr. Fatting, filed an Amended Information with the Clerk of the Court, in the above-entitled case, that took out Appellant's co-defendant, Alfred Blackwell (Blackwell) out of Brown's case. See, Amended Information; And, TT., 6/29/06, pages 5-6, lines 17-25; 1-2.
2. Blackwell's and Appellant's trial had previously been severance, were upon Blackwell had entered into plea negotiations with the State accepting a deal, and was being held at the Clark County Detention Center (CCDC) awaiting transfer to the Nevada Department of Corrections (NDOC), See, TT., 6/29/06, page 3, lines 20-21.
3. In Chambers, and in open court, defense counsel Mr. Cristalli, placed on the record that the state's intention to bring Blackwell into Court, for the purpose of identification and having the jury see him, was extremely unfair and prejudicial to Appellant. See, United States v. Griffin, 778 F. 2d 707 (11th Cir. 1985), were the defendant suffered similar situations because the Courts and prosecutors generally are forbidden from mentioning a co-defendant has either enter into plea negotiations, or been convicted. See, TT., 6/29/06, pages 2-3, lines 8-25;1-17.
4. The State on the other hand, argued that they were not bringing Blackwell into Court as a confession, except for the entry of the plea. TT., 6/29/06, page 3, lines 18-19.
5. And that they would bring Blackwell into Court, "not in prison clothes, and for the sole issue of identification of the perpetrators. See, TT., 6/29/06, pages 3-4, lines 22-25;1-22.

6. Furthermore, prosecutor Digiacomo, through stipulation with counsel on Martell Williams, offered into evidence that:

> On November 8, 2002, Martell Williams was a getaway driver from a robbery of a liquor store in Los Angeles. On February 5, 2003, during a search warrant pursuant to an investigation of the robbery of the liquor store police found several items of jewelry depicted in State's exhibit 18C and 18D inside a residence he shared with his girlfriend.

7. Throughout Appellant's entire trial, Mr. Blackwell and Mr. Williams were mentioned. Blackwell as Appellant's co-defendant, and Williams as a possible suspect in the case at hand.

8. Blackwell, was brought into court in civilian clothes, uncuffed and sat in the audience prior to the jury panel entering the court room; then sometime later, walked out through a back side door of the court room with numerous law officials in uniforms, which was highly prejudicial and unfair to the Appellant, as Blackwell never testified at Appellant's trial and the defense was unable to confront or cross examine him.

9. During closing arguments, the prosecutor makes reference as to Martell Williams as being known as a getaway driver, with 142 pieces of missing jewelry as the logic would be that the getaway driver's cut would be a little bit smaller that the guys that risks themselves, did the tying up and beating. See, TT., 6/30/06, pages 156-157.

10. And, Brandy Billiard, Appellant's girlfriend have one piece, a 13 or 18 thousand dollar ring in her property, thus, pawning a ring in Henderson, Nevada, 13 days prior to the crime. See, TT., 6/30/06, pages 157-158.

11. The facts are as follows:

a). Alfred Blackwell was a co-defendant;

b). The State excluded him as a co-defendant when they filed an amended information taking his name off the original information.

c). The District Court Judge erred in allowing the State to parade Blackwell in civilian clothes in front of the jury, exiting via the back door of the court room with law enforcement officials escorting him.

d). Blackwell's presence at Appellant's trial was extremely unfair and prejudicial to Appellant's due process rights under the Confrontation Clause, as the defense was unable to question him. Mere presence for identification purposes was not warranted, as Blackwell was mentioned throughout the entire five days proceedings.

12. Martell Williams's stipulation as a getaway driver, and as to receiving a smaller cut, was also extremely unfair and prejudicial, as he was never brought into court to testify and Appellant suffered in Confronting the witness and evidence against him.

13. Brandy's hearsay issues, and information attributed to these proceedings were also extremely unfair and prejudicial as the Appellant was unable to confront her also. See, **Bruton v. United States**, 336 U.S. 123, also, **Krulewitch v. United States**, 336 U.S. 440, wherein it states that the introductions of co-defendant's confessions is improper where cross examination of the co-defendant is not possible.

14. In the case at hand, the State's introduced Blackwell, Williams and Brandy as pieces of evidence by way of being co-defendants and or co-conspirators into evidence of the robbery, yet failed to have them as witnesses and testify at trial, and denied the Appellant the opportunity to cross examine the witnesses against him. Therefore, his due process rights were violated, and the conviction must be set aside.

GROUND FOURTEEN: Appellant's claims that his Fifth and Fourteenth Amendment rights to the U.S. Constitution were violated under the Hearsay and Miranda Rights.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal onto this ground in support thereof.

1. On November 27, 2002, after his arrest in Los Angeles, detective Joseph Williamson of the LAPD administered the "Admonition of Rights" to the Appellant. See, Exhibit No. 2.
2. Immediately thereafter, Appellant requested an attorney, refused to sign the waiver and remain silent. See, Admonition of Rights, Exhibit No. 2, which is **"NOT "** written or signed by the Appellant.
3. Detective Williamson on the other hand, personally wrote, "Yeah, Yeah", on the Miranda section of the statement; which in California, the arrestee "must" sign the "Admonition of Rights," and personally write his own statement. In this case, Williamson wrote a false statement for the arrestee himself, that was used as an alleged confession against the Appellant at his trial in Las Vegas, Nevada. See, Exhibit No. 2, and TT., 6/30/06, page 84, lines 16-25; pages 90-91, lines 21-25; 1-8.
4. At trial, over defense counsel's objections, the trial Judge permitted detective Williamson, to admit into evidence and read the "hearsay document," of the Miranda Rights to be read to the jury slowly. See, TT. 12/29/06, pages 82, 83-84, lines 1-25; 18-25; 1-8. He also read the full statement he wrote. See, TT. 12/29/06, pages 84, 85, 86, lines 16-25; 1-25; 1-25.
5. The Appellant has always denied giving such a statement to detective Williamson. Also, that Williamson never read him his Miranda Rights. See, TT. 6/30/06, page 76, lines 7-19.
6. Appellant further denies ever giving a statement to HPD detective, Deniece Price. TT., 6/30/06, page 76, lines 21-24.

7. Appellant claims that detective Williamson violated his Miranda Rights. See, **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694(1966); **Floyd v. State**, 118 Nev. 156, 171-172, 42 P.3d 249, 260(2002); which states:

> "A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent."
> "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement."

Floyd, 118 Nev. At 171, 42 P.3d at 259-60.

8. Therefore, Appellant claims that he did not waive his Miranda rights, as he requested an attorney when detective Williamson interrogated him in Los Angeles; that he did not sign the Admonition of Rights; that detective Williamson violated his Fifth Amendment rights to remain silent by providing a false Miranda Waiver; and, that the Court violated his Fourteenth Amendment Constitutional rights to due process, when it allowed the hearsay testimony of detective Williamson to be heard by the jurors, and the conviction must be reversed.

Henderson Police Department
Criminalistics Bureau
LABORATORY REPORT

X Latent Prints { } Trace { } Firearms { } Serology { } Footwear/Tire { } Arson { } Drugs { } Other

Investigator(s): Denise J Price 690

Requesting Agency: Henderson Police Department

DR Number: 02-18848
Date: November 25 , 2002
Incident: Robbery
Lab Case #: LAB02-00026

Item #	Description	Results
2	Five latent lift cards submitted by M. Weir #1046.	Suitable latent prints present.

The suitable latent prints were compared to the finger and palm print cards bearing the names Alfred BLACKWELL (HPD#64113) and Erick Marquis BROWN (HPD# 64014) with negative results.

Maria Weir 1046
Crime Scene Analyst II

REVIEWED

End of Report

EXHIBIT NO. 1
Page 1

Henderson Police Department
Criminalistics Bureau
LABORATORY REPORT

X Latent Prints { } Trace { } Firearms { } Serology { } Footwear/Tire { } Arson { } Drugs { } Other

Investigator(s): Denise J Price 690

Requesting Agency: Henderson Police Department

DR Number: 02-18848
Date: April 14 , 2003
Incident(s): Robbery
Lab Case #: LAB02-00026

Item #	Description	Results
1046-L-2	Nine latent lift cards submitted by M. Weir #1046.	Suitable latent finger and palm prints present.

The suitable latent fingerprints were compared to the fingerprint card bearing the name Martel WILLIAMS (California CII# A08693998, DOB 5-4-72) with negative results. Comparison of the latent palm prints was not completed as we have no palm prints on file for WILLIAMS. Please submit palm prints on WILLIAMS to complete the comparison request.

Please provide names and identifiers for any additional individuals to be compared.

Maria Weir 1046
Crime Scene Analyst II

REVIEWED

End of Report

Exhibit NO 1, page 2.

Rpt ID: 219-1
Laboratory Report

1046

PAGE NO.	TYPE OF REPORT				BOOKING NO.	DR. NO.
ITEM NO.	QUAN.	ARTICLE	SERIAL NO.	BRAND	MODEL NO.	MISC. DESCRIPTION (E.G. COLOR, SIZE INSCRIPTIONS, CALIBER, REVOLVER, ETC)	DOLLAR VALUE

DEFENDANT'S STATEMENT

DEFENDANT: ERIC BROWN

LOCATION: _____

INTERVIEWING OFFICER:
(INITIALS, NAME, SERIAL#)
WILLIAMSON 26350

_____ **REFUSED TO WAIVE**

_____ **OUTSIDE MIRANDA**

_____ **MIRANDA NOT GIVEN (LIST REASONS BELOW)**

__✓__ **AFTER A MIRANDA WAIVER (QUOTE EXACT RESPONSE)** YEAH, YEAH

DATE: 11-27-02 **TIME:** 1400

ADMONITION OF RIGHTS

When a suspect is to be interrogated regarding his/her possible participati in the commission of a criminal offense, the following "warning" shall be re to him/her:

1. You have the right to remain silent. Do you understand?
2. Anything you say may be used against you in court. Do you unde stand?
3. You have the right to the presence of an attorney before and durin any questioning. Do you understand?
4. If you cannot afford an attorney, one will be appointed for you, free charge, before any questioning, if you want. Do you understand?

Either of the following can then be asked to obtain an expressed waiver:
1. Do you want to talk about what happened?

70-15.03.0 (3/00)

ON 11-25-02, A GUY NAMED "SUAVE" FROM 92ND/HOOVER/HOOVER CRIP APPROACHED ME IN L.A. AND ASKED ME TO SELL A BAG OF JEWELRY FOR HIM IN L.A. "SUAVE" IS 6'3 BROWN-SKINNED AND ABOUT 27-28. I WAS GOING TO GO SEE A GUY NAMED FASHARD, A PERSIAN GUY WHO I KNEW FROM BEFORE BUT HE MOVED. SO I WENT ACROSS THE STREET TO GUY, A WHITE GUY, FOREIGNER AND ASKED HIM IF HE WANTED TO BUY SOME JEWELRY. HE SAID HE WASN'T INTERESTED AND I LEFT TO COME BACK HERE. YOU GUYS ARRESTED ME WHEN I WENT TO CHECK OUT.

EXHIBIT NO. 2

ORIGINAL

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK BROWN,

Appellant,

v

THE STATE OF NEVADA,

Respondent.

CASE NO: 47856

FILED

AUG 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA

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

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07-18334

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Counsel for Erick Brown

IN THE SUPREME COURT OF

THE STATE OF NEVADA

ERICK BROWN,	)	
	)	
Appellant,	)	
	)	
v	)	**CASE NO: 47856**
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	
	)	

MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA

Counsel for Appellant respectfully moves this Honorable Court to receive the instant arguments, written by Defendant/Appellant, and considered but not included in the construction of Appellant's initial Fast Track Appeal. Counsel for Appellant respectfully requests that this Honorable Court receive the attached correspondence pursuant to Anders v. California, 386 U.S. 738. 87 S.Ct. 1396, 18 L.Ed.2d 493.

...

...

GROUND FIVE: Appellant was denied his Fourth Amendment rights to the U.S. Constitution, to search and seizure as no search warrant was ever obtained by the arresting officers.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this appeal onto this ground in support hereof.

1. On November 27, 2002, while exiting the elevator of the Hyatt Regency Hotel, in Los Angeles, See, 6/28/06, TT. Pages 99-100-101, 6/29/06, TT. Page 12, lines 6-16. This Appellant was surrounded by approximately Ten (10) law enforcement officials form LAPD and FBI agents.
2. Under oath, FBI special agent Darin McAllister stated that he observed a suspicious package (black backpack), approximately 10 feet or so from the Appellant. See, 6/228/06, TT. Page 101, lines 1-6.
3. That he, McAllister immediately went to move it to find out who it belonged to, and when he asked appellant responded that it was his. That he picked up the backpack, and in doing so, it's contents spilled out because he picked it up from the side, and he observed numerous jewelry pieces in plastic bags, such as chains, bracelets, rings, trinket jewelry anywhere in the amount of three, four hundred pieces of jewelry. See, 6/28/06, TT. Pages 101-102, 103, 121-122.
4. When asked by defense counsel, Michael Cristalli, had he, McAllister, ever sought to execute some type of search warrant in order to look inside the bag, McAllister stated: "No, I did not." See, 6/28/06, TT. Page 122, lines 7-10.
5. LAPD, Michael Woodings, who was part of the surveillance team assumed custody of the backpack once it was brought up to the 15th floor of the hotel. See, 6/28/06, TT. Pages 135-136.
6. FBI special agent, Frank Aimaro, stated under oath that when he introduced himself to the appellant, the appellant had the black backpack on his shoulder. See, 6/29/06, TT. Pages 13, 14, lines 22-25, 1-5.
7. That as he was introducing himself to appellant and begin asking him questions, FBI agent, mark Wolfson, took the bag off of Mr. Brown's shoulder and placed it on the ground, right at

to put him up at the Golden Nugget for the duration of the trial, rather than have him drive bac and forth. Let's note Mr. Bracken is unemployed with only one prior job in his life which h held for only seven months, selling telephones for Cingular, from August to February of 05 And since February to trial, "he was just enjoying life." See Trial Transcripts, June 26, 2006 pages 109, 111, lines 12-25, 1-25, 1-6.

6. The state's reason for the use of it's challenge was pretext, this juror could not have been excluded pursuant to **Witherspoon v. Illinois**, 391 U.S. 510 (1968), and later case law. Therefore, prong two is not met by the State. Appellant argues that had Ms. Whittle been on the jury panel, his trial could have resulted in a hung jury, or even a not guilty verdict.

7. The state, through its use of peremptory challenges, was allowed to systematically exclude Ms. Whittle from the jury. The State's proffered race-neutral explanation of her job history and T-Shirt was merely a pretext for purposeful racial discrimination. Therefore, the trial court erred in determining a race-neutral reason existed for removing Ms. Whittle from the jury, demonstrating that prong three of the Batson test was not met, thus denying Appellant Brown of equal protection of the law, a fair trial outcome, and violating his Sixth and Fourteenth Amendment Due Process rights to the U.S. Constitution, and the conviction cannot stand.

GROUND FOUR: The State used peremptory challenge to exclude black citizen from Appellant's jury, and, despite trial counsel's objection, the District Court allowed the State's discriminatory actions to stand, in violation of Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Supporting Facts:

Appellant hereby incorporates as if fully stated herein all other grounds of this Appeal.

1. Appellant Brown is an African American, and therefore a member of an identifiable minority i the United States. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Cour held that a criminal defendant's Fourteenth Amendment right to equal protection of the laws i violated when the government uses peremptory challenges to remove black venire persons from a jury. Batson and it's progeny set forth a three-step process for evaluating race-based objections to peremptory challenges:

   a). The opponent of a peremptory challenge must make a prima facie showing of racial discrimination;

   b). The state must proffer a race-neutral explanation for the challenge; and,

   c). The trial court must determine whether the opponent of the strike has proved that the proffered race-neutral explanation is merely a pretext for purposeful racial discrimination.

See, **Purkett v. Elem**, 514 U.S. 765, 767-68 (1995)(announcing three-step "Batson" process).

2. Ms. Whittle is a black woman, and was a potential juror in Appellant's case.
3. Appellant alleges that Ms. Whittle was excluded from the jury based upon her race.
4. The state's race-neutral explanation for excusing Ms. Whittle, Juror Number 488, was that no other juror was merely as sporadic in terms of job history, and that she wore a T-Shirt to Court which read "Most likely to steal your boyfriend", and that particular statement on it showed a concern lack of maturity on her part. See, trial transcript, June 27, 2006, pages 2-3.
5. Defense counsel noted for the record that seeing anything from her in terms of her past work history that was distinguishable from any other one of the jurors. In fact, juror number 12, Mr. Bracken, who was currently unemployed and living in Laughlin, Nevada, the Court was willing

EXHIBIT "A"

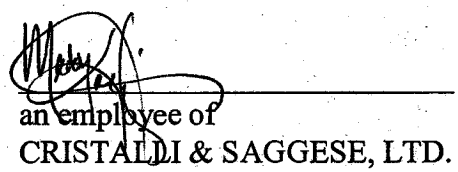
CERTIFICATE OF MAILING

I hereby certify that I mailed a foregoing copy of Appellant Erick Brown's **MOTION TO SUPPLEMENT DEFENDANT'S FAST TRACK APPEAL PURSUANT TO ANDERS V. CALIFORNIA**, on the 16th day of August, 2007, by depositing a copy thereof in the United States Mail, postage prepaid, addressed to:

DAVID ROGER, ESQ.
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

CATHERINE CORTEZ MASTO, ESQ.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

and that there is regular communication between the place(s) mailed and the place(s) so addressed.



an employee of
CRISTALLI & SAGGESE, LTD.

DECLARATION OF MICHAEL V. CRISTALLI, ESQ.

MICHAEL V. CRISTALLI, ESQ., makes the following declaration:

1. Counsel has represented Erick Brown at trial and currently before this Honorable Court.

2. Defendant submitted the same issues for Counsel's consideration before the construction of the Appellate brief in this matter, though, it is not the same writing concurrently tendered to this Honorable Court.

3. Counsel did not include these issues for consideration in Appellant's opening brief.

4. Counsel remains convinced that the issues included in the brief are meritorious and should be included.

5. Counsel respectfully submits the other issues pursuant to Anders v. California, 386 U.S. 738. 87 S.Ct. 1396, 18 L.Ed.2d 493. (Please see attached Exhibit "A").

EXECUTED this 16th day of August, 2007.

MICHAEL V. CRISTALLI, ESQ.

This motion is made and based upon the Declaration of Counsel contained herein.

DATED this 16th day of August, 2007.

Respectfully Submitted By:

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
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