act evidence, however, the State claims that this issue does not mandate reversal absent manifest error. See, Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); Big Pond v. State, 128 Nev. __, 270 P.3d 1244, 1249 (2012) (State's Answering Brief pp. 24). The State also admits that they failed to file a bad acts motion pursuant to NRS 48.045.

The State appears to recognize the admission of the beating was error. The State concludes that the error was "nothing but harmless" (State's Answering Brief pp. 25). The State approaches the appeal with this type of argument on several issues. Apparently, the State recognizes that errors occurred throughout the trial but then argue there was overwhelming evidence of guilt and the errors were harmless. Mr. McCarty was sentenced to death in a trial riddled with errors, some of which appear to be intended by the State.

In Tabish and Murphy, 119 Nev. 290, 72 P.3d 584 (2003), this Court concluded that the district court manifestly abused its discretion in permitting the introduction of separate charges. In Tabish and Murphy, this Court provided: "We reject the State's contention that all the counts charged were part of a common scheme or plan, the 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.

Interestingly enough, the State made identical arguments for the admission of the Ms. Estores beating as the State made in introducing the prior bad acts in Tabish and Murphy. In Tabish and Murphy the State argued there was a common thread between the beatings of Mr. Casey at the Jean sand pit and the Binion murder. The State argued there was a common ground between the counts of

greed, money, and the beating of an elderly gentleman. 119 Nev. 293, 302-03. Here, the State argues that there was a common thread between the prior beating of Ms. Estores and her eventual murder. One striking dissimilarity in the cases exist. In Tabish and Murphy, Tabish was accused of killing Mr. Binion and beating Mr. Casey. Whereas, Mr. McCarty was not involved in the beating of Ms. Estores, a month prior to the homicides.

It is obvious that the beating of Ms. Estores was improperly admitted in Mr. McCarty's trial. This is exactly why the State hopes this Court will determine the error to be harmless. The error was not harmless in Tabish and Murphy which was a non-capital murder trial. Mr. McCarty was sentenced to death. How many times will the State be permitted to argue the errors are harmless before reversal is mandated.

The trial prosecutor represented that no bad acts would be admitted against Mr. McCarty. Yet, on appeal, the State does not dispute that this evidence amounted to a prior bad act. In fact, the State argued that the beating of Ms. Estores provided a motive pursuant to NRS 48.045. Mr. McCarty is entitled to a new trial.

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.

At trial, Mr. McCarty objected to all three of the hearsay statements admitted at trial. The State recognizes that the district court overruled two of the objections and sustained the third (State's Answering Brief pp. 25). The district court abused its discretion when overruling the two objections. See, Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

A. TESTIMONY OF MELISSA ESTORES

Ms. Estores was permitted to describe Mr. Malone's angry reaction to her statement that she was not Malone's girlfriend. Curiously, the State argues that the our of court statement was not offered to prove the truth of the matter asserted, but rather to demonstrate the effect of the statement upon Malone (State's Answering Brief pp. 25).

Actually, the out of court statement was offered to prove the truth of the matter asserted. It is obvious from the record that the State wanted to introduce evidence that Mr. Malone was furious with Ms. Estores' assertion that she was a free agent. The State's contention that the statement was used to demonstrate the effect upon Malone is true in part. Mr. Malone was furious and angry. The State then used this hearsay information to establish an apparent motive. The State's argument only works if the reader does not understand the facts of the case.

The confrontation clause of the United States Constitution guarantees a defendant an opportunity to confront the witnesses against him. Mr. Malone was not given an opportunity to confront Mr. Malone. Mr. McCarty objected pursuant to the sixth and fourteenth amendments to the United States Constitution.

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, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (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).

The district court abused its discretion when it permitted Ms. Estores to describe the reaction of Mr. Malone over the defense objection.

B. TESTIMONY OF RAMAAN HALL

Mr. Hall was permitted to describe the demeanor of Mr. Malone after he had been associating with the defendant. The prosecution posed the question that Mr. Malone was acting "like a pimp" because he was associating with Mr. McCarty. An objection was lodged.

Again, the State seems to recognize that the statement amounted to hearsay. In the State's Answering Brief, the State claims they agreed to "move on" during a bench conference to address the defense objection. The defense did not want to highlight the hearsay any further and declined a cautionary instruction. However, the State recognizes the hearsay and confrontation clause violation but claims that there agreement to "move on" seems to satisfy any constitutional violation. Additionally, the State argues that the district court did not err because the court sustained the objection. Throughout the trial, the State committed acts of misconduct and simply claim that the errors are harmless. The fact that the State

agreed to move on does not excuse the continuous violations that occurred throughout the trial.

C. TESTIMONY OF DETECTIVE COLLINS REGARDING THE D.A. BELIEVING MR. MCCARTY TO BE A LIAR.

Mr. McCarty objected to the State being permitted to introduce detective Collins' statements that the district attorney believed Mr. McCarty to be a liar. Detective Collins provided the following statements:

> ...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.A. Vol. 12 pp. 2559).
>
> - - as long as you're not providing the entire truth that the D.A. is not going to give you what you want (A.A. Vol. 12 pp. 255-2560).
>
> Why should he (the D.A.) talk to you when he knows you're lying to us? (A.A. Vol. 12 pp. 2558-2559).
>
> When - - when we showed him this, this was his first words, he goes, "You know, the guy's not telling the truth." (A.A. Vol. 12 pp. 2558-2559).
>
> - - Las Vegas to talk to you if you're not willing to tell him the truth? (A.A. Vol. 12 pp. 2558-2559).
>
> 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).

Not only did the State claim they were unsure whether they would use the defendant's statements, the State was then permitted to introduce highly inflammatory hearsay statements in Mr. McCarty's recorded statements.

The State argues that the statements were not offered for the truth of the matter asserted (State's Answering Brief pp. 26). If the State was not offering the statements for the truth of the matter asserted why not agree to redact the statements. The State continuously argued that Mr. McCarty was lying during his statements. In fact, on appeal, the State argues that Mr. McCarty's statements

amounted to a "series of lies" (State's Answering Brief pp. 27). Here, the detective was permitted to state that the D.A. believed that Mr. McCarty was continuously lying. During closing argument, the prosecutor continuously informed the jury that Mr. McCarty had lied during his statements to the police. On appeal, appellate counsel argues that Mr. McCarty's statements amounted to "a series of lies". However, the State argues that the statements were not used for the truth of the matter asserted. In fact, these are exactly the reasons the State introduced the statements.

Lastly, the State continues with their theme that these hearsay statements amount to harmless error given the overall strength of the evidence (State's Answering Brief pp. 27). It is obvious that the prosecutors continually introduced evidence that was error because the state continuously argues the errors are harmless. This is an overwhelming theme in this case.

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.

Mr. McCarty was precluded from introducing Mr. Ramaan Hall's prior inconsistent statement regarding the condition of the victims at the time they left the apartment. At trial, Mr. Hall testified that the victims left with the defendant because they were beaten. Mr. McCarty cross-examined Mr. Hall extensively regarding this allegation. On the same day of trial, Nicolin Broderway testified. On May 30, 2006 Ms. Broderway told police in a recorded statement that Ramaan Hall indicated that the victims were fine when they left the apartment. Ms.

Broderway even told the police that Mr. Hall confirmed that the victim's were fine (A.A. Vol. 30 pp. 6714). Mr. Hall was confronted regarding the willingness of the victims to go with the defendants. Therefore, Mr. Hall was confronted and given an opportunity to explain the fact that he had told the police the women went willingly. Thereafter, Mr. McCarty desired to question Ms. Broderway regarding Mr. Hall's prior inconsistent statement.

> 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.

The State objected and the defense cited NRS 51.035 during the bench conference (A.A. Vol. 30 pp. 6657). Defense counsel further informed the district court that the State had elicited Mr. Hall's testimony that the girls had suffered injury yet had previously informed Ms. Broderway that the girls had not suffered injury. During the objection (at the bench) defense counsel complained ..."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). The district court precluded the defense from questioning Ms. Broderway regarding the prior inconsistent statement.

Pursuant to Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996), this Court reasoned that a witness must be confronted with a prior inconsistent statement during the trial. Here, Mr. McCarty confronted Mr. Hall extensively regarding his testimony that the girls were injured.

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

Mr. Herb denied having a conversation with his son regarding charges that

were filed against him. On cross-examination, Mr. McCarty desired to play a portion of a jail phone call where Mr. Herb told his son he knew about the charges. The State objected and requested that the district court order the defense to impeach Mr. Herb with a transcript of the call rather than play the call. The defense was precluded from playing the best evidence. The defense moved for a mistrial.

The State argues that Mr. Herb was impeached with the transcript and the district court did not commit error. In fact, the district court just followed the direction of the State who did not want Mr. Herb's voice to be heard on the jail phone call.

The best evidence rule is a common law rule of evidence which can be traced back at least as far as the 18th century. In v. Barker, (1745) 1 ATK, 21, 49, 26 ER 15 33, Lord Harwicke stated that no evidence was admissible unless it was "the best that the nature of the case will allow". The best evidence rule has been codified in rules 1001-1008 of the federal rules of evidence. These rules generally require the original or reliable duplicate of any "writing, recording, or photograph, when the content of that evidence is given legal significance by substantive law".

Here, the defense desired to impeach Mr. Herb with the best evidence. The recording of the call between Mr. Herb and his son was the best evidence. The tape was a jail recording which had been provided by the State. The State was successful in precluding the best evidence being utilized by Mr. McCarty simply because they didn't want the jury to hear it. Now, on appeal the State argues that Mr. Herb was sufficiently impeached with a transcript. The State makes no effort to explain why Mr. McCarty should have been precluded from utilizing the best evidence.

The State argues that Mr. McCarty cites no authority for the proposition that the district court abused its discretion when it directed the form of impeachment. Mr. McCarty specifically objected to the failure to properly utilize the best evidence (Opening Brief pp. 63). Mr. McCarty should not have been precluded from proper cross-examination and redirected to impeach in a manner that satisfied the State.

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. Initially, Ms. Fontana attempted to explain that she could consider all four forms of punishment if the murders had been a result of accident or drunk driving where someone had been killed. However, when pressed with the concept of first degree murder, Ms. Fontana was substantially impaired from considering the possibility of parole. Ms. Fontana stated that she would have a "hard time seeing them turned loose on the street". Defense counsel challenged for cause and the district court denied the challenge.

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. Ms. Fontana could not consider all four forms of punishment. The State acknowledges that Ms. Fontana explained that it would be difficult to consider the possibility of parole (State's Answering Brief pp. 28). The State then argues that "difficulty is not the standard" for a challenge for cause. However, the juror's views clearly substantially impaired her from considering all four forms of punishment. See,

Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed 2d 776 (1968); Wainwright v. Witt, 469 U.S. 412, 105 Sup. Ct. 844, 83 L. Ed. 2d 841 (1984).

The State argues that the juror was not seated on the jury and there was no allegation that the seated jury was not impartial. The State is absolutely wrong. On appeal and at trial Mr. McCarty bitterly complained that one juror was continuously sleeping. This argument has been extensively briefed. Mr. McCarty was forced to use a peremptory challenge when the challenge for cause was obvious. Mr. McCarty was left with an all non-African American jury with one juror asleep during major portions of the trial and 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.

Mr. McCarty can demonstrate a pattern of misconduct that occurred throughout this trial. Mr. McCarty requests this Court consider the issues enunciated in this argument as well as the other acts of egregious misconduct articulated throughout the briefs.

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

The State's Answering Brief concludes the prosecutor's remarks could not have substantially affected the jury's verdict and could be considered harmless (State's Answering Brief pp. 30). Again, the State recognizes that the prosecutor injected error into the trial. In a repeated pattern, the State argues that numerous issues are harmless.

The State presented cell phone evidence during trial. This evidence was damaging to Mr. McCarty. The State failed to file the proper expert notice

pursuant to NRS 174.234. Prior to trial, the court entertained arguments regarding the State's failure to timely file the notice requirement. The State presented cell phone information through the custodian of records.

Just prior to closing argument, the defense asked the court to preclude the State from referring to the custodian of records as an "expert". In direct disregard for the court's order, the prosecutor referred to the custodian of records as an expert. Defense counsel objected and ultimately moved for a mistrial. The court referred to the State's comment as "unfortunate" (A.A. Vol. 40 pp. 8934).

This is one of the most seasoned capital prosecutors in the State of Nevada. He did not accidentally make a mistake. Error was injected throughout this trial.

B. BURDEN SHIFTING

During trial, the prosecutor told the jury that "they want us to call his alibi witnesses for him". Defense counsel objected. During closing argument, the prosecutor argued that defense counsel made no closing argument regarding the pandering charges. The State does not dispute that the prosecutor made these arguments. Yet again, the State contends that any error should be deemed harmless (State's Answering Brief pp. 31). In fact, the State's arguments are non-sensical.

First, the State contends that the prosecutor's comments "they want us to call his alibi witnesses for him" were the prosecutor's efforts to rebut Mr. McCarty's assertions, in his recorded interviews, the witnesses would provide an alibi. The State's argument makes no logical sense.

The defendant did not file an alibi notice nor was it the defendant's position at trial that the witnesses provided an alibi. Undoubtedly, Mr. McCarty told detectives in one of his many statements that two witnesses could provide an alibi. The State originally claimed that they were not sure that they would utilize Mr.

McCarty's statements. Thereafter, without the defense being able to comment in opening argument on the statement, the State played all of Mr. McCarty's statements. Then, the prosecutor argued this comment which shifted the burden to the defense.

The defense never implied that the State should be responsible for calling alibi witnesses as no alibi was ever suggested at trial. The prosecutor's comments squarely shifted the burden to the defendant. The jury could only ponder why the defense had not bothered to call the alibi witnesses. On appeal, the State now argues that this error was harmless.

Next, the prosecutor argued that McCarty made no effort, during closing argument, to dispel the pandering charge. Unbelievably, the State in their Answering Brief contends, "this argument only pointed out a deficiency in the defenses' closing argument..." (State's Answering Brief pp. 31). The State should be aware that the defense is not required to make a closing argument. It is improper for the State to inform the jury that the defenses silence to a charge amounts to guilt. The State claims that any burden shifting connected to the pandering charge was cured by the court's instructions to the jury (State's Answering Brief pp. 32). The State repeatedly claims the error was cured by instructions. The errors are obvious. Mr. McCarty did not have a duty to call witnesses on his behalf. Mr. McCarty did not have a duty to make a closing argument. For the prosecutor to comment on the failure of McCarty to call two witnesses and address the pandering charge was highly improper.

Interestingly enough, the State cites to People v. Santana, 255 P.3d 1126, 1131 (Colo. 2011), for the proposition that the prosecutor is permitted fair response to the comments of defense counsel (State's Answering Brief pp. 31).

Unfortunately, the prosecution was not commenting on defense counsel's comments. The prosecutor was commenting on the silence of the defense. The defense had a right to hold the State to their burden of proof without comment. Therefore, the State's argument is meritless.

Additionally, Mr. McCarty never stated at trial that the State had a burden to call his "alibi witnesses". This is because Mr. McCarty never claimed an alibi at trial. These comments were highly improper and amounted to burden shifting in violation of the United States Constitution.

C. OTHER ACTS OF PROSECUTORIAL MISCONDUCT

The following is a list of other acts noted and objected to during trial. The prosecutor referred to the defendant as a "thug". The prosecutor asked the lead detective if Mr. McCarty's statements had been altered. The prosecutor elicited evidence that Mr. McCarty was shackled while in the desert area.

Perhaps, each of the incidents viewed in a vacuum do not amount to prejudicial error. However, when the trial is taken as a whole, the errors become overwhelming. Mr. McCarty cited to extensive state and federal authority condemning prosecutorial misconduct. The State even acknowledged that the trial was "contentious" (State's Answering Brief pp. 24). The case was contentious because of the errors being consistently implemented by the State. Mr. McCarty is entitled to a reversal of his trial and/or his sentence of death based upon unconstitutional misconduct.

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

The State concedes that the prosecutor's elicited the defendant's custody status on two occasions. Yet again, the State argues the error was harmless (State's

Answering Brief pp. 34). In essence, the State recognizes that Mr. McCarty caught the State in many errors. The State repeatedly claims every error is harmless. At what point does the State's admission to all of the errors amount to reversible error.

The State had no right to inform the jury of Mr. McCarty's custodial status. On appeal, the State argues that one of the comments was "minor and fleeting" (State's Answering Brief pp. 34). Comically, the State claims that the other comment regarding Mr. McCarty's custody status was to explain why detectives were assisting him in walking in the desert area (State's Answering Brief pp. 34)

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

This issue stands submitted as enunciated in the Opening Brief.

XII. THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 6, 1 1, 12, A ND 39 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This issue stands submitted as enunciated in the Opening Brief.

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 along with Mr. Malone of battery with substantial bodily harm on Ms. Estores. Mr. McCarty and Mr. Malone were also charged with the robbery of Ms. Estores after the battery concluded. The State theorized that Mr. Malone physically beat Ms. Estores and Mr. McCarty aided and abetted.

Mr. Malone's jury found him not guilty of the robbery and only guilty of simple battery. Whereas, Mr. McCarty's jury found him guilty of both robbery and battery with substantial bodily harm.

The State argues that inconsistent verdicts by different juries as to co-conspirators are permissible (State's Answering Brief pp. 38). See, People v. Palmer, 15 P.3d 234, 236-37 (Cal. 2001).

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 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 Mr. Malone's trial, the jury rejected the charge of robbery. The jury also rejected Ms. Estores' assertion that she had suffered substantial bodily harm. The jury also spared Mr. Malone's life. Mr. McCarty was found guilty of the battery with substantial bodily harm. Yet, he did not lay a hand on Ms. Estores. Mr. McCarty was found guilty of robbery. Mr. McCarty was sentenced to death. It is shocking that one jury would reject the allegation that Ms. Estores suffered substantial bodily harm and robbery at the hands of Mr. Malone. Mr. McCarty's jury found him guilty of both counts. In viewing the evidence in the light most favorable to the State, there was insufficient evidence to convict Mr. McCarty of these counts.

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.

During the penalty phase, the father of Charlotte Combado told the jury that the defendant should receive the maximum penalty (A.A. Vol. 41 pp. 9174). The

State acknowledges that this statement was made to the jury. Prior to this statement, the defense complained that the prosecution had been presenting inappropriate victim impact (A.A. Vol. 41 pp. 9175). During the previous complaint, the prosecution argued that the victim impact was not inappropriate because none of the witnesses had asked for a particular penalty (A.A. Vol. 41 pp. 9175). Additionally, the prosecution admitted that they had reviewed Mr. Combado's notes prior to his testimony.

The State acknowledges that the district court intervened after Mr. Combado's improper request for the maximum penalty. Mr. McCarty must demonstrate a reasonable probability that the jury was influenced by this comment. "In making this determination, this Court should consider four factors: 1) whether the mark was solicited by the prosecution; 2) whether the district court immediately admonished the jury; 3) whether the statement was clearly and enduringly prejudicial; and 4) whether the evidence of guilt was convincing" Middleton v. State, 114 Nev. 1089, 1113, 968 P.2d 296, 312 (1998). Here, the defense had already complained that the State was eliciting improper victim impact. When the inappropriate statement was made by Mr. Combado, the State made no effort to intervene. The State even claimed they had reviewed Mr. Combado's notes prior to his statement.

Mr. McCarty declined a limiting instruction because he did not want to highlight the comment. Obviously, the jurors all knew Mr. Combado desired the death penalty for Mr. McCarty. The statement was highly prejudicial. The statement is prejudicial for the very reason this Court addressed this type of comment in Middleton (fourteen years prior).

Additionally, it cannot be ignored that Mr. Malone was not sentenced to

death by a separate jury. The State's theory was that Mr. Malone had physically beaten the victims to death and that Mr. McCarty was the accessory. Mr. McCarty has a significant physical handicap. The error mandates a reversal of the death sentence.

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.

Mr. McCarty's death sentence is excessive considering both the crime and the defendant. NRS 177.055(2)(e); Dennis v. State, 116 Nev. 1075, 1084, 13 P.3d 434, 440 (2000). Mr. McCarty's death sentence is disproportionate given the sentence of his co-defendant.

The United States Supreme Court proposed the proportionality doctrine in three cases during the 1980's, namely Enmund v. Florida, 458 U.S. 782, 102 Sup. Ct. 3368, 73 L. Ed. 2d 1148 (1982); Solem v. Helm, 463 U.S. 277, 103 Sup. Ct. 3001, 77 L. Ed. 2d 637 (1983); and Tyson v. Arizona, 481 U.S. 137, 107 Sup. Ct. 1676, 95 L. Ed. 2d 127 (1987), to clarify the key principle of proportionality within the cruel and unusual punishment clause of the eighth amendment. The fundamental principle behind proportionality is that the punishment should fit the crime. In 1983, the United States Supreme Court ruled that Courts must do three things to decide whether a sentence is proportional to a specific crime: 1) compare the nature and gravity of the offense and the harshness of the penalty, 2) compare the sentences imposed on other criminals in the same jurisdiction; ie. whether more serious crimes are subject to the same penalty or to less serious penalties, and 3) compare the sentences imposed for commission of the same crime in other

jurisdictions. Helm, 463 U.S. 277, 292.

In Helm, the United States Supreme Court explained that the principle of proportionality is deeply rooted in the common law. It was expressed in magna carte, applied by English courts for centuries, and repeated in the English bill of rights in the language that was adopted in the eighth amendment. 463 U.S. 277, 284-86. "Comparisons can be made in light of the harm caused or threatened to the victim or to society, and the culpability of the offender". Id. 292-294. In several cases, the court has applied the principle to invalidate criminal sentences. See, Weems v. United States, 217 U.S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793 (1910).

The United States Supreme Court has recognized that the court must consider the proportionality of others similarly situated. Here, Mr. McCarty's statement is disproportionate.

During Mr. Malone's penalty phase, the jury learned that Mr. Malone had previously been convicted of rape. More importantly, Mr. Malone was accused of a third murder. The State's theory at trial was Malone was the muscle behind the crimes. Mr. Malone had been in a dating relationship with one of the victims. Mr. Malone had previously beaten this victim. Mr. McCarty is severely handicapped. Therefore, the State argued that Mr. McCarty was an aider and abetter.

During trial, the defense complained that the prosecutor had been permitted to argue proportionality of co-defendants in a case pending in this Court. In State of Nevada v. Timothy Burnside, C235798-2, the prosecution was permitted to inform the jury that Mr. Burnside, (who was ultimately sentenced to death) should receive the maximum punishment because, Mr. McKnight, his co-defendant, was only the get away driver.

In Flannagan v. State, 112 Nev. 1409, 930 P.2d 961 (1996), this Court

permitted the State to inform the jury regarding the punishments of co-defendants. Proportionality has been part of our jurisprudence for decades. A review of the record provides a manifest injustice. Mr. Malone's life was spared yet Mr. McCarty was sentenced to death.

In the most cavalier fashion, the State agues that the fact Mr. Malone's jury sentenced him to life "is of no moment in this case" (State's Answering Brief pp. 41). The disproportionality pursuant to the Eighth Amendment to the United States Constitution is obvious.

Mr. McCarty was denied the opportunity to prevent relevant evidence regarding proportionality between the defendants. Mr. Malone was sentenced to life imprisonment in a separate capital trial. Mr. Malone was accused of a third murder and had actually been convicted of rape. The State was permitted to introduce Mr. Malone's third murder allegation over Mr. Malone's objection.

The State argues that Mr. Malone's criminal history is not relevant. The district court agreed (State's Answering Brief pp. 9). The State relies on Coleman v. State, 116 Nev. 687, 725, 7 P.3d 426, 450 (2000) for the proposition that "evidence presented in mitigation must be relevant to the offense, the defendant, or the victim". See also, Gallego v. State, 117 Nev. 348, 364, 23 P.3d 227, 238 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. _, 263 P.3d 235 (2011). It is ironic that the State has been permitted to introduce evidence of proportionality to obtain a death sentence. Yet, Mr. McCarty was denied the same right. Here, Mr. McCarty was significantly physically handicapped. Mr. Malone was not. Mr. McCarty's criminal history did not consist of a rape conviction and an allegation of a third murder. Mr. Malone had a much more significant criminal history. Mr. Malone was more culpable for the physical injuries endured by the

two victims according. The State precluded Mr. McCarty from introducing the comparison between the two defendants. This resulted in a grossly disproportionate sentence in violation of the 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 murder yet the jury sentenced Mr. Malone to life without the possibility of parole. The State theorized in both trials that Mr. McCarty wasn't capable of causing the physical injuries to both victims based upon his physical handicap. In Mr. Malone's trial he was accused of a separate murder and have also been convicted of a separate sex related offense. There was no allegation that McCarty had such a significant violent criminal history. Additionally, Mr. Malone was accused of savagely beating Ms. Estores forty-five days prior to the murder.

The State argues that this Court should not consider proportionality review and comparing other similar cases are irrelevant pursuant to NRS 177.055(2) (State's Answering Brief pp. 40).

In Helm, the United States Supreme Court explained that the principle of proportionality is deeply rooted in the common law. It was expressed in magna carte, applied by English courts for centuries, and repeated in the English bill of rights in the language that was adopted in the eighth amendment. 463 U.S. 277, 284-86. "Comparisons can be made in light of the harm caused or threatened to the victim or to society, and the culpability of the offender". Id. 292-294. In several

cases, the court has applied the principle to invalidate criminal sentences. See, Weems v. United States, 217 U.S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793 (1910).

A review of clearly established federal law provides guidelines for proportionality review. Mr. McCarty played a lesser role in the murders of the victims. Without any doubt Mr. Malone was much more physically capable of applying the brutal wounds suffered by the victims. Mr. Malone was accused of a separate murder. Mr. McCarty was not. Mr. Malone had a prior sex offense conviction. Mr. Malone previously attacked Ms. Estores prior to the murders. It is difficult, if not impossible to argue that Mr. McCarty is more deserving of the death penalty than Mr. Malone. In fact, the State does not even attempt this analysis.

It is difficult to comprehend that a handicap man with a lesser criminal record was sentenced to death for identical crimes, when Mr. Malone was not.

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.

In Mr. McCarty's Opening Brief, he specifically complained that the prosecutor's comments warranted reversal and cited state and federal authority in support of the argument. A review of the State's Answering Brief is devoid of any response to Mr. McCarty's argument. The State obviously recognizes that the prosecutor's argument amounted to misconduct. Mr. McCarty is entitled to a

reversal based upon prosecutorial misconduct.

Rule 31(d) Consequences of Failure to File Briefs or Appendix states:

> If an appellant fails to file an opening brief or appendix within the time provided by this Rule, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file an answering brief, respondent will not be heard at oral argument except by permission of the court. The failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made. If an appellant has not filed a reply brief, oral argument will be limited as provided by Rule 34(c).

In R v. State, 126 Nev. Adv. Op 19, 233 P. 3d 357 (2011), this Court explained,

> We expects all appeals to be pursued with high standards of diligence, professionalism, and competence, and that the supreme court intends to impress upon the members of the bar its resolve to end lackadaisical appellate practices. Nev. R. App. P. 31(d) is a discretionary rule providing that if a respondent fails to file an adequate response to an appeal, the supreme court may preclude that respondent from participating at oral argument and consider the failure to respond as a confession of error. In determining whether to treat the failure to brief an issue as a confession of error under Rule 31(d) the consequences should be proportionate to the failure (internal citations omitted).

Therefore, Mr. McCarty is entitled to a reversal based upon the failure to the State to address this issue.

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. 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.

In the State's Answering Brief, they cite no authority for the proposition that the prosecutor may shift the burden to the defense in a penalty phase. In fact, the State cites no case law or statutes in this argument. The State complains that Mr. McCarty's argument is "misleadingly presented" (State's Answering Brief pp. 41). The State contends that the prosecutor was addressing the mitigation specialist and her failure to contact witnesses at the time the improper argument was made to the jury. Unfortunately, the State fails to cite any portion of the prosecutor's argument to substantiate this contention.

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 cites no authority for the proposition the defense is required to contact witnesses. Therefore, assuming *arguendo* that the prosecutor was referring to the mitigation specialist, burden shifting still exists. The State's response is curious. The State relies upon no legal authority. The State claims that the prosecutor should be permitted to complain that the mitigation specialist has a duty to contact witnesses. This admission by the State should result in reversal as it proves burden shifting. More importantly, the State's contention is inaccurate.

Throughout the brief, it appears that the State has either failed to read the record on appeal or Appellant's Opening Brief. The prosecutor's own words during the closing argument speak for themselves. The prosecutor complained that Mr. McCarty's Aunt claimed child abuse yet the defense failed to call Margo's two brothers and sisters. The prosecutor in fact began telling the jury that the defense "chose not to call" the brothers and sisters. Now, the State contends that the prosecutor was talking about the mitigation specialist. It is obvious that the prosecutor was referring to the individual that he was speaking of (Margo).

A close review of the State's answering brief leads to the conclusion that the State is unable to defend the conduct of the prosecutor. The prosecutor unconstitutionally shifted the burden to Mr. McCarty. The prosecutor told the jury that Mr. McCarty should have called Margo's brothers and sisters to verify the child abuse. Even the State's own contention that the mitigation specialist failed to call Margo's brothers and sisters equates to burden shifting. Lastly, the State failed to cite any legal authority to support this issue.

The State continuously committed misconduct in an effort to obtain a sentence of death. Mr. McCarty is entitled to a new penalty phase.

XIX. THE DEATH PENALTY IS UNCONSTITUTIONAL.

This argument stands submitted as enunciated in the Opening Brief.

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

In the instant case, numerous egregious errors occurred. Mr. McCarty's statements should have been suppressed based upon multiple constitutional violations. Compounding this error, there was overwhelming evidence that the prosecution intended to utilize the defendant's statements and successfully precluded the defense from addressing the statements in opening argument and on cross-examination. Moreover, Mr. McCarty proved that the prosecution was unable to enunciate a race neutral reason to remove Ms. Brooks without an abuse of power. Pretext has been shown. Thus, the prosecutorial misconduct in this case is obvious.

Moreover, the record regarding the sleeping juror is appalling given the fact that the defendant was ultimately sentenced to death by an all non African American jury. Throughout their Answering Brief, the state continuously admits the prosecutor injected error into the trial, however, the errors were harmless. The State admits to introducing bad acts, injecting hearsay, and even prosecutorial misconduct. At this point, the errors cannot be considered harmless.

Importantly, Mr. McCarty's death sentence is disproportionate given the sentence of his co-defendant. Here, each issue alone warrants reversal. However, the cumulative effect of the errors is obvious and overwhelming. Mr. McCarty was sentenced to death in a trial riddled with errors, some of which appear to be

intended by the State. Therefore, Mr. McCarty is entitled to a reversal of his convictions.

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.

CONCLUSION

Based on the foregoing, Mr. McCarty respectfully requests this Court order reversal of his convictions.

DATED this 12th day of November, 2013.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Appellant
JASON MCCARTY

CERTIFICATE OF COMPLIANCE

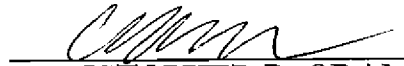
I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman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

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7). Pursuant to NRAP 32(7)(d), the undersigned has filed the appropriate motion so this appellate brief may comply because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains more than 40 pages.

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 12th day of November, 2013.

Respectfully submitted by,



CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Appellant
JASON MCCARTY

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 12, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

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 REPLY BRIEF

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
STEVE WOLFSON, ESQ.
District Attorney
Nevada Bar No. 0002781
200 Lewis Avenue
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

STATE OF NEVADA

FEDERAL CIRCUITS

EIGHTH JUDICIAL DISTRICT COURT OF NEVADA

NEVADA REVISED STATUTES

OTHER JURISDICTIONS

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.

JURISDICTIONAL STATEMENT

The Jurisdictional Statements stands as enunciated in Mr. McCarty's Opening Brief.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in Mr. McCarty's Opening Brief.

STATEMENT OF FACTS

The Statement of the Facts stands as enunciated in Mr. McCarty's Opening Brief.

ARGUMENT

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

On May 23, 2006, Detective Collins drafted an affidavit in support of a search warrant swearing that Mr. McCarty was responsible for the kidnapping and murders of Ms. Combado and Ms. McGee. On May 25, 2006, Mr. McCarty was formally arrested. Approximately fourteen days later on June 7, 2006, Mr. McCarty appeared before the court and served a copy of the criminal complaint for the first time. During this thirteen/fourteen day period, Mr. McCarty made numerous highly incriminating statements.

In an effort to suppress Mr. McCarty's statements, McCarty objected to the illegal detention at both the justice court and district court levels.

On appeal, Mr. McCarty specifically cited to Rumsfeld, 542 U.S. 507, 124 Sup. Ct. 2633, 159 L. Ed. 578 (2004), where the United States Supreme Court held that the Fourth Circuit Court of Appeals erred by denying Mr. Hamdi's immediate access to counsel upon his detention and by disposing of his case without permitting him to meet with an attorney. Hamadi was held as an enemy combatant. The United States Supreme Court determined that the fifth amendment's due

process clause demanded that a citizen be given a meaningful opportunity to contest his detention before a neutral decision maker, including the right to counsel.

Cleverly, the State's Answering Brief fails to address this issue. The State simply argues that Mr. McCarty's right to counsel did not begin until the filing of the criminal complaint on June 7, 2006 (State's Answering Brief pp. 15). This is not an issue of first impression before this Court. However, McCarty is concerned that the issue is being lost amongst the numerous subportions of McCarty's request for suppression. Therefore, Mr. McCarty respectfully requests that this issue be considered as follows:

A. Can the State of Nevada hold Mr. McCarty at a detention center for thirteen/fourteen days without being brought before a magistrate and formally charged; including the right to the appointment of counsel.

In order to render the appropriate decision the following uncontroverted facts must be considered;

1) The State does not dispute that McCarty was formally arrested on May 25, 2006.

2) The State does not dispute that Mr. McCarty was not formally charged by way of criminal complaint until June 7, 2006 (State's Answering Brief pp. 15).

3) During this period of time the State obtained numerous incriminating statements from Mr. McCarty (the extent of the incriminating statements are outlined during the prosecutor's rebuttal closing argument).

4) The State does not dispute that there was a thirteen day period between arrest and Mr. McCarty being formally charged (State's Answering Brief pp. 16).

5) Mr. McCarty even assisted law enforcement by being escorted from the Henderson Detention Center to search for the instrumentalities, of death during this thirteen day period.

In the Opening Brief, Mr. McCarty urged this Court to consider this issue

going as far as suggesting that the State of Nevada was treating him in a similar fashion to an enemy combatant. Mr. McCarty does not wish to exaggerate this constitutional violation. However, it is important to recognize that neither the justice court nor district court observed the seriousness of this issue.

How can the State of Nevada detain an individual on these type of charges without bringing them before a magistrate and formally charging the defendant. It is important to remember that Mr. McCarty was not being held on any type of parole or probation hold. Mr. McCarty was not being held on some other unrelated warrant. Mr. McCarty was held on the instant charges.

In Powell v. Nevada, 511 U.S. 79, 114 Sup. Ct. 1280, 128 L. Ed. 2d 1 (1994), the United States Supreme Court sua sponte raised the question whether a four day delay in judicial confirmation of probable cause violated the fourth amendment. Id. In Powell, the defendant was arrested on November 3, 1989 for child abuse. Four days later, on November 7, a magistrate found probable cause to hold him for a preliminary hearing. At trial, the State of Nevada presented prejudicial statements that Powell had made to police on November 7th. Mr. Powell was sentenced to death.

Here, Mr. McCarty was held for thirteen/fourteen days. At trial, the prosecutor argued Mr. McCarty's highly incriminating statements during this thirteen day period. The jury sentenced Mr. McCarty to death. In Powell, the United States Supreme Court held that this Court made error in failing to retroactively apply the rule cited in Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), which provided that judicial probable cause determination must generally be made within forty-eight hours of a warantless arrest, and that absent extraordinary circumstances a longer delay is unconstitutional.

The question presented in Corley v. United States, 556 .S. 303, 129 Sup. Ct.

1558, 173 L. Ed. 2d 443 (2009), was whether congress intended 18 U.S. C. Sec 35014 to discard, or merely to narrow, the rule in McNabb v. United States, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943) and Mallory v. United States, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge. The United States Supreme Court held that Congress meant to limit, not eliminate, McNabb-Mallory.

Without McNabb-Mallory, federal agents would be free to question suspects for extended periods before brining them out in the open, even though custodial police interrogation, by its very nature isolates and pressures the individual, inducing people to confess to crimes they never committed. 556 U.S. at 305. (Internal citations omitted).

In Corley, the Court set out the standard for determining the issue of voluntariness.

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) **whether or not such defendant was without the assistance of counsel when questioned and when giving such confession**. 556 U.S. at 310. (emphasis added).

In Corley, the Court reiterated its position in Upshaw v. United States, 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), that even voluntary confessions are inadmissible if given after an unreasonable delay in presentment. The court explained,

Despite the Government's confession of error, the D.C. Circuit has

> thought McNabb's exclusionary rule applied only to involuntary confessions obtained by coercion during the period of delay, and so held the defendant's voluntary confession admissible into evidence. This was error, and we reiterated the reasoning of a few years earlier. In the McNabb case we held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to secret interrogation so persons accused of crime. Upshaw consequently emphasized that even voluntary confessions are inadmissible if given after an unreasonable presentment in delay. 556 U.S. at 308. Citing, 335 U.S. at 413, 69 S. Ct. 170, 93 L. Ed. 100.

Mr. McCarty's lack of presentment to a magistrate and numerous incriminating statements thereafter, is the exact scenario the United States Supreme Court aimed to prevent.

NRS 171.178 dictates that an arresting officer making arrest under a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate in power to commit persons charged with offenses against the laws of the State of Nevada.

> The purpose behind NRS 171.178 is to prevent "resort to those reprehensible practices known as the third degree which, through universally rejected as indefensible still find their way into use. It aims to avoid all the evil implications of secret interrogations of persons accused of crime. McNabb v. United States, 318 U. S .332, 344, 63 Sup. Ct. 608, 614 87 L. Ed. 819 (1943); Sheriff, Clark County v. Berman, 99 Neev. 102, 105-06, 659 {. 2d 298, 300 (1983); Morgan v. Sheriff, 92 Nev. 544, 546, 554 P. 2d 733, 734.

Speedy arraignment is principally intended to ensure that the accused is properly informed of his privilege against self incrimination. Berman, 99 Nev. At 106, 659 P.2d at 300; Brown v. Justice Court, 83 Nev. 272, 276, 428 P.2d 376, 378 (1967). In Hubner v. Nevada, this Court held that mere delay between arrest and arraignment, without some showing of prejudice to defendant's constitutional right does not deprive the court of jurisdiction to proceed. Berman, 99 Nev. at 106, 656 P.2d at 303; Brown, 83 Nev. at 276, 428 P. 2d at 378. See, Hubner v. Nevada, 103 Nev. 29, 731 P. 2d 1330 (1987). "Where there has been no interrogation during the delay, and the accused has not confessed or made incriminating

statements, delay has caused no prejudice to the accused, and his rights have not been violated. Id.

Mr. McCarty made highly incriminating statements during the thirteen day delay. The constitutional violation has previously been addressed by the United States Supreme Court. This case provides facts more egregious than those considered in Powell. The suppression of Mr. McCarty's statement after his arrest and before June 7th required suppression.

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

Mr. McCarty's statement on May 25, 2006 should be suppressed. The State argues that McCarty's May 25th interview should not be suppressed as he was not in custody and Miranda was not necessary (State's Answering Brief pp. 8).

In support of the argument McCarty was not in custody, the State provides factual information that is directly belied by the detectives. The State argues that Detectives determined an interview with McCarty was required after speaking to Donald Herb (State's Answering Brief pp. 8). Moreover, the State argues the initiation of the interview with McCarty occurred because he was "a person of interest, not a suspect" (State's Answering Brief pp. 10). The State's assertions are belied by the record. **On May 23, 2006, Detective Collins drafted an affidavit in support of a search warrant swearing under oath that Jason McCarty was responsible for the kidnapping and murders of Ms. Combado and Ms. McGee** (A.A. Vol. 15 pp. 3169). On May 25, 2006, 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). Therefore, the State's contention that Mr. McCarty was a person of interest and not a suspect is directly contradicted by Detective Collins' sworn testimony.

Additionally, the fact that an interview with Donald Herb caused Detectives

the necessity to speak to McCarty is inaccurate. In fact, Detectives swore in an affidavit in support of a search warrant that McCarty was responsible for the kidnapping and murders. This affidavit was signed two days prior to the May 25, 2006, interview. The State's contention is not just misleading it is woefully inaccurate. What more can Mr. McCarty use to demonstrate the inaccuracies of the State's argument McCarty was not in custody. Here, Mr. McCarty can actually prove that the Answering Brief is directly contradicted by sworn testimony of the detectives. When detectives spoke with Mr. McCarty on May 25, 2006, he was the suspect and detectives had already stated this under oath.

In an attempt to establish McCarty was not in custody the State is forced to rely upon misrepresentations.

The State does admit in their Answering Brief that McCarty was not specifically told he could leave (State's Answering Brief pp. 10). However, the State attempts to claim McCarty was not told "he couldn't leave" (State's Answering Brief pp. 10). However, during the May 25, 2006 interview Mr. McCarty asked "to take a walk" and he was told by detectives he was "not walking anywhere" (A.A. Vol. 14 pp. 3118).

On page eleven of the May 25, 2006 interview, Detectives ask McCarty if he took the girls out to the desert and killed them (A.A. Vol. 15 pp. 3176-3177). McCarty was not Mirandized until page 142 of the interview (A.A. Vol. 15 pp. 3176). Then, during the May 25, 2006 interview, Mr. McCarty states, "can we walk for a second" and detective Collins states, "we ain't walking no where" (A.A. Vol. 15 pp. 3180). Prior to the May 25th interview, detectives were searching continuously for McCarty (A.A. Vol. 11 pp. 2470). During the interview, McCarty asked to speak to his parents but was denied this opportunity. A review of the totality of the circumstances leads to the conclusion that McCarty was not free to leave during the May 25th interview.

The standard to determine custody is whether a reasonable person in the suspect's position would feel "at liberty to terminate the interrogation and leave". Roski v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). "Circumstances to be considered are: 1) the site of the interrogation, 2) whether the investigation has focused on the subject, 3) weather the objective indicia of arrest are present, and 4) the length and form of the questioning". Roski, 121 Nev. at 192, 111 P.3d at 695.

The factors that this Court considers when reviewing the indicia of arrest component include "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 freely during questioning; 4) weather 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 the questioning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). No single factor is conclusive. United States v. McKinney, 88 F.3d 551 554 (8th Cir. 1996).

The totality of the circumstances establish that Mr. McCarty was in custody. Admittedly, Mr. McCarty was not at a police station but was located outside a 7-11. Mr. MccCarty was interviewed in the hot, Las Vegas sun. Clearly, the investigation had focused on McCarty. This is uncontroverted because detectives had already sworn in an affidavit that McCarty was guilty of the murders, two days prior to the interview. The length and form of the questioning was extensive. The police had been looking for Mr. McCarty. The interview was very lengthy. In fact, McCarty was eventually Mirandized on page 142 of the State's transcript.

There was an indicia of arrest. The State admits that Mr. McCarty was not told he was free to leave. Mr. McCarty was ultimately arrested during the interview.

Mr. McCarty was handcuffed prior to be read his Miranda warnings (A.A. Vol. 14 pp. 3149). Detectives admitted that Mr. McCarty was a suspect in the murder during the May 25, 2006 interview (A.A. Vol. 14 pp. 3150). Mr. McCarty was not free to move during the interview. Mr. McCarty did voluntarily respond to questions. The atmosphere of police questioning was obviously police dominated. Ultimately, the police arrested Mr. McCarty during the interview. Therefore, Mr. McCarty meets most of the criteria enunciated by this Court in State v. Taylor.

The totality of the circumstances suggests that Mr. McCarty was not free to leave. Mr. McCarty's statement should have been suppressed in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

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

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. 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).

Detective Collins informed Mr. McCarty he would go to the Deputy District Attorney and tell him that McCarty was not being honest with him. It was also implied that the defendant would be able to see his children. It was further implied that the State would be easier on McCarty if he cooperated. McCarty was repeatedly told that his cooperation or lack thereof would matter. McCarty reasonably believed that his cooperation would be communicated to the district attorney and he would be able to "cut a deal with the DA". Other factors include Mr. McCarty's lack of education. He did not graduate from high school. McCarty

suffered from Cerebral Palsy wherein the left side of his body is significantly handicapped. The questioning of McCarty was prolonged and repeated.

The statement was a result of promises of leniency to the defendant. The totality of the circumstances dictate that McCarty's statement was not freely and voluntarily given.

D. OFFERS IN COMPROMISE

NRS 48.105 states in pertinent part:

> 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).

Mr. McCarty's offer to compromise are enunciated in the transcripts cited in the Opening Brief. Mr. McCarty believed the statements were part of the negotiation process and he was actively assisting in cooperating with law enforcement. Accordingly, Mr. McCarty's statement on June 1, 2006 and three statements on June 6, 2006 were inadmissible.

In conclusion, Mr. McCarty's statements should have been suppressed based on multiple constitutional violations.

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.

In summary, the most compelling evidence against Mr. McCarty came from his numerous recorded statements to law enforcement. This assertion is easily established by reviewing the prosecutor's rebuttal closing argument. Approximately, ninety percent of the prosecutor's rebuttal closing argument was dedicated to Mr. McCarty's statements to the police.

Experienced capital litigators recognize that the most damning evidence against the defendant must be addressed in the defense's opening argument in order to gain credibility and begin an effective defense. Mr. McCarty's counsel informed the district court that a lengthy portion of the opening argument was dedicated to Mr. McCarty's numerous statements to law enforcement. The prosecution admitted they would object to defense counsel addressing Mr. McCarty's statements in the opening argument.

Mr. McCarty was ethically precluded from addressing the most damning evidence against him in opening argument. This was based on the prosecution's assertion that they were unsure whether they would use the most damning evidence against Mr. McCarty. Thereafter, Mr. McCarty was unable to examine any of the lengthy list of prosecution witnesses regarding facts and circumstances relied upon by Mr. McCarty in his recorded statements.

In the eleventh hour of trial, the State presented the lead detective and then proceeded to introduce hours of Mr. McCarty's recorded statements. Including, providing the jurors with lengthy transcripts of the statements so they could follow

recordings which were played simultaneously.

Undoubtedly, the jury could not help but wonder why defense counsel had failed to address any of the facts and circumstances surrounding Mr. McCarty's recorded statements. During the recordings, the defense was paralyzed. The defense had failed (based upon ethical duty) to question any of the witnesses about facts addressed in Mr. McCarty's statements. The State then dedicated approximately ninety percent of their rebuttal closing argument to Mr. McCarty's statements. This was prosecutorial misconduct. Now, on appeal the State presents frivolous arguments to justify this misconduct.

In the State's Answering Brief, the State claims "first, it must be noted that Mr. McCarty's misleading claim on appeal may lead the reader to assume that McCarty statements were played for the first time during the State's rebuttal argument, thereby surprising the defense and foreclosing any opportunity to respond" (State's Answering Brief pp. 17-18). Unfortunately, it appears the appellate writer did not read Mr. McCarty's brief nor the record on appeal. In Mr. McCarty's Opening Brief he states, "**thereafter, during the State's case in chief, the State presented almost the entire audio tape and transcripts of all of Mr. McCarty's five statements**" (Opening Brief pp. 35) (emphasis added). For the State's appellate writer to claim that Mr. McCarty was deceptive as to the time the prosecutor relied upon Mr. McCarty's statements is belied by the record and the Opening Brief.

Next, the State claims that Mr. McCarty claimed to preserve this issue as a claim of prosecutorial misconduct. The State claimed, "third, McCarty's claim is not cognizable as an assertion of prosecutorial misconduct because his objection below was not presented to the district court as a claim of prosecutorial misconduct (State's Answering Brief pp. 18). In Mr. McCarty's Opening Brief he states, "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) (Opening Brief pp. 38). During hearings on this issue, the defense informed the district court..."the State is going to back door us, sucker punch us, essentially" (A.A. Vol. 35 pp. 7696) (Opening Brief pp. 38).

The State presented three arguments to explain the prosecutors conduct on this issue. Arguments one and three are directly belied by the transcripts and the Opening Brief. Mr. McCarty made it clear all of Mr. McCarty's statements were played in the eleventh hour of the State's case in chief and bitterly complained that this conduct amounted to prosecutorial misconduct.

Mr. McCarty addressed the difficulty of the rule enunciated by this Court in Glover v. Eighth Judicial District Court, 220 P.3d 684, 125 Nev. Adv. Rep. 53 (2009). Suspiciously absent from the State's response is any mention or analysis regarding the Glover decision.

Prior to opening argument, the defense addressed the concern of the holding in Glover to the district court. Although the defense desired to address the lengthy recorded statements of Mr. McCarty, the State indicated it would object to the defense making any mention of Mr. McCarty's statements. In Glover, this Court chastised defense counsel for repeatedly ignoring the district court's order to refrain from any discussion regarding the defendant's self serving statement. In Glover, this Court noted, "for a defense lawyer to make statements to the jury that are not and cannot "be supported by proof is, if it relates to significant elements of the case, professional misconduct and formally unfair". Id. Citing Arizona v. Washington, 434 U.S. 497, 98 Sup. Ct. 824, 54 L. Ed. 2d 717 (1977) (quoting United States v. Dinitz, 424 U.S. 600, 612, 96 Sup. Ct. 1075, 47 L. Ed. 2d 267 (1976). In Glover this Court further reiterated that the trial court has an array of measures available to deal with improper defense misconduct. **Based upon this Court's order in Glover, defense counsel ethically informed the district court**

of the concern with addressing Mr. McCarty's statement if the prosecution were to object. The prosecution successfully precluded Mr. McCarty from addressing any of his statements to law enforcement.

Now, the Court is well positioned to recognized the significance of the prosecutorial misconduct. Having recognized that defense counsel appropriately followed the rules of this Court and was precluded from addressing the most damning evidence in the case. A review of the rebuttal argument proves the damning nature of Mr. McCarty's statement. The concern of Mr. McCarty is not just related to this case but to trials in general. Based on this Court's ruling in Glover, a highly skilled prosecutor was able to eliminate any mention by the defense of the most damning evidence against the defendant and then at the eleventh hour of trial play hours of the defendant's statements. Thus, leaving the finders of fact bewildered by the failure of the defense to address the damning evidence either in opening arguments or at any time during cross-examination of the numerous witnesses called by the State. The error is obvious. The defense could not have objected in a more vehement fashion. The objection fell on deaf ears. If the Court does not address this dilemma it most certainly will result in future harm to defendants. Mr. McCarty was sentenced to death and was entitled to due process.

In essence, this type of prosecutorial tactic is inevitably capable of repetition. The State claims that Mr. McCarty cites no authority for the proposition that the remedy was suppression of his voluntary statements (State's Answering Brief pp. 18). The State's contention may be correct because this Court could not have foreseen the tactic available to the prosecution based on the ruling in Glover. However, Mr. McCarty recognized this dilemma prior to the opening argument. First, McCarty directly cited to Glover for the proposition that the ethical rules would not permit McCarty to address the issue if the State would object. The

defense observed the tactical advantage that Glover provided the State. This type of tactical advantage is capable of significant repetition until this Court directly addresses this issue. Complaining that the State was permitted to "sucker punch" the defendant, defense counsel bitterly 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 in 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).

This Court must consider the significant damage from the loss of credibility of defense counsel in a capital case where he has not addressed the most damning evidence against the client. Additionally, the tactical advantage provided by the ruling in Glover left the defense with no ability to address any of the witnesses regarding statements made by the defendant to law enforcement. In other words, Mr. McCarty's statements were extraordinarily lengthy and factually specific. The defense was never able to address any of the State's witnesses regarding Mr. McCarty's statements. Moreover, the statements were played in their entirety at the conclusion of a very lengthy trial.

Mr. McCarty would respectfully request that this Court consider the dynamic of a jury observing McCarty and his counsel during the recorded statements and pondering why counsel had not bothered to tell the jury that these issues existed. It is important to remember that McCarty provided many inconsistencies during the statements. McCarty agreed to take authorities to the desert area where the instrumentalities of death could be located. In fact, the jury witnessed a video and audio of Mr. McCarty in the desert area shackled in an effort to recover weapons. The defense had failed to address this type of evidence.

The analysis of prosecutorial misconduct revolves around only one question: did the misconduct rise to the level that it so infected the trial with

unfairness that any resulting conviction would be a denial of due process of law. Dardin v. Wainwright, 477 U.S. 168, 106 Sup. Ct. 2464, 91 L. Ed 2d 144 (1986). Mr. McCarty urges this Court to consider the ramifications of the Glover decision. Mr. McCarty does not dispute the rule of law that precludes the defense from utilizing a defendant's self-serving statement. Mr. McCarty does vehemently object to the State utilizing this rule as a significant tactical advantage, wherein the end result was death.

Defense counsel complained that the circumstances are "exactly backwards" of the situation in Glover. This Court could fashion an exception to the rule enunciated in Glover. Here, it is obvious based upon the State's rebuttal argument that the defendant's statements were very damning. Where there is overwhelming evidence that the prosecution intended to utilize the defendant's statements the State should not be able to preclude the defense from addressing the statements in opening statements or cross-examination under these circumstances. To permit this rule in Glover would permit repetition of this type of due process violation.

Any examination of alleged misconduct must be examined in the context of the trial as a whole. Boyde v. California, 494 U.S. 370, 110 Sup. Ct. 1190, 108 l. Ed 2d 316 (1990). 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). The focus is on whether the alleged conduct affected the fairness of the trial. Smith v. Phillips, 455 U.S. 209, 102 Sup. Ct. 940, 71 l. Ed. 2d 78 (1982).

The dilemma faced by this Court is whether to believe the prosecution's assertion that they were not sure whether they would utilize Mr. McCarty's statement and would object to the defense addressing the statements when the

State proceeded to play video, audio and provide transcripts to the jury of all five statements. The State addressed McCarty's statements on seventeen occasions during rebuttal closing argument (A.A. Vol. 40 pp. 8886)(recordings played 7 times during the rebuttal argument).

In Mr. McCarty's opening brief he cites to pages of the rebuttal argument where the prosecution almost solely relied upon the defendant's statements. This issue must be carefully addressed, otherwise the repetition is obvious.

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 murder of two women, neither were of African American decent. The district court denied Mr. McCarty's two Batson challenges.

The State did not dispute at trial that the deliberating jury was composed entirely of non African Americans (A.A. Vol. 44 pp. 9890-9891). [1]

The prosecution freely admitted that Mr. McCarty's jury was composed

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[1] On appeal, the State claims that McCarty's assertion that the jury was composed of all non African Americans should be viewed with "Scepticism" (State's Answering Brief pp. 20). The State's argument on appeal is belied by the trial prosecutor's admission that the jury was composed of all non African Americans. Therefore, the appellate writer can be assured there were no African American jurors on the panel because the prosecutor freely admitted it. In this appeal, the State is continuously disingenuous and inaccurate.

entirely of non African Americans. The State unconstitutionally excused Kewnn Brooks (036) an African American female (A.A. Vol. 27 pp. 5969). Ms. Brooks, a full-time university student had a brother that 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 Ms. Brooks.

The State excused Jason Rogers (098) an African American male. Mr. Rogers was employed as a taxi driver for approximately a year and a half. Mr. Rogers had not been the victim of any significant crime. In fact, Mr. Rogers made it clear that he had not been the victim of any crime as serious as a stolen vehicle or residential burglary. On the subject of the death penalty Mr. Rogers stated, "I am saying I understand there are four options if someone is convicted of first degree murder". Mr. Rogers explained, "and each of those options could be considered" (A.A. Vol. 23 pp. 5091). Mr. Rogers answered in the affirmative as to whether he could consider the death penalty (A.A. Vol. 23 pp. 5091-5092).Mr. Rogers informed the court, "and I wouldn't put one over the other right now what's behind it" (A.A. Vol. 23 pp. 5091). Both of these jurors were pretextually excluded.

The State's Answering Brief is anemic regarding the factual analysis regarding the exclusion of these two jurors. Additionally, at least one admission by the prosecution at trial is extremely troubling.

With regard to Jason Rogers, the State argues on appeal "that Rogers was evasive and equivocating, refusing to elaborate on what kind of crime he had been the victim of, refusing to state whether or not he could impose the death penalty, and demonstrating a similar evasiveness in completing his jury questionnaire"

(State's Answering Brief pp. 19). Nothing could be farther from the truth. Mr. Rogers made it clear that he had not even been the victim of a stolen car of a burglary. Mr. Rogers determined that those type of crimes were serious. Interestingly enough, the State cites no portion of Mr. Rogers' questioning to support the argument he was evasive. This is because the State's excusal of Mr. Roger was pretextual and cannot be supported by the record. On the other hand, Mr. McCarty provided citations to the record where Mr. Rogers affirmed that he could consider all four forms of punishment. Mr. Rogers affirmed that he had not been the victim of any significant crime. Moreover, the prosecution barely questioned Mr. Rogers regarding the victimization of any crime. Again, proof that the prosecution's excusal was pretextual. In fact, the defense was not even required to rehabilitate Mr. Rogers after the prosecution questioned him.

The excusal of Ms. Brooks was also pretextual and combines a more troubling excuse for her excusal. After the defense challenged the State pursuant to Batson, the district court inquired as to the prosecution's reasons for the excusal of Ms. Brooks. Then, for the first time, the prosecution admitted that it had conducted independent research on Ms. Brooks and determined that she had a work card for a strip club (A.A. Vol. 27 pp. 5970).

The defense complained that the research amounted to a violation of equal protection and the defense did not have an opportunity to similarly run SCOPE printouts or NCIC background checks on jurors (A.A. Vol. 27 pp. 5971). Although Mr. McCarty bitterly complained about the prosecution's use of SCOPE research on prospective jurors at trial and on appeal, the State failed to address this concern. It appears the prosecution is abusing its power by running scopes on prospective jurors. This is a violation of equal protection. This admission by the

prosecution alone amounts to significant prosecutorial misconduct and abuse of power. The prosecutor is abusing his position to SCOPE in an effort to invade upon the privacy of jurors. This Court must consider whether prosecutors are permitted to use State Scopes to research the background of prospective jurors without cause. Moreover, if the prosecution is permitted to conduct these type of evasive intrusions into perspective jurors, are they required to provide the results to the defense and the court.

In the instant case, the defense was surprised by the State's research and only became aware of this information once the Batson challenge was made. The State never revealed that they were conducting background checks on Ms. Brooks.

The holding in Batson serves to protect three interests that are threatened by discriminatory jury selection: 1) the defendant's right to equal protection, 2) the excluded jurors equal protection rights, and 3) the public's confidence in the fairness of our system of justice. Batson v. Kentucky, 476 U.S. 79, 86-87, 90 L. Ed. 2d 69, 106 Sup. Ct. 1712 (1986); See also, Foster v. Nevada, 121 Nev. 165, 111 P. 3d 1083 (2005).

Here, both these African American jurors had a right to serve as jurors. The State's contention that the reasons for their exclusions were race neutral is belied by the record. More importantly, in a capital case it is very disconcerting that the prosecution is abusing their power in investigating potential jurors. This appears to be an issue of first impression before this Court. Can a prosecutor use law enforcement tools to investigate this type of information in the State of Nevada.

Ms. Brooks explained that she had a very limited relationship with her brother (A.A. Vol. 21 pp. 4643). Ms. Brooks also believed the system had treated

her brother fairly (A.A. Vol. 21 pp. 4643). The State countered claiming that Ms. Brooks was evasive when questioned about her brother's crime and prosecution. Again, Ms. Brooks was straightforward and forthright when asked about her brother.

Mr. McCarty raised statistical analysis regarding the percentage of African Americans who have been arrested and incarcerated. Based on this analysis it is a repetitive position in the State of Nevada that an African American juror has been excluded based upon a family member being incarcerated. In fact, in Cobb v. Nevada, 40346 this issue was addressed by a panel of the Nevada Supreme Court.

In Hawkins v. State, 127 Nev. __, 256 P.3d 965 (2011), this Court determined that defense counsel had failed to develop a pretextual analysis pursuant to Batson. In Hawkins, this Court explained,

> It is almost impossible for this Court to determine if the reason for the peremptory challenge is pretextual without adequate development in the district court. Although the district court did not make specific findings, the prosecutor's explanation for removing the jurors did not reflect an inherent intent to discriminate, and Hawkins failed to show purposeful discrimination or pretext or to offer any analysis of any relevant considerations, such as comparative juror analysis or disparate questioning. Hawkins similarly offers no relevant argument on appeal other than the summary conclusion that the prosecutor's reasons for removing the jurors were pretextual. This is not enough.

Mr. McCarty is cognizant of his burden of establishing the pretext. Mr. McCarty asks this Court to consider that the prosecution never unconstitutionally invaded upon the privacy rights of any other jurors other than Ms. Brooks. The record reflects that Ms. Brooks' SCOPE was run to determine that she had a work card at a strip club. The prosecution did not make a record indicating that he was intruding upon the privacy of all jurors, including non-minorities.

This case involves an example of a highly improper tactic of the prosecutor to invade the privacy rights of an African American female prospective juror.

Therefore, Mr. McCarty has established that the prosecution was taking improper, unlawful steps to find reasons to exclude Ms. Brooks. Additionally, Mr. McCarty has taken great pains in providing this Court with analysis from law enforcement agencies establishing that the exclusion of Ms. Brooks based upon her brother's arrest is pretextual and capable of continuous repetition.

Lastly, the State has made an argument that Mr. Roger's answers were evasive. The prosecution is entitled to make lame arguments, but not ones that are belied by the record. Mr. Rogers' answers were direct and forthcoming. The prosecution cannot be permitted to simply state that any juror was excused because they were evasive if the record is in opposite to this contention.

Unlike defense counsel in Hawkins, McCarty's defense established pretextual exclusion of these two jurors. Mr. McCarty developed the record and did not draw simple conclusions from the prosecutor's arguments regarding removal.

Is this Court aware that seasoned prosecutors are conducting criminal background checks and using SCOPE reports to research prospective jurors in capital murder cases? Is this acceptable prosecutorial behavior? Mr. McCarty proved that the prosecution was unable to enunciate a race neutral reason to remove Ms. Brooks without an abuse of power. Pretext has been proven. Lastly, Mr. McCarty would ask the court to consider that Mr. Rogers and Ms. Brooks had a constitutional right to serve as jurors without improper removal based upon their race.

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.

Juror Nill slept extensively throughout the lengthy trial. In response, the State does not dispute the State and federal case law cited by Mr. McCarty. The State accepts that a juror who sleeps through critical portions of the trial mandates reversal (State's Answering Brief pp. 23).

In fact, the State's entire argument is based on the premise that "...an accurate review of the record reviews that Nill only nodded off at one time, near the end of the penalty phase" (State's Answering Brief pp. 21). Mr. McCarty would admit that if a juror nodded off on one occasion during a lengthy trial that reversal may not be warranted. Therefore, the State's entire argument involves the premise that juror Nill nodded off towards the end of the trial.

Before Mr. McCarty fully analyzes the severity of the jurors egregious conduct, the following should be considered. In order for this Court to accept the State's contention that juror Nill only slept momentarily towards the end of the penalty phase, McCarty's counsel must have been clairvoyant. The record is replete with defense counsel repeatedly complaining to the district court and prosecutor that juror Nill was sleeping. In essence, each and every objection made by the defense must have been false but still the defense anticipated that juror Nill would actually fall asleep. The defense was not clairvoyant. The defense simply recognized that the juror was repeatedly sleeping.

As early as October 27, 2010, the defense complained that juror Nill was sleeping. The defense complained that the juror was sleeping all the time. The record will reflect the defense actually sent a text message to the prosecutor during live testimony, indicating that the juror was sleeping (A.A. Vol. 32 pp. 7148). On one occasion, the defense actually approached the prosecutor during the trial to point out that the juror was "sound asleep" and he "does it all the time" (A. A. Vol.

32 pp. 7148).

During one bench conference, the court actually stated, "...if you look at him right now, he appears to be sleeping" (A.A. Vol. 32 pp. 7148). However, the court noted that based on the distance between the court and the juror it was difficult to see if the juror was actually sleeping (A.A. Vol. 32 pp. 7188).

The defense explained on the record that since the first day of trial, audience members had communicated that the juror was sleeping (A.A. Vol. 32 pp. 7177). In fact, the defense pointed out that another attorney (Mr. Jonathan Powell) had informed the defense that the juror was sleeping (A.A. Vol. 32 pp. 7177). In response to early complaints by the defense, the State argued that the defense was using this argument for tactical purposes (A.A. Vol. 32 pp. 7180). Again, the defense must have been clairvoyant realizing that eventually everyone would realize that the juror was sleeping.

The defense was vehemently complaining to the district court as early as October 27, 2010. Yet, not until November 17, 2010 does the district court eventually excuse the juror for sleeping (A.A. Vol. 42 pp. 9781).

In the meantime, the defense continued to voice the strongest objections to the sleeping juror. It is important to recognize that Mr. McCarty, an African American male was sentenced to death by an all non African American jury. At least eleven of the jurors managed to stay awake during the trial. Yet, Juror Nill continuously slept and eventually was permitted to convict Mr. McCarty.

Early in the trial, one prosecutor admitted that he informed the other prosecutor he believed the juror was sleeping (A.A. Vol. 32 pp. 7180). The Court acknowledged that it appeared the juror was sleeping (A.A. Vol. 32 pp. 7181). On November 15, 2010, the Marshal informed the court that he had asked the juror

about sleeping and the juror denied sleeping (A.A. Vol. 42 pp. 9368). The Marshal questioned the juror on three or four occasions about sleeping (A.A. Vol. 42 pp. 9368).

The district court acknowledged that the defense had continuously complained through the trial and penalty phase that the juror was sleeping (A.A. Vol. 42 pp. 9369). On November 15, 2010, the trial judge noticed that the juror's eyes were closed on two occasions (A.A. Vol. 42 pp. 9370). Yet, even after the Marshal complained to the district court that the juror was sleeping and the prosecution argued that jurors sometimes lose concentration in long trials (A.A. Vol. 42 pp. 9370).

Throughout the trial, the prosecution continued to make ridiculous excuses for the jurors conduct. Is this Court to believe that the defense repeatedly objected without cause? Is this Court to believe that the defense texted the prosecution to alert the prosecution to juror Nill's sleeping. Is this Court to ignore that the defense approached the prosecution to complain about the juror. Is the court supposed to ignore the fact that the Marshal complained to the district court that the juror was sleeping. The complaints continued for weeks.

Even on November 15, 2010, after all this information had been brought to the district court's attention, the district court did not hold a hearing with the juror but rather stated the court would consider the matter further (A.A. Vol. 42 pp. 9372). Finally, a hearing was held and the Marshal adamantly stated that the juror was sleeping. The prosecution questioned the Marshal as to his observations regarding the sleeping juror. The Marshal continuously brought a cup of water for the juror in order to get the juror's attention (A.A. Vol. 4 pp. 9429).

These facts must be considered in light of the State's sole argument that

reversal is not mandated because..."the record reveals that Nill only nodded off one time, near the end of the penalty phase" (State's Answering Brief pp. 21). The State's argument is disingenuous.

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, 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.

As in Braun, the district court had a duty to explore the evidence that the juror was sleeping. It is true that not all complaints regarding juror inattentiveness require a hearing, however, if there is substantial reason to believe the juror to be sleeping a hearing is mandated. The district court failed to hold a hearing for weeks even after repeated complaints regarding the sleeping juror. Both state and federal authority establish that reversal is mandated. The State's entire premise is founded upon the contention that juror Nill slept momentarily towards the end of the penalty phase. A review of the record reveals that the State is entirely unable to defend the conduct of the sleeping juror. Mr. McCarty had eleven non African American jurors deliberate and convict him of two counts of capital murder along with one habitually sleeping juror. The record regarding the sleeping juror is appalling given the fact that the defendant was ultimately sentenced to death by the all non African American jury.

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.

Over defense objections, the State was permitted to introduce evidence that Melissa Estores was severely beaten by the co-defendant, a full month before the homicides. The State admits that Ms. Estores did not recall Mr. McCarty being present during the beating. In Mr. McCarty's statement to the police he admitted to being present. The State does not dispute that the evidence amounted to prior bad