Imagine the surprise of the defense when the allegations made by Justin against Detective Kato ended up mirroring numerous allegations made against him in the past by other persons he interrogated. This is significant in the sense that Justin had no idea who the detective was who brutalized him in Chicago, or what his name was. The defense got his name from documents produced by the District Attorney's Office and began investigating the allegations Justin made by making inquiries in Chicago.

The great weight of the evidence shows that Justin is being truthful when he alleges that Kato brutalized him with threats of physical violence, and tried to dupe him with offers of probation if he talked about his charges. The State simply cannot convince this court that Justin's statement was given voluntarily because the only detective who claims it was is Detective Kato, who is tainted under the great weight of numerous allegations of misconduct and brutalization during interrogations, and labeled a detective whose testimony is "suspect as to believability" and "not truthful" by a Chicago Appeals Court.

That type of language is diplomatic legalese for what the defense is not ashamed to say means Kato is a detective who lies under oath in a court of law in order to secure convictions.

Before the United States Supreme Court decided Miranda in 1966, "voluntariness" was the Courts only concern in relation to custodial interrogation. The Courts wanted to be sure a confession was not forced from a suspect. Oregon v. Elstad, 470 U.S. 298 (1985). Today, "voluntariness" remains as a second issue after compliance with Miranda. Now, if the State intends to use an accused's statement against him, there must first be a hearing outside the presence of the jury to determine voluntariness and compliance with Miranda if applicable. This is the Jackson v. Denno Hearing which this court granted and heard. [Please see, 378 U.S. 368 (1964)], and is mandated by NRS 47.090. The test for voluntariness is the "totality of circumstances." Mincey v. Arizona, 437 U.S. 385 (1978). Tomarchio v. State, 99 Nev. 572 (1983). Passama v. State, 103 Nev. 212 (1987). Alward v. State, 112 Nev. 141 (1996).

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"When a defendant claims that a confession was coerced, the government bears the burden of proving by a preponderance of the evidence that the confession was in fact voluntary." United States v. Mahan, 190 F.3d 416, 422 (6th Cir. 1999).

> A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Franklin v. State, **[***3]** 96 Nev. 417; 610 P.2d 732, 734 - 735 (1980); see also, Crew v. State, 100 Nev. 38; 675 P.2d 986 (1984). A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession and even if there is ample evidence aside from the confession to support the conviction. Jackson v. Denno, 378 U.S. 368, 376 (1964). In order to be voluntary, a confession must be the product of a **[*24]** "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). A confession is involuntary **[**323]** whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 293, 307 (1963). Passama v. State, 103 Nev. 212; 735 P.2d 321 (1987).

The United States Supreme Court has found that some interrogation techniques, especially those designed to take advantage of the unique circumstances surrounding a particular suspect, are so offensive to a civilized system of justice that they are prohibited under the Due Process Clause of the Fourteenth Amendment. Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 449 (1985); Colorado v. Connelly, 479 U.S. 157; 107 S.Ct. 515 (1986). The due process requirement that a confession must be voluntary to be admissible is independent of the Fifth Amendment concerns set out in Miranda. In Miller v. Fenton, 474 U.S. 104; 106 S.Ct. At 449, the court stated:

> . . . [T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

The Nevada Supreme Court has also ruled in the past that promises investigators make during interrogation are important to the issue of voluntariness. If promises made, implicit or

explicit, trick a confessant into confessing, his confession is involuntary. Franklin v. State, supra, 96 Nev. at 421.

Passama, supra, makes it clear that promises made to the Defendant are critical in the voluntariness analysis. "If these promises, implicit and explicit, tricked [the defendant] into confessing [the defendant's] confession was involuntary." Id. at 215; 735 P.2d at 323. In Bowbottom v. State, 105 Nev. 472, 487; 779 P.2d 934, 941 (1989). The Court noted that "each [confession] situation should be evaluated according to its particular facts and circumstances."

Emotional overreaching, like physical coercion, is very important to an analysis of voluntariness. Usually the Court must consider the effect of the totality of the circumstances as the will of the Defendant. Some types of police investigation techniques however can be considered "coercive per se" so that an "totality of the circumstances" analysis is unnecessary.

In State v. Kelekolio, 74 Haw. 479; 849 P.2d 58, 71 - 74 (Haw. 1993), the Hawaii Supreme Court considered the relevant caselaw and scholarly authority and formulated a rule by which to measure the legitimacy of the use of deception by the police in eliciting confessions or inculpatory statements from suspects and arrestees. The Kelekolio court adopted the following rule:

> Employment by the police of deliberate falsehoods intrinsic to the facts of the alleged offense in question will be treated as one of the totality of circumstances surrounding the confession or statement to be considered in assessing its voluntariness; on the other hand, deliberate falsehoods extrinsic to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence the accused to make a confession regardless of guilt, will be regarded as coercive per se, thus obviating the need for a "totality of circumstances" analysis of voluntariness.

849 P.2d at 73.

Examples of extrinsic falsehoods of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt would include the following: assurances of divine salvation upon confession, promises of mental health treatment in exchange for confession, assurances of more favorable treatment rather than incarceration in exchange for confession, misrepresenting the consequences of a particular conviction, representation that

welfare benefits would be withdrawn or children taken away unless there is a confession or suggestion of harm or benefit to someone. See, Lynumn v. Illinois, 372 U.S. 528; 9 L.Ed.2d 922; 83 S.Ct. 917 (1963); Kelekolio, 849 P.2d at 73 - 74.

In this case, the defense alleges that Detective Kato and Cirrone of the Chicago, Illinois Police Department not only threatened Justin Porter with physical violence (use of a phone book on his body to conceal billy club marks, a trip to the "docks" to get his "ass whooped") but verbally abused him before, during, and after his arrest. These detectives also told Justin that what he was accused of was minor, and would result in probation if he admitted culpability. It was the use of those tactics individually and collectively which created the atmosphere which resulted in Justin allegedly admitting to allegations against him to those detectives. Also, because in Justin's mind, the Metro detectives who eventually arrived from Las Vegas were linked to the Chicago detectives, his statement to them was also involuntary.

In addition, Detectives from Las Vegas knew or should have known that Justin was feeble minded when Detective Jensen unsuccessfully tried to get Justin to read his Miranda rights. A defendant who cannot even read the words, and attempts to mouth them out should cause detectives to suspect that he understands less than the average citizen. Rather than take the time to ensure Justin understood the words he could not even read, Detective Jensen acquired a seventy-two page statement without regard to the reasonable suspicion that Justin didn't understand his rights.

Colorado v. Connelly, supra, 479 U.S. at 164. Reaffirmed the principle that a confession may be suppressed in circumstances in which a police officer knows of a suspects mental illness or deficiencies at the time of the interrogation and effectively exploits these weaknesses to obtain a confession.

The detectives in this case employed the so called "false friend" technique whereby they feigned a trusting friendship with JUSTIN and caused him to believe that confessing was in his best interest.

See, Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.2 (2d Ed. 1992). This technique is commonly used in police interrogations because "resistance to the disclosure of

information is considerably increased . . . if something is not done to establish a friendly and trusting attitude on the part of the subject." Welsh S. White, Police Trickery in Inducing Confessions, 127 U.Pa.L.Rev. 581, 614 (1979) {quoting Robert F. Royal & Stephen R. Schutt, The Gentle Art of Interviewing [***21] and Interrogation: A Professional Manual and Guide. (1976)}.

In this atmosphere . . . the suspect is fooled into trusting that the interrogator's behavior will conform to the norms of friendship: the interrogator will loyally help the suspect out of the jam, advise the suspect to confess only if confession will be beneficial [to the suspect] and so on.

Margaret L. Paris, Faults, Fallacies, and the Future of Our Criminal Justice System: Trust, Lies, and Interrogation, 3 Va. J. Soc. Pol'y & L. 3, 21 - 22 (1995).

The use of this technique is not accidental. These detectives knew full well that the strategy they employed was best suited to get Justin to trust them and admit all his wrongdoings. Detective Jensen himself testified that he consciously developed a "game plan" while on the way to Chicago concerning the best way to elicit information from Justin without encouraging him to invoke his rights. (Transcript, March 8, 2004, p. 170-172). To the extent that they took advantage of his mental state and misrepresented their intentions towards him, his confession is involuntary. The aim of the due process requirement was never to exclude false evidence, but to prevent fundamental unfairness in the use of evidence, whether it's true or false. The Miller v. Fenton court, supra, 474 U.S. at 109, made this clear in holding that by virtue of the Due Process Clause "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." See also, Morgan v. Bunbire, 475 U.S. 412 (1986). As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the voluntariness calculous. Spano v. New York, 360 U.S. 315 (1959).

One of the many factor which may negative a defendant's free will and render a confession involuntary is the use of psychological ploys to foment hope. In State v. Parsons, 108 W.Va. 705; 152 S.E. 745 (1930), a juvenile was told during his interrogation that if he cooperated and confessed, he might be placed in a reform school. The West Virginia Supreme Court held that

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confession was inadmissible because it fomented hope in the mind of the accused. In State v. Persinger, 169 W.Va. 121; 286 S.E.2d 261 (1982), the Supreme Court of West Virginia again found a sufficient bar to the use of a confession for any purpose because the Defendant had been told that his cooperation would get him a good recommendation to his probation officer. Courts all across the country are sensitive to taking advantage of defendant's fomenting hope.

The Chicago Detectives elicited an involuntary confession from JUSTIN PORTER by:

1. Stating that what he did in Nevada was petty, and if he admitted to the facts they provided him, he would be treated leniently in Nevada.

2. Suggesting that if he did not admit to the facts, that he would be taken to the "docks" and physically harmed.

3. Suggesting that a phone book could be used to harm him, and no marks would be apparent.

4. Refusing to honor his request to speak with his father while he was being questioned.

5. Refusing to allow George Porter, Justin's Father, to speak with his son when he, George, requested to do so.

JUSTIN also asked Las Vegas Detectives to allow him to speak with his father. They replied that he could talk to his father after "we are done here."

"[T]his Court has recognized that coercion can be mental as well as physical . . . A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion. A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. Thus the range of inquiry in this type of case must be broad, and this Court has insisted that the

judgment in each instance be based upon consideration of [t]he totality of the circumstances." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

"Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

These tactics are effective on a person in JUSTIN'S position because he was a juvenile when arrested. He was scared and isolated from his family. He is a moderate to low intelligence, and unable to resist the interview techniques employed. He had no real understanding of his rights, and no one took the time to explain them to him. The seriousness of the charges facing JUSTIN were also minimized, and the suggestions of leniency were deceptive and improper.

A defendant's relative lack of education has often been mentioned by the courts, especially when such lack of education was combined with mental deficiency or illness, in concluding that a confession was involuntary. The courts generally agree that, while mere lack of education, subnormal intelligence, or mental illness does not necessarily make a confession involuntary, such education and intelligence, or lack thereof, are important facts to be considered. Lederer, 74 Mil.L.Rev. 67, 86.

Thus, in support of conclusions of involuntariness, courts have cited evidence that the defendant was a slow learner with a low mentality who left school after the second grade, with an IQ ranging from 55 to 80. State v. Cook, 47 N.J. 402; 221 A.2d 212. The fact that the defendant had only a junior high education and a history of emotional instability. Spano v. New York, 360 U.S. 315; 3 L.Ed.2d 1265; 79 S.Ct. 1202. The fact that the 21-year-old defendant was mentally deficient and had only a seventh grade education, with his last year having been spent in a school for slow learners. United States v. Blocker, (D.C. Dist.Col.) 354 F.Supp. 1195. And the fact that the defendant had a history of mental illness.

When combined with other facts, promises of lenience can be sufficiently coercive to render a confession involuntary. See, U.S. v. Rogers, 906 F.2d 189, 191 (5th Cir. 1990) (confession involuntary partly due to assurance that defendant would not be arrest if cooperated);

U.S. ex rel. Church v. De Robertis 771, F.2d 1015, 1020 (7th Cir. 1985) (dictum) (confession may be involuntary if defendant's will overborne by State attorney's misleading promise concerning less severe charge); U.S. v. Tingle, 658 F.2d 1332, 1336 - 1337 (9th Cir. 1981) (confession involuntary partly due to officer's promise to bring cooperation to prosecutor's attention).

"A confession is considered voluntary if the State demonstrates that it was not secured through psychological or physical intimidation but rather was the product of a rational intellect and free will . . . Like other misrepresentations, an empty prosecutorial promise could prevent a suspect from making a rational choice by distorting the alternatives among which the person under interrogation is being asked to choose . . . On the other hand, the Sate is not prohibited from inducing a confession with an honest promise of leniency . . . Moreover, in considering whether an empty prosecutorial promise deprived the suspect of his ability to make a rational choice, we take into account the characteristics of the suspect as well as the nature of the interrogation." Sprosty v. Buchler, 79 F.3d 635, 646 (7th Cir. 1996).

The State may also attempt to suggest to this Court that no harm is done in such cases as long as the Defendant's admissions are truthful and supported by the evidence. That is, of course, not true. Connelly, 479 U.S. at 168; Lego v. Twomey, 404 U.S. 477, 489 (1972). The accuracy of the confession should not be considered at a voluntariness hearing. Twomey, 404 U.S. at 483 - 485; see, Doby v. South Carolina Dept. Of Corrections, 741 F.2d 76, 78 (4th Cir. 1984) (trial court erred in considering truthfulness of confession in determining voluntariness).

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination of the issue of voluntariness, a determination uninfluenced by the truth of falsity of the confession." Jackson v. Denno, 378 U.S. 368, 376 - 377 (1964).

One of the other factors which must be considered in the "totality of circumstances" affecting the voluntariness of JUSTIN'S confessions and admissions is his young age. In Elvik v. State, 114 Nev. 883; 965 P.2d 281 (1998). The Nevada Supreme Court stated that the absence of a

parent during a minor's interrogation should be considered in reviewing the totality of the circumstances bearing on the voluntariness of his statement. See, People v. Lara, 67 Cal.2d 365; 62 Cal.Rptr. 586; 432 P.2d 202 (Cal. 1967) (age and presence of parent are factors in determining voluntariness). The Court went on to note that:

> . . . Clearly, neither police officers nor juvenile authorities should be allowed to mislead a youth in order to obtain a confession. A juvenile should be advised of his rights and informed of the possibility of an adult trial. But where the nature of the charges and the identity of the interrogator reflect the existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, resulting statements will be admissible in a criminal trial provided that the record otherwise supports a finding of voluntariness.
>
> . . . The fact that Elvik did not have his mother or an attorney present, coupled with Elvik's youth and the officers' persistent refusal to accept Elvik's claimed failure to remember the shooting, cast some doubt on the voluntariness of Elvik's statements. However, Elvik's intelligence and experience with the criminal system also bear on the voluntariness of his statements.

Marvin v. State, 95 Nev. 836; 603 P.2d 1056 (1979), also gave further guidance as to the interview of minors suspected of crimes. Before being interviewed, a child should be advised of his rights and cautioned that any answers may be used in a criminal court as well as before the juvenile court. Special efforts should be made, especially in the case of young children, to interview the juvenile only in the presence of a parent or guardian. Harling v. United States, 111 U.S.App.D.C. 174, 176 -177; 295 F.2d 161, 163 - 164 (1961). Although a juvenile does have the capacity to make a voluntary confession without the presence or assent of a parent or guardian, and a confession is not psychologically coerced or involuntary simply because no adult assented to it. Stokley v. State of Maryland, 301 F.Supp. 653, 660 (D.Md. 1969). People v. Lara, 67 Cal.2d 365; 62 Cal.Rptr. 586, 596; 432 P.2d 202, 212 (167). In re: J.F.T., 320 A.2d 322, 324 (D.C.App. 1974), it is preferred that a responsible custodian be present. Absent extraordinary circumstances, this should always be the policy when a child is being questioned or a formal statement concerning

his participation is being taken. Clearly, the more serious the offense and the younger the accused, the greater precaution which should be taken in the interrogation process.

"The totality approach . . . includes evaluation of the juveniles age, experience, education, background and intelligence and (inquiry) into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. 707 (1979).

Further, ". . . authoritive opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." In re: Gault, 387 U.. 1, 52; 87 S.Ct. 1428, 1456; 18 L.Ed.2d 527 (1967) [citing Haley v. State of Ohio, 332 U.S. 596; 68 S.Ct. 302; 92 L.Ed. 224 (1948)]. "We appreciate that special problems may arise with respect to waiver of the privilege (against self-incrimination) by . . . children . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance or rights or of adolescent fantasy, fright or despair." Gault, supra, 387 U.S. at 55; 87 S.Ct. at 1458 (parentheses added).

Finally, the Federal Law Enforcement Authorities are specifically required to notify parents of their child's Miranda Rights prior to any interrogation of a child. If parents ask for an opportunity to advise and counsel their child, the request cannot unreasonably be denied. United States v. Doe, 219 F.3d 1009, 1017 (9th Cir. 2000). In U.S. v. Wendy G., 255 F.3d 761 C.A. 9 (Cal) (2001), the requirement that parents must be informed that an opportunity for them to communicate with their child prior to police questioning was added; or a confession should be suppressed.

In sum, Justin Porter testified that Detective Kato threatened him with violence, cursed at him continually, got in his face and scared him into making admissions and confession in this case. Luckily for Justin, Detective Kato just happened to have a long history of the same type of conduct in numerous other criminal cases in Chicago. That fact alone strongly suggests that the serious allegations made by Justin are in fact true. Detective Kato took it upon himself to interrogate Justin without being asked to do so by Nevada law enforcement authorities. Detective Kato did so

because, according to him, he wanted to know what Justin was thinking when he allegedly committed these crimes. Does the court have a sense that a Detective with Kato's history is telling the truth when he says that:

1). Justin's arrest did not invoke a number of drawn weapons pointed at him?

2). No conversation took place between Justin and Kato and Cirone on the way to the police station?

3). Justin was Mirandized twice by Detective Kato?

4). No foul language and aggressive language was used against Justin?

5). No threats of physical violence were made against Justin to ensure he cooperated in his own prosecution?

CONCLUSION

The State has not and cannot convince this Judge by a preponderance of any evidence that Justin was Mirandized and that he knowingly and voluntarily gave a statement admitting involvement in some crimes.

We request that this court suppress any statements given to any law enforcement officer in Las Vegas and Chicago due to violation of Justin's Miranda rights, and involuntariness of the acquired statements.

DATED this 24 day of June, 2005.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
CURTIS S. BROWN, #4546
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
JOSEPH K. ABOOD, #4501
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing WRITTEN ARGUMENT REGARDING DEFENDANT JUSTIN PORTER'S JACSON v. DENNO HEARING is hereby acknowledged this 24th day of August, 2005.

CLARK COUNTY DISTRICT ATTORNEY

By Diana Reguntal

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DISTRICT COURT

CLARK COUNTY, NEVADA 2006 MAR -9 P 5:09

Shirley B. Parraguirre CLERK

STATE OF NEVADA, Plaintiff(s),	Case No. 01-C-174954-C
VS	Dept No. 20
Justin D Porter, Defendant(s).	NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Department 20 .

( ) This reassignment follows the filing of a Peremptory Challenge of Judge _____.
(✓) This reassignment is due to the recusal of Judge BELL. See minutes in file.
( ) This reassignment is due to _____.

ANY TRIAL DATE IS VACATED AND WILL BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below:

at
at

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

SHIRLEY B. PARRAGUIRRE, COUNTY CLERK

By Brett Byington Deputy Clerk

Brett Byington

I hereby certify that on March 09, 2006, I placed a copy of the foregoing document in:

(✓) The folder(s) located in the Office of the County Clerk of each attorney of record listed below.

( ) The United States mail addressed as follows:

David J. Roger
200 S Third St. 7th Floor
Las Vegas, NV 89155

Public Defender

Brett Byington Deputy Clerk

Brett Byington

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JUSTIN D. PORTER aka Jug Capri Porter #1682627 Defendant.	CASE NO: C174954 DEPT NO: XX

STATE'S WRITTEN ARGUMENT REGARDING DEFENDANT'S JACKSON V. DENNO HEARING

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and hereby submits the attached written argument regarding Defendant Justin Porter's Jackson v. Denno Hearing.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Defendant is specifically charged with forty-two separate crimes, committed against eleven different victims, between February 1, 2000 and June 9, 2000.

On September 25, 2002, Defendant filed a Motion to Suppress his Confessions and Admissions to Metro and Chicago Detectives based on Violation of His Miranda Rights and Involuntariness and Request for a Jackson v. Denno Hearing.

The hearing was held on three separate dates. On March 8, 2004, the Court heard testimony from Detectives Kriston Kato and Sam Cirone, of the Chicago Police Department. On February 8, 2005, the Court heard testimony from Dr. John Paglini and Dr. Gregory Brown. On February 9, 2005, the Court heard testimony from the Defendant, Dr. Thomas Bittker, and Dr. John Paglini.

In his written argument in support of suppressing his confessions and admission, Defendant alleges that he did not knowingly, intelligently and voluntarily waive his Miranda rights, and that Chicago and Las Vegas police officers used promises of leniency, threats of force, and coercion to obtain statements from him.

The State herein files its written argument supporting the admission of Defendant's statements in this case.

I.

STATEMENT OF GENERAL CASE FACTS

All of the following Statement's of Facts refer to the Defendant as the perpetrator of the crimes being described. The Defendant was linked to every one of the following situations by either DNA evidence, fingerprint evidence, shoewear impression evidence, admission or confession evidence, eyewitness identification and/or by a combination of a number of the above types of evidence.

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A. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST TERESA TAYLOR

Defendant is charged by way of Second Amended Information with Count I- Burglary While in Possession of a Deadly Weapon; Count II - First Degree Kidnapping With Use of a Deadly Weapon; Counts III through VIII - Sexual Assault With Use of a Deadly Weapon, for crimes that were committed against victim Teresa Taylor.

On February 1, 2000, at approximately 7:30 p.m., Teresa Taylor heard a knock on the front door of her residence, located at 2895 E. Charleston, #2-106, Las Vegas, Nevada. Teresa had spoken to her mother earlier and was expecting her mother to come to the residence and pick something up from her.

Ms. Taylor opened the door and encountered the Defendant, whom she thought was looking for her sister. Ms. Taylor told the Defendant that her sister was not there, and he asked her for a drink of water. Ms. Taylor went and got the Defendant water and took it to the Defendant, who was still standing outside the residence. The Defendant asked Ms. Taylor if they could go in the house and she told him no. Not caring about Ms. Taylor's protest, the Defendant entered her residence and sat down on her couch. Ms. Taylor grabbed the Defendant's arm and attempted to pull him out of the apartment, at which time the Defendant pulled a knife on her.

After brandishing the weapon, the Defendant ordered Ms. Taylor into her bedroom and demanded that she disrobe. Fearful for her life, Ms. Taylor took her clothes off. Thereafter, the Defendant instructed Ms. Taylor to lay down on the bed. Defendant pulled down his pants and got on top of Ms. Taylor, placing his penis in her vagina, while still holding the knife in his hand.

The Defendant got off of Ms. Taylor and started looking around her apartment for anything valuable. The Defendant took approximately $30 or $40 from Ms. Taylor's purse. The Defendant then went back to Ms. Taylor and put his penis in her mouth. Afterwards, the Defendant peed on Ms. Taylor's floor and began looking around her apartment for valuables again. The Defendant forced Ms. Taylor follow him around the apartment while he did that.

The Defendant took some change from a vase in Ms. Taylor's living room but left the pennies behind.

The Defendant forced Ms. Taylor into the restroom of the apartment and told her to wipe her vaginal area. The Defendant took the towel from Ms. Taylor and began wiping her vagina area himself. Thereafter, the Defendant took Ms. Taylor back into the bedroom and forced her to lay down on the bed, on her stomach. The Defendant then placed his penis in Ms. Taylor's vagina, from behind, against her will. Afterwards, the Defendant forced Ms. Taylor to put his penis in her mouth a second time. After the Defendant sexually assaulted Ms. Taylor he stated, "You know you were raped, right?"

The Defendant permitted Ms. Taylor to put pants on and then tied her hands, behind her back, with a telephone cord. The Defendant also tied Ms. Taylor's feet together and then tied then to her hands. The Defendant dragged Ms. Taylor to the closet and put her inside. The Defendant then put water down Ms. Taylor's pants, in an attempt to remove his DNA from her vaginal area. Afterwards, the Defendant placed a knife from Ms. Taylor's kitchen in the closet with her, for the purpose of freeing herself after he left the residence. Ms. Taylor was eventually able to cut herself free and notify the police.

B. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LEONA CASE

Defendant is charged by way of Second Amended Information with Count VII- Burglary While in Possession of a Deadly Weapon; Count IX - First Degree Kidnapping With Use of a Deadly Weapon; Counts X, and XII - Sexual Assault With Use of a Deadly Weapon; Count XI – Attempt Murder With Use of a Deadly Weapon; Count XIII - Robbery With Use of a Deadly Weapon; and Count XIV - First Degree Arson, for crimes that were committed against victim Leona Case (DOB: 8/18/57).

On March 7, 2000, Leona resided in a studio apartment located at 2900 E. Charleston, #50. Leona lived alone at that time, and her apartment was located on the bottom floor. At approximately half past midnight on March 7, 2000, Leona was in her living room, watching a movie, when someone knocked on her door. Leona put the safety chain on her door and

then opened it to see who was there, and she recognized the individual as somebody who had knocked on her door about three to four days prior, looking for the person who previously lived in the apartment. The first time the person at Leona's door had knocked on it, he asked if he could use her telephone, after telling her he was looking for the prior tenant. Leona took her telephone outside on that occasion, and allowed the Defendant to use it outside. The first time the person had knocked on Leona's door and asked to use her telephone, he had a friend with him. Defendant introduced himself to Leona by stating, "My name is Jug, and this is my buddy, Chris."

Leona recognized the person at the door on March 7, as being the individual who identified himself as "Jug." As he did the first time he knocked on Leona's door, Defendant again asked to use Leona's telephone but because it was so late at night, Leona told him, "No," and shut the door.

Leona was sitting in her chair in the living room, and heard something rattling at the window. Thereafter, Leona heard a couple of bangs on her door and then the Defendant kicked it open, off of the frame. After the Defendant entered Leona's apartment by kicking the door in, Leona picked up the telephone and attempted to call 911, however, the call did not go through because the Defendant slapped Leona on the face and knocked her to the ground, taking the phone away from her.

Defendant went into Leona's kitchen, opened the drawers, and got out a steak knife. Defendant first used the knife to threaten Leona, in order to find out where her money was and to move her into the bedroom. Defendant asked Leona where her money was at and she told him she did not have any, however, Defendant saw Leona's purse sitting on her dresser and took $44.00 and some food stamps from it. Defendant also told Leona to give him a little ten carat ring she was wearing that said "mom" on it. Leona gave the Defendant the ring because he had a knife.

Defendant wielded the knife and demanded Leona to go into the bedroom, where he had her hold a lamp that was beside the bed, while he cut the cord off of it. After cutting the cord off with the knife, Defendant put some kind of knot in it, slipped it over her neck, told

her that he was going to tie her up, and started to strangle her with it. Leona grabbed the cord and put her fingers between her neck and the cord, while the Defendant climbed up on the back of the bed and wound it around both of his hands and began strangling her, pulling the cord tight with both hand. Leona began losing consciousness and Defendant stated several times, "Why don't you just die, Bitch." Leona fell forward and the Defendant let go of the cord causing Leona to pull it away from her neck and slip it off of her head, at which point the Defendant told her to disrobe.

Leona disrobed and shoved the cord under the corner of the bed because she did not want the Defendant to find it. Defendant told Leona that he was going to "fuck" her and asked her where her condoms were at. Leona told the Defendant that she did not have any condoms, so he grabbed a plastic bag that covered her coffee filters and used it as a makeshift condom, before putting his penis into Leona's vagina, against her will.

Defendant got off of Leona and took the plastic bag into the bathroom, where he flushed it down the toilet and then washed his private area. After putting her clothes back on, while the Defendant was in the bathroom, Leona found the steak knife laying on the dresser and shoved it between the mattress and box springs, like she had done with the cord. After Defendant was done in the bathroom, he went into the kitchen and got another knife. He returned to the bedroom with the knife and told Leona to get undressed and turn around, because he was going to "fuck her up the ass." Defendant used the cellophane off of Leona's cigarette package as a condom, and he, again, put his penis in her vagina, against her will.

After completing the second act of sexual assault on Leona, Defendant, again, went to the bathroom and washed himself. Leona put her underwear and t-shirt on and as she stood up, off the bed, Defendant lunged at her with the knife and began to stab her in the abdomen. The knife entered Leona's body so deeply that she felt the Defendant's fist hit her stomach. Defendant pulled the knife out and stabbed Leona again, pushing the knife full into her as before. After pulling the knife out of Leona's body the second time, Defendant attempted to cut the right side of Leona's neck with it.

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Realizing the Defendant was trying to kill her, Leona attempted to kick the defendant. Defendant avoided Leona's kick, so Leona bent her head down and went for his waist, thinking maybe she could tackle him and get him down, however, Defendant's arm wound up around Leona's neck and he strangled her to unconsciousness. When Leona regained consciousness Defendant told her to go to the bathroom and wash herself. Defendant told Leona to use soap on her vaginal area.[1] After Leona came out of the bathroom, Defendant had her sit on the bed and made her clean out her fingernails because she had scratched him when she tried to remove his hands from her throat.

The next thing Leona recalled is that the Defendant had the cord again. Defendant told her to put it around her neck again but Leona refused. As a result, Defendant began whipping Leona with it and beat her around the head with it, till she was bleeding severely.

Defendant told Leona to go back into the bathroom and she complied. Defendant shut the bathroom door so Leona locked it. The next thing Leona heard was a bang, and then the smoke alarm going off. Leona knew her apartment was on fire because she heard the smoke alarm and could smell smoke. There also came a point when she heard a door slam, which caused her to unlock the bathroom door and try to open it.

Leona could not open the bathroom door because the Defendant had slid a nine-drawer dresser up against it, blocking Leona in the bathroom. Leona began banging the bathroom door with her shoulder trying to move the dresser over but it would not budge.

Leona began to think that if the Defendant could kick her front door in, she should be able to kick her way out of the bathroom; so she started kicking the door right beneath the door handle, and the dresser tipped over. When Leona was able to squeeze out of the bathroom door, she saw that her apartment was totally on fire. Leona grabbed her sister's cellular telephone and ran outside of the apartment and hid behind a stairwell, afraid the Defendant might still be around. Leona tried to use the cellular telephone three times but it

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[1] Leona had to remove the cellophane from her vagina when the Defendant made her go to the bathroom and wash her vaginal area. Also, the Defendant told her to flush it down the toilet, which she did.

would not connect. Leona ran down between the two buildings where she saw people. She was trying to get somebody to call 911, but she could not talk very well. However, the fire department did arrive and Leona was taken to the hospital for treatment.

After his arrest, Defendant admitted his involvement in the crimes committed against Leona Case.

C. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST RAMONA LEYVA

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XVI - First Degree Kidnapping With Use of a Deadly Weapon; Count XVII - Sexual Assault With Use of a Deadly Weapon; and Count XVIII - Robbery With Use of a Deadly Weapon, against victim Ramona Leyva.

On March 25, 2000, Ramona Leyva resided with her husband in a studio apartment located at 600 Bonanza Rd., Apt. #144, Las Vegas, Nevada. At approximately 10:00 p.m. on the night of the 25th, Ramona had returned to the apartment after dropping her husband off at work. Ramona was in the apartment and had gone to the bathroom and heard a loud noise at the front door. Ramona looked up and saw the Defendant. Ramona quickly closed the bathroom door but the Defendant broke through it and pushed her against the bathroom wall, grabbing her hair and neck.

The Defendant indicated that Ramona should quiet down by telling her to "shush." The Defendant dragged Ramona by her hair and neck out to the kitchen where he grabbed a knife from her kitchen drawer. The Defendant put the knife against Ramona's neck and demanded money from her. The Defendant moved Ramona around the apartment and continued to demand money from her. After convincing the Defendant that she had no money, the Defendant began to touch Ramona's breasts and buttocks with his hands, over her clothes. The Defendant also touched his penis with his hand, over his pants. The Defendant began removing his clothes and Ms. Leyva told him to get some protection, because she knew he was going to rape her and she did not want any disease from him.

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Ramona's husband wore rubber gloves as a dishwasher at his job. There were a pair of rubber gloves on her husband's night stand and the Defendant put the thumb part of one of those gloves over his penis before penetrating Ms. Leyva's vagina with his penis.

Mrs. Leyva was very afraid during the rape and the Defendant told her to tell him that she liked what he was doing, so she did. The Defendant kept the knife in his hand while he sexually assaulted Ms. Leyva. After the sexual assault, the Defendant forced Ms. Leyva to take the glove off of his penis and flush it down the toilet.

The Defendant emptied Ms. Leyva's purse and found her car keys at which time he attempted to leave and take her car. Mrs. Leyva told the Defendant that she had to go work and asked him not to take her car. The Defendant left the apartment briefly to throw the knife into the parking lot. The Defendant then re-entered the apartment and picked up Ms. Leyva's telephone receiver to see if the line worked. After hanging the telephone back up the Defendant left the residence and stole Ms. Leyva's car.

After the Defendant fled in her car, Mrs. Leyva attempted to get some of her neighbors to help her but none of them would answer their doors. Mrs. Leyva walked to a fast food restaurant where she found a Spanish speaking couple to take her to her husband's job. After she arrived at her husband's job he took her to report the crimes.

D. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST MARLENE LIVINGSTON

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XV - Burglary While in Possession of a Deadly Weapon; Count XVI - First Degree Kidnapping With Use of a Deadly Weapon, Victim 65 Years of Age or Older; Count XVII- Sexual Assault With Use of a Deadly Weapon, Victim 65 Years of Age or Older; and Count XVIII - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older, against victim Marlene Livingston.

On April 14, 2000, Marlene Livingston, (DOB 10/12/33), resided at an apartment complex located at 2301 Clifford, Las Vegas, Nevada. The complex has 11 apartments, and Marlene lived in Apt. #11, on the second floor.

On April 3, Marlene worked in the afternoon until 9:00 that night. After work, Marlene went home. At the time, Marlene drove a white, 1991 Dodge Dynasty. After Marlene arrived home from work that night, she checked the mail, had received her social security check, and went to Boulder Station to cash it. Marlene had $515.00, after cashing her check. Marlene stayed at Boulder for approximately an hour or so, wherein she bought some Chinese food and played some nickels.

Marlene left Boulder Station and drove home, where she put some of the left over Chinese food on a plate and put it in the microwave, and then went to take her work clothes off. As Marlene sat on the edge of her bed, and was looking through her purse, wearing only her bra and pants, when she heard a boom and saw the Defendant break through her front door, wearing a mask that did not cover his whole face. Marlene also noticed the Defendant had a knife with a silver blade.

The Defendant demanded Marlene's money, which she took from her wallet and gave to him. Thereafter, the Defendant asked Marlene if she had any gold, and she gave him her pinky ring. The Defendant took the knife that he had and flicked through Marlene's purse with it and saw a $10.00 bill. He accused Marlene of lying to him about having more money, which caused her to explain that she had cashed in $10.00 worth of nickels at Boulder Station and then shoved it in her purse.

The Defendant told Marlene not to look at him, causing her to keep her head down and eyes closed. Marlene told the Defendant, "Take anything you want, I just want to see my grand kids tomorrow." Thereafter, Marlene heard the Defendant go around the bed and grab her telephone. The Defendant then demanded that Marlene stand up. When Marlene complied the Defendant told her to bend over. When Marlene moved her pants to the side a little and told the Defendant that she had a pad on, the intruder sat on the bed, pulled his penis out, and told her they would do it orally and not to bite him. The Defendant told Marlene that "he liked to fuck old ladies."

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Marlene was forced to put her mouth on the Defendant's (exposed) penis and the Defendant held the back of her head and pushed it up and down. During the assault, Marlene kept her eyes closed. During the act the Defendant kept telling Marlene not to bite him.

After the sexual assault, the Defendant asked Marlene if she had a car, a gun, and a husband that was going to come in. Marlene told the Defendant that she had a white Dynasty and he demanded her keys, which she took out of her purse and gave to him. The Defendant told Marlene to go into her bathroom and wash her mouth out. The Defendant also stood behind her during this act, and forced water into her mouth. Thereafter, the Defendant told Marlene to stay in the bathroom, where she stayed for approximately 10 to 15 minutes, because she was scared to come out.

Once Marlene left the bathroom she looked outside and saw that her car was gone. Marlene was afraid the intruder might return so she put on her pajama's and then knocked on the landlord's door and told him what had happened. Marlene's landlord subsequently called the police. After his arrest, Defendant admitted committing the crimes against Marlene Livingston.

E. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST CLARENCE AND FRANCIS RUMBAUGH

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: XXII - Burglary While in Possession of a Deadly Weapon; Count XXIII - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older; and Count - XXIV - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older against the victims, Clarence and Francis Rumbaugh.

On April 12, 2000, Francis Rumbaugh (DOB 04/11/21) and her husband, Clarence Rumbaugh (DOB 09/19/16), lived at 436 North 12th Street #B, in Clark County, Las Vegas. The residence had one bedroom, a living room, and bathroom.

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During the evening of April 12, at approximately 11:25 p.m., Francis and Clarence were at home eating cake and ice cream, in the living room. The front door was open, however the screen door was closed and latched at the time, when Francis heard a loud noise and somebody burst in.

After the Defendant had burst into the residence and Francis began to scream for help, the Defendant told her to shut up. The Defendant then shut two windows and the front door, and picked up the knife Francis had used to cut the cake with, and used it to cut the telephone cord. After the Defendant cut the telephone cord, with the knife still in his hand, he grabbed Francis by the left wrist area and threw her onto the couch. After throwing Francis onto the couch, Defendant approached Clarence Rumbaugh and wrestled with him, eventually throwing Mr. Rumbaugh to the floor and demanding the money from his wallet.

Mr. Rumbaugh got up off of the floor and took his wallet out of his back pocket, but before he could reach into it and take the money out, the Defendant reached in and took $81.00 from the wallet. The Defendant pointed a knife at Mr. and Mrs. Rumbaugh and make them go into their bedroom where he rummaged through their belongings using the tip of the knife. The Rumbaughs had El Cortez cups full of change on their desk and the Defendant picked up those cups to put the loose change consisting of nickels, dimes, and quarters, in his pockets. Afterwards, the Defendant took another hanky from his pocket and wiped the containers off.

The Defendant instructed the Rumbaugh's to stay in their bedroom while he fled the residence.

F. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LEROY FOWLER

Defendant is charged in the Second Amended Criminal Information with having committed the crime of: Count XXV - Burglary While In Possession of a Deadly Weapon, against the victim Leroy Fowler. On June 6, 2000, Mr. Fowler resided at 1121 East Ogden Avenue, Apt. #9, Las Vegas, Nevada, in a studio apartment.

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On June 6, at approximately 1:55 a.m., Mr. Fowler was sleeping on his bed. Mr. Fowler awoke to his front door being kicked in. Mr. Fowler encountered the Defendant, who had a knife in his hand. Mr. Fowler picked up a kitchen chair and began swinging it at the Defendant. Mr. Fowler was making a lot of noise and the Defendant told him several times to shut up.

Mr. Fowler continued swinging the kitchen chair, at which time the Defendant turned and ran out of the apartment.

G. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST JONI HALL

Defendant is charged in the Second Amended Criminal Complaint with having committed the crimes of: Count XVI - Burglary While in Possession of a Deadly Weapon; XXVII - First Degree Kidnapping With Use of a Deadly Weapon; Count XXVIII - Sexual Assault With Use of a Deadly Weapon; and XXIX - Robbery With Use of a Deadly Weapon, against victim Joni Hall.

On June 7, 2000, Joni Hall resided in an apartment located at 624 North 13th Street, Las Vegas, Nevada. Joni had been living in the apartment for a little over a month. Joni and her child along with another woman and her three children all lived in the apartment.

On June 7, during the early morning hours between 1:30 and 2:00 a.m., Joni arrived home to the apartment and went straight to bed. Joni awoke to a thud type noise and thought that maybe her roommate was hitting the wall or one of the children was hitting the door. Joni laid in bed for a couple a seconds before starting to shut her eyes again. Joni saw that the bedroom door was opening and she also saw the Defendant standing in the doorway putting something over his face and saying, "Oh Yeah." The Defendant also had a knife in his right hand.

The Defendant asked Joni if she had money and car keys. Joni told the Defendant no, and the Defendant told Joni not to lie to him. At that point the Defendant told Joni to get up out of bed and forced her to follow him into the living room and kitchen area of the apartment. The Defendant asked Joni if anybody else was in the apartment and Joni told

him that her child was there and her roommate and her children were there.

The Defendant forced Joni to open and close cabinets in the living room and kitchen area of the residence to make sure she wasn't hiding anything. The Defendant also asked Joni what she had to eat and drink in the apartment.

The Defendant asked Joni for some Kool-Aid to drink and Joni gave it to him. The Defendant also took Joni's roommate's cigarettes out of a cabinet. After touching the outer cellophane of the cigarette package, the Defendant took the cellophane off of the package and burned it in the sink, telling Joni he didn't want evidence of his fingerprints around.

The Defendant forced Joni to walk back into her bedroom and he began going through Joni's things. The Defendant told Joni that he was going to get some pussy from a scardie white girl. The Defendant told Joni to lay down on the end of her bed and take off her pants. The Defendant then told Joni that he was just joking with her, that he wasn't like that, and that he wasn't going to do that to her.

A neighbor from upstairs made a loud noise which caused the Defendant to become nervous. The Defendant told Joni to turn off her kitchen and bathroom lights and then peaked out the kitchen blinds to see if anybody was coming downstairs.

The Defendant found some Saran Wrap in the kitchen and forced Joni to tear off a piece of it. The Defendant told Joni he was going to get some pussy from a white girl and told Joni to lay down on the floor, in front of the couch, in the living room. The Defendant walked towards Joni with the knife in one hand and the Saran Wrap in the other.

The Defendant unbuckled his belt and pulled down his pants and got down on the floor with Joni. The Defendant put the knife up near Joni's head and told her if she screamed or made any noise he would kill her. The Defendant put the Saran Wrap on his penis with the other hand and then put his penis in Joni's vagina for approximately one minute. The Defendant then got up, went into the bathroom and flushed the toilet. Joni did not see the Saran Wrap again after the Defendant came out of the bathroom.

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The Defendant told Joni that he was going to take her television and told her to bring a stroller that she had in the bedroom out into the front room. The Defendant put the television in the stroller and took Joni's walkman as well.

After the Defendant left the apartment Joni went and woke up her roommate and told her to go the call the police because they had been robbed and Joni had been raped.

H. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST GYALTSO LUNGTOK

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XXX - Burglary While In Possession of a Deadly Weapon; Count XXXI - Attempt Robbery With Use of a Deadly Weapon; and Count XXXII - Murder With Use of a Deadly Weapon (Open Murder), against victim Gyaltso Lungtok.

On the evening of June 8, 2000, Gyaltso Lungtok became the victim of a homicide during a Burglary and Attempt Robbery perpetrated by the Defendant in this case.

The Defendant gave a statement to Detective LaRochelle, LVMPD Homicide Division, about the homicide investigation regarding Mr. Lungtok and during that initial conversation, Defendant indicated that he was out on the night in question with a guy named Deon. Defendant stated that Deon was talking about getting "a lick, which is a street term for a robbery to get money.

Defendant told Detective LaRochelle that Deon asked him for the gun that he was carrying, so he gave it to Deon.[2] Defendant further told Detective LaRochelle that he waited at a telephone bank while Deon entered the complex where Mr. Lungtok lived. Defendant indicated that he heard banging or crashing noises followed by gunshots.

According to the Defendant, Deon then came running and they ran off together and Deon tells him that the shell casings got picked up from the shooting and not to worry about it. Thereafter, Detective LaRochelle told the Defendant that his story was not plausible and

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[2] The gun used in the Lungtok homicide has been forensically identified as the same gun used in the Lopez/Zazueta crimes.

that he knew the Defendant was more involved than what he had previously told him, at which time the Defendant changed his story and told Detective LaRochelle that he entered Mr. Lungtok's apartment in an attempt to get away from a police car that he saw cruising the street. Defendant said that he had the gun on him and was worried about being arrested if the police stopped him. Defendant told Detective LaRochelle that he thought the apartment was empty, so he kicked the door open and entered the apartment. Defendant indicated it was dark inside the apartment and he became startled when someone came at him from the dark, at which point he fired the gun.

I. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LAURA ZAZUETA, GUADALUPE LOPEZ, AND BEATRIZ ZAZUETA

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XXXII - Burglary While In Possession of a Deadly Weapon; XXXIV - Robbery With Use of a Deadly Weapon; Count XXXV - Attempt Robbery With Use of a Deadly Weapon; Count XXXVI - Attempt Robbery With Use of a Deadly Weapon; Count XXXVII - Attempt Murder With Use of a Deadly Weapon; and Count XXXVIII - Battery With Use of a Deadly Weapon, for crimes committed against victims Laura Zazueta, Guadalupe Lopez, and Beatriz Zazueta.

Laura Zazueta, her sister Beatriz, her brother-in-law Guadalupe, and her nephews Carlitto, 2 years of age, and Andras, 4 years of age, lived at 2850 East Cedar Avenue, Apt. H-229. On the night of June 8, 2000, Laura went out with her boyfriend. He brought her home and left the apartment at approximately 11 or 12 p.m. At the time Laura got home none of her roommates were awake and she went directly to bed and went to sleep. At some point Laura woke up because she heard a noise, and found the Defendant in her bedroom.

In both English and Spanish, the Defendant told Laura to give him the money she had. Laura gave the Defendant approximately $200.00 that she had in a chest of drawers, in her bedroom. After Laura gave the Defendant the money, he demanded more money and became vulgar saying things like "fuck you" and "bitch." Laura became nervous and was forced to her sister's room, while the Defendant followed behind her pointing the gun at her.

When she got to her sister's room, her sister and brother-in-law woke up, causing the Defendant to demand more money from all of them and pointed the gun at all of them. Laura's four-year-old nephew woke up as the Defendant held them at gun point demanding money.

Laura's brother-in-law told the Defendant that he did not have any money, which caused the Defendant to become upset and place the gun against Guadalupe's forehead. Guadalupe grabbed the gun and a struggle ensued causing the gun to fire approximately four times. At that time, Laura dropped to the floor of the bedroom as her sister embraced the child.

The Defendant and Guadalupe struggled with each other out of the bedroom and into the living room and Laura watched as the intruder got away by jumping from the couch through a window.

J. STATEMENT OF FACTS PERTINENT TO DEFENDANT'S PRIOR JUVENILE CONVICTION FOR ARMED ROBBERY IN CHICAGO

On September 4, 1996, Defendant, then 12 years of age, pointed a small handgun (later identified as a starter pistol) at Mertice Gawne, as he attempted to take her car from her.

Police reports indicate that on the aforementioned day, Mertice Gawne was leaving a friend's house and walking to her automobile when she noticed the Defendant and two other boys observing her. Mertice got into her vehicle and waited until the boys were out of sight before leaving the area.

When Mertice got to the intersection of 110th and Hoyne, the Defendant and two other boys jumped out of some bushes and surrounded her car. The Defendant pointed a gun at Mertice and told her to get out of the car because he was taking it from her. The Defendant opened the driver's side door and another boy pounded on the hood of the car. Mertice quickly drove away from the boys and notified police with her cellular telephone.

The Defendant and the other two boys were picked up shortly thereafter. Ms. Gawne identified all three of the boys as the boys who tried to take her car.

On January 31, 1996, Defendant was adjudicated a delinquent and pled guilty to Armed Robbery, a Class X felony in the State of Illinois. On March 6, 1996, Defendant was placed on probation.

II.

STATEMENT OF ADDITIONAL CASE FACTS PERTINENT TO THE STATE'S WRITTEN ARGUMENT

On June 13, 2000, at approximately 3:30 a.m., Detective D. Love, of the Las Vegas Metropolitan Police Department, was conducting an ongoing investigation related to the series of home invasion/sexual assault/ robbery crimes when she observed a black male, later identified as Justin Porter (DOB 12-13-1982), loitering in the area of 209 North 18th Street. Detective Love contacted the Defendant believing that he resembled the description and composite drawing relating to the crimes. Defendant, along with his mother, Angela Smith-Porter, consented to the administration of a buccal swab kit on the Defendant, which was administered by Detective Love.

The swabs were impounded as evidence under event number 000613-0245.

On August 10, 2000, Detective Love received a telephone call from Dave Welch, a Criminalist II employed by the Las Vegas Metropolitan Police Crime Lab, confirming that the Defendant's DNA profile matched the DNA evidence collected from the Teresa Tyler case and the Ramona Leyva case.

On August 10, 2000, Defendant's mother and step-father were contacted by LVMPD, and it was learned that the Defendant had gone to Chicago and was staying with his natural father, George Porter.

On August 11, 2000, a lawful search of the Defendant's Las Vegas residence located at 208 N. 13th St., Apt. 3, Las Vegas, Nevada, 89101, resulted in the seizure of a pair of white Saucony tennis shoes, a pair of red shorts, and a black T-shirt, all of which were items described by the numerous victims in this case as having been worn by the suspect who had victimized them.

After the search of the residence, Detective Berry Jensen received several voice mail messages from the Defendant who was attempting to contact Detective Jensen, after learning

that the Las Vegas residence had been searched. Later, that same day, Detective Jensen actually spoke to the Defendant, who told Detective Jensen that his mother had given him the number and he was calling because he had heard that he was being accused of committing some crimes in Las Vegas.

Defendant further told Detective Jensen that he was not responsible for committing any crimes and that none of his DNA would be at any of the crime scenes. The Defendant also indicated that he would be returning to Las Vegas on August 18, 2000, by Greyhound bus at which time he would take a polygraph regarding the crimes that had been committed.

On August 12, 2000, Chicago police arrested the Defendant at his father's residence based upon an arrest warrant that had been forwarded to them by LVMPD detectives. After arresting the Defendant and taking him into custody, Chicago police notified Las Vegas detectives that they had the Defendant in custody. Las Vegas detectives then made arrangements to travel to Chicago.

Additionally, Las Vegas Detectives faxed the Chicago police information about approximately six of the criminal events the Defendant was suspected of having committed.

Detectives Kato and Cunningham, of the Chicago Police Department advised the Defendant of his Miranda Rights and after stating that he understood those rights, Defendant agreed to speak to them.

During that interview with Chicago police Defendant was asked about the aforementioned six incidents that they had been given information about, said incidents all having occurred in Las Vegas. The Defendant made admissions to five of the six incidents he was questioned about; although Defendant did downplay his activities in all of the incidents, he completely denied the any knowledge of the sixth incident involving Teresa Taylor.

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III.

TESTIMONY ADDUCED AT THE JACKSON V. DENNO HEARING PERTINENT TO THE STATE'S WRITTEN ARGUMENT

A. The Testimony of Chicago Police Detective Kriston Kato

Kriston Kato testified that he had been employed with the Chicago Police Department for twenty-eight years. Detective Kato further testified that he had worked in Area Four, the violent crimes division, for the past eighteen years. (Reporters Transcript of Evidentiary Hearing (RT), 03/08/04, p. 4; 8-18). The violent crimes division entailed handing homicides, aggravated batteries, robberies, and sex crimes; and that he had sometimes been called upon to assist other jurisdictions with requests. (RT, 03/08/04, p. 4; 20-24). On August 11, 2000, through his supervisors in Chicago, Detective Kato was assigned to assist the Las Vegas Metropolitan Police Department (LVMPD) with apprehending the Defendant, in Chicago. After receiving the information from Las Vegas, Detective Kato, his partner, Detective Cirone, and several assist units went to one of the locations that had been provided by LVMPD and located the Defendant. (RT, 03/08/04, p. 5). Approximately eight detectives went to residence, all of which were dressed in plain clothes and driving unmarked vehicles. (RT, 03/08/04, p. 6; 3-16). Detective Kato had been given the Defendant's name, physical description and age, along with information that the Defendant was alleged to have committed home invasions, sex crimes and murder. (RT, 03/08/04, p. 7; 1-12).

On August 12, 2000, upon arrival to the apartment, at approximately 12:45 a.m., Detective Kato and three other individuals went to the front door of the second floor apartment while the other units went to the side and back door of the building. Detective Kato knocked on the door and announced that they were the police, at which time a lady, in her approximate 40's, answered the door. (RT, 03/08/04, p. 8). The detectives requested to see if the Defendant was home, at which time the lady did not speak, but indicated with her eyes, by looking towards the living room, that he was home. Detective Kato testified that it was at that time some of the other individuals may have drawn their weapons. (RT, 03/08/04, p. 9).

Detective Kato testified that the woman signaled with her eyes towards the front room where the living room furniture was located. When the detectives went to the front room, they noticed the Defendant hiding in between the couch and the wall. Detective Kato pulled the couch away from the wall and did not have his weapon drawn at that time, nor did Detective Cirone. Detective Kato testified that somebody probably had a weapon drawn at that point, for officer safety. (RT, 03/08/04, p. 11-12).

Upon finding the Defendant behind the couch, Detective Kato told him to put his hands behind his back, while Detective Cirone handcuffed the Defendant, who was kneeling on the floor. Detective Kato testified that the Defendant was cooperative. (RT, 03/08/04, p. 12; 8-14). Detective Kato indicated to the Defendant that he was under arrest as the result of a warrant, however, the nature of the charges were not discussed with the Defendant. (RT, 03/08/04, p. 13; 3-9) Defendant was escorted from the apartment, to a vehicle located in the front of the apartment building, and driven to the Area Four police station. Defendant was then escorted to the violent crimes office by Detectives Kato and Cirone. (RT, 03/08/04, p. 13; 20-24, p. 14; 1-4).

Detective Kato testified that at the time of the Defendant's arrest, he was told that no one else except the woman and the Defendant were present in the apartment, and that the others would have remained behind to speak to the women. (RT, p. 14; 15-22).

Detective Kato testified that while the Defendant was being escorted to the police department no conversation occurred between the detectives and the Defendant. (RT, 03/08/04, p. 15, 1-15). When they arrived at the police station, Defendant was taken to a second floor interview room where his handcuffs were removed and it was explained to him that he would be remaining there. Additionally, Defendant was told if he needed anything to knock on the door. (RT, 03/08/04, p. 15; 20-24). The interview room the Defendant was taken to had a couple of chairs and a table; however, there was no telephone or telephone book in that interview room. (RT, 03/08/04, p. 16; 4-10).

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Detective Kato uncuffed the Defendant. He was never handcuffed again while in Detective Kato's presence. The door to the interview room closed and locked from the outside so the Defendant was unable to leave the room. The Defendant never asked Detective Kato to see his [Defendant's] father, or anyone along those lines. (RT, 03/08/04, p. 16; 16-23).

After leaving the interview room, Detective Kato spoke to his supervisor and learned that Las Vegas police wanted the Defendant interviewed. (RT, 03/08/04, p. 19-24). Detective Kato reviewed some documents that were faxed to Chicago, from the Las Vegas police, in an attempt to get as much information as he could on the actual crimes that Defendant committed in Las Vegas. (RT, 03/08/04, p. 17).

Detective Kato testified that he had been out of the interview room for about a half an hour, and returned at approximately one-thirty in the morning. (RT, p. 18; 1-7). Detective Kato returned to the interview room with Detective Cunningham, who was also in plain clothes. Detective Kato testified that neither he nor Detective Cunningham had their guns with them, as it was not their practice to take a weapon into the interview room. (RT, 03/08/04, p. 18; 8-21).

Detective Kato testified that when they went back into the interview room and advised the Defendant of his [Miranda] rights from memory, although they do also have a department issue card in Chicago. Detective Kato testified that he advised the Defendant as follows:

> A. Sure. I advised him he had the right to remain silent, anything he said would be used against him in a court of law. And that he had the right to have an attorney present during any questioning. If you couldn't afford one, one would be appointed for him.

(RT, 03/08/04, p. 19; 10-15).

Detective Kato testified that the Defendant indicated that he understood those rights and stated that he wanted to talk. (RT, 03/08/04, p. 19; 19-23). Detective Kato explained to the Defendant that he had been arrested for some crimes that were committed in Las Vegas and he indicated her understood. (RT, 03/08/04, p. 20; 2-6). Detective Kato began by giving

the Defendant specific dates, starting from the most recent incident, and the Defendant indicated that he did not remember any dates but that he remembered certain incidents. Detective Kato explained to the Defendant what he knew about it, based upon the information that was faxed from Las Vegas, and mentioned specific items that were taken from the June incident, at which time the Defendant remembered and gave a brief summary of what he remembered of that incident. (RT, 03/08/04, p. 20; 8-15).

Specifically, Defendant told Detective Kato that he did not force the door open in that incident, that the lady inside was attracted to him when he entered, so they had consensual sex. Defendant stated that when he left he took a CD and another recording device and put it in a baby stroller. Defendant left pushing the stroller with the items inside. At some point, Defendant stopped on the street, left the stroller and the items for a few minutes, and when he returned the stroller was gone. (RT, 03/08/04, p. 20; 18-24, p. 21; 1-6).

Detective Kato testified that in Chicago, an individual is considered an adult at the age of seventeen. Detective Kato had the Defendant's birth date and knew that he was seventeen and considered an adult in Chicago. (RT, 03/08/04, p. 21;18-24, p. 22; 1-2).

Detective Kato testified that he talked to the Defendant about other incidents and the Defendant would not remember the date, but would remember by the age of the victim. Detective Kato testified that, at one point, Defendant remembered a Spanish woman, and Defendant would pinpoint each incident by certain acts he remembered. (RT, 03/08/04, p. 22; 4-12).

Detective Kato testified that the information he had about the incident that occurred on May 16, 2000, had something to do with a potential meat cleaver. The Defendant denied having a meat cleaver during that incident, but did describe a different type of weapon that he used. (RT, 03/08/04, p. 22; 19-24, p. 1-2). In just about every incident that the Defendant remembered, he stated he used a knife that he obtained from the kitchen, and that he never brought a weapon into the apartment. (RT, 03/08/04, p. 23; 1-7).

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Detective Kato testified that in the May 16th incident, the Defendant told him that he asked the woman to take her clothes off. After she complied, he had vaginal sex with her and took five dollars off the dresser. Defendant told Detective Kato he used a small steak knife that he obtained from the kitchen, not a meat cleaver. (RT, 03/08/04, p. 23; 8-20).

The Defendant was able to remember the April incident because of the age of the victim, who reminded him of his mother. Defendant told Detective Kato that he felt bad about what he did to her. (RT, 03/08/04, p. 24; 1-4). Defendant told Detective Kato that he got into her apartment by forcing the chain on the door. Defendant told Detective Kato that the woman was very nice and when they sat down on the bed the lady said she would do whatever he wanted. Defendant told Detective Kato that he took his penis out and the lady gave him oral sex, which he did not like. The Defendant told the Detective that the victim lived close to the Showboat. (RT, 03/08/04, p. 24; 5-24).

Defendant told Detective Kato that he obtained a knife from the kitchen. Defendant told Detective Kato that the victim gave him $50 and a ring off of her finger, which he threw away as soon as he left the apartment because he didn't like the ring. Defendant told Detective Kato that the victim gave him the keys to her car, which was white, and he drove it half a block before realizing what he had done, getting out, and leaving it parked. (RT, 03/08/04, p. 25, p. 26; 1-14).

Detective Kato testified that the Defendant remembered the March incident because the woman was of Spanish decent. Again, Defendant told Detective Kato the door was open, that the victim was attracted to him, and that he had vaginal sex with her. In that incident, Defendant took a knife from her kitchen. (RT, 03/08/04, p. 26; 15-24).

Defendant told Detective Kato about a second incident that occurred earlier in March where he had consensual sex with the victim once and that she liked him and wanted it a second time. Defendant stated that the victim got mad at him and he got angry at her, so he obtained a knife from the kitchen and poked her twice. Defendant didn't think he poked her too hard, but he did see blood. The victim got sick in the bathroom which made Defendant scared and caused him to light a blanket on the bed, in the bedroom, on fire. Defendant threw

the match on the carpet and left apartment. Defendant denied strangling the victim or using scissors as a weapon. Defendant described having been in the victim's apartment before, to use the phone. (RT, 03/08/04, p. 27).

Throughout the statement, Defendant did volunteer information about the crimes, once he did remember. (RT, 03/08/04, p. 28; 15-24).

Detective Kato testified that the interview lasted approximately forty-five minutes and that he and Detective Cunningham and the Defendant were the only ones in the room, the entire time. (RT, 03/08/04, p. 29; 11-14)

Detective Kato stated that no guns were drawn and no threats were made to him. Detective Kato testified that he did not say anything to the effect of, "oh your from Chicago, you know that people from Chicago sometimes go down to the docks and get their ass whooped." Detective Kato testified that there were no threats of use of phone book to brutalize the defendant, nor did he tell the Defendant that the crimes he committed would be considered petty in Chicago, or that he would probably get probation if he would admit to the crimes. (RT, 03/08/04, pp. 29; 19-24, p. 30; 1-8).

Detective Kato testified that the Defendant never asked to speak to his father or his mother and, to the detective's knowledge, the Defendant's father, mother, and step-mother were not in the station house at all. (RT, 03/08/04, p. 30; 6-16). Detective Kato testified that once the forty-five minute interview took place, they left the interview room and contacted the Las Vegas Police Department. Detective Kato testified that the Defendant was never cuffed in the interview room, in his presence. (RT, 03/08/04, p. 30; 17-23).

Detective Kato testified that it was sometime after two o'clock in the morning when the interview ended and they left. Detective Kato instructed the Defendant that he was leaving and told the Defendant that if he needed anything, he should knock on the door. Detective Kato further testified that he told his supervisor that they were leaving, that the Defendant was in the room, and to answer the door if he knocked. (RT, 03/08/04, p. 31). Detective Kato testified that it would not be the practice of anybody to go into the room and chat with the Defendant, and that their supervisor is responsible for whoever is left in the

rooms. (RT, 03/08/04, p. 32; 1-4).

Detective Kato testified that he had further contact with the Defendant, later that day, when they returned at three o'clock in the afternoon, after being told that Las Vegas Police Department was coming to Chicago to interview the Defendant. (RT, 03/08/04, p. 32; 4-9). When Detective Kato arrived at the station, at three o'clock, Defendant was still in the interview room. Detective Kato described the Defendant's demeanor as calm and alert. The defendant did not complain to Detective Kato that he had been poorly treated while he was gone, nor did he complain that he had not been able to use the bathroom or eat. Detective Kato testified that the Defendant did not indicate that he hadn't been able to speak to his dad. (RT, 03/08/04, p. 32;10-24, p. 33; 1-6).

When Detective Kato went back into the room, he re-advised Defendant of his rights, to which Defendant stated he understood. They were the same rights that had been given earlier. Detective Kato told the Defendant that the Las Vegas Police Department was coming to talk to him. Detectives Kato, Cirone, and the Defendant, went through basically the same conversation that was had earlier. Defendant reiterated the same things, at which time the detectives left. LVMPD showed up shortly thereafter. (RT, 03/08/04, p. 33;9-19).

When Detective Kato told the Defendant that Las Vegas police were coming he responded like he expected that to happen, and was fine with it. Defendant did not say that he did not want to speak to them. (RT, 03/08/04, p. 33; 21-24, p. 34; 1-4).

On cross-examination by defense counsel, Detective Kato reiterated that he did not use any ploys or ruses to get the Defendant to confess; that he didn't threaten him physically or brutalize him in any way, nor did he tell the Defendant that it would be easier for the Defendant if he just admitted it. (RT, 03/08/04, p. 62; 5-16). Detective Kato testified that he did not remind the Defendant of what happens to people who don't cooperate with the detectives in Chicago, nor did he threaten him with a phone book. (RT, 03/08/04, p. 62; 17-24).

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Defense counsel extensively questioned Detective Kato about a series of newspaper articles from Chicago newspapers regarding Detective Kato's interrogation techniques. Detective Kato acknowledged that many articles had been written but that he did not personally remember the titles of the articles. (RT, 03/08/04, pp. 63-69). Defense counsel also questioned Detective Kato about an Illinois appellate case that had been overturned after the Appellate court found that the juvenile was not permitted to see his mother at the police station, ruling Detective Kato's testimony suspect to believability, in the process. Detective Kato testified that he had no knowledge of the court opinion. (RT, 03/08/04, p. 75). Additionally, Detective Kato testified that there is an independent body that investigates allegations of use of force by police officers, in Chicago, and that after investigating the conclusion is either that of sustained, not sustained, unfounded, or exonerated. (RT, 03/08/04, p. 82). Detective Kato testified that use of force had never been sustained against him. (RT, 03/08/04, p. 83).

Detective Kato testified that over the eighteen years he has worked in homicide he had worked with a multitude of detectives, all of whom had had similar allegations of use of force lodged against them, on a frequent basis, when a confession is involved. (RT, 03/08/04, p. 83).

B. The Testimony of Chicago Police Detective Sam Cirone

Detective Cirone testified that he was a police officer with the Chicago Police Department for twelve years. Detective Cirone testified that he worked in the violent crimes unit and had been there for nine or ten years, and that Detective Kato had been his partner for a little over eight years. (RT, 03/08/04, p. 88).

Detective Cirone testified that on August eleventh and twelfth of 2000, he and Detective Kato received a request from Las Vegas Police to locate a suspect, and that he went with Detective Kato and other detectives to a residence to locate the suspect. Detective Cirone testified that supervisors also went along. (RT, 03/08/04, p. 89; 1-10).

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Detective Cirone testified that he and Detective Kato and Lieutenant Farrell went to the front door, and that entry was obtained by knocking, after a female answered the door and let them in. Detective Cirone testified that the door was not kicked in. (RT, 03/08/04, p. 89; 11-23). Detective Cirone testified that the female was Defendant's step-mother, and when they asked for the Defendant, she looked at them with her eyes and her head bobbed towards the couch in the living room. Detective Cirone stated that they found the Defendant between the couch and the wall in the living room. (RT, 03/08/04, p. 90; 1-13). Detective Cirone testified that his gun was not drawn at the time, nor did believe that Detective Kato's gun was drawn; however, he was sure somebody had drawn their weapon. (RT, 03/08/04, p. 90; 22-24, p. 91; 1-2).

Detective Cirone testified that the Defendant was cooperative with the verbal directions that he was given, but that outside of the verbal directions being given to place the Defendant under arrest, no other conversation took place. Detective Cirone further testified that upon placing the Defendant into the police car and transporting him to the police station, no conversation occurred between he and Detective Kato and the Defendant. (RT, 03/08/04, p. 91; 3-18) Once they arrived at the police station, they placed the Defendant in an interview room and uncuffed him, at which time Detective Cirone ended his contact with him for the night. Detective Cirone did not participate in the interview with the Defendant that night. (RT, 03/08/04, p. 91; 19-24, p. 92; 1).

At approximately three o'clock, later that day, Detective Cirone returned and Defendant was still in the same interview room. Defendant was not cuffed and was just sitting there. Defendant did not say anything about having been treated poorly, nor did he ask for a parent, father, mother, stepmother, or anything of that nature. (RT, 03/08/04, p. 92, p. 93; 1-6). Detective Cirone participated in a further interview with the Defendant. At that time, Defendant was re-advised of his rights and was told that Las Vegas Police Department was coming to talk to him. Detective Cirone testified that they basically went over the same

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story that the Defendant had repeated earlier.[3] Detective Cirone testified that the Defendant seemed to expect that Las Vegas was coming out, and that he did not indicate that he did not want to talk to them. (RT, 03/08/04, p. 93; 7-23).

Detective Cirone testified that some prompting occurred, in the form of question and answers during the second interview, until the Defendant could remember which incident they were talking about, at which time the Defendant responded in the narrative. (RT, 03/08/04, p. 97).

On cross-examination, Detective Cirone was asked if he was aware of complaints having been lodged against Detective Kato. Detective Cirone testified that almost every officer has had complaints of brutality during interrogation, so he was sure Detective Kato had as well. Detective Cirone testified that it did not seem that Detective Kato had more complaints lodged against him by suspects he had interrogated than the other detectives. (RT, 03/08/04, p. 98, p. 99; 1).

Detective Cirone testified that it was not previously the policy of the Chicago Police Department to videotape or audiotape interrogations, but that that within the past three years the policy had been instituted. (RT, 03/08/04, p. 99).

Detective Cirone testified that he was aware that a report had been generated, but he did not know when because he did not write it, and he wasn't present when it was written. (RT, 03/08/04, p. 113). Detective Cirone testified that what the Defendant told him during the second interview was substantially the same information that had been put into the report prepared by Detective Kato. (RT, 03/08/04, pp. 114-115).

Detective Cirone testified that the purpose of the second interview was to inform the Defendant that Las Vegas was coming out and to see if he was still talking. Detective Cirone further testified that Detective Kato Mirandized the Defendant, from memory, when

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[3] Detective Cirone's testimony as to what the Defendant stated during the second interview is substantially the same as what he told Detectives Kato and Cunningham during the first interview. As such the State would direct the Court to the transcript to review what Defendant told Detective Cirone. (RT, 03/08/04, pp. 94-96).

he entered the room. Detective Cirone testified that it is not the policy of the Chicago Police Department to record Miranda warnings, and while the policy has changed to video record the statements of offenders in certain cases, it would not have been done in this case because it was not Chicago's case. (RT, 03/08/04, pp. 120-121).

C. The Testimony of Las Vegas Metropolitan Police Detective Barry Jensen

Detective Jensen testified that he was employed by the Las Vegas Metropolitan Police Department for fifteen years. Detective Jensen testified that he was currently assigned to the homicide detail and had been for approximately three years. Prior to being assigned to homicide, Detective Jensen was assigned to the adult sexual assault unit for approximately 3 1/2 years. (RT, 03/08/04, p. 124).

The period of time that Detective Jensen was assigned to the adult sexual assault unit included the summer and early fall of 2000, at which time he became involved in a series of events that occurred in the downtown, which was referred to as the downtown area command within Metro's jurisdiction. Detective Jensen's initial involvement in the series of happenings was to investigate as series of sexual assaults with other detectives.

Specifically, Detective Jensen was assigned to investigate the case involving Marlene Livingston which occurred on April 4, 2000. (RT, 03/08/04, p. 125). Detective Jensen testified that other sexual assault were being investigated by other detective at the time and it became the belief of some of the police department that the cases were somehow related. On August 10 [2000] a DNA match from two of the crime scenes had come back identifying the Defendant, which lead the detective to believe that the investigations were absolutely related. (RT, 03/08/04, p. 126). At the time the DNA profile match occurred, they were investigating not just sexual assault type crimes but home invasion robberies and possibly a homicide, that seemed related to the one perpetrator. (RT, 03/08/04, p. 127; 3-10). Detectives from each division, including the sexual assault detail, robbery detail, and homicide detail were responsible for investigating the crimes related to their assigned division. (RT, 03/08/04, p. 15-23).

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Detective Jensen testified that he received information of the Defendant's DNA match, as he was getting ready to go home. Detective Jensen could not remember if he stayed late to work on the arrest warrant or came in early the following morning to prepare it. The information that Detective Jensen had at that time, with regard to Defendant's location was that he lived in an apartment with his mother and step-father. (RT, 03/08/04, p. 128). In addition to the arrest warrant for the sexual assault crimes, a search warrant was also prepared by Detective Michael Castenada, of the sexual assault division. (RT, 03/08/04, p. 129; 1-9).

On August 11 [2002], Detective Jensen made contact with the Defendant's mother and step-father, at which time Defendant's mother informed him that the Defendant had gone to Chicago, a month prior. The contact Detective Jensen had with Defendant's mother and step-father occurred before the search warrant was served, at which time they gave consent to search the apartment. (RT, 03/08/04, p. 129; 10-24, p. 130;1). Although consent was given to search, they waited for the search warrant to be signed by a judge and went in after receiving a call from Detective Castenada that a judge had signed the warrant. Detective Jensen gave the Defendant's mother a business card that included his name and the name of the sexual assault detail for which he worked. (RT, 03/08/04, p. 130; 9-21).

Detective Jensen testified that the DNA profile that was obtained by the Defendant occurred in June, while patrol units and other sexual assault detectives were canvassing the downtown area. One of the patrol units had stopped the defendant at approximately three o'clock in the morning, and a buccal swab was obtained from him, after the Defendant and his mother gave consent to obtain it. Defendant's mother signed a consent to search for the buccal swab. (RT, 03/08/04, p. 131).

In August, when the search warrant was executed at the Defendant's mother and step-father's residence, a copy search warrant and sealing order was left there, and the search warrant referenced the crimes that were being investigated. Later that day, on August 11, 2000, Detective Jensen had received three separate telephone calls, on his voice mail, from the Defendant. In those messages, the Defendant stated that he had talked to his mother and

he knew that they were looking for him and he wanted to talk. (RT, 03/08/04, p. 132).

Detective Jensen testified that on that same day, he received a fourth call from the Defendant while preparing the arrest warrant affidavit. Detective Jensen spoke to the Defendant, on the telephone, and the Defendant told Detective Jensen that he was going to be back in Las Vegas at the end of August, and everything could be taken care of then. (RT, 03/08/04, p. 133).

Once the arrest warrant was signed the judge, a copy of it was faxed over to the Chicago Police Department. Detective Jensen testified that Detective Castenada had spoken to Sergeant Keen, from Chicago, and explained that they were investigating the Defendant on a series of sexual assaults. Additionally, they provided the Sergeant in Chicago with the Defendant's father's home address and telephone number. (RT, 03/08/04, p. 135). Detective Jensen testified that, in dealing with felony crimes, there is going to initially be incident reports when patrol responds to sexual assaults, as well as officer reports from the detective; sometimes multiple officers' reports, as well as a declaration for an arrest warrant that combines everything together. (RT, 03/08/04, p. 135).

Detective Jensen testified that there is also an administrative assistant in the S.A. detail that capsulized everything into a short synopsis, and that any or all of those things could have been provided to the Chicago Police Department, but he wasn't the one that gave them that information. (RT, 03/08/04, p. 136; 1-9). Detective Jensen did not know if Detective Castenada asked Chicago to interview the Defendant. (RT, 03/08/04, p. 136).

Based upon Chicago having taken the Defendant into custody, Detective Jensen made arrangements to go to Chicago. Detective Jensen testified that they were notified at about 11:30 p.m. [Las Vegas time] that the Defendant was in custody. At that time, Lieutenant Monohan made arrangements for Detective Jensen, Detective James LaRochelle (Homicide), and Sergeant Laura Cricket (Robbery), to fly from Las Vegas to Chicago. (RT, 03/08/04, p. 136; 15-23).

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Detective Jensen testified that suspects are often arrested in other jurisdictions and they may waive or fight extradition but they are eventually brought back. Detective Jensen further testified that it is not all the time that they'll fly to another jurisdiction to talk to a suspect, but in this case the lieutenant from Chicago told Detective Castenada that the Defendant wanted to talk to detectives, which was in line with the four telephone calls he had received from the Defendant earlier that same day. (RT, 03/08/04, p. 137).

Detective Jensen testified that they arrived in Chicago between 3:30 and 4:30 in the afternoon, on August twelfth, and they went directly from the airport to the area four police station, where the Defendant was being held. Detective Jensen testified that they spent five or ten minutes conversing with the chain of command in Chicago, thanking them for getting the Defendant into custody without incident, and then locate the room where they could do an interview. Detective Jensen testified that the Defendant was not already in that room. (RT, 03/08/04, p. 138; 4-24).

Detective Jensen testified that Detective LaRochelle inquired with the Chicago detectives as to whether the Defendant had been Mirandized and found out that he had been, but that Detective Jensen did not speak with the guys at the police station. (RT, 03/08/04, p. 139; 2-11).

Detective Jensen first met with the Defendant in a holding cell. At that time, the Defendant was smoking a cigarette and drinking a soda, and had finished up some fast food that was evidenced by bags and wrappers. Detective Jensen further testified that the Defendant was calm and did not appear to be agitated or upset, nor was he handcuffed. Defendant was transported down a small hallway to another room to be interviewed. (RT, 03/08/04, p. 140).

Detective Jensen, Detective LaRochelle, and Laura Cricket all went into the interview room with the Defendant. Detective Jensen testified that he did not have weapon with him and that Detective LaRochelle and Laura Cricket's weapons were not exposed. (RT, 03/08/04, p. 141).

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Prior to beginning the interview they had decided that they would first speak to the Defendant about the sexual assaults and then Laura Cricket would speak to him about the home invasion robberies, and Detective LaRochelle would speak to him about the homicide investigation. (RT, 03/08/04, p. 141; 10-17). Detective Jensen testified that the first thing that they did was re-Mirandize the Defendant with a LVMPD card. Detective Jensen had the Defendant read it aloud, and he was having trouble pronouncing some of the words, although he did sound them out and read it to where Detective Jensen could understand what he was saying. Afterwards, Detective Jensen read the card out loud to the Defendant and asked him if he understood his rights, to which he stated that he did. They asked the Defendant to sign the card, and then they signed and dated it, and put the event number on it. (RT, 03/08/04, p. 142).

When Detective Jensen read the card to the Defendant and asked him if he understood, there was no doubt in his mind that the Defendant understood his rights.[4] Detective Jensen testified that the Defendant was not confused nor did he seem not to understand. (RT, 03/08/04, p. 143). Detective Jensen testified that he did not ask the Defendant if he had any questions about the rights he had been read, but did ask the Defendant if he understood them. (RT, 03/08/04, p.144; 1-3).

Initially, the Defendant was not comfortable speaking due to the fact Laura Cricket was in the room. When Defendant was asked if he was comfortable with Laura Cricket being there, he stated that he was not, so she left the room. Detective Jensen testified that while everyone was in the room, including Sergeant Cricket, the Defendant never indicated that he wanted to speak to his dad or mom before speaking to them, nor did he make those statements after Laura Cricket left the room, or at any time during the interview. (RT, 03/08/04, p. 144; 10-24, p. 145; 1-12). Detective Jensen testified that during the interview

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[4] Detective Jensen did mis-speak at one point during this testimony and stated that there was no doubt in his mind that the defendant didn't understand his rights; however, the Court did clarify his statement with him at which point her corrected himself. (RT, 03/08/04, p. 143; 6-14).

portion and the taped statement, the Defendant specifically indicated that he could not talk to his mother about this because she would think he was crazy, and words to that effect about his father too. (RT, 03/08/04, p. 145; 19-24, p. 146;1-4).

Detective Jensen testified that he knew the Defendant was seventeen years old at the time of the statement. Detective Jensen also knew that the defendant had been arrested and through the court system for the robbery, in Illinois. In addition, the Defendant mentioned that he was on probation during the interview. (RT, 03/08/04, p. 146; 10-24, p. 147; 1-2).

Detective Jensen began the questioning during the interview and then Detective LaRochelle took over. Their procedure followed in the same vein once they did the taped statement. Detective Jensen involved himself only in the portion of the interview process that involved the sexual assaults. (RT, 03/08/04, p. 147; 11-24). Detective Jensen spoke to the Defendant about three sexual assaults during the interview and the statements he gave during the interview were consistent with the statements he gave in the taped statement.

The Defendant did not recall exact names or addresses, but when asked about one house that was near the Showboat, Defendant gave details that matched the crime in which only somebody who was there would know. (RT, 03/08/04, p. 148, p. 149; 1-3). Detective Jensen testified that he was able to provide the Defendant with some detail to refer him to an event, and then the Defendant would provide him with lots of details. The Defendant did not just give one word answers, but gave them a pretty good account of what occurred according to victims or crime scene evidence. (RT, 03/08/04, p. 150; 2-14).

The initial statement with the Defendant, on August 12th, began at 5:30 p.m. and ended at 6:46 p.m., Las Vegas time. The first statement was followed by a thirty minute interview that began about a half hour after the first statement ended. Detective Jensen testified that they took a break in between the first two statements for the Defendant and detectives to use the restroom and get a drink of water. (RT, 03/08/04, p. 151).

Detective Jensen testified that Detective LaRochelle spoke to the Defendant about the homicide during the two statements, as well as the robbery home invasions, and that he had the opportunity to speak to the Defendant about some of the sexual assault crimes. Detective

Jensen testified that due to the lateness of the hour, which was approximately 10:00 [p.m.] Chicago time, and the fact they had been talking to the Defendant for about two hours total, the second interview was ended and was to be picked back up the following day after the Defendant and the detectives got a good nights sleep. (RT, 03/08/04, p. 153).

The following day, Detective Jensen and Sergeant Cricket went back and spoke to the Defendant. Detective Jensen testified that the Defendant seemed more comfortable with Sergeant Cricket the second day because they only discussed one sexual assault, along with some of the other robberies. Detective Jensen testified that the Defendant was cooperative in talking with them and gave narrative answers. (RT, 03/08/04, p. 154).

Detective Jensen testified that on the second day, August 13th, the Defendant did not make any statements about wanting his mother or father present. Detective Jensen testified that he did have contact with the Defendant's mother near the end of the interview on the 13th, after the Defendant asked him to contact Pastor John, and indicating that his mother would have the number. While Detective Jensen was dialing the Defendant's mother's number he asked the Defendant if he wanted to speak with his mother, at which time the Defendant leaned back in his chair waived his arms and said "no" he did not want to speak with her. (RT, 03/08/04, p. 155).

Detective Jensen testified that, from his perspective, conducting an interview before the taped statement makes people more comfortable and they get comfortable talking to you, as opposed to putting a tape recorder right in front of their face and going that way. (RT, 03/08/04, p. 155; 21-24, p. 156; 1-3). Detective Jensen testified that, in this case, he spoke to the Defendant for approximately 1 1/2 hours, going through a voluminous series of crimes that spanned a period of six months, and they were going through to see what ones the Defendant had knowledge about. (RT, 03/08/04, p. 156).

Detective Jensen testified that at no time during his contact with the Defendant on August 12th or 13th, did he ever make any complaints about how he had been treated, prior to their arrival. Defendant never indicated that the Chicago Police Department beat him up or threatened him, or told him that his crimes were petty and he'd likely get probation if he

just admitted to things, nor did the Defendant indicate that they threatened to take him down to the docks and whoop his ass, or hit him with a phone book. (RT, 03/08/04, p. 157; 1-14).

Detective Jensen testified that when everyone was talking to the Defendant, separate and apart from Miranda, he seemed to readily understand the questions they were asking and had no problems communicating with them. (RT, 03/08/04, p. 157).

On cross-examination Detective Jensen testified that he learned while they were in Chicago, that Lieutenant Monahan said that it would be okay if Chicago Detectives spoke to the Defendant. (RT, 03/08/04, p. 166; 14-23). Detective Jensen further testified that he was aware that some synopses of the sexual assault cases were faxed to Chicago as a basis for them to begin their interview with the Defendant. (RT, 03/08/04, p. 167; 2-19).

Detective Jensen testified that the purpose of Miranda is to advise a suspect that he has the right not to talk if he doesn't want to and that he can demand to have an attorney present before questioning begins and during any questioning. (RT, 03/08/04, p. 177; 19-24, p. 178; 1-5). Likewise, Detective Jensen also agreed that the advisement of those rights is essentially meaningless if the person given them does not understand them. (RT, 03/08/04, p. 178; 6-10).

Detective Jensen testified that he has people read him their rights, to see how well they read and get a good idea of a person's education, to make sure if they know how to read. Detective Jensen testified that he tried to have everybody read the rights of a person arrested card in order to gauge where they are at. (RT, 03/08/04, p. 179).

Detective Jensen testified that when somebody either read the card or has otherwise been advised of their rights, he does not actually ask them if they waive those rights, but he asks them if he understand their rights. (RT, 03/08/04, p. 181). Detective Jensen testified that generally a person will reply yes or no to the question of whether they understand, but he does not ask them if they waive. As soon as they tell him that they understand their rights he begins asking the questions in order to get the statement over with. (RT, 03/08/04, pp. 182-183).

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Detective Jensen testified that when they met the Defendant in Chicago, they represented to him that they were from Las Vegas. (RT, 03/08/04, p. 187;24, p. 188; 1-6).

Detective Jensen further testified that he does his interviews with a suspect the same way he does them with a witness, in that he wants to know what they saw, what they did and where they were at. (RT, 03/08/04, p. 190; 17-21).

Detective Jensen testified that through his training and experience, a record must be made at some point that a suspect has been given, notified, or advised of his Miranda rights before questioning and has agreed to waive them. Detective Jensen testified that there are various ways of doing that including taping and writing a report, but that some record needs to be made and that is why they use the card with the rights on it for the suspect to sign. (RT, 03/08/04, p. 194).

Detective Jensen testified that during the initial taped interview he asked the Defendant if remembers signing the rights card and reading the card out loud, and he said he did. (RT, 03/08/04, p. 201; 16-19). Detective Jensen testified that the Defendant read the rights of a person arrested card slowly, but within the normal limits of a high school kid. (RT, 03/08/04, p. 203). Detective Jensen likened the Defendant's reading skills to that of his own fifteen year old son. (RT, 03/08/04, pp. 203-204).

Detective Jensen testified that he knew the Defendant was considered an adult for purposes of Miranda warnings in Chicago, and also understood that someone in Nevada charged with a homicide, albeit seventeen years of age, would be charged as an adult. (RT, 03/08/04, p. 221).

On re-direct, Detective Jensen testified that, as he had indicated in prior testimony, he knew the Defendant had a prior armed robbery adjudication as a juvenile, and therefore was automatically certifiable as an adult in Nevada. (RT, 03/08/04, p. 227; 10-14).

Detective Jensen testified that he never yelled at Defendant or badgered him in any fashion, nor did Detective La Rochelle do any such things. In fact, during his discussion with Detective Jensen, the Defendant indicated that he knew the wrongfulness of what he had done and said things like he wished he could go back in time and take back certain things he

had done. (RT, 03/08/04, p. 227; 15-24, p. 228; 1-10). Defendant spoke to Detective Jensen about knowing that he was in trouble and needing to get himself out of that area, to isolate himself somewhere else, so that he couldn't be found. (RT, 03/08/04, p. 228; 11-15).

Detective Jensen testified that on August 13th, Detective La Rochelle met with and interviewed the Defendant's dad, George Porter. To Detective Jensen's knowledge, there was no indication from Mr. Porter that he had been to the police station trying to talk to the Defendant, and had been thwarted in his efforts. (RT, 03/08/04, p. 229-230).

Detective Jensen testified that at the end of the second interview on August 12th, Defendant told the detectives that he knew it was serious trouble and he could spend a lot of time in jail and even die for what he had done. Additionally, the Defendant made mention that he was going to need a good attorney when he returned to Las Vegas. (RT, 03/08/04, pp. 230-231).

Detective Jensen testified that there was a lot of physical evidence in this case, separate and apart from what the Defendant said to them, including DNA linking him to two of the sexual assaults, as well as finger prints, eyewitness identification, footwear impressions, and ballistic evidence linking a home invasion robbery to the homicide itself. (RT, 3/08/04, p. 233; 1-21).

D. The Testimony of Dr. John Paglini

Dr. Pagilini testified that he is a clinical psychologist with a doctorate in clinical psychology and that he had been certified as an expert in the area of forensic psychology in the Eighth Judicial District, to testify in murder trials and competency related issues. (RT, 02/08/05, p. 8). Dr. Paglini testified that in 2001 or 2002, he had been asked by defense counsel to consult in the instant case, for the purposes of doing a death penalty, mitigation evaluation. (RT, 02/08/05, pp. 9-10).

Dr. Paglini met with the Defendant on January 18, 2002, for seven hours, and subsequently met with him, at the Clark County Detention Center, on February 13, April 13, April 22 and June 7, 2002. Dr. Paglini also conducted numerous interviews with other individuals in Chicago. (RT, 02/08/04, p. 10). Dr. Paglini administered an I.Q. test, two

achievement tests and memory tests, along with a brief neurological test, to the Defendant. (RT, 02/08/05, p. 12).

According to Dr. Paglini, the Defendant's scores on those tests suggest that he was borderline intelligence but not mentally retarded. (RT, 02/08/05, pp. 15-16). Dr. Paglini testified that Defendant's full scale I.Q. is 77, and that he was not mentally retarded because his I.Q. does not fall below 70, nor does he have impaired adaptive functioning. (RT, 02/08/05, pp. 15-16)

Dr. Paglini testified that at nineteen year old, the Defendant's reading was at the end of the third grade level. (RT, 02/08/05, pp. 20-21). Dr. Paglini testified that the Defendant had a sever learning disability. (RT, 02/08/05, p. 28).

On cross-examination, Dr. Paglini testified that it was his understanding that the Assessing, Understanding, and Appreciation of Miranda Rights Test is widely used for juvenile and Miranda Warnings. Dr. Paglini testified that he had never personally used the test. (RT, 02/08/05, p. 73)

Dr. Paglini testified that he read the Defendant's statements in 2002, and that it appeared to be the kind of language that the Defendant would use, based upon what Dr. Paglini knew of the Defendant's I.Q. and capabilities. (RT, 02/08/05, p. 88).

E. The Testimony of Dr. Gregory Brown

Dr. Brown testified that he was a psychiatrist, board certified in both adult psychiatry and forensic psychiatry. (RT, 02/08/05, p. 95). In August 2002, defense counsel retained Dr. Brown help determine whether the Defendant was able to understand the words and concepts behind the Miranda warnings. (RT, 02/08/05, p. 98). Dr. Brown was provided a transcript of a recorded statements given by the Defendant and a psychological report that was prepared by Dr. Paglini on July 10, 2002. (RT, 02/08/05, pp. 99-100).

On August 12, 2002, during his interview with the Defendant, Dr. Brown administered an Assessing, Understanding and Appreciating Miranda Rights test. The test was devised by Thomas Grisso; a psychologist who has been involved with assessing competence to stand trial, and various aspects of competence in the trial process. (RT,

02/08/05, pp. 106-107). Dr. Brown testified that it was the first time he had ever administered the test and it was done at defense counsel's request. (RT, 02/08/05, p. 109). Dr. Brown testified that the Defendant scored very low on this test. (RT, 02/08/05, pp. 117-123).

Dr. Brown testified that the results of the test that administered to the Defendant comport with the results that Dr. Paglini got on the tests that he administered. (RT, 141).

Dr. Brown testified that to a reasonable degree of psychiatric certainty, it was his opinion that the Defendant would have significant difficulty understanding his Miranda Rights, both with regard to vocabulary and comprehension. (RT, 02/08/05, p. 142).

On cross-examination Dr. Brown was asked if he was provided a copy of the Miranda warnings card prior to administering the test and he testified that he was not. (RT, 02/08/05, p. 145).

Essentially, what the prosecution was able to point out to Dr. Brown and this Court, was that the language used on the test that Dr. Brown administered to the Defendant, in reference to Miranda warnings, was nowhere near the same language that is found in the Miranda warnings card used by Chicago police or Las Vegas Metropolitan Police, in this case. (RT, 02/08/05, pp. 146-151).

F. The Testimony of the Defendant, Justin Porter

Defendant testified that he grew up in Chicago and completed the ninth grade there. While in school in Chicago the Defendant got D's and C's and F's, and was in special education classes. (RT, 02/09/05, pp. 6-7) The last grade that the Defendant completed was the tenth grade, in Las Vegas. (RT, 02/09/05, pp. 7-8).

Defendant testified that he was arrested in August 2002, while visiting his father in Chicago, and that he visited his father every summer. (RT, 02/09/05, p. 8).

When asked to testify as to what he remembered about the arrest, the Defendant stated that the police officers came in, and that he door was already broken before they got there, and that they had their guns drawn and pointed in his face and told him don't move, if he did they would "blow my fucking head off, in so many words." (RT, 02/09/05, pp. 8-9).

Defendant stated that there were three or four officers and he was scared. Defendant testified that when the officers came in he asked them what was going on and they told him "don't play fuckin stupid with me", and he was scared. (RT, 02/09/05, p. 9).

Defendant stated that they put him in the police car and they were saying a lot of stuff that he couldn't remember because he was scared and just wanted to be at home with his family. Defendant further testified that once they got him to the police station they handcuffed him to wall and threatened to hit him with the phone book. (RT, 02/09/05, p. 10). The Defendant stated that he was placed into a small room that had a desk or table in it, and that the Detectives who had come to testify came in and talked to him. Specifically, Defendant testified that the Detectives were Kato and Cunningham, who had come to Las Vegas to testify some month prior.[5] Defendant testified that Kato, Cunningham, and another fat or heavy-set officer also was in the room. (RT, 02/08/05, pp. 11-12).

Defendant testified that once he had been handcuffed to wall in the room, Detectives Kato and Cunningham came back into the room and cussed him out, talked bad to him, and called him all types of names and he was scared. Defendant testified they told him they were gonna hit him with a phone book and take him down to the docks. (RT, 02/08/05, p. 12).

Defendant did not remember anyone telling him what his rights were in the room. Defendant testified that while he was sitting down in a chair, handcuffed to the wall, the detectives were in his face. (RT, 02/08/05, p. 14). Defendant testified that Detective Kato told him he was going to use the telephone book and put it on his body and hit him with a Billy club so it wouldn't leave no marks. (RT, 02/08/05, p. 15). Defendant testified that the detectives told him that it's a saying in Chicago, that the police will take you to the docks, whoop your ass. (RT, p. 02/08/05, p. 16). Defendant testified that he was really scared and he believed that the people were going to hurt him. (RT, 02/08/05 p. 17).

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[5] As this Court may recall, Detective Cunningham was present for the first statement given by the Defendant while he was in Chicago, but did not come to Las Vegas to testify.

Defendant testified that he slept on a table in the room and that he was given chips and cookies. (RT, 02/08/05, pp. 17-18). Defendant testified that they told him that "it really ain't nothing, you can get some probation out of it", although Defendant really couldn't remember because it had been such a long time. (RT, 02/08/05, p. 18).

Defendant testified that he didn't remember anything about his rights and that he talked to the Detectives because he was scared. (RT, p. 02/08/05, pp. 19-20). Later, other Detectives came and Defendant testified that he did not know who they were and whether they were from Chicago or Las Vegas, because he was scared. (RT, 02/08/05, p. 20).

Defendant testified that one of the detectives gave him a card to read with Miranda rights on it and he read the card to them, but had some problems, so one of the detectives helped him read the card and then took the card and read it to him. Defendant testified that none of the detectives explained what the words on the card meant, but he signed the card. (RT, 02/08/05, p. 23-24).

Defense counsel played a portion of his taped statement on August 12 [2000], in Chicago with Detective Jensen. Defendant was asked what he meant by answering, "Kind of I do, but sometimes, I don't, yes." when asked if he understood his rights. Defendant testified that he really didn't, but he didn't want anybody to think less of him. (RT, 02/08/05, p. 25). Defendant testified that he had first heard Miranda rights at the age of seventeen. (RT, 02/08/05, p. 25). The Court interjected and asked the Defendant if he had any prior experience with the police, to which he responded he had some small minor juvenile stuff, at which time the Court inquired as to whether he had been previously Mirandized, to which the Defendant stated "Never". (RT, 02/08/05, p. 27).

Defendant testified that when the new detectives came in and started asking him questions he answered them because he saw them all shaking hands and thought they were working together and he was scared. (RT, 02/08/05, p. 28). Defendant testified that Las Vegas detectives did not threaten him like the Chicago detectives did, but he was scared anyway. (RT, 02/08/05, p. 28).

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Defendant testified that he felt better after he spoke to the detectives and answered all their questions, but he did not know that he didn't have to talk to them, and if he hadn't have been scared of the threats they made against him, he wouldn't have spoken to them. (RT, 02/08/05, p. 29).

On cross-examination the Defendant testified that a prosecutor was someone who was trying to put him away for the rest of his life. (RT, 02/08/05, pp. 29-30).

Defendant testified that he had given a buccal swab to Detective Love and that he knew what it was but that he didn't know why he was giving it. Defense counsel then interjected and indicated that they did not explain anything to the Defendant when they took his buccal swab, but explained everything to his mother. (RT, 02/08/05, pp. 37-38).

Defendant testified that in Chicago, on September 4, 1995, he had been arrested for attempted armed robbery, and that he was twelve years old at the time. In September 1995, Defendant and three other people were arrested for approaching a sixty-five year old woman, holding a gun to her face and telling her get out of the car because they were gonna take it. (RT, 02/08/05, pp. 43-44). Defendant testified that he didn't remember being given his Miranda rights, but the police report in that matter indicates that all three Defendants were advised of their rights simultaneously. (RT, 02/08/05, p. 44). Defendant went through the juvenile court system and was on probation for the armed robbery conviction in 1996. (RT, 02/08/05, pp. 45-46).

Defendant was questioned about an August 1996 attempt theft conviction and asked if he went through the juvenile system, to which he stated he could not remember. Defendant was asked about a March 1998 theft, and asked if he went through the juvenile court system there, which he also couldn't remember. Defendant was asked about his arrest in Las Vegas for unlawful taking of a vehicle, which he testified he had been put on probation for. (RT, 02/08/05, pp.46-47). The prosecutor pointed out that the Defendant had five prior contacts with the criminal justice system. (RT, 02/08/05, p. 48).

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Defendant testified that Chicago police officers offered him a bag of chips and some cookies when he first arrived at the police station. (RT, 02/08/05, p. 50). Defendant testified that he slept on a table in the room at the police station. (RT, 02/08/05, p. 51).

Defendant could not tell the prosecutor exactly what the Chicago police detectives told him with regards to probation, but that they did mention probation. (RT, 02/08/05, p. 54). Defendant testified that the word petty means something that ain't really serious, and that he learned it while being here, from his attorneys. (RT, 02/08/05, pp. 56-57).

Defendant testified that he never met the attorney in Chicago, on the armed robbery case, and that all he did was go to court, one time, and it was over, he had probation. The prosecutor then asked the Defendant if he remembered going to court on six prior occasions as follows:

Q. On October 22, 1995, do you remember going to court?

A. No ma'am.

Q. On October 6, 1995, do you remember going to court?

A. No ma'am.

Q. You don't remember the public defender being appointed as your attorney on October 6, 1995?

A. No ma'am.

Q. And then you went back to court on January 31, 1996, with your attorney?

A. No ma'am, all I know is that my momma always took me to court.

Q. And then you went back to court on March 6, 1996, with your attorney and were placed on probation?

A. No ma'am. I –all I know I ever time I went to court, my momma was, took me.

Q. And do you remember going back to court again on March 11, 1996?

A. No ma'am.

Q. All on your same armed robbery case?

A. No ma'am. All - - only time I went everything was really –

(RT, 02/08/05, pp. 67-68).

Defendant testified that he went to court for his criminal case in Las Vegas; never saw his attorney in that case, and was given probation. (RT, 02/08/05, p. 68).

F. The Testimony of Dr. Tom D. Bittker

Dr. Bittker testified that he was a forensic psychiatrist and he is board certified in general psychology and forensic psychiatry. (RT, 02/09/05, p. 78). Dr. Bittker testified that on February 27, 2004, he conducted an interview with the Defendant at the Clark County Detention Center. Dr. Bittker testified that at the time interviewed the Defendant he had extensive file material including three feet worth of witness statements, police statements and voluntary statements. (RT, 02/09/05. pp. 79-80). Dr. Bittker had essentially been given the entire prosecution file to review. Dr. Bittker did not have the reports from Dr. Paglini or Dr. Brown at the time of his interview, but that he was given Dr. Brown's raw data of the Grisso examination. (RT, 02/09/05, p. 80). Dr. Bittker that he had not seen Dr. Paglini or Dr. Brown's reports until he had come to court the previous day. (RT, 02/09/05, p. 81).

Dr. Bittker testified that it was not clear to him the full scope of the rebuttal examination that would be necessary, so he expanded beyond the question of Miranda competency issue. It was Dr. Bittker's testimony that the Defendant evidenced language difficulties with him, and he was impressed at discrepancy between how the Defendant presented to him and how he presented in his voluntary statements in Chicago, in 2000. (RT, 02/09/05, p. 81).

When Dr. Bittker interviewed the Defendant, and was asking questions regarding whether or not he understood the charges being brought against him, he kept repeating a mantra that it was just bad stuff, bad stuff, bad stuff, but could not elaborate on the specific charges, and that he assumed a most childlike demeanor in the first part of the interview which was not fluid or fluent in the way it was in the Chicago police presentation. Dr. Bittker opined, at the time, that the Defendant was attempting to appear far less intelligent to him than his testing would reflect. (RT, 02/09/05, pp. 81-82).

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Dr. Bittker's summary impression of the Defendant was, given the presentation, that he suffered a learning disability, largely language based, with a math element to it; however, the presentation was in contrast with what Dr. Bittker would consider to the Defendant's operational intelligence that was demonstrated in the crimes he was alleged to have committed. (RT, 02/09/05, p. 92). Dr. Bittker testified that the Defendant acknowledged past crimes of auto theft and drug dealing, but not the armed robbery. Dr. Bittker explained that auto theft and drug dealing is going to require some sophistication in thought, in terms of knowing how to drive a car and get into a car that is not your own, knowing how to break into a car. Dr. Bittker further explained that in order to deal drugs, one needs to be aware of when you have potential customer, how to approach the customer, how to distinguish the customer from somebody who may be undercover, and ultimately how to procure the drugs in a safe way. All of which requires operational intelligence. (RT, 02/09/05, pp. 92-93).

Dr. Bittker testified that the Defendant was more disclosing when giving personal history then when Dr. Bittker attempted to interview him with regard to crimes in question. (RT, 02/09/05, p. 94).

Dr. Bittker sat through Dr. Paglini and Dr. Brown's testimony. Dr. Bittker further testified that that the defense experts offered three fundamental conclusions. The first, a conclusion that Dr. Bittker felt is not in dispute, was that the Defendant had a language focus learning disability. The second, that Defendant was unable to intelligently waive his Miranda Rights based on the disability and abetted by, according to the defense, the lack of adequate explanation of what he was waiving. Third, the confession may have been coerced under threat or coincident to torture. (RT, 02/09/05, pp. 95-96).

In opposing the two remaining fundamental conclusions offered by the defense experts, Dr. Bittker testified that he was familiar with the Grisso test that Dr. Brown administered, but he has never used the Grisso test. Dr. Bittker stated that although the test had been standardized he would argue that it is not generally accepted as a test that is reflective as the identity of competency to confess. Dr. Bittker testified that the test had not been employed sufficiently or widely used.

Moreover, Dr. Bittker pointed in evidence to the fact that if he gave Dr. Paglini's CV credit and Dr. Brown's credit, along with his own CV, there is forty years of cumulative forensic and psychological experience with only one use of the test which was Dr. Browns.[6] (RT, 02/09/05, p. 96).

Dr. Bittker testified that the Grisso test offers a caveat which had not been brought into testimony, which was as follows: "Third it is important to recognize the instrument does not measure the validity of the waiver Miranda Rights or legal competency to waive Miranda Rights. The instruments provide information that is relevant to the legal question, but they do not answer the legal question." Dr. Bittker testified that the caveat was taken directly from Dr. Grisso book. (RT, 02/09/05, p. 97).

Dr. Bittker testified that he found Dr. Brown's opinion be inconsistent, when hypothesizing two things: first, if the Defendant is learning disabled, something which Dr. Bittker concurred, then it would have to be hypothesized that at some time prior to the Defendant's confession, voluntary statement that he was coerced, it would have to be hypothesized that learning disability didn't occur or he had an unusual capacity to retain information coincident to what he was coerced into testifying to in the two and-a-half hours off tape. (RT, 02/09/05, pp. 100-101).

Dr. Bittker testified that in distinguishing verbal from instrumental intelligence, the Defendant clearly scored poorly on all the verbal tests and on the mathematics test; however, he scored within normal range on the T.O.N.I., indeed slightly above average, which means he scored better than fifty-four out of a hundred people. Dr. Bittker testified that scoring well on the T.O.N.I. is important here because it is an assessment of non-verbal intelligence and is a reflection of one's innate intelligence. (RT, 02/09/05, pp. 104-105).

Dr. Bittker testified that the Defendant had four prior arrests where Miranda could have been given and has been incarcerated previously. Additionally, Dr. Bittker testified

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[6] So as not to appear as if he were misleading the Court, Dr. Bittker later clarified that the Grisso test had only been in existence for six years, making the cumulative forensic and psychological experience between the experts, with only one use of the test eighteen years.

that the crimes allegedly committed by the Defendant indicate that he is streetwise in his effort to avoid detection. Such as his use of a condom to avoid DNA evidence, his burning down an apartment to avoid getting caught, his running from the police, and his going back to the scene of the murder to pick up the shells that were expanded.

Dr. Bittker testified that the Defendant would evidence some awareness that would indicate that he had the capacity to protect himself. In particular the use of condoms and the presence of mind to retrieve shells would indicate a level of sophistication that is, at least, average if not above average. Additionally, the Defendant's using Saran Wrap when he didn't have a condom available indicates independent thinking, which indicates a level of street smarts. (RT, 02/09/05, pp. 105-106).

Dr. Bittker testified that he would concur with both defense doctors that the defendant was not malingering, as it related to reading, spelling, and reading comprehension; however, the element of testing that occurred on the stand, with regard to Defendant's ability to have very vivid recall of events when it suits him, particularly when they were talking about allegations of coercion and threats of torture, caused Dr. Bittker to believe that the Defendant's interview behavior with him, at least during the first part of the interview, was so childlike as to warrant Dr. Bittker's belief that the Defendant was being pseudo naïve.

Dr. Bittker did not consider the defendant to be psychotic or suffering from disassociative disorder, nor was he regressing suddenly into a childlike state coincident to the threat of Dr. Bittker's interview with him. Dr. Bittker testified that the most parsimonious explanation was that Defendant's behavior was a naïve attempt to feign innocence. (RT, 02/09/05, pp. 106-108).

Dr. Bittker concluded that the Defendant is learning disabled; that he had an operational intelligence as reflected in the T.O.N.I., and past and currently behaviors; that the Grisso test, although relevant, is not conclusive and not generally accepted, and that Defendant's interview behavior and representation of the facts have changed since his voluntary statement, so that the defense allegations of coercion during the interview was inconsistent with a coerced statement. (RT, 02/09/05, pp. 108-109).

Dr. Bittker testified that he could not agree with Dr. Brown's certainty that the Defendant couldn't understand his rights, and that he could not state with a reasonable degree of medical certainty that the Defendant did not understand his rights. (RT, 02/09/05, p. 109).

On cross-examination, Dr. Bittker could not state within a reasonable degree of medical or psychiatric certainty that the Defendant did understand his rights when they were read to him in August 2000, either. (RT, 02/09/05, pp. 109-110.). Dr. Bittker testified that one's understanding of their Miranda Rights does not necessarily require reading and spelling. (RT, 02/09/05, p. 145). Dr. Bittker further pointed out that the problem with the Grisso test was that it had not been extensively applied and that it is a retrospective test; in this case given two years after the fact, which makes it less reliable. (RT, 02/09/05, p. 135-136).

LEGAL ANALYSIS IN SUPPORT OF THE STATE'S ASSERTION THAT THE DEFENDANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS

Before the accused's statements are brought before the jury there must be a hearing in front of the judge, outside the presence of the jury, pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). At the hearing, the judge hears what the suspect told the police and the circumstances under which the suspect made the statements. Then the judge decides (1) whether the statements were "voluntary" using the totality of the circumstances and (2) whether the statements were given after proper Miranda warnings, or whether Miranda was violated, or applicable.

The burden to ask for such a voluntary hearing is on the defendant. *See* Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Nevada has adopted the procedure set forth, often referred to as the "Massachusetts" rule. Grimaldi v. State, 90 Nev. 89, 518 P.2d 615 (1974).

If the statement was involuntary, it ceases to exist legally and can not be used for any purpose. *See* Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978).

The prosecution has the burden of proving by a preponderance of the evidence (1) the

voluntariness of a confession, as well as (2) the waiver of a suspect's Fifth Amendment Miranda rights as being voluntary, knowingly, and intelligently made. Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994). The "totality of the circumstances" test is the standard for determining voluntariness of a statement. Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996); Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

With regard to analyzing a waiver of Miranda rights, the test is whether the waiver was "knowingly and intelligently made." Tomarchio v. State, 99 Nev. 572, 576, 665 P.2d 804 (1983); Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880 (1981). The Nevada Supreme Court has stated:

> . . . Moreover, the Miranda waiver validity must be determined in each case through an examination of the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318 (1993) ("after reviewing the totality of the circumstances, we conclude that there was sufficient evidence to indicate that Anderson knowingly and intelligently waived his rights.").

I.

DEFENDANT'S CONFESSIONS AND ADMISSIONS WERE FREELY GIVEN AFTER HE WAIVED HIS MIRANDA RIGHTS

The State would first point out that no express waiver of Miranda rights is necessary. If a suspect, like the Defendant here, appears to understand the rights and acts in a manner consistent with waiver, it is reasonable to find an implied waiver.

In North Carolina v. Butler, 441, U.S. 369, 99 S.Ct. 1755 (1979), the United States Supreme Court reversed a state supreme court for holding that Miranda required an express waiver. In Terrovona v. Kincheloe, 912 F.2d 1176 (9th Cir. 1990), *cert. denied*, 499 U.S. 979, the Ninth Circuit concurred. In that case, as has occurred in the beginning of this case, a defendant reacted to questions by unhesitatingly making statements intended to exculpate himself.

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Recently, in Mendoza v. State, 130 P.3d 176 (2005), the Nevada Supreme Court addressed the issue of whether a written or oral statement of a Miranda waiver of the right to remain silent is invariably necessary. In denying such a claim and determining that a waiver may be inferred from the actions and words of the person interrogated, the Court made clear:

> A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. *See* Miranda, 384 U.S. at 436 at 444 (1966); *see also*, Floyd v. State, 118 Nev. at 171, P.3d at 259-60). "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." U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (*citing* Untied States v. Pinion, 800 F.2d 976, 980 (9th Cir. 1986)). A written or oral statement of waiver of the right to remain silent is not invariably necessary. *See* North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979). Rather, a waiver may be inferred from the actions and words of the person interrogated. *Id.*
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> A detective read Mendoza his rights in Spanish, and Mendoza never expressed difficulty understanding the nature of his rights or the content of the subsequent questioning. Further, Mendoza never expressed a desire not to speak. A review of the totality of the circumstances reveals that Mendoza voluntarily, knowingly, and intelligently waived his Miranda rights. [FN28][7]

In Elvik v. State, 114 Nev. 883, 965 P.2d 281 (1998), a juvenile defendant was convicted of murder and robbery. At that time of his arrest, the defendant was fourteen years of age and lived with his grandparents in Carson City. Until one week prior to the murder, Elvik lived with his mother in Tustin, California. Id. On appeal, Elvik argued that the district court erred in admitting statements that he made during the interrogation conducted by Tustin police officers on the evening of his arrest because he did not knowingly waive his Miranda rights, his mother was not present, he was not informed that his statement could be used against him in a criminal court and he could be tried as an adult, and his statements were coerced. Id.

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[7] [FN28] Given the wealth of evidence pointing to Mendoza's guilt, even if a Miranda violation had occurred, any error in admitting Mendoza's un-Mirandized statement is harmless beyond a reasonable doubt. *See* Arizona v. Fulminante, 499 U.S. 279, 295-96, 111 S.Ct. 1246 (1991).

Elvik claimed that that he did not waive his Miranda rights because, after one of the officers recited the rights and asked Elvik if he wished to speak to the officers, Elvik replied, "Yeah, I guess." Elvik argued that the reply was ambiguous and did not constitute formal waiver. Id.

In affirming Elvik's conviction, the Nevada Supreme Court stated:

> When a defendant waives his Miranda rights and makes a statement during a custodial interrogation, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence. Quiriconi v. State, 96 Nev. 766, 772, 616 P.2d 1111, 1114 (1980). Although Elvik provides no authority requiring the presence of a parent during the interrogation of a juvenile, we believe that, in light of Elvik's age, the absence of a parent during his interrogation should be considered in reviewing the totality of the circumstances bearing on the voluntariness of his statements. *See* People v. Lara, 67 Cal.2d 365, 62 Cal.Rptr. 586, 432 P.2d 202 (Cal.1967) (age and presence of parent are factors in determining voluntariness).

Id., at 890-891.

As for the issue of whether the interrogating officers failed to inform Elvik that his statements could be used against him in an adult trial in criminal court, the Nevada Supreme Court stated:

> Clearly, neither police officers nor juvenile authorities should be allowed to mislead a youth in order to obtain a confession. A juvenile should be advised of his rights and informed of the possibility of an adult trial. But where the nature of the charges and the identity of the interrogator reflect the existence of an unquestionably adversary police atmosphere and the suspect is reasonably mature and sophisticated with regard to the nature of the process, resulting statements will be admissible in a criminal trial provided that the record otherwise supports a finding of voluntariness. Quiriconi, 96 Nev. at 771, 616 P.2d at 1114 (citation omitted). Although Elvik was not informed of the possibility of an adult trial, he knew that he was being questioned by police investigators who wished to discuss the shooting incident, and the interrogation took place at a police station. Hence, the nature of the charges and the identity of the interrogator reflected the existence of an "unquestionably adversary police atmosphere." We further note that Elvik was reasonably mature and sophisticated with regard to the nature of the process, as he is of above average intelligence and had been

> arrested on at least one previous occasion. [FN7][8] Accordingly, we conclude that the interrogating officers' failure to explain to Elvik that his statements could be used against him in an adult
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> trial in criminal court is not alone sufficient to render Elvik's statements inadmissible.

Id., 114 Nev. 883 at 891.

The Court went on to address the voluntariness of Elvik's confession and stated:

> Finally, Elvik argues that his statements were not voluntary because the interrogation was coercive. A confession is inadmissible unless freely and voluntarily given, Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934, 940 (1989), and, "[i]n order to be voluntary, a confession must be the product of a 'rational intellect and a free will.' " Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (quoting Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960)). In determining whether a confession is the product of a free will, this court employs a "totality of the circumstances test" to determine "whether the defendant's will was overborne when he confessed." Passama, 103 Nev. at 214, 735 P.2d at 323; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, "a confession obtained by physical intimidation or psychological pressure is inadmissible." Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992). (citations omitted).

Id., 114 Nev. 883 at 892.

In Koger v. State, 117 Nev. 138, 17 P.3d 428 (2001), our Supreme Court addressed issues similar to those raised by the Defendant in this case. In Koger, *supra*, the Defendant was convicted of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with use of a deadly weapon, after she and two co-defendant's robbed an armed courier of his gun and cash bags, at the office of Bianca Shoes. Using license plate information and a description of the car driven by Koger provided by witnesses, the police were able to located Koger and identify her as a suspect. Id.

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[8] [FN7] Elvik was arrested for the present offense and interrogated six days before his fifteenth birthday. A psychologist testified that Elvik performed "quite highly" on an intelligence test. The State claims that Elvik was also arrested on at least one prior occasion, for stealing a car from his mother's car lot, and was read his Miranda rights at that time.

During the course of their investigation, the police questioned Koger on three different occasions, the first occurring when Detectives Mayo and Popp questioned her at Treasure Island, her place of employment. Before questioning, Detective Popp admonished Koger of her Miranda rights, reading them from a card. Koger then answered the officer's questions, denying any knowledge of the robbery. Id.

Later that same day, at his office, Detective Mayo conducted a second interview of Koger. Prior to questioning, Detective Mayo again admonished Koger of her Miranda rights. Then, referring to their first interview, Detective Mayo inquired whether Koger had understood her rights "the first time." Koger responded, "kind of." Detective Mayo then asked, "Do you understand them now?" Koger responded, "Yes, I do." Koger was also given a Miranda waiver form which she read and signed. Id.

After further investigation, Detective Mayo found it necessary to interview Koger again. Twelve days after the first interview, Sergeant Lori Crickett interviewed Koger at the Las Vegas Metropolitan Police Department offices. Sergeant Crickett did not advise Koger again of her Miranda rights because, as Sergeant Crickett testified, Detective Pop informed her that Koger had been previously advised of her rights. Furthermore, Koger expressly told Sergeant Crickett that she had indeed been so advised. Koger then admitted her part in the robbery. Id.

In ruling that the district court properly admitted Koger's statements the Supreme Court stated:

> Koger's first claim was that she did not understand her rights as given by Detective Mayo during the second interview, therefore, that she did not waive her rights voluntarily. During the interview Koger responded that she "kind of" understood her rights given during the first interview at Treasure Island. Prior to further questioning, Detective Mayo again advised Koger of her rights and inquired whether she understood them at that time. Koger responded, "Yes, I do." Thereupon, Detective Mayo began the interview. The record shows no further indication of Koger attempting to stop the interview or otherwise invoking or misunderstanding her Miranda rights. In light of these facts, we conclude that Koger knowingly and voluntarily waived her Miranda rights before answering Detective Mayo and thus the trial court properly admitted her statements.

Id., 17 P.3d 428 at 430.

The Nevada Supreme Court also addressed the issue of "diluted or stale" warnings in Koger, *supra*. Koger had argued that she did not waive her Miranda rights voluntarily prior to the third interview with Sergeant Crickett, in which Koger admitted taking part in the planning and being present at the scene of the armed robbery. Koger's argument was based upon the fact that, although Sergeant Crickett reminded Koger of her previous Miranda admonition, Koger could not have remembered rights because the admonition had been given twelve days earlier. Id., 17 P.3d 428 at 430.

In concluding that the police did not fail to properly admonish Koger by relying on a Miranda admonition twelve days old, the Court held:

> The issue before us is, in essence, whether "the original warnings have become diluted or stale." State v. Beaulieu, 116 R.I. 575, 359 A.2d 689, 693 (1976), abrogated on other grounds by State v. Lamoureux, 623 A.2d 9, 14 (R.I.1993). We addressed this issue once before in Taylor v. State, 96 Nev. 385, 386, 609 P.2d 1238, 1239 (1980), in which this Court stated that "[w]here the accused has been fully and fairly apprised of his Miranda rights, there is no requirement that the warnings be repeated each time the questioning is commenced." Taylor, however, is factually distinct because it addressed a three-hour lapse of time between the Miranda admonition and the subsequent interview. Moreover, Taylor did not discuss relevant factors other than time that should be considered when weighing the totality of the circumstances as required in a Miranda analysis.
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> Faced with this issue, the Supreme Court of Rhode Island outlined various factors to consider:
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> > the time elapsed between the warnings and the interrogation which elicited the damaging response; whether the warnings and interrogations were conducted in the same or in different locales; whether the warnings and/or initial interrogation were conducted by the same person or persons who conducted the suspect interrogation; the extent to which the statements made by the accused in the later interrogation differ in any substantial respect from those made at the former; the apparent emotional, physical and intellectual state of the accused at the later questioning. Beaulieu, 359 A.2d at 693.
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> Certainly, the most relevant factor in analyzing whether a former Miranda admonition has diminished is the amount of time elapsed between the first reading and the subsequent interview. Most courts addressing the time factor have considered instances involving only a few hours. *See, e.g.*, United States v. Frankson, 83 F.3d 79 (4th Cir.1996) (two and one-half hours); Evans v.

McCotter, 790 F.2d 1232 (5th Cir.1986) (approximately three hours); Baskin v. Clark, 956 F.2d 142 (7th Cir.1992) (thirty minutes); Patton v. Thieret, 791 F.2d 543 (7th Cir.1986) (forty minutes); U.S. ex rel. Henne v. Fike, 563 F.2d 809 (7th Cir.1977) (nine hours); U.S. v. Boyd, 180 F.3d 967 (8th Cir.1999) (one and one-half or two hours); People of Territory of Guam v. Dela Pena, 72 F.3d 767 (9th Cir.1995) (approximately fifteen hours); Ballard v. Johnson, 821 F.2d 568 (11th Cir.1987) (three to four hours).

Other courts have addressed time periods of one day or more. *See, e.g.*, United States v. Andaverde, 64 F.3d 1305 (9th Cir.1995) (one day); Puplampu v. United States, 422 F.2d 870 (9th Cir.1970) (two days); Maguire v. United States, 396 F.2d 327 (9th Cir.1968) (three days). The outer limit extends to one week as discussed in Martin v. Wainwright, 770 F.2d 918 (11th Cir.1985),[9] and -- under certain circumstances two weeks as discussed in Biddy v. Diamond, 516 F.2d 118 (5th Cir 1975).

In the above cases, the courts determined that statements made following the time interval were covered by the previous Miranda warnings and that the defendants could not successfully challenge the voluntariness of the statements based solely on the passage of time. We are not aware of any cases in which a court determined that the intervening time period was too long to invalidate the prior Miranda warnings.

The case at hand requires deliberation, however, because twelve days passed between Koger's April 22 interview with Detective Mayo, in which she was apprised of her Miranda rights, and her May 4 interview with Sergeant Crickett, in which Koger made further inconsistent and incriminating statements. Twelve days extends to the outer limit of the elapsed time allowed by courts previously facing this issue. Arguably, this case lies within the parameters of Biddy, which allowed an interim period of fourteen days. But in Biddy, the Fifth Circuit determined that the defendant knew of her Miranda rights because she had exercised those rights at various times during the two-week period. *See* id. at 123. Specifically, defendant Biddy had requested the presence of counsel twice and opted to remain silent during certain interviews, and was thus particularly familiar with her rights. *See* id. at 120-21. In contrast to Biddy, there is no evidence that Koger exercised her Miranda rights before her interview with Sergeant Crickett. Moreover, unlike defendant Biddy, Koger did not have contact with the police during the interim period.

Thus, the longest period allowed in the cases fairly analogous to the instant

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[9] Opinion modified on other grounds by Martin v. Wainwright, 781 F.2d 185 (11th Cir. 1986).

> matter is one week as discussed in Martin. *See* Martin, 770 F.2d at 930. In Martin, the Eleventh Circuit determined that defendant Martin had been "fully warned, and knowingly and intelligently waived his Miranda rights" during a July 4 interrogation. Id. Before his confession seven days later on July 11, "Martin indicated that he still understood those rights ." Id. Thus, the court concluded that additional "Miranda warnings on July 11 would have been needlessly repetitious" and that the "confession was not obtained in violation of Miranda." Id. at 930-31.

Koger, 17 P.3d 428 at 432.

At the Denno hearing of the instant matter, Detective Kriston Kato testified that during his first interview with the Defendant, in Chicago, he advised the Defendant of his [Miranda] rights from memory,[10] although they do also have a department issue card in Chicago. Detective Kato testified that the Defendant indicated that prior to the questioning he understood those rights and stated that he wanted to talk. (RT, 03/08/04, p. 19; 19-23). Detective Kato drafted a report indicating that, prior to the questioning, he had advised the Defendant of his rights.

Later in the day, prior to the arrival of the Las Vegas Detectives, Detective Kato interviewed the Defendant again, re-advising him of his Miranda rights, to which Defendant stated that he understood, and was given the same rights that Detective Kato gave earilier. Detective Kato told the Defendant that the Las Vegas Police Department was coming to talk to him. At that time, Detectives Kato and Cirone, and the Defendant, went through basically the same conversation that Defendant had with Detectives Kato and Cunningham, earlier that morning. In the second interview, Defendant reiterated the same things as he had in the first interview. (RT, 03/08/04, p. 33; 9-19, p. 93).

At the Denno hearing, Detective Jensen testified that when they met with the Defendant in Chicago, Las Vegas Detectives identified themselves to the Defendant prior to beginning their interview with him. (RT, 03/08/04, p. 182; 1-7). Detective Jensen further

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[10] Detective Kato testified that he told the Defendant the following: "I advised him he had the right to remain silent, anything he said would be used against him in a court of law. And that he had the right to have an attorney present during any questioning. If you couldn't afford one, one would be appointed for him." (RT, 03/08/04, p. 19;10-15)

testified that the first thing that they did was re-Mirandize the Defendant with a LVMPD card, which they had the Defendant read aloud. The Defendant was having trouble pronouncing some of the words, although he did sound them out and read it to where Detective Jensen could understand what he was saying. Afterwards, Detective Jensen read the card out loud to the Defendant and asked him if he understood his rights, to which the Defendant stated that he did. They asked the Defendant to sign the card, and then they signed and dated it, and put the event number on it. (RT, 03/08/04, p. 142). Detective Jensen testified that the Defendant was not confused, nor did he seem not to understand. (RT, 03/08/04, p. 143). Detective Jensen did not ask the Defendant if he had any questions about the rights he had been read, but did ask the Defendant if he understood them, to which he stated he did. (RT, 03/08/04, p.144; 1-3).

As this Court may recall, Defendant is not new to the criminal justice system. Evidence presented at the Denno hearing established that the Defendant has engaged in prior criminal conduct in Chicago, Illinois, and was on probation for armed robbery, at the time he committed the instant crimes. Moreover, this Court heard testimony from the Defendant's own mouth that he had a juvenile conviction for unlawful taking of vehicle here in Nevada, for which he received probation. (RT, 02/08/05, pp. 46-47). At he hearing, the prosecution presented evidence to the Court which illustrated that this Defendant had five prior contacts with the criminal justice system, prior the instant case. (RT, 02/08/05, p. 48).

Defendant attempts to find significance in the fact that Detective Jensen, having advised the defendant of his rights (and performing an effective rule-of-thumb comprehension test by having the defendant read the rights aloud from the printed card), did not repeat the admonition during the tape-recorded interview or take any further steps to ensure that he Defendant still understood his rights. Specifically the following conversation between Detective Jensen and the Defendant occurred:

BJ. O.K. Apartment number 3. Ah, Justin, do you know this is being recorded?

A. Yes sir.

BJ. Is that O.K. with you?

A. Fine by me.

BJ. Secretary, ah, Detective James LaRochelle....

JL. P number 4353

BJ. Justin, before we spoke today, I gave you a Rights of Miranda card, do you remember that?

A. Yes sir.

BJ. And do you remember signing that?

A. Yes sir.

BJ. O.K. and do you understand your rights?

A. **Hm, kinda I do, but sometimes I . . . . you know, yes.**

BJ. Did you read the card out loud?

A. Yes, to you.

Clearly, the Defendant affirmatively acknowledged reading and signing the card, as well as understanding those rights. (Defendant's Voluntary Statement, 08/12/00, 1930 hours, Chicago time, pp. 2-3). The Defendant then goes on to give a 77 page voluntary statement to the Las Vegas Detectives describing the crimes for which he is charged in this case. At no time during the 45 minutes of taped statement does the record show any indication of the Defendant attempting to stop the interview or otherwise invoking or misunderstanding his Miranda rights.

The defense employed two experts in the field of psychiatry and psychology to support their assertion that Defendant's wavier of Miranda was not knowingly and intelligently given. Essentially, the defense is suggesting that because the Defendant is learning impaired and has a low I.Q., he could not have possibly understood his Miranda warnings.

Voluntariness must be reviewed under a standard of the totality of the circumstances in the particular case. Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 232 (1987) The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence. Stringer v. State, 108 Nev. 413, 418, 836 P.2d 609, 612 (1992). In making this

determination, the "mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, 479 U.S. 157, 165, 107 S.Ct. 515, 521 (1986) There must also be some sort of "state action" tending to exploit the confessant's mental state. Id.

In Young v. State, 103 Nev. 233, 737 P.2d 512 (1987), Young was convicted of murder, fetal manslaughter and burglary. Trial evidence revealed that Young, was mildly retarded, functioning at the level of a nine-year-old child; his score on the Wechsler Adult Intelligence test placed him in the bottom two percent of society. Id.

On appeal, Young argued that because of his low intelligence quotient, his statements should have been deemed involuntary. In denying Young's claim the Nevada Supreme Court stated:

> We conclude that Young's confession was voluntary; the determination by the lower court was not erroneous. Young also contends that because of his low intelligent quotient, his statements must be deemed involuntary. We rejected a similar argument in Ogden v. State, 96 Nev. 258, 607 P.2d 576 (1980). Young had eleven years of education as an average student, and he repeatedly indicated to police officers that he understood his rights. He even read a copy of the Miranda rights out loud to police officers. He had been informed of those rights many times in his past. There was no error.

Id., 103 Nev. 233 at 235.

Much like the facts of Young, *supra*, the Defendant in this case has had ten years of education; and, while school records from Chicago suggest he is a below average student, he did manage to make it through the 10th grade. Additionally, Defendant had been given Miranda rights no less than four times by Detectives involved in this investigation. The evidence before the Court, through testimony from Chicago and Las Vegas detectives, the tape recorded statement from Las Vegas detectives, as well as a signed copy of a Waiver of Rights card from Las Vegas detectives, clearly illustrates that the Defendant understood his rights and wanted to talk to the police.

Additionally, it cannot be said that this Defendant has not been previously informed of his Miranda rights, given his five prior contacts with the criminal justice system. (RT,

02/08/05, p. 48). As this Court may recall, while the Defendant testified at the hearing that he had "NEVER" been given Miranda warnings until he was arrested in this case, the State presented evidence that such a statement was simply not true, in the form of the police reports from Defendant's prior armed robbery conviction in Chicago.

Unlike the facts in Young, *supra*, the instant Defendant is not anywhere near mildly retarded. The defendant is simply learning disabled, with an I.Q. of 78. In fact, Dr. Bittker's testimony that the Defendant has a high level of "street smarts" and has evidenced uncanny recall when it suits his needs, along with his ability to take the steps to protect himself from being caught during the commission of all of the crimes charged in this case, evinces an above average level of sophistication.

Additionally, the State would direct this Court's attention to the preliminary hearing testimony of Laura Zazueta, one of the defendant's numerous victims. After the defendant burst into her residence with a gun, he told Laura to give him all the money that she had, in both the English and Spanish language. Thus, despite his learning disability, this Defendant has learned to speak to Spanish. Moreover, the Defendant was bright enough to speak his victim's language while taking her money and terrorizing her and her family.

Clearly, under the totality of the circumstances approach, it cannot be said that the Defendant did not voluntarily, knowingly and intelligently waive his Miranda rights, on several occasions, in this matter.

The State would further point out to this Court that the Assessing Understanding and Appreciation of Miranda Rights Test that Dr. Brown administered should not be considered by this court as it is not scientifically accepted in any community. It is a test administered to juveniles, it does not answer the legal question before this court, which is the competency of this Defendant to waive his Miranda rights, and is even less reliable in this matter, given the fact it was administered to the Defendant two years after the issue at hand.

In Connecticut v. Griffin, 279 Con. 266, 869 A.2d 640 (2005), the Defendant was convicted of manslaughter in the first degree with a firearm and carrying a pistol without a permit. Prior to trial, the court denied in part the defendant's motion to suppress his

statement, which was based upon the testimony of a clinical psychologist using Grisso's "testing instrument" at issue here, and granted the State's motion in limine. The court found Grisso's protocol was inadmissible under a Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), analysis, concluding that the defendant "failed to prove that the methodology underlying the technique was scientifically valid." Id. Defendant appealed, and the Appellate Court affirmed.

The Supreme Court of Connecticut upheld the Appellate Court, holding that the protocol utilized by the clinical psychologist to determine the validity of defendant's waiver of Miranda rights was subject to a preliminary determination of scientific reliability, and that the protocol was not scientifically reliable. Thus, the test at issue here has already been found to be unreliable under our circumstances.

Additionally, the test itself has caveats, directly from Dr. Grisso himself, one of which states: ***Third it is important to recognize the instrument does not measure the validity of the waiver Miranda Rights or legal competency to waive Miranda Rights. The instruments provide information that is relevant to the legal question, but they do not answer the legal question."***

Based upon the fact that the protocol used by clinical psychologists who administer the Understanding and Appreciation of Miranda Rights Test is not scientifically reliable, this Court must not consider the expert testimony of Dr. Brown as it relates to the defendant's testing in this particular area.

Moreover, because Defendant's statements cannot be suppressed on "learning disability" alone, and because this Court must look at the totality of the circumstances, there is absolutely no question that the Defendant's statements are admissible at the trial of this matter. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (post-arrest statements are admissible where a defendant is fully advised of his Miranda rights and makes a free, knowing and voluntary statement to the police).

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II. THE DEFENDANT'S CONFESSIONS AND ADMISSIONS TO LAW ENFORCEMENT WERE KNOWINGLY AND VOLUNTARILY GIVEN

The Due Process Clause of the Fourteenth Amendment requires that a confession must be voluntary to be admissible. Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934 (1989); Passama v. State, 103 Nev. 212, 214, 735 P.2d 321 (1987); Miller v. Fenton, 474 U.S. 104, 106 S. Ct. 445 (1985). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Rowbottom, *supra*, *citing* Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Passama, *supra*, citing Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745 (1963).

The United States Supreme Court has reiterated that certain interrogation techniques are so offensive to a civilized system of justice that they violate due process. Passama, *supra*; Miller, *supra*. A confession may also be rendered inadmissible if it is the result of promises which impermissibly induce the confession. Passama, *supra*; Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732 (1980). To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. Passama, *supra*, citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S. Ct. 2041 (1973).

In the instant case, the Defendant's motion asserts that the Chicago police elicited an involuntary confession from the Defendant by the following means:

1. Stating that what he did in Nevada was petty, and if he admitted to the facts they provided him, he would be treated leniently in Nevada.

2. Suggesting that if he did not admit to the facts that he would be taken to the "docks" and physically harmed.

3. Suggesting that a phone book could be used to harm him, and no marks would be apparent.

4. Refusing to honor his request to speak with his father while he was being questioned.

5. Refusing to allow Defendant's father to speak to the Defendant, his son, when his father requested to do so.

(Defendant's Motion, p. 32; 5-17).

First, the State would point out that there is nothing in the record which supports the Defendant's claim that he was threatened by Chicago Police, other than the Defendant's self-serving statements suggesting the same. In fact, the record contradicts the defendant.

During the hearing of this matter, Detective Kato testified that his supervisor, Lieutenant Farrell, received information from the Las Vegas police that they wanted the Defendant interviewed. (RT, 03/08/04, p. 39; 18-22, p. 49). Detective Kato testified that he reviewed documents faxed from Las Vegas in preparation of the interview. (RT, 03/08/04, p. 17). Detective Kato didn't have any problem with his lieutenant's request that he interview the Defendant, irregardless of the fact he was not arrested for crimes committed in his jurisdiction, because he was interested what the Defendant was thinking when he was doing all those things. (RT, 03/08/04, pp. 48-49).

Detective Kato stated that when he Mirandized the Defendant for the interview, the Defendant told him that he understood his rights and wanted to talk, causing Detective Kato to have to explain why the Defendant was there, which he did by mentioning crimes that had been committed in Las Vegas. The Defendant told Detective Kato that he understood, and began talking to Detective Kato about the incidents. (RT, 03/08/04, pp. 19-20).

The General Progress Report prepared by Detective Kato memorializing the statements indicates that the Defendant made some very general admissions regarding some of the crimes mentioned in the Las Vegas warrant, but denied any knowledge of others, and very much minimized his actions in all of the incidents he made admissions to.

Additionally, Detective Jensen testified at preliminary hearing and at the Denno hearing that he had been informed that the Defendant had been Mirandized after he was taken into custody by the Chicago Police, but prior to their conducting an informal interview. According to Detective Jensen, the interview occurred after the Defendant inquired into why he was arrested and what kind of crimes Las Vegas had him arrested for.

The Defendant's inquiry with the Chicago police as to why he was arrested was in the same vein as his inquiry to Detective Jensen, during the three telephone messages he left for Detective Jensen in Las Vegas on August 11, 2000, indicating that Defendant knew Las Vegas police were looking for him and he wanted to talk, along with the actual telephone conversation Defendant had with Detective Jensen, later that same day, that he would be back in Las Vegas at the end of August and everything could be taken care of then. (RT, 03/08/04, pp. 132-133).

Defendant's interaction with Las Vegas Police detectives is extremely telling of how he interacted with the Chicago Police as well. Moreover, the fact that the Chicago police did not have jurisdiction over the Defendant makes it entirely unbelievable that the Chicago police would threaten the Defendant with a "phone book" beating or threaten to take the Defendant to the "docks" if he did not answer their questions. Frankly, the State is astonished that the Defendant didn't accused the Chicago detectives of inducing him into confession, by providing him with chips and cookies upon his arrival at Area Four. At least there was evidence presented at the hearing that Defendant received sustenance from the Chicago detectives, which would have supported such a claim.

It is also an incredulous suggestion that the Chicago police would tell the Defendant that the crimes he had committed in Las Vegas were "petty" and that he would be treated leniently if he admitted to the facts that they provided him, since all of the crimes were serious felonies and the Defendant used a deadly weapon in the commission of the crimes. Additionally, during the Denno hearing, the Defendant testified that he could not tell the prosecutor exactly what the Chicago police detectives told him with regards to probation, but that they did mention probation. (RT, 02/08/05, p. 54). Defendant further testified that the word petty "means something that ain't really serious," and that he learned it while being here, from his attorneys. (RT, 02/08/05, pp. 56-57). That being said, if the Chicago detectives suggested the crimes were petty as Defendant asserts, he would not have known what they meant by it, because he recently just learned the definition from his attorneys here in Las Vegas.

The State would further point out that the Defendant did not ever mention to Las Vegas Police that he had been threatened or coerced to speak to Chicago police. Had the Defendant thought he was going to receive some kind of break from criminal prosecution in Nevada, it seems certain he would have discussed such an arrangement with the Las Vegas Detectives, because his future depended on it. Instead, Defendant discussed with Las Vegas Detectives, the fact that he knew he was in very big trouble and could even die for what he had done.

Additionally, had the Defendant been physically threatened with harm by the Chicago police, one would think that he would have told the Las Vegas police detectives about any physical threats of violence made by the Chicago detectives. Instead, he worried that people were going to think less of him for what he had done, and worried about whether the Las Vegas Detectives thought he was sorry for his conduct, as was evidenced by his statement to the Detectives as follows:

A. Do you think I'm sorry for what I did?

JL. Do you want me to ask you that? Do you think....are you sorry for what you did?

A. Yes I am, you know, and if I could turn back the hands of time, like I'm saying, I wish I could. God knows I wish I could.

(Defendant's Voluntary Statement, 08/12/00, 1930 hours, Chicago time, p. 76).

Another time, the Defendant further stated, in part:

Q. Is there anything else you'd like to add to this statement? Uh, something you feel is important that maybe I haven't asked you?

A. Yeah. I mean, yes there is.

Q. Go Ahead.

A. Man, I felt that, you know, if after this statement is over with, you know, all this is said and done, you know, I feel that people are gonna think the worst of me 'cause this happened, you know. And I don't want nobody to think the worst of me. I just want them to see what's on the inside of me, you know.....

(Defendant's Voluntary Statement, 08/13/00, 1500 hours, p. 22).

The Defendant also expressed to the LVMPD detectives that he slept better after talking to them and that it would be good for him if the people he hurt could find it in their heart to forgive him. (Defendant's Voluntary Statement, 08/13/00, 1500 hrs, pp. 23-24).

At the end of each statement given by the Defendant, detectives would ask the Defendant if there was anything else he wanted to add to the statement that they did not ask him. Each time, the Defendant expressed his remorse for what he had done. Obviously, this is not the type of scenario that suggests threats of force, coercion, or lack of free will.

Defendant would like this Court to rely on newspaper articles alleging brutalization as an interrogation tactic of Detective Kato, as well as an overturned case in Illinois, to suggest that Detective Kato's testimony cannot be trusted, and to substantiate Defendant's allegations of threats of force and coercion and lack of free will. Obviously, this Court was able to form a basic impression of Detective Kato during his testimony here in Las Vegas, as well as the testimony from the other witnesses who testified, which suggested that there was not a need for threats of force in speaking to this Defendant because he wanted to talk, in fact, in Defendant's own words, he felt better after he spoke to the detective and he slept better after he spoke to the detectives.

The Defendant's written argument suggests that a case entitled The People of the State of Illinois v. Ezekiel McDaniel, 326 Ill.App.3d 771, 762 N.E.2d 1086 (2001)[11], is the "crowning glory" against Detective Kato. (Defendant's Written Argument, p. 46; 11-14).

In that case, the Illinois Supreme Court, in a totality of the circumstances, under de novo review concluded the following:

> That the fourteen year old defendant's confession was involuntary based upon the followings factors: 1) defendant was 14 years old at the time of his arrest and interrogation and had very limited prior contact with the criminal justice system; 2) police conduct frustrated defendant's mother attempts to confer with defendant prior to his interrogation 3) the assigned youth officer had no interest in protecting defendant's welfare; and 4)

[11] Defense references the case as, Republic of the State of Illinois v. Ezekiel McDaniel, Appellate Court of Illinois, 1st Dist., 3rd Div. 326, Ill App. 3rd 771, 726 NE 2nd 1086.

> the timing and circumstances of the arrest contributed to the coercive nature of his interrogation.

Id., 326 Ill.App.3d 771 at 787, 762 N.E.2d 1086 at 1099.

In reading the aforementioned case, the State would point out that the 14 year old defendant filed a motion to suppress followed by an amended motion to suppress with the trial court and neither motion alleged police brutality. In fact, the first time the issue of police brutality was raised was during the suppression hearing. Likewise, the McDaniel's mother testified at the hearing that when she was able to see her son she did not notice any marks on him nor was he upset or crying. In the Appellate court's opinion itself, there is no finding that the defendant's confession was involuntary due to police brutality or threats thereof. The Illinois Court appeared far more concerned about the fact the defendant was 14 years old and taken out of his home at 2:00 a.m., taken to the police station where he was held for five hours without being able to speak to his mother, who was at the station and wished to speak to her son, as evidenced by her numerous telephone calls in the early morning hours to her son's godmother, Officer Sykes.

The Illinois Appellate Court determined that the conduct of the police in not allowing Defendant's mother to see her son to contribute to the coercive nature of the interrogation, in that that Detective Kato's testimony that he was never asked by the Defendant's mother to see the Defendant was not believable, thus the rest of his testimony was suspect to believability, especially the assertion that the Defendant did not want his mother present during questioning. Id., 326 Ill.App.3d 771 at 780, 762 N.E.2d 1086 at 1094.

Unlike the facts of the instant case, McDaniel was 14 years of age at the time of his arrest and had very little prior experience with the criminal justice system. Additionally, McDaniel's mother had right to speak to her son prior to questioning or be present during questioning based upon his status as 14 year old juvenile, and she evinced a desire to do so. In this case, there was simply no evidence presented at the Denno hearing that Defendant's father, mother or step-mother were ever present at the Area Four police station at any time. Obviously, if they weren't present, there can be no allegations that they made attempts to

confer with the Defendant which were ultimately thwarted by law enforcement. Moreover, while allegations were made in McDaniel, *supra*, that Detective Kato used threat of force and actually struck the child, McDaniel's mother's testimony refuted such claims at the suppression hearing and the trial court found the claim to be incredible. Additionally, the Appellate court completely refused to address the allegations in the Opinion.

Frankly, the State fails to see the significance of the court opinion in relation to the instant case.

In this case, Defendant's mother was aware that the Las Vegas Police were investigating numerous crimes involving the Defendant. As a result of that investigation the Defendant's mother's house was searched and the Defendant's mother gave detectives the telephone number for the Defendant's father, in Chicago, where the Defendant was staying at the time.

Thereafter, twice during police questioning, the Defendant's mother was on the telephone with various detectives investigating the cases; both times, the Defendant refused to speak to his mother. Clearly, both of the Defendant's parents were made fully aware of the fact that the Defendant was in custody and being questioned about his involvement in numerous instances of criminal activity that occurred in Las Vegas.

Although it is a non issue in the instant case, the State would remind this Court that there is no due process requirement that a juvenile suspect's parents be notified of his detention, or that they be present at interview or interrogation.

In United States v. Doe, 155 F.3d 1070, 1072 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that:

> The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the "totality of the circumstances." There is no due process requirement that a juvenile's parents be notified for the waiver to be valid, and we decline to create one. Rather, the lack of parental notification is one factor to consider in the totality of the circumstances. (citations omitted).

//

In Derrick v. Peterson, 924 F.2d 813 (9th Cir.1991), a juvenile defendant was alleged to be border-line retarded (psychologists testified that his IQ was 62 or, perhaps, 74). The Ninth Circuit held that the test is whether, under all the circumstances, the officers obtained the defendant's statement by physical or psychological coercion, or by improper inducement, so that the suspect's will was overborne. Id. The court further noted that there was no case that required that a juvenile's parents be notified as a prerequisite to admissibility of a statement. Id., 924 F.2d at 819.

Additionally, the State would remind this Court that the Defendant was 17 years of age at the time he committed the instant crimes. The Defendant was also on probation for a robbery conviction that occurred in Chicago, four years prior, at the time he was arrested for the arson, burglary, kidnapping, home invasion, first degree arson, attempt murder, and sexual assault crimes, some of which were facilitated with use of a deadly weapon, in this case.

As previously stated above, upon their arrival in Chicago LVMPD detectives learned from Sergeant Mahone that the Defendant had a previous robbery conviction in Chicago, that he was certifiable as an adult, and that he was treated as an adult in their jurisdiction.

The Juvenile Court Act found in NRS Chapter 62 does not, however, apply to the crimes of Murder or Attempt Murder or any related crimes arising out of the same facts as the Murder or Attempted Murder. Regardless of the age of the offender, or in the case where the offender is 16 years of age, or older, has a prior juvenile felony adjudication and is now charged with forcible Sexual Assault or any felony with use of a deadly weapon. (NRS 62.020, 62.040). Therefore, a child charged with such an offense is not entitled to the Chapter 62 protections including the presence of a parent. *See* Shaw v. State, 104 Nev. 100 (1988). (Emphasis added).

In this case, based upon Defendant's prior felony juvenile adjudication for robbery, in Chicago, and the fact that the new crimes that he was charged with having committed included forcible sexual assault and various other felonies involving the use of a deadly weapon, Defendant was not entitled to the presence of either parent in this case, although,

the record reflects the Defendant was, in fact, offered the opportunity to speak to his mother, on two occasions, and by his own mouth indicated that he could not speak to his mother, or his father, about his actions because they would think he was crazy.

As previously stated above, Defendant was arrested at his father's house in Chicago. Moreover, Detective Jensen testified that Detective LaRochelle interviewed George Porter during their stay in Chicago. (RT, 03/08/04, p. 133, pp. 229-230). Yet, no testimony was provided at the evidentiary hearing that would suggest either parent was stopped from seeing or speaking to the Defendant, at any time, from the inception of this case. It is the State's position that the Denno hearing provided the Defendant had ample opportunity to produce his mother and father as witness to substantiate his assertions that he was not able to speak to his parents.

CONCLUSION

Based upon the above and foregoing Points and Authorities the State respectfully requests Defendant's Motion to Suppress Confessions and Admissions to Metro and Chicago Detectives Based Upon Violation of Miranda Rights be denied.

DATED this 18th day of August, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s//LISA LUZAICH
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 18th day of August, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JUSTIN D. PORTER, ID#1682627
CLARK COUNTY DETENTION CENTER
330 S. Casino Center Blvd.
Las Vegas, Nevada 89101

BY M. Warner
Secretary for the District Attorney's Office

mmw/SVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN JUG CAPRI PORTER, Appellant, vi. THE STATE OF NEVADA, Respondent.	No. 54866

APPELLANT'S APPENDIX – VOLUME III – PAGES 506-750

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS
HOWARD S. BROOKS
PHILIP JAY KOHN

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUSTIN JUG CAPRI PORTER
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY _____
Employee, Clark County Public Defender's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN JUG CAPRI PORTER, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 54866

APPELLANT'S APPENDIX – VOLUME III – PAGES 506-750

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JUSTIN PORTER
Case No. 54866

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ORIGINAL

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CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER
aka Jug Capri Porter,
#1682627

Defendant.

Case No. C174954
Dept. No. XVI

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S CONFESSIONS AND ADMISSIONS TO METRO AND CHICAGO DETECTIVES BASED ON VIOLATION OF HIS MIRANDA RIGHTS AND INVOLUNTARINESS AND REQUEST FOR JACKSON V. DENNO HEARING

DATE OF HEARING: 12-17-02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through DOUGLAS W. HERNDON, Chief Deputy District Attorney, and files this Opposition to Defendant's Motion to Suppress Defendant's Confession and Admissions to Metro and Chicago Detectives Based On Violation of His Miranda Rights and Involuntariness and Request for Jackson v. Denno Hearing.

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This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 26 day of November, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
DOUGLAS W. HERNDON
Chief Deputy District Attorney
Nevada Bar #004286

POINTS AND AUTHORITIES

STATEMENT OF THE CASE PERTINENT TO THIS OPPOSITION

Defendant is charged by way of Amended Criminal Information with the crimes of Burglary While In Possession of a Deadly Weapon (Felony - NRS 205.060, 193.165), First Degree Kidnapping With Use of a Deadly Weapon (Felony - NRS 200.310, 200.320, 193.165), Sexual Assault With Use of a Deadly Weapon (Felony - NRS 200.364, 200.366, 193.165), Robbery With Use of a Deadly Weapon (Felony - NRS 200.380, 193.165), First Degree Kidnapping with Use of a Deadly Weapon With Substantial Bodily Harm (Felony - NRS 200.310, 200.320, 193.165), Sexual Assault With Use of a Deadly Weapon With Substantial Bodily Harm (Felony - NRS 200.364, 200.366, 193.165), Attempt Murder With Use of A Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), First Degree Arson With Use of a Deadly Weapon (Felony - NRS 205.010, 193.165), First Degree Kidnapping With Use of a Deadly Weapon, Victim 65 Years of age or Older (Felony - NRS 200.310, 200.320, 193.165, 193.167), Sexual Assault With Use of a Deadly Weapon Victim 65 Years of Age or Older (Felony - NRS 200.364, 200.366, 193.165, 193.167), Robbery With Use of a Deadly Weapon, Victim 65 years of Age or Older (Felony - NRS 200.380, 193.165, 193.167), Battery With Intent to Commit a Crime, Victim 65 Years of Age or Older

(Felony - NRS 200.400, 193.167), Attempt Robbery With Use of a Deadly Weapon (Felony - NRS 200.380, 193.165, 193.330), and Murder With Use of a Deadly Weapon (OPEN MURDER), (Felony - NRS 200.010, 200.030, 193.165).

The Defendant is specifically charged with forty-two separate crimes, committed against eleven different victims, between February 1, 2000 through June 9, 2000.

On September 25, 2002, Defendant filed a Motion to Suppress his Confessions and Admissions to Metro and Chicago Detectives based on Violation of His Miranda Rights and Involuntariness and Request for a Jackson v. Denno Hearing. The State's Opposition follows.

I. STATEMENT OF GENERAL CASE FACTS

All of the following Statement's of Facts refer to the Defendant as the perpetrator of the crimes being described. The Defendant was linked to everyone of the following situations by either DNA evidence, fingerprint evidence, shoewear impression evidence, admission or confession evidence, eyewitness identification and/or by a combination of a number of the above types of evidence.

A. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST TERESA TAYLOR

Defendant is charged by way of Second Amended Information with Count I- Burglary While in Possession of a Deadly Weapon; Count II - First Degree Kidnapping With Use of a Deadly Weapon; Counts III through VIII - Sexual Assault With Use of a Deadly Weapon, for crimes that were committed against victim Teresa Taylor.

On February 1, 2000, at approximately 7:30 p.m., Teresa Taylor heard a knock on the front door of her residence, located at 2895 E. Charleston, #2-106, Las Vegas, Nevada. Teresa had spoken to her mother earlier and was expecting her mother to come to the residence and pick something up from her.

Ms. Taylor opened the door and encountered the Defendant, whom she thought was

looking for her sister. Ms. Taylor told the Defendant that her sister was not there, and he asked her for a drink of water. Ms. Taylor went and got the Defendant water and took it to the Defendant, who was still standing outside the residence. The Defendant asked Ms. Taylor if they could go in the house and she told him no. Not caring about Ms. Taylor's protest, the Defendant entered her residence and sat down on her couch. Ms. Taylor grabbed the Defendant's arm and attempted to pull him out of the apartment, at which time the Defendant pulled a knife on her.

After brandishing the weapon, the Defendant ordered Ms. Taylor into her bedroom and demanded that she disrobe. Fearful for her life, Ms. Taylor took her clothes off. Thereafter, the Defendant instructed Ms. Taylor to lay down on the bed. Defendant pulled down his pants and got on top of Ms. Taylor, placing his penis in her vagina, while still holding the knife in his hand.

The Defendant got off of Ms. Taylor and started looking around her apartment for anything valuable. The Defendant took approximately $30 or $40 from Ms. Taylor's purse. The Defendant then went back to Ms. Taylor and put his penis in her mouth. Afterwards, the Defendant peed on Ms. Taylor's floor and began looking around her apartment for valuables again. The Defendant forced Ms. Taylor follow him around the apartment while he did that. The Defendant took some change from a vase in Ms. Taylor's living room but left the pennies behind.

The Defendant forced Ms. Taylor into the restroom of the apartment and told her to wipe her vaginal area. The Defendant took the towel from Ms. Taylor and began wiping her vagina area himself. Thereafter, the Defendant took Ms. Taylor back into the bedroom and forced her to lay down on the bed, on her stomach. The Defendant then placed his penis in Ms. Taylor's vagina, from behind, against her will. Afterwards, the Defendant forced Ms. Taylor to put his penis in her mouth a second time. After the Defendant sexually assaulted Ms. Taylor he stated, "You know you were raped, right?"

The Defendant permitted Ms. Taylor to put pants on and then tied her hands, behind her back, with a telephone cord. The Defendant also tied Ms. Taylor's feet together and then

tied then to her hands. The Defendant dragged Ms. Taylor to the closet and put her inside. The Defendant then put water down Ms. Taylor's pants, in an attempt to remove his DNA from her vaginal area. Afterwards, the Defendant placed a knife from Ms. Taylor's kitchen in the closet with her, for the purpose of freeing herself after he left the residence. Ms. Taylor was eventually able to cut herself free and notify the police.

B. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LEONA CASE

Defendant is charged by way of Second Amended Information with Count VII- Burglary While in Possession of a Deadly Weapon; Count IX - First Degree Kidnapping With Use of a Deadly Weapon; Counts X, and XII - Sexual Assault With Use of a Deadly Weapon; Count XI - Attempt Murder With Use of a Deadly Weapon; Count XIII - Robbery With Use of a Deadly Weapon; and Count XIV - First Degree Arson, for crimes that were committed against victim Leona Case.

Leona Case was born August 18, 1957. On March 7, 2000, Leona resided in a studio apartment located at 2900 E. Charleston, #50. Leona lived alone at that time, and her apartment was located on the bottom floor.

At approximately half past midnight on March 7, 2000, Leona was in her living room, watching a movie, when someone knocked on her door. Leona put the safety chain on her door and then opened it to see who was there, and she recognized the individual as somebody who had knocked on her door about three to four days prior, looking for the person who previously lived in the apartment. The first time the person at Leona's door had knocked on it, he asked if he could use her telephone, after telling her he was looking for the prior tenant. Leona took her telephone outside on that occasion, and allowed the Defendant to use it outside. The first time the person had knocked on Leona's door and asked to use her telephone, he had a friend with him. Defendant introduced himself to Leona by stating, "My name is Jug, and this is my buddy, Chris.

Leona recognized the person at the door on March 7, as being the individual who

identified himself as "Jug." As he did the first time he knocked on Leona's door, Defendant again asked to use Leona's telephone but because it was so late at night, Leona told him no, and shut the door.

Leona was sitting in her chair in the living room, and heard something rattling at the window. Thereafter, Leona heard a couple of bangs on her door and then the Defendant kicked it open, off of the frame. After the Defendant entered Leona's apartment by kicking the door in, Leona picked up the telephone and attempted to call 911, however, the call did not go through because the Defendant slapped Leona on the face and knocked her the ground, taking the phone away from her.

Defendant went into Leona's kitchen, opened the drawers, and got out a steak knife. Defendant first used the knife to threaten Leona, in order to find out where her money was and to move her into the bedroom. Defendant asked Leona where her money was at and she told him she did not have any, however, Defendant saw Leona's purse sitting on her dresser and took $44.00 and some food stamps from it. Defendant also told Leona to give him a little ten carat ring she was wearing that said "mom" on it. Leona gave the Defendant the ring because he had a knife.

Defendant wielded the knife and demanded Leona to go into the bedroom, where he had her hold a lamp that was beside the bed, while he cut the cord off of it. After cutting the cord off with the knife, Defendant put some kind of knot in it, slipped it over her neck; told her that he was going to tie her up, and started to strangle her with it. Leona grabbed the cord and put her fingers between her neck and the cord, while the Defendant climbed up on the back of the bed and wound it around both of his hands and began strangling her, pulling the cord tight with both hand. Leona began losing consciousness and Defendant stated several times, "Why don't you just die, Bitch." Leona fell forward and the Defendant let go of the cord causing Leona to pull it away from her neck and slip it off of her head, at which point the Defendant told her to disrobe.

Leona disrobed and shoved the cord under the corner of the bed because she did not want the Defendant to find it. Defendant told Leona that he was going to "fuck" her and

asked her where her condoms were at. Leona told the Defendant that she did not have any condoms, so he grabbed a plastic bag that covered her coffee filters and used it as a makeshift condom, before putting his penis into Leona's vagina, against her will.

Defendant got off of Leona and took the plastic bag into the bathroom, where he flushed it down the toilet and then washed his private area. After putting her clothes back on, while the Defendant was in the bathroom, Leona found the steak knife laying on the dresser and shoved it between the mattress and box springs, like she had done with the cord. After Defendant was done in the bathroom, he went into the kitchen and got another knife. He returned to the bedroom with the knife and told Leona to get undressed and turn around, because he was going to "fuck her up the ass." Defendant used the cellophane off of Leona's cigarette package as a condom, and he, again, put his penis in her vagina, against her will.

After completing the second act of sexual assault on Leona, Defendant, again, went to the bathroom and washed himself. Leona put her underwear and t-shirt on and as she stood up, off the bed, Defendant lunged at her with the knife and began to stab her in the abdomen. The knife entered Leona's body so deeply that she felt the Defendant's fist hit her stomach. Defendant pulled the knife out and stabbed Leona again, pushing the knife full into her as before. After pulling the knife out of Leona's body the second time, Defendant attempted to cut the right side of Leona's neck with it. Realizing the Defendant was trying to kill her, Leona attempted to kick the defendant. Defendant avoided Leona's kick, so Leona bent her head down and went for his waist, thinking maybe she could tackle him and get him down, however, Defendant's arm wound up around Leona's neck and he strangled her to unconsciousness.

When Leona regained consciousness Defendant told her to go to the bathroom and wash herself. Defendant told Leona to use soap on her vaginal area.[1] After Leona came out of the bathroom, Defendant had her sit on the bed and made her clean out her fingernails

[1] Leona had to remove the cellophane from her vagina when the Defendant made her go to the bathroom and wash her vaginal area, and that the Defendant told her to flush it down the toilet, which she did.

because she had scratched him when she tried to remove his hands from her throat.

The next thing Leona recalled is that the Defendant had the cord again. Defendant told her to put it around her neck again but Leona refused. As a result, Defendant began whipping Leona with it and beat her around the head with it, till she was bleeding severely.

Defendant told Leona to go back into the bathroom and she complied. Defendant shut the bathroom door so Leona locked it. The next thing Leona heard was a bang, and then the smoke alarm going off. Leona knew her apartment was on fire because she heard the smoke alarm and could smell smoke. There also came a point when she heard a door slam, which caused her to unlock the bathroom door and try to open it.

Leona could not open the bathroom door because the Defendant had slid a nine-drawer dresser up against it, blocking Leona in the bathroom. Leona began banging the bathroom door with her shoulder trying to move the dresser over but it would not budge.

Leona began to think that if the Defendant could kick her front door in, she should be able to kick her way out of the bathroom; so she started kicking the door right beneath the door handle, and the dresser tipped over. When Leona was able to squeeze out of the bathroom door, she saw that her apartment was totally on fire. Leona grabbed her sister's cellular telephone and ran outside of the apartment and hid behind a stairwell, afraid the Defendant might still be around. Leona tried to use the cellular telephone three times but it would not connect. Leona ran down between the two buildings and saw people, she was trying to get somebody to call 911 but she could not talk very well, however, the fire department did arrive and Leona was taken to the hospital for treatment.

After his arrest, Defendant admitted his involvement in the crimes committed against Leona Case.

C. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST RAMONA LEYVA

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XVI - First Degree Kidnapping With Use of a Deadly Weapon; Count XVII - Sexual Assault With Use of a Deadly Weapon; and Count XVIII -

Robbery With Use of a Deadly Weapon, against victim Ramona Leyva.

On March 25, 2000, Ramona Leyva resided with her husband in a studio apartment located at 600 Bonanza Rd., Apt. #144, Las Vegas, Nevada. At approximately 10:00 p.m. on the night of the 25th, Ramona had returned to the apartment after dropping her husband off at work. Ramona was in the apartment and had gone to the bathroom and heard a loud noise at the front door. Ramona looked up and saw the Defendant. Ramona quickly closed the bathroom door but the Defendant broke through it and pushed her against the bathroom wall, grabbing her hair and neck.

The Defendant indicated that Ramona should quite down by telling her to "shush". The Defendant dragged Ramona by her hair and neck out to the kitchen where he grabbed a knife from her kitchen drawer. The Defendant put the knife against Ramona's neck and demanded money from her. The Defendant moved Ramona around the apartment and continued to demand money from her.

After convincing the Defendant that she had no money, the Defendant began to touch Ramona's breasts and buttocks with his hands, over her clothes. The Defendant also touched his penis with his hand, over his pants. The Defendant began removing his clothes and Ms. Leyva told him to get some protection, because she knew he was going to rape her and she did not want any disease from him.

Ramona's husband wore rubber gloves as a dishwasher at his job. There were a pair of rubber gloves on her husband's night stand and the Defendant put the thumb part of one of those gloves over his penis before penetrating Ms. Leyva's vagina with his penis.

Mrs. Leyva was very afraid during the rape and the Defendant told her to tell him that she liked what he was doing, so she did. The Defendant kept the knife in his hand while he sexually assaulted Ms. Leyva. After the sexual assault, the Defendant forced Ms. Leyva to take the glove off of his penis and flush it down the toilet.

The Defendant emptied Ms. Leyva's purse and found her car keys at which time he attempted to leave and take her car. Mrs. Leyva told the Defendant that she had to go work and asked him not to take her car.

The Defendant left the apartment briefly to throw the knife into the parking lot. The Defendant then re-entered the apartment and picked up Ms. Leyva's telephone receiver to see if the line worked. After hanging the telephone back up the Defendant left the residence and stole Ms. Leyva's car .

After the Defendant fled in her car, Mrs. Leyva attempted to get some of her neighbors to help her but none of them would answer their doors. Mrs. Leyva walked to a fast food restaurant where she found a Spanish speaking couple to take her to her husbands job. After she arrived at her husband's job he took her to report the crimes.

D. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST MARLENE LIVINGSTON

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XV - Burglary While in Possession of a Deadly Weapon; Count XVI - First Degree Kidnapping With Use of a Deadly Weapon, Victim 65 Years of Age or Older; Count XVII- Sexual Assault With Use of a Deadly Weapon, Victim 65 Years of Age or Older; and Count XVIII - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older, against victim Marlene Livingston.

On April 14, 2000, Marlene Livingston, (DOB 10/12/33), resided at an apartment complex located at 2301 Clifford, Las Vegas, Nevada. The complex has 11 apartments, and Marlene lived in Apt. #11, on the second floor.

On April 3, Marlene worked in the afternoon until 9:00 that night. After work, Marlene went home. At the time, Marlene drove a white, 1991 Dodge Dynasty. After Marlene arrived home from work that night, she checked the mail, had received her social security check, and went to Boulder Station to cash it. Marlene had $515.00, after cashing her check. Marlene stayed at Boulder for approximately an hour or so, wherein she bought some Chinese food and played some nickels.

Marlene left Boulder Station and drove home, where she put some of the left over Chinese food on a plate and put it in the microwave, and then went to take her work clothes off. As Marlene sat on the edge of her bed, and was looking through her purse, wearing only

her bra and pants, when she heard a boom and saw the Defendant break through her front door, wearing a mask that did not cover his whole face. Marlene also noticed the Defendant had a knife with a silver blade.

The Defendant demanded Marlene's money, which she took from her wallet and gave to him. Thereafter, the Defendant asked Marlene if she had any gold, and she gave him her pinky ring. The Defendant took the knife that he had and flicked through Marlene's purse with it and saw a $10.00 bill. He accused Marlene of lying to him about having more money, which caused her to explain that she had cashed in $10.00 worth of nickels at Boulder Station and then shoved it in her purse.

The Defendant told Marlene not to look at him, causing her to keep her head down and eyes closed. Marlene told the Defendant, "Take anything you want, I just want to see my grand kids tomorrow." Thereafter, Marlene heard the Defendant go around the bed and grab her telephone. The Defendant then demanded that Marlene stand up. When Marlene complied the Defendant told her to bend over. When Marlene moved her pants to the side a little and told the Defendant that she had a pad on, the intruder sat on the bed, pulled his penis out, and told her they would do it orally and not to bite him. The Defendant told Marlene that "he liked to fuck old ladies."

Marlene was forced to put her mouth on the Defendant's (exposed) penis and the Defendant held the back of her head and pushed it up and down. During the assault, Marlene kept her eyes closed. During the act the Defendant kept telling Marlene not to bite him.

After the sexual assault, the Defendant asked Marlene if she had a car, a gun, and a husband that was going to come in. Marlene told the Defendant that she had a white Dynasty and he demanded her keys, which she took out of her purse and gave to him. The Defendant told Marlene to go into her bathroom and wash her mouth out. The Defendant also stood behind her during this act, and forced water into her mouth. Thereafter, the Defendant told Marlene to stay in the bathroom, where she stayed for approximately 10 to 15 minutes, because she was scared to come out.

Once Marlene left the bathroom she looked outside and saw that her car was gone.

Marlene was afraid the intruder might return so she put on her pajama's and then knocked on the landlord's door and told him what had happened. Marlene's landlord subsequently called the police. After his arrest, Defendant admitted committing the crimes against Marlene Livingston.

E. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST CLARENCE AND FRANCIS RUMBAUGH

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: XXII - Burglary While in Possession of a Deadly Weapon; Count XXIII - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older; and Count - XXIV - Robbery With Use of a Deadly Weapon, Victim 65 Years of Age or Older against the victims, Clarence and Francis Rumbaugh

At preliminary hearing of this matter, Francis Rumbaugh testified that she was 79 years of age and her birthdate is April 11, 1921.

On April 12, 2000, Francis Rumbaugh (DOB 04/11/21) and her husband, Clarence Rumbaugh (DOB 09/19/16), lived at 436 North 12th Street #B, in Clark County, Las Vegas. The residence had one bedroom, a living room, and bathroom.

During the evening of April 12, at approximately 11:25 p.m., Francis and Clarence were at home eating cake and ice cream, in the living room. The front door was open, however the screen door was closed and latched at the time, when Francis heard a loud noise and somebody burst in. After the Defendant had burst into the residence Francis began to scream for help and the Defendant told her to shut up. The Defendant then shut two windows and the front door. Additionally, the Defendant picked up the knife Francis had used to cut the cake with and used it to cut the telephone cord. After the Defendant cut the telephone cord, with the knife still in his hand, he grabbed Francis by the left wrist area and threw her onto the couch.

After the Defendant threw Francis onto the couch, he approached Clarence Rumbaugh and wrestled with him, eventually throwing Mr. Rumbaugh to the floor and

demanding the money from his wallet. Mr. Rumbaugh got up off of the floor and took his wallet out of his back pocket, but before he could reach into it and take the money out, the Defendant reached in and took $81.00 from the wallet.

The Defendant pointed a knife at Mr. and Mrs. Rumbaugh and make them go into their bedroom where he rummaged through their belongings using the tip of the knife. The Rumbaugh's had El Cortez cups full of change on their desk and the Defendant picked up those cups to put the loose change consisting of nickels, dimes, and quarters, in his pockets. Afterwards, the Defendant took another hanky from his pocket and wiped the containers off.

The Defendant instructed the Rumbaugh's to stay in their bedroom while he fled the residence.

F. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LEROY FOWLER

Defendant is charged in the Second Amended Criminal Information with having committed the crime of: Count XXV - Burglary While In Possession of a Deadly Weapon, against the victim Leroy Fowler.

On June 6, 2000, Mr. Fowler resided at 1121 East Ogden Avenue, Apt. #9, Las Vegas, Nevada, in a studio apartment. On June 6, at approximately 1:55 a.m., Mr. Fowler was sleeping on his bed. Mr. Fowler awoke to his front door being kicked in.

Mr. Fowler encountered the Defendant who had an knife in his hand. Mr. Fowler picked up a kitchen chair and began swinging it at the Defendant. Mr. Fowler was making a lot of noise and the Defendant told him several times to shut up.

Mr. Fowler continued swinging the kitchen chair, at which time the Defendant turned and ran out of the apartment.

G. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST JONI HALL

Defendant is charged in the Second Amended Criminal Complaint with having

committed the crimes of: Count XVI - Burglary While in Possession of a Deadly Weapon; XXVII - First Degree Kidnaping With Use of a Deadly Weapon; Count XXVIII - Sexual Assault With Use of a Deadly Weapon; and XXIX - Robbery With Use of a Deadly Weapon, against victim Joni Hall.

On June 7, 2000, Joni Hall resided in an apartment located at 624 North 13th Street, Las Vegas, Nevada. Joni had been living in the apartment for a little over a month. Joni and her child along with another woman and her three children all lived in the apartment.

On June 7, during the early morning hours between 1:30 and 2:00 a.m., Joni arrived home to the apartment and went straight to bed. Joni awoke to a thud type noise and thought that maybe her roommate was hitting the wall or one of the children was hitting the door. Joni laid in bed for a couple a seconds before starting to shut her eyes again. Joni saw that the bedroom door was opening and she also saw the Defendant standing in the doorway putting something over his face and saying "Oh Yeah." The Defendant also had a knife in his right hand.

The Defendant asked Joni if she had money and car keys. Joni told the Defendant no, and the Defendant told Joni not to lie to him. At that point the Defendant told Joni to get up out of bed and forced her to follow him into the living room and kitchen area of the apartment. The Defendant asked Joni if anybody else was in the apartment and Joni told him that her child was there and her roommate and her children were there.

The Defendant forced Joni to open and close cabinets in the living room and kitchen area of the residence to make sure she wasn't hiding anything. The Defendant also asked Joni what she had to eat and drink in the apartment.

The Defendant asked Joni for some kool-aid to drink and Joni gave it to him. The Defendant also took Joni's roommate's cigarettes out of a cabinet. After touching the outer cellophane of the cigarette package, the Defendant took the cellophane off of the package and burned it in the sink, telling Joni he didn't want evidence of his fingerprints around.

The Defendant forced Joni to walk back into her bedroom and he began going through Joni's things. The Defendant told Joni that he was going to get some pussy from a scardie

white girl. The Defendant told Joni to lay down on the end of her bed and take off her pants. The Defendant then told Joni that he was just joking with her, that he wasn't like that, and that he wasn't going to do that to her.

A neighbor from upstairs made a loud noise which caused the Defendant to become nervous. The Defendant told Joni to turn off her kitchen and bathroom lights and then peaked out the kitchen blinds to see if anybody was coming downstairs.

The Defendant found some Saran Wrap in the kitchen and forced Joni to tear off a piece of it. The Defendant told Joni he was going to get some pussy from a white girl and told Joni to lay down on the floor, in front of the couch, in the living room. The Defendant walked towards Joni with the knife in one hand and the Saran Wrap in the other.

The Defendant unbuckled his belt and pulled down his pants and got down on the floor with Joni. The Defendant put the knife up near Joni's head and told her if she screamed or made any noise he would kill her. The Defendant put the Saran Wrap on his penis with the other hand and then put his penis in Joni's vagina for approximately one minute. The Defendant then got up, went into the bathroom and flushed the toilet. Joni did not see the Saran Wrap again after the Defendant came out of the bathroom.

The Defendant told Joni that he was going to take her television and told her to bring a stroller that she had in the bedroom out into the front room. The Defendant put the television in the stroller and took Joni's walkman as well.

After the Defendant left the apartment Joni went and woke up her roommate and told her to go the call the police because they had been robbed and Joni had been raped.

H. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST GYALTSO LUNGTOK

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XXX - Burglary While In Possession of a Deadly Weapon; Count XXXI - Attempt Robbery With Use of a Deadly Weapon; and Count XXXII - Murder With Use of a Deadly Weapon (Open Murder), against victim Gyaltso Lungtok.

On the evening of June 8, 2000, Gyaltso Lungtok became the victim of a homicide, during a Burglary and Attempt Robbery perpetrated by the Defendant in this case.

The Defendant gave a statement to Detective LaRochelle, LVMPD Homicide Division, about the homicide investigation regarding Mr. Lungtok and during that initial conversation, Defendant indicated that he was out on the night in question with a guy named Deon. Defendant stated that Deon was talking about getting "a lick", which is a street term for a robbery to get money.

Defendant told Detective LaRochelle that Deon asked him for the gun that he was carrying, so he gave it to Deon.[2] Defendant further told Detective LaRochelle that he waited at a telephone bank while Deon entered the complex where Mr. Lungtok lived. Defendant indicated that he heard banging or crashing noises followed by gunshots. According to the Defendant, Deon then came running and they ran off together and Deon tells him that the shell casings got picked up from the shooting and not to worry about it. Thereafter, Detective LaRochelle told the Defendant that his story was not plausible and that he knew the Defendant was more involved than what he had previously told him, at which time the Defendant changed his story and told Detective LaRochelle that he entered Mr. Lungtok's apartment in an attempt to get away from a police car that he saw cruising the street. Defendant said that he had the gun on him and was worried about being arrested if the police stopped him. Defendant told Detective LaRochelle that he thought the apartment was empty, so he kicked the door open and entered the apartment. Defendant indicated it was dark inside the apartment and he became startled when someone came at him from the dark, at which point he fired the gun.

I. STATEMENT OF FACTS PERTINENT TO THE CRIMES COMMITTED AGAINST LAURA ZAZUETA, GUADALUPE LOPEZ, AND BEATRIZ ZAZUETA

Defendant is charged in the Second Amended Criminal Information with having committed the crimes of: Count XXXII - Burglary While In Possession of a Deadly Weapon;

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[2] The gun used in the Lungtok homicide has been forensically identified as the same gun used in the Lopez/Zazueta crimes.

XXXIV - Robbery With Use of a Deadly Weapon; Count XXXV - Attempt Robbery With Use of a Deadly Weapon; Count XXXVI - Attempt Robbery With Use of a Deadly Weapon; Count XXXVII - Attempt Murder With Use of a Deadly Weapon; and Count XXXVIII - Battery With Use of a Deadly Weapon, for crimes committed against victims Laura Zazueta, Guadalupe Lopez, and Beatriz Zazueta.

Laura Zazueta, her sister Beatriz, her brother-in-law Guadalupe, and her nephews Carlitto, 2 years of age, and Andras, 4 years of age, lived at 2850 East Cedar Avenue, Apt. H-229. On the night of June 8, 2000, Laura went out with her boyfriend and the he took her home and left the apartment at approximately 11 or 12 p.m. At the time Laura got home none of her roommates were awake and she went directly to bed and went to sleep. At some point Laura woke up because she heard a noise, and found the Defendant in her bedroom.

In both English and Spanish the Defendant told Laura to give him the money she had. Laura gave the Defendant approximately $200.00 that she had in a chest of drawers, in her bedroom. After Laura gave the Defendant the money, he demanded more money and became vulgar saying things like "fuck you" and "bitch." Laura became nervous and was forced to her sister's room, while the Defendant followed behind her pointing the gun at her. When she got to her sister's room, her sister and brother-in-law woke up, causing the Defendant to demand more money from all of them and pointed the gun at all of them. Laura's four year old nephew woke up as the Defendant held them at gun point demanding money.

Laura's brother-in-law told the Defendant that he did not have any money which caused the Defendant to become upset and place the gun against Guadalupe's forehead. Guadalupe grabbed the gun and a struggle ensued causing the gun to fire approximately four times. At that time, Laura dropped to the floor of the bedroom as her sister embraced the child.

The Defendant and Guadalupe struggled with each other out of the bedroom and into the living room and Laura watched as the intruder got away by jumping from the couch through a window.

J. STATEMENT OF FACTS PERTINENT TO DEFENDANT'S PRIOR 1996 JUVENILE CONVICTION FOR ARMED ROBBERY, IN CHICAGO.

On September 4, 1996, Defendant, then 12 years of age, pointed a small handgun (later identified as a starter pistol) at Mertice Gawne, as he attempted to take her car from her.

Police reports indicate that on the aforementioned day, Mertice Gawne was leaving a friends house and walking to her automobile when she noticed the Defendant and two other boys observing her. Mertice got into her vehicle and waited until the boys were out of sight before leaving the area. When Mertice got to the intersection of 110th and Hoyne, the Defendant and two other boys jumped out of some bushes and surrounded her car.

The Defendant pointed a gun at Mertice and told her to get out of the car because he was taking it from her. The Defendant opened the driver's side door and another boy pounded on the hood of the car. Mertice quickly drove away from the boys and notified police with her cellular telephone.

The Defendant and the other two boys were picked up shortly thereafter and all three were positively identified by Ms. Gawne as the boys who tried to take her car.

On January 31, 1996, Defendant was adjudicated a delinquent and plead guilty to Armed Robbery, a Class X felony in the State of Illinois. On March 6, 1996, Defendant was placed on probation.

II. STATEMENT OF ADDITIONAL CASE FACTS PERTINENT TO THIS OPPOSITION

On June 13, 2000, at approximately 3:30 a.m., Detective D. Love, of the Las Vegas Metropolitan Police Department, was conducting an ongoing investigation related to the series of home invasion/sexual assault/ robbery crimes when she observed a black male, later identified as Justin Porter (DOB 12-13-1982), loitering in the area of 209 North 18th Street. Detective Love contacted the Defendant believing that he resembled the description and composite drawing relating to the crimes. Defendant, along with his mother, Angela Smith-

Porter, consented to the administration of a buccal swab kit on the Defendant, which was administered by Detective Love. The swabs were impounded as evidence under event number 000613-0245.

On August 10, 2000, Detective Love received a telephone call from Dave Welch, a Criminalist II employed by the Las Vegas Metropolitan Police Crime Lab, confirming that the Defendant's DNA profile matched the DNA evidence collected from the Teresa Tyler case and the Ramona Leyva case.

Defendant's mother and step-father were contacted by LVMPD on August 10, 2000, and it was learned that the Defendant had gone to Chicago and was staying with his natural father, George Porter.

On August 11, 2000, a lawful search of the Defendant's Las Vegas residence located at 208 N. 13th St., Apt. 3, Las Vegas, Nevada, 89101, resulted in the seizure of a pair of white Saucony tennis shoes, a pair of red shorts, and a black T-shirt, all of which were items described by the numerous victims in this case as having been worn by the suspect who had victimized them. After the search of the residence, Detective Berry Jensen received several voice mail messages from the Defendant who was attempting to contact Detective Jensen, after learning that the Las Vegas residence had been searched.

Later on that same day Detective Jensen actually spoke to the Defendant, who told Detective Jensen that his mother had given him the number and he was calling because he had heard that he was being accused of committing some crimes in Las Vegas. Defendant further told Detective Jensen that he was not responsible for committing any crimes and that none of his DNA would be at any of the crime scenes. The Defendant also indicated that he would be returning to Las Vegas on August 18, 2000, by Greyhound bus at which time he would take a polygraph regarding the crimes that had been committed.

On August 12, 2000, Chicago police arrested the Defendant at his father's residence based upon an arrest warrant that had been forwarded to them by LVMPD detectives. After arresting the Defendant and taking him into custody, Chicago police notified Las Vegas detectives that they had the Defendant in custody. Las Vegas detectives then made

arrangements to travel to Chicago.

Additionally, Las Vegas Detectives faxed the Chicago police information about approximately six of the criminal events the Defendant was suspected of having committed. Detectives Kato and Cunningham, of the Chicago Police Department advised the Defendant of his Miranda Rights and after stating that he understood those rights, Defendant agreed to speak to them.

During that interview with Chicago police Defendant was asked about the aforementioned six incidents that they had been given information about, said incidents all having occurred in Las Vegas. The Defendant made admissions to five of the six incidents he was questioned about, although Defendant did downplay his activities in all of the incidents. (A copy of the Interview with Chicago Police is attached hereto as Exhibit "1").

In his motion, Defendant's asserts that Chicago police officers used promises of leniency, threats of force, and coercion to obtain statements from him. (Defendant's Motion, p. 11; 21-28, p. 12; 1-9). Defendant further asserts that he requested to speak to his father, who was allegedly at the police station, and that his request was ignored. (Defendant's Motion, p. 11; 18-20). The State would point out that there is absolutely nothing in the record which suggests that the Chicago police used any kind of threats to obtain statements from the Defendant or that the Defendant requested to speak to his father and was denied such a request.

Additionally, such a claim is belied by the Defendant's interactions with Las Vegas Metropolitan detectives upon their arrival in Chicago. It should first be noted that the Defendant was arrested on August 12, 2000, at approximately 12:45 am in Chicago. He was interviewed by Chicago police thereafter. That same day, August 12, 2000, Las Vegas Detectives went to Chicago and interviewed the Defendant at approximately 5:30 pm. During his conversation with the Las Vegas Detectives, the Defendant was twice provided an opportunity to speak to his mother, via telephone, and he declined to do so.

Referring specifically to the Las Vegas Detectives interview, at approximately 5:30 p.m., Chicago time, after arriving from Las Vegas, Detectives James LaRochelle and Barry

Jensen conducted an interview with the Defendant.

Defendant was advised of his Miranda rights and agreed to talk to the Detectives. Prior to doing so, the Defendant signed a LVMPD Rights of Person Arrested Card. (A copy of which is attached hereto as Exhibit "2"). Thereafter, the following conversation between the Defendant and Detective Jensen occurred:

BJ. Justin, before we spoke today, I gave you a Rights of Miranda card, do you remember that?

A. Yes sir.

BJ and do you remember signing that?

A. Yes sir.

BJ. O.K. and do you understand your rights?

A. Hm, kinda I do, but sometimes I . . . . you know, *yes*.

BJ. Did you read the card out loud?

A. Yes, to you.

(Defendant's Voluntary Statement, 08/12/02, 19:30 hours Chicago, Illinois time, pp. 2-3).

During the preliminary hearing of this matter, Detective LaRochelle testified that the Defendant was in custody, in Chicago, on a warrant that had issued out of Clark County, when he agreed to speak with the LVMPD detectives. (PHT, 11/1/00, p. 60). ***Detective LaRochelle further indicated that the Defendant was advised of Miranda rights and that Detective Barry Jensen handed the Defendant a copy of the LVMPD Miranda warning card and asked the Defendant if he could read it. The Defendant subsequently read and signed the card. Additionally, the Defendant indicated to the detectives that he understood his Miranda rights and agreed to speak with them.*** (PHT, 11/1/00, p. 61).

Detective LaRochelle indicated that prior to the Defendant's statements being recorded, he and Detective Jensen interviewed the Defendant for approximately an hour and a half to two hours. The detectives began the pre-informational interview by receiving background information from him and then proceeded to talk about the specific incidents that he was charged under for the arrest warrant, which was a series of sexual assaults. (PHT,

11/1/00, pp. 62-63).

Detective Jensen and Detective LaRochelle had previously agreed that if the Defendant denied any of the sexual assault crimes, Detective LaRochelle would move into questioning the Defendant about the robbery which occurred at the Cedar Springs Apartment. (PHT, 11/1/00, pp. 63-64). At one point during the pre-taped interview the Defendant did deny being involved in a sexual assault that Detective Jensen had DNA on, so Detective LaRochelle took over and began questioning the Defendant about the robbery. Subsequently, the Defendant made admissions to Detective LaRochelle about the robbery. (PHT, 11/1/00, p. 64).

Thereafter, Detective LaRochelle shifted his questioning over to a homicide investigation which occurred in the same vicinity as the robberies and sexual assaults in Las Vegas. Detective LaRochelle testified that he did not tell the Defendant that the incident located at 415 South Tenth Street was a homicide, but instead just referred to it as an incident. (PHT, 11/1/00, p. 67). The Defendant initially told detectives that he did not know the location that they were talking about, at which time the Detectives showed the Defendant a photograph of the exterior of the apartment complex.

Detective LaRochelle testified that when he laid the photograph down in front of the Defendant, the Defendant had a non-verbal reaction which was not present in the other part of the interview, got up from his chair, pointed at the photograph several times and said "I had nothing to do with this. I had nothing to do with this." The Defendant became somewhat excited after being shown the picture and after he calmed down, he told the Detectives that he had accompanied somebody named Deon to the location and that Deon was responsible for the homicide. (PHT, 11/1/00, pp. 68).

After the pre-taped interview, the Detectives immediately conducted a taped statement of the Defendant where they asked the same questions about the sexual assaults, attempt murder and robbery, and homicide investigations, to which the Defendant provided the same answers that he had given during the pre-taped statement. (PHT, 11/1/00, p. 78).

At the conclusion of that interview, Detective LaRochelle asked the Defendant if there

was anything else he would like to add to his taped statement that he hadn't asked in the interview, to which the Defendant replied, "Can you ask me if I feel sorry about this?" Detective LaRochelle responded by asking, "Do you want me to ask you that?" When Detective LaRochelle asked the Defendant if he felt sorry about things, the Defendant told him that if he could take back the hands of time he would, and none of it would have happened. (PHT, 11/1/00, p. 79).

After the first tape recorded statement, Detective LaRochelle and Detective Jensen gave the Defendant a short break. Detective LaRochelle testified that he re-entered the interview room and told the Defendant that their investigation into the homicide showed that the Defendant was not being truthful with them, as the evidence showed that the Defendant did have something to do with it; at which point the Defendant changed his narration of the events involving the homicide, explaining that he was the one who committed the killing, although he again downplayed how it occurred. (PHT, 11/1/00, p. 80-81).

On cross-examination, ***Detective LaRochelle testified that when he and the other two detectives arrived at the police station in Chicago, approximately 15 hours after the Defendant had been taken into custody by the Chicago police, he was told by Detective Kato, of the Chicago Police Department, that the Defendant was in the back room eating fast food, smoking a cigarette, and drinking a coke or a soft drink.*** (PHT, 11/1/00, p. 100).

Further, Detective LaRochelle testified that the Defendant never indicated to him that he wanted his mother, or his father; although Detective LaRochelle did recall a police report indicating that the Defendant may have requested a priest. (PHT, 11/2/00, p. 10).

On re-direct examination, Detective LaRochelle testified that Detective Kato had told him that the Defendant was talking and had asked questions about why he was being arrested and what evidence there was for him to be in custody. Detective LaRochelle testified that he was aware that Detective Kato did advise the Defendant of his Miranda rights. (PHT, 11/02/00, p. 16).

Detective LaRochelle indicated that during the interview with the Defendant, Detective Jensen received a telephone call from the Defendant's mother, at which time the

Defendant gestured that he did not want to speak to his mother at all, based upon his embarrassment about the whole incident. (PHT, 11/02/00, p. 17).

Detective LaRochelle further testified that upon his arrival in Chicago, he learned from Sergeant Mahone that the Defendant had a previous robbery conviction in Chicago, that he was certifiable as an adult, and that he was treated as an adult in their jurisdiction. Further, during the course of the recorded statement the Defendant mentioned to Detectives LaRochelle and Jensen that he was still on probation. (PHT, 11/02/00, p. 19)

Detective Rochelle testified that the ***Defendant did not request to speak with his mother or father, or request to have them present at any time during any of his voluntary statements LVMPD detectives.*** (PHT, 11/02/00, p. 21).

Detective LaRochelle testified that the Defendant appeared to have an understanding of the criminal justice system because after he gave the confession about Gyaltso Lungtok, the Defendant told Detective LaRochelle that he [Defendant] could be killed for this, [meaning the murder investigation], and that he would need a good lawyer when he got back to Las Vegas. (PHT, 11/02/00, p. 32).

Detective Barry Jensen also testified during the preliminary hearing in this matter. Detective Jensen testified that he and Detective LaRochelle, along with Sergeant Laurie Crickett, arrived at the Chicago precinct where they briefly met with Chicago detectives. At that time Detective Kato told them that he had verbally Mirandized the Defendant and although he did not do a formal interview with the Defendant, the Defendant had made some admissions to him. (PHT, 11/15/00, pp. 24-25).

Detective Jensen testified that prior to interviewing the Defendant they provided him with a Miranda card and asked him to read it out loud. The Defendant complied and read the card out loud, although Detective Jensen did have to help the Defendant pronounce some of the bigger words. Afterwards, ***Detective Jensen asked the Defendant if he understood what he had read and the Defendant indicated that he understood.*** (PHT, 11/15/00, pp. 27-28). ***The Defendant then signed the card and agreed to speak with Detectives*** Jensen and LaRochelle. (PHT, 11/15/00, p. 28).

Detective Jensen indicated that the pre-taped interview of the Defendant was approximately 1 - 1 1/2 hours in duration. Thereafter, a small break occurred for the Detectives and the Defendant to use the restroom and obtain a drink of water. After the break, but prior to the tape-recorded portion of the interview ***Detective Jensen again asked the Defendant if he read the rights of Miranda card and if he understood them. Defendant indicated that he did. Defendant further indicated that he still wanted to talk to detectives, and acknowledged that he knew his statement was now being recorded.*** (PHT, 11/15/00, p. 43).

Detective Jensen testified that the Defendant gave great detail about the incidents and appeared willing to provide them with information about the incident that he could remember. Additionally, Defendant told Detective Jensen that he was having trouble sleeping at night because he would see in his dreams, some of the things that he had done. (PHT, 11/15/00, pp. 43-44).

Detective Jensen testified that the recorded statements on August 12, ended at approximately 8:45 p.m., Chicago time. Prior to leaving the police station Detectives Jensen and LaRochelle told the Defendant that they would see him again the following day and the Defendant told them that would be fine. (PHT, 11/15/00, p. 50). On August 13, 2000, in the afternoon hours, Detectives Jensen and LaRochelle, and Sergeant Laurie Crickett went back to the Chicago police precinct where they met with the Chicago detectives and talked amongst themselves. Detective Jensen and Sergeant Crickett decided to interview the Defendant again. (PHT, 11/15/00, p. 51). Detective Jensen was not sure if he re-advised the Defendant of his Miranda rights; however, he testified that he usually does so. (PHT, 11/15/00, p. 51). Detective Jensen indicated that the Defendant's demeanor showed that he was not comfortable talking about the sexual assault crimes with the Sergeant Crickett in the room, and that when he was asked if he would be more comfortable if Sergeant Crickett left the room the Defendant indicated in the affirmative so Sergeant Crickett excused herself and left the room. Prior to Sergeant Crickett leaving the room, the Defendant indicated that he wanted to get the name and telephone number of a pastor that they [his family] knew in

Indiana. Sergeant Crickett called the Defendant's mother and obtained the information. Before the telephone call to the Defendant's mother was made, the ***Defendant again indicated that he did not want to speak to his mother because she would not understand what was going on.*** (PHT, 11/15/00, pp. 52-53).

During this last interview the Defendant again indicated that he knew the interview was being recorded and that it was okay with him. (Defendant's Voluntary Statement, 08/13/00, p. 2). At the conclusion of the interview the Defendant told Detective Jensen that he slept much better the previous night, after his initial interview with the Detectives. (Defendant's Voluntary Statement, 08/13/00, p. 24).

LEGAL ANALYSIS

Before the accused's statements are brought before the jury there must be a hearing in front of the judge, outside the presence of the jury, pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). At the hearing, the judge hears what the suspect told the police and the circumstances under which the suspect made the statements. Then the judge decides (1) whether the statements were "voluntary" using the totality of the circumstances and (2) whether the statements were given after proper Miranda warnings, or whether Miranda was violated, or applicable.

The burden to ask for such a voluntary hearing is on the defendant. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Nevada has adopted the procedure set forth, often referred to as the "Massachusetts" rule. Grimaldi v. State, 90 Nev. 89, 518 P.2d 615 (1974).

If the statement was involuntary, it ceases to exist legally and can not be used for any purpose. See Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978).

The prosecution has the burden of proving by a preponderance of the evidence (1) the voluntariness of a confession, as well as (2) the waiver of a suspect's Fifth Amendment Miranda rights as being voluntary, knowingly, and intelligently made. Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994). The "totality of the circumstances" test is the standard for determining voluntariness of a statement. Alward v. State, 112 Nev. 141, 912 P.2d 243

(1996); Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

With regard to analyzing a waiver of Miranda rights, the test is whether the waiver was "knowingly and intelligently made." Tomarchio v. State, 99 Nev. 572, 576, 665 P.2d 804 (1983); Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880 (1981). The Nevada Supreme Court has stated:

> . . . Moreover, the Miranda waiver validity must be determined in each case through an examination of the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318 (1993) ("after reviewing the totality of the circumstances, we conclude that there was sufficient evidence to indicate that Anderson knowingly and intelligently waived his rights.").

I. DEFENDANT'S CONFESSIONS AND ADMISSIONS WERE FREELY GIVEN AFTER HE WAIVED HIS MIRANDA RIGHTS

In the instant case, prior to Defendant's pre-taped interview, Detective Jensen advised the defendant of his Miranda rights by having the Defendant read the rights aloud from a printed card. Detective Jensen indicated that he helped the Defendant pronounce some of the bigger words and that the defendant acknowledged that he understood his rights, signed the printed card after reading it outloud, and agreed to speak with the detectives. (PHT, 11/15/00, pp. 27-28).

Detective Jensen had no trouble understanding what the Defendant was reading to him, nor did the Defendant appear to have any trouble understanding what he read after the words were properly pronounced for him, nor did he appear to have trouble understanding the content of what the detectives were saying to him. (PHT, 11/15/02, p. 83).

Furthermore, this particular Defendant is not new to the criminal justice system. This Defendant has engaged in prior criminal conduct in Chicago, Illinois, and was on probation at the time he committed the crimes for which he is currently charged in Nevada. As previously stated above, Detective LaRochelle testified during the preliminary hearing that Sergeant Malone, of the Chicago Police Department, informed him that the Defendant had a previous robbery conviction out of Chicago; that he was certifiable as an adult, and that he

was treated as an adult in their jurisdiction. (PHT, 11/02/00, p. 19).

Given those circumstances, it cannot be said that the Defendant did not have any understanding of his Miranda warnings. Still, the defendant now claims that he is of "questionable intelligence." Clearly, this self-serving declaration is utterly unsupported by the faintest shred of evidence.

Defendant attempts to find significance in the fact that Detective Jensen, having advised the defendant of his rights (and performing an effective rule-of-thumb comprehension test by having the defendant read the rights aloud from the printed card), did not repeat the admonition during the tape-recorded interview or take any further steps to ensure that he Defendant still understood his rights.

First, no express waiver of Miranda rights is necessary. If a suspect, like the defendant here, appears to understand the rights and acts in a manner consistent with waiver, it is reasonable to find an implied waiver.

In North Carolina v. Butler, 441, U.S. 369, 99 S.Ct. 1755 (1979), the United States Supreme Court reversed a state supreme court for holding that Miranda required an express waiver. In Terrovona v. Kincheloe, 912 F.2d 1176 (9th Cir. 1990), cert. denied, 499 U.S. 979, the Ninth Circuit concurred. In that case, as in the beginning of this case, a defendant reacted to questions by unhesitatingly making statements intended to exculpate himself.

In Koger v. State, 117 Nev. 138, 17 P.3d 428 (2001), our Nevada Supreme Court addressed issues similar to those raised by the Defendant in this case. In Koger, *supra,* the Defendant was convicted of Conspiracy to Commit Robbery, Burglary While In Possession of a Firearm, and Robbery With Use of a Deadly Weapon, after she and two co-defendant's robbed an armed courier of his gun and cash bags, at the office of Bianca Shoes. Using license plate information and a description of the car driven by Koger provided by witnesses, the police were able to located Koger and identify her as a suspect. Id.

During the course of their investigation, the police questioned Koger on three different occasions, the first occurring when Detectives Mayo and Popp questioned her at Treasure Island, her place of employment. Before questioning, Detective Popp admonished

Koger of her Miranda rights, reading them from a card. Koger then answered the officer's questions, denying any knowledge of the robbery. Id.

Later that same day, at his office, Detective Mayo conducted a second interview of Koger. Prior to questioning, Detective Mayo again admonished Koger of her Miranda rights. Then, referring to their first interview, Detective Mayo inquired whether Koger had understood her rights "the first time." Koger responded, "kind of." Detective Mayo then asked, "Do you understand them now?" Koger responded, "Yes, I do." Koger was also given a Miranda waiver form which she read and signed. Id.

After further investigation, Detective Mayo deemed in necessary to interview Koger again. Twelve days after the first interview, Sergeant Lori Crickett interviewed Koger at the Las Vegas Metropolitan Police Department offices. Sergeant Crickett did not advise Koger again of her Miranda rights because, as Sergeant Crickett testified, Detective Pop informed her that Koger had been previously advised of her rights. Furthermore, Koger expressly told Sergeant Crickett that she had indeed been so advised. Koger then admitted her part in the robbery. Id.

In ruling that the district court properly admitted appellant's statements our Nevada Supreme Court stated:

> Koger's first claim was that she did not understand her rights as given by Detective Mayo during the second interview, therefore, that she did not waive her rights voluntarily. During the interview Koger responded that she "kind of" understood her rights given during the first interview at Treasure Island. Prior to further questioning, Detective Mayo again advised Koger of her rights and inquired whether she understood them at that time. Koger responded "Yes, I do." Thereupon, Detective Mayo began the interview. The record shows no further indication of Koger attempting to stop the interview or otherwise invoking or misunderstanding her Miranda rights. In light of these facts, we conclude that Koger knowingly and voluntarily waived her Miranda rights before answering Detective Mayo and thus the trial court properly admitted her statements.

Id., 17 P.3d 428 at 430.

The Nevada Supreme Court also addressed the issue of "diluted or stale" warnings in Koger, *supra*. Koger had argued that she did not waive her Miranda rights voluntarily prior to the third interview with Sergeant Crickett, in which Koger admitted taking part in the

planning and being present at the scene of the armed robbery. Koger's argument was based upon the fact that, although Sergeant Crickett could not have reminded Koger of her previous Miranda admonition, Koger could not have remembered rights because the admonition had been given twelve days earlier. Id., 17 P.3d 428 at 430.

In concluding that the police did not fail to properly admonish Koger by relying on a Miranda admonition twelve days old, the Court held:

> The issue before us is, in essence, whether "the original warnings have become diluted or stale." State v. Beaulieu, 116 R.I. 575, 359 A.2d 689, 693 (1976), *abrogated on other grounds* by State v. Lamoureux, 623 A.2d 9, 14 (R.I.1993). We addressed this issue once before in Taylor v. State, 96 Nev. 385, 386, 609 P.2d 1238, 1239 (1980), in which this Court stated that "[w]here the accused has been fully and fairly apprised of his *Miranda* rights, there is no requirement that the warnings be repeated each time the questioning is commenced." Taylor, however, is factually distinct because it addressed a three-hour lapse of time between the *Miranda* admonition and the subsequent interview. Moreover, Taylor did not discuss relevant factors other than time that should be considered when weighing the totality of the circumstances as required in a *Miranda* analysis.
>
> Faced with this issue, the Supreme Court of Rhode Island outlined various factors to consider:
>
> > the time elapsed between the warnings and the interrogation which elicited the damaging response; whether the warnings and interrogations were conducted in the same or in different locales; whether the warnings and/or initial interrogation were conducted by the same person or persons who conducted the suspect interrogation; the extent to which the statements made by the accused in the later interrogation differ in any substantial respect from those made at the former; the apparent emotional, physical and intellectual state of the accused at the later questioning. Beaulieu, 359 A.2d at 693.
>
> Certainly, the most relevant factor in analyzing whether a former *Miranda* admonition has diminished is the amount of time elapsed between the first reading and the subsequent interview. Most courts addressing the time factor have considered instances involving only a few hours. *See, e.g.*, United States v. Frankson, 83 F.3d 79 (4th Cir.1996) (two and one-half hours); Evans v. McCotter, 790 F.2d 1232 (5th Cir.1986) (approximately three hours); Baskin v. Clark, 956 F.2d 142 (7th Cir.1992) (thirty minutes); Patton v. Thieret, 791 F.2d 543 (7th Cir.1986) (forty minutes); U.S. ex rel. Henne v. Fike, 563 F.2d 809 (7th Cir.1977) (nine hours); U.S. v. Boyd, 180 F.3d 967 (8th Cir.1999) (one and one-half or two hours); People of Territory of Guam v. Dela Pena, 72 F.3d 767 (9th Cir.1995) (approximately fifteen hours); Ballard v. Johnson, 821 F.2d 568 (11th Cir.1987) (three to four hours).
>
> Other courts have addressed time periods of one day or more. *See, e.g.*, United States v. Andaverde, 64 F.3d 1305 (9th Cir.1995) (one day);

Puplampu v. United States, 422 F.2d 870 (9th Cir.1970) (two days); Maguire v. United States, 396 F.2d 327 (9th Cir.1968) (three days). The outer limit extends to one week as discussed in Martin v. Wainwright, 770 F.2d 918 (11th Cir.1985), [FN1] and--under certain circumstances--two weeks as discussed in Biddy v. Diamond, 516 F.2d 118 (5th Cir.1975). Opinion modified on other grounds by Martin v. Wainwright, 781 F.2d 185 (11th Cir.1986), [FN1][3] and -- under certain circumstances two weeks as discussed in Biddy v. Diamond, 516 F.2d 118 (5th Cir 1975).

In the above cases, the courts determined that statements made following the time interval were covered by the previous *Miranda* warnings and that the defendants could not successfully challenge the voluntariness of the statements based solely on the passage of time. We are not aware of any cases in which a court determined that the intervening time period was too long to invalidate the prior *Miranda* warnings.

The case at hand requires deliberation, however, because twelve days passed between Koger's April 22 interview with Detective Mayo, in which she was apprised of her *Miranda* rights, and her May 4 interview with Sergeant Crickett, in which Koger made further inconsistent and incriminating statements. Twelve days extends to the outer limit of the elapsed time allowed by courts previously facing this issue. Arguably, this case lies within the parameters of Biddy, which allowed an interim period of fourteen days. But in Biddy, the Fifth Circuit determined that the defendant knew of her *Miranda* rights because she had exercised those rights at various times during the two-week period. See id. at 123. Specifically, defendant Biddy had requested the presence of counsel twice and opted to remain silent during certain interviews, and was thus particularly familiar with her rights. See id. at 120-21. In contrast to Biddy, there is no evidence that Koger exercised her *Miranda* rights before her interview with Sergeant Crickett. Moreover, unlike defendant Biddy, Koger did not have contact with the police during the interim period.

Thus, the longest period allowed in the cases fairly analogous to the instant matter is one week as discussed in Martin. See Martin, 770 F.2d at 930. In Martin, the Eleventh Circuit determined that defendant Martin had been "fully warned, and knowingly and intelligently waived his Miranda rights" during a July 4 interrogation. Id. Before his confession seven days later on July 11, "Martin indicated that he still understood those rights ." Id. Thus, the court concluded that additional "Miranda warnings on July 11 would have been needlessly repetitious" and that the "confession was not obtained in violation of Miranda." Id. at 930-31.

Koger, 17 P.3d 428 at 432.

In the instant case, the record reflects that Defendant was advised of his Miranda rights from Detective Chris Kato, after his arrest by Chicago Police. Later that same day,

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[3] [FN1] Opinion modified on other grounds by Martin v. Wainwright, 781 F.2d 185(11th Cir. 1986).

Detectives Jensen and LaRochelle arrived from Las Vegas where they met with the Defendant and provided him with a Rights of Miranda card. Thereafter, Defendant read the card to the detectives, signed the card, and agreed to speak to the Detectives, in what was considered a pre-taped interview. (PHT, 11/15/02, pp. 82-83), also, (See State's Exhibit "2"). Additionally, Detective Jensen indicated after the Defendant had read the card out loud, he explained the warnings to the Defendant again. (PHT, 11/15/02, p. 83).

Thereafter, prior to obtaining the first tape-recorded statement from the Defendant, Detective Jensen asked the Defendant if he recalled reading the Rights of Miranda card, if he remembered signing it, and if he understood his rights. The Defendant affirmatively acknowledged reading and signing the card, as well as understanding those rights. (Defendant's Voluntary Statement, 08/12/00, 1930 hours, pp. 2-3).

Specifically the following conversation between Detective Jensen and the Defendant occurred:

BJ. O.K. Apartment number 3. Ah, Justin, do you know this is being recorded?

A. Yes sir.

BJ. Is that O.K. with you?

A. Fine by me.

BJ. Secretary, ah, Detective James LaRochelle....

JL. P number 4353

BJ. Justin, before we spoke today, I gave you a Rights of Miranda card, do you remember that?

A. Yes sir.

BJ. And do you remember signing that?

A. Yes sir.

BJ. O.K. and do you understand your rights?

A. Hm, kinda I do, but sometimes I . . . . you know, ***yes***.

BJ. Did you read the card out loud?

A. Yes, to you.

(Defendant's Voluntary Statement, 08/12/00, 1930 Chicago time, pp. 2-3).

The Defendant then goes on to give a 77 page voluntary statement to police describing the crimes for which he is charged in this case. At no time during the 45 minutes of taped statement does the record shows any indication of the Defendant attempting to stop the interview or otherwise invoking or misunderstanding his Miranda rights.

Contrary to Defendant's argument, there is an abundance of evidence to indicate that Defendant voluntarily and knowingly waived his Miranda rights. First, there is the "Rights of Persons Arrested" card voluntarily signed by Defendant. Exhibit "2". Second, there is the testimony from Detectives Jensen and LaRochelle during the preliminary hearing, who both testified that Defendant read aloud the Miranda warnings and signed the Rights of Person Arrested card. Third, there is the testimony of Detectives Jensen and LaRochelle who testified that Defendant acknowledged that he understood his Miranda rights and agreed to talk to them. Finally, there is the transcription of Defendant's 77 page voluntary statement in which he provides details regarding the crimes for which he is charged, yet never says anything to suggest his statement is anything other than voluntary.

Accordingly, Defendant's statements are admissible at the trial of this matter. See Miranda v. Arizona, 384 U.S. 436 (1966) (post-arrest statements are admissible where a defendant is fully advised of his Miranda rights and makes a free, knowing and voluntary statement to the police).

II. THE DEFENDANT'S CONFESSIONS AND ADMISSIONS TO LAW ENFORCEMENT WERE KNOWINGLY AND VOLUNTARILY GIVEN

The Due Process Clause of the Fourteenth Amendment requires that a confession must be voluntary to be admissible. Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934 (1989); Passama v. State, 103 Nev. 212, 214, 735 P.2d 321 (1987); Miller v. Fenton, 474 U.S. 104, 106 S. Ct. 445 (1985). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Rowbottom, supra, citing Blackburn v. Alabama, 361

U.S. 199, 208, 80 S. Ct. 274 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Passama, supra, citing Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745 (1963).

The United States Supreme Court has reiterated that certain interrogation techniques are so offensive to a civilized system of justice that they violate due process. Passama, supra; Miller, supra. A confession may also be rendered inadmissible if it is the result of promises which impermissibly induce the confession. Passama, supra; Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732 (1980). To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. Passama, supra, citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S. Ct. 2041 (1973).

In the instant case, the Defendant's motion asserts that the Chicago police elicited an involuntary confession from the Defendant by the following means:

1. Stating that what he did in Nevada was petty, and if he admitted to the facts they provided him, he would be treated leniently in Nevada.
2. Suggesting that if he did not admit to the facts that he would be taken to the "docks" and physically harmed.
3. Suggesting that a phone book could be used to harm him, and no marks would be apparent.
4. Refusing to honor his request to speak with his father while he was being questioned.
5. Refusing to allow Defendant's father to speak to the Defendant, his son, when his father requested to do so.

(Defendant's Motion, p. 32; 5-17).

First, the State would point out that there is nothing in the record which suggests that the Defendant was threatened by Chicago Police. Furthermore, the State has attached a copy of a General Progress Report prepared by Detective Kato after the Defendant's arrest in Chicago, (State's Exhibit "1"), which indicates that the Defendant made some very general admissions with regard to some of the crimes that were referred to in the Las Vegas warrant, but denied any knowledge of others, and very much limited his actions in all of those incidents of which he did make admissions to.

Additionally, Detective Jensen testified at preliminary hearing that Detective Kato, of the Chicago Police Department had informed him that he read the Defendant his Miranda rights, after he was taken into custody by Chicago Police, prior to conducting an informal interview with the Defendant. According to what Detective Kato told Detective Jensen, the interview occurred after the Defendant inquired into why he was arrested and what kind of crimes Las Vegas had him arrested for.

It is the State's position that the Defendant's interactions with Las Vegas Police detectives is extremely telling of how he interacted with the Chicago Police as well. First, the fact that the Chicago police did not have jurisdiction over the Defendant makes it entirely unbelievable that the Chicago police would threaten the Defendant with a "phone book" beating or threaten to take the Defendant to the "docks" if he did not answer their questions. Moreover, it is doubtful that the Chicago police told the Defendant that the crimes he had committed in Las Vegas were "petty" and that he would be treated leniently if he admitted to the facts that they provided him, since all of the crimes were serious felonies and the Defendant used a deadly weapon in the commission of the crimes.

The State would further point out that the Defendant did not ever mention to Las Vegas Police that he had been threatened or coerced to speak to Chicago police. Also, had the Defendant thought he was going to receive some kind of break from criminal prosecution in Nevada, the Defendant would have discussed such an arrangement with the Las Vegas Detectives.

Additionally, if the Defendant had been physically threatened with harm by the Chicago police, one would think that he would have told the Las Vegas police detectives about any physical threats of violence made by the Chicago detectives.

Detective Jensen's preliminary hearing testimony made it very clear that the Defendant knew the ramifications of the crimes he had committed. In fact, the Defendant made a statement to Detective Jensen that indicated he [Defendant] could die for what he had done to Gyaltso Lungtok and that he [Defendant] better get himself a good attorney when he got back to Las Vegas.

Even more telling of the voluntariness of this Defendant's statements to LVMPD detectives were the statements of remorse made by the Defendant during the interviews, where he states:

> A. Do you think I'm sorry for what I did?
>
> JL. Do you want me to ask you that? Do you think....are you sorry for what you did?
>
> A. Yes I am, you know, and if I could turn back the hands of time, like I'm saying, I wish I could. God knows I wish I could.

(Defendant's Voluntary Statement, 08/12/00, 1930 hours, Chicago time, p. 76).

Another time, the Defendant further stated, in part:

> Q. Is there anything else you'd like to add to this statement? Uh, something you feel is important that maybe I haven't' asked you?
>
> A. Yeah. I mean, yes there is.
>
> Q. Go Ahead.
>
> A. Man, I felt that, you know, if after this statement is over with, you know, all this is said and done, you know, I feel that people are gonna think the worst of me 'cause this happened, you know. And I don't want nobody to think the worst of me. I just want them to see what's on the inside of me, you know....."

(Defendant's Voluntary Statement, 08/13/00, 1500 hours, p. 22).

The Defendant further expressed to the LVMPD detectives that he slept better after talking to them and that it would be good for him if the people he hurt could find it in their heart to forgive him. (Defendant's Voluntary Statement, 08/13/00, 1500 hrs, pp. 23-24).

At the end of each statement given by the Defendant, detectives would ask the Defendant if there was anything else he wanted to add to the statement that they did not ask him. Each time, the Defendant expressed his remorse for what he had done. Obviously, this is not the type of scenario that suggests threats of force, coercion, or lack of free will.

With regard to the Defendant's alleged request to Las Vegas Detectives, to speak with his father, and the allegation that the Defendant's father was not permitted to speak to his son, the State would first point out that there is no due process requirement that a juvenile

suspect's parents be notified of his detention, or that they be present at interview or interrogation.

In United States v. Doe, 155 F.3d 1070, 1072 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that:

> The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the "totality of the circumstances." There is no due process requirement that a juvenile's parents be notified for the waiver to be valid, and we decline to create one. Rather, the lack of parental notification is one factor to consider in the totality of the circumstances. (citations omitted).

In Derrick v. Peterson, 924 F.2d 813 (9th Cir.1991), a juvenile defendant was alleged to be border-line retarded (psychologists testified that his IQ was 62 or, perhaps, 74.) The Ninth Circuit held that the test is whether, under all the circumstances, the officers obtained the defendant's statement by physical or psychological coercion, or by improper inducement, so that the suspect's will was overborne. Id. The court further noted that there was no case that required that a juvenile's parents be notified as a prerequisite to admissibility of a statement. Id., 924 F.2d at 819.

In this case, Defendant's mother was aware that the Las Vegas Police were investigating numerous crimes involving the Defendant. As a result of that investigation the Defendant's mother's house was searched and the Defendant's mother gave detectives the telephone number for the Defendant's father, in Chicago, where the Defendant was staying at the time. Additionally, as previously stated, Defendant was arrested at his father's residence in Chicago.

Thereafter, twice during police questioning, the Defendant's mother was on the telephone with various detectives investigating the cases; both times, the Defendant refused to speak to his mother. Clearly, both of the Defendant's parents were made fully aware of the fact that the Defendant was in custody and being questioned about his involvement in numerous instances of criminal activity that occurred in Las Vegas.

Additionally, the State would remind this Court that the Defendant was 17 years of age at the time he committed the instant crimes. The Defendant was also on probation for a

robbery conviction that occurred in Chicago, four years prior, at the time he was arrested for the arson, burglary, kidnapping, home invasion, first degree arson, attempt murder, and sexual assault crimes, some of which were facilitated with use of a deadly weapon, in this case.

As previously stated above, upon their arrival in Chicago LVMPD detectives learned from Sergeant Mahone that the Defendant had a previous robbery conviction in Chicago, that he was certifiable as an adult, and that he was treated as an adult in their jurisdiction.

The Juvenile Court Act found in NRS Chapter 62 does not, however, apply to the crimes of Murder or Attempt Murder or any related crimes arising out of the same facts as the Murder or Attempted Murder. ***Regardless of the age of the offender, or in the case where the offender is 16 years of age, or older, has a prior juvenile felony adjudication and is now charged with forcible Sexual Assault or any felony with use of a deadly weapon***. (NRS 62.020, 62.040). Therefore, a child charged with such an offense is not entitled to the Chapter 62 protections including the presence of a parent. See Shaw v. State, 104 Nev. 100 (1988). (Emphasis added).

Based upon Defendant's prior felony juvenile adjudication for robbery, in Chicago, and the fact that the new crimes that he was charged with having committed included forcible sexual assault and various other felonies involving the use of a deadly weapon, Defendant was not entitled to the presence of either parent in this case, although, the record reflects the Defendant was, in fact, offered the opportunity to speak to his mother, on two occasions.

CONCLUSION

Based upon the above and foregoing Points and Authorities the State respectfully requests Defendant's Motion to Suppress Confessions and Admissions to Metro and Chicago

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Detectives Based Upon Violation of Miranda Rights be denied.

DATED this 26 day of November, 2002.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
DOUGLAS W. HERNDON
Chief Deputy District Attorney
Nevada Bar #004286

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S CONFESSIONS AND ADMISSIONS TO METRO AND CHICAGO DETECTIVES BASED ON VIOLATION OF HIS MIRANDA RIGHTS AND INVOLUNTARINESS AND REQUEST FOR JACKSON V. DENNO HEARING, was made this 27 day of November, 2002, by facsimile transmission to:

CURTIS S. BROWN
Deputy Public Defender
455-5112

BY _____
Employee of the District Attorney's Office

P:\WPDOCS\OPP\FOPP\013\01390103.WPD

EXHIBIT "1"

GENERAL PROGRESS REPORT
DETECTIVE DIVISION

12 Aug 00 14 Aug 00 3rd

Las Vegas Warrant 5431

INTERVIEWED: PORTER, Justin M/B/17 YOA Date of birth: 13 Dec 82
1251 S. KILDARE 2nd flr. 5-10, 170 lbs., med. compl. SS#606 75 8324

Date of Arrest: 12 Aug 00, 0045 hrs., Location: 1251 S. kildare 2nd flr.

R/D after locating Justin Porter at 1251 S. Kildare, interviewed same at Area Four Violent Crimes. R/D advised Porter of his rights and after stating he understood those rights, Porter agreed to speak to R/D. R/D was in the company of Det. Cunningham#21159 when this interview was conducted. Las VEGAS POLICE DEPT. had faxed six incidents that Justin Porter was the suspected offender. These six incidents were the subject of the interview.

R/D informed Porter of the date of the incident(7 Jun 00) and Porter stated he did not remembe the incident by the date. R/D then informed Porter of one item that was taken and Porter stated the following.
The door of the apartment was ajar and that he only pushed it open with minimum force. The lady inside the apartment was afraid and told Justin that she would do anything if he promised not to harm her. Porter states he became sexually excited at this statement and felt that the woman was attracted to him. Porter states that he told her to take her clothes off and after she complied, he then had vaginal sex with her.
Porter denied entering the apartment with a knife but may have picked a knife up from the kitchen. Porter states that he then left the apartment with a TV and a CD player. Porter placed these items in a baby stroller and pushed the items down the street. Porter states tha he left the stroller and items next to a building for a few minutes. Porter says when he returned the stroller and TV and CD player were gone. Porter states that he has no more knowledge of this incident.

Interview of Justin Porter cont'd:

The next incident happened on 16 May 00, Porter states he remembers the incident before the 7 Jun 00 incident. Porter states that he believed that this apartment door was partially open and the woman inside the apartment had similiar reaction to the 7 Jun 00 lady. Porter states that he asks the woman to take her clothes off and after she complies, he had vaginal sex with her one time. Porter states that afterwards he took five dollars off of her dresser Porter denies having a meat cleaver and describes his weapon as a small steak knife that he obtained from the kitchen. Porter could add nothing more to this incident.

R/D gave Porter the date of 4 Apr 00 and Porter did not remeber the date. R/D then supplied Porter with the age of the victim and Porter stated that the lady reminded him of his mother and that he felt bad.

~~Porter stated that he pushed on her apartment door and that the door was ajar.~~ Porter stated that he believed broke the chain that was secured from the inside. Porter relates tha the woman was very nice and when they sat down on the bed and the lady said she would do anything he wanted, Porter pulled out his penis. The lady performed oral sex and Porter stat ~~that he did not like it.~~

Porter states that he remembered that this lady lived right by the Show Boat and on the 2nd Porter relates that he obtained a knife from the kitchen and that the lady gave him fifty dollars. Porter also states that she took off her ring and gave it to him. Porter states that he did not ~~like the ring and threw it away as soon as he got outside the apartment.~~ Porter states that when she gave him the fifty dollars, the lady gave him her car keys. Porter asked the lady what kind of a car and she describes a white car. Porter locates the car and drives the car approx. a half a block away. Porter states he realized what ~~he~~ had just ~~done and becomes afraid. Porter states that he pulled~~ the car over and parked same. Porter could not add anything more to this incident.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
DETECTIVE DIVISION-HOMICIDE BUREAU

12 Aug 00 14 Aug 00 3rd

Las Vegas Warrant

3231

Interview of Justin Porter cont'd:

(25 Mar 00 incident)

The next incident Porter remembered the incident when R/D described the woman to be of Spainish descent. Porter states that her apartment door was open and that he believed that this lady was attracted to him. Porter states that they had vaginal sex one time. PORTER denies takinghis persons car and that he obtained a knife from the kitchen.
Porter could not add anything more.

The 7 Mar 00 incident was recalled by Porter when R/D described the fire. Porter states that he had vaginal sex one time with the lady and he believed that it was consentual sex. Porter states that he had used her phone before and was allowed entry into her apartment. Porter relates that when he wanted to have sex a second time the lady acted like she no longer was attracted to him. Porter became angry and obtained a knife from the kitchen. Porter states that he poked her with the knife he believed two times. Porter relates that he observed a little blood but did not think she was cut bad. Porter states that the lady became sick and ran to the bathroom. Porter states he panics and lights a match and burns a blanket that was on the bed in the bedroom. Porter relates he then throws the match on the rug. Porter then leaves tha apartment.
Porter denies choking the victim and denies ever possessing any scirrors. Porter also denies taking any thing from the apartment. Porter could not add anything further.

The 1 Feb 00 incident, Porter could not recall. R/D along with Det. Cunningham, terminated the interview.

K. Kato 2200 [illegible] EC 2 [illegible]

EXHIBIT "2"

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

RIGHTS OF PERSONS ARRESTED

You have the right to remain silent. If you give up that right to remain silent anything you say can and will be used against you in a court of law. You have the right to speak to an attorney before answering any questions, and to have an attorney present with you while you answer any questions. If you cannot afford an attorney, an attorney will be appointed for you by the court at no cost to you, and you need not answer any questions until that attorney has been appointed for you. If you decide to answer questions now, you may stop at any time and ask to talk to an attorney before any questioning continues. If you decide to stop answering questions once you have begun, all questioning will stop.

Date and Time	Signed
08-12-2003 1700 hrs 0416 hrs	X Justin D Porter
Officer	File #
K. JENSEN 3462	000610-1143

LVMPD 99 (REV. 4-94)

J. LaRochelle 4353

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0505
CONNECTION TEL	4555112
CONNECTION ID	CLARK CO. PUBLIC
ST. TIME	11/27 14:04
USAGE T	07'53
PGS. SENT	45
RESULT	OK

OPPS
STEWART L. BELL
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Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER
aka Jug Capri Porter,
#1682627

Defendant.

Case No. C174954
Dept. No. XVI

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S CONFESSIONS AND ADMISSIONS TO METRO AND CHICAGO DETECTIVES BASED ON VIOLATION OF HIS MIRANDA RIGHTS AND INVOLUNTARINESS AND REQUEST FOR JACKSON V. DENNO HEARING

DATE OF HEARING: 12-17-02
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through DOUGLAS W. HERNDON, Chief Deputy District Attorney, and files this

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CASE NO. C174954

DEPT. NO. 16

DOCKET U

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Dec 18 11 47 AM '02
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,

PLAINTIFF,

VS.

JUSTIN PORTER,

DEFENDANT.

O R D E R F O R T R A N S C R I P T

IT IS HEREBY THE ORDER OF THE COURT THAT AN EXPEDITED TRANSCRIPT BE PREPARED OF THE ABOVE-ENTITLED CASE FOR THE HEARING HELD ON DECEMBER 17, 2002. THE TRANSCRIPTS ARE TO BE PAID AT THE EXPEDITED OVERNIGHT COPY TRANSCRIPTION RATE OF $8.20 PER PAGE FOR THE ORIGINAL AND TWO COPIES AT COUNTY EXPENSE.

DATED DECEMBER 18, 2002.

John S. McGroarty

HONORABLE JOHN S. MCGROARTY

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COUNTY CLERK

ORIGINAL

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CLERK

ORDR

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Nevada Bar #000477
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Nevada Bar #004286
200 South Third Street
Las Vegas, NV 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER,
#1682627

Defendant.

Case No. C174954
Dept No. XVI

ORDER DENYING DEFENDANT'S MOTION TO DISMISS NOTICE OF INTENT TO SEEK DEATH PENALTY FOR VIOLATION OF INTERNATIONAL TREATY AND CUSTOMARY LAW

DATE OF HEARING: 12-17-02
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 17th day of December, 2002, the Defendant being present, represented by JOSEPH ABOOD, Deputy Public Defender, and CURTIS BROWN, Deputy Public Defender, the Plaintiff being represented by STEWART L. BELL, District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

///

///

IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss Notice of Intent to Seek Death Penalty for Violation of International Treaty and Customary Law, shall be, and it is denied.

DATED this 30th day of December, 2002.

DISTRICT JUDGE

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

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ORDR

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Nevada Bar #002781
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN PORTER,
#1682627

Defendant.

CASE NO: C174954

DEPT NO: XVI

ORDER

(For Psychiatric Examination)

IT APPEARING to the Court that the Defendant is charged by Information with the charges of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON, SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, ROBBERY WITH USE OF A DEADLY WEAPON, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM, SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, FIRST DEGREE ARSON, SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER, ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER, ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON, MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER), and BATTERY WITH USE OF A DEADLY

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WEAPON,

IT IS THEREFORE ORDERED that DR. THOMAS BITTKER be, and he is hereby, appointed, authorized and directed by the Court to examine the mental condition of the said Defendant, JUSTIN PORTER, and that DR THOMAS BITTKER shall have access to the Defendant in the Clark County Detention Center, on Thursday, February 19, 2004,

THAT said examination and findings to be made as soon as practicable prior to the continuation date of March 5, 2004, in Department XVI.

IT IS FURTHER ORDERED that DR. THOMAS BITTKER submit a report of examination of said Defendant to the Court, and to provide a copy of said report to the District Attorney's Office and to Defense Counsel.

DATED this 4th day of February, 2004.

DISTRICT JUDGE

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY
DOUGLAS HERNDON
Chief Deputy District Attorney
Nevada Bar #004296

msf

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PHILIP J. KOHN, PUBLIC DEFENDER
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Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. JUSTIN JUG CAPRI PORTER, Defendant.	CASE NO. C174954X DEPT. NO. XVI

WRITTEN ARGUMENT REGARDING DEFENDANT JUSTIN PORTER'S JACKSON V. DENNO HEARING

COMES NOW, the Defendant, JUSTIN JUG CAPRI PORTER, by and through Chief Deputy Public Defenders CURTIS S. BROWN and JOSEPH K. ABOOD, and hereby submit this written argument regarding Defendant Justin Porter's Jackson v. Denno hearing.

DATED this 24 day of June, 2005.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
CURTIS S. BROWN, #4546
Chief Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
JOSEPH K. ABOOD, #4501
Chief Deputy Public Defender

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PROCEDURAL

Defendant Justin Porter filed a motion to suppress his confessions and admissions to metro and Chicago detectives based on violation of his Miranda rights and involuntariness of his statements. We requested a Jackson v. Denno hearing on the matter. That hearing was held on three separate dates. On March 8, 2004, Kristen Kato and Sam Cirone, detectives with the Chicago Police Department testified at this hearing. On February 8, 2005, Dr. John Paglini and Dr. Gregory Brown testified, and on February 9, 2005, Justin Porter, Dr. Tom Bittker, and Dr. John Paglini testified. The State bears the burden to show this court beyond a preponderance of evidence that Justin's statement was given pursuant to lawful Miranda warnings and was given voluntarily.

The presentation of evidence at this hearing was concluded and the parties requested the opportunity to present written arguments to the court.

ALLEGATIONS BY THE DEFENSE

In our motion to suppress, we alleged that:

I. Justin Porter did not knowingly, intelligently and voluntarily waive his Miranda rights.

II. Justin Porter's statements to Chicago and Las Vegas detectives were not voluntary since they were the product of coercion, and or promises which induced him to make confessions or admissions.

FACTS

As this court knows from the facts filed in our motion to suppress, Justin Porter was developed as a suspect in a series of crimes which occurred in the downtown area between February and June of 2000.

On August 11, 2000, a search warrant was served on the home of Justin's mother in Las Vegas. She informed detectives that Justin was in Chicago visiting his father. (Transcript, March 8, 2004, p. 132). On that same day, Justin called Detective Barry Jensen three times and left messages that his mother had informed him that the detectives wanted to speak to him. Detective Jensen actually received a call from Justin while typing the search warrant on August 11, 2000. Detective Jensen testified that Justin told him he would be back in Las Vegas at the end of August,

and that they could take care of everything then (Transcript, March 8, 2004, p. 133). Those facts are of no consequence since a suspect either waives or invokes his Miranda rights at the point that they are given. Justin had not at this point been Mirandized, and was not told he was suspected of any crimes.

On August 12, 2000, at 12:45 A.M., Justin Porter was arrested in Chicago, Illinois, where he was visiting his father for the summer. His arrest was pursuant to a warrant faxed to Chicago police by metro detective Michael Castaneda. This Arrest Warrant DID NOT include homicide charges, and Justin was not arrested on that charge. He was arrested solely on charges of home invasion and sexual assault. (See, PHT November 1, 2000, p. 98 and PHT November 2, 2000, p. 24). That arrest occurred at 0045 hours at Defendant's father's home. The specifics of that arrest are more fully discussed later in this written argument.

After being transported to a Chicago Police Department Substation at 1251 South Kildare, Justin was questioned by Detectives Kato and Cunningham although at the preliminary hearing the Las Vegas Detectives claim they were unaware of any questioning by Chicago police. Justin was given the facts of six incidents by the Chicago detectives which Metro police were investigating and had faxed to the Chicago police. Detective La Rochelle testified at the Preliminary Hearing that as far as he knew, the Chicago Detectives did NOT interview Justin before the Metro Detectives arrived in Chicago, but that Officer Kato did advise the Defendant of his Miranda Rights. (PHT November 2, 2000, p. 16). Later it was discovered that Justin was indeed given information of the six incidents being investigated by Metro by Detective Kato in Chicago prior to his interrogation by Metro. The defense alleges that while Detective Kato and Cirrone were alone with Justin, a number of events occurred which were designed to coerce Justin into admitting the crimes he was suspected of.

When the Chicago Detectives came to interrogate to Justin, they told him that if he committed those crimes in Chicago he would probably get probation if he just admitted tot he crimes. When he continued to resist their ploys, they resorted to suggesting that he could be coerced into talking. JUSTIN PORTER, who was only seventeen years of age, was told that "being from Chicago, you know that people who don't cooperate go to the docks and get their ass

whooped." He was also threatened with use of a phone book to brutalize him because it would leave no evidence of abuse. Justin was obviously frightened and began admitting to the facts given to him by the Chicago detectives. Through the combination of threats of physical violence and the ruse that what he did was petty and would get him probation if he just admitted it, Justin made admissions to Chicago Detectives Kato and Cunningham which he would repeat to Las Vegas Detectives hours later. Those facts make up the basis of our contention that Justin's statement was not voluntary.

Detective Kristen Kato was the first person to make reference to Justin being mirandized. Detective Kato testified for the first time at Justin's Jackson v. Denno hearing on March 8, 2004. Detective Kato testified that he had a warrant for Justin's arrest (transcript, March 8, 2005, p. 13) and that he in fact placed Justin under arrest after he was handcuffed (transcript, March 8, 2004, p. 13). There is no question that Justin Porter was in custody as of August 12, 2000, at 12:45 a.m. Detective Kato testified that there was no questioning or conversation of any type between he, Justin, or Detective Kato's partner Detective Cirone, on the way to the police station. (Transcript, March 8, 2004, p. 15).

Upon arriving at the police station, Detective Kato took Justin into an interview room, took the handcuffs off of him, and told him to knock on the door if he needed anything (transcript, March 8, 2004, p. 15). It is interesting to note that rather than simply booking Justin after his arrest on an arrest warrant, Detective Kato took him to an interview room even though he earlier testified that there was no discussion between Justin and anyone else up to that point. It is clear that Detective Kato had every intention of interviewing Justin Porter, and that he was not asked to do so by anyone at Metro.

After locking him in the interview room, Detective Kato took it upon himself to talk to his supervisor to "get as much information as I could on the actual crimes that he committed in Las Vegas." (Transcript, March 8, 2004, p. 17). He reviewed "documents" that were faxed to him supervisor by Las Vegas detectives, and reviewed them in order to "have an interview and see if he would elaborate on any of the investigations that they sent over on the fax." (Transcript, March 4, 2004, p. 17). At approximately 1:30 in the

morning on March 12, 2000, he and Detective Cunningham, also a Chicago detective, entered the interview room Justin Porter was placed in. Detective Kato then claims he advised Justin Porter of his rights, from memory. He claims that Justin Porter indicated that he understood his rights, and that he wanted to talk. (Transcript, March 8, 2004, p. 19). He testified to this court that metro detectives wanted Justin to be interviewed (transcript, March 8, 2004, p. 39), and that his lieutenant told him that metro wanted Justin questioned (transcript, March 8, 2004, p. 49). That appears to be a blatant falsehood.

Most interestingly, Detective Kato admitted on cross that he had an interest in interviewing Justin about incidents that occurred outside his jurisdiction because, "I like to know what he's thinking when he's doing these things." (Transcript, March 8, 2004, p. 49-50). More likely, in the view of the defense, Detective Kato wanted to "question" Justin so that he could employ his special talent for extracting statements from individuals who no one else seems to be able to get a statement from. Detective Kato's special brand of threats, lies, and coercion eventually led to Justin agreeing to many of the facts Detective Kato presented him with. As this court knows, the truth or falsity of the admissions or confessions made by a criminal defendant have no bearing on whether or not those statements are admissible if they were taken in violation of a defendants Miranda rights, or if they were given involuntarily.

On August 12, 2000, Detectives Jensen, Cricket and La Rochelle arrived in Chicago, Illinois to interview JUSTIN PORTER at the Chicago Police Department Area Section 4 Station located at 3151 West Harrison. They were told by Detectives Kato and Cunningham of the Chicago Police that Justin was questioned by them earlier concerning information of six of the "Area Command Series" crimes faxed to them by Metro.

By the time Detectives Jensen, La Rochelle, and Cricket arrived in Chicago on August 12, 2000, Justin had been in custody approximately fifteen hours. He had slept little since his arrest. Any sleep he did get was on a table and chair. According to him, he was kept alone in a room chained to a wall. He was unchained when the Chicago Police came to interrogate him.

Metro Detectives Jensen and La Rochelle interrogated Justin beginning at approximately 1700 hours Chicago time. It is undisputed that this interrogation was also custodial in nature. Detective La Rochelle testified at the Preliminary Hearing that Detective Jensen Mirandized JUSTIN at approximately 1700 hours and then they spoke to him without a tape recorder until 1930 hours local time. (PHT November 1, 2000, p. 114). The Miranda warnings consisted of Detective Jensen handing JUSTIN a card with his rights typed on it and asking him to read it aloud. Detective La Rochelle testified at the Preliminary Hearing that Detective Jensen handed JUSTIN a copy of the Miranda warnings. The Defendant then signed it and dated it and stated he understood his rights. (PHT November 1, 2000, p. 61). Later, Detective La Rochelle acknowledged that it was actually he, not JUSTIN, who dated the waiver. (PHT November 1, 2000, p. 104).

When Detective Jensen testified about his recollection of Mirandizing JUSTIN, he stated that when he asked JUSTIN to read the card aloud, he had trouble reading it. Detective Jensen had to help JUSTIN who was trying to sound out some of the words. Detective Jensen then asked him if he understood what he read, and he claims that JUSTIN said yes. The Detectives never did ask JUSTIN if he wished to waive those rights and talk with them. (PHT November 15, 2000, p. 25).

After this Mirandizing, JUSTIN made a number of admissions according to these detectives, off tape. These admissions off tape were made during approximately two and half hours of interrogation, which our detectives call a "pre-interview." Detective La Rochelle testified that the reason he didn't put the tape recorder on shortly after JUSTIN began admitting to some of the robberies and sexual assaults is because he wanted JUSTIN to talk about the homicide first, before a taped statement was taken. The detective added that he was concerned that if he put the tape recorder on, JUSTIN may actually state he wanted to speak to a lawyer, and the questioning would have to stop. (PHT November 1, 2000, p. 112). The detective testified at the hearing that when Justin contacted him telephonically on August 11, 2000, he did not advise him of his rights and, in fact, would not advise a suspect of his rights until he absolutely had to (Transcript, March

8, 2005, pp. 164-165). Detective Jensen went on to answer the following questions on cross-examination concerning Miranda rights:

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///

Q: What I'm saying is your game plan of going there and getting this statement wouldn't have played out the way you wanted if he invokes his right to remain silent?

A: That's correct.

Q: Or if he invokes his right to have an attorney present?

A: That's correct.

Q: Because in your experience, for all intense purposes, if the attorney is there he's going to stay silent?

A: Sure. Once they invoke, we don't get to talk to them.

Q: Right. And that kind of would have been a wasted trip if that happened?

A: Well - -

Q: Maybe not personally, but the purpose was to go get a statement?

A: That's correct.

Q: And if you get that and he invokes and doesn't give a statement, then the trip was kind of a waste?

A: Sure.

(Transcript, March 8, 2005, p. 171).

Detective Jensen then went on and testified as follows at the hearing:

Q: Well, let me rephrase.

The rights to remain silent, if invoked, impede potentially the gathering of information.

A: Yes.

Q: Which potentially impede the investigation?

A: It depends on the investigation. Depends of the other evidence that you have.

Q: Potentially?

A: Sure.

Q: And so, I guess, ultimately, the hope when you are advising an individual of his rights per Miranda, frankly, is that he elects to talk to you?

A: Yes, I love it when people talk to me.

Q: I mean, your hope is that he elects to not invoke his right to remain silent?

A: Absolutely.

Q: Your hope is that he elects not to invoke his right to have an attorney present?

A: Sure.

(Transcript, March 8, 2005, p. 175-176).

The detectives were vitally concerned that JUSTIN not invoke any of his Miranda Rights. This is an obvious case of the Detectives manipulating a young, uneducated, impressionable boy into not asking for a lawyer. These detectives knew that if they spent too much time dwelling on the Miranda event, Justin might make it clear that he wanted a lawyer and the questioning would have to stop. That would interfere with their investigation.

When the detectives were satisfied that JUSTIN had made all the admissions and confessions they needed in their two and half hours, unrecorded "pre-interview," they decided to take a recorded statement. The first recorded statement given by JUSTIN was August 12, 2000 at 1930 hours Chicago time. He had very little sleep, was physically threatened and intimidated by the Chicago Police earlier, was told that what he supposedly did was minor and probably lead to probation, and was denied his request to speak to his father. According to the transcript of Justin's interrogation, the recorded statement begins with Detective Jensen stating:

Q: Justin, before we spoke to you today, I gave you a Rights of Miranda Card, do you remember that?

A: Yes, sir.

Q: And do you remember signing that?

A: Yes, sir.

Q: Ok. And do you understand your rights?

A: Hm, kinda I do, but sometimes I . . . yes.[1]

Q: Did you read the card aloud?

A: Yes to you.

Neither detective bothered asking Justin whether or not he needed further classification of his rights based on Justin's equivocal answer to the all important question, "Do you understand your rights?"

The detectives then go into all the admissions JUSTIN made in the "pre-interview." This statement ended up being seventy-seven pages in length.

Detective La Rochelle agreed at the Preliminary Hearing that JUSTIN was not told anything more about his rights other than what he tried to read two and half hours earlier. He was never asked if he waived his rights prior to the statement, and he was never informed he could have a parent present prior to questioning. (PHT November 1, 2000, pp. 114 - 115). In fact, Justin was never again told his Miranda Rights before any other statement he gave. (PHT November 1, 2000, p. 133). He was interviewed again on August 13, 2000, by Detective Jensen of Metro's Sexual Assault Detail at the Chicago Police Department and no Miranda warnings were given, and no inquiry was made as to whether Justin wished to talk to detectives again. Concerning that Justin was at no time asked whether he waived his rights, Detective Jensen testified as follows at the hearing:

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[1] **In the Audio tape, Mr. PORTER actually seems to say "Hm, kinda I do, but sometimes... <u>I, I don't</u>, yes" (emphasis added for distinction).**

Q: Okay. Now getting back just for one second. When somebody has either read this or otherwise been advised of their rights, you don't actually ask them, do you waive those rights?

A: No.

Q: Okay. Because you've learned through your experience or your training that the words waiver and rights might alarm somebody to the point where they actually get a little nervous?

A: No. I just ask them if they understand them. If they understand their rights. If they understand what I just read, words to that effect.

Q: Okay. And then you ask, and then you just start talking?

A: Yes.

Q: And if they start talking, you assume that they've waived those rights?

A: Generally, they reply either yes or no.

Q: That they understand?

A: Yes.

Q: But you don't ask them whether they waive it.

A: That's correct.

(Transcript, March 8, 2004, p. 181-182).

Interestingly enough, Detective La Rochelle knew JUSTIN was only seventeen (PHT November 1, 2000, p. 116) but didn't tell him he had a right to a parent's presence during questioning because he believes JUSTIN has no such right during a homicide investigation. (PHT November 2, 2000, p. 23). The detective also admitted he had no idea what a "Gault" warning was.

On whether or not JUSTIN understood the Miranda Card he was attempting, with little success, to read, Detective Jensen testified that he had to help JUSTIN with some of the words which he was sounding out. He acknowledged that JUSTIN was reading the card very slowly. In addition, Detective Jensen acknowledges that JUSTIN didn't understand some of the words, but no one bothered telling him what the words meant (PHT November 15, 2000, pp. 27 - 28 and pp. 82 -

83) and didn't ask JUSTIN if he affirmatively waived his rights before questioning. (PHT November 15, 2000, p. 96).

Unfortunately, we have no record at all of the actual Miranda warnings that took place in this case because Detective Jensen did not record that part of Justin's interview. Detective Jensen testified that he did not audio tape the advisement and waiver because it was his aim to establish a friendly rapport with Justin, and that placing a tape recorder in front of his prior to that happening may have caused him to not talk, and that would be counter to the detectives goals. (Transcript, March 8, 2004, p. 199-200). What we do know is that Detective Jensen testified that Justin was asked to read the rights of persons arrested card, and that he read it slowly, that he had to sound the words out with Detective Jensen's help, and that Detective Jensen never explained what any of the words meant (Transcript, March 8, 2004, pp. 202-206), even though it was obvious Justin could not even pronounce them.

TESTIMONY ADDUCED AT JACKSON v. DENNO HEARING

I. JUSTIN PORTER DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS MIRANDA RIGHTS.

Detective Barry Jensen testified at the hearing that he was not aware that any detectives from Chicago had interviewed his suspect until later when he arrived in Chicago. There he learned that Lieutenant Monahan from metro said, "it would be okay if they (Chicago detectives) spoke with him." (Transcript, March 8, 2004, p. 166). That vernacular suggests to the defense that Detective Kato specifically asked to speak to Justin because he knew his brand of "interrogation" would likely be as successful as it had numerous times in the past. However, Detective Jensen neither requested, nor was he aware prior to going to Chicago that Chicago detectives questioned him. (Transcript, March 8, 2004, p. 168). It should be obvious to this court that Detective Jensen not only never asked Chicago detectives to inject themselves into his case, but that Detective Kato seemed to have had personal reasons to interrogate Justin. It is highly unlikely in our view that Detective Kato, who did not record, video, notate, or memorialize his interrogation in any way would care in the least about actually Mirandizing Justin prior to interrogating

him. Detective Kato's credibility with this court should be suspect based on all the complaints of brutalization that have been lodged against him in the past by people who have been in Justin's position. Those facts will be addressed more fully in this written argument.

After Justin was placed in the interview room, Detective Cirone claims that he was not involved with Justin until later that day, so did not participate in the "interview" conducted by Detective Kato.

Detectives Kato and Cunningham then apparently entered the interview room and interrogated Justin. Detective Kato claims that Justin wanted to talk to him (transcript, March 8, 2004, p. 19). Detective Kato claims that Justin then made certain admissions and confessions to him after he provided Justin with various details about the offenses which allegedly occurred in Las Vegas. He also claims that Justin "volunteered" information to him. (Transcript, March 8, 2004), pp. 20-28).

This interview began at approximately 1:30 A.M. (Transcript, March 8, 2004) and lasted 45 minutes (Transcript, March 8, 2004, p. 29). Detective Kato then left Justin in that interview room for the remainder of the night, and into the afternoon. Detectives Kato and Cunningham then returned at approximately 3:00 P.M. that afternoon (over twelve hours later) because they were told Las Vegas Police Department was coming to Chicago to interview Justin (Transcript, March 8, 2004, p. 32).

Detective Kato then claimed that he entered into the interview room, re-advised Justin of his rights, and told him that Las Vegas police were coming to see him. (Transcript, March 8, 2004, p. 33).

Detective Cirrone was with Kato at this time. Surprisingly, Cirrone testified that, "we basically went over the same story that he had repeated earlier" (Transcript, March 8, 2004, p. 93) even though he was not present for the interview earlier that morning between Kato, Cunningham, and Justin. He then goes on to use the same verbiage that Kato used to describe the story that Justin allegedly told. I mention this because a careful review of the testimony of these Chicago detectives raises serious concerns about their veracity. They

obviously got their stories straight prior to testifying before this court. In fact, this court should conclude that these so called detectives represent the worst in law enforcement, and are highly skilled liars with great experience in misconduct and false testimony to cover up their criminal conduct.

None the less, although these detectives claim at this point that Justin was mirandized at 1:30 A.M., and again about 3:00 P.M. on August 12, 2000, and that Justin understood his rights, no documentation at all confirms this claim. There is no signed Miranda waiver (Transcript, March 8, 2004, p. 45). Detective Kato agreed that the only way this court has to evaluate whether or not Justin was actually mirandized is his word. The defense does not lightly impugn the reputations of detectives in our jurisdiction; however, it should be abundantly clear to this court that Detectives Kato and Cunningham are serial liars who make a career out of brutalizing confessions from defendants, then lying to judges and juries about their misconduct. That fact will be addressed more fully later in this argument.

There is no reliable evidence whatsoever that Justin was mirandized twice by Chicago detectives. That is despite the fact that Detective Kato testified that when a suspect decides to confess in Chicago, the suspect can choose a court reported statement, handwritten statement, or a video. (Transcript, March 8, 2004, p. 48). None of those things occurred in this case.

These so called advisements and waivers by Justin which occurred at 1:30 A.M. and 3:00 P.M. on August 12, 2000, if it is true that they actually occurred, must still be knowing and voluntary. It is abundantly clear that if Justin did not understand the nature of his Miranda rights, which we know for a fact were given later by metro detectives, he certainly did not understand the warnings that Kato and Cunningham claim he was given, although no evidence exists to corroborate the Miranda events. In fact, this exchange took place between defense counsel and Detective Kato during his testimony at the hearing on March 8, 2004, p. 54:

Q. You've already told this judge that no efforts were made to memorialize this giving of his Miranda warnings and his waiver; is that right?

A. That's correct.

Q. You, obviously, agree that the providing of Miranda warnings is a critical step in an interview or interrogation procedure; is that right?

A. Critical.

MS. LUSAICH: Well, actually that calls for a legal conclusion.

MR. ABOOD: Well, let me rephrase. I don't want to waste any time on this.

THE COURT: Sure.

BY MR. ABOOD:

Q. Is it important to you, when you're taking a statement from a suspect to a crime, to make sure that the requirements of Miranda are strictly adhered to?

A. Yes, sir.

Q. Can you explain to the judge why it wasn't important enough for you to make any notes of this Miranda event in this particular case?

MS. LUSAICH: That assumes fact not in evidence that he made no notes.

MR. ABOOD: I believe these facts are abundantly in evidence.

THE COURT: Overruled. Go ahead.

MS. LUSAICH: Well, no. He generated a report. He says he made no notes. He generated a report, he didn't tape record.

THE COURT: No. He's referring to a signed Miranda waiver.

MR. ABOOD: Or recorded, Judge.

THE COURT: Or recorded.

MR. ABOOD: Or video taped or anything.

THE COURT: I agree. Sir, it wasn't memorialized, correct?

THE WITNESS: That's correct.

THE COURT: The waiver was not memorialized?

THE WITNESS: That's correct.

THE COURT: Thank you.

BY MR. ABOOD:

Q. In this murder case where you're receiving information from a suspect himself concerning sexual assault, attempt murders, murders, et cetera, didn't that strike you as important to make sure you had taken care of this Miranda issue, so we wouldn't have to be talking about this?

A. It was up to Las Vegas Police Department.

Q. But, sir, you were there questioning their suspect. They were not there; is that correct?

A. That's correct.

Q. So, again, did you think about it?

A. No, sir.

Detective Kato's position is therefore that "it was up to the Las Vegas Police Department" to ensure that Justin Porter's Miranda rights were properly given and then knowingly and voluntarily waived by Justin. At the same time, he wants this court to believe that he Mirandized Justin two times, but offers no evidence that the events took place because he felt that, "It was up to the Las Vegas Police Department."

It is therefore instructive to determine what steps metro actually took to ensure that Justin was properly Mirandized and understood all his rights.

Firstly, Detective Jensen did not ask anyone in Chicago to interview or interrogate Justin, and he has no idea who would have made such a request. (Transcript, March 8, 2004, p. 136).

Detective Jensen testified he, Homicide Detective James La Rachelle, and Robbery Sergeant Lana Cricket all flew to Chicago on August 12, 2000, after hearing Justin had been taken into custody there. (Transcript, March 8, 2004, p. 136).

They arrived in Chicago and began to interview Justin at about 5:30 p.m., Chicago time, March 12, 2000. The testimony concerning Miranda warnings given by Jensen are as follows:

Q. Okay. And what was the procedure to initially drop the tape recorder down and start taping it? Or what?

A. No. The first thing we did was re-Mirandized him from one of out L.V.M.P.D. cards.

Q. Okay.

A. I had him read it aloud.

Q. So you did the Miranda?

A. Yes.

Q. Okay. And you said you did it? You read it off of a department issued card?

A. I had Justin Porter read it first.

Q. Okay.

A. And he was – he was having trouble pronouncing some of the words. He sounded out and read it to where I could understand what he was saying.

Q. Okay.

A. Then I read the card to him out loud. And I asked if he understood his rights. And he said he did. And then we told him to, or we asked him to sign the card. And we signed it. Put the date and time on it and the event number.

Q. Okay. When you read the card to him and then asked him if he understood it, then you said that he said, yes?

A. Yes.

Q. I mean, were you confident that he understood it as opposed to just giving you have lip service?

A. Absolutely. There wasn't a doubt in my mind that he did not understand his rights.

THE COURT: What? He what?

THE WITNESS: There's not a doubt in my mind that he -- that he did -- that he understood his rights.

THE COURT: You said, did not.

THE WITNESS: I'm sorry.

THE COURT: Keeping me awake.

BY MR. HERNDON:

Q. I mean, his demeanor wasn't one of, I'm confused. I don't really understand?

A. No.

Q. He didn't say anything like, I understand. I could be quiet, but I don't understand this part?

A. No. He did not.

Q. Okay, did you ask him: Do you have any questions about it?

A. Pardon me?

Q. Did you ask him if he had any questions about when you read it back to him?

A. No. I just asked him if he understood them.

Q. Okay. And he signed the card?

A. Yes, he did.

Q. And then you all begin talking to him?

A. Yes.

Detective Barry Jensen testified at Justin Porter's preliminary hearing on November 15, 2000. He was asked about his specific recollection of Justin's Miranda events at that time. He stated that he and Detective La Rochelle were in the interview room with Justin. The interview began by providing Justin a Miranda card, and asking him to read it out loud. (PHT, November 15, 2000, p. 25). The questioning by Deputy D.A. Lowry disclosed the following:

BY MS. LOWRY:

Q. Now, can you explain for us how you use that card? What you have the defendant do? What you did?

A. I asked Justin Porter to read the card out loud to us. He read the card. I had to help him with some of the words.

Q. For instance, do you recall which words you may have had to help him with?

A. I don't really recall, but some of the bigger words.

Q. Okay.

A. He was trying to sound them out. I just helped him with it.

Q. Okay. And so he read it out loud?

A. Yes.

Q. And then what?

A. I asked him if he understood what he just read, and he stated he did.

Q. All right.

A. I asked him if he understood it, if he would sign it, and he did.

Q. And did he agree thereafter to speak with you?

A. Yes, he did.

(PHT, November 15, 2000, pp. 27-28).

This all occurred during a pre-interview without any recordings of any kind. The interview was attended by Detective Jensen, Detective La Rochelle, and Justin. (PHT, November 15, 2000, p. 25). No report was generated referencing this Miranda event (Transcript, March 8, 2004, p. 208). On cross examination at the preliminary hearing, Detective Jensen testified that after Justin read the card to him, he (Detective Jensen) did not read it back to Justin. (PHT, November 15, 2000, p. 83). However, at the Jackson v. Denno hearing, Detective Jensen testified that he reviewed his notes and found an officer's report by Detective Castaneda dated August 17, 2000. That report said "Detective Jensen advised Justin Porter of his right per Miranda. Justin Porter also read the Miranda right card out loud to Detective Jensen and La Rochelle, and then Justin Porter signed the card. (Transcript, March 8, 2004, p. 209). However, Detective Castaneda was

not in the interview room at the time, but simply typed up a report based on what Jensen told him from his "experience." (Transcript, March 8, 2004, p. 210). Specifically, Jensen testified as follows at the hearing: (Transcript, March 8, 2004, p. 210).

A. Right, and he typed.

Q. And he typed up a report?

A. What I had told him from our experience.

Q. But when we're testifying about what you recall, you don't recall reading Justin his rights:

A. That's correct.

Q. Okay.

A. At that time I didn't.

Q. Well, you don't recall today reading it. You just referenced the report where he maybe indicated you did?

A. That's correct.

Q. But you still have no recollection of actually reading it to him?

A. That's correct.

Q. Okay. And you didn't recall it? Don't recall it today and you didn't recall it three years ago?

A. That's correct.

Q. Which was within months of his arrest?

A. Yes.

Detective Jensen admitted that he did not explain any of the wording to Justin at that or any other time. (Transcript, March 8, 2004, p. 211).

The direct evidence we do have of an actual Miranda event concerning Justin takes place during that same interview after Detective Jensen actually did turn the tape recorder on. He does not re-read Justin his right at that time, but the following does take place:

Q. You turn the tape on and it begins. Now, when referencing the audio taped portion of the interview, the statement, you don't read Justin his Miranda rights off this card on the audio tape?

A. No, I do not.

Q. And, in fact, you don't even have him reread it to you on the audio tape?

A. No, I do not.

(Transcript, March 8, 2004. pp. 211-212).

Q. Okay. Now, what you do is, you ask him if he remembers you giving him the rights card?

A. Yes.

Q. Correct? And this is because we discussed earlier, it's important to make a record that he was advised of his rights?

A. That's correct.

Q. Okay. You asked him if he remembers? He says, yes, sir?

A. Yes.

Q. Okay. Clear, unequivocal?

A. That's correct.

Q. Then you asked him if he signed it? And if you want to reference it for any reason, feel free. And then you asked him if he signed it? Again anwers, yes, sir?

A. Yes.

Q. Clear, unequivocal?

A. That's correct.

Q. And then you asked him if he understood his rights. The sixty-four thousand dollar question.

A. Yes.

Q. And he says something to the effect, kind of, I do, but sometimes, you know, yes? (See footnote 1).

A. Yes.

Q. And that's your interpretation of having listened to the tape as to what he says?

A. That's who transcribed it?

Q. Transcribed it. Okay. Now the same clear and unequivocal answer that had been given to the two previous questions.

A. Yes.

Q. In fact, before he actually answers that question, he pauses for just a moment before he even says, hmmm kind of, I do, correct?

A. Yes.

Q. Okay.

A. That's what it indicates.

Q. Now, also within his statement, and, boy, we went through this corrected uncorrected copy thing before. But also within his statement when you're asking him if he remembers reading it to you and signing it, you don't ever reference that you read it to him?

A. That's correct.

Q. And had you read it to him, you would have likely referenced that in the recorded version that you read him his rights?

A. I may or may not have.

Q. Okay. Now when he indicated, hmmm, kind of I do, but sometimes, yes, your reliance that he understood his rights was based upon his saying yes?

A. I use the whole statement.

Q. Well, again, you're not re-Mirandizing him in this tape recorded statement?

A. That's correct.

Q. You are referencing an earlier discussion?

A. Yes.

Q. Okay. Now once we're past this section of the transcribed tape, there's no further discussions about Miranda or rights to an attorney or rights to remain silent?

A. No.

Q. Okay. And when the interview was over, I trust there were no further discussions about those particular rights?

(Transcript, March 8, 2004, pp. 213-216).

The point of this hearing goes to the issue of whether Justin actually understood his Miranda rights, and waived them knowingly and intellegently.

Besides his equivocal answer to the question by Detective Jensen, the defense had him evaluated by a number of experts to help this court determine whether his waiver was knowingly and intelligently given.

On February 8, 2005, Dr. John Paglini, who has a doctorate in clinical psychology, testified. He met with Justin for seven hours on January 18, 2002. Additionally, he met with Justin at the Clark County Detention Center on February 13, April 13, April 22, and June 7, 2002. He also conducted eleven to twelve collateral interviews in Chicago, Illinois. (Transcript, February 8, 2005, p. 10).

He administered an I.Q. test, traveled to Chicago to obtain Justin's academic records from kindergarten to ninth grade, administered two achievement tests and memory tests, as well as a neurological screener test. (Transcript, February 8, 2005, p. 15).

At the time of the I.Q. test, Justin's age was 19, but his verbal I.Q. was 78. (Transcript, February 8, 2005, p. 14). Dr. Paglini explained that this essentially means that 93 out of 100 people in Justin's age range scored better than he did in relation to verbal abilities (transcript, February 8, 2005, p. 15). Justin was classified as "borderline intelligence." Dr. Paglini also administered the Wide Range Achievement Test Revision Third Edition on January 8, 2002. In the reading section he had a standard score of 63, which indicates he is comparable to a second grader. In the spelling section he had a standard score of 54 which means he is comparable with a first grader. Dr. Paglini concluded that Justin has "very severely impaired spelling." (Transcript, February 8, 2005, p. 17).

This is confirmed by the testimony of Detective Barry Jensen at both this hearing and at the preliminary hearing where he states that he had to help Justin pronounce the words on his rights advisement card, and that Justin was reading it very slowly and deliberately.

In order to confirm his earlier scores, Dr. Paglini decided to give Justin a different achievement test to see if the results would be consistent. The scoring was exactly what Dr. Paglini experienced in the Wide Range Achievement Test he gave Justin. The sub tests given included reading comprehension, which placed Justin in the 3.6 grade equivalent. Listening comprehension placed him in borderline intelligence, placing him at grade 3.5, and expression was at the 5th grade level. These two tests given approximately ten days apart confirmed that Justin's reading pronunciation, his reading comprehension, and his listening comprehension level were at grade 3.5 to 3.8. He is severely impaired. (Transcript, February 8, 2005, p. 18-19).

Dr. Paglini testified that the WRAT 3 test he gave Justin tested pronunciation since one must be able to pronounce words before he can read it. Justin scored at the second grade level, and Justin's reading comprehension was below the third grade level. (Transcript, February 8, 2005, p. 20).

When questioned about whether it was possible that Justin may be malingering, Dr. Paglini stated that with respect to the adult intelligence test, the Wide Range Achievement Test, and the individual achievement test, there was no evidence of malingering. Justin's behavior indicated he was trying to succeed, not fail. (Transcript, February 8, 2005, pp. 25-26).

Further evidence that Justin is indeed of borderline intelligence consists of the fact that the I.Q. tests given him in grade school are comparable with the latest and other tests that Dr. Paglini administered pursuant to our request.

The fact of the matter is that these tests all indicate that Justin's I.Q. suggests borderline intelligence which is right over mental retardation. That makes Justin severely impaired. (Transcript, February 8, 2005, p. 33).

Justin's school history supports the conclusions. He was identified as a "special eduation" student in kindergarten and repeated the first grade. He was sent to a school which had better facilities to treat the learning disabled. Throughout his schooling he has been well below the achievement of his peers. (Transcript, February 8, 2005, p. 37-40).

In fact, even this court noted that the school documents themselves show that Justin was "socially promoted" from eighth grade to high school because he was too old to remain in the

eighth grade. And, when he did enter high school, he was at the second or third grade level (Transcript, February 8, 2005, p. 42-43).

Not surprisingly, an IEP (Individual Education Program) was established for Justin in 1997 because he needed specialized care in his education, due to being learning disabled. At that time, the school district recognized in his IEP that Justin had "poor memory skills, his reading, spelling and writing skills significantly interfere with his education and preference. He has a severe reading disability and poor development." (Transcript, February 8, 2005, p. 46-47).

In terms of the amount of time Dr. Paglini spent on Justin's case, in order to render his opinions, he characterized it as follows:

> A. Oh, I probably had minimally twelve to fourteen contact hours. And I was in Chicago interviewing family. That might have been seven or eight hours. Then I did some collaterals over the phone. That could have been several more hours.
>
> Then reviewing discovery and add on numerous hours for that.

(Transcript, February 8, 2005, p. 53).

The gist of Dr. Paglini's testimony appeared to be that Justin is learning disabled, borderline I.Q. That he's cognitively severely impaired. He has a spelling disorder and a likely severe reading disorder.

The fact is that Dr. Paglini testified to show a young man who is challenged in reading and writing. He is so deficient in these areas that he could not even adequately read his Miranda warning, let alone understand them. He had to be helped in pronunciating the words on the advisement of rights form produced by Detective Jensen. He in fact stated that he has problems understanding the warnings themselves when he used the words. "Hmm, kinda I do, but sometimes... I, I don't, yes" in response to Detective Jensen's question whether he understands his rights.

The defense retained Dr. Gregory Brown, M.D., a forensic psychiatrist to evaluate Justin's actual understanding of the Miranda rights, and their waiver. He was provided with a great many documents concerning Justin's case and reviewed the results of a number of tests given by Dr. John Paglini, a psychologist.

Dr. Brown testified that the I.Q. test administered by Dr. John Paglini showed a full score of about 77, and that was slightly above what would be considered mentally retarded. (Transcript, February 8, 2005, p. 101).

More specifically, Justin seems to be diagnosed as "borderline intellectual functioning." Dr. Brown agreed with Dr. Paglini's assessment that Justin's spelling abilities were impaired at about the first percentile, and a third grade level, and his basic reading skills were at a second grade level. (Transcript, February 8, 2005, pp. 102-104). He also agreed that the school records we obtained including the standardized test scores administered through his school years gives validity to the test scores obtained by Dr. Paglini in that they complement each other, and give validity to the low scores Justin achieves even now.

Dr. Brown, after reviewing all the data, then administered an "Assessing, Understanding, and Appreciation of Miranda Rights Test" which was devised by Dr. Thomas Grisso. He administered this test to Justin on August 12, 2002. Dr. Brown testified that this is a relatively straight forward test in which you are basically reading sentences to people and asking them what those sentences mean. (Transcript, February 8, 2005, p. 110). The court may recall that Dr. Brown gave examples of the types of questions which appear in the assessment, and the scores given for various answers. A lengthy explanation was provided by Dr. Brown. (Transcript, February 8, 2005, pp. 111-116).

Justin scored a one out of nine on his ability to comprehend his Miranda rights, which put him at the lowest one percentile. In other words, 99 people out of 100 would score better than Justin on that portion of the test. (Transcript, February 8, 2005, p. 117).

Justin was also evaluated concerning his comprehension of Miranda vocabulary, which is designed to determine whether an individual understands the concept of a particular sentence. He scored two out of twelve on that section. Dr. Brown noted that it was very hard for Justin to understand this task, and that he often had to read Justin the sentence pairs two or three times before he was able to answer. (Transcript, February 8, 2005, p. 119). In this section of the test, Justin was placed in the 1.2 percentile, which meant that 98 or 99 out of people out of 100 would score better than he did on that portion of the test. A full explanation of this section of the test

together with the words Justin did not understand was also testified to. (Transcript, February 8, 2005, pp. 120-123).

The test Dr. Brown administered had other sections which were designed to test Justin's understanding of his Miranda rights. For example, Dr. Brown testified at length about a section called "function of rights in interrogation." (Transcript, February 8, 2005, p. 130-163).

Finally Dr. Brown was asked to render his opinion as to whether or not Justin understood his Miranda rights.

He stated that the results he scored on the Miranda test were in comport with the results Dr. Paglini got on the tests he administered to Justin. That is to say that Justin has significant difficulties with vocabulary, reading, and verbal processing.

The scores Dr. Brown got also were consistent with the I.Q. scores Justin reviewed in grade school and high school. The score Dr. Brown got was also consistent with the scores Dr. Paglini got in the testimony he administered to Justin which was covered earlier.

Finally, Dr. Brown opined that it was his professional opinion that he would have had significant difficulties understanding the Miranda rights both in terms of the vocabulary and the comprehension. (Transcript, February 8, 2005, p. 142).

Finally, on February 9, 2005, Justin Porter testified at the Jackson v. Denno hearing. He stated that while going to school, he achieved primarily Cs, Ds and Fs. He took primarily special education classes. He believes he took classes because of his problems in reading, writing, and spelling. The last grade he ever completed was the 10th grade in Las Vegas. He never graduated from high school and never accomplished a G.E.D. (Transcript, February 9, 2005, pp. 6-8).

His testimony specifically concerning whether he understood his Miranda rights was as follows: Justin testified that he had a better understanding of his Miranda rights after his attorneys went over them with him. He stated he does not remember if the Chicago detectives ever told him his Miranda rights before they interrogated him, and that he did not sign any waivers. (Transcript, February 9, 2005, pp. 12-13).

Whether or not Detectives Kato and Cirone from Chicago ever mirandized him as they testified at his hearing they had is an open question. There is no evidence of the Miranda event

either recorded or noted in any way. If Justin was mirandized by Kato as Kato claims, he has no recollection of that. Justin testified about being mirandized by Detective Jensen from metro:

Q. Okay. Now, do you remember these detectives giving you a card to read that had your Miranda Rights on it?

A. Yeah.

Q. Okay. Now, that was before they turned the tape recorder on?

A. Yes, sir.

Q. All right. Now did you try to read the card to them?

A. Yes, sir.

Q. Did you have a problem reading that card to them?

A. Yes, sir.

Q. Eventually, did any of these detectives help you read the card?

A. Yes, sir.

Q. Did they help you pronounce the words on the card?

A. No, they just took it from me and was, like, reading it they self.

Q. Okay. So how much of it do you think you read before they took it away from you and read it to you themselves?

A. I can't say, I was.

Q. Now, did either of these detectives explain to you what any of those words on that card meant?

A. No, sir.

Q. And he asked you to sign the card?

A. Yes, sir.

Q. And did you sign it?

A. Yes, sir.

Q. Do you remember the detective asking you if you understood your rights?

A. No, sir.

Q. I'm going to play portion of your August Twelfth interview in Chicago with Detective Jensen. I want to ask you to tell the judge whether or not this is your voice. Okay?

Was that your voice?

A. Yes, sir.

Q. What did you mean when he asked you the question: Do you understand your rights? What did you mean when you said: Kind of I do, but sometimes I, you know, yes. Or what does that mean?

A. It was just that, I was trying to say, I really didn't, you know. But I was just – didn't want nobody to think less of me, you know, so –

(Transcript, February 9, 2005, pp. 23-24).

Both Justin and Detective Jensen testified that no effort was made to explain the Miranda rights to Justin after his equivocal response as to whether or not he understood his rights. Justin himself testified that he did not understand his Miranda warnings. (Transcript, February 9, 2005, p. 73). He testified that he would not have spoken to the detectives had he known he didn't have to, and that he would have said nothing to them had he not been scared. (Transcript, February 9, 2005, p. 29).

In an effort to rebut the defenses evidence that Justin did not knowingly, intelligently, and voluntarily waive his Miranda rights, the State called Dr. Tom D. Bittker. Dr. Bittker acknowledged that Justin did evidence language difficulties. (Transcript, February 9, 2005, p. 81). He, however, believes that Justin was trying to appear far less intelligent that previous testimony would suggest. Ironically, that would place Justin in the category of a bona fide mentally retarded individual. When Ms. Luzaich attempted to elicit an example of what Bittker was speaking of, he stated that Justin kept repeating that he was charged with "bad stuff" when Bittker asked about the charges against him. (Transcript, February 9, 2005, p. 82). This court should know that the defense in this case specifically advised Justin not to talk about the facts of his case. In fact, Dr. Bittker testified that Justin was more disclosing when he was talking about history that was not relevant to the crime in question. (Transcript, February 9, 2005, p. 94). Dr. Bittker then went

through a litany of crimes with Justin and asked him if he was accused of those crimes. Justin made it a point to make it clear to Dr. Bittker that he didn't do anything wrong. (Transcript, February 9, 2005, pp. 85-88). Obviously, he has a right to deny the charges against him and Dr. Bittker didn't understand that the purpose of his evaluation was not to gather evidence from Justin to use against him.

Dr. Bittker did agree with Dr Paglini that Justin had significant difficulty with abstract thinking, moving from concrete to abstract thoughts. (Transcript, February 9, 2005, p. 87). Dr. Bittker acknowledged that Justin does suffer a language based hearing disability with a math element as well. (Transcript, February 9, 2005,p. 92).

Dr. Bittker agreed with Greg Brown and John Paglini that Justin was not malingering as it relates to his language deficits. (Transcript, February 9, 2005, p. 107). He agreed that includes Justin's ability to read, spell, and comprehend. On cross examination, Dr. Bittker agreed that he could not state within a degree of psychiatric certainty that Justin understood his Miranda rights when they were read to him in August of 2000. (Transcript, February 9, 2005, pp. 109 and 134). He opined himself that an individual like Justin who can't read and write well confronts a "barrier to full understanding of Miranda." (Transcript, February 9, 2005, p. 166).

The deficiencies in Dr. Bittker's testimony and flawed conclusion that Justin was "trying to appear less intelligent than he actually is" when Dr. Bittker interviewed him and that he assumed a "most childlike demeanor" (Transcript, February 9, 2005, p. 82) are based on the following:

1). he only interviewed Justin for one hour.

2). He was retained by the State with no real purpose as to the hearing, so conducted a generalized interview with him not knowing the purpose of his involvement.

3). he failed to understand that Dr. Brown's conclusion that Justin did not understand his Miranda rights within a reasonable degree of psychiatric certainty was based on not solely on the Grisso Miranda test, but on:

   a. the educational history of Justin Porter,

   b. multiple I.Q. examinations throughout his childhood,

c. the T.O.N.I., and

d. the Wechster and other tests performed by Dr. Paglini.

(Transcript, February 9, 2005, p. 146).

4). Dr. Bittker was given nothing by the State which we provided them concerning Justin's performance on the tests, and his education history. In other words, Dr. Bittker did not have:

a. Justin's educational records which show he had a learning disability,

b. the reports of Dr. Brown and Dr. Paglini, and

c. any of the examinations conducted by these doctors.

5). Dr. Bittker failed to administer a malingering test to Justin during his one hour interview even though such tests are available. (Transcript, February 9, 2005, p. 151).

In an effort to show this court that JUSTIN is not malingering, but really is feeble minded, he was asked the following questions at the hearing; some of which he answered correctly, and some of which he did not.

Q. Okay. How many weeks in a year?

A. In a year?

Q. Yeah.

A. I don't know.

Q. Well, how many hours are in a day?

A. Twenty-four.

Q. Do you remember how many months there are in a year?

A. Twelve.

Q. Yet, you don't know how many hours you were locked up in that room?

A. No, sir.

(Transcript, February 9, 2005, p. 72),

Thus, given the opportunity in open court to malinger, JUSTIN does get two out of three of the questions he is asked right, and does not know how many weeks are in a year. Arguably, that is the most difficult of the three questions. Also, this court may find significant the fact that when given the opportunity to claim that our own Metro detectives pressured him, threatened him, brutalized him, etc., while the tape recorder was not on, Justin truthfully denies that those things happened.

The defense is confident that this court will carefully review the respective doctors time with Justin, the materials they reviewed, the amount of preparation they engaged in, and the soundness of their opinions. The only reasonable conclusion that may be drawn is that Justin is simply not intelligent enough to read, pronounce, or understand his Miranda rights, and no one cared to make sure he was waiving those rights voluntarily and intelligently.

The circumstance is akin to reading the Miranda card to a foreigner who does not understand English, and asking him if he understands his rights. Simply because the foreigner says "yes" to all the important questions, the State wants this court to conclude that the substance and spirit of Miranda have been satisfied. Detective Jensen had every reason to doubt that Justin did not understand his Miranda rights. Not only could he not pronounce the words, prompting Detective Jensen to take the card away and read it to Justin himself; but Justin responds to the question of whether he understands what Jensen read to him in a most equivocal way. The actual tape in this case shows Justin answered:

"Hm, kinda I do, but sometimes.... I, I don't, yes."

Rather than make any effort to determine which part of the all important rights Justin did and did not understand, Detective Jensen just begins questioning him as if the Miranda rights are simply a minor inconvenience to be performed in a perfunctory way. Detective Jensen himself made it clear to this court that he is vitally interested that a defendant not invoke his rights. The defense understands that the detective is in the business of gathering incriminating statements and that anything which interferes with that goal is to be somehow manipulated or minimized. However, this Court is in the business of safeguarding the citizen's rights against an overbearing State. It should be clear that in this case, Justin's clear lack of understanding, supported by his substandard

intelligence and lifetime of academic failure all support the contention that Justin in no way voluntarily and intelligently waived his Miranda rights.

LAW CONCERNING OUR ASSERTATION THAT JUSTIN DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA RIGHTS.

A person's right not to incriminate himself is protected by the Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Nevada Constitution. Holyfield v. Townsell, 101 Nev. 793; 711 P.2d 845 (1985). "[T]he accused must be adequately and effectively apprized of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384 U.S. 436, 467; 16 L.Ed.2d 694, 719 (1966). (Emphasis added). The Supreme Court went on to say:

> "[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he was the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Miranda v. Arizona, 384 U.S. 436, 478 - 479 (1966).

In Davis v. United States, 129 L.Ed.2d 362; 114 S.Ct. 2350 (1994), the Supreme Court reaffirmed its holding in Miranda that the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. It obviously follows reason that when you have a defendant who can't even adequately read the warnings, some effort must be made by law

enforcement to ensure that individual is waiving them only after fully understanding what they are, i.e., an intelligent waiver.

> The Supreme Court examined an individual's Fifth and Fourteenth Amendment right to be free from compelled self-incrimination in the context of custodial interrogation, and concluded that certain procedural safeguards were necessary to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of [a] suspect's Fifth Amendment rights . . . These safeguards include certain rights that an accused must be informed of, and must waive, before interrogation can commence: He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation . . . Only if there is a voluntary, knowing, and intelligent waiver of the rights expressed in the warnings can police question a suspect without counsel being present and introduce at trial any statements made during the interrogation. Alston v. Redman, 34 F.3d 1237, 1242 (3rd Cir. 1994).

Because any waiver must be "voluntary, knowing, and intelligent," a "totality of the circumstances" test was developed.

> Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel . . . The totality approach permits - indeed, it mandates - inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [Defendant's] age, experience, education, background, and intelligence, and to whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. Fare v. Michael C., 442 U.S. 707, 724 - 725 (1979).

United States v. Male Juvenile, 121 F.3d 34 (2nd Cir. N.Y. 1997).

The law is thus clear that the government bears the burden of showing this Court that JUSTIN PORTER waived his constitutional rights and did so voluntarily, knowingly and intelligently.

In Tomarchino v. State, 99 Nev. 572, 665 P.2d 804 (1983), the Nevada Supreme Court stated:

The "totality of the circumstances" test may be relevant to a discussion of whether a defendant's confession is voluntary under due process standards. The "totality of the circumstances" test, however, is not applicable in analyzing whether a defendant has relinquished his Fifth Amendment rights against self-incrimination. Instead, in that the purported waiver of a constitutional right is ineffective unless knowingly and intelligently made, the alleged waiver of Miranda rights must be judged under a "knowing and intelligent waiver" standard. The application of this higher standard of review may result in the exclusion of some confessions which might have been voluntary under the lesser, "totality of the circumstances" test.

Thus it appears that this court is to use the higher "knowing and intelligent waiver" in determining whether the State has satisfied their burden is showing that Justin relinquished his right against self incrimination, and the "totality of the circumstances" test is addressing the question whether Justin gave his statement voluntarily.

To complicate matters even further, JUSTIN PORTER was a juvenile at the time the crimes were committed, and at the time he was questioned. Detectives made note of that fact prior to the August 12, 2000 interrogation. Because of the special Parens Patriae relationship of the Court to the juvenile offender, the child should be cautioned that his statement can be used against him in adult court. Quirkoni v. State, 96 Nev. 766; 616 P.2d 1111 (1980). Marvin, a Minor v.

State, 95 Nev. 836; 603 P.2d 1056 (1979). In this case, the Supreme Court enunciated special safeguards as follows:

> Before being interview. A child should be advised of his rights and cautioned that any answers may be used in a special court as well as before the Juvenile Court. Special efforts should be made, especially in the case of young children, to interview the juvenile only in the presence of a parent or guardian . . . this should always be the policy when a child is being questioned or a formal statement concerning his participation is being taken. Clearly, the more serious the offense and the younger the accused, the greater the precaution which should be taken in the interrogation process.

These special safeguards are important in the "voluntariness" analysis discussed in the next section of this Motion.

The record is clear that not only did Detectives Jensen and La Rochelle not affirmatively ask Defendant whether he waived his rights prior to questioning, but, they made no efforts whatsoever to make sure he even understood those rights. In fact, the record suggests that JUSTIN did not understand his rights, and could barely read the Miranda card. Please recall that when asked, in a tape recorded statement, whether he understood the rights he tried to read two and a half hours earlier, the defense position is that JUSTIN responded: **Hm, kinda I do, but sometimes I . . . I don't, yes.**

"In order for a confession obtained during a custodial interrogation to be admissible, any waiver of one's Miranda rights must be voluntary, knowing, and intelligent. . . A valid waiver depends upon the totality of the circumstances, including the background, experience, and conduct of the defendant." Burket v. Angelone, 208 F.3d 172, 199 (4th Cir. 2000).

"A defendant's waiver of his Miranda rights is only effective if the waiver is knowingly, intelligently and voluntarily made . . . [A]s with a challenge to the voluntariness of a confession, when the defendant challenges the validity of his waiver of his Miranda rights, the government bears the burden of proving the validity of the waiver by a preponderance of the evidence." United States v. Garcia Abrego, 141 F.3d 142, 171 (5th Cir. 1998).

"The government is required to prove waiver by a preponderance of the evidence, and the clearly erroneous standard applies to the assessment of factual issues relating to the waiver . . . To prove a valid waiver, the government must show (1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right . . . Only if the totality of the circumstances reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." United States v. Male Juvenile, 121 F.3d 34, 39 - 40 (2d Cir. 1997).

Part of the "totality of the circumstances" analysis, which must be done on a case by case basis, directs the courts to consider the intellectual and understanding of the particular defendant involved. At the Jackson v. Denno Hearing the defense was able to show that JUSTIN PORTER is well below average intelligence, and detectives should have known they needed to take special care to ensure he understood the valuable rights they claim he waived voluntarily, intelligently, and knowingly.

"A valid waiver cannot be established by showing only that the accused responded to further police-initiated custodial interrogation even after being newly advised of his rights." Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir.).

"[T]he facts surrounding [Defendant]'s interrogation clearly indicate that he did not understand the nature of the rights he was waiving. Moreover, the customs agents took no steps to ensure that [Defendant]'s waiver was knowing and intelligent. Therefore, we conclude that the district court clearly erred in finding that despite [Defendant]'s low IQ and poor English-verbal comprehension, he nonetheless functioned at a level sufficient to have understood and waived the constitutional rights orally read to him in English . . . Thus, in the circumstances of this case, the

district court erred in not suppressing [Defendant]'s inculpatory statements." United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998).

In Floyd v. State, 118 Nev.Adv.Op. No. 17; 42 O.3d 249 (2002), the Court stated the following:

> Though informed of his Miranda rights, unless the defendant knowingly and voluntarily waived them, statements made during custodial interrogation are inadmissible. The State must prove by a preponderance of the evidence that the waiver was knowing and intelligent. To determine the validity of the waiver, this court examines "the facts and circumstances of the case such as the background, conduct and experience of the defendant." Relevant considerations in determining voluntariness of a confession include the youth of the defendant, his lack of education or low intelligence, the lack of advise of constitutional rights, the length of detention, repeated and prolonged questioning, and physical punishment such as deprivation of food or sleep. The admissibility of a confession is primarily a factual question; this court should not disturb the district court's determination if it is supported by substantial evidence.

Not only should these detectives have taken basic measures to make sure JUSTIN understood what he "read" on the Miranda Rights Card, especially in view of his equivocal answers to whether or not he even understood what he read. The detectives also had an obligation to advise JUSTIN that they intended to use his statement against him to secure a conviction. Prior to the initiation of questioning, police must fully apprise the suspect of their intention to use any statement to secure a conviction. Moran v. Burbine, 475 U.S. 412, 420; 89 L.Ed.2d 410; 106 S.Ct. 1135 (1986). Moran requires that a voluntary waiver of rights be "made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id. at 421.

What is clear after Justin's Jackson v. Denno hearing is that he is learning disabled and operates at the intellectual level of a child. He is unable to read, write, or comprehend the English language any more than a child in the third or fourth grade. The only Miranda warnings which we

know for a fact were given, and know what Justin's reaction to the warnings were, indicate that he clearly had questions as to the exact nature of his rights. Detective Jensen should have considered the following facts after he Mirandized Justin.

1. Justin had substantial difficulty reading the Miranda warnings on his own.
2. Justin read the warnings very slowly, and actually needed help mouthing out the words.
3. Detective Jensen had to take the card away and actually read the warnings to Justin himself.
4. When asked if Justin understands the warnings, he responded on the audiotape "Hm, kinda I do, but sometimes…I, I don't, yes."

Detective Jensen did not make any effort whatsoever to find out which part of the Miranda rights Justin did and did not understand. He made no effort at all to determine if Justin waived the rights. Detective Jensen simply just went on with the interview completely glossing over Justin's right against self-incrimination. There is no reasonable argument that Justin's so-called waiver was, "knowing, intelligent and voluntary." This court simply cannot conclude based on the evidence received at this hearing that Justin remotely "knew" what his rights were. This court cannot conclude that what Justin did not know about his rights could make up the basis of an "intelligent" waiver. It is clear from the testimony of Detective Jensen in this case that he did not make any effort to clear up Justin's equivocal Miranda warnings because he was fearful that Justin might actually invoke these rights. This court should conclude that the State has not shown by a preponderance of the evidence that Justin knowingly, voluntarily, and intelligently waived his rights against self-incrimination.

II.

JUSTIN PORTER'S STATEMENTS TO CHICAGO AND LAS VEGAS DETECTIVES WERE NOT VOLUNTARY, SINCE THEY WERE THE PRODUCT OF COERCION AND PROMISES WHICH INDUCED HIM TO MAKE CONFESSIONS OR ADMISSIONS.

Justin Porter testified at his Jackson v. Denno hearing that he was arrested on August 12, 2000, in Chicago, Illinois, where he was visiting his father, like he does every summer. (Trancscript, February 9, 2005, p. 8). It is undisputed that he was arrested at 12:45 A.M. Justin testified as follows:

A. Well, when I was in the house, they come in the house early in the morning.

Q. Who is they?

A. The police officers. They come in, but the door had already been broke in, and we didn't know what was it – what was it from. But when my stepmother got there, that's when they came in. And they had their guns drawn and pointed in my face and told me, don't move. If I did they would blow my fucking head off, in so many words?

Q. Are those their words or your words?

A. They words.

Q. Okay. How many police officers were there?

A. I can't actually say, but I know at least four, three. Three, four.

Q. And were you scared?

A. Yes, I was scared.

Q. Now where did they take you from there?

A. To the police station.

Q. In Chicago?

A. Yeah. But before they took me to the police station when they were leaving out, they was still talking crazy to me.

Q. When you say talking, do your best to remember exactly what they said.

A. I know when they came in, I was, like, I ax'd them what was going on? And they told me, don't play fucking stupid with me, you know, them type of words they was using.

Q. Okay.

A. I – I was just scared.

Q. All right. They put you in a police car?

A. Yeah. They put me in a police car.

Q. Did they say anything to you on the way to the police station?

A. Yeah. They – they was saying a lot of stuff to me. A lot of stuff I couldn't remember because I know I was scared. I just wanted to – just wanted to be at home with my family. I didn't want to go through what I went through.

(Transcript, February 9, 2005, pp. 8-10).

Detective Kato testified at the hearing concerning his recollection of the arrest. Detective Kato has been a detective with the Chicago Police Department for 28 years. He is assigned to area four, violent crimes, and has been so for 18 years. On August 11, 2000, his supervisors told him that Las Vegas Metro had information that Justin was in Chicago, and they wanted him arrested. Detective Kato, Cirone, and several assist units went to Justin's residence. There were approximately eights persons involved in the arrest (Transcript, March 8, 2004, pp. 4-6). Detective Kato testified that he was told Justin committed "home invasions, sex crimes, and murder" prior to his going to Justin's residence. (Transcript, March 8, 2004, p. 7). Detective Kato described the arrest as follows:

1. He went to the front door while other units went to the side and back door of the building (p. 7).

2. There were a total of four officers at the front door, and Detective Kato knocked on the door (p. 8).

3. After knocking at the door, they announced they were police officers, and a lady opened the door (p. 8).

4. After asking the lady if Justin was there, she indicated in some way that he was in the living room, and that some people may have drawn their weapons at that time (p. 9).

5. After finding Justin "under or in between the couch and the wall" (p. 10), "there probably was somebody who had a weapon drawn" (p. 9).

6. Justin was cooperative during the arrest (p. 12).

7. He and Detective Cirone then transported him to the violent crimes office (p. 14).

8. Detective Kato claimed that neither he nor Detective Cirone said anything at all to Justin in the vehicle (p. 15).

Justin went on to testify that at the police station, he was handcuffed to the wall (Transcript, February 9, 2005, p. 10), in a room, and that Detectives Kato and Cunningham came in to talk to him, (p. 11) and that they cussed him out, called him names, threatened to hit him with a phone book, take him down to the docks (p. 12). He has no recollection of being advised of his rights at that time. The detectives were "in his face" (p. 13), only a couple feet away when the above took place (p. 14). Specifically, Detective Kato told Justin that he would use a phone book against his body and hit him with a billy club so it would not leave any marks (p. 15). Apparently, Detective Kato and his partner took turns verbally abusing and threatening Justin, and Justin was scared (p. 15). These detectives threatened Justin with taking him to the docks to "whoop his ass." (p. 16). He believed them (p. 17). Justin testified that these detectives tried to convince him that his crimes would get him probation (p. 18) if he talked about his case (p. 19).

Justin has no idea how many hours later, buy at some point he saw other detectives arrive to question him. At this point, the only sleep he got was on a table (p. 17) and had eaten nothing except chips and cookies (p. 18). His sleep was interrupted by people coming in and out of the room he was in (p. 52).

The new detectives he saw (Metro Las Vegas) were shaking hands and talking with Detective Kato like they knew each other (p. 21).

Justin did not tell these new detectives he later learned were from Las Vegas about the threats and abuse he suffered at the hands of Detectives Kato and Cunningham because he thought they were working together (p. 28) based on what he witnessed about their shaking hands and

talking. He also thought they were friends (p. 59), and he was still frightened (p. 28). The detectives from Las Vegas DID NOT threaten him in any way (p. 28). However, he agreed to cooperate with them primarily because he was scared (p. 64). He testified that "if you going to get your ass kicked, you probably say fine by me too!!" (p. 64). Part of Justin's fear of those Chicago detectives following through with their threats against him is based on what he learned by living in Chicago as a youth. Justin testified:

> A. You don't know what it is to live in Chicago. You never lived – you are never had – you never lived in the neighborhood I lived in where the police don't care who you is. Where they will take you and grab you by your collar and push you around, and tell you, you know what I'm saying you're a punk and get out of here. Don't let us catch you around here. You don't know how that is. (p. 42).

This court is obligated to determine whether Detectives Kato and Cirone are credible in their version of this arrest, or whether Justin's account makes more sense based on the courts knowledge and experience of how arrests of persons suspected of "home invasions, sex crimes, and murder" normally go.

The defense suggests that these detectives are simply lying when they claim that they did not say the things to Justin he claims they said on the way to the police station. Only three people, Detective Kato, Detective Cirone, and Justin Porter know what transpired in the police car. The detectives want this court to believe that they said nothing at all to Justin while alone in the police car. Justin claims they used foul language and that he was scared.

Also, the defense had no idea we would uncover so much negative information about Detectives Kato and Cunningham from Chicago until Justin began telling us how they mistreated him while they interrogated him. Imagine our surprise when we discovered numerous newspaper articles about these detectives which featured a number of criminal defendants making essentially the same allegations of brutalization against the very same detectives, in the very same way, under the very same circumstances.

We submit that based on the extensive history of abuse, misconduct, mistreatment, and manipulation Detective Kato has been accused of numerous times in the past, his credibility is

presumed to be non existent as it relates to the administration of justice. Specifically, the defense has shown that Detective Kato was told by our District Attorney's Office of the allegations Justin is making against him prior to his testifying on March 8, 2004. (Transcript, March 8, 2004, p. 35). That he has testified in hearings such as Justin's numerous times in the past, and that he has been previously accused of brutalizing people during interrogations (p. 35).

Detective Kato's testimony concerning the actual arrest in this case is at odd with Justin's testimony, and at odds with what this court should know about felony arrests of dangerous persons suspected of serious crimes including murder with a deadly weapon. The following testimony was excited from Detective Kato concerning the arrest:

Q. And you told this judge that at twelve forty-five in the morning you knocked on the door?

A. Yes, sir.

Q. How long did you wait before the door was kicked in?

A. The door was never kicked in.

Q. The front door of this apartment building also had a locked door; is that right?

A. Not that I recall. The door to the building was not locked, no.

Q. It was not locked?

A. That's correct.

Q. It was one of these doors that does lock; is that right?

A. I don't recall, but it wasn't locked when we went up.

Q. Okay. How long after you knocked on this door did this woman that you described answer that door?

A. Very short time.

Q. Can you give me any better answer than that?

A. A very short time.

Q. Did you knock loudly?

A. No. She heard it and answered the door.

Q. You were aware at the time that you knocked on this door, that you were looking for an individual who has been charged in Las Vegas with a number of serious crimes; is that right?

A. Charged? I don't know.

Q. Accused?

A. Accused, yes.

Q. Okay. Sexual assaults?

A. That's correct.

Q. Home invasions?

A. Yes, sir.

Q. Attempt murder?

A. Yes, sir.

Q. Murder?

A. Yes, sir.

Q. And, in fact, you were aware that this individual is alleged also to have used weapons; is that correct?

A. Yes, sir.

Q. Knives?

A. That's correct.

Q. Guns?

A. I wasn't specific with the weapons, but I knew he used weapons.

Q. And you're telling this judge that you guys just knocked on the door and waited for someone to answer?

A. That's correct.

Q. Is that your normal practice when you're trying to arrest someone who is suspected or accused of murder?

A. Yes, sir.

Detective Kato's account sounds more like "Avon calling" then what even a casual observer of arrests of suspected dangerous felons would know to be the truth. The true facts of the arrest are important because it is at that point that Justin begins to experience fear and apprehension which eventually leads to his confession. Justin testified that when he was arrested, he was told not to move or "they would blow my fucking head off." (Transcript, February 9, 2005, p. 9). Justin testified that when he asked what was going on, the detectives told him not to "play fucking stupid." (Transcript, February 9, 2005, p. 9).

Detective Kato's account of the ride to the Chicago police substation is very different from Justin's recollection. Kato wants this court to believe that no words were exchanged at all between Justin, Kato and Kato's partner, Cirone, on the way to the police station. This court may recall that Justin and these two detectives were alone in the detectives car on the way to the substation. Justin testified that the detectives were "saying a lot of stuff to me."

At the police station, Justin testified he was handcuffed to the wall (Transcript, February 9, 2005, p. 10) that Kato and Cunningham began "cussing me out", "talking bad to me", "calling me all types of names, and stuff like that", and that he was scared. (p. 12). Justin went on to testify these Chicago detectives then told him they were going to "hit me with the phone book" (p. 12) and "take him down to the docks" (p. 12).

Justin testified that they were yelling and cursing at him because "they wanted me to say something. That's what they wanted. I didn't want to – I didn't want to be there. I was just afraid." (p. 13)

Justin also testified in response to whether Kato or any Chicago detectives read him his rights. "All I know they was telling – cussing at me. I – they didn't say nothing about no rights, none of that. Not that I remember." (p. 13)

Detective Kato testified that Metro wanted Justin to be interviewed (p. 39), even though our detectives testified alternatively in the past that: 1). Justin was not interviewed by Chicago detectives; 2). they never requested that Chicago detectives interview him; 3). they had no idea Chicago detectives interviewed him; 4). that Chicago detectives asked if they could interview Justin after his arrest; and 5). that Chicago detectives were given permission to interview Justin.

It should be clear to this court that Detective Kato interfered with Metro's case, and that he had his own agenda and reasons to "interview" Justin. He in fact admitted to this court that he "interviewed" Justin because "I like to know what he's thinking when he's doing these things." (p. 50)

A portrait soon emerged of the true Detective Kato who is well known in Chicago as a ruthless and brutal interrogator. Detective Kato, by his own admission, has been featured in an extensive series of articles in the Chicago press, to include the Tribune. The media in Chicago took issue with his "interrogation techniques" and widely reported numerous accusations of brutalization against Detective Kato. Exhibit A is the portion of Detective Kato's testimony which reviews in a cursory fashion the many articles written about him in which he is accused of the same type of abuses that Justin told the court Kato did to him. The crowning glory against Kato is an actual Illinois appeals court case which accuses Kato of lying to a jury about his brutalization of a minor he arrested. (Republic of the State of Illinois v. Ezekiel McDaniel, Appellate Court of Illinois, 1st Dist., 3rd Div. 326, Ill App. 3rd 771, 726 NE 2nd 1086).

In that case, the appellate court took issue with Detective Kato's testimony which convicted a fourteen year-old youth. The court stated:

> Q. Our review of the record shows that the; trial court's factual findings were against manifest weight of the evidence. Significantly, the trial court should have found that the defendant's mother asked to see the defendant several times between two thirty a.m. and eight a.m., and that each time her requests were denied.
>
> It is not believable that the defendant's mother waited at the area four police station for over five hours, twice calling Officer Sykes for advice on how she could see her son without asking to see the defendant.
>
> Moreover, if Detective Kato was not truthful regarding Ms. McDaniel efforts to see defendant, then the rest of his testimony is suspect as to believability. Especially, the detective's assertion that the defendant did not want his mother present during his questioning. (Transript, March 8, 2004, pp. 74 – 75)