incarcerated (A.A. Vol. 21 pp. 4643). Ms. Brooks explained that she had an limited relationship with her brother (A.A. Vol. 21 pp. 4643). Ms. Brooks indicated that the system had treated her brother fairly (A.A. Vol. 21 pp. 4643).

In sum, Ms. Brooks, a full time university student had a brother than had been charged with a crime. Ms. Brooks was unaware of the facts and circumstances regarding the crime or the prosecution. Ms. Brooks was satisfied that her brother was treated fairly. The State used a systematic and pretextual reason to exclude the juror. The State systematically excluded an African American juror based upon her knowledge of someone in her family being involved in the criminal justice system.

The State's peremptory challenges to two African-American members of the venire were pretextual and exercised in violation of Batson v. Kentucky, 476 U.S. 79 (1986); U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 6.010.

In State of Arizona v. Holder, 155 Ariz. 83 , 745 P.2d 141(1987), the court stated:

> A criminal defendant can use the facts and circumstances of his individual case to make a prima facie showing that the state is violating his equal protection rights by using peremptory challenges systematically to exclude members of the defendant's race from the jury.

The Holder court also held,

> In Batson, the United States Supreme Court indicated that to establish a prima facie case the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of race. 155 Ariz. 83, 745 P.2d 141(1987).

In Batson v. Kentucky, 476 U.S. 79, 86 (1986) (overruled in part by Powers v. Ohio, 499 U.S. 400, 416 (1991), by finding that defendant's racial identity vis-a-vis the challenged juror was not a condition to asserting a Batson claim), the U.S. Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the U.S. Constitution. "Batson provides a three-step process for a

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trial court to use in adjudicating a claim that a peremptory challenge was based on race:

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Snyder v. Louisiana, 552 U.S. 472, 476 (2008) (quotations and alterations omitted). See also Diomampo v. State, 185 P.3d 1031, 1036 (2008). Even though other African Americans may ultimately serve on the jury, a Batson violation as to only one potential juror is a constitutional violation. Snyder, 552 U.S. at 478 (citing United States v. Vazquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose")); accord Ali v. Hickman, 584 F.3d 1174, 1193 (9th Cir. 2009), as amended; See also United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987) ("under Batson, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even where there are valid reasons for the striking of some black jurors.")

In Miller-El v. Dretke, 545 U.S. 231, 239 (2005) ("Miller-El II"), the Supreme Court "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478. The prosecution's proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent. Id. at 485. Among other factors to be considered in determining whether a race-neutral justification for a peremptory challenge is merely pretextual, this Court considers the disparate questioning by the prosecutors of minority and non-minority prospective jurors. Diomampo, 185 P.3d at 1036 & n.18 (citing Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006)). Additionally, "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." Miller-El II, 545 U.S. at 246 (quoting Ex parte Travis, 776 So. 2d 874, 881 (Ala. 2000)). Further, in evaluating whether a proffered justification for a peremptory challenge is pretextual, one proper

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consideration is whether there is evidence of historical discrimination against minorities in jury selection by the district attorney's office. Diomampo at 1036 n.18 (2008) (finding Batson violations and reversible error where Clark County District Attorney's Office proffered pretextual reasons for striking minority members of the venire) (citing Ford v. State, 122 Nev. 398, 403, 132 P.2d 574, 578 (2006)).

In reviewing a Batson challenge, the trial court's decision on the ultimate issue of discriminatory intent represents a finding of fact which is accorded great deference on appeal. Diomampo at 1036-37. Appellate court's should apply a clearly erroneous standard of review when reviewing a district court's resolution of a claim of discriminatory intent under Batson. Snyder v. Louisiana, 552 U.S. 472, 474 (2008). Discriminatory jury selection in violation of Batson generally constitutes structural error that mandates reversal. Diomampo at 1037 (citing Batson, 476 U.S. at 100).

A defendant has a constitutional right to be tried by a jury whose members are selected by nondiscriminatory criteria. Powers v. Ohio, 499 U.S. 400, 404 (1991) (citing Strauder v. W. Va., 100 U.S. 303, 305 (1880)). This right is not dependant on whether the potential jurors are the same race as the defendant. Powers at 402 ("[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.").

Recently, in Hawkins v. Nevada, 127 Nev. Av. Op. 50 (August 4, 2011) this Court explained the bases for finding pretextual removal of jurors,

> (1) the similarity of answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutor and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office. Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006) (internal footnote omitted) (citing Miller-El v. Dretke, 545 U.S. 231, 240-65 (2005)).

In addition, "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." Id. at 404, 132 P.2d at 578 (citing Kaczmarek, 120 Nev. at 334, 91 P.3d at 30).

In the instant case, the State used a reason to excuse Ms. Brooks that can be used against

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almost any single African American in Clark County. The statistics cited above illustrate that almost every African American will have had a family member or someone closely associated with him or her who has been arrested in their lifetime. Now, prosecutors are free to argue, that the potential jurors being excused because they know someone who has been arrested.

Ms. Brooks was a full time college student. There was absolutely no valid reason to remove her from the jury other than her race. The State consistently provided the argument that the juror knew someone who has been involved in the criminal justice system as a reason to pretextually preempt the juror. The statistics are clear.

Two studies conducted by Blumstein and Graddy in 1983, estimated the cumulative risks of arrest. The study found:

> Alfred Blumstein and Elizabeth Graddy examined 1968-1977 arrest statistics from the country's fifty-six largest cities. Looking only at felony arrests, Blumstein and Graddy found that one out of every four males living in a large city could expect to be arrested for a felony at some time in his lifetime. When broken down by race, however, a nonwhite male was three and a half times more likely to have a felony arrest on his record than was a white male. Whereas only 14% of white males would be arrested, 51 % of nonwhite males could anticipate being arrested for a felony at some time during their lifetimes. See generally Alfred Blumstein & Elizabeth Graddy, Prevalence and Recidivism Index Arrests: A Feedback Model, 16 LAW & SOC'Y REV. 265 (1981-82).

Additionally, the United States Department of Justice concluded that in 1997, nine percent (9%)of the African American population in the United States was under some form of correctional supervision compared to two percent (2%) of the Caucasian population[10]. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males and 727 white male inmates per 100,000 white males[11]. Under the state's argument, virtually, every African-American as a prospective juror would be ineligible under the state's theory of racial neutrality because the statistics show they will know someone who has been arrested.

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[10]U.S. Department of Justice, *Bureau of Justice Statistics*, (1997) available at http://www.ojp.usdog.gov/bjs/glance/cpracept.htm

[11]U.S. Department of Justice, *Bureau of Justice Statistics*, (2008), available at http://www.ojp.usdog.gov/bjs/glance/jailrair.htm

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According to the Bureau of Justice Statistics presented by the Department of Justice African American's were almost three (3) times more likely than Hispanics, and five times more likely than Caucasians to be in jail[12]. Additionally, midyear 2006, African American men comprised forty-one (41%) percent of the more than two million men in custody. Overall, in 2006 African American men were incarcerated at a rate of six and a half percent (6.5%) times the rate of Caucasian Men[13].

Counsel for Mr. McCarty is not arguing that the prosecutor is a racist. It should be clear that the argument made by Mr. McCarty does not include alleging that the prosecutor does not like African American individuals. However, the prosecutor believes that he stands a better chance of conviction and/or a sentence of death if the majority of African Americans are removed from the jury panel. This is a tactical decision taken by the prosecutor in order to increase the chances of conviction and a sentence of death. The prosecutor could not even provide a valid race neutral reason to remove Ms. Brooks. The prosecutor went so far as to conduct an independent investigation. Even that investigation revealed nothing that would permit a prosecutor to remove Ms. Brooks.

Mr. McCarty has demonstrated a systematic exclusion of African American jurors. [14] The State removed these two jurors leaving a non-African American jury deliberating the fate of Mr. McCarty.

The district court erred when it failed to exercise its discretion when defense counsel objected and then ultimately moved for a mistrial. Mr. McCarty is entitled to a new trial based upon a violation of the fifth, sixth and fourteenth amendments to the United States Constitution.

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[12]U.S. Department of Justice, *Bureau of Justice Statistics,* (2008), available at http://www.ojp.usdoj.gov/bjs/prisons.htm

[13]U. S. Department of Justice, *Number of jailed inmates and incarceration rates by race,* (2006) available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf

[14] The State will counter by stating that the defense removed an African American juror. The defense removed a career military man of African American decent. Obviously, the defense was legitimately concerned that the man's involvement having had a career in the military would cause him to favor the prosecution.

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IV. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE DISTRICT COURT REFUSING TO EXCUSE A SLEEPING JUROR UNTIL THE PENALTY PHASE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Voir dire began on October 12, 2010. The trial concluded on November 18, 2010. As early as October 27, 2010, the defense began repeatedly complaining to the court that a juror appeared to be sleeping through substantial portions of the trial. Defense counsel complained that juror number 16 appeared to be sleeping. Defense counsel complained to the court that he was sleeping all the time. Defense counsel even indicated that he had sent a text message to the prosecutor to make the prosecutor aware that the juror was sleeping (A.A. Vol. 32 pp. 7148). Defense counsel even approached the prosecutor and asked the prosecutor to look at juror number 16 because he appeared to be "sound asleep" and "he does it all the time" (A.A. Vol. 32 pp. 7148). The prosecution argued that the jurors eyes were not closed (A.A. Vol. 32 pp. 7148). Interestingly enough, during the bench conference the court states "**actually, if you look at him right now, he appears to be sleeping**" (A.A. Vol. 32 pp. 7148). Even after the court made the observation, the prosecution continued to deny that the juror was sleeping. The prosecutor went further stating that he was the closest attorney to the juror (A.A. Vol. 32 pp. 7148). The court indicated that it was such a distance from the juror it was hard to see if his eyes were closed (A.A. Vol. 32 pp. 7148).

> Later in the trial, defense counsel explained,
> Since I, I think, day one of the trial, we have had persons communicated with us that he's sleeping. Mr. Powell, again, reminded me when we just took out last recess that the man is sleeping (A.A. Vol. 32 pp. 7177).

Defense counsel further complained that there is increasing concern because the man is falling asleep (A.A. Vol. 32 pp. 7178). Defense counsel reminded the court that there was four alternates and that the alternates could be used because "..the juror has been seen sleeping by more than person on more than one day" (A.A. Vol. 32 pp. 7179). The prosecutor claimed that the defense is using tactical efforts to remove the juror (A.A. Vol. 32 pp. 7180). However, the prosecutor acknowledged that the defense had repeatedly informed the court and the state that the juror was sleeping (A.A. Vol. 32 pp. 7180). In fact, the prosecutor admitted that defense counsel approached the prosecutor during live testimony and asked the prosecutor to look at the juror

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because he was sleeping (A.A. Vol. 32 pp. 7180). The prosecutor acknowledged that he told the other prosecutor he was sleeping, however, the other prosecutor believed he was just writing with him eyes down (A.A. Vol. 32 pp. 7180). Again, the court acknowledged that it appeared that the juror had been sleeping (A.A. Vol. 32 pp. 7181). However, the judge was unable to clearly see the jurors eyes (A.A. Vol. 32 pp. 7181). The court was unsure whether the juror was in fact sleeping or looking down. Juror number 16 continued to sleep through the trial and was part of the jury panel which deliberated and convicted Mr. McCarty. All the way into the penalty phase, the defense complained that the juror was obviously sound asleep.

On November 15, 2010, the defense requested that the court consider juror number 16 and his continuous sleeping habits (A.A. Vol. 42 pp. 9368). On November 15, 2010, the marshal informed the court that he twice asked the juror about sleeping and the juror denied sleeping stating he was resting his eyes (A.A. Vol. 42 pp. 9368). In fact, the marshal had questioned him three or four times about sleeping (A.A. Vol. 42 pp. 9368). The defense told the court, "you know, its just a significant problem" (A.A. Vol. 42 pp. 9369). The defense complained that the marshal was having to continuously approach the juror to provide water to make sure that he was paying attention (A.A. Vol. 42 pp. 9369). Defense counsel states, "and this is something that's been going on since trial began" (A.A. Vol. 42 pp. 9369). The court acknowledged that defense counsel had been complaining through the trial phase that the juror had been sleeping (it is important to remember that this discussion is occurring in the penalty phase) (A.A. Vol. 42 pp. 9369). The judge acknowledged that he noticed that the juror's eyes were closed on two occasions on November 15, 2010 (the date of this discussion) (A.A. Vol. 42 pp. 9370). Even with the marshal complaining that the juror appeared to be sleeping, the prosecutor informed the court that it was not unusual for jurors to lose some concentration (A.A. Vol. 42 pp. 9370). In an effort to avoid permitting Mr. McCarty a fair trial, the prosecutor seemed determined to conclude the trial with a juror who was constantly sleeping.

At this point in the penalty phase, both defense attorneys had repeatedly complained about juror number 16 sleeping. More than two weeks prior to this discussion, the court seemed to acknowledge that he had seen the juror sleeping. One prosecutor had told the other prosecutor

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that the juror was sleeping. Yet, the prosecutors made frivolous arguments, that the juror was just looking down or resting his eyes. Audience members were notifying the defense team that the juror was sleeping from day one. This fact was repeatedly brought to the attention of the court. Even after the November 15, 2010 discussion, the court did not hold a hearing with the juror but rather stated that he would consider the matter further (A.A. Vol. 42 pp. 9372).

The prosecutor implied that it was a defense tactic even after the marshal had informed the court of the concern. The prosecutor informed the court that it was a defense tactic even after the court had seen the juror sleep (A.A. Vol. 42 pp. 9370-9371). Again, another example of prosecutorial misconduct.

Later in the day, the judge questioned Mr. Nill (juror 16) regarding his sleeping habits (A.A. Vol. 42 pp. 9423). The juror claimed he had a cataract problem and that he concentrated better when his eyes were closed (A.A. Vol. 42 pp. 9424). Defense counsel explained that the juror was sleeping constantly and that he actually approached the marshal and asked the marshal to watch juror 16 (A.A. Vol. 42 pp. 9427). The prosecutor claimed that there was no proof that juror 16 had missed any of the evidence. The court then asked the marshal to explain his perceptions. The marshal stated,

> I observed him and he had his eyes closed. I sit there and watched him for maybe fifteen seconds he appeared to be sleeping. I went over, I got a cup of water - - actually I started over I came back and I decided I better get him some water because I thought he might be sleeping. I go over to him. I kind of put my foot down kind of heavily on the - - when I stepped up and he didn't do anything but even before I went over there I asked juror number 16 to nudge him and she, so what I did is I went up and he looked at me - I gave him the cup of water and he asked me what it was for and I said well, I didn't know if you were sleeping or not. I just wanted to make sure your alright. And then even at that point he - - looked around at the juror next to him and the juror behind him to see if the water was for them, and when I realized that he noticed the water was for him I just left it and came back over here, not to draw any attention (A.A. Vol. 42 pp. 9429).

The prosecutor then questioned the marshal and the marshal again affirmed that he thought the juror was sleeping (A.A. Vol. 42 pp. 9429). The marshal continued to repeat that he believed he was sleeping (A.A. Vol. 42 pp. 9430). Finally, on November 17, 2010, the court indicated that juror 16 would be excused (A.A. Vol. 42 pp. 9781).

Hopefully, the transcript reflects to the reader that the juror did not even recognize that the marshal was provided the water for him and seemed dazed and confused. The defense made

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every effort to inform the judge throughout the trial that the juror was sleeping. However, the defense efforts to obtain a fair trial were met with a prosecutor who constantly argued that it was defense attorney's tactics. Yet, the court appeared to notice the sleeping juror as early as October 27, 2010. The juror continued to sleep and was not officially removed from the jury panel until November 17, 2010. Mr. McCarty was sentenced to death.

If sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury. See, United States v. Kimberlin, 805 F.2d 2010, 244 (7th Cir. 1986); United States v. Bradlee, 173 F.3d 225, 230 (3rd Cir. 1999); United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987). However, a court is not required to remove a sleeping juror and a court has discretion in how to handle a sleeping juror. See, United States v. Wilcox, 50 F.3d 600, 603 (8th Cir. 1995). Reversal is appropriate only if the defendant was deprived of his fifth amendment due process rights or his sixth amendment right to an impartial jury. Springfield, 829 F.2d at 864.

The trial judge has discretion in determining whether to hold investigative hearings on allegations of jury misconduct. United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert denied, 434 U.S. 818, 98 Sup. Ct. 58, 54 L. Ed. 2d 54 (1977). However, the Ninth Circuit has held that failure to conduct a hearing or make investigation into a sleeping juror would be grounds for abuse by the trial judge of his considerable discretion. See, United States v. Barrett, 703 F.2d 1076 (1982). In Barrett, the Ninth Circuit remanded the case for instructions to the trial judge to conduct a hearing to determine whether the juror was sleeping during trial, and if so, whether the jurors sleeping prejudiced the defendant to the extent that he did not receive a fair trial. United States v. Hendrix, 549 F.2d at 1229.

Recently, the appeals court of Massachusetts considered the standard for a sleeping juror. In Commonwealth v. Braun, 74 Mass. App. Court 904, 905 NE 2d 124 (2009), the court noted that the right to a trial by jury is not a trivial matter. If a juror sleeps through testimony a defendant's fundamental right to a fair trial has been placed in jeopardy. 905 NE 2d 124, 126. Citing, Commonwealth v. Keaton, 36 Mass. App. Court. 81, 87, 628 NE 2d 1286 (1994). In Braun, the court found that the commonwealth and the defendant are entitled to a sober,

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conscious jury. Commonwealth v. Rock, 429 Mass. 609, 614, 710 NE 2d 595 (1999). In Braun, the court held that the judge abused his discretion by failing to conduct a voir dire regarding whether there was a real basis for concluding the juror was sleeping during testimony calling into question the jurors ability to fulfill her oath. Id. In Braun, the court concluded stating, "we do not suggest that every complaint regarding jury inattentiveness requires a voir dire. Here, however, the judge had substantial reason to believe the juror may have been sleeping". 905 NE 2d 124, 127.

In the instant case, there was substantial evidence that the juror was sleeping during significant portions of the trial. The defense repeatedly complained to the court that the juror was sleeping. However, the prosecutor argued it was simply defense tactics. The State argued that the defense was using a tactical maneuver to remove the juror even after the marshal repeatedly complained to the juror himself that he should pay attention. The marshal even admitted that the juror appeared to be sleeping. The court admitted that the juror appeared to be sleeping. Yet, this juror was permitted to deliberate and convict Mr. McCarty of two capital crimes. Mr. McCarty was not entitled to a perfect trial, but he was entitled to a fair trial. Mr. McCarty had a non-African American jury sentence him to death. Mr. McCarty had eleven non African-American jurors deliberate and convict him of two counts of capital murder along with one sleeping juror. The record regarding this sleeping juror is appalling given the fact that this defendant was ultimately sentenced to death.

V. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE INTRODUCTION OF INADMISSIBLE BAD ACT EVIDENCE IN VIOLATION OF NRS 48.045(B) AND THE FAILURE OF THE STATE TO DISCLOSE THEIR INTENT TO USE SIGNIFICANT BAD ACT EVIDENCE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State failed to file any bad act motions pursuant to NRS 48.045. Defense counsel inquired whether the State was going to use any bad acts (A.A. Vol. 27 pp. 5952). The State responded saying, "we are not offering any 48.045 bad act evidence" (A.A. Vol. 27 pp. 5954). The defense even file a motion regarding any bad acts to be used by the State. However, the State's denial of their intent to use bad act evidence was entirely disingenuous. The instant trial

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was extremely lengthy. However, there should be no confusion that the prosecution stated that they had no intent to use bad act evidence against Mr. McCarty on October 19th. Later that same day, this is exactly what the State did. The State introduced bad act evidence against Mr. McCarty even though they previously informed the Court that they were not going to introduce such evidence.

The State introduced evidence that Melissa Estores was severely beaten by the co-defendant, Dominic Malone in April of 2006. A full month before the homicides. Prior to the State introducing the beating, Mr. McCarty objected and informed the Court that the State was about to introduce bad act evidence (A.A. Vol. 28 pp. 6083). Defense counsel complained that Mr. McCarty was not charged with the beating and was not accused of being involved in the beating of Ms. Estores. However, the State desired to introduce the beating of Ms. Estores by her boyfriend, Dominic Malone because Mr. McCarty was charged by way of conspiracy in the murders with Mr. Malone (A.A. Vol. 28 pp. 6083). The State admitted that Mr. McCarty was not charged with Ms. Estores beating in April of 2006. The prosecutor stated, "this is solely Dominic Malone's gig" (A.A. Vol. 28 pp. 6083). Defense counsel objected stating "the beating was highly inflammatory and prejudicial" (A.A. Vol. 28 pp. 6084). This is the analysis that should have taken place when the State filed a valid motion pursuant to NRS 48.045(b) and a Petrocelli hearing held. The State ignored this procedure. The State informed the Court hours before the introduction of this evidence that they had no intent on introducing bad act evidence against Mr. McCarty. In an effort to obtain admissibility, the State claimed that Mr. McCarty admitted in his statements that he had witnessed this beating (A.A. Vol. 28 pp. 6084-6086). [15]

Ms. Estores was permitted to testify to the severe beatings she endured at the hands of Dominic Malone on April 6, 2006 (approximately 45 days prior to the murders)(A.A. Vol. 28 pp. 6087-6095).

A limiting instruction was read to the jury, informing the jury that Mr. McCarty was not

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[15] Again, proof that the State had every intention of introducing Mr. McCarty's statements to the jury to prove that he had witnessed this beating. This comment by the prosecutor was made shortly after the prosecutor informed the Court that he did not know whether he was going to use Mr. McCarty's statements.

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charged with the beating (.A. Vol. 28 pp. 6091). Ms. Estores was taken by Mr. Malone behind a bar where a group of individuals watched her being beaten by Mr. Malone (A.A. Vol. 28 pp. 6092). Over a defense hearsay objection, Ms. Estores explains that Mr. Malone told her that she owed him $120.00 and a quarter ounce of crack (A.A. Vol. 28 pp. 6098). The Court overruled the objections after initially sustaining the objection (A.A. Vol. 28 pp. 6097). Ms. Estores' jewelry was taken off and Mr. Malone told her it was "PT Time" (A.A. Vol. 28 pp. 6101). Ms. Estores' jewelry was then thrown in the nearby pool (A.A. Vol. 28 pp. 6102). Mr. Malone then delivered a series of blows to Ms. Estores' chest and was told if she fought back or made a noise he would hit her in the temple (A.A. Vol. 28 pp. 6102). Ms. Estores intimately described the brutal beating she suffered at the hands of Mr. Malone until she "kind of phased out" (A.A. Vol. 28 pp. 6103). Ms. Estores described how her chest "caved in" and then she was pulled up and hit in the temple and the forehead (A.A. Vol. 28 pp. 6104). No one intervened to assist her (A.A. Vol. 28 pp. 6104). Mr. Malone placed his foot on Ms. Estores' head (A.A. Vol. 28 pp. 6105).

Unfortunately, for Mr. McCarty, the State successfully introduced this incredibly brutal beating claiming that Mr. McCarty had witnessed the beating. Yet, at the conclusion of Ms. Estores' description of the assault the prosecutor asked the following, "[N]ow, during this whole incident in April of 2006, did you ever see Mr. McCarty at the Sportsmans during this incident"? Ms. Estores answered "No" (A.A. Vol. 28 pp. 6105-6106). For eight pages of transcript Ms. Estores described the brutal nature of this beating. Then, Ms. Estores admitted that Mr. McCarty was not even present for the incident that occurred approximately fifty days prior to the murders.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act

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evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

In Tabish and Murphy, 119 Nev. 290, 72 P. 3d 584 (2003), this Court reversed reasoning, "[I]n our view, however, the district court would have manifestly abused its discretion in finding that the probative value of evidence was not substantially outweighed by the danger of unfair prejudice." The Nevada Supreme Court, in Tabish and Murphy found the Casey Counts and the Binion Murder Count should have been tried separately because the charges were not based on 'common scheme or plan' and trying the charges together were unconstitutionally prejudicial. 119 Nev. 293, 301. In Tabish and Murphy, this Court held that the charges from the second crime should have been severed from the crimes against the manager under Nev. Rev. Stat. § 173.115, as money and greed were insufficient to show a common scheme or plan for crimes fifty (50) days apart.

In Tabish and Murphy, the Supreme Court provided:

> We reject the State's contentions that all of the counts charged were part of a common scheme or plan, that combining the counts was not unfairly prejudicial and promoted judicial economy, that the counts had to be combined to give the jury the complete story of the crimes or that the counts would have been cross-admissible as prior bad acts in separate trials. 119 Nev. 293, 302.

The State argued extensively on appeal that there was a common thread between the facts that occurred in the Casey "Jean sandpit" incident and the Binnion murder. The State argued that there was a common ground between the two (2) counts of greed and money. Both Binnion and

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Casey were older gentlemen with valuable assets and both were attacked in ways leaving no visible sign of injuries. 119 Nev. 293, 202-203. Whereas, in the instant case, Mr. McCarty was not even the perpetrator of the crime.

In the instant case, defense counsel specifically requested the Court to inquire of the State if they intended to use bad act evidence. The State denied their intent to use bad act evidence. However, within hours, the State introduced irrelevant and highly inflammatory evidence in the trial. The State claimed they could link Mr. McCarty to the meeting by his admission that he had observed the beating. The probative value of the evidence was far outweighed by the prejudicial effect. Essentially, the State successfully put forth information that Mr. McCarty associated with Dominic Malone who was a brutal assailant. [16]

First, Mr. McCarty is entitled to a new trial based upon the Court permitting the State to introduce improper and highly prejudicial evidence. Next, Mr. McCarty is entitled to reversal based on the prosecutor denying his intent to introduce bad act evidence. Lastly, it should be noted that the State may argue that this assault did not amount to bad act evidence against Mr. McCarty. Therefore, Mr. McCarty is entitled to a reversal based upon highly inflammatory irrelevant evidence.

VI. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE STATE INTRODUCING INADMISSIBLE HEARSAY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, the State was permitted to introduce inadmissible hearsay in violation of the confrontation clause. NRS 51.035 which states: Hearsay means a statement offered in evidence to prove the truth of the matter asserted unless 2) the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is: a) inconsistent with the declarant's testimony.

The United States Supreme Court held that an out of court statement may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. The United States Supreme Court reasoned that the

[16] Interestingly enough, it is Mr. McCarty who is sentenced to death and not Mr. Malone.

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only indicia of reliability sufficient to satisfy the U.S. Constitution's Confrontation Clause was "actual confrontation." Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004).

The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination" Davis v. Alaska, 415 U.S. 308, 315, 39 L.Ed.2d. 347, 94 Sup. Ct. 1105 (1974)(Quoting, Douglas v. Alabama, 380 U.S. 415, 418, 13 L.Ed. 2d. 934, 85 Sup. Ct. 1074 (1965). If a statement does not fall within a firmly rooted hearsay exception, the statement is presumptively unreliable and inadmissible for confrontation clause purposes. Idaho v. Wright, 497 U.S. 805, 818, 111 L.Ed.2d. 638, 110 Sup. Ct. 3139 (1989)(Quoting, Lee v. Illinois, 476 U.S. 530, 543, 90 L.Ed.2d. 514, 106 Sup.Ct. 2056 (1996).

In, Cruz v. New York, 107 S.Ct. 1714 (1987), at 1717; the United States Supreme Court held that, "[T]he confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant to be confronted with the witnesses against him." The United States Supreme Court further stated, "[w]e have held that guarantee, extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses." See, Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965).

A. Testimony of Melissa Estores

During the testimony of Melissa Estores, the State was permitted to introduce statements made by Mr. Malone regarding the State of the relationship between Mr. Malone and Ms. Estores (A.A. Vol. 28 pp. 6159-6165). The State asked Ms. Estores whether she told Mr. Malone that she was his girlfriend. The State then inquired how Mr. Malone responded when Ms. Estores indicated that she was not his girlfriend but a "free agent" (A.A. Vol. 28 pp. 6160). Defense counsel objected and after a lengthy bench conference, the court overruled the objection (A.A. Vol. 28 pp. 6164). Ms. Estores then stated that Mr. Malone's reaction was very angry and that he began arguing with Ms. Estores about his "baby momma" (A.A. Vol. 28 pp. 6165). During the verbal altercation, Ms. Estores described Mr. Malone as very angry with his teeth clenched (A.A. Vol. 28 pp. 6165).

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B. Testimony of Ramaan Hall

Ramaan Hall was called by the State (A.A. Vol. 29 pp. 6478). Mr. Hall was friends with Dominic Malone. The prosecutor asked:

Q: What was it about D-Roc's demeanor after he was hanging around the defendant that led you to believe that he was acting like a pimp (D-Roc is Dominic Malone's moniker).

A: The way he was speaking. It was like, "-any bitch that, you know, doesn't pay me is getting hands put on them"

The defense objected to this hearsay (A.A. Vol. 29 pp. 6478).

In the instant case, Mr. McCarty was convicted of Pandering. The State asked Mr. Hall to speculate that Dominic Malone had begun acting like a pimp because he was associating with Mr. McCarty. First, the State elicited speculation. Second, this amounted to hearsay. The Court did inform the defense that he was inclined to instruct the jury to disregard it but the defense requested that the statement not be further highlighted (A.A. Vol. 29 6479). This testimony was damaging because it was an attempt to establish that Mr. McCarty was a pimp and was teaching Mr. Malone how to be a pimp. Mr. McCarty was eventually convicted of pandering.

C. Statements by Detective Collins regarding the D.A. believing Mr. McCarty to be a liar.

On June 6, 2006, the following interrogation took place between Detective Collins and Defendant McCarty:

Q. Romeo (McCarty), I know - - I know you're not being honest with me and I mean the thing is, the D.A. is not going to want to talk to you unless you're being honest with me.
A. I can't explain something that I don't know about (A.A. Vol. 12 pp. 2559).

Later in the interrogation, Detective Ridings asks:

Q. But do you understand- -
A. - - me to see my kids - -
Q. Do you understand that as long - -
A. (Incomprehensible).
Q. - - as long as you're not providing the entire truth that the D.A. is not going to give you what you want?
A. I haven't heard that from the D.A. I haven't seen nothing in writing.
Q. Well, come on.
A. (Incomprehensible).
Q. Come on, Jason. You're not stupid.
A. Come on, man, nothing. I keep hearing it from you guys.
Q. Okay.

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...

BY DETECTIVE COLLINS

Q. Why should he - - listen. Why should he talk to you when he knows you're lying to us?

BY DETECTIVE RIDINGS:

Q. When - - when we showed him this, this was his first words, he goes, "You know, the guy's not telling the truth."

A. Why should I - -

Q. As busy as he is, going to take time out of his day to drive all the way from downtown - -

A. Because that's - -

Q. - - Las Vegas to talk to you if you're not willing to tell him the truth? (A.A. Vol. 12 pp. 2558-2559).

BY DETECTIVE COLLINS

Q. He's not going to talk to you while you're lying to us.

A. Well, then, I mean, man, that's why you guys job is to investigate crimes. His job - - like you told me before: it's your job to investigate crimes. It's his job to make deals, not yours.

Q. Right.

A. So then , like I said, once again, you're steadily asking for me something but you're not telling me - -

Q. Well, the only thing I'm going to tell him is that we're investigating it and, you know what, he's steadily lying to us. He continually lies (A.A. Vol. 12 pp. 255-2560).

Over defense objection, the district court permitted the above mentioned excerpt to be played to the jury. The defense moved for mistrial based upon the detectives repetitive improper and hearsay statements regarding the D.A. believed the defendant was "lying continuously" and "steadily lying" (A.A. Vol. 38 pp. 8365-8366). See, NRS 51.035 which states: Hearsay means a statement offered in evidence to prove the truth of the matter asserted unless 2) the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is: a) inconsistent with the declarant's testimony.

In the instant case, the State was permitted to introduce inadmissible hearsay in violation of the confrontation clause. Based upon the above and foregoing, Mr. McCarty is entitled to a reversal of his convictions.

VII. MR. MCCARTY WAS PRECLUDED FROM INTRODUCING EXCULPATORY EVIDENCE THAT WAS NOT HEARSAY AND WAS DENIED HIS RIGHT TO PROPERLY IMPEACH A WITNESS IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

A. MR. MCCARTY WAS PRECLUDED FROM INTRODUCING EXCULPATORY EVIDENCE REGARDING A STATEMENT MADE BY RAMAAN HALL.

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During the testimony of Ramaan Hall (AKA Trey Black) he testified that the two victims had been abducted from an apartment complex shortly before the homicides. Ramaan Hall speculated that the girls must have gone with Mr. McCarty and Mr. Malone because they appeared to be beaten. Thereafter, the State called Nicolin Broderway (A.A. Vol. 30 pp. 6604). Nicolin Broderway testified that she spoke to Ramaan Hall after the victims had gone missing (A.A. Vol. 30 pp. 6657). Ms. Broderway informed authorities that Ramaan Hall told her that the girls were fine. Therefore, Mr. McCarty desired to introduce Mr. Hall's prior inconsistent statements. Specifically, Ramaan Hall told the jury that the girls appeared to be beaten up. Yet, he had told Nicolin Broderway that the girls appeared to be fine. The State lodged a hearsay objection which resulted in a lengthy bench conference (A.A. Vol. 30 pp. 6657). Defense counsel continuously informed the Court that the statement was admissible as a prior inconsistent statement. The judge refused to let defense counsel question Ms. Broderway about the prior inconsistency. Mr. McCarty was convicted of kidnapping from the apartment complex. Yet, the prior inconsistent statement by Ramaan Hall that the girls were fine would clearly be exculpatory evidence and part of the defense theory of the case.

NRS 51.035 states: Hearsay means a statement offered in evidence to prove the truth of the matter asserted unless 2) the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is: a) inconsistent with the declarant's testimony.

In the instant case, Ramaan Hall testified on the same day as Nicolin Broderway. Ramaan Hall testified in the morning and Ms. Broderway testified in the afternoon. Mr. Hall was subject to examination by both the State and the defense. Mr. Hall, the declarant, testified that the victims must have gone with the defendant because they were beaten, Now, Mr. McCarty desired to introduce Mr. Hall's inconsistent statements to Nicolin Broderway regarding the condition of the victims.

NRS 51.035 is squarely on point and was cited several times during the bench conference. At the bench conference, the prosecutor complained "that the foundation was never laid" (A.A. Vol. 30 pp. 6657). Defense counsel complained that the prosecutor had elicited from

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Mr. Hall that the girls had suffered injury (A.A. Vol. 30 pp. 6658, 6659). Defense counsel complained that the prosecutor elicited the testimony from Mr. Hall and now the prior inconsistent statement was clearly admissible (A.A. Vol. 30 pp. 6659). The prosecutor further complained that Mr. Ramaan Hall was never given an opportunity to address the issue. In fact, the prosecutor was pleased to have Mr. Hall indicate that the women were injured when recorded statements made by Nicolin Broderway to the police demonstrated that Mr. Hall had made inconsistent statements.

The prosecution was permitted to introduce evidence without any concern that the truth would be refuted. The prosecution was able to subvert the rules of evidence and exclude exculpatory evidence. Defense counsel stated, "...Trey Black is telling people that these girls were fine and then he comes into court and says these girls were injured. Judge, that - - I don't understand that. That's an inconsistent statement" (A.A. Vol. 30 pp. 6661). Thereafter, the Court confirms that defense counsel cannot ask Nicolin Broderway about Ramaan Hall's inconsistency (A.A. Vol. 30 pp. 6662).

The prosecutor states, "because that's what the rules of evidence say". Defense counsel then states, "show me the rule of evidence that says that " (A.A. Vol. 30 pp. 6663). Defense counsel requests that the Court take a break and that all parties review the rules of evidence regarding prior inconsistent statements (A.A. Vol. 30 pp. 6663). Nevertheless, defense counsel's request proper request fell on deaf ears. The exculpatory evidence was excluded.

Prior inconsistent statements are routinely held to be admissible. See, Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981); Daly v. State, 99 Nev. 564, 665 P.2d 798 (1983), Cunningham v. Nevada, 100 Nev. 396, 683 P.2d 500 (1984), cert. denied 469 U.S. 935, 105 Sup. Ct. 336, 83 L. Ed.2d 272 (1984); Smith v. State, 100 Nev. 471, 686 P.2d 247 (1984). In Hardison v. State, 104 Nev. 530, 763 P.2d 52 (1988), this Court held that a witnesses statement to the police and at a preliminary hearing indicating that he was a witness to a murder and identified the killer but at trial testified that he was not present at the time of the murder permitted the prosecution to introduce the prior inconsistent statement under the prior inconsistent statute.

Defense counsel found the exclusion of the exculpatory evidence so damaging, Mr.

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McCarty moved for mistrial (A.A. Vol. 30 pp. 6717). On May 30, 2006 Nicolin Broderway told the police in a recorded statement she had talked to Ramaan Hall and he indicated, "She's fine. She's ok. They didn't hurt her. They let her go" (A.A. Vol. 30 pp. 6714). On page thirty-eight (38) of Ms. Broderway's recorded statement to the police she told police that she asked Ramaan Hall if he was sure and that he stated "yes" (A.A. Vol. 30 pp. 6714). Defense counsel complained to the district court that Nicolin Broderway had been told on two occasions, after the killing, that Victoria Magee was not hurt and that she was fine (A.A. Vol. 30 pp. 6714). Ramaan Hall had testified that one of the girls had a red mark and it appeared that they were injured in the apartment (A.A. Vol. 30 pp. 6715). Defense counsel further made it clear that at the time of the conversation between Ms. Broderway and Ramaan Hall the women had been murdered and therefore the statement was not made for the truth of the matter asserted but rather for the falsity of Ramaan Hall's statement. Secondly, the statement was used because it was inconsistent with Ramaan Hall's testimony in front of the jury (A.A. Vol. 30 pp. 6715).

In Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996), cert denied, 520 U.S. 1126, 117 Sup. Ct. 1267, 137 L. Ed. 2d 346 (1997), this Court reasoned that although a witness may not be confronted with his statement at the time of his examination there should be some opportunity at some point in the trial for the witness to explain or deny the statement. In the instant case, Mr. Hall was confronted by defense counsel regarding the willingness of the victims to go with the defendants. Mr. Hall tried to dispute the willingness of the victims and claimed that they had been injured or appeared to have been beaten. Hence, Mr. Hall was confronted and given an opportunity to explain the fact that he had told the police that the women had gone willingly. Thereafter, Mr. McCarty had every right to introduce Nicolin Broderway's testimony that Ramaan Hall had stated that Victoria was fine and had not been hurt.

The defendant's right to confrontation under the Sixth Amendment to the United States Constitution includes the right to cross-examination hostile or adverse witnesses. This Sixth Amendment protection extends to the states, pursuant to the Fourteenth Amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400 (1965).

A full cross-examination of the witness upon subjects of his examination in chief is

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the absolute right of the party against whom he is called. Quiules v. U.S., 344 F.2d 490 (9th Cir. 1965). The rights to cross-examination and confrontation are essential to due process. Chambers v. Mississippi, 93 U.S. 1038 (1973). The Nevada Supreme Court has repeatedly recognized that one accused of a crime has the right to cross-examine pursuant to the United States Constitution. State v. Merritt, 66 Nev. 380, 212 P.2d 706 (1949); Serrrano v. State, 83 Nev. 324, 429 P.2d 831 (1967).

The denial of the rights to confrontation and cross-examination results in constitutional error of the first magnitude and no amount or lack of prejudice will cure it. Brookhart v. Janis, 384 U.S. 1 (1966).

The United States Supreme Court has held that proper cross-examination includes testing the perception and memory of the witness; it encompasses impeaching the witness by showing bias, prejudice, motive, and under appropriate circumstances, the criminal record of the witness. It went on to conclude that cross-examination is the principle means by which the believability and truth of a witness' testimony are tested; that the witness' motivation in testifying is important and it may be discerned by the instrument of cross-examination. Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam); Davis v. Alaska, 415 U.S. 308 (1974); Green v. McElroy, 360 U.S. 474 (1950); U.S. v. Simtob, 901 F.2d 799 (9th Cir. 1990). The defendant is also entitled to test the witness's knowledge of the facts bearing on the defendant's guilt or innocence. U.S. v. Priachett, 699 F.2d 317 (6th Cir. 1983); U.S. v. Vargas, 933 F.2d 701 (9th Cir. 1991). If the witness claims a lack of memory while testifying, the defendant must receive full and fair opportunity to probe and expose the witness's infirmities through cross-examination. U.S. v. Owens, 484 U.S. 554 (1988). The Nevada Supreme Court is consistent and holds that a wide latitude of cross-examination is allowed in order to test the motives, interests, animus, accuracy, veracity and credibility of a witness. Lloyd v. State, 85 Nev. 576, 460 P.2d 111 (1969), cert. denied 398 U.S. 932.

In the instant case, Mr. Hall was extensively questioned regarding his observations of the alleged abduction. Mr. Hall was specifically questioned by defense counsel regarding the willingness of the women to go with the defendants. Mr. Hall told the jury that the women must

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have been beaten. Mr. McCarty had every right to introduce statements made by Mr. Hall to Nicolin Broderway which were clearly inconsistent with this position. Ms. Broderway's testimony regarding Mr. Hall's statement that the girls were fine after the alleged abduction was exculpatory. The district court erred when it relied upon the State's unfounded legal arguments that the statute did not permit this type of impeachment. The district court erred in precluding this highly exculpatory evidence in violation of the sixth and fourteenth amendments to the United States Constitution.

B. MR. MCCARTY WAS DENIED THE RIGHT TO PROPERLY IMPEACH HAROLD HERB.

On October 27, 2010, Harold Herb testified for the State. Mr. Herb is the father of Donald Herb (co-defendant who agreed to testify). During cross-examination of Harold Herb, defense counsel desired to play a portion of a Clark County Detention Center phone call that occurred between Harold Herb and his son, Donald Herb. Defense counsel was precluded from playing any portion of the tape based on the State's objection (A.A. Vol. 33 pp. 7228-7232). The State admitted that Harold Herb told defense counsel that he did not remember making a particular statement (7237). Defense counsel was questioning Harold Herb regarding a jail phone call wherein he told Donald Herb he knew about his son's charges (VOL 327114). Harold Herb stated, "I don't remember saying that, honestly" (7114). Defense counsel then began playing a portion of the jail phone call for Mr. Herb and an objection was lodged by the State (7114-7115). Defense counsel was precluded from playing the call. The State argued defense counsel should show a transcript to the witness instead of playing the tapes (7115).

The district court erred when it sustained the State's objection. Defense counsel was precluded from playing the best evidence. The defense moved for a mistrial on October 28, 2010 (7228). Mr. Herb had denied having conversations with his son regarding charges that were filed against him and knowledge of the facts. In order to impeach Mr. Herb, defense counsel desired to play the Clark County Detention Center phone call.

The United States Supreme Court has held that proper cross-examination includes testing the perception and memory of the witness; it encompasses impeaching the witness by showing bias, prejudice, motive, and under appropriate circumstances, the criminal record of

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the witness. It went on to conclude that cross-examination is the principle means by which the believability and truth of a witness' testimony are tested; that the witness' motivation in testifying is important and it may be discerned by the instrument of cross-examination. Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam); Davis v. Alaska, 415 U.S. 308 (1974); Green v. McElroy, 360 U.S. 474 (1950); U.S. v. Simtob, 901 F.2d 799 (9th Cir. 1990).

In the instant case, Mr. McCarty was denied his right to proper cross-examination by the failure of the district court to allow proper impeachment evidence. Therefore, based upon the above and foregoing, the district court committed error when it failed to permit Mr. McCarty the right to confrontation and impeachment.

VIII. THE DISTRICT COURT FAILED TO GRANT MR. MCCARTY'S LEGITIMATE CHALLENGE FOR CAUSE WHEN A JUROR WAS SUBSTANTIALLY IMPAIRED FROM CONSIDERING LIFE WITH THE POSSIBILITY OF PAROLE.

Juror 03, Faye Fontana was questioned as to whether she could consider all four forms of punishment (A.A. Vol. 20 pp. 4437). Ms. Fontana was questioned regarding her possible impairment to being a life qualified juror. At the conclusion of defense counsel's questioning Ms. Fontana stated, "but I would have to say probably, if it was premeditated and there was no impairment of any kind or whatever, and it was premeditated I would have a hard time seeing them turned loose on the street" (A.A. Vol. 20 pp. 4437). Defense counsel challenged the juror for cause and the district court denied the challenge (A.A. Vol. 20 pp. 4449). In Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001), this Court explained that the proper inquiry is whether the perspective jurors views "would prevent of substantially impair" the consideration of all four forms of punishment. In the instant case, it was clear that Ms. Fontana could not consider all four forms of punishment.

Initially, Ms. Fontana attempted to explain that she could consider all four forms of punishment if their had been an accident or a drunk driver had killed someone. But when pressed with the concept of first degree murder, Ms. Fontana was substantially impaired from considering the possibility of parole. Just as the State is entitled to a death qualified jury, Mr. McCarty was entitled to a life qualified jury.

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In Wainwright v. Witt, 469 U.S. 412, 105 Sup. Ct. 844, 83 L.Ed. 2d 841, the United States Supreme Court clarified the proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment. The Standard is whether the jurors view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath" 496 U.S. 412, 424. See also Witherspoon v. Illinois, 391 U.S. 510, 88 Sup. Ct. 1770, 20 L.Ed. 2d 776 (1968). See, Adams v. Texas, 448 U.S. 38 (1980). The United States Supreme Court concluded in Dennis v. United States, 339 U.S. 162, 168 (1950) that trial courts have a serious duty to determine the question of actual bias, and a broad discretion in it's ruling on challenges. Therefore... "in exercising it's discretion, a trial court must be zealous to protect the rights of the accused".

Therefore, based on the above and foregoing this Court should grant a reversal of Mr. McCarty's convictions. Alternatively, Mr. McCarty is entitled to a new penalty phase.

IX. MR. MCCARTY IS ENTITLED TO A NEW TRIAL AND/OR PENALTY PHASE BASED UPON A PATTERN OF PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, Mr. McCarty can demonstrate a pattern of misconduct that occurred throughout the trial. Mr. McCarty will address each incident of prosecutorial misconduct separately as subsections under this caption.

A. THE PROSECUTOR OPENLY DISOBEYED THE DISTRICT COURT'S ORDER REGARDING CELL PHONE TESTIMONY.

Prior to opening statements, defense counsel informed the district court that the State had failed to file any notice of expert witness regarding cell phone sites/towers. The defense was concerned that the State would attempt to call an expert witness having not provided the appropriate notice. During jury selection, defense counsel informed the court that a review of the expert notices from the State did not reveal any expert notice regarding cell phones (A.A. Vol. 26 pp. 5814). A lengthy discussion between the court, the defense, and the State occurred regarding this issue (A.A. Vol. 26 pp. 5814-5841). During the lengthy debate, the defense requested that the Court preclude the State from calling an expert because of improper notice. Although a lengthy hearing regarding the issue occurs during voir dire, the issue is again considered eight

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days later on October 26, 2006. Defense counsel prepared a written brief for the court regarding the cell phone issue. On October 26, 2010, the court entertained the defenses arguments (A.A. Vol. 26 pp. 6727). Citing NRS 174.234 a party has to file a notice of expert witness twenty-one days prior to trial (A.A. Vol. 26 pp. 6727).

The State had noticed approximately ten to fifteen experts, but not a cell phone expert (A.A. Vol. 26 pp. 6728). Having considered arguments from the parties the court determined that the custodian of records will be permitted to testify regarding the cell phones (A.A. Vol. 26 pp. 6757). It is important to note that some of the most damaging evidence to Mr. McCarty comes from the cell phone evidence (along with Mr. McCarty's lengthy statements). Approximately two weeks into trial, there had been two lengthy discussions regarding cell phone evidence and whether the State would be permitted to introduce the evidence given their failure to properly notice an expert. [17]

Just prior to closing argument, the defense requested that the district court admonish the State that they not be permitted to call the custodian of records an expert. The State recognized that they had failed to notice a cell phone expert and were therefore precluded from referring to the custodian of records as an expert (A.A. Vol. 40 pp. 8933). However, the request by the defense that the State follow the rule of law fell on deaf ears. During closing argument, the prosecutor intentionally referred to the custodian of records as an "expert" (A.A. Vol. 40 pp. 8923). While discussing cell phone evidence, the prosecutor stated, "and during that time period, just like Donald Herb said, Donald Herb bounces off quite a few towers - - oh, and **just like the expert said** there are three - -". Defense counsel objected and the district court stated "custodian of records" (A.A. Vol. 40 pp. 8923-8924).

At the conclusion of closing argument, defense counsel moved for a mistrial based upon repeated acts of prosecutorial misconduct. During the motion for mistrial, defense counsel explained,

And secondly, your honor, it does ring somewhat hollow that it was a slip of the

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[17] Mr. McCarty wants their to be clarification that this issue concerns prosecutorial misconduct that occurs during the State's closing argument.

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> tongue when for a month, even all the way up until just before closing arguments, I brought it up again, and the court admonished the State as to what they could and couldn't say, and Mr. DiGiacomo said - - the quote was "just like the expert said".

Defense counsel further stated, "that has been pounded to death, that there has been no expert in the case to the point to where the court right before closing made the point again" (A.A. Vol. 40 pp. 8934).

Defense counsel further explained, "but on that particular issue that is just amazing to me that that just happened right - - if I wouldn't have seen it I wouldn't have believed it" (A.A. Vol. 40 pp. 8934). The Court then told the prosecutor that his reference to an expert was improper and was "unfortunate" (A.A. Vol. 40 pp. 8934).

The prosecutor was precluded from calling the custodian of records an expert because he had simply failed to meet the twenty-one day deadline. There was significant litigation regarding the issue. Just prior to closing argument, this very experienced prosecutor was admonished not to refer to the custodian as an expert. The prosecutor ignored this court's order. A pattern of behavior was created in Mr. McCarty's trial of a prosecutor who did not feel he had any obligation to follow the rules of the court. He simply made pathetic excuses for his open and notorious refusal to follow the law.

B. BURDEN SHIFTING

It is improper for a prosecutor to infer that the defense is responsible for presenting evidence, making arguments, or generally burden shifting. Improper for the prosecutor to insinuate the defendant must explain the absence of witnesses. Lisle v. State, 113 Nev. 540, 937 P.2d 473, 481 (1981), cert denied, 119 Sup. Ct. 101 (1998). Reversible error for a prosecutor to tell jurors the defendant is responsible for presenting a compelling case. U.S. v. Roberts, 119 F.3d 1006, 1011 (1st Cir. 1997). Improper to call attention to the defendant's failure to call witnesses and present evidence which unconstitutionally shifts the burden of proof to the defendant. Washington v. State, 112 Nev. 1054, 1059-61, 921 P.2d 1253, 1256-58 (1996). Ordering a new trial where a prosecutor commented on the defendant's failure to produce evidence of witnesses and explaining that "it is generally improper for a prosecutor to comment on the defenses failure to produce evidence or call witnesses as such comment impermissibly

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shifts the burden of proof to the defense". Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996).

1. FAILURE TO CALL AN ALLEGED ALIBI WITNESS

Although the State was successful in precluding the defense from commenting on Mr. McCarty's numerous statements, the prosecutor specifically spent eighty to ninety percent of his closing argument dedicated to the defendant's statements, including continuously playing portions of the defendant's statements and then arguing it's meaning. At one point, the prosecutor tells the jury that Mr. McCarty mentioned to the police that there were two lesbians that could act as an alibi. The prosecutor states, "and they want us to call his alibi witnesses for him". Defense counsel stated, "judge I object. Those witnesses were very important witnesses for him. To now imply that they were alibi witnesses. There was never a notice of alibi. It's improper conduct. It's prosecutorial misconduct. I'll make a motion at the end" (A.A. Vol. 40 pp. 8924).

The district court asked the prosecutor to address defense counsel's complaint regarding the alibi witnesses. The State pointed out that Mr. McCarty stated that the women were his alibi's to the police on numerous occasions (A.A. Vol. 40 pp. 8932). The defense acknowledged the truth of that statement. However, the defense was not permitted to discuss the defendant's statements in opening argument because the prosecutor said he was not going to use the defendant's statements. All of these facts establish that the prosecutor had every intent of using the defendant's statements and was well aware of the Glover case and knew he could use it as a sword and a shield. The prosecutor was well aware that Mr. Mccarty had not attempted to put forth an alibi defense. Even the prosecutor was unable to enunciate an excuse for his blatant misconduct. Not only did the prosecutor commit significant deception, he shifted the burden to the defense.

Mr. McCarty never provided notice of an alibi. Mr. McCarty never told the jury in opening argument or throughout the trial about a potential alibi. In fact, as this Court is now aware, the defense was not even permitted to mention Mr. McCarty's statements because the prosecutor blatantly deceived the court and said he was unsure whether he was going to use the defendant's statements (in contrast to the fact that he dedicated almost his entire rebuttal

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argument to the defendant's statements). More disturbing, is the prosecutors statement that "they" want the state to call the alibi witness for him. This conduct was outrageous. At some point, this Court must determine that a prosecutors continuous deceit to the court and to the defense must result in sanctions.

Here, the State deliberately shifted the burden. Mr. DiGiacomo is an extremely experienced prosecutor. Mr. DiGiacomo is well aware that the defense would have to provide an alibi notice in advance of trial. Mr. DiGiacomo was well aware that Mr. McCarty did not provide an alibi notice nor did his counsel ever make an argument that there was an alibi. [18] During closing argument, Mr. DiGiacomo cannot claim that he was not paying attention during the trial. Hence, Mr. DiGiacomo was aware that the defense had made no effort to present such an alibi defense. For the prosecutor to then tell the jury that Mr. McCarty wanted the State to present his alibi witnesses is nothing short of egregious prosecutorial misconduct. The statement also amounts to burden shifting

2. FAILURE OF THE DEFENSE TO ARGUE PANDERING

During closing argument, while addressing the pandering count, the prosecutor stated, "it doesn't make sense to Red, but it certainly makes sense in the context of all the evidence because not even the defense yesterday argued to you that he's not Victoria's pimp. There wasn't a single argument to that". Defense counsel stated, "objection, your honor, it's improper, we don't have a burden to argue anything" (A.A. Vol. 40 pp. 8881). During a bench conference, the court informs the prosecutor..."your going to cross that line, if your not taking a step over by stating that they didn't present that or didn't argue and say there wasn't evidence to that effect". The prosecutor explained, "in the rules of rebuttal we are allowed to comment on their argument, what - - their arguments that they made, the positions that they took, the theories that they advanced" (A.A. Vol. 40 pp. 8882-8883). The prosecution was then told to rephrase the statement.

For the prosecutor to argue that defense counsel made no closing argument regarding the pandering counts also amounts to burden shifting. .

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[18] Therefore, Mr. DiGiacomo was well aware that Mr. McCarty's statements to the police that Ms. Nagel and Ms. Phillips could vouch as alibis would not be used by the defense.

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C. THE STATE REFERRED TO THE DEFENDANT AS A "THUG" DURING CLOSING ARGUMENT.

In closing argument, the prosecutor stated, "and in this condition, in this badly beaten conditions these two thugs are going through her purse" (A.A. Vol. 40 pp. 8642). Defense Counsel objected stating, "Judge I'd object to the word "thugs" being used to describe the defendant (A.A. Vol. 40 pp. 8642). The Court sustained the objection (A.A. Vol. 40 pp. 8642).

It has long been held by courts throughout the United States (both state and federal) that name calling of a defendant is improper. Examples of name calling that have been found to be improper are numerous in the United States. See, Martin v. Parker, 11 F.3d 613, 616, (6th Cir. 1993); Drew v. Collins, 964 F.2d 411, 419 (5th Cir. 1992), cert denied 509 U.S. 925 (1993); U.S. v. Prantil, 764 F.2d 548, 555 (9th Cir. 1985); U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984); Patterson v. State, 747 P.2d 535, 537-38 (Alaska 1987); Biondo v. State, 533 So. 2d 911 (Florida 1988); Bridgeforth v. State, 498 So. 2d 796 801 (Miss. 1986); State v. Rodriguez, 31 Nev. 342, 102 P.d 863, 864 (1909)' Comm v. Smith, 385 A.2d 1320, 1322 (PA 1978).

D. THE DEFENSE MOVED FOR MISTRIAL BASED ON REPEATED ACTS OF MISCONDUCT.

Defense counsel makes a contemporaneous objection and motion for mistrial with regard to all of the following issues (A.A. Vol. 38 pp. 8438). In approximately a thirty minute period of trial, the following improper events occurred: The prosecutor referenced that Mr. McCarty's statements had been redacted. The prosecutor asked Detective Collins if the tape (Mr. McCarty's statements) had been altered. The court agreed that the State could have conducted that issue in a better way (A.A. Vol. 38 pp. 8438). The State produced evidence to the lead detective that Mr. McCarty was in shackles (belly chains) while with detectives in the desert area (A.A. Vol. 38 pp. 8438). The prosecutor asked detective Collins whether Donald Herb had been charged with the murder counts. An objection was sustained by the court and the prosecutor told the court "I suggest you pull the criminal complaint" (or words to that effect) (A.A. Vol. 38 pp. 8439). The defense requested a mistrial based upon grossly inappropriate prosecutorial misconduct (A.A. Vol. 38 pp. 8439).

This Court has a history of frowning upon experienced members of the Clark County

District Attorney's office for repeated acts of prosecutorial misconduct. See, Eg. McKenna v. State, 114 Nev. 1044, 468 P.2d 739 (1998); Howard v. State, 106 Nev. 713, 722-23 n1, 800 P.2d 175 (1991); Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221; Green v. State, 113 Nev. 157, 170, 931 P.2d 54 (1997); Murray v. State, 113 Nev. 11, 17-18, 930 P.2d 121 (1997).

In Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990), this Court provided a non-exhaustive sampling of cases in which Mr. Dan Seaton made a career out of trampling on the United States Constitution. This Court explained,

> In Downey v. State, 103 Nev. 4, 731 P.2d 350 (1987), Seaton improperly hinted that there was additional inculpatory evidence to which the jury was not privy. In Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988), Seaton committed misconduct by characterizing the crime as "a Friday-the-13th kind of scenario." He further characterized the presumption of innocence as a farce, a comment this court deemed "outrageous." In Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988), Seaton referred to the possibility that the defendant could kill again if allowed to live. Although the comment did not require reversal, it nevertheless violated our holding in Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). In Santillanes v. State, 104 Nev. 699, 765 P.2d 1147 (1988), we concluded that Seaton "distinctly traversed the boundary separating proper from improper argument" by communicating to the jury his personal opinion as to the accused's guilt. This, again, was in clear violation of a prior decision of this court, namely, Yates v. State, 103 Nev. 200, 734 P.2d 1252 (1987). In 1989, Seaton again violated our ruling in Collier. See Valerio v. State (Case No. 19008, order dismissing appeal filed September 6, 1989). Seaton disingenuously argued that he believed his comment was permissible under our holding in Pellegrini, even though Pellegrini had not yet been published at the time he made his comments at Valerio's trial. 106 Nev. 713, 722.

State and federal law, as well as other professional ethical standard, not only prohibit prosecutors from committing the type of misconduct described in this brief, but also obligate them to assist in protecting the constitutional rights of people facing trial. The United States Supreme Court has held that the prosecutor,

> Is the representative not of an ordinary party to a controversy, but of a severity who's obligation to govern impartially is as compelling as it's obligation to govern at all; and who's interest who therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 75, 88 (1935), overruled on other grounds by Stiron v. United States, 361 U.S. 212 (1960).

The Ninth Circuit explained in Commonwealth of Northern Mariana Islands v. Mandiola, 976 F.2d 475, 486 (9th Cir. 1992), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997), that "it is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial".

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The Ninth Circuit has stressed that,

> Prosecutors are subject to restraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may indeed must - do everything ethically permissible to advance their client's interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly staying well within the rules. U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993); See also, American Bar Association, *Professional Responsibility Report of Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

E. DECEIT OF COURT AND DEFENSE COUNSEL IN THE USE OF MR. MCCARTY'S STATEMENTS. [19]

Prior to opening argument, defense counsel specifically requested that the State determine whether Mr. McCarty's statements would be introduced (A.A. Vol 27 Pg 5952). Defense counsel stated,

> The first one is the State has told me that they may not mention Mr. McCarty's statements in opening argument. If they don't, then I don't believe I'm permitted to open the door to that. It—it would be self serving. So what I would ask the court to do is make the State tell us whether they are going to Mr. McCarty's statement. If they are, then I can fairly comment on them. If they cant, I think its objectionable" (A. A. Vol 27 pp 5952).

The prosecutor, Mr. DiGiacomo then explains, "In my opening, I do not discuss Mr. McCarty's statement" (A.A. Vol 27 pp 5953). Mr. DiGiacomo further states "we - until we know some of the evidentiary ruling and the way the evidence comes out, I don't know that I can actually answer the question as to weather or not we will play some of Mr. McCarty 's statements" (A.A. Vol 27 pp 5953).

As a result, Mr. McCarty was then not able to address any of his extremely prejudicial statements. Thereafter, at no surprise, the State presented each and everyone of Mr. McCarty's lengthy recording statements. In fact, the prosecutor played the tape recorded statements to the jury on 17 occasions during rebuttal closing argument (A.A. Vol. 40 pp. 8886 (recording played two separate times); 8888; 8889; 8892; 8894; 8900; 8910 (recording played two separate times); 8911 (recording played three separate times); 8912; 8913 (recording played two separate times); 8915; and 8916).

In the instant case, Mr. McCarty is entitled to a new trial and/or penalty phase based upon

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[19] For purposes of this section of this argument, Mr. McCarty endorses argument 2.

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the above repeated acts of significant prosecutorial misconduct.

X. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED ON THE STATE PRESENTING EVIDENCE OF MR. MCCARTY'S INCARCERATION ON TWO OCCASIONS.

During the direct examination of Detective Ridings, the State asked Detective Ridings if he had spoken with the defendant at the Henderson Detention Center (A.A. Vol. Pp. 7923). Defense counsel immediately objected and moved for a mistrial based upon presentation of Mr. McCarty's custody status (7924). The State argued that the jury was aware that Mr. McCarty had been arrested (7924). On the second occasion, the State presented evidence that Mr. McCarty was shackled while assisting detectives in locating the objects used in the murder (in the desert area).

Courts have considered whether error exists when jurors recognize the defendant's in custody status. When jurors become aware that the defendant is in custody, the Ninth Circuit has held that measures to eliminate the risk of actual prejudice and a right to fair trial include: 1) allowing the defendant to appear without restraints during recesses; 2) instructing security to be more discreet; and 3) instructing the jury that the custody status of a defendant is irrelevant to determine guilt or innocence. See, United States v. Halliburton, 870 F.2d 557 (9th Cir.) (cert. Denied, 492 U.S. 910, 109 Sup. Ct. 3227, 106 L.2d 575 (1989). See also, United States v. Acosta-Garcia, 448 F.2d 395, 396 (9th Cir. 1971).

In the instant case, the jury was aware that Mr. McCarty was in custody during one of his interviews. Additionally, the jury was aware that Mr. McCarty was shackled during his attempt to retrieve objects in the desert. Mr. McCarty was entitled to a fair trial and the error requires reversal.

XI. MR. MCCARTY IS ENTITLED TO REVERSAL OF HIS CONVICTIONS BASED UPON THE STATE'S INTRODUCTION OF OVERLY GRUESOME AUTOPSY PHOTOS.

On October 26, 2010, the defense objected to numerous overly gruesome photographs that were to be shown to the jury. The photos and exhibit numbers that were objected to by defense counsel were exhibits 208, 213-214, 219-221, 223, 229, 236, 247-248, and 251-252 (A.A. Vol. 31 pp. 151,169, 206, 202, 204). In Byford v. State of Nevada, 116 Nev. 215 pp4 P.2d

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700 (2000), this Court held:

> Admission of evidence is within the trial court's sound discretion; this court will respect the trial court's determination as long as it is not manifestly wrong." Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). Gruesome photos are admissible if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). "Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976) (citations omitted), overruled on other grounds by Alford v. State, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995).

Although, this Court noted the admission of evidence is within the trial court's sound discretion, Mr. McCarty would argue this evidence should not have been permitted. It was admitted to inflame the jury. Therefore, based upon the above and foregoing, Mr. McCarty is entitled to a reversal of his convictions and sentence of death.

XII. THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 6, 11, 12, AND 39 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The undersigned has raised this issue to this Court numerous times and acknowledges that this Court has always denied the issue. These issues are presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

A. THE "IMPLIED MALICE" INSTRUCTION

INSTRUCTION NO. 30

> Express malice is that deliberate intention unlawfully to take away the life of a human, which is manifested by external circumstances capable of proof. Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (A.A. Vol. 39, pp. 8582).

The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S. 1, 11, 13-14 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). The words "abandoned or malignant heart" are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a "bad man." In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966), the California Supreme Court analyzed the element of implied malice,

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and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) (Rehearing pending):

> "Nevada statutes and this court have apparently never employed the phrase 'depraved heart,' but that phrase and 'abandoned and malignant heart' both refer to the same 'essential concept ... one of extreme recklessness regarding homicidal risk.' Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes 'general malignant recklessness of others' lives and safety or disregard of social duty')."

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as superfluous and misleading:

> Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.
>
> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter.414 at 363-364 (footnotes omitted).

Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart" conveys anything rational to a juror. No reasonable juror today would understand that phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result. The fact that no other state, as far as Mr. McCarty can determine, uses this language in a jury instruction also militates in favor of finding that it does not satisfy due process standards. See Schad v. Arizona,

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501 U.S. 624, 642 (1991).

Wherefore it is respectfully requested that this Court find that the "abandoned and malignant heart" implied malice is unconstitutionally vague and ambiguous and denied Mr. McCarty of due process of law and based thereon reverse his conviction. Likewise the catch phrase of "heart fatally bent on mischief" has no meaning in the definition of malice aforethought. This Court should strike down this instruction and craft language that has meaning and is understandable to the average person.

B. THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

INSTRUCTION NO. 32

The jury was given the following instruction on premeditation and deliberation:

> Premeditation is a design, a determination to kill distinctly formed in the mind by the time of the killing.
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constitution the killing has been preceded by and has been the result of premeditation, no matter how rapidly t he act follows the premeditation, it is premeditated (A.A. Vol. 39, pp. 8584).

By approving the concept of "instantaneous" premeditation and deliberation, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder, and without proof beyond a reasonable doubt of "premeditation and deliberation," which are statutory elements of first degree murder. The instruction violates the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitution's guarantee of a reliable sentence.

The vague "premeditation and deliberation" instruction given during Mr. McCarty trial, which does not require and sort of premeditation at all, violated the constitutional guarantee of due process of law because it was so bereft of meaning as to the definition of two elements of the statutory offence of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made defense against the charges virtually impossible, due to the inability

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to discern what the State needs to prove to establish the elements of the charged offense. By relieving the State of it's burden of proof as to an essential element of the charged offense, this unconstitutional "premeditation and deliberation" instruction was per se prejudicial, and no showing of specific prejudice is required. Nevertheless, substantial prejudice occurred as a result of the giving of this instruction. The unconstitutional "premeditation and deliberation" instruction substantially and injuriously affected the process to such an extent as to render Mr. McCarty's conviction fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instruction did not affect the conviction.

C. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 44

The trial court's reasonable doubt instruction given improperly minimized the State's burden of proof. The jury was given the following instruction on reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation (A.A. Vol. 39, pp. 8596).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S.39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991). Crawley recognizes that this Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). This issue is presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

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D. EQUAL AND EXACT JUSTICE

The trial court's "equal and exact justice" instruction improperly minimized the State's burden of proof. The court provided the following instruction to the jury:

INSTRUCTION NO. 59

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law, but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada (A.A. Vol. 39, pp. 8611).

By informing the jury that it must provide equal and exact justice between the defendant and the State, this instruction created a reasonable likihood that the jury would not apply the presumption of innocence in favor of Mr. McCarty, and would thereby convict and sentence based on an lesser standard of proof than the constitution requires. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

Based on the foregoing, Mr. McCarty would respectfully request this Court reverse his convictions.

XIII. THERE WAS INSUFFICIENT EVIDENCE TO FIND MR. MCCARTY GUILTY OF COUNT FIVE AND COUNT 6, BATTERY WITH SUBSTANTIAL BODILY HARM AND ROBBERY.

Mr. McCarty was charged with Mr. Malone of battery with substantial bodily harm on Melissa Estores. This battery took place on May 16, 2006. On the same day, Mr. McCarty and Mr. Malone allegedly robbed Ms. Estores, after the battery, Mr. Malone alleging of Ms. Estores' purse and it's contents (count 6) (8137). Mr. Malone was charged with these counts. Mr. McCarty allegedly aided and abetted Mr. Malone in the beating of Ms. Estores and the subsequent robbery. Mr. McCarty's jury found him guilty of both counts. Whereas, Mr. Malone's jury found Mr. Malone not guilty of counts 6, robbery and only guilty of battery without substantial bodily harm.

This Court has stated that when the sufficiency of evidence is challenged on appeal, "[t]he relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found essential elements of

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the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250 ,681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319,61 LED. 2d 560, 99 S.Ct. 2781 (1979)).

In the instant case, Mr. Malone was accused of kidnapping Melissa Estores and beating her in the desert area. Mr. McCarty was not accuse of laying a hand Ms. Estores. The jury convicted Mr. Malone of battery without substantial bodily harm. Mr. McCarty the disabled man, who was not accused of laying a hand on Ms. Estores, was convicted of battery with substantial bodily harm. Allegedly, on the drive from the desert, after the beating, Ms. Estores alleged that her belongings were thrown out of the vehicle. Mr. McCarty was convicted of robbery. Yet, Mr. Malone who allegedly threw Ms. Estores' purse away was found not guilty of robbery. Mr. McCarty the driver, was convicted of robbery.

It is also important to remember that Mr. Malone's jury spared his life and Mr. McCarty's jury sentenced him to death. Based on the standard enunciated by this Court, there is insufficient evidence to convict Mr. McCarty of Counts five and six. Counts five and six should be dismissed.

XIV. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE STATE'S WITNESS (VICTIM'S FAMILY MEMBER) REQUESTING THAT THE JURY IMPOSE THE MAXIMUM PUNISHMENT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Charles Combado is the father of Charlotte Combado (A.A. Vol. 41 pp. 9174). During direct examination he read a statement to the jury. During his statement, he requested that **the defendant should receive nothing but the maximum penalty** for the horrific act (A.A. Vol. 41 pp. 9174). Defense counsel moved for a mistrial and informed the court that shortly before Mr. Combado's testimony the prosecution had been accused of presenting inappropriate victim impact (A.A. Vol. 41 pp. 9175). During the previous defense complaint to the court, the prosecution had stated that it was not as though the witness had asked for a particular penalty (A.A. Vol. 41 pp. 9175). The State admitted that victim impact is not permitted to request a specific sentence. The prosecution informed the court that they had looked at Mr. Combado's notes but had not seen that statement in his notes (A.A. Vol. 41 pp. 9176). The prosecution argued that Mr. Combado did not ask for the death penalty (A.A. Vol. 41 pp. 9176). In response,

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defense counsel complained that the prosecutor's argument was "absurd" (A.A. Vol. 41 pp. 9177). Mr. Combado's request for the maximum punishment clearly provided evidence to the jury that Mr. McCarty should be sentenced to death (A.A. Vol. 41 pp. 9177). Defense counsel also noted that it was the court who intervened and instructed Mr. Combado to confine his comments to the impact on the family (A.A. Vol. 41 pp. 9174; 9179). Defense counsel objected to the prosecutor's sitting idly by and listening to Mr. Combado make inappropriate statements that they acknowledged were inappropriate. Yet, the prosecutor did nothing to intervene. Again, evidence of a pattern of consistent misconduct. Undoubtedly, the State will argue that all of the errors and misconduct are harmless so that they can continue their pattern of misbehavior.

In Middleton v. Nevada, 114 Nev. 1089, 968 P.2d 296 (1998), this Court affirmed the trial court's ruling that the victims could neither request that the jury impose a sentence of death or the maximum penalty. 114 Nev. 1089, 1101. For more than a decade, the prosecutors in Nevada have been aware that victims could not ask for the maximum penalty or the death penalty. Interestingly enough, these were the exact words used by Mr. Combado. The State admitted that they had reviewed Mr. Combado's notes but did not see this statement. However, when Mr. Combado expressed this opinion to the jury, the prosecutor sat idly by and the district court intervened. Based on this violation of clearly established law, Mr. McCarty is entitled to a new penalty phase.

XV. THE DISTRICT COURT DENIED MR. MCCARTY THE OPPORTUNITY TO INTRODUCE MR. MALONE'S NOTICE OF AGGRAVATION AND/OR CRIMINAL HISTORY SO THAT THE JURY COULD CONSIDER PROPORTIONALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court should be aware that Mr. Malone was given a life sentence in his subsequent capital trial. In Mr. Malone's penalty phase, the jury learned that Mr. Malone was accused of a third murder and had actually been convicted of rape. The State was permitted, over Mr. Malone's objection, to introduce the other murder evidence in Mr. Malone's penalty phase. Here, Mr. McCarty desired the same opportunity. Mr. McCarty wished to demonstrate that he should not be sentenced to death based upon proportionality. An expert testified and the State did not dispute that Mr. McCarty suffered from Cerebral Palsy and was significantly disabled. Mr.

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McCarty's arm is crippled and he drags his leg. In both Mr. McCarty's and Mr. Malone's trials the State's theory was that Mr. McCarty was incapable of murdering the two women in such a brutal fashion by himself. Mr. McCarty desired to introduce Mr. Malone's criminal history to demonstrate that he was most probably the individual who inflicted the majority of the significant injuries suffered by both victims. This request was denied (A.A. Vol. 43 pp. 9487-9490).

First, defense counsel complained to the court that Mr. DiGiacomo had recently tried a capital case where he compared the getaway driver (who was also tried with a separate murder) to the physical shooter (A.A. Vol. 43 pp. 9487-9490). In State of Nevada v. Timothy Burnside, C235798-2 (Timothy Burnside v. State of Nevada, 56654), Mr. Burnside was sentenced to death. Defense counsel for McCarty cited the closing argument transcript of Mr. DiGiacomo where he indicated that Mr. Burnside should be sentenced to death and the court should consider that Mr. McKnight was just a getaway driver and that Mr. Burnside had a significant criminal history. In Burnside, Mr. DiGiacomo was permitted to argue proportionality. Whereas, in the instant case, Mr. McCarty was not given that opportunity.

In Flanagan v. State, 112 Nev. 1409, 930 P.2d 691 (1996), this Court explained,

> The district court denied appellants' motion to exclude evidence of their co-defendants' sentences from the third penalty hearing. The prosecutor informed the jury of the sentences received by the four other individuals involved in the murders. In closing argument, the prosecutor argued that in view of the other four individuals' involvement in the crimes and their sentences, appellants deserved the death penalty. Appellants contend that this evidence and argument was improper, but this court has already rejected this contention, concluding that "it was proper and helpful for the jury to consider the punishments imposed on the co-defendants." Flanagan II, 107 Nev. at 248, 810 P.2d at 762.

Therefore, Mr. McCarty is entitled to a new penalty phase based upon the refusal of the district court to permit a proper proportionality argument in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XVI. MR. MCCARTY'S SENTENCE OF DEATH SHOULD BE REVERSED BASED UPON INCONSISTENT JURY VERDICTS BETWEEN MR. MCCARTY AND MR. MALONE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. McCarty was sentenced to death. Mr. Malone was tried subsequently for identical offenses. Mr. Malone was convicted of the same two counts of capital murder yet the jury

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sentenced Mr. Malone to life without the possibility of parole. The State's theory in both trials was that Mr. McCarty was incapable of causing the physical injuries to both victims without the aid of Mr. Malone. It became clear during Mr. McCarty's trial that the State contended that Mr. Malone had caused many of the physical injuries to the two victims. Additionally, the State was permitted to introduce evidence that Mr. Malone was accused of a separate murder and had been convicted of sex related crime. There was no allegation that Mr. McCarty had such a significant and violent criminal history. Although, the State presented evidence of Mr. McCarty's criminal history, it failed in comparison to Mr. Malone's criminal history.

Mr. Malone was able bodied and Mr. McCarty was seriously disabled. The Court should remember that Mr. Malone was accused of savagely beating Ms. Estores approximately forty-five days before the murder. Ms. Estores was also beaten shortly before the murder.

The two women were abducted from an apartment complex. Yet, even the State would admit it would be physically impossible for Mr. McCarty to have physically abducted the women by himself. The discrepancy in the two individual's sentences are highly disturbing.

This Court has recognized that pursuant to the 1985 Amendment NRS 177.055(2)(d) the Court no longer conducts proportionality review of death sentences. See, Thomas v. State, 114 Nev. 1127, 1145, 967 P.2d 1111, 1125 (1998), Cert. denied, 528 U.S. 830, 145 L. Ed.2d 72, 120 Sup. Ct. 85 (1999), Guy v. State, 108 Nev. 770, 784, 839 P.2d 578, 587 (1992). Instead, the Court reviews a penalty for excessiveness considering the crime and the defendant. See, Guy, 108 Nev. at 784, 839 P.2d at 587.

In the instant case, Mr. McCarty's sentence of death is clearly excessive especially in light of Mr. Malone's jury sentencing the more culpable and violent perpetrator to a life sentence.

It is morally and philosophically appropriate for the jurors to have the benefit of proportionality data when deciding whether or not to impose the death sentence. The jurors cannot act as the conscience of the community as to whether the accused should be sentenced to death unless they know of the other actions of the community in similar cases. As a vital link to community values, see Gregg v. Georgia, 428 U.S. 153, 181 (1976), the jurors are entitled to know what the community has done in other cases.

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An individual juror's decision in a penalty phase is a "profoundly moral evaluation". Satterwhite v. Texas, 486 U.S. 249, 261 (1988) (Marshall, J., concurring in part and concurring in the judgment.). Information about resolution of similar homicide cases in Nevada is critical to a juror's moral evaluation about whether she or he is right to put Mr. Washington to death. Further, it is constitutionally mandated that a juror be able to consider all relevant mitigation. See, e.g., Boyde v. California, 494 U.S. 370 (1990); Lockett v. Ohio, 438 U.S. 586 (1978). Under federal and state constitutions, proportionality evidence constitutes mitigation, since it demonstrates that Mr. McCarty should not have been sentenced to death, and that society and the government do not consider such crimes as he is charged with to be deserving of the death penalty.

In the instant case, defense counsel was even precluded from presenting information regarding Mr. Malone to the jury. Had Mr. McCarty been given an opportunity to properly present evidence that the State has been permitted to present in the past, the result of the penalty phase would be different. Mr. McCarty should have been permitted to introduce the co-defendant's criminal history. If Mr. McCarty had been given an opportunity to present the evidence he desired, the jury would have recognized that Mr. Malone was clearly a worse perpetrator than Mr. McCarty. Mr. McCarty respectfully requests that this Court consider the preclusion of potentially mitigating evidence at Mr. McCarty's penalty phase. Mr. McCarty was sentenced to death in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XVII. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON IMPROPER PROSECUTORIAL ARGUMENT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During penalty phase closing argument, the prosecutor explains,

> So what were the imposition of the death penalty do in this case? Will it bring Charlotte or Victoria back? No. Of course not. Nothing will. Will it absolutely end the violence in our society? No. Could the imposition of the death penalty in this case prevent death in the future by the message it sends to our community? Quite possibly it could.

There upon defense counsel objects and the court overrules the objection. (A.A. Vol. 44 pp. 9824).

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This argument improperly diverted the jury from determining the proper sentence for Mr. McCarty by asking the jury to solve a societal problem. Darden, 477 U.S. at 180; Evans v. State, 117 Nev. 609, 633, 28 p.3d 498, 514-15 (2001) (citing, Leon-Reyes, 177 F.3d at 822-23; Collier, 101 Nev. At 479, 705 P.2d at 1130; U.S. v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993). But see, Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997).

Where deterrence is a proper subject for argument, the defendant should be given due process rights to present evidence, for example, to rebut allegations of the death penalty deters under Simmons v. South Carolina, 512 U.S. 154, 163-64 (1994). This Court should reverse it's previous rulings in Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997), where the Court held that "a prosecutor in a death penalty case properly may ask the jury through it's verdict to, set a standard to make a statement to the community". See also, Witter v. State, 112 Nev. 908, 924, 921 P.2d 886, 896 (1996) (holding that a prosecutor did not violate the constitution where commented that the failure to impose death "would be disrespectful to the dead and irresponsible to the living," (which implies the existence of a duty to society); Mazzan v. State, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989) (recognizing that it is improper to pressure jurors and to threaten them with community standards but refusing without reasoning to find improper statement that jurors needed to "set a standard" for the community); Collier v. State, 101 Nev. 743, 749, 705 P.2d 1126 (1985)(condemning argument that a jury must be angry with the defendant "or we are not a moral community" as an impermissible appeal to community standards.

In the instant case, the prosecutor should not be permitted to make this type of impermissible argument. Additionally, Mr. McCarty was not given an opportunity to demonstrate that the death penally is not a deterrent.

XVIII. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE STATE IMPERMISSIBLY SHIFTING THE BURDEN TO THE DEFENSE DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During closing argument in the penalty phase the prosecutor stated,

Another thing he says is, I never saw, I never met, nor do I know Jason McCarty.

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> So they have Margo. They have Margo with two brothers and a sister who could verify, absolutely no doubt verify, whether or not what Margo says about the horrible nature this household, and they chose not to call (A.A. Vol. 44 pp. 9878.

Defense counsel objected based upon the State impermissibly shifting the burden to the defense. Mr. McCarty was described as growing up in an extremely abusive household. Margo McMosley described observing the abuse. Now, the State is claiming that Margo McMosley is not credible and that her two brothers and a sister could have been called by the defense to verify the abuse in the McCarty household.

It is improper for a prosecutor to infer that the defense is responsible for presenting evidence, making arguments, or generally burden shifting. Improper for the prosecutor to insinuate the defendant must explain the absence of witnesses. Lisle v. State, 113 Nev. 540, 937 P.2d 473, 481 (1981), cert denied, 119 Sup. Ct. 101 (1998). Reversible error for a prosecutor to tell jurors the defendant is responsible for presenting a compelling case. U.S. v. Roberts, 119 F.3d 1006, 1011 (1st Cir. 1997). Improper to call attention to the defendant's failure to call witnesses and present evidence which unconstitutionally shifts the burden of proof to the defendant. Washington v. State, 112 Nev. 1054, 1059-61, 921 P.2d 1253, 1256-58 (1996). Ordering a new trial where a prosecutor commented on the defendant's failure to produce evidence of witnesses and explaining that "it is generally improper for a prosecutor to comment on the defenses failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense". Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996).

The State continuously committed misconduct in an effort to obtain a sentence of death. Mr. McCarty is entitled to a new penalty phase based upon the unconstitutional nature of the State shifting the burden to the defendant.

XIX. THE DEATH PENALTY IS UNCONSTITUTIONAL.

Mr. McCarty's state and federal constitutional rights to due process, equal protection, right to be free form cruel and unusual punishment, and right to a fair penalty hearing were violated because the death penalty is unconstitutional. U.S. Const. Amend. V, VI, VII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

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Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers.

Under the federal constitution, the death penalty is cruel and unusual in all circumstances. *See* Gregg v. Georgia, 428 U.S. 153, 227 (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting); contra, id. at 188-195 (Opn. of Stewart, Powell and Stevens, JJ.); id. at 276 (White, J., concurring in judgment). since stare decisis is not consistently adhered to in capital cases, e.g., Payne v. Tennessee, 111 S.Ct. 2597 (1991), this court and the federal courts should reevaluate the constitutional validity of the death penalty.

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

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Mr. McCarty recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard, 117 Nev. at 83, 17 P.3d at 416 and cases cited therein. Nonetheless, the Court has never explained the rationale for its decision on this point and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

Based upon the above and foregoing, Nevada's death penalty scheme unconstitutional, requiring the vacation of Mr. McCarty's sentence.

XX. MR. MCCARTY'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

In Dechant v. State, 116 Nev. 918, 10 P.3d 108 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id. Mr. McCarty was severely prejudiced by the cumulative error in the instant case.

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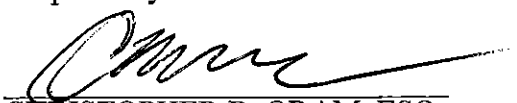
CONCLUSION

Based on the foregoing, Mr. McCarty would respectfully request that this Court reverse his conviction and sentence of death based upon the above mentioned arguments and the cumulative error in this case.

DATED this 2nd day of May, 2012.

Respectfully submitted:



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b, this appellate brief complies because although excluding the parts of the brief exempted by NRAP 32(7)(b), it does contain more than 37,000 words and 80 pages, the undersigned has filed the appropriate motion to extend the page limitation.

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

DATED this 2nd day of May, 2012.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 2nd, 2012. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

JASON MCCARTY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 58101

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE MICHAEL VILLANI, PRESIDING

APPELLANT'S OPENING BRIEF

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OTHER JURISDICTIONS

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NEVADA REVISED STATUTES

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ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. MCCARTY'S MOTION TO SUPPRESS.

II. THE DISTRICT COURT ERRED WHEN IT FAILED TO PRECLUDE THE PROSECUTOR FROM INTRODUCING THE STATEMENTS OF MR. MCCARTY BASED UPON A VIOLATION OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III. MR. MCCARTY WAS DENIED A FAIR TRIAL BASED UPON THE DISTRICT COURT DENYING BATSON CHALLENGES IN VIOLATION OF THE FIFTH SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE DISTRICT COURT REFUSING TO EXCUSE A SLEEPING JUROR UNTIL THE PENALTY PHASE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE INTRODUCTION OF INADMISSIBLE BAD ACT EVIDENCE IN VIOLATION OF NRS 48.045(B) AND THE FAILURE OF THE STATE TO DISCLOSE THEIR INTENT TO USE SIGNIFICANT BAD ACT EVIDENCE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED UPON THE STATE INTRODUCING INADMISSIBLE HEARSAY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VII. MR. MCCARTY WAS PRECLUDED FROM INTRODUCING EXCULPATORY EVIDENCE THAT WAS NOT HEARSAY AND WAS DENIED HIS RIGHT TO PROPERLY IMPEACH A WITNESS IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

VIII. THE DISTRICT COURT FAILED TO GRANT MR. MCCARTY'S LEGITIMATE CHALLENGE FOR CAUSE WHEN A JUROR WAS SUBSTANTIALLY IMPAIRED FROM CONSIDERING LIFE WITH THE POSSIBILITY OF PAROLE.

IX. MR. MCCARTY IS ENTITLED TO A NEW TRIAL AND/OR PENALTY PHASE BASED UPON A PATTERN OF PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X. MR. MCCARTY IS ENTITLED TO A NEW TRIAL BASED ON THE STATE PRESENTING EVIDENCE OF MR. MCCARTY'S INCARCERATION ON TWO OCCASIONS.

XI. MR. MCCARTY IS ENTITLED TO REVERSAL OF HIS CONVICTIONS BASED UPON THE STATE'S INTRODUCTION OF OVERLY GRUESOME AUTOPSY PHOTOS.

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XII. THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 6, 11, 12, AND 39 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

XIII. THERE WAS INSUFFICIENT EVIDENCE TO FIND MR. MCCARTY GUILTY OF COUNT FIVE AND COUNT 6, BATTERY WITH SUBSTANTIAL BODILY HARM AND ROBBERY.

XIV. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE STATE'S WITNESS (VICTIM'S FAMILY MEMBER) REQUESTING THAT THE JURY IMPOSE THE MAXIMUM PUNISHMENT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XV. THE DISTRICT COURT DENIED MR. MCCARTY THE OPPORTUNITY TO INTRODUCE MR. MALONE'S NOTICE OF AGGRAVATION AND/OR CRIMINAL HISTORY SO THAT THE JURY COULD CONSIDER PROPORTIONALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVI. MR. MCCARTY'S SENTENCE OF DEATH SHOULD BE REVERSED BASED UPON INCONSISTENT JURY VERDICTS BETWEEN MR. MCCARTY AND MR. MALONE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVII. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON IMPROPER PROSECUTORIAL ARGUMENT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVIII. MR. MCCARTY IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE STATE IMPERMISSIBLY SHIFTING THE BURDEN TO THE DEFENSE DURING THE PENALTY PHASE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XIX. THE DEATH PENALTY IS UNCONSTITUTIONAL.

XX. MR. MCCARTY'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

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JURISDICTIONAL STATEMENT

This is a direct appeal from a judgment of conviction and sentence of death, pursuant to a jury verdict, for conspiracy to commit kidnapping, first degree kidnapping, battery with substantial bodily harm, pandering, conspiracy to commit murder, murder with use of a deadly weapon, and robbery with use of a deadly weapon. The judgement of conviction was filed on April 6, 2011. A timely notice of appeal was filed on April 5, 2011.

STATEMENT OF THE CASE

Mr. McCarty was charged by way of Information with Counts 3 and 7, Conspiracy to commit kidnapping; Counts 4, 13, and 14, First degree kidnapping; Count 5, Battery with substantial bodily harm; Count 6, Robbery; Counts 8 and 9, Pandering; Count 10, Conspiracy to commit murder; Count 11, Conspiracy to commit burglary; Count 12, Burglary; and Counts 15 and 16, Murder with use of a deadly weapon. The notice of intent to seek the death penalty was filed on August 30, 2006.

Mr. McCarty's trial began on October 12, 2010, in front of the Honorable Michael Villani. The trial concluded on November 9, 2010, and the jury began deliberations. On November 9, 2010, the jury returned with a verdict of guilty as to all counts. The penalty phase began on November 12, 2010. The penalty phase concluded on November 18, 2010. At the conclusion of the penalty phase on November 18, 2010, the jury imposed a sentence of death.

The following aggravating circumstances were found by the jury: 1) The murder was committed by a person who at any time before a penalty hearing is conducted for the murder or is or has been convicted of a felony involving the use or threat of violence to the person of another, to-wit: first degree kidnapping as alleged in Count 4 of the amended information; 2) The murder was committed by a person who at any time before a penalty hearing is conducted for the murder is or has been convicted of a felony involving the use or threat of violence to the person of another, to-wit: battery with substantial bodily harm as alleged in Count 5 of the amended information; 3) The murder was committed by a person who at any time before a penalty hearing is conducted for the murder is or has been convicted of a felony involving the use or threat of violence to a person of another, to-wit: robbery as alleged in Count 5 of the amended

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information; 4) The murder was committed while the person was engaged alone or with others in the commission of any kidnapping in the first degree and the person charged killed or attempted to kill the person murdered or knew or had reason to know that life would be taken or lethal force used, to-wit: first degree kidnapping as alleged in Count 12 of the amended information; 5) The murder was committed while the person was engaged along or with others in the commission of any kidnapping in the first degree and the person charged killed or attempted to kill the person murdered or knew or had reason to know that life would be taken or lethal force used, to-wit: first degree kidnapping as alleged in Count 13 of the amended information; 6) A murder was committed by a person for himself or another to receive money or any other thing of monetary value; and 7) The defendant has in the immediate proceeding been convicted of more than one offence of murder in the first degree.

The following mitigating circumstances were found by the jury: Mitigating circumstances: 1) Jason McCarty's history of cerebral palsy; 2) Jason McCarty's history of early care rejection; 3) Jason McCarty's history of esteem, sense of inadequacy, and social isolation; 4) Jason McCarty's history of parental separation; 5) Jason McCarty's history of maternal substance abuse; 6) Jason McCarty's history of drug and violence exposure and victimization in the community; 7) Jason McCarty's history of parental neglect; 8) Jason McCarty's history of abuse by mother; 9) Jason McCarty's history of brother criminality and drug use; 10) Jason McCarty's history of independent health care; 11) Jason McCarty's lack of protective factors and consistent early intervention; 12) Previously worked as a porter while at the Clark County Detention Center.

Mr. McCarty's sentencing was held on April 5, 2011. Mr. McCarty was sentenced as follows: Count 3: A maximum of sixty months and a minimum of twenty-four months; Count 4: Life with parole eligibility after a minimum of five years to run consecutive to Count 3; Count 5: A maximum of forty-eight months and a minimum of nineteen months to run concurrent with Count 5; Count 6: A maximum of one hundred fifty months and a minimum of sixty months to run concurrent with Count 5; Count 7: A maximum of forty-eight months and a minimum of nineteen months to run concurrent with Count 6; Count 8: Twelve months to run consecutive to Count 7; Count 9: A maximum of sixty months and a minimum twenty-four months to run

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concurrent to Count 8; Count 10: A maximum of one hundred twenty months and a minimum of forty-eight months to run concurrent with Count 9; Count 11: A maximum of one hundred twenty months and a minimum of forty-eight months to run concurrent to Count 10; Count 12: Life without the possibility of parole to run consecutive to Count 11; Count 13: Life without the possibility of parole to run consecutive to Count 12; Count 14: Death; Count 15: Death; Count 16: A maximum of one hundred eighty months and a minimum of forty-eight months plus a consecutive maximum of one hundred eighty months with a minimum of forty-eight months for the use of a deadly weapon to run consecutive to Count 13; and Count 17: A maximum of one hundred eighty months and a minimum of forty-eight months plus a consecutive maximum of one hundred eighty months with a minimum of forty-eight months for the use of a deadly weapon to run consecutive to Count 16. Mr. McCarty received one thousand seven hundred seventy-six days credit for time served.

Mr. McCarty's judgement of conviction was filed on April 6, 2011. A timely notice of appeal was filed on April 5, 2011. This appeal follows.

STATEMENT OF FACTS

On May 20, 2006, a man walking his dog stumbled across the naked bodies of Victoria Magee and Charlotte Combabo (A.A. Vol. 27 pp.6035-6036). The two females were located in a desert area on I-95 between Henderson and Boulder City are (A.A. Vol 27 pp. 6035). The two naked bodies had suffered stab wounds and significant blunt force trauma which resulted in their deaths (A.A. Vol. 27 pp. 6036).

Ms. Melissa Estores was living at the Sportsman Royal Manor, Las Vegas Nevada, in the Spring of 2006 (A.A. Vol. 27 pp. 6070). [1] The Sportsman Royal Manor is located on the corner of Boulder Highway and Tropicana (A.A. Vol. 27 pp. 6072). Ms. Estores had met Charlotte Combabo approximately six months prior to her death (A.A. Vol. 27 pp. 6075). Ms. Estores had also met Victoria Magee in early 2006 (A.A. Vol. 28 pp. 6076). Ms. Estores was in a dating relationship with Dominic Malone (A.A. Vol. 27 pp. 6073). Dominic Malone's nickname was

[1]Ms Estores had two felony convictions, both financial crimes (A.A. Vol. 27 pp. 6070).

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"D-Roc" (A.A. Vol. 27 pp. 6073). Ms. Estores knew Jason McCarty (A.A. Vol. 28 pp. 6076). Jason McCarty's nickname was "Romeo" (A.A. Vol. 27 pp. 6076). Mr. McCarty and Mr. Malone were acquaintances (A.A. Vol. 27 pp. 6076).

Ms. Estores claimed that she observed a news story on the television describing how two naked women had been found dead in the desert (A.A. Vol 28 pp. 6250) Based on the news story, Ms. Estores and her friend, Brian Noe, went to the Henderson Police Department to provide information (A.A. Vol. 28 pp. 6252). Ms. Estores informed police that she believed she knew who the victims were and that she could identify the victims. Ms. Estores provided serval statements to authorities.

Ms. Estores sold crack cocaine for Dominic Malone (A.A. Vol. 27 pp. 6073). According to Ms. Estores, Charlotte Combabo also sold crack cocain at the Sportsman Manor (A.A. Vol. 27 pp. 6074). [2] Ms. Estores told police that Victoria Magee was a prostitute (A. A. Vol. 28 pp. 6076). In April of 2006 (approximately six weeks prior to the murder), Dominic Malone physically battered Ms. Estores outside of the Sportsman Manor (A.A. Vol. 28 pp. 6080-6081). Over the defense objection, the State introduced that Ms. Estores had been beaten by Dominic Malone even though Mr. Mccarty was not charged with the incident and was not accused of involvement in this incidence (the state admitted "he's" was Mr. Mccarty). It was explained that the incident was solely Dominic Malone's "gig" (A.A. Vol. 28 pp. 6083). Ms. Estores was beaten by Dominic Malone based upon a dispute regarding drugs and money (A.A. Vol. 28 pp. 6098-6100). Mr. Malone ripped or removed Ms. Estores jewelry and threw it in the pool area (A.A. Vol. 28 pp. 6101-6102). Ms. Estores was then hit in the chest and temples (A.A. Vol. 28 pp. 6102). Ms. Estores admitted that Mr. Mccarty was not present during the incident (A.A. Vol. 28 pp. 6105-6106).

On the morning of May 16, Ms. Estores, Charlotte Combabo and Mr. McCarty went to room 29 of the Oasis Motel (A.A. Vol. 28 pp. 6146). At the motel, Mr. McCarty was allegedly convincing Ms. Combabo that he would pay her $150 dollars if she would help get victoria

[2] Charlotte Combabo was also known as Christina (A.A. Vol. 27 pp. 6074).

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Magee to come to the motel. Supposedly, Victoria Magee owed Mr. McCarty $80 dollars (A.A. Vol. 28 pp. 6137-6138). Shortly thereafter, Ms. Estores claimed she looked out the motel window and observed Charlotte Combabo walking with her arm around Victoria Magee (A.A. Vol. 28 pp. 6141). Later, Melissa Estores, Jason McCarty, Dominick Malone, Charlotte Combabo, Victoria Magee and Donald Herb entered a little green car from the back of the Sahara Hotel (A.A. Vol. 28 pp. 6146-6147).

During the car ride, their were several physical altercations between the occupants. Charlotte Combabo physically assaulted Victoria (A.A. Vol. 28 pp. 6154). Allegedly, Mr. McCarty and Victoria were attacking Christina (A.A. Vol. 28 pp. 6168). Mr. McCarty was allegedly driving and hitting Victoria (A.A. Vol. 28 pp. 6169). [3] Dominic Malone was also hitting Ms. Estores in the vehicle (A.A. Vol. 28 pp. 6172).

The vehicle was heading towards the Railroad Pass hotel and casino (A.A. Vol. 28 pp. 6173) . Prior to arriving at the Railroad Pass casino, the vehicle turned into a construction site (A.A. Vol. 28 pp. 6174). Mr. McCarty and Mr. Malone then exit the vehicle (A.A. Vol. 28 pp. 6175). Allegedly, Mr. McCarty begins assaults Victoria (A.A. Vol. 28 pp 6176). Then, Mr Malone begins beating Ms. Estores (A.A. Vol. 28 pp. 6177-6178). Mr. Malone continues beating Ms. Estores for approximately ten minutes (A.A. Vol. 28 pp. 6178). Mr. McCarty tells Mr. Malone "that's enough", and the beating of Ms. Estores ends (A.A. Vol. 28 pp. 6179). Ms. Estores, Victoria, Charlotte, Mr Malone and Mr. McCarty then get back in the vehicle and drive to the Hard Rock hotel (A.A. Vol. 28 pp. 6196).

During the drive to the Hard Rock, Ms. Estores' purse was thrown out the window (A.A. Vol. 28 pp. 6196). At the Hard Rock, the three women were supposed to make money selling drugs and prostituting (A.A. Vol. 28 pp. 6197). Mr. Malone claimed the Ms. Estores owed him $60 dollars (A.A. Vol. 28 pp.6198) Victoria owed Mr. McCarty $80 dollars (A.A. Vol. 28 pp. 6198) The three women were allegedly told that there would be three shallow graves in the desert if they did not make money at the Hard Rock Hotel (A.A. Vol. 28 pp. 6199). The three women

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[3]The state did not dispute that Mr. McCarty suffered from Cerebral Palsy and that one of his arms was handicapped (A.A. Vol. 28 pp. 6169).

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then got out of the vehicle and entered the Hard Rock Hotel (A.A. Vol. 28 pp. 6200). Charlotte Combabo smoked the methamphetamine she was supposed to sell, at the Hard Rock hotel (A.A. Vol. 28 pp. 6209).

Without making any money, the three girls were picked up by David Parker and were taken to his house (A.A. Vol. 28 pp. 6209-6210). Mr. Parker drives the girls to his house in the early morning hours where they rest for approximately twelve hours (A.A. Vol. 28 pp. 6211). The three women then left Mr. Parkers residents and went to the South Cove apartment complex located on Fremont street (A.A. Vol. 28 pp. 6221).

At the South cove, the women went to room number 222, which was Leonard Black's room (A.A. Vol. 28 pp. 6221). Ramaan Hall also stayed at the South Cove, in room 217 (A.A. Vol. 28 pp. 6222). Ramaan Hall and Ms. Combabo owed Leonard black money (A.A. Vol. 28 pp. 6222)(Leonard Black is also known as "Tre Black"). Dominic Malone also stayed with Ramann Hall, in room 217 (A.A. Vol. 28 pp. 6222). Ms. Estores admitted that she sold drugs for Ramaan Hall (A.A. Vol. 28 pp. 6222). At first, the women went to apartment 222 but could not get into the apartment (A.A. Vol. 28 pp. 6224). Next, the women went to an apartment on the third floor occupied by Mr. Cortez (A.A. Vol. 28 pp. 6224-6225). Eventually, the women go to apartment 222 (A.A. Vol 28 pp. 6230). In the room there are two golf clubs (A.A. Vol. 28 pp. 6231).

At this apartment, Ms. Estores believed Christina lied about the drugs (A.A. Vol. 28 pp. 6232). Ms. Estores, Ramaan Hall and DeMarco "leave the apt to go purchase cigarettes" (A.A. Vol. Pp. 6233). Charlotte Combabo and Victoria Magee stayed in the apartment. Approximately twenty minutes later, Ms. Estores returns to the apartment and Victoria and Charlotte are missing (A.A. Vol. 28 pp. 6233-6236). The door to the apartment was wide open and the two girls' clothing was on the bed and the floor (A.A. Vol. 28 pp. 6235) One of the golf clubs was also missing (A.A. Vol. 28 pp. 6236).

Ramaan Hall described his relationship with Dominic Malone as close as brothers (A.A. Vol. 29 pp. 6482). Ramaan Hall has been convicted of possession of cocaine with intent to sell and possession of firearm by prohibited person (A.A. Vol. 29 pp. 6489). Ramaan Hall was also

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convicted of trafficking of controlled substance on two occasions (A.A. Vol. 29 pp. 6489). Additionally, Mr. Hall was convicted of possession of controlled substance with intent to sell in 1998 (A.A. Vol. 29 pp. 6489). Mr. Hall stated that he received a phone call from Dominic Malone explaining he was coming to the South Cove Apartment complex with Mr. McCart,y to get the women (A.A. Vol. 29 pp. 6496-6497). Mr. Hall then warned Ms. Estores that she and the other girls should leave the apartment (A.A. Vol. 29 pp. 6497). The three women then leave and go to another apartment in the South Cove. Mr. Hall claims he sees Mr. Malone and Mr. McCarty arrive and the two defendant's take Charlotte and Victoria away. The defendants's had a golf club with them (A.A. Vol. 29 pp. 6499-6500). Mr. Hall told the police that he had seen Mr. McCarty running upstairs during the incident (A.A. Vol. 30 pp. 6529).

Donald Herb was known to the individuals as someone who would "hang around" the Sportsmans Manor (A.A. Vol. 28 pp. 6147-6148). Donald Herb, Mr. Malone and Mr. Mccarty all knew each other. Mr. Herb had two convictions for possession of controlled substance. (A. A Vol 32 Pg 7197). On the night the women were murdered, Mr. Herb testified that he had conversations with Mr. McCarty (A.A. Vol 32 Pg 7205). Mr. McCarty allegedly asked Mr. Herb if he wanted to come out and pick up his vehicle (Mr. McCarty was allegedly driving Mr. Herbs vehicle) (A.A. Vol 33 Pg 7205 7206). During one conversation, Mr. Herb stated he would come to pick up his vehicle (A.A. Vol 33 Pg 7206). Mr. Herb stopped at a gas station on Nellis and Charleston and then proceeded to the desert area (A.A. Vol 33 Pg 7206 7207). Mr. Herb was given directions to a location in the desert (A.A. Vol 33 Pg 7207 7210). According to Mr. Herb, he could hear Mr. Malone in the background, during the phone conversations (A.A. Vol 33 Pg 7209). Mr. Herb explained that during one of the phone conversations he heard Mr. McCarty instruct Mr. Malone to hurry up because Mr. Malone had broken the golf club. Mr. McCarty proceeded to tell Mr. Malone to "hit the bitch in head with a rock" (A.A. Vol 33 Pg 3310).

When Mr. Herb got out to the desert area, he was instructed to follow Mr. McCarty and Mr. Malone to a separate area (A.A. Vol. 33 pp. 7211). The three men go to an area in the vicinity of Boulder City and disposed of several items (A.A. Vol 33 Pg 7211-7215). Mr. Malone took out three or four large rocks and threw them in the desert along with a piece of a golf club

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(A.A. Vol 33 Pg 7219). Mr. McCarty pulled out what appeared to be a steak knife and walked out in the desert to dispose of it (A.A. Vol 33 Pg 7220-7221). The three men began talking about tire tracks and Mr. Herb provided Mr. M cCarty $200.00 so that the tires on the vehicle could be changed (A.A. Vol 33 Pg 7262).

Mr. Herb was eventually charged with 16 counts including murder, kidnapping, robbery, and burglary (A.A. Vol 33 Pg 7274-7275). Mr Herb plead guilty to accessory to murder after the fact and agreed to testify against Mr. McCarty (A.A. Vol 33 Pg 7275). Mr. Herb cooperated with the police and assisted the police to the desert area to recover the weapons used during the murder (A.A. Vol 33 Pg 7277).

Police interviewed Mr. McCarty on three different occasions (A.A. Vol 37 Pg 3298). The first recorded interview with Mr. McCarty occurred on May 25, 2006 (A.A. Vol 37 Pg 3298). Detective Gerard Collins confronted Mr. McCarty at a 7-11 on Eastern and Nellis (A.A. Vol 37 Pg 8299). Detective Collins claimed Mr. McCarty was not in custody when interviewed. At the conclusion of the first statement, Mr. McCarty was placed into custody (A.A. Vol 37 Pg 8299). On June 1, 2006, Mr. McCarty gave a recorded statement at the Henderson Detention Center. On June 6, 2006, Mr. McCarty again spoke with police at the Henderson Detention Center (A.A. Vol 37 Pg 8299). At the conclusion of the first statement on June 6, 2006, Mr. McCarty and the police had two more recorded interactions (A.A. Vol 37 Pg 8299). (Three conversation occurred with Mr. McCarty on June 6, 2006)(A.A. Vol 37 Pg 8300). The first conversation occurred at the Henderson Detention Center. The second conversation occurred in a police vehicle after being taken out of the detention center (A.A. Vol 37 pg 8300). The third conversation occurred in the desert area when police were searching for weapons (A.A. Vol 37 Pg 8300). The jury heard all five audio recordings between Mr. McCarty and the police (A.A. Vol 37 Pg 8302). (State's exhibit 293).

In fact, the State played numerous hours of the defendant's lengthy recordings with the police. Undoubtedly, the most incriminating evidence presented to the jury were the hours upon

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hours of statements made by the defendant. [4]

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. MCCARTY'S MOTION TO SUPPRESS.

The district court erred when it failed to grant Mr. McCarty's Motion to Suppress which was filed on May 9, 2007. The following argument is derived from Mr. McCarty's Motion to Suppress. This Motion to Suppress and it's corresponding exhibits can be found in Appellant's Appendix Volume 11, pages 2345-2475 and Volume 12 pages 2476-2578.

FACTS ADDUCED FROM THE EVIDENTIARY HEARING ON NOVEMBER 29, 2007:

Detective Ridings admitted that based on the conversation with Donald Herb, he was looking for Jason McCarty (A.A. Vol. 14 pp. 3094-3095). Detective Ridings contacted Mr. McCarty at a parking lot of a 7-11, on May 25, 2006. Mr. McCarty provided a tape recorded statement at that time (A.A. Vol. 14 pp. 3099). Detective Ridings admitted that Mr. McCarty was in custody at the conclusion of his first interview (A.A. Vol. 14 pp. 3100). Mr. McCarty is then placed in the Henderson Detention Center (A.A. Vol. 14 pp. 3100).

On June 1, 2006, Mr. McCarty was contacted by Detectives at the Henderson Detention Center and provided an interview (A.A. Vol. 14 pp. 3100-3101). A second tape recorded interview was given at that time. Mr. McCarty was advised of his Miranda rights (A.A. Vol. 14 pp. 3101). Again, on June 6, 2006, Mr. McCarty was interviewed at the Henderson Detention Center (A.A. Vol. 14 pp. 3101). On June 6, Detectives removed Mr. McCarty from the Henderson Detention Center and brought him to the desert area to search for instrumentalities used during the murders (A.A. Vol. 14 pp. 3102). Mr. McCarty had indicated he wanted to show

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[4]As this court has become aware, the State misrepresented and blatantly deceived the district court and defense counsel into believing that the State would not introduce the defendant's recorded statements to the jury. The State successfully deceived the parties in order to preclude defense counsel from presenting the vast majority of defense counsel's opening argument. Defense counsel prepared an opening argument in which a great majority dealt with the defendants statements. The State was able to preclude the defense from making any mention of Mr. McCarty's numerous statements by claiming they did not believe they would use the defendant's statements. Yet, the vast majority of substantive argument in the State's rebuttal argument revolved around McCarty's numerous statements.

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the detectives where the murder weapons were (A.A. Vol. 14 pp. 3102). [5]

Detective Ridings had been involved with the case since the discovery of the bodies on May 20, 2006 (A.A. Vol. 14 pp. 3104). On May 21, 2006, Ms. Estores and Mr. Noe contacted police and told the police that they believed that "Romeo" (Jason McCarty) was involved in the murders (A.A. Vol. 14 pp. 3105). No Miranda warnings were provided prior to the tape recording on May 25, 2006 (A.A. Vol. 14 pp. 3107). The interview occurred for approximately an hour and a half (A.A. Vol. 14 pp. 3107). During the May 25, 2006, interview, Mr. McCarty asked to "take a walk" and he was told that he was not walking anywhere (A.A. Vol. 14 pp. 3118).

Again, on June 1, 2006, Mr. McCarty stated he wanted to speak with the DA's office to resolve the matter so that he could see his children (A.A. Vol. 14 pp. 3123). Again, on June 6, Detective Collins had spoken with the District Attorney's Office and was instructed to talk to defendant McCarty as long as he was willing to talk (A.A. Vol. 14 pp. 3123). Detective Collins admitted that he was looking for Mr. McCarty because he wanted to talk to Mr. McCarty prior to May 25, 2006 (A.A. Vol. 14 pp. 3130).

Detective Collins displayed a badge, gun, and handcuffs to the defendant on May 25, 2006 (A.A. Vol. 14 pp. 3138). During the May 25 conversation, Detectives questioned Mr. McCarty about the two bodies discovered on May 20, 2006 (A.A. Vol. 14 pp. 3142). On May 25, Mr. McCarty requested permission to be taken to see his mother but his request was declined because he was under arrest (A.A. Vol. 14 pp. 3143). During the May 25 conversation, the detective tells Mr. McCarty that there are no secrets in this murder investigation (A.A. Vol. 14 pp. 3145). Mr. McCarty was handcuffed before he was read his Miranda rights (A.A. Vol. 14 pp. 3149). Detective Collins admitted that Mr. McCarty was a suspect in the murder case during the May 25 conversation (A.A. Vol. 14 pp. 3150).

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[5]During the June 6, 2006 contact with Mr. McCarty he provided three separate statements (1) Henderson Detention Center, 2) Police vehicle, and 3) In the desert where he is attempting to assist police in finding the murder weapons. It is important to remember that each and every one of these statements was presented to the jury during the guilt phase and argued extensively by the prosecutor in closing arguments.

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On June 1, 2006, Detective Collins received a phone call from Deputy District Attorney Scott Mitchell.[6] Scott Mitchell advised Detective Collins to meet with Jason McCarty because Jason McCarty's father told Scott Mitchell that Jason wanted to talk (A.A. Vol. 15 pp. 3151). Detective Collins met with Mr. McCarty at the Henderson Detention Center on June 1, 2006. Miranda rights were read to Mr. McCarty on June 1, 2006 (A.A. Vol. 15 pp. 3152). When Detective Collins began the interview the defendant stated "I want to talk to the DA". Detective Collins asked Mr. McCarty if he wanted to speak to him and Mr. McCarty stated "you told me once before you couldn't help me" (A.A. Vol. 15 pp. 3153).

Prior to the June 6, 2006, conversations between Detectives and Mr. McCarty, Detectives received cell phone information for Mr. McCarty's phone (A.A. Vol. 15 pp. 3154). Before the June 6, 2006, conversations, Detective Collins again spoke with Deputy District Attorney Scott Mitchell who instructed Detective Collins to continue to talk to Mr. McCarty. Especially, since Mr. Mitchell believed that Mr. McCarty had been untruthful in previous conversations (A.A. Vol. 15 pp. 3154). On June 6, pursuant to Deputy District Attorney Mitchell's instructions, Detectives confronted Mr. McCarty about cell phone records (A.A. Vol. 15 pp. 3155). However, on June 6, 2006, Mr. McCarty continued to insist that he be permitted to talk to the district attorney, directly (A.A. Vol. 15 pp. 3156). On June 6, Mr. McCarty was taken from the Henderson Detention Center to the desert area to assist in locating murder weapons (A.A. Vol. 15 pp. 3156-3157). Mr. McCarty told detectives he could show them where a red handkerchief was buried and a knife used in the murder (A.A. Vol. 15 pp. 3158).

On May 23, 2006, Detective Collins drafted an affidavit in support of a search warrant swearing that Jason McCarty ("Rome") was responsible for the kidnapping and murders of Charlotte Combado and Victoria McGee (A.A. Vol. 15 pp. 3169). On May 25, Detective Collins admitted that he had no intention of seeking Mr. McCarty out as a witness because he was a suspect (A.A. Vol. 15 pp. 3170-3171). Detective Collins admits that he questioned Mr. McCarty about the murder and battery charges during the May 25 statement

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[6] Deputy District Attorney Scott Mitchell is the screening Deputy (A.A. Vol. 11 pp. 2225).

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(A.A. Vol. 15 pp. 3175). On page eleven (11) of the May 25, 2006, statement, the Detective asks Mr. McCarty if he took the girls out to the desert and killed them (3176-3177). Mr. McCarty was not mirandized until page one hundred forty-two (142) (A.A. Vol. 15 pp. 3176). On page seventy (70) of the May 25, 2006 statement, the detective asks Mr. McCarty about dumping two bodies in the desert (A.A. Vol. 15 pp. 3177). During the May 25 conversation (at page 136) Mr. McCarty states "can we walk for a second" and Detective Collins states "we ain't walking nowhere" (A.A. Vol. 15 pp. 3180).

Mr. McCarty was told that the District Attorney had instructed the detectives to talk to him and the District Attorney wanted the detectives to relay information to Mr. McCarty (A.A. Vol. 15 pp. 3190)(June 1, 2006 interview). After the June 1, 2006 conversation, Detective Collins communicated the information provided by Mr. McCarty to the Deputy District Attorney (A.A. Vol. 15 pp. 3193). Prior to the June 6 communications with Mr. McCarty, Detective Collins again contact Deputy District Attorney Mitchell (A.A. Vol. 15 pp. 3193). Detective Collins is instructed by Deputy District Attorney Mitchell to "go down there and basically tell him about this and see what he says" (A.A. Vol. 15 pp. 3193-3194). Detective Collins never asked Deputy District Attorney Mitchell whether Mr. McCarty was to appear in Court or whether he had been appointed an attorney (A.A. Vol. 15 pp. 3194). Detective Collins and Deputy District Attorney Mitchell talk about Mr. McCarty's custody and the fact that a complaint has yet to be filed (A.A. Vol. 15 pp. 3194). **In fact, Detective Collins admits that almost two weeks has elapsed since Mr. McCarty had been arrested prior to him being taken to justice court and a complaint filed (A.A. Vol. 15 pp. 3194).**

On May 25, there were two detectives questioning Mr. McCarty (A.A. Vol. 15 pp. 3218-3219). There were also two unmarked police vehicles present (A.A. Vol. 15 pp. 3219). Additionally, Officers moved Mr. McCarty to the back of the 7-11 because of the heat from the sun (A.A. Vol. 15 pp. 3220). During the interview of Mr. McCarty there were three detectives present (A.A. Vol. 15 pp. 3221).

During argument at the evidentiary hearing, defense counsel states,

> ...Your honor, doesn't Scott Mitchell - and with all aspersions cast aside, doesn't he have an obligation to sit there and think, you know, I'm the screening deputy,

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I'm in charge of when this case gets filed and now I'm in charge of telling the cops what they should and shouldn't be doing with - in terms of speaking with the defendant. He's not represented right now, he's not going to be represented until this complaint gets filed, so it's not going to hurt my case to not file (A.A. Vol. 15 pp. 3227).

Defense counsel further argued that this created an appearance of impropriety (A.A. Vol. 15 pp. 3227).

BASED ON INFORMATION RECEIVED IN THE INVESTIGATION ON MAY 20, 2006, AND ON MAY 21, 2006, THE HPD's INVESTIGATION REVEALED THE TWO MAIN SUSPECTS TO BE MALONE AND MCCARTY

As early as May 22, 2006, the HPD openly indicated that they believed Malone and McCarty had involvement in the alleged murders of Combado and McGee (A.A. Vol. 11 pp. 2425). Mr. McCarty was described as a light skinned black or latin male having a disfigured left hand, which was frozen in a "cocked position". Id Also, on May 22, 2006, Detectives Hosaka and Benjamins conducted several searches for McCarty at the following locations: Oasis Motel, located at 1731 S. Las Vegas Blvd.; Tod Motel, located at 1508 S. Las Vegas Blvd.; and the Blue Harbor Club Apartments, located at 3380 Swenson, Las Vegas (A.A. Vol. 11 pp. 2428).

Furthermore, Detective Collins testified that McCarty was a suspect on May 22, 2006, which was three days before the HPD made contact with him on May 25, 2006. Detective Collins testified as follows:

By Defense Counsel:

Q. The search warrant for number 217.
Q. Affiant believes that Malone and Rome (McCarty) are responsible for the kidnappings and murders of Charllotte Combado (Combado) and Victoria Magee (Magee). That is actually what is written?
A. Yeah.
Q. You believed you were truthful to the judge in writing what you did in the affidavit?
A. That's what I believed, yes (A.A. Vol. 11 pp. 2440).

THE INVESTIGATION CONTINUED ON MAY 23, 2006; DEFENDANT MALONE WAS QUESTIONED AND BOOKED BY THE HPD

Malone was contacted and questioned on May 23, 2006, which was two full days before McCarty was interrogated by the HPD (A.A. Vol. 11 pp. 2444). The questioning about McCarty

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(Jason) during the May 23, 2006, questioning of Malone is as follows[7]:

BY DETECTIVE COLLINS:

Q. Well, let me ask you something. Do you have a friend that you hang around with that's got like a - - something wrong with his arm and hand?
A. Yeah, I know the guy.
Q. What's that - - what's the guy's name?
A. Jason (A.A. Vol. 11 pp. 2447).

Q. He's a black dude. How do you know Jason?
A. I know Jason from being over at the bar at the Sportsman's
...
Q. Do you hang out with him?
A. Every now and then, yes. (A.A. Vol. 11 pp. 2448).

Q. Is Jason working?
A. To my knowledge, I think so.
Q. Yeah? Do you know what he does?
A. No. But I think he do like printing. (A.A. Vol. 11 pp. 2448).

Q. Have you been inside the green Alero with other people?
A. Yeah, Me, him, and Donnie.
Q. You, him, and Donnie?
A. Yes, Me, Donnie, and Jason (A.A. Vol. 11 pp. 2447-2448)

Q. Okay. Why does - - why does Jason drive sometimes?
A. I guess because he takes Donnie to work.(A.A. Vol. 11 pp. 2450)

Q. Jason took you home?
A. Yes. (A.A. Vol. 11 pp. 2451).

Q. Do you know where... Jason is staying?
A. At this point in time, no, I don't. (A.A. Vol. 11 pp. 2453).

Q. You got a telephone number for Jason?
A. No. (A.A. Vol. 11 pp. 2432).

Q. How about you and Jason? You go to the strip?
A. No, We haven't been to the Strip (A.A. Vol. 11 pp. 2434).

Q. Does any of your friends like - - like Tre or - - or Jason or Donnie go up to the Henderson?
A. I don't know (A.A. Vol. 11 pp. 2454).

...
Q. Who was driving?
A. Jason.
Q. Jason was driving?
A. Yes, sir (A.A. Vol. 11 pp. 2455).

Q. Okay, Las Tuesday or Wednesday night, were you with Jason in Donnie's car

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[7]When referenced to the Malone transcript are made, McCarty is referred to as Jason, Jerome, Rome, or Romeo, in an effort to maintain the integrity of the transcript.

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along with Donnie?? (A.A. Vol. 11 pp. 2456).

Q. Okay. Did you - - did you , Donnie and Jason go to the Sahara Hotel?
A. No. (A.A. Vol. 11 pp. 2540).

Q. Okay, is it possible you could have been in that car with Donnie and Jason and picking up the three girls at the Sahara Hotel, namely Victoria (Magree), Christina (Combado), and Melissa?
A. No. (A.A. Vol. 11 pp. 2457).

After his above referenced statement to the HPD, on May 23, 2006, MALONE was placed under arrest by the HPD. Malone was charged with crimes relating to the alleged beating of Estores, which allegedly occurred on or about May 16, 2006.

ON MAY 24, 2006, the HPD CONTINUED THEIR SEARCH FOR SUSPECT MCCARTY

On May 24, 2006, Detective Hosaka continued his search for McCarty. Detective Hosaka search at the following locations: Tod Motel, Oasis Motel, and the Blue Harbor Club Apartments (A.A. Vol. 11 pp. 2470). McCarty was not located at any of the locations. Id.

HPD Detectives also traveled to South Cove Apartments on May 24, 2006, to obtain registration information for Unit F-222. Id. Also, a search of 1165 Blankenship (Malone's residence) was conducted. Id. HPD Detectives also traveled to the Blue Harbor apartments to check to see if Malone had an apartment at the Blue Harbor. Id. Information revealed that Malone did not have an apartment at the Blue Harbor. Id.

ON MAY 25, 2006 HPD DETECTIVES QUESTIONED SUSPECTS HERB AND MCCARTY; BOTH WERE ARRESTED AND CHARGED WITH THE MURDERS OF COMBADO AND MAGEE AS WELL AS RELATED CRIMES

On May 25, at around 1:30 P.M., Detectives Ridings and Webster contacted the management at the Oasis Motel, with an administrative subpoena requesting information regarding McCarty's renting of room #29, at the Oasis Motel (A.A. Vol. 11 pp. 2473). This information was gathered from Estores's statement to the HPD on May 21, 2006, again on May 24, 2006. Id. Receipts showed that McCarty rented the room from May 8, 2006 to May 9, 2006, and also from May 16, 2006 to May 17, 2006. Id.

Also, on May 25, 2006, Detective Ridings confirmed that "Romeo" was in fact McCarty (A.A. Vol. 11 pp. 2475). Ridings also confirmed that McCarty was married to Eileen Nicolle Beck-McCarty. Id. Ridings then attempted to locate McCarty at 5950 S. Pecos #1021, in Las

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Vegas, NV. Id. Detective Ridings observed a white four (4) door Honda Accord in front of 5950 S. Pecos. Id. The white Honda displayed a temporary moving permit issued to a Donald Herb (Herb) at 140 Sir Noble. Id. Detective Ridings then went to Creel Printing and confirmed that McCarty did in fact work for Creel Printing. Id.

On May 25, 2006, at approximately 1:50 P.M., Detective Ridings and Detective Webster traveled to 1920 S. Casino Center Dr., to make contact with Eileen Nicolle Beck-McCarty (hereinafter "Eileen") (A.A. Vol. 12 pp. 2478). Eileen confirmed that she was indeed married to McCarty and that they had five (5) children together. Id. Eileen also stated to the HPD that McCarty hung around Magree. Eileen stated that she had seen Magee with McCarty a few days ago in Room #35, at the Oasis Motel. Id. Eileen stated that Herb and McCarty hung out together and she also provided directions to Herb's house at 140 Sir Noble, in Las Vegas, NV. Id. Eileen also stated that she wanted to divorce McCarty because he had struck her in the face a few days ago. Id.

On May 25, 2006, McCarty was detained and interrogated behind a 7-11 near Charleston and Nellis. McCarty was originally detained by Detective Ridings and informed to wait for Detective Collins (A.A. Vol. 12 pp. 2487). McCarty was not allowed to leave. Id. At around 6:15 P.M., Detective Collins arrived and began the interrogation of McCarty. Id. Approximately two hours into the interrogation, defendant was Mirandized for the ***first*** time. At page 142 of a 167 page statement, the defendant was told he was being arrested for charges relating to the alleged beating of Melissa Estores, which had occurred several days earlier. However, on May 25, 2006 when defendant was booked he was charged with the murders of Combado and Magee (A.A. Vol. 12 pp. 2490).

SEVERAL STATEMENTS WERE GIVEN BY SUSPECTS/DEFENDANTS MALONE, HERB, and MCCARTY

McCarty gave numerous statements to the HPD. They began on May 25, 2006, and continued through June 1, 2006, and three (3) statements were given on June 6, 2006.[8] (A.A. Vol.

[8]McCarty gave statements on May 25, 2006, June 1, 2006, and three (3) statements on June 6, 2006, all of which were before Counsel had been retained or appointed to McCarty.

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12 pp. 2492-2576). Defendant Herb gave two statements to the police on May 25, 2006.[9] (A.A. Vol. 11 pp. 2402). Malone gave statements to the HPD on May 23, 2006 (2 statements), May 31, 2006, and June 1, 2006.

A. DEFENDANT'S STATEMENTS MUST BE SUPPRESSED AS HE WAS IN CUSTODY, INTERROGATED, AND NOT MIRANDIZED DURING THE MAY 25, 2006, INTERVIEW.

1. THE LAW REGARDING CUSTODIAL INTERROGATION

The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 322 (1998); Miranda v. Arizona, 384 U.S. 436 (1966). "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning." State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel "at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed.2d 383 (1995).

There are four factors pertinent to the objective custody determination including the following: (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning. Avery v. State, 122 Nev. 278, 129 P.3d 664 (2006) citing Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251-52 (1996) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983)). No single factor is dispositive. Avery v. State, 122 Nev. 278, 129 P.3d 664 (2006). Interrogation is defined as "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980).

In certain cases, even a criminal defendant in his own bedroom has been determined to be "in custody." (See e.g. Orozco v. Texas, 394 US 324, 22 L Ed 2d 311, 89 S Ct 1095 (1969), where the U.S. Supreme Court determined that even though the defendant was in his own bedroom, he was still deemed "in custody" because four (4) officers were questioning defendant and he was not "free

[9]Donald Herb has reached a plea agreement with the State of Nevada and has agreed to testify against Malone and McCarty

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to leave.")

2. DEFENDANT MCCARTY WAS IN CUSTODY AND INTERROGATED FOR MIRANDA PURPOSES ON 5-25-06

3. THE SITE OF THE INTERROGATION

The first factor in Avery addresses the "site of the interrogation." Although the interrogation did not take place in a typical police station, the site was controlled by the HPD. First, Detective Ridings located McCarty near the 7-11 and told him he would have to wait for Detective Collins. The two then proceeded to the rear of the 7-11. McCarty asked to see his parents, but was denied the opportunity. At that point, McCarty was detained. McCarty waited for approximately thirty (30) minutes for Detective Collins to arrive. Detective Webster also arrived (A.A. Vol. 12 pp. 2492). McCarty was placed with his back to Detective Ridings's truck and the back of the 7-11. Detective Collins was directly in front of McCarty. Detective Ridings and Detective Webster were in front of Detective Ridings's vehicle. Although the site was not a police office, it could be considered one. McCarty had no ability to leave, no ability to contact his parents, or contact his attorney for advice.

4. THE OFFICERS QUESTIONS FOCUSED ON JASON MCCARTY

The second factor of Avery addresses whether the interrogation focuses on the subject. From the beginning of the interrogation in the instant case, the focus was on Defendant Jason McCarty the HPD focused on McCarty and his presence at South Cove, his relationship with MALONE, his relationship with Herb, and his knowledge of Combado, Magee, and Estores. The following question and answer session makes that clear.

BY DETECTIVE COLLINS:

Q. How many - - how many times you go to South Cove? You go there quite often?
A. I haven't been to South Cove in almost ten years (A.A. Vol. 12 pp. 2495).

Q. You know a guy named D-Rock (Malone)?
A. Yeah. He used to be at the Sportsman's (A.A. Vol. 12 pp. 2495).

Q. What if I tell you Donnie says you had the car last week and then a bunch of other people saw you in the car last week? (A.A. Vol. 12 pp. 2497).

Q. What do you mean beat that girl (referring to Estores) up again? Tell me about it. (A.A. Vol. 12 pp. 2498).
Q. Okay, Victoria who?
A. Victoria
Q. Do you know where Victoria is now? No? (A.A. Vol. 12 pp. 2495).

Q. You guys, you and Rock, D-Rock, took Victoria and Christina out to the desert and you killed them.
A. Oh, no. (A.A. Vol. 12 pp. 2509)

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The above questions, by the HPD, indicate that McCarty was the subject of the interrogation.

5. THE INDICIA OF ARREST WERE PRESENT DURING JASON MCCARTY's MAY 25, 2006, TWO HOUR INTERROGATION BEHIND THE 7-11 NEAR CHARLESTON AND NELLIS.

In State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998), this Court provided several objective indicia of arrest: 1) whether the suspect was told that the questioning was voluntary or that he was free to leave, 2) whether the suspect was not formally under arrest, 3) whether the suspect could move about freely during questioning, 4) whether the suspect voluntarily responded to questions, 5) whether the atmosphere of questioning was police-dominated, 6) whether the police used strong-arm tactics or deception during questioning, and 7) whether the police arrested the suspect at the termination of questioning. An analysis of the factors set forth in Taylor and in the present case demonstrates that Mr. McCarty was indeed in "custody" from the onset during the over two hour-long interrogation behind the 7-11 near Nellis and Charleston—and thus entitled to Miranda warnings.

Mr. McCarty was never told during the two hour long interrogation behind the 7-11 that he was free to leave (A.A. Vol. 12 pp. 2492). In spite of the "custodial" setting, the officers involved in Defendant's interrogation did not elect to Mirandize him until page142 of his statement (approx. 90 minutes into his statement) (A.A. Vol. 12 pp. 2529).

The recorded transcript of the May 25, 2006, custodial interrogation makes obvious that Defendant McCarty was a suspect at the time of the custodial interrogation. The custodial interrogation began prior to Detective Collins arriving at 6:35 P.M (A.A. Vol. 12 pp. 2493). Objectively, Defendant McCarty knew he was not free to leave at any point in the interrogation. At one point, Defendant McCarty asked to be able to walk with one of the officers. His request was immediately denied by the HPD officers. The following is an example of Defendant's inability to leave the interrogation site.

Q. (McCarty) Can we walk for a second?
A. (Collins) Can we walk for a second?
Q. Just (incomprehensible). Just you and I?
A. We ain't walking nowhere. (A.A. Vol. 12 pp. 2527).

The three officers did not allow McCarty to make any phone calls while Collins interrogated

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him or leave the interrogation (A.A. Vol. 12 pp. 2492). The questioning was police dominated. Deception was used throughout the questioning process. McCarty was first told that this investigation was related only to the beating of Estores (A.A. Vol. 12 pp. 2495). Not until much later in the interview did the police relay that this was a murder investigation (A.A. Vol. 12 pp. 2527). McCarty was arrested approximately ninety (90) minutes into the police questioning. Both objective and subjective indicia of arrest were present during the questioning of Mr. McCarty.

6. MCCARTY WAS QUESTIONED FOR TWO (2) HOURS IN THE LAS VEGAS AFTERNOON HEAT BEHIND A 7-11.

McCarty was questioned and detained near a 7-11 near Charleston and Nellis. The actual questioning began at approximately 6:30 P.M., and did not conclude until 8:25 P.M. In addition, McCarty was detained prior to Detective Collins's arrival, by HPD officer Ridings and told to wait for Detective Collins.

7. MCCARTY WAS INTERROGATED ON MAY 25, 2006

Defendant McCarty was "interrogated" pursuant to the definition outlined in Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980). McCarty was asked numerous questions about his knowledge or relationships with Malone, Herb, Magee, Combado and Estores.

B. MR. MCCARTY'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HIS STATEMENTS WERE COERCED AND NOT VOLUNTARILY AND FREELY GIVEN

1. THE LAW REGARDING INVOLUNTARY CONFESSIONS

A motion to suppress a confession should be granted if the confession was coerced; "[u]nder the Fifth Amendment, a confession is coerced or involuntary if 'the defendant's will was overborne at the time he confessed." Juan H. v. Allen, 408 F.3d 1262, 1273 (2005). (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)). The United States Supreme Court has directed that a totality of the circumstances test be used to determine whether there was coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

Apart from the Fifth Amendment protections set out in Miranda and its progeny, in order for a confession to be admissible and comport with due process, the confession must be made freely and voluntarily, without compulsion or inducement. Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). The confession must be the product of a free will and rational intellect. Id. at 213.

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Either State physical intimidation or psychological pressure constitute coercion, and make a confession involuntary. Id. at 214.

Aside from the Fifth Amendment Violations that occurred during the initial interrogation, the record reflects that McCarty's statements made on June 1, 2006, and on June 6, 2006, were also involuntary taken, in direct violation of Mr. McCarty's Fourteenth Amendment Rights. The United States Supreme Court has reiterated its view that 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 under the Due Process Clause of the Fourteenth Amendment. Miller v. Fenton, 474 US 104, 106, S Ct 445, 449, 88 L Ed.2d 405 (1985). A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-735 (1980).

Several factors are relevant in deciding whether a suspect's statements are voluntary, including: 1) the youth of the accused; 2) his lack of education or his low intelligence; 3) the lack of any advice of constitutional rights; 4) the length of detention; 5) the repeated and prolonged nature of questioning; 6) and the use of physical punishment such as the deprivation of food or sleep. Passama v. State, 103 Nev. 212, 214 (1987); Miller v. Fenton, 474 U.S. 104, 112 (1985). A suspect's prior experience with law enforcement is also a relevant consideration. Rosky v. State, 111 P.3d 690 (Nev. 2005); Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

If promises, either implicit or explicit, tricked defendant (Passama) into confessing, his confession was involuntary. Franklin v. State, 96 Nev 417, 421, 610 P.2d 732, 736 (1980). It is not permissible to tell a defendant that his failure to cooperate will be communicated to the prosecutor. United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981).

In Passama, the confession was deemed inadmissible because the confession was not voluntary. Passama v. State, 103 Nev 212, 735 P.2d 321 (1987). Defendant Passama was neither young or uneducated, and his intelligence was low average. Sheriff Miller questioned Passama and told him that he would go to the D.A., and see Passama went to prison if he was not entirely truthful.

While it is understood that the police may actually lie to a criminal defendant, the investigating officers cannot promise that the consequence of providing information to the police

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will be favorable to the criminal defendant. An officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary. Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992), cert denied, 506 U.S. 1082, 113 S. Ct. 1053, 122 L.Ed.2d 360 (1993). However, the police or other investigators may not lie about the consequences of a defendant's participation.

A confession, "must not be extracted by any...direct or implied promises, however slight" Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734 (1980) (quoting People v. Carr, 8 Cal.3d 287, 104 Cal. Rptr. 705, 502 P.2d 513 (1972)). A confession is admissible as evidence only if it is made freely, voluntarily, and without compulsion or inducement. Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967). Courts have distinguished between lies that arguably would cause a suspect to reflect on "his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime," and lies interjecting "extrinsic considerations" into the suspect's deliberation. Holland v. McGinnis, 963 F.2d 1044, 1050 (7th Cir. 1992). Lies involving extrinsic considerations include those causing a suspect to reach an erroneous conclusion about the punishment he will incur if he does not cooperate, misrepresentations of the consequences others will face if the suspect does not talk, and lies that undermine the Miranda warnings or otherwise convey the message that the suspect "must confess at that moment or forfeit forever any future benefit that he might derive from cooperating." United States v. Anderson, 929 F.2d 96, 100 (2d Cir. 1991).

2. THE INVOLUNTARY CONFESSIONS (ADMISSIONS) BY DEFENDANT MCCARTY DUE TO THE TACTICS OF HPD INVESTIGATORS

In the instant matter, Detective Collins asserted to Defendant McCarty that he would go to District Attorney Scott Mitchell and tell Mr. Mitchell that McCarty was not being honest with him. It was also implied that Defendant McCarty would be able to see his kids. It was also implied that the State would go easier on him if he "cooperated." McCarty was repeatedly told that the D.A., would hear about his "cooperation" or "lack of cooperation." On June 6, 2006, the following interrogation took place between Detective Collins and Defendant McCarty

> Q. Romeo (McCarty), I know - - I know you're not being honest with me and I mean the thing is, the D.A. is not going to want to talk to you unless you're being honest with me.

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A. I can't explain something that I don't know about (A.A. Vol. 12 pp. 2559).

Later in the interrogation, Detective Ridings talks also about going to the D.A., if not told the truth.

Q. But do you understand- -
A. - - me to see my kids - -
Q. Do you understand that as long - -
A. (Incomprehensible).
Q. - - as long as you're not providing the entire truth that the D.A. is not going to give you what you want?
A. I haven't heard that from the D.A. I haven't seen nothing in writing.
Q. Well, come on.
A. (Incomprehensible).
Q. Come on, Jason. You're not stupid.
A. Come on, man, nothing. I keep hearing it from you guys.
Q. Okay.
...
BY DETECTIVE COLLINS
Q. Why should he - - listen. Why should he talk to you when he knows you're lying to us?
BY DETECTIVE RIDINGS:
Q. When - - when we showed him this, this was his first words, he goes, "You know, the guy's not telling the truth."
A. Why should I - -
Q. As busy as he is, going to take time out of his day to drive all the way from downtown - -
A. Because that's - -
Q. - - Las Vegas to talk to you if you're not willing to tell him the truth? (A.A. Vol. 12 pp. 2558-2559).

BY DETECTIVE COLLINS
Q. He's not going to talk to you while you're lying to us.
A. Well, then, I mean, man, that's why you guys job is to investigate crimes. His job - - like you told me before: it's your job to investigate crimes. It's his job to make deals, not yours.
Q. Right.
A. So then , like I said, once again, you're steadily asking for me something but you're not telling me - -
Q. Well, the only thing I'm going to tell him is that we're investigating it and, you know what, he's steadily lying to us. He continually lies (A.A. Vol. 12 pp. 255-2560).

Over defense objection, the district court permitted the above mentioned excerpt to be played to the jury. The defense moved for mistrial based upon the detectives repetitive improper and hearsay statements regarding the D.A. believed the defendant was "lying continuously" and "steadily lying" (A.A. Vol. 38 pp. 8365-8366).

The types of violations committed by the HPD are the exact violations which were discussed in Passama and Tingle. It was pointed out by the HPD, that the HPD was in direct contact with the D.A. It was also pointed out that Detectives Ridings and Collins would inform District Attorney

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Mitchell that they believed McCarty was lying to them about matters relevant to the deaths of Combado and Magee. Defendant McCarty reasonably believed, whether direct or implied, that his "cooperation" would be communicated to the D.A., and that he would be able to "cut a deal" with the D.A.

Other factors to be considered include Defendant McCarty's lack of education. He did not graduate from high school. Additionally, he suffers from cerebral palsy and the left side of his body suffers as a result. His left arm is essentially useless. Prior to being placed under arrest, Defendant McCarty was never given any indication of his rights or opportunity to contact an attorney (A.A. Vol. 12 pp. 2492-2576).The questioning was prolonged and repeated. The custodial interrogation is devoid of any mention of McCarty's Constitutional Rights until page 142 of the May 25, 2006, transcript.

In the instant case, the statement was the result of promises of leniency to Defendant McCarty. The HPD made it clear that they would go to the D.A. and that the sooner they found certain evidence the better it would be (A.A. Vol. 12 pp. 2543). The implication was that if McCarty "cooperated" and helped the HPD to obtain evidence related to the alleged crimes, then things would "be better for McCarty." Detective Ridings states the following: "[Y]ou understand that the longer it takes us to track down those items, the more chances there are of those items not being there?" (A.A. Vol. 12 pp. 2544). The implication being, if McCarty did not cooperate, the HPD or the D.A., would not help him out.

3. <u>MCCARTY MADE SEVERAL ADMISSIONS TO THE HPD.</u>

McCarty made the following admissions from which a jury could conclude implicate Defendant McCarty in the deaths of Combado and Magee.

Q. How big was the knife?
A. Fit in the palm of my hand, basically (A.A. Vol. 12 pp. 2570).

Q. Picked him up from where about 3:00? About where?
A. (Incomprehensible) Wagon Wheel, whatever street you said it was (A.A. Vol. 12pp. 2570).

Q. Okay. So - - you met up with them the night that this happened?
A. After – yeah, after it happened, they did it (A.A. Vol. 12 pp. 2570).

Q. Well, then tell us your part of it. You haven't told us your part of it.
A. I told you I got rid of evidence (A.A. Vol. 12 pp. 2576).

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Q. Yes.
A. Take me there and I can take you where the knife is buried and where the rock was.
Q. Are you prepared to do that right now?
BY DETECTIVE COLLINS
Q. It's a knife?
A. Knife, whatever. It's only about - - I'd say it's a knife because it's only about a little bit linger than my hand (A.A. Vol. 12 pp. 2576).

BY DETECTIVE FUENTES
Q. This looks familiar right here?
A. This whole - - yeah, this area, because this is the way it was. The rock's on that side. Walked up over here. The rock would be on that side of the road (A.A. Vol. 12 pp. 2567).

C. ALL INTERROGATIONS SUBSEQUENT TO MAY 25, 2006, WITH JASON MCCARTY ARE FRUIT OF THE POISONOUS TREE AND MUST BE EXCLUDED IN EVIDENCE

1. THE LAW REGARDING SUPPRESSION OF STATEMENTS AFTER A MIRANDA VIOLATION

Evidence or statements obtained after an illegal search are suppressed in evidence. See generally Wong Sun v. United States, 371 US 471, 83 S Ct 407, 9 L Ed 441 (1963). Statements taken after a Miranda violation may be suppressed in evidence. U.S. v Perdue, 8 F.3d 1455 (10th Cir 1993). Where a statement is illegally obtained by the government from the accused, other evidence obtained as a result of the statement may be excluded. People v. Briggs, 709 P.2d 911 (Colo. 1985). The Supreme Court considered a similar question in Oregon v. Elstad, 470 U.S. 298 (1985). In Elstad, the police elicited a confession from a suspect prior to giving him Miranda warnings, but then, after receiving the Miranda warnings, he confessed a second time. Id., at 300-02. The Court in Elstad ruled that the second confession was admissible. The Elstad Court also enumerated several factors that bear on whether the coercion from the first confession has carried into subsequent confessions. Among these factors include: 1) the time that passes between confessions, 2) the change in place of interrogations, 3) the change in identity of the interrogators. Id. Both the Ninth Circuit and this Court have apparently adopted the Elstad rule and its surprising limitation of the protections afforded by Miranda. See U.S. v. Orso, 266 F.3d 1030 (9th Cir. 2001): Silva v. State, 113 Nev. 1365 (1997). Thus, under the analysis set forth in Elstad and its progeny, when determining the admissibility of a defendant's statement given after the Miranda warning actual coercion is a violation of the Fifth Amendment. If there was coercion, the Court must suppress the evidence

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unless the violation was sufficiently attenuated to permit the use of the evidence. U.S. v. Wauneka, 770 F.2d 1434, 1439-40 (9th Cir. 1985).

2. MCCARTY'S MAY 25, 2006, JUNE 1, 2006, AND HIS THREE (3) STATEMENTS ON JUNE 6, 2006, ARE ALL FRUIT OF THE POISONOUS TREE AND MUST BE EXCLUDED IN EVIDENCE AT THE TIME OF TRIAL

During the initial interrogation, over ninety minutes passed before McCarty was Mirandized. Although there was a change in venue for McCarty's statements, all interrogations were police dominated and were controlled primarily be Detectives Ridings and Collins. See Exhibits 25 through 29.

The balance of McCarty's May 25, 2007, statement was made under coercion. McCarty was placed in handcuffs and was still in the hot Las Vegas sun. The statements made after McCarty was placed under arrest/Mirandized at page 142-43, of the May 25, 2006 statement are directly after the Pre-Miranda statement. The interrogators stayed the same, and the location stayed the same. The only change was that McCarty was placed in cuffs (A.A. Vol. 12 pp. 2524).

Additionally, McCarty's statements on June 1, 2006, and also on June 6, 2006, were coerced because McCarty thought he was actually going to be given leniency for his cooperation in locating evidence and providing information to the HPD investigators. From the onset, McCarty requested to speak with the D.A., but was only allowed to speak to HPD investigators. McCarty continued to provide information, based on his understanding that his "cooperation" would be relayed to the D.A. McCarty was continually told that his lack of cooperation would be reported to the D.A.

The follow up questioning, which occurred on May 25, 2006, June 1, 2006, and June 6, 2006, all derived from the original Miranda violation, which occurred on May 25, 2006.

Any physical evidence derived from the illegally obtained May 25, 2006, statement must be excluded as evidence at a trial in this matter. On June 6, 2006, Defendant MCCARTY accompanied the HPD to the desert area where evidence was located.

D DEFENDANT MCCARTY MADE STATEMENTS TO THE POLICE ON MAY 25, 2006, JUNE 1, 2006, and on JUNE 6, 2006, WHICH WERE OFFERS IN COMPROMISE.

1. OFFERS IN COMPROMISE

NRS 48.105 states in pertinent part:

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1. Evidence of
(a) furnishing or promising to furnish; or
(b) Accepting or offering or promising to accept,
a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, in not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

NRS 48.125 states in pertinent part:

Evidence...of an offer to plead guilty to the crime charged or any other crime is not admissible in a criminal proceeding involving the person who made the plea or offer.

In Mann v. State, 96 Nev. 62, 65, 605 P.2d 209, 210 (1980), this court noted that NRS 48.125 (1) was a legislative declaration of a "...public policy favoring the candid and honest negotiations necessary for the successful operation of our plea bargaining system..." In Robinson v. State, a criminal conviction was reversed and remanded for a new trial because the prosecutor made reference to admissions made by defendant during plea negotiations. Robinson v. State, 98 Nev. 202, 644 P.2d 514 (1982).

In McKenna v. State, this very issue was raised, but not decided because it was not presented to the District Court. McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998). The instant case is distinguishable from McKenna for two very important reasons. First, Defendant McCarty has raised this issue in District Court. Second, throughout his discussions with the HPD detectives, McCarty makes several references to the DA and his request to talk to the D.A. It was understood by Defendant McCarty that the HPD is a conduit for the DA, and that the information will be relayed to the D.A., to make a deal between the State and McCarty.

2. MCCARTY'S OFFER IN COMPROMISE

From the outset of McCarty's June 1, 2006, custodial interrogation it is clear that Defendant McCarty wants to talk to the D.A. to "cut a deal."

Detective Collins and Ridings interrogate McCarty at the HPD. The questioning relevant to negotiations is as follows:

DETECTIVE COLLINS: - - your rights, my understanding, I got a call from the D.A.'s office today from Scott Mitchell, and he says he got a call from your dad, and your dad said that you wanted to talk to somebody about more information or whatever it is you want. Do you want to talk to me?
JASON MCCARTY: I told him I'd talk to a D.A. (A.A. Vol. 12 pp. 2538).
DETECTIVE RIDINGS

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Q. What I will do is tomorrow morning ' cause it's too late, first thing tomorrow morning, I will call Mr. Mitchell, okay, the D.A., and I will tell him that - - that you're looking to cut a deal.
A. And I can tell - - I can tell you now that I can give him - -
Q. What - -
A. - - so he knows exactly what I can give him - -
Q. Okay, What is it?
A. Why they were killed.
Q. Uh huh.
A. Who killed em.
Q. Uh huh.
A. What he used. Where the evidence is.
Q. Uh-huh.
A. That's where my involvement came in (A.A. Vol. 12 pp. 2539).

Clearly, Defendant McCarty believes that his statements are part of a negotiation process and that he is actively assisting and cooperating with the HPD to further the course of the investigation. Defendant McCarty offered the information in an attempt to receive a deal from the HPD. The tone of the June 1, 2006 and June 6, 2006, negotiations indicate that McCarty has a reasonable belief that his information will assist the HPD with the investigation and that he will receive some sort of leniency with cooperation. Evidence of offers in compromise are rarely admissible in evidence. The spirit of negotiation encourages the open exchange and discussion of ideas in an effort to resolve a dispute or conflict. Further compounding the problem, McCarty had not been appointed Counsel on June 1, 2006, when he entered the negotiation process with the D.A. and the HPD.

During trial, defense counsel explained, "so there's a difference in the efforts of a police officer who lies to a suspect relative to evidence they may have found, or, you know, the co-defendant told us this and this, etcetera, etcetera, versus lying when it comes to the implication of a constitutional right" (A.A. Vol. 38 pp. 8350).

Defense counsel further explained,

> The --the exchange that occurred between Detective Ridings, Detective Collins, and Mr. McCarty in the last moments prior to the tape being turned off was relative to Mr. McCarty's inquiry will it help me if I take you out and show you where the weapons were -- were located. And both detectives, one Detective Collins says, sure, it will help you. The second detective says, Ridings says how can it not help you if you tell the truth. Okay? (A.A. Vol. 38 pp. 8350).

Clearly, Defendant McCarty believes that his statements are part of a negotiation process and that he is actively assisting and cooperating with the HPD to further the course of the investigation. Accordingly, McCarty's June 1, 2006, and three statements on June 6, 2006, were inadmissible in

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evidence as offers in compromise.

E THE ADVERSARIAL PROCESS BEGAN ON MAY 25, 2006, AND DEFENDANT MCCARTY WAS NOT PROVIDED WITH AN ATTORNEY IN VIOLATION OF 6th AMENDMENT PRINCIPLES

1. THE LAW REGARDING RIGHT TO COUNSEL

Mr. McCarty was arrested on May 25, 2006. Approximately fourteen days later on June 7, 2006, Mr. McCarty was provided a copy of the criminal complaint and finally appointed counsel. In the fourteen day period between Mr. McCarty's arrest and the appointment of counsel, Mr. McCarty provided numerous highly incriminating statements that were all used during the guilt portion of the trial. It was improper for the State to detain Mr. McCarty for fourteen days without counsel. In Hamdi v. Rumsfeld, 542 U.S. 507, 124 Sup. Ct. 2633, 159 L.ed 578 (2004), the United States Supreme Court held that the fourth circuit court of appeals erred by denying Mr. Hamadi immediate access to counsel upon his detention and by disposing of his case without permitting him to meet with an attorney. Hamdi, had been held as an enemy combatant. The United States Supreme Court held that the fifth amendment's due process clause demanded that a citizen held in the United States as an asserted "enemy combatant" had to be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker, including the right to access to counsel.

The Sixth Amendment Right to Counsel, which applies to the States by way of the Fourteenth Amendment's Due Process Clause, Simmons v. State, 112 Nev. 91, 98, 912 P.2d 217, 221 (1996), prevents admission at trial of a defendant's statements which police have deliberately elicited after the right has attached and without obtaining a waiver or providing counsel. Fellers v. United States, 540 U.S. 519, 124 S. Ct. 1019, 157 L. Ed.2d 1016 (2004). Once a defendant invokes the Sixth Amendment right to counsel, the government must cease further attempts to obtain his statements until he has been provided counsel, unless he initiates the conversation and waives his rights. Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed.2d 261 (1988). Adversarial proceedings commence by way of formal charge, preliminary hearing, indictment, information, or arraignment. Fellers, 540 U.S. 519, (2004).

A defendant is denied his Sixth Amendment right to counsel if, once the right attaches,

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government agents "deliberately elicit" incriminating statements in the absence of defendant's attorney. Massiah v. United States, 377 U.S. 201, 206, 84 S.Ct. 1199, 1203, 12 L.Ed.2d 246 (1964). This Court has held that a defendant has a Sixth Amendment right to be assisted by counsel at any critical stage of a criminal proceeding. Beals v. State, 106 Nev. 729, 802 P.2d 2 (1990).

The Right to Counsel attaches to "critical stages" of the prosecution process when a defendant's rights might be prejudiced in the absence of counsel. United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967). Although no all-inclusive definition of a "critical stage" has been provided, the criminal prosecution is said to begin with the initiation of "adversary judicial proceedings." Kirby v. Illinois, 406 U.S. 682, 688, 92 S.Ct. 1877, 1881-82, 32 L.Ed.2d 411 (1972). Thus, the right to counsel has been recognized as applicable to certain pre-trial procedures, including preliminary hearings, arraignments, certain identification procedures, and efforts to elicit inculpatory statements. See 2 Wayne R. La Fave & Jerold Israel, Criminal Procedure Sec., 11.2(b) at 20 (1984). In jurisdictions such as Pennsylvania, the arraignment signals the initiation of the adversary judicial proceedings and the attachment of the Sixth Amendment. Com v. Cornelius, 856 A. 2d 62, Pa. Super., (2004).

2. THE FACTS AS THEY PERTAIN TO JASON MCCARTY'S LACK OF REPRESENTATION

On May 25, 2006, Jason McCarty was placed under arrest and detained in the Henderson Detention Center and charged with the murders of Combado and Magee. As early as May 25, 2006, the adversarial process began. The public defender was appointed to represent Defendant Jason McCarty on June 7, 2006 (A.A. Vol. 12 pp. 2578; A. Supp. A. Vol 1 pp. 5). Defendant Jason McCarty did not have Counsel from the time of arrest until June 7, 2006, when the public defender was appointed. During that time, from May 25, 2006, until June 7, 2006, thirteen (13) days elapsed. During the thirteen (13) days in which Defendant McCarty was not represented by counsel, he made statements to the HPD on May 25, 2006, June 1, 2006, and three (3) statements on June 6, 2006.

Under the circumstances and due to the severity of this matter, it is difficult to understand why Mr. McCarty was not provided counsel until June 7, 2006, when the public deender was finally appointed. The HPD and the prosecution in this matter capitalized on Defendant McCarty's lack of representation and continually questioned McCarty about the alleged crimes, evidence, and other

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pertinent matters. At one point, McCarty even mentioned that he had an attorney, however the questioning continued (A.A. Vol. 12 pp. 2551). The questioning by HPD Detective Collins was as follows:

Q. Who's told you to stop talking to me?
A. The attorney and my father (A.A. Vol. 12 pp. 2555).

Based on the foregoing arguments, all statements made by Jason McCarty were inadmissible in evidence in this case. Mr. McCarty's Miranda rights were violated and his May 25, 2006, statement should have been suppressed. In addition, any statements subsequent to the May 25, 2006, should also been suppressed as "fruits of the poisonous tree." Mr. McCarty's statements were not voluntary, in violation of the 14th Amendment to the United States Constitution. McCarty's 6th Amendment rights were violated, and McCarty was not provided an attorney until June 7, 2006, when the public defender was appointed. McCarty was charged with crimes on May 25, 2006, including the murders of Combado and Magee, as well as several related crimes. All statements/confessions/admissions made by McCarty should have been suppressed at the trial in this matter.

II. THE DISTRICT COURT ERRED WHEN IT FAILED TO PRECLUDE THE PROSECUTOR FROM INTRODUCING THE STATEMENTS OF MR. MCCARTY BASED UPON A VIOLATION OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to opening argument, defense counsel specifically requested that the State determine whether Mr. McCarty's statements would be introduced (A.A. Vol 27 Pg 5952). Defense counsel stated,

> The first one is the State has told me that they may not mention Mr. McCarty's statements in opening argument. If they don't, then I don't believe I'm permitted to open the door to that. It—it would be self serving. So what I would ask the court to do is make the State tell us whether they are going to use Mr. McCarty's statement. If they are, then I can fairly comment on them. If they don't, I think its objectionable" (A. A. Vol 27 pp 5952).

The prosecutor, Mr. DiGiacomo then explains, "In my opening, I do not discuss Mr. McCarty's statement" (A.A. Vol 27 pp 5953). Mr. DiGiacomo further states "we - until we know some of the evidentiary ruling and the way the evidence comes out, I don't know that I can actually answer the question as to weather or not we will play some of Mr. McCarty 's

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statements" (A.A. Vol 27 pp 5953).

As a result, Mr. McCarty was then not able to address any of his extremely prejudicial statements. Thereafter, at no surprise, the State presented each and everyone of Mr. McCarty's lengthy recording statements. In fact, the prosecutor played portions of the tape recorded statements to the jury on 17 occasions during rebuttal closing argument (A.A. Vol. 40 pp. 8886 (recording played two separate times); 8888; 8889; 8892; 8894; 8900; 8910 (recording played two separate times); 8911 (recording played three separate times); 8912; 8913 (recording played two separate times); 8915; and 8916). The following is a summery that was used by Mr. DiGiacomo during his rebuttal closing argument. In fact, the vast majority of the rebuttal argument was dedicated to Mr. McCarty's statements. Revealing, Mr DiGiacomo's direct misrepresentation to the court and defense counsel.

The following facts are taken from Mr. DiGiacomo's rebuttal closing argument. Mr. McCarty acknowledges that the following excerpts are voluminous and may appear out of place. However, it is necessary to present the following facts to establish the voluminous amount of information and argument presented to the jury based solely on Mr. McCarty's statements.

> *Mr. McCarty told authorities that Victoria Magee's phone was taken by the killers and used by the killers (A.A. Vol 37 Pg 8871). The prosecutor told the jury that Mr. McCarty acknowledged to police that he had lied in order to minimize his involvement (A.A. Vol. 37 pp. 8875). The prosecutor informed the jury that Mr. McCarty made the following statement to Detective Ridings "Not on May 25" (A.A. Vol 37 Pg 8875). Mr. DiGiacomo explained "Let's see, the funny thing is about those people is everything relevant that they have to say, Mr. McCarty confirmed for you in his own statement — or to the police on six separate occasions he said it" (A.A. Vol 37 Pg 8876). Mr. DiGiacomo indicated that Mr. McCarty "knows because he had to make up the story as to why it is that the evidence doesn't support where he's at that particular time, so he's right on his time-line" (A.A. vol 37 Pg 8876-8877).*
> *The prosecutor then explains,*
>
> *The other thing that — I think it was Mr. Oram actually said to you early on in this argument was that Red "Melissa Estores" made up this story about her getting hundred and fifty dollars so that Mr. McCarty could Victoria's eighty, is I think that way he put it. Well, that wasn't in her testimony anywhere. Her testimony was that Christina was out a hundred and fifty, that Mr. McCarty offered Christina extra money if she would go to Victoria. And oh, by the way, Mr. McCarty acknowledges that the debt owed was eighty dollars. Now, he says it was Donnie, not to him" (A.A. Vol 37 Pg 8879 8880). " Go back to the first statement of Mr. McCarty, May 25, 2006. Ask your self, he lies for forty five minuets about a number of things, and he admits to that later on. He goes through and lies about you know, distancing himself from the car and all those other things, but then go to a statement, at about forty five minuets" (A.A. Vol 37 Pg*

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8886). At this point in the argument, the prosecutor instructs or plays a portion of the statement for the jury (A.A. Vol 37 Pg 8886 line 4).

Mr. DiGiacomo then states, "Mr. McCarty, first thing he says when –when he finally says something irrelevant is, yes, she got beat in the car. And he goes on to say that little — incomprehensible in transcript, listen closely to the recording. She got beat in the car and we had to stop him in the car, is what he says. That's his first story to the police. (A.A. Vol 37 Pg 8886). Mr. DiGiacomo continues to quote Mr. McCarty extensively on 8886 discussing how Mr. McCarty described an incident out in the desert. Thereafter, Mr. DiGiacomo again plays a portion of Mr. McCarty's statement to the jury (A.A. Vol 37 Pg 8886).

Mr. DiGiacomo then told the jury, "now, Mr. McCarty made his slip right their, right?" (A.A. Vol 37 Pg 8886). Mr. DiGiacomo then quotes Mr. McCarty stating "well, that's the night before she got beat in the car," (A.A. Vol 37 Pg 8886-8887). Mr. DiGiacomo then states "what he is really telling you is, I was in the car on Wednesday, too" (A.A. Vol 37 Pg 8887). Then, a portion of Mr. McCarty's statement is again played for the jury and Mr. DiGiacomo sates "I'm not going to argue to you what Mr. McCarty just told you isn't true, but what he just told you, was he meaning I ran physically, I like ran, or did he mean run like I move quickly as I could (A.A. Vol 37 Pg 8888). Mr. DiGiacomo argued that Mr. McCarty was capable of running stating "well, what do you know from Mr. McCarty's own mouth" (A.A. Vol 37 Pg 8888). Then, Mr. DiGiacomo played another portion of Mr. McCarty's statement and explained "what does Mr. McCarty say". Thereafter, Mr. DiGiacomo plays another portion of the tape (A.A. Vol 37 Pg 8889). Mr. DiGiacomo then asks the jury "who's he talking about" (A.A. Vol 37 Pg 8889).

Mr. DiGiacomo explains that Mr. McCarty admitted in his statements that he bought the phones and he was in possession of the phones (A.A. Vol 37 Pg 8890). Mr. DiGiacomo again asked the jury "and Mr. McCarty, what does he say? Well, I can't quite remember. I might have picked Corrinna up that night from the Road Runner. No, the place where the knife– the murder weapon came from"(A.A. Vol 37 Pg 8891).

Mr. DiGiacomo states, "well, Mr. McCarty acknowledges talking to Ryan" (A.A. Vol 37 Pg 8892). Thereafter, Mr. DiGiacomo plays a portion of Mr. McCarty's statement. Mr. DiGiacomo then states that Mr. McCarty acknowledged talking to Ryan (A.A. Vol 37 Pg 8892). Mr. DiGiacomo again informs the jury that Mr. McCarty admits to making up all these lies to minimize himself (A.A. Vol 37 Pg 8892). Mr. DiGiacomo informs the jury that Mr. McCarty acknowledges that the phone was taken during the murder and one of the murderers had the phone (A.A. Vol 37 Pg 8893). Mr. DiGiacomo then informed the jury that Mr. McCarty stated that something was peculiar about the phone (A.A. Vol 37 Pg 8893).

Mr. DiGiacomo again asked the jury "and what does Mr. McCarty say?" (A.A. Vol 37 Pg 8894). Thereafter, Mr. DiGiacomo played another portion of Mr. McCarty's statements (A.A. Vol 37 Pg 8894). Mr. DiGiacomo explained that Mr. McCarty acknowledges that he had a conversation with Nicolyn Broaderway (A.A. Vol 37 Pg 8894).

Mr. DiGiacomo told the jury that the defendant later acknowledges that this is the only time he was beaten (A.A. Vol 37 Pg 8896). Mr. DiGiacomo informs the jury that Mr. Mccarty admitted that he went with Mr. Malone to the Hard Rock (A.A. Vol 37 Pg 8898). Mr. DiGiacomo informs the jury that "even the defendant acknowledges that Donald Herb was home when his dad was awake and Donald Herb get home before his dad wakes up" (A.A. Vol 37 Pg 8889). Mr. DiGiacomo again plays a portion of Mr. McCarty's statement (A.A. Vol 37 Pg 8900).

Mr. DiGiacomo informed the jury "Mr. McCarty acknowledges what

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Donald Herb's alibi was, that's what his alibi was always going to be because why?"(A.A. Vol 37 Pg 8900). Mr. DiGiacomo informed the jury that Mr. McCarty tried to disassociate himself from the green vehicle but later acknowledged that that is the murder vehicle (A.A. Vol 37 Pg 8903). Importantly, Mr. DiGiacomo tells the jury "but perhaps the most telling thing about what exactly Jason McCarty's role was in this particular case came from him, himself, and it self forensically linked, because he's got no problem telling you that Dominic Malone had the golf club, but wow what does he not want to talk about? It's that item in a red handkerchief, right? Even when he starts giving up, hey i'll be willing to tell the DA whatever they want to hear if I know im going to get a deal" (A.A. Vol 37 Pg 8905). Mr. DiGiacomo then told the jury that Mr. McCarty told the police he wanted an accessory deal" (A.A. Vol 37 Pg 8905).

Mr. DiGiacomo explained that Mr. McCarty had talked about the golf club and rocks which killed the victims (A.A. Vol 37 Pg 8909). Mr. DiGiacomo states "...but in the end of the statement, Mr. McCarty in another one of his fantastic slip ups says, it's life" (A.A. Vol 37 Pg 8906). Mr. DiGiacomo talks to the jury about Mr. McCarty stating the knife would fit in the palm of my hand (A.A. Vol 37 Pg 8906). Mr. DiGiacomo also talks to the jury about how Mr. McCarty admitted to being at the Road Runner restaurant (A.A. Vol 37 Pg 8906). Mr. DiGiacomo argued that the knife came from the Road Runner (A.A. Vol 37 Pg 8906). Mr. DiGiacomo again played Mr. McCarty's statement (A.A. Vol 37 Pg 8910). Portions of Mr. McCarty's statements are played on (A.A. Vol 37 Pg 8911and 8912). Mr. DiGiacomo again confirmed that Mr. McCarty admitted that he had his cell phone (A.A. Vol 37 Pg 8912). Statements made by Mr. McCarty are again played (A.A. Vol 37 Pg 8913 and 8915). The prosecutor tells the jury "every time the police explain to him a piece if evidence, Mr. McCarty has a different version of the story" (A.A. Vol 37 Pg 8915). Mr. DiGiacomo tells the jury that Mr. McCarty accused Donald Herb of the murder (A.A. Vol 37 Pg 8915).

Mr. DiGiacomo tells the jury, "Mr. McCarty and all the other people agreed that Red and Christine wind up at the oasis on Tuesday: that on Tuesday sometime during the daytime, Christine and McCarty leave and there is that discussion about Victoria and everything else, ...(A.A. Vol 37 Pg 8917 8918). Mr. McCarty admits that it was him and Victoria that were going to Disneyland (A.A. Vol 37 Pg 8918). Mr. DiGiacomo informs the jury that Mr. McCarty denies going in a particular direction on the night of the murder when talking to the police (A.A. Vol 37 Pg 8919). Mr. McCarty acknowledges what the phone records are going to show (A.A. Vol 37 Pg 8919 8920). Mr. McCarty acknowledged that he was going to use two girls "as alibis" (A.A. Vol 37 Pg 8924). Mr. DiGiacomo then tells the jury that defense counsel expected us to call the two girls as alibis for Mr. McCarty. Mr. DiGiacomo explains to the jury that Mr. McCarty told the police that they were alibi witnesses (A.A. Vol 37 Pg 8925). Mr. McCarty then tells police that they are not really alibi witnesses (A.A. Vol 37 Pg 8925).

Mr. DiGiacomo spent almost every page of the closing argument addressing Mr. McCarty's statements. Yet, Mr. DiGiacomo clearly deceived the district court and defense counsel by stating that he was not sure if he would use the defendants's statement. A review of the statement of facts reveals that the most incriminating evidence used by Mr. DiGiacomo in trial were the statements of Mr. McCarty.

The district court denied Mr. McCarty's Motion to Suppress his statements. The State

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vigorously litigated against Mr. McCarty's requests for suppression. A lengthy evidentiary hearing was held regarding suppression. At the conclusion of the evidentiary hearing, the district court denied suppression which permitted the State to use all five of Mr. McCarty's lengthy recorded statements.

In preparation for trial, Mr. McCarty prepared a lengthy opening argument in order to address the statement of Mr. McCarty. Mr. McCarty was aware that the most incriminating evidence against him were the recorded statements. Just prior to opening argument, defense counsel becomes concerned because the State claims that they may not elect to use Mr. McCarty's statements. Defense counsel then requests that the Court inquire from the State whether Mr. McCarty's statements would be used.

Mr. McCarty was aware that he was not permitted to use his own statements unless the State would introduce them. Because the State would not elect to state whether they would use Mr. McCarty's statement, Mr. McCarty was not free to address the highly incriminating statements.

Thereafter, during the State's case in chief, the State presents almost the entire audio tape and transcripts of all of Mr. McCarty's five statements. In rebuttal closing argument, the vast majority of the prosecutor's substantive arguments address Mr. McCarty's statements. The jury would obviously be left to wonder why defense counsel failed to mention or address all of Mr. McCarty's highly prejudicial statements (including but not limited to Mr. McCarty proceeding to the desert area to uncover the instrumentalities of the murder). Mr. McCarty made numerous admissions regarding cell phones. Mr. McCarty provided numerous inconsistencies. A review of the State's rebuttal closing argument demonstrates the prosecutors state of mind. The prosecutor clearly believed that Mr. McCarty's statements were some of the most incriminating statements against him.

This Court should consider that the State has used the case of Glover v. Eighth Judicial District Court, 220 P.3d 684, 125 Nev. Adv. Rep. 53 (2009), as a shield and a sword. Prior to opening argument, Mr. McCarty's counsel addressed the facts and law surrounding the Glover decision and expressed concern that he would not be permitted to raise Mr. McCarty's statements

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if the State did not intend to use them. In Glover, this Court explained,

> We uphold the district courts order excluding Glover's statement and prohibiting argument about its content. Significantly, the defense admits that Glover's out of court statement was hearsay. While the State could have offered the statement as the admission of a party opponent no legitimate negative inference arose from the State's decision not to offer the otherwise inadmissible evidence. The State's failure to use the statement just meant the State had invoked the hearsay rule which deemed the defendants exculpatory out of court statement self serving and thus inadmissible. 220 P.3d 684, 689.

Therefore, Mr. McCarty was aware that he could not use his own statements because they were hearsay and self serving. However, Mr. McCarty prepared extensively to address his statements because it was obvious to everyone how damaging the statements were to the defense (this is proven by the prosecutor's election to concentrate on Mr. McCarty's statement so extensively in rebuttal closing argument). Mr. McCarty was therefore precluded from trying to explain the statements and give the jury a road map in opening argument.

The constitution guarantees every defendant a fair trial. These guarantees are ensured through the Due Process Clause. One of the fundamental rights found in the Due Process Clause is the right of a criminal defendant to have a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. at 485 (1967). By denying defendant the ability to, not only address the issue in Opening Statement, but furthermore denying the defendant the ability to cross-examine witnesses regarding the statement, defendant was denied his ability to present a complete defense as well as denying him of several valuable Constitutional rights.

One of the prominent components of the Sixth Amendment is the right to effective assistance of counsel. See generally, Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991). This is most commonly done through attacking the credibility of counsel for the defendant through prosecutorial misconduct. In the instant case, forcing the defendant to not address his statement in Opening or by confronting the witnesses against him, this has called into question the credibility of counsel for defendant and denied defendant effective assistance of counsel.

Due Process analysis does not consider an examination of the reasoning behind a prosecutor's decisions. It is not necessary for the prosecutor to have acted in bad faith in order for there to be misconduct. The focus is on whether the alleged conduct affected the fairness of the trial. Smith v. Phillips, 455 U.S. 209 (1982). In the instant case, there can be no doubt that

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the actions of the State, whether they acted in bad faith or not, have unfairly prejudiced Mr. McCarty. Having been prohibited from addressing the statements through witnesses or during Opening Statements, Mr. McCarty was ambushed by the statements unfairly and without recourse.

Any examination of alleged misconduct must be examined in the context of the trial as a whole. Boyde v. California, 494 U.S. 370 (1990). It is not enough to examine the statements and the actions of the State in a vacuum. In the instant case, there must be a close examination of the actions of counsel for Defendant. Counsel for Defendant raised the issue prior to trial, informing the district court that they would like to address the jury with regard to the statements during Opening Statements (A.A. Vol. 35 pp. 7842). In essence, what the State has done, is forced Defendant to be unable to properly inform the jury of the evidence that will be introduced during trial (Opening Statement) and forced Defendant not to be able to properly confront the witness against him that are going to be the basis of the State's case.

The analysis of prosecutorial misconduct revolves around only one question: did the misconduct rise to the level that is so infected the trial with unfairness that any resulting conviction would be a denial of due process of law. Darden v. Wainright, 477 U.S. 168 (1986). In the instant case, there can be no doubt that Defendant has been denied due process and a fair trial. Defendant was prohibited from presenting a complete defense. Defendant was prohibited from properly confronting the witnesses against him. The fact that the State may or may not have intended this to occur is irrelevant. The only issue is the denial of Defendant's fundamental trial rights.

This Court should consider the significant damage from the loss of credibility of defense counsel in a capital case wherein he/she has not addressed the most damming evidence against their client. In fact, in the instant case, defense counsel utterly failed to mention hours upon hours of damaging evidence which the jury spent days listening too. The loss of credibility of a capital litigator is something that should not go unnoticed. The State used the Glover decision as a shield to preclude defense counsel from addressing Mr. McCarty's statements. Thereafter, played ever one of Mr. McCarty's statements and provided the jury with transcripts. Additionally, the

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prosecutor disingenuously claimed he was unsure whether he would use the statement and then spent ninety percent of his rebuttal argument addressing the statements.

In essence, the State fought vigorously to introduce Mr. McCarty's statements. Then, minutes before opening argument was to proceed, contends that he was unsure whether he would use Mr. McCarty's statements. The prosecutor admits that he would object to defense counsel addressing the statements. Then, uses Mr. McCarty's statements to deal lethal blows that severely damaged the credibility of defense counsel. It is difficult, if not impossible to understand how any prosecutor would not desire to use Mr. McCarty's statements in the trial. Again, this fact is proven by the prosecutors rebuttal closing argument.

Prior to the introduction of Mr. McCarty's statement, defense counsel complained that the State had admitted they would have objected if defense counsel had mentioned Mr. McCarty's statements during opening argument (A.A. Vol. 35 pp. 7686). Defense counsel specifically requested the Court preclude the State from introducing Mr. McCarty's statement based upon these representations (A.A. Vol. 35 pp. 7686). Defense counsel cited the Glover decision and complained that counsel for the defense would have been in direct violation with this Court's order by commenting on inadmissible hearsay (A.A. Vol. 35 pp. 7688). During the hearings, prior to the introduction of Mr. McCarty's statements, defense counsel complained about prosecutorial misconduct (A.A. Vol. 35 pp. 7694-7695). Defense counsel complained that the circumstances are "exactly backwards" of the situation in Glover (A.A. Vol. 35 pp. 7695). Defense counsel complained,

> Now, we did nothing in our opening statement because we were precluded from doing so in an admission from the State that they would have objected if we had done so and holding in a Nevada Supreme Court case saying that it could have been tantamount to defense misconduct. We were absolutely precluded from going into the statements (A.A. Vol. 35 pp. 7696).

Defense counsel further complained to the district court that... "the State is going to back door us, sucker punch us, essentially" (A.A. Vol. 35 pp. 7696). Defense counsel further complains that Mr. McCarty's due process is being violated and the decision to permit the statements is in violation of the United States Supreme Court cases (A.A. Vol. 35 pp. 7696-7697).

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In response, the State made a hollow argument that defense counsel ambiguously attacked witnesses regarding the possibility that Mr. McCarty did not have possession of his cell phone. The State's argument would hardly support the concept that the State then decided to use all of Mr. McCarty's statements that took hours upon hours of trial time for the jury to hear. The State presented Mr. McCarty's statement because they were some of the most damaging evidence. The jury did not spend hours upon hours listening to Mr. McCarty's recorded statements because the State wanted to prove that Mr. McCarty always had his phone. If this were true, why would the State need to present Mr. McCarty's statements where he was in the desert attempting to locate the instrumentalities used in the murder. The State tricked the trial Court and defense counsel. The State has no right to use the Glover decision as a sword and a shield.

In the instant case, the prosecutor should have been precluded from introducing the statements of Mr. McCarty based upon a violation of due process in violation of the fifth, sixth and fourteenth amendments to the United States Constitution.

III. MR. MCCARTY WAS DENIED A FAIR TRIAL BASED UPON THE DISTRICT COURT DENYING BATSON CHALLENGES IN VIOLATION OF THE FIFTH SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. McCarty is African American. Mr. McCarty was accused and convicted of the murder of two women, neither were of African American descent. The district court denied Mr. McCarty's Batson challenges. The result of the Court's denials resulting in an all white jury sentencing Mr. McCarty to death. In fact, the State did not dispute that the deliberating jury was composed entirely of non African Americans (A.A. Vol. 44 pp. 9890-9891). Counsel for Mr. McCarty anticipated the State's decision to preempt the African American jurors. In fact, prior to the State using the peremptory challenge on juror 098, Jason Rogers, defense counsel told the Court that a Batson challenge would be made if the State excused the juror (A.A. Vol. 27 pp. 5953). Shortly thereafter, the State used a peremptory challenge on juror 098, Jason Rogers. Defense counsel immediately objected pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69 (1986) (A.A. Vol. 27 pp. 5966).

The prosecution initially argued that there was no pattern established. The State claims that Mr. Rogers wrote in his questionnaire that he did not have an opinion about the death

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penalty (A.A. Vol. 27 pp. 5967). The State claimed that they could not obtain a precise answer for Mr. Rogers regarding the death penalty or whether he had been a victim of crime (A.A.Vol. 27 pp. 5968).

Mr. Rogers was employed as a taxi driver for approximately a year and a half (A.A. Vol. 23 pp. 5088). Mr. Rogers was asked by the prosecution if he had been a victim of a crime such as his house being broken into or his car stolen and Mr. Rogers indicated "nothing major like that" (A.A. Vol. 23 pp. 5090). In fact, the State barely questioned Mr. Rogers regarding his alleged victimization. Mr. Rogers made it abundantly clear that he had not even been the victim of something as minor as a stolen vehicle or a residential burglary. The prosecutor asked a few simple questions about the victimization and Mr. Rogers provided adequate answers. There is nothing in the transcript to suggest that the prosecutors race neutral reason for excluding Mr. Rogers on the basis of his evasive answers regarding victimization is legitimate. It is clear that the prosecutor used a pretextual reason to exclude Mr. Rogers. A review of the transcript reflects that any victimization suffered by Mr. Rogers was extremely minor. Mr. Rogers informed the prosecutor of this fact and the prosecutor simply moved on in his questioning.

When the prosecutor questioned Mr. Rogers about the death penalty, Mr. Rogers explained that he believed the death penalty was an option (A.A. Vol. 23 pp. 5091). A review of the transcript reflects no hesitation by Mr. Rogers on this subject. Mr. Rogers specifically indicated that the death penalty was an option in the very first question asked of him regarding the death penalty. In fact, Mr. Rogers stated, "I am saying I understand there are four options if someone is convicted of first degree murder". Mr. Rogers further stated, "and that each of those options could be considered" (A.A. Vol. 23 pp. 5091). Mr. Rogers further told the prosecutor "and I wouldn't put one over the other right now without knowing what's behind it" (A.A. Vol. 23 pp. 5091). The prosecutor then asked Mr. Rogers if there was a circumstance in his mind where he could vote in favor of the death penalty and juror Rogers answered in the affirmative (A.A. Vol. 23 pp. 5091-5092). Mr. Rogers had no reservation about the death penalty. The transcript clearly reflects that Mr. Rogers indicated that he had not been the victim of any major crime. Additionally, Mr. Rogers indicated that he could vote in favor of the death penalty.

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Interestingly enough, Mr. Rogers provided these answers to the prosecutor without any necessity for rehabilitation from defense counsel. Defense counsel anticipated that the prosecutor would remove Mr. Rogers by way of peremptory challenge to ensure an all white jury. The State claimed that defense counsel was using "gamesmanship" based upon the defense anticipating of the peremptory challenge. On the contrary, defense counsel was well aware that the State would try to exclude the African Americans leaving an all non-African American jury panel.

The State also excused Kwenn Brooks (036), an African American female (A.A. Vol. 27 pp. 5969). The State claimed the race neutral reason was that her brother was convicted by the district attorneys office, for criminal activity (A.A. Vol. 27 pp. 5970).

Unbelievably, the State informed the Court that they conducted independent research on Ms. Brooks and learned that she had a work card for a strip club (A.A. Vol. 27 pp. 5970). Defense counsel complained that the State was doing independent research on jurors without informing the defense or the Court (A.A. Vol. 27 pp. 5971). Defense counsel complained that the State's independent research was a violation of equal protection and the defense did not have an opportunity to run scope printouts or NCIC background checks on jurors (A.A. Vol. 27 pp. 5971). Not only did defense counsel move for a Batson challenge but also moved for a mistrial based upon the State conducting independent research. It was apparent that the State had not excused Ms. Brooks for any other reason than the independent research they decided to conduct on her. The only pathetic excuse the State could muster was that she had obtained a card for a stip club.

The State provided a pretextual reason to excuse Ms. Brooks. The State was unable to provide any race neutral reason based upon her answers so they conducted an independent investigation of the juror. Not until pressed with a Batson challenge did the State reveal they were conducting such independent investigations.

Ms. Brooks informed the prosecutor that she was a full time student at the University of Phoenix (A.A. Vol. 21 pp. 4641). Ms. Brooks indicated that her brother had been arrested on charges but she was unaware of the nature of the charges (A.A. Vol. 21 pp. 4642). Ms. Brooks then clarified that her brother had been stopped for speeding and she believed he was then

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