

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \*

DOMONIC MALONE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 61006

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APPELLANT'S APPENDIX

VOLUME 1

Direct Appeal From A Judgment of Conviction  
Eighth Judicial District Court  
The Honorable Michael Villani, District Court Judge  
District Court No. C224572

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CLERK

1 **INFO**

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13 9:00 A.M.  
14 PD; SGRO

DISTRICT COURT  
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA, )

16 Plaintiff, )

17 -vs- )

18 DOMONIC RONALDO MALONE,  
19 #1670891,  
20 JASON DUVAL MCCARTY, #0932255 )

21 Defendants. )

Case No: C224572  
Dept No: V

**INFORMATION**

22 STATE OF NEVADA )  
23 ) ss.  
24 COUNTY OF CLARK )

25 DAVID ROGER, District Attorney within and for the County of Clark, State of  
26 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

27 That DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY, the  
28 Defendant(s) above named, having committed the crimes of CONSPIRACY TO COMMIT  
KIDNAPPING (Felony - NRS 200.310, 200.320, 199.480); FIRST DEGREE  
KIDNAPPING (Felony - NRS 200.310, 200.320); BATTERY WITH SUBSTANTIAL  
BODILY HARM (Felony - NRS 200.481); PANDERING (Felony - NRS 201.300);  
CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480);  
CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 205.060,  
199.480); BURGLARY (Felony - NRS 205.060); MURDER WITH USE OF A DEADLY  
WEAPON (Felony - NRS 200.010, 200.030, 193.165); and ROBBERY WITH USE OF A

1 DEADLY WEAPON (Felony - NRS 200.380, 193.165), on or between April, 2006 and May  
2 19, 2006, within the County of Clark, State of Nevada, contrary to the form, force and effect  
3 of statutes in such cases made and provided, and against the peace and dignity of the State of  
4 Nevada,

5 COUNT 1 - FIRST DEGREE KIDNAPPING

6 Defendant DOMONIC RONALDO MALONE did, in April of 2006, wilfully,  
7 unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy,  
8 abduct, conceal, kidnap, or carry away MELISSA ESTORES, a human being, with the intent  
9 to hold or detain the said MELISSA ESTORES against her will, and without her consent, for  
10 the purpose of inflicting substantial bodily harm on the said MELISSA ESTORES.

11 COUNT 2 - BATTERY WITH SUBSTANTIAL BODILY HARM

12 Defendant DOMONIC RONALDO MALONE, did, in April of 2006, then and there  
13 wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-  
14 wit: MELISSA ESTORES, by beating and kicking the said MELISSA ESTORES about the  
15 head and body, resulting in substantial bodily harm to the said MELISSA ESTORES

16 COUNT 3 - CONSPIRACY TO COMMIT KIDNAPPING

17 Defendants did, on or about May 16, 2006, then and there meet with each other and  
18 between themselves, and each of them with the other, wilfully, unlawfully, and feloniously  
19 conspire and agree to commit a crime, to-wit: kidnap MELISSA ESTORES, and in  
20 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 4-6,  
21 said acts being incorporated by this reference as though fully set forth herein.

22 COUNT 4 - FIRST DEGREE KIDNAPPING

23 Defendants did, on or about May 16, 2006, wilfully, unlawfully, feloniously, and  
24 without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or  
25 carry away MELISSA ESTORES, a human being, with the intent to hold or detain the said  
26 MELISSA ESTORES against her will, and without her consent, for the purpose of inflicting  
27 substantial bodily harm on the said MELISSA ESTORES.

28 //

1 COUNT 5 - BATTERY WITH SUBSTANTIAL BODILY HARM

2 Defendants did, on or about May 16, 2006, then and there wilfully, unlawfully, and  
3 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,  
4 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in  
5 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible  
6 under one or more of the following theories of criminal liability, to-wit: (1) by directly or  
7 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
8 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
9 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
10 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
11 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
12 the location where said battery took place, then instructing the said MELISSA ESTORES to  
13 submit to said beating.

14 COUNT 6 - ROBBERY

15 Defendant did, on or between May 16, 2006 and May 17, 2006, then and there  
16 wilfully, unlawfully, and feloniously take personal property, to-wit: purse and/or its contents,  
17 from the person of MELISSA ESTORES, or in her presence, by means of force or violence  
18 or fear of injury to, and without the consent and against the will of the said MELISSA  
19 ESTORES, the Defendants being responsible under one or more of the following theories of  
20 criminal liability, to-wit: (1) by directly or indirectly committing said crime, and/or (2) by  
21 conspiring with each other to commit the crime of battery and/or kidnapping where each co-  
22 conspirator is liable for the general intent crimes committed by fellow co-conspirators which  
23 were a foreseeable consequence of the conspiracy; and/or (3) by aiding and abetting, by  
24 Defendant JASON DUVAL MCCARTY driving the said MELISSA ESTORES and  
25 Defendant DOMONIC RONALDO MALONE to the location where a battery took place,  
26 then instructing the said MELISSA ESTORES to submit to said beating, thereafter driving  
27 both DOMONIC RONALDO MALONE and MELISSA ESTORES from the location as  
28 DOMONIC RONALDO MALONE robbed MELISSA ESTORES of her purse and/or its

1 COUNT 5 - BATTERY WITH SUBSTANTIAL BODILY HARM

2 Defendants did, on or about May 16, 2006, then and there wilfully, unlawfully, and  
3 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,  
4 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in  
5 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible  
6 under one or more of the following theories of criminal liability, to-wit: (1) by directly or  
7 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
8 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
9 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
10 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
11 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
12 the location where said battery took place, then instructing the said MELISSA ESTORES to  
13 submit to said beating.

14 COUNT 6 - ROBBERY

15 Defendant did, on or between May 16, 2006 and May 17, 2006, then and there  
16 wilfully, unlawfully, and feloniously take personal property, to-wit: purse and/or its contents,  
17 from the person of MELISSA ESTORES, or in her presence, by means of force or violence  
18 or fear of injury to, and without the consent and against the will of the said MELISSA  
19 ESTORES, the Defendants being responsible under one or more of the following theories of  
20 criminal liability, to-wit: (1) by directly or indirectly committing said crime, and/or (2) by  
21 conspiring with each other to commit the crime of battery and/or kidnapping where each co-  
22 conspirator is liable for the general intent crimes committed by fellow co-conspirators which  
23 were a foreseeable consequence of the conspiracy; and/or (3) by aiding and abetting, by  
24 Defendant JASON DUVAL MCCARTY driving the said MELISSA ESTORES and  
25 Defendant DOMONIC RONALDO MALONE to the location where a battery took place,  
26 then instructing the said MELISSA ESTORES to submit to said beating, thereafter driving  
27 both DOMONIC RONALDO MALONE and MELISSA ESTORES from the location as  
28 DOMONIC RONALDO MALONE robbed MELISSA ESTORES of her purse and/or its

1 contents.

2 COUNT 7 - CONSPIRACY TO COMMIT KIDNAPPING

3 Defendants did, on, about, or between May 17, 2006 and May 19, 2006, then and  
4 there meet with each other and between themselves, and each of them with the other,  
5 wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: kidnap  
6 MELISSA ESTORES and/or CHARLOTTE COMBADO and/or VICTORIA MAGEE, and  
7 in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 2-3,  
8 said acts being incorporated by this reference as though fully set forth herein.

9 COUNT 8 - PANDERING

10 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
11 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
12 compel CHARLOTTE COMBADO to become a prostitute, and/or to engage or continue to  
13 engage in prostitution.

14 COUNT 9 - PANDERING

15 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
16 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
17 compel VICTORIA MAGEE to become a prostitute, and/or to engage or continue to engage  
18 in prostitution.

19 COUNT 10 - CONSPIRACY TO COMMIT MURDER

20 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
21 with each other and between themselves, and each of them with the other, wilfully,  
22 unlawfully, and feloniously conspire and agree to commit a crime, to-wit: Murder, and in  
23 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 13-19,  
24 said acts being incorporated by this reference as though fully set forth herein.

25 COUNT 11 - CONSPIRACY TO COMMIT BURGLARY

26 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
27 with each other and between themselves, and each of them with the other, wilfully and  
28 unlawfully conspire and agree to commit a crime, to-wit: Burglary, and in furtherance of

1 said conspiracy, Defendants did commit the acts as set forth in Count 13, said acts being  
2 incorporated by this reference as though fully set forth herein.

3 COUNT 12 - BURGLARY

4 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
5 wilfully, unlawfully, and feloniously enter, with intent to commit assault and/or battery  
6 and/or a felony, to-wit: Kidnapping and/or Murder, that certain building occupied by  
7 LEONARD ROBINSON, located at 1525 East Fremont, Room No. 222, Las Vegas, Clark  
8 County, Nevada.

9 COUNT 13 - FIRST DEGREE KIDNAPPING

10 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,  
11 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,  
12 conceal, kidnap, or carry away CHARLOTTE COMBADO, a human being, with the intent  
13 to hold or detain the said CHARLOTTE COMBADO against her will, and without her  
14 consent, for the purpose of committing murder.

15 COUNT 14 - FIRST DEGREE KIDNAPPING

16 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,  
17 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,  
18 conceal, kidnap, or carry away VICTORIA MAGEE, a human being, with the intent to hold  
19 or detain the said VICTORIA MAGEE against her will, and without her consent, for the  
20 purpose of committing murder.

21 COUNT 15 - MURDER WITH USE OF A DEADLY WEAPON

22 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
23 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and  
24 with malice aforethought, kill CHARLOTTE COMBADO, a human being, by striking the  
25 said CHARLOTTE COMBADO about the head and body with a deadly weapon, to-wit: a  
26 golf club and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown  
27 sharp object, the said actions of the Defendants resulting in the death of the said  
28 CHARLOTTE COMBADO; the Defendants being responsible under one or more of the



1 following principles of criminal liability, to-wit: (1) by having premeditation and  
2 deliberation in its commission; and/or (2) the killing occurring during the perpetration or  
3 attempted perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being  
4 liable as co-conspirator for the acts done in furtherance of the conspiracy, which acts were  
5 intended by the Defendants; and/or (4) by aiding and abetting in the commission of the crime  
6 by accompanying each other to the crime scene where the Defendants acted as lookouts for  
7 one another, the Defendants did physically take the said CHARLOTTE COMBADO, to a  
8 remote area, the Defendants did take personal property from the person or presence of the  
9 said CHARLOTTE COMBADO, the Defendants did either both physically strike the said  
10 CHARLOTTE COMBADO, or did act as lookout and prevent her from escaping while the  
11 other struck the said CHARLOTTE COMBADO about the head and body with a golf club  
12 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
13 object, the said actions of the Defendants resulting in the death of the said CHARLOTTE  
14 COMBADO, the Defendants left the crime scene together, the Defendants encouraging one  
15 another throughout by actions and words, the Defendant and the accomplice acting in  
16 concert throughout each with intent to commit murder.

17 COUNT 16 - MURDER WITH USE OF A DEADLY WEAPON

18 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
19 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and  
20 with malice aforethought, kill VICTORIA MAGEE, a human being, by striking the said  
21 VICTORIA MAGEE about the head and body with a deadly weapon, to-wit: a golf club  
22 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
23 object, the said actions of the Defendants resulting in the death of the said VICTORIA  
24 MAGEE; the Defendants being responsible under one or more of the following principles of  
25 criminal liability, to-wit: (1) by having premeditation and deliberation in its commission;  
26 and/or (2) the killing occurring during the perpetration or attempted perpetration of  
27 kidnapping and/or robbery and/or burglary and/or (3) by being liable as co-conspirator for  
28 the acts done in furtherance of the conspiracy, which acts were intended by the Defendants;

1 and/or (4) by aiding and abetting in the commission of the crime by accompanying each  
2 other to the crime scene where the Defendants acted as lookouts for one another, the  
3 Defendants did physically take the said VICTORIA MAGEE, to a remote area, the  
4 Defendants did take personal property from the person or presence of the said VICTORIA  
5 MAGEE, the Defendants did either both physically strike the said VICTORIA MAGEE, or  
6 did act as lookout and prevent her from escaping while the other struck the said VICTORIA  
7 MAGEE about the head and body with a golf club and/or a knife and/or a rock and/or an  
8 unknown blunt object and/or an unknown sharp object, the said actions of the Defendants  
9 resulting in the death of the said VICTORIA MAGEE, the Defendants left the crime scene  
10 together, the Defendants encouraging one another throughout by actions and words, the  
11 Defendant and the accomplice acting in concert throughout each with intent to commit  
12 murder.

13 COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON

14 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
15 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
16 person of CHARLOTTE COMBADO, or in her presence, by means of force or violence or  
17 fear of injury to, and without the consent and against the will of the said CHARLOTTE  
18 COMBADO, said Defendants using a deadly weapon, to-wit: a golf club and/or a knife  
19 and/or a rock and/or other unidentified blunt or sharp object, during the commission of said  
20 crime.

21 COUNT 18 - ROBBERY WITH USE OF A DEADLY WEAPON

22 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
23 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
24 person of VICTORIA MAGEE, or in her presence, by means of force or violence or fear of  
25 injury to, and without the consent and against the will of the said VICTORIA MAGEE, said

26 //

27 //

28 //

Defendants using a deadly weapon, to-wit: a golf club and/or a knife and/or a rock and/or other unidentified blunt or sharp object, during the commission of said crime.

BY



DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
ALLRED, CLAY	HPD #1221
BENJAMINS, FELICIA	HPD #720
COLLINS, GERARD	HPD #324
ESTORES, MELISSA	UNKNOWN ADDRESS
FUENTES, FRANKLIN	HPD #621
HALL, RAMAAN	UNKNOWN ADDRESS
HERB, DONALD	UNKNOWN ADDRESS
HERB, HAROLD	140 SIR NOBLE ST., LVN
HOSAKA, MARK	HPD #777
KUBICZEK, PIOTR DR.	CORONER'S OFFICE
NAGEL, LYNN	C/O CCDA OFFICE
PARKER, DAVID	CANCUN APARTMENTS
PHILLIPS, CORRINA	C/O CCDA OFFICE
RIDINGS, CRAIG	HPD #358
ROBINSON, LEONARD	1525 E. FREMONT #F-222, LVN
WEBSTER, MICHAEL	HPD #899

DA#06FH0742A, B/mb  
HPD EV#06-11513  
CONSP; KIDNAP; BWSBH; BURG; MWDW; RWDW - F  
(TK5)

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE,  
JASON DUVAL MCCARTY,

Defendants.

CASE NO. C224572

DEPT. V

**ARRAIGNMENT HELD IN DEPT. LLA**

BEFORE THE HONORABLE KEVIN V. WILLIAMS, HEARING MASTER  
WEDNESDAY, AUGUST 16, 2006

**RECORDER'S TRANSCRIPT OF HEARING RE:  
ARRAIGNMENT**

APPEARANCES:

For the State:

MARC DIGIACOMO, ESQ.,

Deputy District Attorney

Also Present:

DAVID RICKERT, ESQ.,

Deputy District Attorney

For the Defendants:

CHARLES A. CANO, ESQ.,

Deputy Special Public Defender

ANTHONY P. SGRO, ESQ.

RECORDED BY: KIARA SCHMIDT, COURT RECORDER

1 WEDNESDAY, AUGUST 16, 2006

2 \* \* \* \* \*

3 P R O C E E D I N G S

4  
5 THE COURT: Case Number C224572, State of Nevada versus Domonic  
6 Malone and Jason McCarty.

7 MR. SGRO: Good morning, Your Honor, Anthony Sgro on behalf of  
8 Mr. McCarty.

9 MR. CANO: Charles --

10 THE COURT: Good morning, Mr. Sgro.

11 MR. CANO: Charles Cano on behalf of Mr. Malone, Your Honor.

12 THE COURT: Good morning, Mr. Cano.

13 What are we doing here today, gentlemen?

14 MR. SGRO: We're going to enter pleas of not guilty, however,  
15 Mr. Digiacomo went upstairs to get the copies of the Informations 'cause we  
16 don't have them this morning.

17 THE COURT: Okay, we'll just trail this for just a minute. Okay?

18 MR. RICKERT: Thank you, Judge.

19 MR. SGRO: Thank you.

20 MR. CANO: Thank you.

21 (Matter trailed and recalled)

22 THE COURT: Case Number C224572, State of Nevada versus Domonic  
23 Malone and Jason McCarty.

24 Would counsel approach the bench, please?

25 MR. SGRO: Good morning, Your Honor, Anthony Sgro on behalf of

1 Jason McCarty.

2 THE COURT: Okay. Would you gentlemen approach, please, for a  
3 second, Mr. Sgro?

4 MR. SGRO: Oh, sorry.

5 (Bench conference)

6 THE COURT: Okay. What are we doing here today, gentlemen?

7 MR. SGRO: Your Honor -- oh, sorry. We're going to enter a not-guilty  
8 plea. We've -- I've spoken with Mr. McCarty. He's indicated he does not wish  
9 to invoke his right to a speedy trial.

10 I do also want to ask the Court to do a couple things. Set a status  
11 check in a couple weeks in front of the department we're going to be in front  
12 of just to make sure schedules are going to coincide with the trial date we get  
13 today.

14 THE COURT: Sure.

15 MR. SGRO: And also to get an order that the writ would be due 21 days  
16 from the filing of the grand -- of the preliminary hearing transcript.

17 THE COURT: Oh, we can give you that today. So don't worry about  
18 that.

19 MR. SGRO: Okay.

20 MR. CANO: And on behalf of Mr. Malone, Your Honor, we'll be entering  
21 a not-guilty plea as well. We'll also be waiving our right to a speedy trial and  
22 we request 21 days from the filing of the preliminary hearing transcripts to file  
23 any writs as well.

24 THE COURT: Okay. Mr. Malone?

25 THE DEFENDANT: Yeah.

1 THE COURT: Okay. Set up to the microphone.  
2 THE DEFENDANT: Yes, sir.  
3 THE COURT: Okay. What is your true name, sir?  
4 THE DEFENDANT: Domonic Ronaldo Malone.  
5 THE COURT: How old are you, sir?  
6 THE DEFENDANT: Twenty-six.  
7 THE COURT: How far did you go in school?  
8 THE DEFENDANT: Ninth grade.  
9 THE COURT: Do you read, write, and understand the English language?  
10 THE DEFENDANT: Yes, sir.  
11 THE COURT: You understand what you're charged with?  
12 THE DEFENDANT: Yes, sir.  
13 THE COURT: What's your plea to counts one through eighteen as listed  
14 in the Information?  
15 THE DEFENDANT: Not guilty, sir.  
16 THE COURT: Okay. You have a right to a speedy trial within 60 days.  
17 Do you want a speedy trial, sir?  
18 THE DEFENDANT: No, sir.  
19 THE COURT: Okay. We'll give you your trial date in just a minute.  
20 THE COURT: Mr. McCarty?  
21 THE DEFENDANT: Yes, sir.  
22 THE COURT: What is your true name, sir?  
23 THE DEFENDANT: Jason Duval McCarty.  
24 THE COURT: How old are you, sir?  
25 THE DEFENDANT: Thirty-five.

1 THE COURT: How far did you go in school?  
2 THE DEFENDANT: Thirteen years.  
3 THE COURT: Read, write, and understand the English language?  
4 THE DEFENDANT: Yes, sir.  
5 THE COURT: Understand what you're charged with?  
6 THE DEFENDANT: Yes, sir.  
7 THE COURT: What's your plea to counts three through eighteen as listed  
8 in the Information, sir?  
9 THE DEFENDANT: Not guilty.  
10 THE COURT: You have a right to a speedy trial within 60 days. Do you  
11 want a speedy trial, sir?  
12 THE DEFENDANT: No, sir.  
13 THE COURT: Okay, give both of these gentlemen their trial dates.  
14 THE CLERK: Yes, Your Honor. For the same date, calendar call, January  
15 second, at 8:30 a.m. --  
16 THE COURT: Is there something a little bit farther out than that on her  
17 calendar that she gave you, the date she gave you?  
18 THE CLERK: I don't have anything other than that.  
19 THE COURT: Okay, we'll use that one then. Go ahead.  
20 THE CLERK: Jury trial, January eighth, at ten a.m., Department V.  
21 THE COURT: Okay, we now need to give them a status check date.  
22 THE CLERK: And I'm sorry, Mr. Sgro, you wanted a status check date  
23 for --  
24 THE COURT: He wants to double --  
25 MR. SGRO: Confirmation of the trial schedule.



1 THE COURT: Yeah.

2 THE CLERK: Thank you.

3 MR. DIGIACOMO: Sometime before, let's say, September second.

4 THE CLERK: Before September second, the closest to that I have would

5 be Thursday, August 31st.

6 MR. CANO: I'm out of the jurisdiction then.

7 MR. DIGIACOMO: Could we do it the 29th? Are you around the 29th?

8 MR. CANO: I'm here on the 29th, yeah.

9 MR. DIGIACOMO: Can we do it the 29th then?

10 THE CLERK: Sure. August 29th and that would be at 8:30 a.m.

11 MR. SGRO: I'm sorry. I am out of the jurisdiction on the 29th.

12 THE CLERK: Okay. The one before that would be August 24th --

13 MR. DIGIACOMO: Unfortunately, that status check is a -- is --

14 MR. RICKERT: That's like next week.

15 MR. DIGIACOMO: -- too early.

16 MR. SGRO: Court's indulgence, Your Honor.

17 (Attorneys for all parties conferring regarding dates)

18 MR. DIGIACOMO: All right. Can we have it September third?

19 THE CLERK: September third --

20 MR. CANO: Actually, the fifth.

21 MR. DIGIACOMO: Is that the fourth?

22 MR. CANO: Fifth.

23 MR. DIGIACOMO: Fifth.

24 THE CLERK: September fifth, yes, Tuesday, and that would be at

25 8:30 a.m., Department V.

1 MR. DIGIACOMO: Judge, just for the record, this morning I turned over  
2 to both defense counsels five disks that have all the photographs so far taken  
3 on the case as well as a variety of disks which contain all the actual recordings  
4 of the interviews that were conducted, and I've given both counsel their own  
5 copy.

6 THE COURT: Okay. Mr. Sgro, you were the attorney down in Justice  
7 Court; is that correct?

8 MR. SGRO: I was, Your Honor.

9 THE COURT: Okay. And you were appointed by who down there?

10 MR. SGRO: By Judge George.

11 THE COURT: Okay, then you will -- your appointment will continue.  
12 Please submit the appropriate paperwork to Judge Glass.

13 And both of you gentlemen will have 21 days form the filing of any  
14 transcripts to file any appropriate writs that you deem necessary. Okay?

15 MR. DIGIACOMO: Thank you, Judge.

16 MR. CANO: Thanks, Your Honor.

17 MR. SGRO: Thank you, Your Honor.

18 THE COURT: All right.

19 (Proceedings concluded)

20 \* \* \* \* \*

21  
22  
23 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
24 audio/video proceedings in the above-entitled case to the best of my ability.

25 

Kiara Schmidt, Court Recorder/Transcriber

***AFFIRMATION***

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Transcript filed in District Court Case No. C224572 does not contain the social security number of any person.



---

KIARA SCHMIDT, Court Recorder/Transcriber  
Date: 5/7/08

  
CLERK

**NISD**  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
MARC DIGIACOMO  
Deputy District Attorney  
Nevada Bar #006955  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2211  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,  
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

**NOTICE OF INTENT TO SEEK DEATH PENALTY**

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through MARC DIGIACOMO, Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: On or about March 11, 2000, Defendant DOMONIC RONALDO MALONE did waive a knife at JAWANNA JONES and/or punch DAWANNA JONES and/or wrapped a phone cord around the neck of DAWANNA JONES, using it as a ligature and/or Defendant DOMONIC RONALDO MALONE pulled DAWANNA JONES' pants and underwear off and inserted his fingers

1 into her vagina and/or Defendant DOMONIC RONALDO MALONE put a pillow over  
2 DAWANNA JONES' head in a smothering manner and/or Defendant DOMONIC  
3 RONALDO MALONE did insert his penis into her vagina and/or during intercourse,  
4 Defendant DOMONIC RONALDO MALONE did strike DAWANNA JONES in the face  
5 several times and/or by Defendant DOMONIC RONALDO MALONE ejaculating inside  
6 DAWANNA JONES and/or Defendant DOMONIC RONALDO MALONE was charged by  
7 Criminal Information filed on July 24, 2000 with First Degree Kidnapping, two (2) counts of  
8 Sexual Assault and Battery With Intent To Commit a Crime and/or at the time of the filing  
9 of the Information, the crime which was plead as intended was sexual assault on Count IV  
10 and/or on, or about, November 30, 2000, Defendant DOMONIC RONALDO MALONE  
11 plead guilty to count IV of the Information, Battery With Intent To Commit a Crime and/or  
12 at that time, the Information was amended by interlineation to allege the underlying crime as  
13 grand larceny and/or on or about January 9, 2001, a judgment of conviction was filed  
14 convicting Defendant DOMONIC RONALDO MALONE of Battery With Intent To Commit  
15 A Crime in Eighth Judicial District Court Case Number C168678 in Clark County Nevada  
16 and/or thereafter Defendant DOMONIC RONALDO MALONE was sentenced to a  
17 maximum sentence of ninety (90) months in the Nevada Department of Prisons with a  
18 minimum parole eligibility of thirty (30) months, said sentence was suspended and  
19 Defendant DOMONIC RONALDO MALONE was placed on probation and/or on or about  
20 June 14, 2001, a order for revocation of probation and amended judgment of conviction was  
21 filed revoking Defendant DOMONIC RONALDO MALONE's probation and imposing the  
22 underlying sentence on him. [NRS 200.033(1)(b)].

23 The evidence upon which the state will rely is the testimony of the witnesses, the  
24 pleadings, judgment of conviction, guilty plea agreement and order for revocation of  
25 probation and amended judgment of conviction in C168678, as well as the police reports  
26 from Las Vegas Metropolitan Police Department Event Number 000311-1568. Attached to  
27 this notice are the Information, Guilty Plea Agreement, Judgment of Conviction and Order  
28 For Revocation of Probation and Amended Judgment of Conviction in C168678 as well as

1 the Declaration of Arrest Warrant from Las Vegas Metropolitan Police Department event  
2 number 000311-1568. All of the discovery and records have been ordered related to the  
3 above referenced case and will be provided forthwith.

4 2. The murder was committed by a person who, at any time before a penalty hearing  
5 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony  
6 involving the use or threat of violence to the person of another and the provisions of  
7 subsection 4 do not otherwise apply to that felony, to-wit: FIRST DEGREE KIDNAPPING  
8 as alleged in Count 1 of the Information in C224572, the instant case. That Count alleges  
9 that Defendant DOMONIC RONALDO MALONE did, in April of 2006, wilfully,  
10 unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy,  
11 abduct, conceal, kidnap, or carry away MELISSA ESTORES, a human being, with the intent  
12 to hold or detain the said MELISSA ESTORES against her will, and without her consent, for  
13 the purpose of inflicting substantial bodily harm on the said MELISSA ESTORES. [NRS  
14 200.033(1)(b)].

15 MELISSA ESTORES testified at the preliminary hearing to Defendant DOMONIC  
16 RONALDO MALONE lured her out of the bar at the Royal Sportsman Manor for the  
17 purpose of beating her repeatedly behind the building in April of 2006, that beating resulting  
18 in substantial bodily harm. It is anticipated that the trial jury will convict Defendant  
19 DOMONIC RONALDO MALONE of First Degree Kidnapping as alleged in Count 1 of the  
20 instant information. The evidence the State intends to rely upon is the evidence presented at  
21 the guilty phase of the instant matter, the jury verdicts returned in the instant matter, as well  
22 as any statements or police reports in Henderson case number 06-11513.

23 3. The murder was committed by a person who, at any time before a penalty hearing  
24 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony  
25 involving the use or threat of violence to the person of another and the provisions of  
26 subsection 4 do not otherwise apply to that felony, to-wit: BATTERY WITH  
27 SUBSTANTIAL BODILY HARM as alleged in Count 2 of the Information in C224572, the  
28 instant case. That Count alleges that Defendant DOMONIC RONALDO MALONE, did, in

1 April of 2006, then and there wilfully, unlawfully, and feloniously use force or violence  
2 upon the person of another, to-wit: MELISSA ESTORES, by beating and kicking the said  
3 MELISSA ESTORES about the head and body, resulting in substantial bodily harm to the  
4 said MELISSA ESTORES. [NRS 200.033(1)(b)].

5 MELISSA ESTORES testified at the preliminary hearing to Defendant DOMONIC  
6 RONALDO MALONE lured her out of the bar at the Royal Sportsman Manor for the  
7 purpose of beating her repeatedly behind the building in April of 2006, that beating resulting  
8 in substantial bodily harm. It is anticipated that the trial jury will convict Defendant  
9 DOMONIC RONALDO MALONE of BATTERY WITH SUBSTANTIAL BODILY  
10 HARM as alleged in Count 2 of the instant information. The evidence the State intends to  
11 rely upon is the evidence presented at the guilty phase of the instant matter, the jury verdicts  
12 returned in the instant matter, as well as any statements or police reports in Henderson case  
13 number 06-11513.

14 4. The murder was committed by a person who, at any time before a penalty hearing  
15 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony  
16 involving the use or threat of violence to the person of another and the provisions of  
17 subsection 4 do not otherwise apply to that felony, to-wit: FIRST DEGREE KIDNAPPING  
18 as alleged in Count 4 of the Information in C224572, the instant case. That Count alleges  
19 that Defendants DOMONIC RENALDO MALONE and JASON MCCARTY did, on or  
20 about May 16, 2006, wilfully, unlawfully, feloniously, and without authority of law, seize,  
21 confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away MELISSA  
22 ESTORES, a human being, with the intent to hold or detain the said MELISSA ESTORES  
23 against her will, and without her consent, for the purpose of inflicting substantial bodily  
24 harm on the said MELISSA ESTORES. [NRS 200.033(1)(b)].

25 MELISSA ESTORES testified at the preliminary hearing to Defendants DOMONIC  
26 RONALDO MALONE and JASON MCCARTY drove her to a location in the desert area of  
27 Henderson with the intent to beat her, that beating resulting in substantial bodily harm. It is  
28 anticipated that the trial jury will convict Defendant DOMONIC RONALDO MALONE of

1 First Degree Kidnapping as alleged in Count 4 of the instant information. The evidence the  
2 State intends to rely upon is the evidence presented at the guilty phase of the instant matter,  
3 the jury verdicts returned in the instant matter, as well as any statements or police reports in  
4 Henderson case number 06-11513.

5 5. The murder was committed by a person who, at any time before a penalty hearing  
6 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony  
7 involving the use or threat of violence to the person of another and the provisions of  
8 subsection 4 do not otherwise apply to that felony, to-wit: BATTERY WITH  
9 SUBSTANTIAL BODILY HARM as alleged in Count 5 of the Information in C224572, the  
10 instant case. That Count alleges that Defendants DOMONIC RONALDO MALONE and  
11 JASON MCCARTY did, on or about May 16, 2006, then and there wilfully, unlawfully, and  
12 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,  
13 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in  
14 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible  
15 under one or more of the following theories of criminal liability, to-wit: (1) by directly or  
16 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
17 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
18 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
19 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
20 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
21 the location where said battery took place, then instructing the said MELISSA ESTORES to  
22 submit to said beating. [NRS 200.033(1)(b)].

23 MELISSA ESTORES testified at the preliminary hearing to Defendants DOMONIC  
24 RONALDO MALONE and JASON MCCARTY drove her to a location in the desert area of  
25 Henderson with the intent to beat her, that beating resulting in substantial bodily harm. It is  
26 anticipated that the trial jury will convict Defendant DOMONIC RONALDO MALONE of  
27 BATTERY WITH SUBSTANTIAL BODILY HARM as alleged in Count 5 of the instant  
28 information. The evidence the State intends to rely upon is the evidence presented at the



1 guilty phase of the instant matter, the jury verdicts returned in the instant matter, as well as  
2 any statements or police reports in Henderson case number 06-11513.

3 6. The murder was committed by a person who, at any time before a penalty hearing  
4 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony  
5 involving the use or threat of violence to the person of another and the provisions of  
6 subsection 4 do not otherwise apply to that felony, to-wit: ROBBERY as alleged in Count 6  
7 of the Information in C224572, the instant case. That Count alleges that Defendants  
8 DOMONIC RONALDO MALONE and JASON MCCARTY did, on or between May 16,  
9 2006 and May 17, 2006, then and there wilfully, unlawfully, and feloniously take personal  
10 property, to-wit: purse and/or its contents, from the person of MELISSA ESTORES, or in  
11 her presence, by means of force or violence or fear of injury to, and without the consent and  
12 against the will of the said MELISSA ESTORES, the Defendants being responsible under  
13 one or more of the following theories of criminal liability, to-wit: (1) by directly or  
14 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
15 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
16 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
17 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
18 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
19 the location where a battery took place, then instructing the said MELISSA ESTORES to  
20 submit to said beating, thereafter driving both DOMONIC RONALDO MALONE and  
21 MELISSA ESTORES from the location as DOMONIC RONALDO MALONE robbed  
22 MELISSA ESTORES of her purse and/or its contents. [NRS 200.033(1)(b)].

23 MELISSA ESTORES testified at the preliminary hearing that Defendants DOMONIC  
24 RONALDO MALONE and JASON MCCARTY after being beaten in the desert, Defendants  
25 robbed her of her purse and contents, throwing them out the window of the car. It is  
26 anticipated that the trial jury will convict Defendant DOMONIC RONALDO MALONE of  
27 ROBBERY as alleged in Count 6 of the instant information. The evidence the State intends  
28 to rely upon is the evidence presented at the guilty phase of the instant matter, the jury

1 verdicts returned in the instant matter, as well as any statements or police reports in  
2 Henderson case number 06-11513.

3 7. The murder was committed while the person was engaged, alone or with others, in  
4 the commission of, or an attempt to commit or flight after committing or attempting to  
5 commit, any kidnapping in the first degree, to wit: FIRST DEGREE KIDNAPPING as  
6 alleged in Count 13 of the instant information. That count alleges that Defendants  
7 DOMONIC RONALDO MALONE and JASON MCCARTY did, on or between May 17,  
8 2006 and May 19, 2006, wilfully, unlawfully, feloniously, and without authority of law,  
9 seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away CHARLOTTE  
10 COMBADO, a human being, with the intent to hold or detain the said CHARLOTTE  
11 COMBADO against her will, and without her consent, for the purpose of committing  
12 murder. [See NRS 200.033(4)].

13 The basis for this aggravator is the aggravated nature of the crime itself. The  
14 evidence upon which the State will rely is the testimony and exhibits introduced during the  
15 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

16 8. The murder was committed while the person was engaged, alone or with others, in  
17 the commission of, or an attempt to commit or flight after committing or attempting to  
18 commit, any kidnapping in the first degree, to wit: FIRST DEGREE KIDNAPPING as  
19 alleged in Count 14 of the instant information. That count alleges that Defendants  
20 DOMONIC RONALDO MALONE and JASON MCCARTY did, on or between May 17,  
21 2006 and May 19, 2006, wilfully, unlawfully, feloniously, and without authority of law,  
22 seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away VICTORIA  
23 MAGEE, a human being, with the intent to hold or detain the said VICTORIA MAGEE  
24 against her will, and without her consent, for the purpose of committing murder. [See NRS  
25 200.033(4)].

26 The basis for this aggravator is the aggravated nature of the crime itself. The  
27 evidence upon which the State will rely is the testimony and exhibits introduced during the  
28 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

1           9. The murder was committed while the person was engaged, alone or with others, in  
2 the commission of, or an attempt to commit or flight after committing or attempting to  
3 commit, any robbery, to wit: ROBBERY WITH USE OF A DEADLY WEAPON as alleged  
4 in Count 17 of the instant information. That count alleges that Defendants DOMONIC  
5 RONALDO MALONE and JASON MCCARTY did, on or between May 17, 2006 and May  
6 19, 2006, then and there wilfully, unlawfully, and feloniously take personal property, to-wit:  
7 clothing, from the person of CHARLOTTE COMBADO, or in her presence, by means of  
8 force or violence or fear of injury to, and without the consent and against the will of the said  
9 CHARLOTTE COMBADO, said Defendants using a deadly weapon, to-wit: a golf club  
10 and/or a knife and/or a rock and/or other unidentified blunt or sharp object, during the  
11 commission of said crime. [See NRS 200.033(4)].

12           The basis for this aggravator is the aggravated nature of the crime itself. The  
13 evidence upon which the State will rely is the testimony and exhibits introduced during the  
14 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

15           10. The murder was committed while the person was engaged, alone or with others,  
16 in the commission of, or an attempt to commit or flight after committing or attempting to  
17 commit, any robbery, to wit: ROBBERY WITH USE OF A DEADLY WEAPON as alleged  
18 in Count 17 of the instant information. That count alleges that Defendants DOMONIC  
19 RONALDO MALONE and JASON MCCARTY did, on or between May 17, 2006 and May  
20 19, 2006, then and there wilfully, unlawfully, and feloniously take personal property, to-wit:  
21 clothing, from the person of VICTORIA MAGEE, or in her presence, by means of force or  
22 violence or fear of injury to, and without the consent and against the will of the said  
23 VICTORIA MAGEE, said Defendants using a deadly weapon, to-wit: a golf club and/or a  
24 knife and/or a rock and/or other unidentified blunt or sharp object, during the commission of  
25 said crime. [See NRS 200.033(4)].

26           The basis for this aggravator is the aggravated nature of the crime itself. The  
27 evidence upon which the State will rely is the testimony and exhibits introduced during the  
28 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

1           11. The murder was committed by a person, for himself or another, to receive money  
2 or any other thing of monetary value, to-wit: by Defendants DOMONIC RONALDO  
3 MALONE and JASON MCCARTY attempting to collect eighty dollars (\$80) from the  
4 person of VICTORIA MAGEE and/or to facilitate the collection of three hundred and sixty  
5 dollars (\$360) from MELISSA ESTORES and/or by Defendants DOMONIC RONALDO  
6 MALONE and JASON MCCARTY killing CHARLOTTE COMBADO and VICTORIA  
7 MAGEE as a mechanism to control their street level prostitution and/or drug sales  
8 operations. [NRS 200.033(6)].

9           The basis for this aggravator is the aggravated nature of the crime itself. The  
10 evidence upon which the State will rely is the testimony and exhibits introduced during the  
11 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

12           12. The murder of CHARLOTTE COMBADO was committed by a person who has,  
13 in the immediate proceeding, been convicted of more than one offense of murder of the first  
14 or second degree, to-wit: the MURDER of VICTORIA MAGEE as alleged in Count 16 of  
15 the instant information. That count alleges that Defendants DOMONIC RONALDO  
16 MALONE and JASON MCCARTY did, on or between May 17, 2006 and May 19, 2006,  
17 then and there wilfully, feloniously, without authority of law, and with premeditation and  
18 deliberation, and with malice aforethought, kill VICTORIA MAGEE, a human being, by  
19 striking the said VICTORIA MAGEE about the head and body with a deadly weapon, to-  
20 wit: a golf club and/or a knife and/or a rock and/or an unknown blunt object and/or an  
21 unknown sharp object, the said actions of the Defendants resulting in the death of the said  
22 VICTORIA MAGEE; the Defendants being responsible under one or more of the following  
23 principles of criminal liability, to-wit: (1) by having premeditation and deliberation in its  
24 commission; and/or (2) the killing occurring during the perpetration or attempted  
25 perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being liable as co-  
26 conspirator for the acts done in furtherance of the conspiracy, which acts were intended by  
27 the Defendants; and/or (4) by aiding and abetting in the commission of the crime by  
28 accompanying each other to the crime scene where the Defendants acted as lookouts for one

1 another, the Defendants did physically take the said VICTORIA MAGEE, to a remote area,  
2 the Defendants did take personal property from the person or presence of the said  
3 VICTORIA MAGEE, the Defendants did either both physically strike the said VICTORIA  
4 MAGEE, or did act as lookout and prevent her from escaping while the other struck the said  
5 VICTORIA MAGEE about the head and body with a golf club and/or a knife and/or a rock  
6 and/or an unknown blunt object and/or an unknown sharp object, the said actions of the  
7 Defendants resulting in the death of the said VICTORIA MAGEE, the Defendants left the  
8 crime scene together, the Defendants encouraging one another throughout by actions and  
9 words, the Defendant and the accomplice acting in concert throughout each with intent to  
10 commit murder. [NRS 200.033(12)]

11 The basis for this aggravator is the aggravated nature of the crime itself. The  
12 evidence upon which the State will rely is the testimony and exhibits introduced during the  
13 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

14 13. The murder of VICTORIA MAGEE was committed by a person who has, in the  
15 immediate proceeding, been convicted of more than one offense of murder of the first or  
16 second degree, to-wit: the MURDER of CHARLOTTE COMBADO as alleged in Count 15  
17 of the instant information. That count alleges that Defendants DOMONIC RONALDO  
18 MALONE and JASON MCCARTY did, on or between May 17, 2006 and May 19, 2006,  
19 then and there wilfully, feloniously, without authority of law, and with premeditation and  
20 deliberation, and with malice aforethought, kill CHARLOTTE COMBADO, a human being,  
21 by striking the said CHARLOTTE COMBADO about the head and body with a deadly  
22 weapon, to-wit: a golf club and/or a knife and/or a rock and/or an unknown blunt object  
23 and/or an unknown sharp object, the said actions of the Defendants resulting in the death of  
24 the said CHARLOTTE COMBADO; the Defendants being responsible under one or more of  
25 the following principles of criminal liability, to-wit: (1) by having premeditation and  
26 deliberation in its commission; and/or (2) the killing occurring during the perpetration or  
27 attempted perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being  
28 liable as co-conspirator for the acts done in furtherance of the conspiracy, which acts were

1 intended by the Defendants; and/or (4) by aiding and abetting in the commission of the crime  
2 by accompanying each other to the crime scene where the Defendants acted as lookouts for  
3 one another, the Defendants did physically take the said CHARLOTTE COMBADO, to a  
4 remote area, the Defendants did take personal property from the person or presence of the  
5 said CHARLOTTE COMBADO, the Defendants did either both physically strike the said  
6 CHARLOTTE COMBADO, or did act as lookout and prevent her from escaping while the  
7 other struck the said CHARLOTTE COMBADO about the head and body with a golf club  
8 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
9 object, the said actions of the Defendants resulting in the death of the said CHARLOTTE  
10 COMBADO, the Defendants left the crime scene together, the Defendants encouraging one  
11 another throughout by actions and words, the Defendant and the accomplice acting in  
12 concert throughout each with intent to commit murder. [NRS 200.033(12)]

13 The basis for this aggravator is the aggravated nature of the crime itself. The  
14 evidence upon which the State will rely is the testimony and exhibits introduced during the  
15 guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

16 In filing this NOTICE, the State incorporates all pleadings, witness lists, notices and  
17 other discovery materials already provided to Defendant by the Office of the District  
18 Attorney as part of its open-file policy as well as any future discovery received and provided  
19 to Defendant.

20 DATED this 30th day of August, 2006.

21 Respectfully submitted,

22 DAVID ROGER  
23 Clark County District Attorney  
24 Nevada Bar #002781

25 BY /s/ CHRIS J. OWENS for  
26 MARC DIGIACOMO  
27 Deputy District Attorney  
28 Nevada Bar #006955

1 CERTIFICATE OF FACSIMILE TRANSMISSION

2 I hereby certify that service of the above and foregoing, was made this \_30th\_ day of  
3 August, 2006, by facsimile transmission to:

4 SPECIAL PUBLIC DEFENDER  
5 FAX: 455-6273

6  
7 BY /s/ M. Beaird  
8 Employee of the District Attorney's Office  
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*Shirley B. Parraguirre*  
CLERK

3 1 INFO  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

9 I.A. 08/02/00  
10 8:30 A.M.  
11 PD

DISTRICT COURT  
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 DOMONIC RONALDO MALONE,  
16 #1670891

17 Defendant.

Case No. C  
Dept. No. VI  
Docket B

168678

INFORMATION

18 STATE OF NEVADA

19 COUNTY OF CLARK

ss:

20 STEWART L. BELL, District Attorney within and for the County of Clark, State of  
21 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

22 That DOMONIC RONALDO MALONE, the Defendant(s) above named, having  
23 committed the crimes of FIRST DEGREE KIDNAPING WITH USE OF A DEADLY  
24 WEAPON (Felony - NRS 200.310, 200.320); SEXUAL ASSAULT (Felony - 200.364,  
25 200.366), and BATTERY WITH INTENT TO COMMIT A CRIME (Felony - NRS  
26 200.400), on or about the 11th day of March, 2000, within the County of Clark, State of Nevada,  
contrary to the form, force and effect of statutes in such cases made and provided, and against  
the peace and dignity of the State of Nevada,

COUNT I - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,  
inveigle, entice, decoy, abduct, conceal, kidnap, or carry away DAWANNA JONES, a human

NORA PEÑA

APPROVED BY CLERK OF THE COURT  
SHIRLEY B. PARRAGUIRRE, CLERK  
BY *Nora Peña* DEPUTY  
NOV 3 0 3 AM

COUNTY CLERK

JUL 24 2000

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EXHIBIT "1"

0029



AMENDED BY ORDER OF THE COURT

SHIRLEY B. PARRAGUIRRE, CLERK  
BY Nora Peña, DEPUTY

NORA PEÑA

NOV 30 2009

1 being, with the intent to hold or detain the said DAWANNA JONES, against her will, and  
2 without her consent, for the purpose of committing sexual assault, said Defendant using a deadly  
3 weapon, to-wit: a knife and/or ligature, during the commission of said crime.

4 COUNT II - SEXUAL ASSAULT

5 did then and there wilfully, unlawfully, and feloniously sexually assault and subject  
6 DAWANNA JONES, a female person, to sexual penetration, to-wit: digital penetration, by  
7 inserting his finger into the vagina of the said DAWANNA JONES, against her will.

8 COUNT III - SEXUAL ASSAULT

9 did then and there wilfully, unlawfully, and feloniously sexually assault and subject  
10 DAWANNA JONES, a female person, to sexual penetration, to-wit: sexual intercourse, by  
11 inserting his penis into the vagina of the said DAWANNA JONES, against her will.

12 COUNT IV - BATTERY WITH INTENT TO COMMIT A CRIME

13 did then and there wilfully, unlawfully, and feloniously use force or violence upon the  
14 person of another, to-wit: DAWANNA JONES, with intent to commit <sup>Grand Larceny</sup> ~~sexual assault~~, by hitting  
15 and kicking the said DAWANNA JONES about the head and body with his hands an feet, and/or  
16 by wrapping a telephone cord tightly around her neck, and/or by pushing a pillow against her  
17 face, during the commission of <sup>Grand Larceny</sup> ~~a sexual assault~~.

18 STEWART L. BELL  
19 DISTRICT ATTORNEY  
Nevada Bar #000477

20  
21 BY Gabrielle Ferrales  
22 GABRIELLE FERRALES  
23 Deputy District Attorney  
24 Nevada Bar #006600

25 Names of witnesses known to the District Attorney's Office at the time of filing this  
26 Information are as follows:

27	<u>NAME</u>	<u>ADDRESS</u>
28	MITCHELL, JAMES H. III	LVMPD P#1829

1	JOHNSON, KEVIN C.	LVMPD P#2892
2	HARTUNG, SHEILA L.	LVMPD P#3603
3	ROSENBERG, TODD J.	LVMPD P#3816
4	COWLEY, DARYL J.	LVMPD P#5167
5	LITTLE, CHRISTOPHER	LVMPD P#5442
6	DUKES, JASON	LVMPD P#5656
7	DAHN, ROBBIE K.	LVMPD P#5947
8	GREENBERGER, JAMES A.	LVMPD P#6352
9	JONES, DAWANNA CAMILLE	1040 SIERRA VISTA DR. #4, LVN
10	EBBERT, LINDA	UMC - 1800 W. CHARLESTON BLVD.
11	JONES, GWENDOLYN ADAIRE	1028 SIERRA VISTA DR. #7, LVN

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 LVMPD EV#0003111568  
 28 1ST DEG KID WDW;S/A;BATT W/INTENT - F  
 (TK7)

-3-

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1 GMEM  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 435-4711  
8 Attorney for Plaintiff

FILED IN OPEN COURT  
NOV 30 2000

SHIRLEY B. PARRAGUIRRE, CLERK  
BY Nora Pena  
NORA PENA DEPUTY

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,  
#1670891

Defendant.

Case No. C168678  
Dept. No. VI  
Docket B

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: COUNT IV - BATTERY WITH INTENT TO COMMIT  
A CRIME (CATEGORY B FELONY - NRS 200.400), as more fully alleged in the charging  
document attached hereto as Exhibit "I".

My decision to plead guilty is based upon the plea agreement in this case which is as  
follows:

The State will not oppose probation at rendition of sentence. After rendition of sentence  
the State will not oppose dismissal of the Remaining Counts I through III in the original  
information in this case and Case No. 00F18563X.

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of  
the offense(s) to which I now plead as set forth in Exhibit "I".

I understand that as a consequence of my plea of guilty the Court must sentence me to  
imprisonment in the Nevada State Prison for a minimum term of not less than two (2) years and

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COUNTY CLERK

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1 a maximum term of not more than ten (10) years. The minimum term of imprisonment may not  
2 exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also  
3 be fined up to \$10,000.00. I understand that the law requires me to pay an Administrative  
4 Assessment Fee.

5 I understand that, if appropriate, I will be ordered to make restitution to the victim of the  
6 offense(s) to which I am pleading guilty and to the victim of any related offense which is being  
7 dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the  
8 State of Nevada for any expenses related to my extradition, if any.

9 I understand that I am eligible for probation for the offense to which I am pleading guilty.  
10 I understand that, except as otherwise provided by statute, the question of whether I receive  
11 probation is in the discretion of the sentencing judge.

12 I understand that if more than one sentence of imprisonment is imposed and I am eligible  
13 to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences  
14 served concurrently or consecutively.

15 I also understand that information regarding charges not filed, dismissed charges, or  
16 charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

17 I have not been promised or guaranteed any particular sentence by anyone. I know that  
18 my sentence is to be determined by the Court within the limits prescribed by statute. I  
19 understand that if my attorney or the State of Nevada or both recommend any specific  
20 punishment to the Court, the Court is not obligated to accept the recommendation.

21 I understand if the offense(s) to which I am pleading guilty to was committed while I was  
22 incarcerated on another charge or while I was on probation or parole that I am not eligible for  
23 credit for time served toward the instant offense(s).

24 I understand that the Division of Parole and Probation will prepare a report for the  
25 sentencing judge prior to sentencing. This report will include matters relevant to the issue of  
26 sentencing, including my criminal history. This report may contain hearsay information  
27 regarding my background and criminal history. My attorney and I will each have the opportunity  
28 to comment on the information contained in the report at the time of sentencing. Unless the

1 District Attorney has specifically agreed otherwise, then the District Attorney may also comment  
2 on this report.

3 WAIVER OF RIGHTS

4 By entering my plea of guilty, I understand that I am waiving and forever giving up the  
5 following rights and privileges:

6 1. The constitutional privilege against self-incrimination, including the right to refuse to  
7 testify at trial, in which event the prosecution would not be allowed to comment to the jury about  
8 my refusal to testify.

9 2. The constitutional right to a speedy and public trial by an impartial jury, free of  
10 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the  
11 assistance of an attorney, either appointed or retained. At trial the State would bear the burden  
12 of proving beyond a reasonable doubt each element of the offense charged.

13 3. The constitutional right to confront and cross-examine any witnesses who would  
14 testify against me.

15 4. The constitutional right to subpoena witnesses to testify on my behalf.

16 5. The constitutional right to testify in my own defense.

17 6. The right to appeal the conviction, with the assistance of an attorney, either appointed  
18 or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other  
19 grounds that challenge the legality of the proceedings and except as otherwise provided in  
20 subsection 3 of NRS 174.035.

21 VOLUNTARINESS OF PLEA

22 I have discussed the elements of all of the original charge(s) against me with my attorney  
23 and I understand the nature of the charge(s) against me.

24 I understand that the State would have to prove each element of the charge(s) against me  
25 at trial.

26 I have discussed with my attorney any possible defenses, defense strategies and  
27 circumstances which might be in my favor.

28 All of the foregoing elements, consequences, rights, and waiver of rights have been

1 thoroughly explained to me by my attorney.

2 I believe that pleading guilty and accepting this plea bargain is in my best interest, and  
3 that a trial would be contrary to my best interest.

4 I am signing this agreement voluntarily, after consultation with my attorney, and I am not  
5 acting under duress or coercion or by virtue of any promises of leniency, except for those set  
6 forth in this agreement.

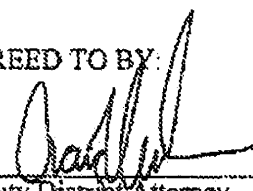
7 I am not now under the influence of any intoxicating liquor, a controlled substance or  
8 other drug which would in any manner impair my ability to comprehend or understand this  
9 agreement or the proceedings surrounding my entry of this plea.

10 My attorney has answered all my questions regarding this guilty plea agreement and its  
11 consequences to my satisfaction and I am satisfied with the services provided by my attorney.

12 DATED this 29 day of November, 2000.

13  
14   
15 DOMONIC RONALDO MALONE  
16 Defendant

17 AGREED TO BY:

18   
19 Deputy District Attorney  
20  
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of  
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s) to  
5 which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution that  
7 the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent  
9 with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading  
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto  
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or  
16 other drug at the time I consulted with the defendant as certified in paragraphs 1  
17 and 2 above.

18 Dated: This 29 day of November, 2000.

19   
20 ATTORNEY FOR DEFENDANT

21  
22  
23  
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25  
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28 pm

FILED

JUL 24 3 34 PM '00

*Shirley A. Jones*  
CLERK

1 INFO  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

9 I.A. 08/02/00  
10 8:30 A.M.  
11 PD

DISTRICT COURT  
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 DOMONIC RONALDO MALONE,  
16 #1670891

17 Defendant.

Case No. C148678  
Dept. No. VI  
Docket B

INFORMATION

18 STATE OF NEVADA }

19 COUNTY OF CLARK }

ss:

20 STEWART L. BELL, District Attorney within and for the County of Clark, State of  
21 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

22 That DOMONIC RONALDO MALONE, the Defendant(s) above named, having  
23 committed the crimes of FIRST DEGREE KIDNAPING WITH USE OF A DEADLY  
24 WEAPON (Felony - NRS 200.310, 200.320); SEXUAL ASSAULT (Felony - 200.364,  
25 200.366), and BATTERY WITH INTENT TO COMMIT A CRIME (Felony - NRS  
26 200.400), on or about the 11th day of March, 2000, within the County of Clark, State of Nevada,  
27 contrary to the form, force and effect of statutes in such cases made and provided, and against  
28 the peace and dignity of the State of Nevada,

COUNT I - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,  
inveigle, entice, decoy, abduct, conceal, kidnap, or carry away DAWANNA JONES, a human

EXHIBIT "1"



1 being, with the intent to hold or detain the said DAWANNA JONES, against her will, and  
2 without her consent, for the purpose of committing sexual assault, said Defendant using a deadly  
3 weapon, to-wit: a knife and/or ligature, during the commission of said crime.

4 COUNT II - SEXUAL ASSAULT

5 did then and there wilfully, unlawfully, and feloniously sexually assault and subject  
6 DAWANNA JONES, a female person, to sexual penetration, to-wit: digital penetration, by  
7 inserting his finger into the vagina of the said DAWANNA JONES, against her will.

8 COUNT III - SEXUAL ASSAULT

9 did then and there wilfully, unlawfully, and feloniously sexually assault and subject  
10 DAWANNA JONES, a female person, to sexual penetration, to-wit: sexual intercourse, by  
11 inserting his penis into the vagina of the said DAWANNA JONES, against her will.

12 COUNT IV - BATTERY WITH INTENT TO COMMIT A CRIME

13 did then and there wilfully, unlawfully, and feloniously use force or violence upon the  
14 person of another, to-wit: DAWANNA JONES, with intent to commit <sup>Grand Larceny</sup> ~~sexual assault~~, (by hitting  
15 and kicking the said DAWANNA JONES about the head and body with his hands an feet, and/or  
16 by wrapping a telephone cord tightly around her neck, and/or by pushing a pillow against her  
17 face, during the commission of a <sup>Grand Larceny</sup> ~~sexual assault~~.

18 STEWART L. BELL  
19 DISTRICT ATTORNEY  
20 Nevada Bar #000477

21 BY Gabrielle Ferrales  
22 GABRIELLE FERRALES  
23 Deputy District Attorney  
24 Nevada Bar #006600

25 Names of witnesses known to the District Attorney's Office at the time of filing this  
26 Information are as follows:

27	<u>NAME</u>	<u>ADDRESS</u>
28	MITCHELL, JAMES H. III	LVMPD P#1829



ORIGINAL

9

1 JOCP  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

FILED

JAN 9 4 00 PM '01

*Shirley L. Long*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 DOMONIC RONALDO MALONE,  
13 #1670891

14 Defendant.

Case No. C168678  
Dept. No. VI

JUDGMENT OF CONVICTION  
(PLEA OF GUILTY)

18 The Defendant previously appeared before the Court herein with counsel and entered a  
19 plea of guilty to the crime(s) of Count IV - BATTERY WITH INTENT TO COMMIT A  
20 CRIME (Felony), in violation of NRS 200.400; thereafter, on the 28th day of December, 2000,  
21 the Defendant was present in court for sentencing with his counsel, DARREN COX, Deputy  
22 Public Defender, and good cause appearing,

23 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition  
24 to the \$25.00 Administrative Assessment Fee, the Defendant is sentenced to: a MAXIMUM  
25 term of (90) NINETY MONTHS with a MINIMUM parole eligibility of (30) THIRTY  
MONTHS in the Nevada Department of Prisons. SUSPENDED; placed on PROBATION for  
an indeterminate period not to exceed 3 YEARS. CONDITIONS: 1. General search clause. 2.  
Complete impulse counseling program as deemed necessary. 3. That defendant complete any

CE-02

JAN 10 2001

Page: 67

COUNTY CLERK

JAN 8 2001

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1 other therapeutic counseling as deemed necessary by the Division of Parole and Probation. 4.  
2 Complete 8 HOURS OF COMMUNITY SERVICE work EACH MONTH of probation not to  
3 exceed the provisions of NRS 176.087, unless employed full time. 5. That the defendant have  
4 no contact with the victim Dawanna Jones. 6. That the defendant have no contact with the  
5 daughter without approval of Family Court.

6 DATED this 8 day of December, 2000.

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9 DISTRICT JUDGE 

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28 tgd

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JUN 14 4 19 PM '01

*Shirley...*

1 JOCK  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

13 -vs-

14 DOMONIC RONALDO MALONE,  
15 #1670891

16 Defendant.

Case No. C168678  
Dept. No. VI

17 ORDER FOR REVOCATION OF PROBATION AND  
18 AMENDED JUDGMENT OF CONVICTION

COUNTY CLERK

JUN 14 2001

COUNTY CLERK

JUN - 8 2001

19 The Defendant previously appeared before the Court herein with counsel and entered a  
20 plea of guilty to the crime(s) of Count IV - BATTERY WITH INTENT TO COMMIT A  
21 CRIME (Felony), in violation of NRS 200.400; and, thereafter, on the 28th day of December,  
22 2000, the Defendant was present in Court for sentencing with counsel wherein the Court did  
23 adjudge the Defendant guilty thereof by reason of the plea(s) of guilty, suspended the execution  
24 of the sentence(s) imposed and granted probation to the Defendant.

25 THEREAFTER, a parole and probation officer provided the Court with a written  
26 statement setting forth that the Defendant has, in the judgment of the parole and probation  
officer, violated the conditions of probation; and on the 7th day of June, 2001, the Defendant  
appeared in court with his counsel, DARREN COX, Deputy Public Defender, and pursuant to  
a probation violation hearing/proceeding, and good cause appearing therefor;

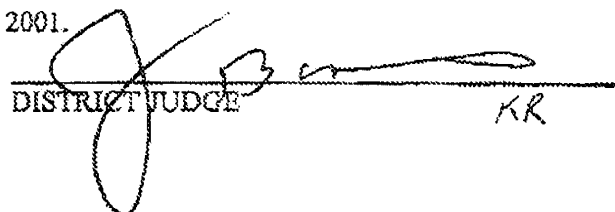
CE-02

JUN 14 2001

1 IT IS HEREBY ORDERED that the probation previously granted to the Defendant is  
2 revoked: and

3 IT IS FURTHER ORDERED THAT: Original SENTENCE of a MAXIMUM of  
4 NINETY (90) MONTHS and a MINIMUM of THIRTY (30) MONTHS in the Nevada  
5 Department of Prisons imposed with 240 DAYS credit for time served.

6 DATED this 14<sup>th</sup> day of June, 2001.

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DISTRICT JUDGE KR

28 tgd

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
**DECLARATION OF WARRANT/SUMMONS**

(N.R.S. 171.106)  
(N.R.S. 53 amended 07/13/93)

**FILED**

EVENT: 000311-1568

STATE OF NEVADA )

1998 MAR 23 A 8:45

) ss:

COUNTY OF CLARK )

JUSTICE COURT  
LAS VEGAS, NEVADA

BY: \_\_\_\_\_  
DEPUTY

Sheila Hartung, being first duly sworn, deposes and says:

That she is a police officer with the Las Vegas Metropolitan Police Department, being so employed for a period of twelve years, assigned to investigate the crime(s) of Sexual Assault (2 counts) and Battery With intent to Commit Sexual Assault committed on or about March 11, 2000, which investigation has developed DOMONIC MALONE as the perpetrator thereof.

**THAT DECLARANT DEVELOPED THE FOLLOWING FACTS IN THE COURSE OF THE INVESTIGATION OF SAID CRIME TO WIT:**

1. That on March 11, 2000 at approximately 1555 hours Officers were called to the scene of a sexual assault and battery at 1040 Sierra Vista #4. The victim of the crime, Dawanna Jones, told arriving officers that her ex-boyfriend and the father of her child, Domonic Malone, had beaten and sexually assaulted her. Miss Jones was transported to UMC by ambulance.
2. That General Assignment Detective J. Mitchell #1829 went to the hospital to interview Miss Jones and General Assignment Detective T. Rosenberg #3816 went to the apartment to process the crime scene.
3. That Miss Jones told Detectives that Malone had come to her apartment to visit with his son. Miss Jones stated that her sister had taken the baby to a birthday party and left Jones and Malone alone in the apartment.
4. That Jones stated she and Malone began to argue, and soon a violent argument ensued. Jones stated that Malone took a knife from the kitchen butcher block and waved it in front of her face, threatening her. He put the knife down and the argument took them into her bedroom.
5. That Jones stated Malone began punching her in her face with his fists and pushed her backwards onto the bed. Jones said that Malone grabbed the phone cord and ripped it from the wall, wrapping it around her neck, using it as a ligature. Jones told Detectives that Malone then pulled her pants and underwear off and inserted his fingers into her vagina.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
**DECLARATION OF WARRANT/SUMMONS CONTINUATION**  
Page 2

EVENT: 006311-1588

6. That Jones stated Malone put a pillow over her head in a smothering manner and then inserted his penis into her vagina, having sexual intercourse with her. Jones stated that during the intercourse, Malone struck her in the face several times. Jones stated that Malone ejaculated inside of her.

7. That Malone then fled the apartment and could not be located by Detectives.

8. That the scene was processed and photographed. Detective Rosenberg noted that the bedroom was in disarray and the mattress of the bed was off the box spring and the phone cord was ripped from the wall. There was a pillow with blood on it.

9. That the medical examination of Miss Jones was conducted by Nurse Linda Ebbert who concluded that Miss Jones had numerous bruises and swelling in her facial area. Miss Jones had ligature marks on her neck and there was blood in her vagina. Also found in her vagina was sperm.

Wherefore, declarant prays that a Warrant of Arrest be issued for suspect DOMONIC MALONE on a charge(s) of Sexual Assault (2 counts) and Battery With Intent to Commit Sexual Assault.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on this 15th day of March, 2000.

DECLARANT: \_\_\_\_\_

*Shirley Hartung*

WITNESS: \_\_\_\_\_

*Dfore 3748*

DATE: \_\_\_\_\_

*3/15/00*



  
CLERK

1 AINF  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 CHRIS J. OWENS  
6 Chief Deputy District Attorney  
7 Nevada Bar #001190  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,  
#1670891,  
JASON DUVAL MCCARTY, #0932255

Defendants.

Case No: C224572  
Dept No: V

AMENDED  
INFORMATION

STATE OF NEVADA }  
COUNTY OF CLARK } ss.

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY, the Defendant(s) above named, having committed the crimes of CONSPIRACY TO COMMIT KIDNAPPING (Felony - NRS 200.310, 200.320, 199.480); FIRST DEGREE KIDNAPPING (Felony - NRS 200.310, 200.320); BATTERY WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.481); PANDERING (Felony - NRS 201.300); CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480); CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 205.060, 199.480); BURGLARY (Felony - NRS 205.060); MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165); and ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165), on or between April, 2006 and May

1 19, 2006, within the County of Clark, State of Nevada, contrary to the form, force and effect  
2 of statutes in such cases made and provided, and against the peace and dignity of the State of  
3 Nevada,

4 COUNT 1 - FIRST DEGREE KIDNAPPING

5 Defendant DOMONIC RONALDO MALONE did, in April of 2006, wilfully,  
6 unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy,  
7 abduct, conceal, kidnap, or carry away MELISSA ESTORES, a human being, with the intent  
8 to hold or detain the said MELISSA ESTORES against her will, and without her consent, for  
9 the purpose of inflicting substantial bodily harm on the said MELISSA ESTORES.

10 COUNT 2 - BATTERY WITH SUBSTANTIAL BODILY HARM

11 Defendant DOMONIC RONALDO MALONE, did, in April of 2006, then and there  
12 wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-  
13 wit: MELISSA ESTORES, by beating and kicking the said MELISSA ESTORES about the  
14 head and body, resulting in substantial bodily harm to the said MELISSA ESTORES

15 COUNT 3 - CONSPIRACY TO COMMIT KIDNAPPING

16 Defendants did, on or about May 16, 2006, then and there meet with each other and  
17 between themselves, and each of them with the other, wilfully, unlawfully, and feloniously  
18 conspire and agree to commit a crime, to-wit: kidnap MELISSA ESTORES, and in  
19 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 4-6,  
20 said acts being incorporated by this reference as though fully set forth herein.

21 COUNT 4 - FIRST DEGREE KIDNAPPING

22 Defendants did, on or about May 16, 2006, wilfully, unlawfully, feloniously, and  
23 without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or  
24 carry away MELISSA ESTORES, a human being, with the intent to hold or detain the said  
25 MELISSA ESTORES against her will, and without her consent, for the purpose of inflicting  
26 substantial bodily harm on the said MELISSA ESTORES.

27 COUNT 5 - BATTERY WITH SUBSTANTIAL BODILY HARM

28 Defendants did, on or about May 16, 2006, then and there wilfully, unlawfully, and

1 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,  
2 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in  
3 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible  
4 under one or more of the following theories of criminal liability, to-wit: (1) by directly or  
5 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
6 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
7 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
8 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
9 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
10 the location where said battery took place, then instructing the said MELISSA ESTORES to  
11 submit to said beating.

12 COUNT 6 - ROBBERY

13 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
14 wilfully, unlawfully, and feloniously take personal property, to-wit: purse and/or its contents,  
15 from the person of MELISSA ESTORES, or in her presence, by means of force or violence  
16 or fear of injury to, and without the consent and against the will of the said MELISSA  
17 ESTORES, the Defendants being responsible under one or more of the following theories of  
18 criminal liability, to-wit: (1) by directly or indirectly committing said crime, and/or (2) by  
19 conspiring with each other to commit the crime of battery and/or kidnapping where each co-  
20 conspirator is liable for the general intent crimes committed by fellow co-conspirators which  
21 were a foreseeable consequence of the conspiracy; and/or (3) by aiding and abetting, by  
22 Defendant JASON DUVAL MCCARTY driving the said MELISSA ESTORES and  
23 Defendant DOMONIC RONALDO MALONE to the location where a battery took place,  
24 then instructing the said MELISSA ESTORES to submit to said beating, thereafter driving  
25 both DOMONIC RONALDO MALONE and MELISSA ESTORES from the location as  
26 DOMONIC RONALDO MALONE robbed MELISSA ESTORES of her purse and/or its  
27 contents.

28 //

1 COUNT 7 - CONSPIRACY TO COMMIT KIDNAPPING

2 Defendants did, on, about, or between May 17, 2006 and May 19, 2006, then and  
3 there meet with each other and between themselves, and each of them with the other,  
4 wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: kidnap  
5 MELISSA ESTORES and/or CHARLOTTE COMBADO and/or VICTORIA MAGEE, and  
6 in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 2-3,  
7 said acts being incorporated by this reference as though fully set forth herein.

8 COUNT 8 - PANDERING

9 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
10 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
11 compel CHARLOTTE COMBADO to become a prostitute, and/or to engage or continue to  
12 engage in prostitution.

13 COUNT 9 - PANDERING

14 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
15 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
16 compel VICTORIA MAGEE to become a prostitute, and/or to engage or continue to engage  
17 in prostitution.

18 COUNT 10 - CONSPIRACY TO COMMIT MURDER

19 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
20 with each other and between themselves, and each of them with the other, wilfully,  
21 unlawfully, and feloniously conspire and agree to commit a crime, to-wit: Murder, and in  
22 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 13-19,  
23 said acts being incorporated by this reference as though fully set forth herein. 18 counts

24 COUNT 11 - CONSPIRACY TO COMMIT BURGLARY

25 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
26 with each other and between themselves, and each of them with the other, wilfully and  
27 unlawfully conspire and agree to commit a crime, to-wit: Burglary, and in furtherance of  
28 said conspiracy, Defendants did commit the acts as set forth in Count 13, said acts being

incorporated by this reference as though fully set forth herein.

COUNT 12 - BURGLARY

Defendants did, on or between May 17, 2006 and May 19, 2006, then and there wilfully, unlawfully, and feloniously enter, with intent to commit assault and/or battery and/or a felony, to-wit: Kidnapping and/or Murder, that certain building occupied by LEONARD ROBINSON, located at 1525 East Fremont, Room No. 222, Las Vegas, Clark County, Nevada.

COUNT 13 - FIRST DEGREE KIDNAPPING

Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away CHARLOTTE COMBADO, a human being, with the intent to hold or detain the said CHARLOTTE COMBADO against her will, and without her consent, for the purpose of committing murder.

COUNT 14 - FIRST DEGREE KIDNAPPING

Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away VICTORIA MAGEE, a human being, with the intent to hold or detain the said VICTORIA MAGEE against her will, and without her consent, for the purpose of committing murder.

COUNT 15 - MURDER WITH USE OF A DEADLY WEAPON

Defendants did, on or between May 17, 2006 and May 19, 2006, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill CHARLOTTE COMBADO, a human being, by striking the said CHARLOTTE COMBADO about the head and body with a deadly weapon, to-wit: a golf club and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp object, the said actions of the Defendants resulting in the death of the said CHARLOTTE COMBADO; the Defendants being responsible under one or more of the following principles of criminal liability, to-wit: (1) by having premeditation and

( )  
1 deliberation in its commission; and/or (2) the killing occurring during the perpetration or  
2 attempted perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being  
3 liable as co-conspirator for the acts done in furtherance of the conspiracy, which acts were  
4 intended by the Defendants; and/or (4) by aiding and abetting in the commission of the crime  
5 by accompanying each other to the crime scene where the Defendants acted as lookouts for  
6 one another, the Defendants did physically take the said CHARLOTTE COMBADO, to a  
7 remote area, the Defendants did take personal property from the person or presence of the  
8 said CHARLOTTE COMBADO, the Defendants did either both physically strike the said  
9 CHARLOTTE COMBADO, or did act as lookout and prevent her from escaping while the  
10 other struck the said CHARLOTTE COMBADO about the head and body with a golf club  
11 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
12 object, the said actions of the Defendants resulting in the death of the said CHARLOTTE  
13 COMBADO, the Defendants left the crime scene together, the Defendants encouraging one  
14 another throughout by actions and words, the Defendant and the accomplice acting in  
15 concert throughout each with intent to commit murder.

16 COUNT 16 - MURDER WITH USE OF A DEADLY WEAPON

17 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
18 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and  
19 with malice aforethought, kill VICTORIA MAGEE, a human being, by striking the said  
20 VICTORIA MAGEE about the head and body with a deadly weapon, to-wit: a golf club  
21 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
22 object, the said actions of the Defendants resulting in the death of the said VICTORIA  
23 MAGEE; the Defendants being responsible under one or more of the following principles of  
24 criminal liability, to-wit: (1) by having premeditation and deliberation in its commission;  
25 and/or (2) the killing occurring during the perpetration or attempted perpetration of  
26 kidnapping and/or robbery and/or burglary and/or (3) by being liable as co-conspirator for  
27 the acts done in furtherance of the conspiracy, which acts were intended by the Defendants;  
28 and/or (4) by aiding and abetting in the commission of the crime by accompanying each

1 other to the crime scene where the Defendants acted as lookouts for one another, the  
2 Defendants did physically take the said VICTORIA MAGEE, to a remote area, the  
3 Defendants did take personal property from the person or presence of the said VICTORIA  
4 MAGEE, the Defendants did either both physically strike the said VICTORIA MAGEE, or  
5 did act as lookout and prevent her from escaping while the other struck the said VICTORIA  
6 MAGEE about the head and body with a golf club and/or a knife and/or a rock and/or an  
7 unknown blunt object and/or an unknown sharp object, the said actions of the Defendants  
8 resulting in the death of the said VICTORIA MAGEE, the Defendants left the crime scene  
9 together, the Defendants encouraging one another throughout by actions and words, the  
10 Defendant and the accomplice acting in concert throughout each with intent to commit  
11 murder.

12 COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON

13 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
14 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
15 person of CHARLOTTE COMBADO, or in her presence, by means of force or violence or  
16 fear of injury to, and without the consent and against the will of the said CHARLOTTE  
17 COMBADO, said Defendants using a deadly weapon, to-wit: a golf club and/or a knife  
18 and/or a rock and/or other unidentified blunt or sharp object, during the commission of said  
19 crime.

20 COUNT 18 - ROBBERY WITH USE OF A DEADLY WEAPON

21 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
22 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
23 person of VICTORIA MAGEE, or in her presence, by means of force or violence or fear of  
24 injury to, and without the consent and against the will of the said VICTORIA MAGEE, said

25 //

26 //

27 //

28 //

Defendants using a deadly weapon, to-wit: a golf club and/or a knife and/or a rock and/or other unidentified blunt or sharp object, during the commission of said crime.

BY



DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
ALLRED, CLAY	HPD #1221
BENJAMINS, FELICIA	HPD #720
COLLINS, GERARD	HPD #324
ESTORES, MELISSA	UNKNOWN ADDRESS
FUENTES, FRANKLIN	HPD #621
HALL, RAMAAN	UNKNOWN ADDRESS
HERB, DONALD	UNKNOWN ADDRESS
HERB, HAROLD	140 SIR NOBLE ST., LVN
HOSAKA, MARK	HPD #777
KUBICZEK, PIOTR DR.	CORONER'S OFFICE
NAGEL, LYNN	C/O CCDA OFFICE
PARKER, DAVID	CANCUN APARTMENTS
PHILLIPS, CORRINA	C/O CCDA OFFICE
RIDINGS, CRAIG	HPD #358
ROBINSON, LEONARD	1525 E. FREMONT #F-222, LVN
WEBSTER, MICHAEL	HPD #899

DA#06FH0742A, B/mb  
HPD EV#06-11513  
CONSP; KIDNAP; BWSBH; BURG; MWDW; RWDW - F  
(TK5)



ORIGINAL

7  
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2006 OCT -9 P 4: 56

*Shirley A. Harwood*  
CLERK

1 MOT  
ANTHONY P. SGRO, ESQ.  
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CHAD N. DENNIE, ESQ.  
3 Nevada Bar No.: 008789  
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6 CHRIS ORAM, ESQ.  
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7 520 S. 4<sup>th</sup> St., 2<sup>nd</sup> Floor  
Las Vegas, NV 89101  
8 (702) 384-5563

9 Attorneys for Defendant Jason McCarty

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

Case No.: C 224572  
Dept No.: V

13  
14 Plaintiff,

15 vs.

16 JASON MCCARTY,  
and DOMONIC MALONE

17 Defendant.  
18

19  
20 MOTION TO SEVER

21 COMES NOW, Defendant, JASON MCCARTY, by and through his attorney, ANTHONY  
22 P. SGRO, ESQ., and CHRIS ORAM, ESQ., and moves this Court for an order severing the criminal  
23 trial of Defendant JASON MCCARTY from that of his co-defendant DOMONIC MALONE. This  
24 motion is made pursuant to NRS 174.165, and Article I, § 8 of the Nevada Constitution, U.S. Const.  
25 Amend. VI, § 14, relevant caselaw and a hearing is requested.

26 ...  
27 ...  
28 ...

19  
MCJ

RECEIVED

OCT - 9 2006

COUNTY RK

1 This Motion is based upon the following Points and Authorities, the pleadings and papers  
2 on file herein, and any oral argument before the court.

3 DATED this 9th day of October, 2006.  
4

5 Respectfully Submitted by,

6 PATTI & SGRO, LTD.

7   
8

9 Anthony P. Sgro, Esq.  
10 Nevada Bar No. 003811  
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19 Las Vegas, NV 89101  
20 (702) 384-5563

21 Attorneys for Defendant Jason McCarty  
22  
23  
24  
25  
26  
27  
28

1 NOTICE OF MOTION

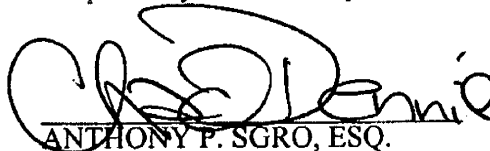
2 TO: THE STATE OF NEVADA, Plaintiff

3 TO: CHRIS OWENS, Deputy District Attorney,

4 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the undersigned  
5 will bring the foregoing motion on for hearing before the above-entitled Court on the 31st day  
6 of October, 2006, at the hour of 8:30 am, in Department V, or as soon thereafter as  
7 counsel may be heard.

8 **DATED** this 9th day of October, 2006.

9  
10 Respectfully submitted by,

11 

12 ANTHONY P. SGRO, ESQ.  
13 PATTI & SGRO, Ltd.  
14 Nevada Bar No. 003811  
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23 Attorneys for Defendant Jason McCarty  
24  
25  
26  
27  
28

MEMORANDUM OF POINTS AND AUTHORITIES

**I. FACTS**

**A. ON MAY 20, 2006, TWO DEAD BODIES WERE FOUND NEAR PARADISE HILLS AND DAWSON STREET, IN HENDERSON, NEVADA**

On May 20, 2006, the Henderson Police Department ("HPD") received a 911 call regarding two dead bodies that had been found just west of Paradise Hills and Dawson Street in Henderson, Nevada. See July 24, 2006, transcript, Volume III, of the Preliminary Hearing proceedings, page 366, attached hereto as Exhibit 1. The two dead bodies were identified as Jane Dawson Doe One and Jane Dawson Doe Two. See Exhibit 1, p. 368. On or about May 21, 2006, a female named Melissa Estores, along with Ryan Noe made contact with the HPD and believed the two dead bodies to be Victoria Rachel Magee ("Victoria") and Charlotte Agnes Combado ("Christina"). See July 26, 2006, Preliminary Hearing transcript, p.74, attached hereto as Exhibit 2. The two dead bodies were eventually identified as Victoria Rachel Magee (hereinafter "MAGEE") and Charlotte Agnes Combado (hereinafter "COMBADO"). See Exhibit 1, p. 368. Detective Collins of the Henderson Police Department ("HPD") was assigned as the lead investigator in the investigation of the deaths of MAGEE and COMBADO. See Exhibit 1, p. 365. A crime scene was set up and secured. See Exhibit 1, p. 367.

To assist with the HPD's investigation, surveillance tapes were requested from the Hard Rock Hotel and Casino, the Sahara Hotel, and 7-Eleven stores near South Cove, a Shell or Texaco station near Conostoga and Nevada. See Exhibit 2, p. 81. Based in part on information obtained from Melissa Estores, the HPD obtained arrest warrants for MALONE, HERB, and MCCARTY. See Exhibit 2, p. 173-75.

**B. THE HPD's INVESTIGATION OF THE DEATHS OF COMBADO and MAGEE LED THE HPD TO THREE SUSPECTS: DONALD HERB, DOMONIC MALONE, and JASON MCCARTY**

On May 23, 2006, MALONE was questioned by Detective Collins. See Exhibit 2, p. 68. On May 23, 2006, MALONE denied any involvement in the incident that occurred with a female named Melissa Estores on the night that they were taken to the Hard Rock Cafe, but MALONE did admit about a month prior to beating Estores in the chest area at the Sportsman's complex. See Exhibit

1 l, p. 382. On May 23, 2006, MALONE was questioned, arrested, and transported to the Henderson  
2 City Jail. See Exhibit 1, p. 378. MALONE was also questioned about being with MCCARTY on  
3 Wednesday night at the Sportsman's Lounge. At the Preliminary Hearing, Detective Collins on  
4 direct examination from Prosecutor Chris Owens, Esq., stated the following:

5 MR OWENS: What did he say to you about the night of the murder as to what he was doing that  
6 Wednesday into the Thursday?

7 THE WITNESS: he did tell me on Wednesday night that he was down at the Sportsman's and that  
8 he did run into Romeo.

9 BY MR. OWENS:

10 Q.: What happened?

11 A.: He said they stayed there for a little bit, and Romeo ended up taking him home between, I think  
12 he said probably like about 12:30, a little bit after midnight, probably between midnight and 1:00  
13 o'clock in the morning.

14 See Exhibit 2, p. 68, l. 14-19.

15 On or about, May 25, 2006, HERB, MCCARTY, and MALONE, were all booked with  
16 charges including and related to the murders of COMBADO and MAGEE. See Exhibit 2, p. 79.  
17 The two vehicles of Donald Herb, a green Alero and a white Honda were impounded and processed  
18 by crime scene investigators. See Exhibit 2, p. 86.

19 **C. SEVERAL STATEMENTS WERE GIVEN BY SUSPECTS/DEFENDANTS**  
20 **MALONE, HERB, and MCCARTY**

21 Defendant HERB gave two statements to the police on May 25, 2006.<sup>1</sup> MCCARTY gave  
22 statements to the HPD on May 25, 2006, June 1, 2006, and three (3) statements on June 6, 2006.<sup>2</sup>  
23 MALONE gave statements to the HPD on May 23, 2006 (2 statements), May 31, 2006, and June 1,  
24 2006. Each of the statements by MALONE make specific reference to Defendant MCCARTY, and,  
25 arguably, implicates him in the crimes that are the subject of the instant case. The statements of  
26 MALONE require severance based on the Nevada Revised Statutes and relevant case-law.

27 ...

28 <sup>1</sup>Donald Herb has reached a plea agreement with the State of Nevada and has agreed to testify  
against MALONE and MCCARTY.

<sup>2</sup>MCCARTY gave statements on May 25, 2006, June 1, 2006, and three (3) statements on  
June 6, 2006, all of which were before Counsel had been retained or appointed to MCCARTY.

1 **II. ARGUMENT**

2 **A. SEVERANCE IN THIS MATTER IS NECESSARY BECAUSE INTRODUCTION**  
3 **OF THE CO-DEFENDANT MALONE'S CONFESSION/STATEMENTS WOULD**  
4 **VIOLATE DEFENDANT MCCARTY'S SIXTH AMENDMENT RIGHT OF**  
5 **CONFRONTATION AND CROSS-EXAMINATION.**

6 N.R.S. 174.165(1) states:

7 If it appears that a defendant or the State of Nevada is prejudiced by a joinder of  
8 offenses or of defendants in an indictment or information, or by such joinder for  
9 trial together, the court may order an election or separate trials of counts, grant a  
10 severance of defendants or provide whatever other relief justice requires.

11 In Amen v. State, 106 Nev. 749, 755, 801 P.2d 1354, 1358 (1990), the Nevada Supreme  
12 Court held that: "N.R.S. 174.165 provides that the district court may sever a joint trial 'if it appears  
13 that a defendant is prejudiced' by the joinder."

14 Previously, the Nevada Supreme Court reversed a conviction and remanded cases for new  
15 trial based on the District Court's refusing to grant a severance for a defendant. See Duckworth v.  
16 State, 113 Nev. 780, 942 P.2d 157. In Duckworth, Martin and Duckworth were co-defendants for  
17 the murders of Joseph Smith and Vikki Smith. The evidence against Martin was largely  
18 circumstantial. Testimony, including a confession by Duckworth, inferred that Duckworth had acted  
19 with an accomplice. Id. at 794, 942 P.2d at 166. Motions to sever were denied by the District Court.  
20 The Nevada Supreme Court stated:

21 However, we conclude that this was error because Duckworth's confessions referred  
22 to another unnamed person, and it is likely that the jury deduced that this other  
23 person was Martin. This conclusion is bolstered by the fact that Martin and  
24 Duckworth sat together at trial, and testimony had indicated that Martin and Joey  
25 were friends and that Martin, Joey, and Duckworth all drove from California  
26 together.

27 Id. at 794-95, 942 P.2d at 166-67.

28 Furthermore, the Court concluded, "that because Duckworth did not testify, the introduction  
of his confession, which probably inculpated Martin, violated Martin's right of cross examination  
secured by the confrontation clause of the Sixth Amendment." Id. at 795, 942 P.2d at 167. See also,  
Stevens v. State, 97 Nev. 443, 634 P.2d 662 (1981).

In Bruton, 391 U.S. 123 (1968), the United States Supreme Court held that an accused's right  
of cross-examination secured by the confrontation clause of the Sixth Amendment is violated at his

1 joint trial with a Co-Defendant who does not testify by the admission of the Co-Defendant's  
2 confession inculcating the accused, notwithstanding jury instructions that the Co-Defendant's  
3 confession must be disregarded in determining the accused's guilt or innocence.

4 The Bruton court also found that if a co-defendant in a joint trial has made a confession  
5 implicating another co-defendant and the prosecution seeks to use the confession, the non-confessing  
6 defendant has a right to exclusion of the confession, severance, or redaction of the confession to  
7 avoid mention or implication of him. The introduction of the co-defendant's confession violates the  
8 non-confessing co-defendant's Sixth Amendment right of confirmation and cross-examination. The

9 Bruton Court continued:

10 Such a context is presented here, where the powerfully incriminating extra-judicial  
11 statement of a co-defendant, who stands accused side by side with a defendant, are  
12 deliberately spread before the jury in a joint trial. Not only are the incriminations  
13 devastating to the defendant, but the credibility is inevitably suspect, a fact  
14 recognized when accomplices do take the stand and the jury is instructed to weigh  
15 the testimony carefully given the recognized motivation to shift blame onto others.  
16 The unreliability of such evidence is intolerably compounded when the alleged  
17 accomplice, as here, does not testify and cannot be tested by cross-examination.

18 Bruton, 391 U.S. 123, 135-36 (1968).

19 The Nevada Supreme Court in Stevens, 97 Nev. 443, 634 P.2d 662 (1981), recognized the  
20 principle that not every situation may be cured by limiting instructions or any other cautionary  
21 measures. Even though the State had excised all references to Stevens, the Nevada Supreme Court  
22 reversed Defendant Stevens' conviction pursuant to the Bruton rule when a co-defendant's statement  
23 was offered at trial, and Stevens had no opportunity to cross-examine that co-defendant. Id. at 444,  
24 534 P.2d, 663. The Nevada Supreme Court held:

25 It appears likely that the jury read the appellant's [Stevens] name into the blanks in  
26 each of [co-defendant] Oliver's statements introduced at the trial below. The  
27 circumstantial links between Oliver and Stevens, referred to by the prosecutor, and  
28 the fact that Oliver and appellant were being tried together made it not only natural,  
but seemingly inevitable, that the jury would infer appellant to be the person referred  
to in the blanks in Oliver's statement.

29 Id.

30 ...

31 ...

1 In Cruz, the United States Supreme Court held:

2 Where a non-testifying co-defendant's confession incriminating the defendant is not  
3 directly admissible against the defendant, the Confrontation Clause bars its admission  
4 at their joint trial, even if the jury is instructed not to consider it against the  
5 defendant, and even if the defendant's own confession is admitted against him.

6 Cruz v. New York, 481 U.S. 186 (1987). According to the holding in Bruton it is necessary in order  
7 to preserve MCCARTY's Sixth Amendment right to confrontation and cross-examination that the  
8 trial be severed from co-defendant MALONE. It is likely that the State will attempt to introduce the  
9 statements of MALONE, and without an opportunity to cross-examine MALONE regarding his  
10 statements, his statement will inculcate MCCARTY and result in extreme prejudice to MCCARTY.  
11 In the instant case, this Court is faced with the exact dilemma that the Nevada Supreme Court  
12 considered in both Duckworth and Stevens, and that the U.S. Supreme Court addressed in Bruton.

13 At the preliminary hearing, HERB testified to his alleged involvement in the murders of  
14 MAGEE and COMBADO. HERB testified that MCCARTY drove his green Alero in the months  
15 of April and May and that MCCARTY is a friend of his. See July 27, 2006, transcript of Preliminary  
16 Hearing, p. 6, attached hereto as Exhibit 3. HERB testified that MCCARTY had a cell phone with  
17 the number (702) 237-3308. HERB testified that he was involved in drug transactions with  
18 MCCARTY and MALONE. See Exhibit 3, p. 11. HERB testified that MALONE, MCCARTY, and  
19 HERB were together with MAGEE, COMBADO, and ESTORES on the night that Estores was  
20 allegedly battered by MALONE. See Exhibit 3, p. 12. HERB then testifies that he was taken home  
21 and is not sure where MALONE, MCCARTY, MAGEE, COMBADO, and ESTORES went later  
22 in the evening. See Exhibit 3, p. 13. HERB testified that on what is believed to be the early morning  
23 of May 18, 2006, HERB received a call from MCCARTY. See Exhibit 3, p. 15. HERB testified that  
24 MCCARTY and MALONE summoned him to the crime scene and needed help in relation to two  
25 murders. See Exhibit 3, pp. 15-21. HERB also testified that MCCARTY was with MALONE on  
26 the Tuesday night before the alleged murders of MAGEE and COMBADO. See Exhibit 3, p. 12.  
27 Defendant MCCARTY believes the State will attempt to prove that he was present with MALONE  
28 on the night (Tuesday) ESTORES was allegedly beaten by MALONE and also on the night of the  
alleged murders of MAGEE and COMBADO.



1 Co-defendant MALONE has made statements, arguably, that explicitly inculcate Defendant  
2 MCCARTY. Defendant MCCARTY believes the State will present a theory that MCCARTY and  
3 MALONE were together on Wednesday night, May 17, 2006, into the early morning of Thursday,  
4 May 18, 2006. The following statements by MALONE would be used by the State to place  
5 MALONE and MCCARTY together on May 17, 2006, and also in the early morning of May  
6 18, 2006.

7 MALONE is questioned as to whether MCCARTY took him home on Wednesday night.  
8 The questioning is as follows:

9 Q.: Okay, How about were you with Romeo Wednesday night?  
A.: Now, I remember - - if not mistaken, that Wednesday when I came down, I think Romeo took  
10 me home, or was - - I'm not sure. I'm not really sure, but I know somebody took me home  
11 Wednesday.

12 See May 31, 2006, MALONE statement, p. 55, l. 20-4, attached hereto as Exhibit 5.

13 MALONE is questioned about being in apartment 1585 on Wednesday night or early  
14 Thursday morning, which is the night that the alleged murders of Christina and Victoria took place.  
15 The questioning is as follows:

16 Q.: When you're with - - when you're with Romeo on Wednesday night and before he took you  
home, did - - did you guys go up to the girls' apartment?

17 A.: 1585?

Q.: Yeah.

18 A.: Yeah.

Q.: Yeah. Were the girls there?

19 A.: To my knowledge, I think so.

20 See Exhibit 5, p. 59, l. 15-22.

21 MALONE is also questioned about getting a ride home from Jason on the Wednesday night  
22 both were in apartment 1585. The questioning is as follows:

23 Q.: Okay. And you're saying - - you're saying that Romeo took you home.

A.: Yeah.

24 Q.: Do you know what time he took you home?

A.: I do not know.

26 See Exhibit 5, p. 60, l. 15-19.

27 Q.: Okay. All right. But you - - you can't remember what time you got home that - - what time that  
28 Romeo dropped you off?

1 A.: No.  
Q.: But it was before he got beat?  
2 A.: Yeah. He was in his right state of mind then.  
Q.: Okay.  
3 A.: Yeah.  
Q.: All right. But you said - - you said when you got there and you were with Romeo at the  
4 Sportsman Wednesday night, it was dark?  
A.: Uh huh.  
5 Q.: Okay, But you're not sure exactly what time it was?  
A.: No sir.  
6 Q.: Okay. And you said you did go to the girls' apartment?  
A.: Yes.  
7 Q.: Okay. And let's say - - let's say if the girls say that you were there probably about like past  
midnight, would that be accurate before you got taken home.  
8 A.: It could be, yeah.  
9 See Exhibit 5, pp. 64-5, l. 20- 13.  
10 Q.: Then you got - - then- - and Donnie says that - - that you and Romeo went and got - - went and  
got the girls and took 'em out to the desert.  
11 A.: Like I say, you got to take that up with them.  
12 See Exhibit 5, p. 26, l. 21-4.  
13 MALONE is questioned about being with Donald Herb or MCCARTY in the early morning  
14 that the battery was committed on MCCARTY. MALONE answers as follows:  
15 Q.: Okay. "Cause Romeo says you were with Donnie that night, you know. Is that true?  
16 A.: Like I said, no.  
17 See Exhibit 5, p. 79, l. 2-4.  
18 Q.: Okay. All right. And - - now, Donnie says - - Donnie says you were with Romeo that night.  
A.: Uh-huh.  
19 Q.: Okay. Now, how would Donnie know that you were with Romeo that night?  
A.: I don't know. Like I say, I didn't see Donnie. I really didn't.  
20 See Exhibit 5, p. 81, l. 1-7.  
21 The following questioning goes into the beating received by MCCARTY on the early  
22 morning of May 18, 2006. MALONE is questioned as follows:  
23 Q.: Excuse me. When - - when Romeo got jumped.  
24 A.: No, I wasn't there.  
Q.: No. Were you at - - were you at the girls' house in 1585, you know, where Romeo's friends, the  
25 girlfriends, the two lesbians?  
A.: No, I wasn't there.  
26  
27 See Exhibit 5, p. 31, l. 5-9.  
28 Q.: When was - - when was the next time that you saw Romeo?

1 A.: Well he, - - well, he probably seen me the next day.  
Q.: About what time?  
2 A.: It was daytime because that was when - - 'cause we - - think we supposed to did something or  
whatever. I don't remember.  
3 Q.: Right.  
A.: But I was asking, you know, what's - - what's - - what's happening, whether he like - - he really  
4 couldn't talk.  
Q.: Yeah.  
5 A.: And I was like, "What's wrong?"  
Q.: Cause he said - - he said when he got his ass kicked right there about 2:30 in the morning, he  
6 called you and you showed up back at the Sportsman?  
A.: Nah. 'Cause if I did, there wouldn't be nothing to talk about. 'Cause like I say, I would never  
7 let that happen to you. I won't let that happen to nobody.

8 See Exhibit 5, pp. 61-2, l. 25-16.

9 MALONE is questioned further about getting a ride home from MCCARTY and MCCARTY being  
10 beaten on the same night. The line of questioning is as follows:

11 Q.: Okay. And then what happened was that Romeo took you home.  
A.: Uh-huh.  
12 Q.: Okay. And then Romeo came back and got his ass kicked - -  
A.: Yeah.

13

14 See Exhibit 5, p. 78, l. 13-7.

15 In the event co-defendants MCCARTY and MALONE proceed to a joint trial, it is almost  
16 certain that the State will admit the statements of co-defendant MALONE. U.S. Const. Amend. VI,  
17 § 14. MCCARTY will be precluded from cross-examining the statement of co-defendant MALONE  
18 if he does not testify, and introduction of the co-defendant's confession would significantly prejudice  
19 MCCARTY's ability to receive a fair trial afforded under the Sixth Amendment to the United States  
20 Constitution. U.S. Const. Amend. VI, § 14. **The following, if admitted as evidence, and if**  
21 **MCCARTY is not given an opportunity to cross-examine MALONE illustrate additional**  
22 **problems which would result if a severance is not granted.**

23 Q.: Well, let me ask you something. Do you have a friend that you hang around with that's got like  
a - something wrong with his arm and his hand?  
24 A.: Yeah, I know the guy.  
Q.: What's that - what's that guy's name?  
25 A.: Jason  
Q.: Jason. Jason what?  
26 A.: I don't know his last name.  
Q.: You don't know his last name. Is he white or black?  
27 A.: He's a black dude.  
Q. He's a black dude. How do you know Jason?  
28 A.: I know Jason from being over at the bar at the Sportsman's

1 See Exhibit 4, page 21-22, l. 17-4.

2 MALONE was questioned about selling dope to Tre and Jason. The questioning is as  
3 follows:

4 Q.: You selling dope to - - like Tre and Jason?

5 A.: No.

6 See May 23, 2006, MALONE statement, p. 60, l. 24-5, attached hereto as Exhibit 4.

7 MALONE is questioned about last seeing MCCARTY. The line of questioning is as follows:

8 Q.: And what about Jason?

A.: Jason, he had me call once or twice and stuff like that.

9 Q.: When was the last time you saw him?

A.: Last time I saw Jason, about the other day.

10 Q.: The other day?

A.: The other day.

11 Q.: What day was that?

A.: About yesterday.

12 Q.: Yesterday?

A.: Yeah.

13

14 See Exhibit 4, p. 63, l. 22-6.

15 MALONE was questioned about the last time he saw Christina. The questioning is as  
16 follows:

17 Q.: You said you took the - - he took you home.

A.: Yeah. And I said - - I think when I seen Christina, about the last time I probably seen Jason.

18 Q.: So you're telling me the night that you - - that you got a ride home from Jason - -

A.: Was probably the last - -

19 Q.: was the night that you saw - -

A.: I seen - -

20 Q.: Christina?

A.: About the same time I seen Christina, yeah.

21

22 See Exhibit 4, p. 75-6, l. 19-3.

23 MALONE is questioned about MCCARTY's physical description. The questioning is as follows:

24 Q.: Who's the guy with the left arm or whatever?

25 A.: That's Jason.

26 See Exhibit 4, p. 95, l. 6-8.

27 MALONE is questioned about the possibility of MCCARTY being Victoria's pimp.

28 Q.: How about - - how about - - how about Romeo, okay? Is Romeo - - is Romeo Victoria's pimp?

1 A: That I know of, uh-huh.  
Q.: No?  
2 A.: I don't -- I don't think that's -- well, it could be, but I doubt it.  
3 See Exhibit 5, p. 91, l. 13-8.  
4 In MALONE's June 1, 2006, statement, MCCARTY is mentioned as having been arrested  
5 by the HPD. See MALONE June 1, 2006, statement, p. 7, l. 14, attached hereto as Exhibit 6.  
6 **MALONE is questioned about the green Alero, which is owned by Donald Herb.**  
7 **MCCARTY believes the State will introduce a theory that one or both of the vehicles are**  
8 **associated with the murders of MAGEE and COMBADO. The line of questioning and the**  
9 **references to MCCARTY, which are numerous, are as follows:**  
10 Q.: Have you been inside the green Alero?  
A.: Yes, I have.  
11 Q.: You have.  
A.: Yeah.  
12 Q.: Yeah?  
A.: Yeah.  
13 Q.: Have you been inside the green Alero with other people?  
A.: Yeah. Me, him, and Donnie.  
14 Q.: You, him, and Donnie:  
A.: Yes, Me, Donnie, and Jason.  
15 Q.: Donnie and Jason?  
A.: Yeah.  
16 Q.: Okay. And who drives that car when you guys are in Donnie's car?  
A.: Sometime Donnie drive. Sometimes Jason drive.  
17 Q.: Really?  
A.: Yeah.  
18 Q.: Okay. Why does -- why does Jason drive sometimes?  
A.: I guess because he takes Donnie to work.  
19  
20 See Exhibit 4, pp. 25-26, l. 13-6.  
21 Q. Okay. And when you were in the car with Donnie, who was in there with you?  
A.: It was just me, him, and Jason. And then the last time I was in it, Jason took me home.  
22 Q.: Jason took you home?  
A.: Yes.  
23 See Exhibit 4, p. 27, l. 10-15.  
Q.: So the last time you were in -- the last time you were in Donnie's car --  
24 A.: Yeah.  
Q.: -- Jessie, Sarah --  
25 A.: No. No.  
Q.: Well --  
26 A.: Last time I was in Donnie's car --  
Q.: Yeah.  
27 A.: -- Jason, and me, and Donnie was first, right, in the car together.  
Q.: Right. Right.  
28 A.: But the last, the same day --

1 Q.: Yeah.  
A.: It was me and Jason and he dropped me off.  
2  
3 See Exhibit 4, pp. 29-30, l. 14-2.  
MALONE is further questioned about specifics about MCCARTY, including where he lives  
and if he was driving on a certain night. The questioning is as follows:  
4 Q.: Yeah. Do you know where -- do you know where Jason is staying?  
A.: At this point in time, no, I don't.  
5 Q.: No?  
A.: I've never been- -  
6 Q.: Where was he staying last?  
A.: to his house.  
7 ...  
Q.: Okay. What's wrong with -- does Jason have something wrong with his arm?  
8 A.: I guess. I don't really look at people like that.  
Q.: Yeah.  
9 A.: I just notice that his arm is like limp, but, you know. I don't be looking at people like that.  
10 See Exhibit 4, pp. 33-4, l. 2-3.  
11 Q.: Who was driving?  
A.: Jason.  
12 Q.: Jason was driving?  
A.: Yes sir.  
13  
14 See Exhibit 4, p. 43, l. 13-6.  
15 The HPD focused on three suspects in relation to the alleged murders of COMBADO and  
16 MAGEE. Defendant MCCARTY was interrogated several times. Donald Herb was contacted  
17 numerous times. **In addition, MALONE is questioned about picking up the girls at the Sahara**  
18 **Hotel, which is the night (Tuesday, May 16, 2006) when Estores was allegedly beaten by**  
19 **MALONE. MCCARTY is mentioned and the questioning is as follows:**  
20 Q.: Well, apparently -- apparently, you --  
A.: Me:  
21 Q.: Donnie and Jason --  
A.: Uh huh.  
22 Q.: okay, picked up these girls at the Sahara Hotel.  
A.: Uh- huh.  
23 Q.: Okay? And then you left with them.  
A.: Uh- huh.  
24  
25 See Exhibit 4, p. 54, l. 10-17.  
26 Q. All right? Did you, Jason, Christina, Victoria, and Melissa drive out to Henderson last week?  
27 A.: For what.  
28 See Exhibit 4, p. 82, l. 4-6.

1 Q.: Okay. So what you are telling me is that you were never in the green car with Jason and the three  
2 girls, and you never drove up to Henderson?  
A.: That's right.  
3 Q.: Okay. And that you never drove back and went to the Hard Rock?  
A.: No sir.  
4  
5 See Exhibit 4, p. 89, l. 9-18.  
6 Q.: right, and we talked about Red getting beat?  
A.: Uh-huh.  
7 Q.: Okay. And I asked if you were with - - if you were with Romeo - -  
A.: Uh-huh.  
8  
9 See Exhibit 5, p. 8, l. 19-23.  
10 MALONE is questioned about going to the Hard Rock with MCCARTY to drop off  
11 COMBADO, MAGEE, and ESTORES. MCCARTY believes the State will present a theory that  
12 COMBADO, MAGEE, and ESTORES were dropped off at the Hard Rock on the night that  
13 ESTORES was beaten by MALONE. The questioning is as follows:  
14 Q.: Are you saying that you were not with Donnie, Romeo, Christina, Red, and Victoria on Tuesday  
night at the Sahara? You didn't go down there and pick them up - - pick up Red and Romeo?  
15 A.: Why I - - why I need to go down there and pick them up?  
Q.: I'm just asking. Were you there or not?  
16 A.: No.  
17 See Exhibit 5, p. 54, l. 4-9.  
18 MALONE was further questioned about being with MCCARTY on the night Estores was  
beaten. The line of questioning is as follows:  
19 Q.: Tuesday night when Red said you beat her - -  
A.: Uh-huh.  
20 Q.: - - when you had the girls in the car and it was you and Romeo.  
A.: Uh-huh.  
21 Q.: Okay. And she said - - she said you guys took her out to this remote area - -  
A.: Uh-huh.  
22  
23 See Exhibit 5, p. 74, l. 18-25.  
24 Q.: Okay. All right. Because I mean Romeo says that you were in the cars on Tuesday night and that  
you did beat Red.  
25 A.: Nah.  
Q.: He's lying?  
26 A.: Yeah, he have to be if that's what he told you.  
27 See Exhibit 5, pp. 76-7, l. 23-2.  
28 ...

1 **B. SEVERANCE IN THIS MATTER IS NECESSARY BECAUSE ONLY MALONE IS**  
2 **CHARGED WITH TWO ADDITIONAL COUNTS WHICH RELATE TO AN**  
3 **EARLIER BATTERY OF ESTORES.**

4 The Nevada Supreme Court held in Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), that  
5 defendants were entitled to severance because one defendant was charged and convicted of offenses  
6 in the same trial where the other defendant was not charged with the offenses, but was convicted on  
7 other charges. In Tabish, both Tabish and Murphy were charged by the State by information with  
8 numerous crimes relating to three separate incidents. Id. at 296, 72 P.3d 584 at 586. Tabish and  
9 Murphy were charged with three separate incidents including: (1) the alleged robbery and murder  
10 by suffocation and/or poisoning of Lonnie Theodore "Ted" Binion at Binion's home on September  
11 17, 1998 ("Binion counts"); (2) the removal of a large quantity of silver belonging to Binion from  
12 an underground vault located in a desert near Pahrump, Nevada ("Silver counts"); and (3) financial  
13 interests in a sand and gravel pit in Jean, NV ("Casey counts"). Id. Murphy was not convicted of  
14 the Casey counts, however, Tabish was convicted on the Casey counts. The Supreme Court  
15 concluded "that the district court's refusal to sever the Casey counts from the remaining charges in  
16 the case and to give a crucial limiting instruction warrant reversal." Id. at 297, 72 P.3d 584 at 586.  
17 Attorneys for Murphy and Tabish argued that the Casey counts were not based upon a "common  
18 scheme or plan." Id. at 301, 72 P.3d at 589.

19 The Court held, even certain similar counts could not be joined because their connection in  
20 time was too remote. Id. at 303, 72 P.3d 584 at 591. In Mitchell v. State, 105 Nev. 735, 782 P.2d  
21 1340, (1989) the Nevada Supreme Court held that two separate incidents which were forty-five days  
22 apart involving social drinks at a particular bar, which were followed by alleged sexual assaults were  
23 not to be considered part of a common scheme or plan. In Tabish, the Court determined, "the joined  
24 incidents were dissimilar, and fifty days separated the Casey incident from the alleged murder and  
25 theft of the silver." Tabish, 119 Nev. 293, 303-04, 72 P.3d 584, 591, (2003). In Tabish, the Court  
26 stated that even though a limiting instruction was given to the counts against Murphy, Murphy was  
27 prejudiced by the joinder of the Casey counts. Id. at 304, 72 P.3d at 591.

28 In the instant case, MALONE is charged with two counts relating to a battery against  
ESTORES which is alleged to have happened in or about April of 2006. See Information, attached



1 hereto as Exhibit 7. MALONE is charged in Count I of the Information with First Degree  
2 Kidnapping and Battery with Substantial Bodily Harm. See Exhibit 7. MCCARTY is not charged  
3 in either of these two counts, which involve only ESTORES and MALONE. There is no specific  
4 date that the State alleges that the incidents against ESTORES took place. It is possible that these  
5 alleged incidents took place as early as April 1, 2006, which would be over forty-five days prior to  
6 the alleged incidents which took place in the remainder of the Counts, in which both MALONE and  
7 MCCARTY are charged. The state alleges that MALONE and MCCARTY committed the  
8 remainder of these crimes from May 16, 2006, until May 19, 2006. Based on the Nevada Supreme  
9 Court decisions in both Tabish and Mitchell, the joint trials of MCCARTY and MALONE must be  
10 severed.

11 **CONCLUSION**

12 WHEREFORE, for the foregoing reasons, JASON MCCARTY, based on the arguments  
13 presented above respectfully requests this Honorable Court to enter an order pursuant to N.R.S.  
14 174.165, to sever him from the currently scheduled joint trial.

15 DATED this 4<sup>th</sup> day of October, 2006.

16 Respectfully Submitted by,

17 

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28 Attorneys for Defendant Jason McCarty

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a foregoing copy of the **MOTION TO SEVER**, on October  
2006, by depositing a copy thereof, in the United States Mail, postage pre-paid, addressed

to:

CHRIS J. OWENS, ESQ.  
DEPUTY DISTRICT ATTORNEY  
200 Lewis Avenue  
Las Vegas, Nevada 89101

RANDALL H. PIKE, ESQ.  
SPECIAL PUBLIC DEFENDER  
330 S. Third St., 8<sup>th</sup> Floor  
Las Vegas, NV 89155

and that there is regular communication by mail between the place of mailing and the place so  
addressed.

  
an employee of PATTI & SGRO, Ltd.

  
CLERK

1 **OPPS**  
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7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, )

10 Plaintiff, )

CASE NO: C224572

11 -vs- )

DEPT NO: V

12 DOMONIC RONALDO MALONE, )  
13 #1670891, )  
14 JASON DUVAL MCCARTY, #932255 )

Defendants. )

15 **STATE'S OPPOSITION TO DEFENDANT MCCARTY'S MOTION TO SEVER**

16 DATE OF HEARING: 10/31/06

17 TIME OF HEARING: 8:30 A.M.

18 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
19 MARC DIGIACOMO, Deputy District Attorney, and hereby submits the attached Points and  
20 Authorities in Opposition to Defendant McCarty's Motion To Sever.

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

24 **STATEMENT OF FACTS**

25 On May 20, 2006 at approximately 0915, the Henderson Police Department received  
26 a 9-1-1 emergency call that there were two naked deceased females in the desert just west of  
27 Paradise Hills and Dawson Street. Patrol officers responded to the location and secured the  
28 scene. At the time, there was no identification for the partial decomposed females who

1 appeared to have been killed by both blunt and sharp force trauma.

2 **MELISSA ESTORES aka "RED"**

3 The next day, during the autopsies, two individuals contacted the HPD about the  
4 bodies, Ryan Noe and Melissa Estores (hereinafter "Red"). Red was a friend of Noe who  
5 informed him that she believed she knew who the two females in the desert were. Noe  
6 brought Red to the police station.

7 Red is a street hustler that sells both "hard" and "soft" drugs for various people.  
8 "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months  
9 leading up to the killings, Red worked mainly for an individual named Tre Black (later  
10 identified as Ramaan Hall) selling methamphetamine. Tre Black had a protégée named D-  
11 Roc (later identified as Defendant Domonic Malone). Red would sell crack for D-Roc.  
12 Red's main area of sale was the bar at the Royal Sportsman Manor located at the corner of  
13 Tropicana and Boulder Highway.

14 **APRIL KIDNAPPING AND**  
15 **BEATING OF RED**

16 At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter,  
17 D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.  
18 Sometime in April of 2006, D-Roc showed up at the bar in the Royal Sportsman Manor and  
19 told Red he wanted to talk to her. Red left the bar with D-Roc and went behind it where no  
20 one could see them. Once they were back there, D-Roc demanded his and Tre Black's  
21 "work" and money back from Red. Red gave D-Roc all of his stuff, some of Tre Black's  
22 work and some of Tre Black's cash back to D-Roc. D-Roc then told Red it was "PT" time or  
23 "prayer time." This is a saying for getting a beating. Other witnesses have said "PT" stands  
24 for Pimp Training.

25 D-Roc explained the rules of the beating. He was going to punch Red in the chest. If  
26 she tried to block, he was going to hit her in the right temple, left temple and forehead. Then  
27 he was going to do it all over again. D-Roc began by punching Red in the chest. When he  
28 did so, she naturally tried to block. Then he would punch her in the head three times, and

1 start all over. This went on for a lengthy period of time until Red ultimately was down and  
2 severely hurt. At that point, a friend came and helped her to a car.

3 After several days of convalescing, Red went back to work. When she went back, she  
4 learned that Tre Black never received the "work" she had given back to D-Roc, and he  
5 wanted to get paid.

### 6 **TUESDAY MAY 16<sup>th</sup> KIDNAPPING OF VICTORIA**

7 On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner  
8 when she saw Charlotte Combado (hereinafter "Christine"). Christine was another local  
9 hustler who sold drugs for "D boys," or low level street drug dealers. On this occasion,  
10 Christine was selling for another individual known simply as "Black" (later identified as  
11 Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the bar, however,  
12 she lost all of her money in the gambling machines, so she owed Leonard Black \$150 and  
13 didn't know what to do. Red offered to help Christine. This eventually led to them coming  
14 into contact with Defendant Jason McCarty (hereinafter Rome) in a green Oldsmobile Alero.

15 While everyone knew the green Oldsmobile as Rome's car, the car is actually owned  
16 by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. Donny is  
17 really a wannabe "D Boy" that hung around D-Roc and Rome.

18 Rome began driving downtown. As they were going, Christine told Rome her  
19 problem of needing \$150. Rome explained that he was having an issue with one of his girls,  
20 Victoria Magee as she owed him \$80. The group wound up at the Oasis hotel downtown and  
21 began to smoke Marijuana. During this time, Rome and Christine struck up an agreement  
22 that Christine would find Victoria and bring her to Rome and Rome would cover her debt to  
23 Leonard Black.

24 Red fell asleep in the apartment. When she woke up, Christine and Rome were gone.  
25 While they were gone, she looked out the window, saw the green Oldsmobile across the  
26 street at a Burger King. In the parking lot, Christine had her arm around Victoria and was  
27 leading her to the car.

28 The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red

( )  
1 left the Oasis on foot and walked towards the Stratosphere. On the way, Rome was on the  
2 Nextel two way with Christine in the green Oldsmobile. Rome told Christine that they  
3 would meet at the valet to the Sahara Hotel. By this time, it was early evening.

4 When Red and Rome arrived at the valet, they came into contact with green  
5 Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and  
6 Victoria. Everyone piled into the Green Oldsmobile. From the Sahara, the group drove to  
7 Donny's house, where Donny got out and the group left.

8 Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red  
9 remained in the car, while Rome, Victoria and Christine went into the complex. D-Roc  
10 began to talk to Red about her being his girl. Red told D-Roc that she was nobody's girl. D-  
11 Roc told Red that she still owed Tre Black \$360 but Red told D-Roc that she had paid off her  
12 debt. The \$360 was allegedly the money owed from the incident in April where D-Roc had  
13 beaten Red. After a while, Rome, Victoria and Christine came back to the car.

14 **TUESDAY MAY 16<sup>TH</sup> KIDNAPPING**  
15 **AND BEATING OF RED**

16 From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc  
17 was acting strange. Eventually, the group pulled off the Wagonwheel exit and wound up in a  
18 desert site near some new home construction. Once she got there, Red was ordered out of  
19 the car. When she got out, D-Roc guided her to a location, and began to beat her again. D-  
20 Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome  
21 was yelling at Red to just take her beating. The beating was related to the prior April  
22 beating.

23 Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her  
24 there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5)  
25 seconds to get into the car or he was going to leave her there. Ultimately, D-Roc dragged  
26 Red back into the car. At this point, it was approximately midnight or early morning on  
27 Wednesday, May 17<sup>th</sup>.

28 On the way back into town, D-Roc wanted Red's purse. Ultimately, Red gave D-Roc

1 her purse, and he threw the contents of it out of the window. Once they got back into town,  
2 D-Roc and Rome explained what was going to happen.

3 **THREATS TO KILL PRIOR TO**  
4 **DROPPING THE GIRLS OFF AT THE**  
5 **HARDROCK**

6 D-Roc and Rome explained to the girls that Victoria had to make \$80 to give to  
7 Rome, Red had to make \$360 to give to D-Roc and Christine had to make sure no one got  
8 away. If any one of them did not do what they were told, there would be three shallow  
9 graves in the desert where Red had just been beaten.

10 Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc  
11 and Rome were trying to "put her on the track." (Prostituting). The group remained at the  
12 Hotel for hours however, Red had nothing to sell and refused to prostitute herself, Victoria  
13 couldn't catch a date, and Christine used all the drugs that she was supposed to sell.

14 Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend  
15 named David Parker. Parker came and picked all three girls up and took them back to his  
16 house behind the Cancun Hotel.

17 The group spent most of Wednesday, during the day, at Parker's house. Finally, the  
18 three decided that they needed to head back to the South Cove Apartments where both Tre  
19 and Leonard Black live. Early in the evening on Wednesday, the group wound up at the  
20 South Cove Apartments.

21 **WEDNESDAY KIDNAPPING OF**  
22 **VICTORIA AND CHRISTINE FROM**  
23 **THE SOUTH COVE APARTMENTS**

24 When they got there, they tried to go to Leonard Black's apartment which is 222,  
25 however, they could not get in. The group ran into Tre Black near his apartment at 217 and  
26 Tre Black told Red that D-Roc was looking for her. Finally, Leonard Black arrived, with a  
27 friend named DeMarcus. The three girls then got into 222. Leonard Black, Red and  
28 Demarcus left to go get gas in Demarcus' car.

1 When they return to the apartment, Victoria and Christine were gone, there was a golf  
2 club missing from the apartment, as well as signs that they did not leave voluntarily. The  
3 clothes of both people were still there along with other personal items. Most importantly,  
4 Victoria's sandals were still there. They were the only shoes that Victoria owned, and she  
5 would not have left without them.

6 Leonard Black was upset that someone broke into his home and asked Red who did it.  
7 Red told Leonard Black that it was D-Roc and Rome. Early the next morning, Leonard went  
8 looking for D-Roc and Rome at the Sportsman.

9 **THURSDAY MAY 18<sup>th</sup> BEATING OF**  
10 **ROME BY LEONARD BLACK**

11 On May 18<sup>th</sup>, at 4 a.m., Leonard Black found Rome in the parking lot of the  
12 Sportsman and beat him pretty badly. The police were called and the ambulance arrived.

13 A couple of days later, Red saw a news story related to the two bodies and knew,  
14 since she had not seen them, that the two girls in the desert were Victoria and Christine. The  
15 police had Red show them where her beating took place, and she directed them to a desert  
16 area just across the street from where the bodies were taken. Based upon this information,  
17 the police set out to find D-Roc, Rome, and Donny.

18 Leonard Black was located and confirmed the information that he was aware of from  
19 Red. David Parker confirmed Red's information as far as he was aware. Ryan Noe also  
20 supported Red's information.

21 In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually  
22 contacted. Corrina initially tried to alibi Rome and D-Roc but eventually confirmed they  
23 were responsible for the crime.

24 Corrina corroborated that Rome, Victoria and Christine showed up at their place in at  
25 the Sportsman on Tuesday night. That Victoria appeared to be scared and upset. And that  
26 the three left together. During this time, Rome was driving the green Oldsmobile.

27 Corrina remembered D-Roc and Rome picking her up on Wednesday night from work  
28 and taking her home somewhere around 11 p.m. At that time, both D-Roc and Rome were



( )  
1 complaining about the three girls and looking for them. At around midnight, D-Roc and  
2 Rome left together.

3 They did not see Rome until several hours later when he was beat up in the parking  
4 lot by Leonard Black. They heard statements by Rome in front of D-Roc after the murder  
5 about having the tires on the car changed. In fact, Corrina at one point tried to get the tires  
6 changed. Also, Corrina heard D-Roc make mention of leaving the girls in the desert without  
7 clothing.

8 After the preliminary hearing, Tre Black was interviewed. Tre Black indicated that  
9 he saw D-Roc and Rome in the South Cove Apartments, D-Roc had a golf club, and they  
10 were looking for the girls. A short while later, he saw D-Roc and Rome leading Victoria and  
11 Chistine to the green Oldsmobile. Tre Black also indicated that when he saw Red earlier in  
12 the evening, he had warned her D-Roc was looking for her.

### 13 CELL PHONE RECORDS

14 When the case was submitted to the district attorney's office, it was submitted on all  
15 three, D-Roc, Rome and Donny. The cell phone records establish that on Wednesday  
16 evening, after 1 a.m., Rome called Donny. The tower records reflect that Donny was at his  
17 home in the northeast portion of town, while Rome was hitting on a tower at Wagon Wheel  
18 and US 95, next to the crime scene. From that point, the records show Rome remaining in  
19 that area as calls are received between Donny and Rome until about 2:17 a.m., when Donny  
20 is hitting off another cell tower located almost on top of the bodies. Shortly thereafter, the  
21 cell records show both of them returning north.

### 22 ACCESSORY DONNY HERB'S TESTIMONY

23 Donny Herb waived his preliminary hearing to plead guilty to accessory to murder.  
24 Donny testified during the preliminary hearing. Donny testified that he owned the green  
25 Oldsmobile but that Rome had borrowed it for the past two months. That on some day in  
26 mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to pick-up Rome  
27 and Red. At the time, D-Roc, Victoria, and Christine were in the vehicle. After picking  
28 them up, he drove to his house and stayed there. The rest left in the green Oldsmobile.

1 Sometime thereafter, D-Roc told Donny that he beat up Red and that Rome was there also.

2 At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome.  
3 At the time, Donny was home. In the first phone call, Rome told Donny that D-Roc and  
4 Rome had the girls, and asked him if he wanted to come. Donny said no. Later, Rome  
5 called back and told him that if he wanted the green Oldsmobile, he was going to have to  
6 come and get it or they were going to drive to California and send it back to him on a flatbed  
7 truck. Donny agreed to drive his other car to meet them. In one of the phone calls, Donny  
8 overheard Rome yelling to D-Roc to "hit her again with a rock."

9 Donny drove to the area of exit 56 by the Railroad pass casino and met up with D-  
10 Roc and Rome. The three then drove off to a remote desert location and Rome disappeared  
11 for a short time, then came back to the vehicles.

12 Eventually, Donny got the story from the D-Roc and Romeo. Donny said they both  
13 told him that they went to South Cove Apartments to some guy's room and left together with  
14 the girls arm in arm. Both indicated that they only had Victoria and Christine because Red  
15 had gone with the guy that had the apartment. Donny said they took the girls to where Red  
16 had been beat up. D-Roc and Romeo told him that they had beat the girls up pretty bad.  
17 They told him they beat them, took their clothes and left them there.

18 Donny drove the detectives out to the remote location. During the ensuing search, a  
19 golf putter, broken in three places was found. Ultimately, Rome drove them to a similar  
20 location, and a knife was located.

### 21 D-ROC'S STORY

22 D-Roc was first contacted on May 23, 2006 by HPD. At that time, D-Roc denied any  
23 knowledge of the any of the crimes with the exception of the April beating of Red. D-Roc  
24 admitted to being at the Sportsman the day of the crime, however, said that Rome took him  
25 home around midnight. He was re-contacted again on June 1<sup>st</sup> and stuck to that story.

26 //

27 //

28 //

1                                   **DEFENDANT JASON McCARTY'S STATEMENTS**

2                                   **ROME'S STORY ON MAY 25th**

3           Rome was contacted on May 25, 2006 by HPD. At first, Rome admitted that he had  
4   drove the green Oldsmobile in the past, but he hadn't driven it in 2-3 weeks. He also stated  
5   that the last time he saw D-Roc was a couple of weeks before. Rome told detectives that he  
6   was jumped at 4 a.m. on Thursday, May 18<sup>th</sup> in the Sportsman parking lot.

7           When advised that there was an investigation into a beating, and Rome was told D-  
8   Roc was in jail, Rome asked, "don't tell me he beat up Red. Don't tell me he beat that girl  
9   up again." Rome admitted to knowing D-Roc beat Red back in April, but denied knowledge  
10   of the beating on Tuesday night.

11          After several denials, Rome then admitted that after Red and him were picked up  
12   from the Sahara, Red got beat. He said Red owed D-Roc \$360. Rome said, "he did beat her  
13   down. He beat the shit out of her."

14          Rome then admitted that he drove the green Oldsmobile out to Henderson where Red  
15   was beaten by D-Roc. He claimed not to know where he was going, but D-Roc directed  
16   him. Rome said that in fact, he missed the turn off the first time, drove to the Railroad Pass  
17   Casino then had to make a U-turn. Rome stated that he stopped the car, D-Roc made Red  
18   get out and he beat her. Rome claimed to have stopped D-Roc during the beating. Rome  
19   claimed they got back into the car and drove back to the Sportsman. Then he said that he  
20   and D-Roc drove the girls to the Hardrock at about 2:30 or 3:00 in the morning. Rome  
21   claimed that Victoria called for him to come get her, but that when he got to the Hardrock,  
22   she was gone.

23          Rome admitted that the night before he was beaten, he was contacted by Donny at  
24   about 9 or 9:30 in the evening. At the time, Donny showed up with D-Roc and wanted the  
25   green Oldsmobile and offered to give Rome the white Honda. Rome claimed that Donny  
26   told him that he and D-Roc were going to go pick up the girls. He claimed that Donny and  
27   D-Roc then left and he remained in an apartment with Corrina Phillips and Lynn Nagel. He  
28   claims that Donny and D-Roc returned at 6:00 a.m. the next morning.

( )

1 **ROME'S STORY ON JUNE 1st**

2 On June 1, 2006, Rome's father contacted the District Attorney's Office indicating  
3 that his son wanted to talk to a DA. The detectives were sent back to interview Rome. On  
4 this occasion, Rome told HPD that he knew where the weapons were buried that were used  
5 to kill the two girls.

6 Rome claimed that he and D-Roc were in apartment 217 at South Cove (Tre Black's)  
7 talking to a friend of D-Roc named "Black." Rome claimed not to know the guy, but that the  
8 person was a black male with a bald head with a white girl. Rome said he received a call  
9 from Victoria and he and D-Roc went to get her at apartment 222. Rome said they didn't  
10 kidnap the girls, he said they left willingly. Rome claimed they got the Sportsman and that  
11 Donny met up with them and that Donny and D-Roc took the girls out to the desert and  
12 killed them.

13 Rome acknowledged that he did some things that might end up getting him some time  
14 in prison, but denied doing the killing. He said he could tell the DA why the girls were  
15 killed, who killed them and what was used to kill the girls. He also stated that he could take  
16 the police to where the weapons were hid, where the tires from the car were and where the  
17 clothes were put. He claimed Donny and D-Roc paid him to dispose of these items. He said  
18 that one weapon was a golf club broken into three pieces and that he discarded it in a desert  
19 area by Lake Mead. He also claimed to have discarded some clothing.

20 Rome then said that when they picked up the girls, they went to the Sportsman where  
21 he met up with Donny and D-Roc. He claimed to have gone to Corrina and Lynn's  
22 apartment and that Donny gave D-Roc a ride home. He claimed he didn't know at the time  
23 that the girls left with them. He only figured it out later.

24 Most importantly, Rome told the detectives that he always has his cellular phone.  
25 That the only time during the relevant period that he did not have his phone was when he got  
26 arrested because it was in the green Oldsmobile.

27 **ROME'S STORY ON JUNE 5th**

28 On June 5<sup>th</sup>, Rome was contacted again. He offered to take the police to the location

1 of the weapons (he did not know that Donny had already helped them locate the golf club).  
2 Rome drove them to the desert and helped them find the knife. During the ride, detectives  
3 confronted him about some of the evidence. When they confronted him with the fact that his  
4 phone was pinging off a tower over the bodies, Rome claimed that was because he had  
5 traded phones with Donny. When told that Donny's phone was pinging off a tower by  
6 Donny's home, Rome claimed because he went to get the white car. When asked why he  
7 need to go to the house to get the white car when Donny gave it to him the night before,  
8 Rome, finally, asked for a lawyer.

## 9 **AUTOPSIES**

### 10 **CHARLOTTE "CHRISTINE" COMBADO**

11 On May 21, 2006, Dr. Piotr Kubiczek of the Clark County Coroner's Office  
12 conducted an autopsy on the person of Charlotte Combrado. Dr. Kubiczek identified  
13 multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper  
14 and lower extremities. Ultimately, he appeared to identify at least 20 blunt force injuries and  
15 two sharp force injuries. The one to the chest appeared to be a superficial incision before  
16 death, however, the stab wound to the neck was peri-mortum as there is no injury to the skin  
17 itself from the wound. Ultimately, the cause of death was blunt and sharp force trauma to  
18 the head and thorax. The manner of death was homicide. There was an amount of  
19 methamphetamine in both the decomposition fluid and the liver.

### 20 **VICTORIA MAGEE**

21 On the same date, Dr. Piotr Kubiczek of the Clark County Coroner's Office  
22 conducted an autopsy on the person of Victoria Magee. Dr. Kubiczek identified multiple  
23 blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper and lower  
24 extremities. Ultimately, he appeared to identify at least 31 blunt force injuries and three  
25 sharp force injuries. All three appear to be superficial to the head, however, the stab wound  
26 to the jaw was peri-mortum as there was no injury to the skin itself from the wound.  
27 Ultimately, the cause of death was blunt and sharp force trauma to the head and thorax. The  
28 manner of death was homicide. There was an amount of cocaine in both the decomposition

1 fluid and the liver.

## 2 POINTS AND AUTHORITIES

3 NRS 173.135 clearly allows two or more defendants to be charged under the same  
4 indictment or information if they participated in the same criminal conduct. Persons who  
5 have been jointly indicted should be tried jointly, absent compelling reasons to the contrary.  
6 Jones v. State, 111 Nev. 848, 853, 899 P.2d 544 (1995). In order to obtain a severance, a  
7 criminal defendant must show clear, manifest, or undue prejudice from the joint trial. United  
8 States v. Enriquez-Estrada, 999 F.2d 1355, 135 n. 1 (9th Cir. 1993). The decision to sever is  
9 left to the trial court and will not be reversed absent an abuse of discretion. Amen v. State,  
10 106 Nev. 749, 755, 801 P.2d 1354, 1359 (1990). The burden is upon the party requesting  
11 severance to establish prejudice. Broad and general allegations of prejudice are not enough  
12 to require a trial court to grant a severance. United States v. Baker, 10 F.3d 1374, 1389 (9th  
13 Cir. 1993). In order to meet this burden, the party challenging the trial court's decision on  
14 the issue of severance must make a substantial showing of prejudice. Amen v. State, 106  
15 Nev. 749, 755, 801 P.2d 1354, 1358 (1990). Finally, even if prejudice is shown, the trial  
16 court is not required to sever; rather, it must grant relief tailored to alleviate the prejudice.  
17 See, e.g., Zafiro v. United States, 506 U.S. 534, 540-541, 113 S.Ct. 933 (1993).

18 The general rule favoring joinder has evolved for a specific reason – there is a  
19 substantial public interest in joint trials of persons charged together because of the judicial  
20 economy involved. Jones v. State, 111 Nev. at 853. Joint trials of persons charged with  
21 committing the same offense expedites the administration of justice, reduces the congestion  
22 of trial dockets, conserves judicial time, lessens the burden upon citizens to sacrifice time  
23 and money to serve on juries, and avoids the necessity of recalling witnesses who would  
24 otherwise be called upon to testify only once. Jones, 111 Nev. at 853-854 (citations  
25 omitted). Consequently, the doctrine of severance is a very limited one.

26 In Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002), for example, codefendants  
27 Marshall and Currington were tried and convicted together of first degree murder, robbery,  
28 and conspiracy to commit robbery. At trial, Marshall's defense strategy was to blame

1 Currington; Currington's defense strategy was to blame Marshall. Id. at 644-645. Both  
2 were convicted.

3 On appeal, Marshall contended the district court erred in refusing to sever his trial  
4 from Currington's. Id. at 644. Marshall contended he and Currington had antagonistic  
5 defenses in that each argued the other was responsible for the murder. Id. at 645. Marshall  
6 relied on the standard articulated in Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002),  
7 which stated that, "defenses must be antagonistic to the point that they are 'mutually  
8 exclusive' before they are to be considered prejudicial," requiring severance. Marshall, 118  
9 Nev. at 646 (citation omitted). Rowland further stated that defenses are mutually exclusive  
10 when the core of the codefendant's defense is so irreconcilable with the core of the  
11 defendant's own defense that the acceptance of the codefendant's theory by the jury  
12 precludes acquittal of the defendant. Marshall, 118 Nev. at 646 (citations omitted).

13 The Court in Marshall was concerned that the language in Rowland was too broadly  
14 stated. Consequently, the Court clarified - - and limited - - the standard articulated in  
15 Rowland which requires severance.

16 "To the extent that this language suggests that prejudice requiring severance is  
17 presumed whenever acceptance of one defendant's defense theory logically  
18 compels rejection of another defendant's theory, **it is too broadly stated.** As  
19 we have explained elsewhere, while there are situations in which inconsistent  
20 defenses may support a motion for severance, **the doctrine is a very limited one.** A defendant seeking severance must show that the codefendants have  
conflicting and irreconcilable defenses and there is danger that the jury will  
unjustifiably infer that this conflict alone demonstrates that both are guilty.  
We take this opportunity to further clarify this issue.

21 Marshall, 118 Nev. at 646 (emphasis added). The Court then went on to explain the  
22 standard articulated in Rowland.

23 The decisive factor in any severance analysis remains prejudice to the  
24 defendant. NRS 174.165(1) provides in relevant part: 'If it appears that a  
25 defendant ... is prejudiced by a joinder ... of defendants ... for trial together, the  
26 court may order an election or separate trials of counts, grant a severance of  
27 defendants or provide whatever other relief justice requires.' Nevertheless,  
28 prejudice to the defendant is not the only relevant factor: **a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials.** Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial. Despite the concern for efficiency and consistency, the district

1 court has a continuing duty at all stages of the trial to grant a severance if  
2 prejudice does appear. Joinder of defendants is within the discretion of the  
3 district court, and its decision will not be reversed absent an abuse of  
discretion. To establish that joinder was prejudicial requires more than simply  
showing that severance made acquittal more likely; misjoinder requires  
reversal only if it has a substantial and injurious effect on the verdict.

4 Marshall v. State, 118 Nev. at 646-647 (emphasis added) (citations omitted).

5 Most importantly, the Court stated that “**antagonistic defenses are a relevant**  
6 **consideration but not, in themselves, sufficient grounds for concluding that joinder of**  
7 **defendants is prejudicial.**” 118 Nev. at 648 (emphasis added). In fact, the Court in  
8 Marshall ruled that the defenses were antagonistic; nevertheless, joinder was proper. The  
9 fact that codefendants at a joint trial offer mutually exclusive defenses, the Court recognized,  
10 is not, in itself, sufficient to establish that joinder was prejudicial. Id. at 648. Marshall failed  
11 to demonstrate that the joint trial compromised a specific trial right or prevented the jury  
12 from making a reliable judgment regarding guilt or innocence. Marshall, 118 Nev. at 648.  
13 Moreover, the State’s case was not dependent on either defendant’s testimony, and the  
14 prosecution presented evidence linking both to the murder. Id. Accordingly, the Court  
15 affirmed Marshall’s conviction.

16 A similar analysis was offered by the highest court of the land in Zafiro v. United  
17 States, 506 U.S. 534, 113 S.Ct. 933 (1993). In that case, petitioners contended it is  
18 prejudicial whenever two defendants both claim they are innocent and each accuses the other  
19 of the crime. 506 U.S. at 538. The United States Supreme Court rejected their contention,  
20 holding that “mutually antagonistic defenses are not prejudicial *per se*.” 506 U.S. at 538. A  
21 court should grant a severance *only* if there is a serious risk that a joint trial would  
22 compromise a specific trial right of one of the defendants, or prevent the jury from making a  
23 reliable judgment about guilt or innocence. 506 U.S. at 539. It is *not* prejudicial for a  
24 codefendant to introduce relevant, competent evidence that would be admissible against the  
25 defendant at a severed trial. Id. The Government offered sufficient evidence against all four  
26 petitioners, and the district court cured any possibility of prejudice by properly instructing  
27 the jury that it had to consider the case against each defendant separately. 506 U.S. at 540-  
28 541. Thus, the U.S. Supreme Court held it was not an abuse of discretion to deny



1 petitioners' motions to sever. Id. at 541.

2 In the instant matter, Defendant McCarty hasn't even alleged that his defense would  
3 be antagonistic with Defendant Malone. Defendant McCarty has alleged two grounds for  
4 severance. First, Defendant alleges that the State will introduce statements of Defendant  
5 Malone which implicate Defendant McCarty, creating a Bruton problem. Secondly,  
6 Defendant asserts that merely because he is not charged in two (2) of eighteen (18) counts ,  
7 his case should be severed. Neither issue presents grounds sufficient to justify severance.  
8 The State will scrupulously avoid any Bruton issue, and the evidence that relates to the  
9 counts which Defendant McCarty is not charged, would still be admitted in a trial even if the  
10 case was severed as it is relevant to establish both the motive and intent of Defendant.

11 **I.**

12 **THERE IS NOT A BRUTON PROBLEM AS IT RELATES TO STATEMENTS**  
13 **MADE BY MALONE**

14 Defendant asserts that severance is required because the State will admit statements  
15 by Malone which implicate McCarty. It is a far stretch of the imagination to assert that  
16 anything that Malone told the police could in any way implicate McCarty. In fact, the only  
17 thing that McCarty appears to reference in his motion is the fact that Malone indicated he  
18 knew McCarty and was with McCarty the Wednesday night before the Thursday homicide,  
19 both facts which are not disputed in the several statements given by McCarty to police.  
20 However, to alleviate any concern, the State agrees not to admit any statement by Malone  
21 that he was with McCarty on Wednesday or that he even knows McCarty.

22 The confrontation clause of the Sixth Amendment of the United States Constitution  
23 guarantees the right of a criminal defendant to be confronted with the witnesses against him.  
24 Thus, when two defendants are tried together, the extra judicial statement of one cannot be  
25 admitted against the other unless the confessing defendant testifies and is subject to cross-  
26 examination. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

27 In Bruton, the United States Supreme Court held that the Sixth Amendment Right  
28 of Confrontation is denied where a co-defendant's statement implicating the defendant is

1 admitted into evidence without effective redaction or opportunity to cross-examine. Since  
2 Bruton, many cases have interpreted the meaning of the rule, and clarified its application:  
3 Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1732 (1971) (inapplicable when co-defendant  
4 testifies at joint trial); Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921 (1968) (retroactivity);  
5 Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) (co-defendant statement  
6 admissible with proper limiting instruction and proper redaction to avoid implicating  
7 defendant); Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056 (1986) (co-defendant statement not  
8 admissible without 'indicia of reliability' from either circumstances surrounding the  
9 confession or the 'interlocking' character of defendant's or co-defendant's confessions);  
10 Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979) (interlocking confessions may be  
11 admissible), *abrogated by* Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987) (where a  
12 non-testifying codefendant's confession facially incriminating the defendant is not directly  
13 admissible against the defendant, the Confrontation Clause bars its admission at their joint  
14 trial, even if the jury is instructed not to consider it against the defendant, and even if the  
15 defendant's own confession is admitted against him); Schneble v. Florida, 405 U.S. 427, 92  
16 S.Ct. 1056 (1972) (harmless error rule applies); McRoy v. State, 92 Nev. 758, 557 P.2d  
17 1151 (1976) (does not apply where the co-defendant's confession does not contain a direct  
18 reference to the defendant); Maginniss v. State, 93 Nev. 173, 561 P.2d 922 (1977)  
19 (inapplicable where declarant testified as a witness and was subject to full and effective  
20 cross-examination); Stevens v. State, 97 Nev. 443, 634 P.2d 662 (1981) (harmless error rule  
21 applies).

22 Taken as a whole, this line of cases stands for the proposition that non-testifying co-  
23 defendant statements directly implicating a defendant must be redacted to ensure that no  
24 direct implication may be used against a Defendant. Additionally, even where some  
25 statements are admitted, then a limiting instruction must be given indicating that it may only  
26 be used against one co-defendant. See Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702  
27 (1987). The State intends to scrupulously adhere to the requirements of Richardson and  
28 remove any implication from any statement admitted made by Defendant Malone. Even if

1 such were not the case, Defendant McCarty would have to show some prejudice from  
2 joinder. *See Marshall v. State*, 118 Nev. 642, 56 P.3d 376 (2002).

3 Defendant McCarty's claim of prejudice is truly non-existent since Defendant Malone  
4 refused to acknowledge his role in the crime. Defendant McCarty asserts that Malone's  
5 indication that he was with McCarty the night before the homicides somehow implicates  
6 Defendant McCarty.<sup>1</sup> However, to avoid any Bruton issue, the State will not admit any  
7 statement by Malone that references Defendant McCarty at all. To the extent that Defendant  
8 McCarty is referenced at all, his name will be redacted. Additionally, the portions cited by  
9 Defendant McCarty on pages 9 thru 11 of his motion are not portions that the State would  
10 normally intend to admit.<sup>2</sup> Certainly, should a joint trial proceed, the State is aware that it  
11 will not be using those portions of those sections cited by Defendant McCarty which  
12 implicate him. Therefore, there will be no Bruton problem.

## 13 II.

### 14 MERELY BECAUSE MALONE IS CHARGED IN TWO CRIMES THAT 15 MCCARTY IS NOT IS NOT A BASIS FOR SEVERANCE

16 Defendant McCarty asserts that because Defendant Malone is charged in two (2) of  
17 eighteen (18) counts that he is not, his case should be severed from Defendant Malone.  
18 Defendant McCarty provides absolutely no authority for the severance of co-defendants to  
19 resolve joined charges.<sup>3</sup> To support his position, Defendant makes citation to two cases  
20 where the court found charges should be severed, not co-defendants.

21 In Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), the Nevada Supreme Court  
22 reversed a conviction for co-defendants because some charges against only one of the co-  
23 defendants should not have been joined. The basis for the severance of the charges was that  
24 the charges were not properly joined against either defendant. The Court went on to state

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25  
26 <sup>1</sup> This is particularly disconcerting since in the several statements that Defendant McCarty provides, he repeatedly  
confirms the limited information provided by Malone.

27 <sup>2</sup> For example, the State may assert that Defendant Malone admitted that he was at apartment 1585 with "the girls" on  
Wednesday night until at least midnight, however, the State would not admit that he claimed Defendant McCarty drove  
him home before the homicides.

28 <sup>3</sup> If the charges are not properly joined, then the remedy is to file a motion to sever the charges.

1 that prejudice applied to both Defendants. However, nowhere in the opinion was there even  
2 a suggestion that the defendants should have been severed.

3 In Mitchell v. State, 105 Nev. 735, 782 P.2d 1340 (1989), the Nevada Supreme Court  
4 reversed a conviction of a defendant who had been charged with two separate attacks on two  
5 separate women a time period apart. Nothing in the opinion even relates at all to co-  
6 defendants.

7 Evidence related to the April beating of Melissa "Red" Estores would be admissible  
8 at a severed trial of McCarty. Severing the co-defendants would not change the nature of the  
9 evidence admitted. The evidence will show that Red was beaten by Malone in April. The  
10 form of the beating, "PT Time" was the exact same type of beating which occurred on May  
11 16<sup>th</sup>. It is from this April beating, which McCarty admitted that he was aware of, where  
12 Malone asserted that Red owed Tre Black \$360. The beating on Tuesday May 16<sup>th</sup> of Red  
13 by Malone and McCarty was motivated by their attempts to collect that \$360. Additionally,  
14 after the beating, the three victims were driven to the Hardrock Hotel. Red was told she  
15 owed Malone \$360. Victoria was told she owed McCarty \$80. Christine was told it was her  
16 job to make sure that Red and Victoria made the money and that they did not get away. If  
17 they failed, then there would be three (3) graves in the desert where Red was just beaten.  
18 The girls did not make the money, Red got away, and Victoria and Christine were killed for  
19 it. As such, the entire crime relates back to the \$360 owed by Red which was the product of  
20 the April beating. Certainly, evidence related to that beating would be admissible to  
21 establish the motive and intent of the parties as well as to establish the relationship between  
22 the parties and the common scheme of the beatings.

23 NRS 173.115 provides in part:

24 Two or more offenses may be charged in the same indictment or information  
25 in a single count for each offense if the offenses charged, whether felonies or  
26  misdemeanors, are ... based on two or more acts or transactions connected  
together or constituting parts of a common scheme or plan.

27 (emphasis added). Conversely, if the Court was considering the separation of various  
28 charges in one pleading document, the defendant would have to show that prejudice would

1 result from a single trial or more than one count. Ex parte Groesbeck, 77 Nev. 412 (1961).  
2 Mere anticipatory conclusions are insufficient. White v. State, 83 Nev. 292 (1967);  
3 Anderson v. State, 81 Nev. 477 (1965). See also NRS 174.165.

4 Moreover, Defendant McCarty cannot assert a prejudice from the evidence being  
5 admitted. He is not charged with a crime relating to the April beating. However, even if the  
6 State would need to satisfy a Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) type  
7 hearing, certainly, such could be accomplished. The relevance of the evidence is readily  
8 apparent as it not only establishes the relationship between the parties but provides the  
9 motive for the subsequent beatings and homicides. It can be proved by clear and convincing  
10 evidence because not only does Estores testify to the incident, still has bruises which are  
11 documented from the incident, but both Defendants, Malone and McCarty, admit to the  
12 incident. Finally, the prejudicial value cannot be said to substantially outweigh the  
13 prejudice. First, McCarty is not alleged to have been involved in the beating. Moreover, it  
14 is in no way offered to establish the propensity of either Defendant for violence. As such,  
15 even if it were subjected to the rigid Petrocelli standards, it would be admissible.

16 Finally, the April incident is relevant to explain some of the memory problems which  
17 Ms. Estores suffers. During the preliminary hearing, Defendant McCarty repeatedly  
18 questioned the lapse in memory that Ms. Estores suffers from related to several aspects of  
19 the case. The most important is the sequencing of events. Ms. Estores testified that her  
20 memory problems began after the April beating and were exasperated by the May beating.  
21 Evidence that corroborates that fact, e.g. the massive injuries associated with the April  
22 beating, is relevant to establish why there was some memory problems. Therefore, it would  
23 be admissible even if it wasn't independently admissible on all the other relevant grounds.

#### 24 CONCLUSION

25 Defendant McCarty has raised no ground which even suggests that severance would  
26 be warranted. As the State does not intend to introduce any statement of Malone that will

27 //

28 //

1 result in a Bruton problem, and evidence of the April beating would be admissible even if  
2 severed, this Court should deny Defendant McCarty's Motion to Sever.

3 DATED this 20th day of October, 2006.

4 Respectfully submitted,

5 DAVID ROGER  
6 Clark County District Attorney  
7 Nevada Bar #002781

8 BY /s/CHRISTOPHER OWENS for  
9 MARC DIGIACOMO  
10 Deputy District Attorney  
11 Nevada Bar #006955

12 CERTIFICATE OF FACSIMILE TRANSMISSION

13 I hereby certify that service of the above and forgoing, was made this 20th day of  
14 October, 2006, by facsimile transmission to:

15 ANTHONY SGRO, ESQ.  
16 COUNSEL FOR JASON DUVAL MCCARTY  
17 FAX#386-2737

18 BY /s/M. Beaird  
19 Employee of the District Attorney's Office

20 CERTIFICATE OF ELECTRONIC FILING

21 I hereby certify that service of the above and forgoing, was made this 20th day of  
22 October, 2006, by Electronic Filing to:

23 PUBLIC DEFENDER'S OFFICE  
24 Counsel for DOMONIC RONALDO MALONE  
25 E-mail Address: pdclerk@co.clark.nv.us

26 /s/M. Beaird  
27 Secretary for the District Attorney's Office

28 /mb

1 0001

2 DAVID M. SCHIECK  
3 SPECIAL PUBLIC DEFENDER  
4 Nevada Bar No. 00824  
5 CHARLES A. CANO  
6 Deputy Special Public Defender  
7 Nevada Bar No. 5901  
8 RANDALL H. PIKE  
9 Deputy Special Public Defender  
10 Nevada Bar No. 1940  
11 330 South Third Street, 8<sup>th</sup> Floor  
12 Las Vegas, NV 89155-2316  
13 (702) 455-6265  
14 Attorneys for Defendant

FILED

2003 OCT 25 A 9:40

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,  
13  
14 Plaintiff

15 vs.

16 DOMONIC MALONE,  
17  
18 Defendant.

CASE NO. C224572  
DEPT. NO. V

DATE OF HEARING:  
TIME OF HEARING:

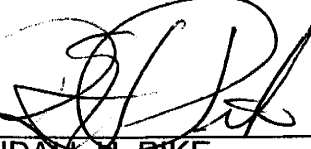
19 **MOTION TO SEVER**


20 COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys,  
21 DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public  
22 Defender and RANDALL H. PIKE, Deputy Special Public Defender and hereby files his Motion  
23 to Sever.

24 Said Motion is made and based upon the attached Points and Authorities, all papers  
25 ...  
26 ...  
27 ...  
28 ...

1 and pleadings on file herein, and on any oral argument at the time of the hearing of said  
2 Motion.

3 DATED this 24 day of October, 2006.

4  
5   
6  
7 RANDALL H. PIKE  
8 Deputy Special Public Defender  
9 Nevada Bar No. 1940  
330 S. Third Street, 8<sup>th</sup> Floor  
Las Vegas, NV 89155  
Attorney for Defendant Malone

10  
11   
12  
13 CHARLES A. CANO  
14 Deputy Special Public Defender  
15 Nevada Bar No. 5901  
16 330 S. Third Street, 8<sup>th</sup> Floor  
17 Las Vegas, NV 89155  
18 Attorney for Defendant Malone

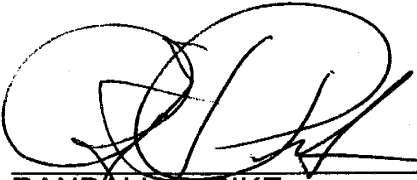
19  
20 **NOTICE OF MOTION**

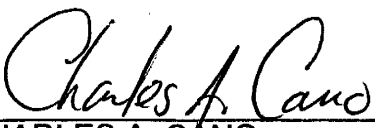
21 TO: STATE OF NEVADA, Plaintiff; and

22 TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

23 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and  
24 foregoing **MOTION TO SEVER** on the 7 day of November, 2006, at the hour of 8:30  
25 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may  
26 be heard.

27 DATED this \_\_\_\_ day of October, 2006.

28  
29   
30  
31 RANDALL H. PIKE  
32 Deputy Special Public Defender  
33 Nevada Bar No. 1940  
34 330 S. Third Street, 8<sup>th</sup> Floor  
35 Las Vegas, NV 89155  
36 Attorney for Defendant Malone

37   
38  
39 CHARLES A. CANO  
40 Deputy Special Public Defender  
41 Nevada Bar No. 5901  
42 330 S. Third Street, 8<sup>th</sup> Floor  
43 Las Vegas, NV 89155  
44 Attorney for Defendant Malone



1 **POINTS AND AUTHORITIES**

2 **FACTS**

3  
4 On May 5, 2006, Henderson Police responded to a call indicating that there were two  
5 (2) female bodies located in the desert to the south of Henderson. They were subsequently  
6 identified as Charlotte Combado and Victoria Magee. The cause of death was blunt force  
7 trauma and sharp force trauma. (Coroner's report admitted at Preliminary Hearing).

8 The Preliminary Hearing lasted a number of days. At the initial appearance, counsel  
9 for the Defendants Malone and McCarty brought a Motion to Continue based upon the late  
10 production of reports. (Preliminary Hearing Volume I, hereinafter Vol. No, pp. 12-21).  
11 Additionally, the morning of the Preliminary Hearing, the Co-Defendant, Donald Herb, was  
12 offered and signed a plea agreement that included an agreement that he testify against his  
13 Co-Defendants. (Vol. I, p. 28). The Court denied the Defendant's Motion to Continue or, in  
14 the alternative, allow the testimony to proceed for preliminary hearing purposes only and not  
15 allow the testimony to be "preserved" for trial purposes. (Vol. I, p. 47).

16 The first witness called by the State was Melissa Estores (aka "Red"). She described  
17 herself as a "hustler", who sold drugs. (Vol. I, pp. 52, 292). Immediately prior to testifying, she  
18 had been drinking Crown Royal, an alcoholic beverage, in the jury room with two (2) of the  
19 other witnesses for the State. (Vol. I, p. 133). She indicated that she knew the victims for  
20 approximately one year. (Vol. I, p.49). She identified the Defendant, Domonic Malone, by his  
21 "street name" of "D-Roc" and Defendant McCarty as "Romeo" or "Rome." (Vol. I, pp.50-51).  
22 She was "D-Roc's" girlfriend and she sold drugs for him. (Vol. I, p.52). She sold "hard and  
23 soft drugs". (Vol. I, p.53). Mr. Digiacoimo argued that "the nature of the relationship [between  
24 "D-Roc" and "Red"] is the motivation for the murder" and the Court did not require any  
25 disclosure of agreements between "Red" and the State regarding non-prosecution for the drug  
26 sales. (Vol. I, p. 56-57).

27 "Red" also sold drugs for "Black" but had never sold drugs for "Rome". (Vol. I, pp. 59-  
28 71). Charlotte Combado, a.k.a. Christine, "took 'work' (e.g. sold drugs) from whoever she

1 could get work from." ("Work" is the street slang for controlled substances or drugs)(Vol. I, p.  
2 77). Christine would work for whom ever would give her drugs to sell. (Vol. I, p. 78). "Red"  
3 helped Christine sell drugs around the Sportman's Manor. (Vol. I, p. 79)

4 In April of 2006, "Red" was residing in an area known as the Sportsman's Manor. She  
5 met "D-Roc" and was involved in a physical altercation. (Vol. I, p. 60). "Red" testified that her  
6 jewelry "got lost" when "we had our fight." (Vol. I, p. 64). During the altercation she did not  
7 fight back because "[she] felt it was better if I just went with it because I cared about him."  
8 (Id.). "Red" testified that she was "hit in the chest... in the forehead, the temples and the other  
9 side... [and] again in the chest." (Vol. I, p. 68). This altercation lasted for about ten (10)  
10 minutes. "D-Roc" allegedly called the physical beating "P.T. time." (Id.). According to the  
11 witness, she was "laid up" for about 5 days and the bruising lasted about six (6) weeks. (Vol.  
12 I, p. 69). She did not want to get the police involved and she "took it in stride". (Vol. I, p. 241).  
13 After five (5) days, "D-Roc" apologized to "Red" for the incident and advised her that she owed  
14 "Black" \$120.00. (Vol. I, p. 71). It was at this time that "Red" ended her personal relationship  
15 with "D-Roc", but began it again a short time later. (Vol. I, pp. 222-223). The reason for the  
16 altercation was because of the personal relationship between "D-Roc" and "Red" and because  
17 of a debt owed to "D-Roc" by "Red". This altercation occurred approximately one (1) month  
18 prior to the death of Combado and Magee. Neither, Combado, Magee, Herb or McCarty was  
19 present during the altercation between "D-Roc" and "Red."

20 On May 14, 2006, Mother's Day, "D-Roc" told "Red" that "he didn't want [her] to see  
21 [Black], work with him, call him, nothing, no contact." (Vol. I, p. 74). On that day, however,  
22 she was at the South Cove Apartments, number 217, with "Black" and Christine. (Vol. I, p.  
23 75). Christine owed someone for drugs advanced to her and she was "in the hole." (Vol. I,  
24 p. 79). "Red" made some sales for her, but Christine would put the funds back into "the [slot]  
25 machines." (Id.). "Red" was concerned enough to try and borrow money on behalf of  
26 Christine. (Vol. I, p. 80).

27 The next morning, "Rome" arrived at Christine and "Red's" residence at the Sportsman  
28 Manor and both women left with him in his car. (Vol. I, p. 83). They left in a green car that

1 would subsequently be identified as belonging to Donald Herb, a.k.a. "Donny"; who had loaned  
2 "Rome" the car for his use. While traveling to the Oasis Hotel, Christine talked with "Rome"  
3 about how she needed to come up with \$150.00 to pay back her "sack money". (Vol. I, p. 88).  
4 During this drive, "Red" was smoking a blunt; a blunt is marijuana wrapped in a cigar husk.  
5 (Vol. I, p. 254). Christine and "Rome" came to an agreement such that if she could bring  
6 Victoria Magee to him, he could recover \$80 dollars that was owed to him and he would take  
7 care of her \$150 debt. (Vol. I, p. 89). Also during this period of time, "Rome" was questioning  
8 "Red" about her relationship with "D-Roc." (Vol. I, p. 90). "Rome", "Red" and Christine are  
9 interrupted by an employee of the Oasis Hotel who indicates that three (3) people cannot go  
10 into a room, at which point, Christine and "Rome" leave to get "D-Roc." (Vol. I, p.93).

11 "Red's" next recollection is seeing Christine and Victoria walking across the street at  
12 the Burger King which is in front of the Oasis Hotel. Christine's arm was around Victoria. (Vol.  
13 I, p. 94). "Rome" came back to the Oasis Hotel, retrieved "Red" and they walked towards the  
14 Stratosphere Hotel and Casino. (Id). "Rome" was talking on his telephone with Donny who  
15 was now driving the green car, which had Christine, Victoria and "D-Roc" in the back. (Vol.  
16 I, pp. 94-95). Donny was dropped off at his residence and the remainder of the occupants  
17 traveled to the Sportsman Manor. At the Sportsman Manor, "Rome", Christine and Victoria  
18 got out of the car and returned a short time later. All five (5) left together in the green car with  
19 "Rome" driving (Vol. I, pp. 97, 99).

20 "Rome" drove the car to a Desert area with "D-Roc" in the front passenger seat. "D-  
21 Roc" gets out of the car, takes "Red" and starts to strike her with his fists. (Vol. I, p. 105).  
22 "Rome" tells "Red" not to fight back. (Vol. I, p. 106). The bruises from this beating lasted  
23 about "a week or so, maybe two weeks" according to "Red". (Vol. I, p. 109). The bruises and  
24 beatings, "Red" explained, had nothing to do with the deaths of Combado and Magee. (Vol.  
25 I, p. 285). After they left the desert, "D-Roc" went through "Red's" purse looking for her cell  
26 phone. "Red" had removed the cell phone from the purse and hid it under the driver's seat.  
27 He eventually threw the purse and contents out of the car. (Vol. I, p. 111).

28 "Rome" drove the car to the Hard Rock Hotel and Casino where Christine, Victoria and

1 "Red" were dropped off. "D-Roc" told them they were to make some money. "Red" testified  
2 that both "Rome" and "D-Roc" said, "if they didn't get that money from us by sunrise, we would  
3 be in three shallow graves in the desert." (Vol. I, p. 113). According to "Red" she owed "D-  
4 Roc" \$360, but neither Christine nor Victoria owed "D-Roc" any money. (Vol. I, 113-114).  
5 However, Victoria did owe "Rome" eighty dollars (\$80). (Vol. I, 113-114). The girls were  
6 supposed to raise the money by selling drugs. Christine had been given drugs from "Rome".  
7 However, rather than selling the drugs, Christine smoked the drugs in the bathroom at the  
8 Hard Rock Hotel. Victoria tried to raise money through prostitution, but was unsuccessful.  
9 (Vol. I, p. 115). According to "Red", Christine was there to "make sure that ["Red"] and Victoria  
10 did what we were supposed to do." (Vol. I, p. 115). "Red" refused Christine's direction to sell  
11 herself, describing herself as "a hustler, not a 'Ho'." (Id). "Red" yelled at Christine in the Hard  
12 Rock Hotel, "[that she] wouldn't be in this situation if it wasn't for her" and wanted to beat her  
13 up. (Vol. I, pp. 160-161,169).

14 "Red" called David Parker who picked the girls up from the Hard Rock Hotel and took  
15 them to his residence where they stayed until the next night. (Vol. I, p. 117). The girls went  
16 to the South Cove Apartments, and talked with "Black", who said "D-Roc" was on his way over,  
17 so they left and went to the El Cortez. (Vol. I, p. 119). While at the El Cortez, they were able  
18 to contact Leonard Black, who picked them up and took them back to the South Cove  
19 Apartments, # 222, where he was staying with "Demarco". There were two golf clubs in the  
20 room. (Vol. I, p. 121). "Red" was concerned about Christine lying to Leonard Black, so she  
21 left with him and Demarco to get another car. They were gone for about 45 minutes. (Vol. I,  
22 p. 123). When they returned, Christine and Victoria were gone, two purses were dumped out  
23 and a golf club was missing. (Vol. I, p. 125).

24 "Red" told Leonard Black that she suspected "D-Roc" and "Rome" of entering his  
25 apartment, so all three went to the Sportsman Manor to confront "Rome" and "D-Roc".  
26 Leonard Black only found "Rome" and he assaulted and beat him up, after which, Black left  
27 with "Red" and DeMarco. (Vol. I, p. 129). "Red" had no further contact with "Rome" or "D-Roc"  
28 after "Rome's" beating.

1 After learning of the deaths, "Red" contacted the police. (Vol. I, p. 131). She had a  
2 number of recorded statements as well as 15-20 contacts with the police. (Vol. I, p. 138). The  
3 police provided her living accommodations and expenses for food. (Vol. I, p.147). "Red"  
4 admitted to drinking "almost every day" and smoking a "blunt" almost every day. (Id). "Red"  
5 cannot read and has memory problems. (Vol. I, p. 159).

6 The next witness called by the State, Correna Phillips, lived at the Sportsman Manor  
7 with her girlfriend, Lynn Nagel during the week in question. (Vol. II, p. 4) On May 16<sup>th</sup>,  
8 Tuesday night, "Rome", "D-Roc", Christine, and Victoria came to their residence. (Vol. II, p.  
9 7). It was the first time she had met Christine, although she had known "Rome" for "about a  
10 month and a half" prior to that date and "D-Roc" "a couple of weeks less than that" (Vol. II, pp.  
11 8-9). Phillips had been with "D-Roc", "Rome" and Lynn earlier that evening about 4:00 to 5:00  
12 p.m. over at Walmart. (Vol. II, p. 20). At Walmart, "Rome" bought new shoes and "D-Roc"  
13 bought a black sweater. (Vol. II, p. 23).

14 During that evening's meeting at Phillips' residence, Christine was "running in and out  
15 doing deals" and "D-Roc" was "doing business," while Nagel was playing the Play Station and  
16 "Rome" was standing around. (Vol. II, p. 11). "D-Roc" was on the telephone and Phillips  
17 testified that she overheard him "wanting to take the girls out there for 'P.T.' time." (Vol. II, p.  
18 14). Although she had no idea what "P.T." meant, she "thought it had something to do with  
19 taking pimp training or something." (Vol. II, p. 18). She overheard "D-Roc" say, "well, we were  
20 going to take the girls, take them out to the desert, PT, or whatever, and just leave them out  
21 there and come back, or something like that." (Vol. II, p. 15). Phillips did not know to whom  
22 "D-Roc" was speaking on the telephone. She had heard "Rome", Donny, and "D-Roc" "all three  
23 of them" talking about it earlier, two or three days before that weekend. (Vol. II, p. 16).  
24 Victoria had left to perform an act of prostitution. (Vol. II, p.12). Phillips told them to stop their  
25 transactions, at which point, "Rome" advised her that he was leaving and he was going to  
26 "take the girls to the Hard Rock...because the girls wanted to go to the Hard Rock." (Vol. II,  
27 pp. 12, 98). They all left.

28 Phillips believed, "the leader to me, I thought was kind of like Romeo. But then I thought

1 D-Roc, though too in a way. But Romeo, like Donny, controlled all the money and stuff like  
2 that. Romeo and Donny would sell together, and D-Roc pretty much sold on his own... It  
3 seemed like Romeo, like pretty much controlled Donny, and like he and Donny not so much  
4 D-Roc. D-Roc was pretty much on his own." (Vol. II, p. 26). On a previous occasion, "Rome"  
5 had explained to her how he pimps girls, how he got them and how he made money off of  
6 them including how he would control his girls. (Vol. II, p. 19). Phillips never had these  
7 conversations with "D-Roc". (Id).

8 Phillips did not see them again until the next day, Wednesday, May 17<sup>th</sup>. "Rome" and  
9 Donny gave her a ride to work at about 5:00 p.m. (Vol. II, p. 13). After she got off work,  
10 "Rome" and "D-Roc" picked her up between 10:15 and 10:30 p.m. "Rome" was driving the  
11 green car owned by Donny. (Vol. II, p. 27). In at least one of her statements however, Phillips  
12 told police that she took the bus home that evening. (Vol. II, p. 92). Phillips justified this  
13 conflicting statement stating, "after [the police] kept telling me that I had taken the bus, I was  
14 just like whatever, I took the bus." (Vol. II, p. 91).

15 At the residence, "Rome" was involved with Nagel with the Play Station video game,  
16 and "D-Roc" was "nodding off". (Vol. II, p. 28). "D-Roc" explained that he was "really tired".  
17 "D-Roc" stated, "I have been up for days" to which "Rome" responded "I'm taking him ["D-Roc"]  
18 home." (Id.) This occurred between 11:30 p.m. and midnight. (Id).

19 "Rome" called Phillips later that next morning at about 2:00 a.m., and arrived at her  
20 residence at about 3:00 a.m. "Rome" had been drinking, had some shoes in his hand and  
21 then left. (Vol. II, p. 29). Phillips received a telephone call that "Rome" had just been beaten  
22 up. Thursday morning she saw him and he had a black eye, scratches on his neck and  
23 "looked like he got beat up pretty bad" (Id.) "Rome" acted "like he was in a state of  
24 shock...like scared or something. Like stunned." (Vol. II, p. 34).

25 On the Friday, following the above events, Phillips testified that she overheard "D-Roc"  
26 on the telephone and he had mentioned something "about I had taken their clothes off and left  
27 them out there." (Vol. II, p. 38). She did not know to whom he was speaking. (Id). On that  
28 Friday, when "Rome", Donny and "D-Roc" picked her up from work, "D-Roc" took his shorts

1 off and threw them away. Phillips did not question this, as "[D-Roc]" did weird things, so I just  
2 though it was something he did". (Vol. II, p. 41). Phillips took the green car from "Rome" the  
3 next Monday and tried to have the tires replaced. (Vol. II, p. 45). She was unsuccessful  
4 and returned the car to "Rome" who stated, "me and "D-Roc" will go and take care of it." (Vol.  
5 II, p. 46). While "D-Roc" was in the room at the time, he didn't say anything or nod his head,  
6 "he was just standing there". (Vol. II, p. 48).

7 While watching the television with "Rome" there was a news report about the Combado  
8 and Magee deaths. "Rome" told Phillips that someone was "framing him and 'D-Roc'" for the  
9 murders. (Vol. II, p. 51). "Rome" had previously told her, "days before that they were going  
10 to take them out to the desert and they were going to, weren't going to kill them or anything  
11 like that. . . [t]hey did mention going to take them out to the desert, smack them around a  
12 couple of times, teach them a lesson, I guess, because they owed them money or something."  
13 (Id). Phillips never talked with "D-Roc" about the deaths. (Vol. II, p. 52).

14 Phillips testified that she discussed the matter with Donald Herb, a.k.a. Donny, at his  
15 residence. She overheard Donny telling his parents that "a couple girls were killed in the  
16 desert, that they were trying to frame him for the murder." (Vol. II, p. 54) Donny and his father  
17 told her "not to talk to anybody without his lawyer." (Vol. II, p. 55).

18 "Rome" took Phillips into the desert and "showed me a spot where it was, where he had  
19 buried it. Supposedly 95,000 or 90,000 and two kilos." (Vol. II, p.56). However, Phillips was  
20 unable to find the money and drugs stating, "it wasn't there. I looked." (Id). Phillips testified  
21 that during her interview the police knew about the money due to "three way calls" from  
22 "Rome" through the bail bondsman to herself. (Vol. II, p. 117).

23 Phillips gave numerous statements to the police, when confronted by officers and being  
24 told by officers that she was going to either be a suspect or a witness, she stated "I wanted  
25 to be on the other side, on the witness side. I was just scared." (Vol. II, p.108).

26 Donald Jay Herb, a.k.a. "Donny", "D-Boy", is charged within the original complaint in the  
27 case. Prior to the Preliminary Hearing, he had, through his attorneys, brokered a negotiated  
28 plea that involved him testifying against his Co-Defendant's in this case. (Vol. V, pp. 44-46).

1 Donny testified that he was the owner of the two cars in question, the 2002 green  
2 Oldsmobile Allero and the 1993 white Honda Accord. (Vol. V, p.5). He had allowed "Rome"  
3 to use the green car for the entire months of April and May, 2006. (Vol. V, p. 6). This despite  
4 the fact that the Honda was not registered and has an expired 30 day permit. (Vol. V, p. 64).  
5 "Rome" was a friend of Donny's for three to four years and they had resided together for a  
6 period of about two years. (Id). Donny and "Rome" communicated frequently by cellular  
7 telephones; Donny's number was 453-9274 and "Rome's" number was 237-3308. (Vol. V, p.  
8 8). They saw each other "almost every day." (Vol. V, p. 9).

9 "D-Roc" was a recent acquaintance of approximately two or three months. (Vol. V, p.  
10 9). Donny didn't even know Mr. Malone's last name until he read in the Court records. (Id).  
11 "D-Roc" and "Rome" were "just hanging out together for protection in the neighborhood." (Vol.  
12 V, p. 10). Donny was a regular at Sportsman. He was selling drugs at that location "pretty  
13 much every day." (Vol. V, p. 48). In establishing the relationship between the parties, Donny  
14 stated that Victoria was "Rome's girl" and Christine was hanging out around the Sportsman,  
15 and also associated with "Rome"; "Red" was "a friend of Malone's girlfriend, or a female  
16 companion." (Id).

17 Donny described the events of the night before the death of the girls. "Rome" called  
18 Donny and told him that he was going to leave the state with the car. (Vol. V, p. 60). Donny  
19 told "Rome", "I'm going to come and get my car." (Vol. V, p. 15). "Rome" gave him directions  
20 to Exit 56A on the 95 south. (Id). Donny had not made any arrangements to have someone  
21 assist him in retrieving his car. (Vol. V, p. 65). Nor was there any conversation about Donny  
22 and "Rome" switching cars. (Vol. V, p. 66). Despite the fact that Donny and "Rome" had  
23 numerous calls back and forth that evening. (Vol. V, p. 16-18). "Rome" states on the cell  
24 phone prior to Donny arriving: "You know what we're doing out here. We're not just beating  
25 them up this time. You're involved in two murders now." (Vol. V, p. 18). Allegedly in the  
26 background, he hears "D-Roc" saying that "he broke the club that they had." "Rome" replies,  
27 "Okay. Just hit the bitch in the head with a rock." During one cell phone call, "Rome" tells  
28 Donny "Victoria is dead" and then hung up. (Vol. V, p. 39).



1 Arriving at the scene, Donny sees "Rome" and "D-Roc" in the green car. He follows  
2 them toward Boulder City. (Vol. V, p. 19). "Rome's" hearsay statements (as to "D-Roc")  
3 describe the prior battery by "D-Roc" on "Red". (Vol. V, p. 24). About a week prior to that,  
4 "Rome" complained to Donny that Victoria "had went to work and then not showed up for a  
5 couple of days. She took some work [drugs] with her. She was smoking it— this being  
6 Victoria..." (Vol. V, p. 25). "Red" had received some drugs from "D-Roc", and she was also  
7 missing. (Vol. V, p. 26). The two vehicles stop about "four miles south of the dam" and  
8 "Rome" and "D-Roc" start removing things from the trunk of the car. (Vol. V, p. 28). Donny  
9 gets out of his car, "D-Roc" hands him a head of a golf club and tells him to get rid of it. Donny  
10 then throws it into the desert. Donny, "Rome" and "D-Roc" discussed alibis, and what  
11 everyone's alibi would be. (Vol. V, p. 36). "Rome" later advised Donny that "he would have  
12 two of [their] friends, Correna and Lynn . . . say that he was at their house at that time, and  
13 that the green car was there, they remember him." (Vol. V, p. 38). After cleaning out the rest  
14 of the trunk, everyone leaves in the two cars, until they stop at Russell Road and Boulder  
15 Highway. "Rome" calls Donny, and "asks me to go inside and get a bottle of water for him."  
16 Donny complies. (Vol. V, p. 30).

17 From that location, "Rome" "asks [Donny] to drive Mr. Malone home." "Rome" "heads  
18 towards the Sportsman." (Id). Donny takes "D-Roc" to his (Donny's) house, where Donny  
19 turns off his alarm, changes his clothes for work, and drops off "D-Roc" near Lake Mead and  
20 Martin Luther King Drive. Donny then picks up Lenny and takes him to work. (Vol. V, p. 31).

21 During this time, "D-Roc" was wearing black shorts, sandals and a long sleeved black  
22 t-shirt. At the spot near the dam, several discussions about clothing were held. This  
23 culminated when "Rome," "told Mr. Malone to take the girls' clothes and burn them". (Vol. V,  
24 p. 34). The night after the deaths, "Rome" gave additional information to Donny. (Vol. V, p.  
25 38). Conveniently, Donny could not say exactly how they were killed. (Vol. V, p. 39). "D-Roc"  
26 never made a statement about the incident. (Vol. V, p. 40).

27 In an effort to destroy evidence, "Rome" told, "[Donny] that we needed to change the  
28 tires so they wouldn't match the tire marks at the crime scene... I then gave him \$200 cash so

he could take care of that" (Vol. V, p. 41). Although present, "D-Roc" again said nothing about the incident or the need to change tires. (Id). Prior to assisting the Las Vegas Metropolitan Police Department, Donny admitted lying to them about his involvement as well as those of "Rome" and "D-Roc". (Vol. V, p. 43). During interrogations, wherein, Metro told Donny that (1): "Rome" had said that Donny and "D-Roc" did it, and (2): "D-Roc" said that Donny and "Rome" did it. Metro repeatedly told Donny that he, "could either be a witness or [he] could be a suspect..." (Id). After understanding that both "Rome" and "D-Roc" had inculpated him in the murders of Combado and Magee; Donny decided that he would be a "witness" as opposed to a "suspect". Donny took officers out to the locations that he had destroyed evidence and Metro recovered some of evidence of the murders. (Vol. V, p. 42).

The State of Nevada has charged Domonic Ronaldo Malone, individually, with: Count I, First Degree Kidnapping, of Melissa Estores in April of 2006; Count II, Battery with Substantial Bodily Harm, of Melissa Estores in April of 2006. Both Malone and Jason Duval McCarty are charged with Count III, Conspiracy to Commit Kidnapping, of Melissa Estores on or about May 16, 2006; Count IV, First Degree Kidnapping of Melissa Estores on or about May 16, 2006; Count V, Battery with Substantial Bodily Harm, of Melissa Estores on or about May 16, 2006; Count VI, Robbery of Melissa Estores on or about May 16, 2006 and May 17, 2006, to wit, taking Estores' purse and its contents; Count VII, Conspiracy to Commit Kidnapping, of Melissa Estores and/or Charlotte Combado and/or Victoria Magee on or about or between May 17-19, 2006; Count VIII, Pandering, of Charlotte Combado on or between May 16-17, 2006; Count IX, Pandering, of Victoria Magee on or between May 16-17, 2006; Count X, Conspiracy to Commit Murder, of Charlotte Combado and Victoria Magee on or between May 17-19, 2006 as incorporated by Counts XIII-XVIII; Count XI, Conspiracy to Commit Burglary, on or between May 17-19, 2006 as incorporated by Count XIII; Count XII, Burglary, of 1525 E. Fremont, Room No. 222, on or between May 17-19, 2006; Count XIII, First Degree

1 Kidnapping, of Charlotte Combado on or between May 17-19, 2006; Count XIV, First Degree  
2 Kidnapping, of Victoria Magee on or between May 17-19, 2006; Count XV, Murder with Use  
3 of a Deadly Weapon, of Charlotte Combado on or between May 17-19, 2006; Count XVI,  
4 Murder with Use of a Deadly Weapon, of Victoria Magee on or between May 17-19, 2006; on  
5 or between May 17-19, 2006; Count XVII, Robbery with Use of a Deadly Weapon, of Charlotte  
6 Combado on or between May 17-19, 2006, to wit, taking of her clothing; Count XVIII, Robbery  
7 with Use of a Deadly Weapon, of Victoria Magee on or between May 17-19, 2006, towit, taking  
8 of her clothing.  
9

### 10 ARGUMENT

#### 11 12 JOINDER OF ALL THE COUNTS IN ONE TRIAL IS EXTREMELY PREJUDICIAL 13 VIOLATING DEFENDANT'S FUNDAMENTAL RIGHT TO DUE PROCESS AND A FAIR 14 TRIAL

15 To allow the joinder of counts in unrelated matters, as well as, to allow Co-Defendants  
16 to be tried together when circumstances would make the trial fundamentally unfair to both  
17 defendants would be a violation of Malone's due process right to a fair trial. First, there is the  
18 issue of joining unrelated cases and the prejudice that is produced from such joinder. Counts  
19 I and II are from a completely different incident that allegedly occurred one month prior to the  
20 case at bar. Counts III, IV, V and VI are from an incident that occurred the day prior to the  
21 case at bar. Counts VII- XVIII involve the deceased in the case at bar and revolve around the  
22 same approximate time frame. Second, the issue of mutually exclusive defenses amongst  
23 the co-defendants can hinder a fair trial and cause irreparable prejudice to each defendant.  
24 Third, the Bruton issue can cross-contaminate the evidence causing the jurors to misapply  
25 evidence towards each individual defendant leading to a violation of each defendant's right to  
26 due process and a fair trial.  
27  
28

1 The Fifth Amendment to the United States Constitution, made applicable to the States  
2 by the Fourteenth Amendment, and Article 1, Section 8 of the Nevada Constitution, provide  
3 that no person shall be deprived of liberty without due process of law. "Under the Due  
4 Process Clause ... criminal prosecutions must comport with prevailing notions of fundamental  
5 fairness." California v. Trombetta, 467 U.S. 479, 485 (1984). An accused, whether guilty or  
6 innocent, is entitled to a fair trial, and it is the duty of the Court and prosecutor to see that he  
7 gets it. Garner v. State, 78 Nev. 366, 373 (1962). "The due process right of an accused during  
8 a criminal [proceeding] is 'the right to a fair opportunity to defend against the State's  
9 accusations.'" Brown v. State, 107 Nev. 164, 167 (1991).

11 "Prosecutors [must] insure that defendants receive a fair and impartial trial." McKee v.  
12 State, 112 Nev. 642, 917 P.2d 687 (1996). The prosecutor's primary duty is not to convict but  
13 to see that justice is done. See, Nevada Supreme Court Rule 179; McKee v. State, 112 Nev.  
14 642, 917 P.2d 940 (1996). "The prosecutor represents the state and has a duty to see that  
15 justice is done in a criminal prosecution." Jimenez v. State, 112 Nev. 610, 918 P.2d 687  
16 (1996).

18 NRS 174.165 (1) provides that the trial court may order an election or separate trials  
19 of counts, grant a severance of defendants or provide whatever relief justice requires "[i]f it  
20 appears that a defendant ... is prejudiced by a joinder of offenses or of defendants in an  
21 indictment or information, or by such joinder for trial together." NRS 174.165 was patterned  
22 after and is virtually identical to Federal Rule of Criminal Procedure 14, which provided that  
23 "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of  
24 the defendants in an indictment or information or by such joinder for trial together, the court  
25 may order an election or separate trials of counts, grant a severance of defendants or provide  
26 whatever other justice requires."

1 Federal Rule of Criminal Procedure 14 provides a remedy for prejudicial joinder of  
2 offenses or defendants, though the original joinder may have been proper under Rule 8 of the  
3 Federal Rules of Criminal Procedure. United States v. Morales, 868 F.2d 1562 (11<sup>th</sup> Cir. 1989).  
4 Federal Rule of Criminal Procedure allows the Court to separate or sever the trial or counts  
5 if the defendant or government is prejudiced by a joinder. See, Fed.R.Crim.Proc. 14 (1994).  
6 The power to grant relief from prejudicial joinder under Rule 14 "rests within the broad  
7 discretion of the District Court as an aspect of its inherent right and duty to manage its own  
8 calendar." United States v. Gay, 567 F.2d 916, 919 (9<sup>th</sup> Cir. 1978); Opper v. United States, 348  
9 U.S. 84, 95 (1954).  
10

11  
12 Notwithstanding the public's interest in judicial economy, a single  
13 trial of several defendants "may not be had at the expense of one  
14 defendant's right to a fundamentally fair trial." United States v.  
15 Echeles, 352 F.2d 892, 896 (7<sup>th</sup> Cir. 1965). "The Court must  
16 weigh, case by case, the advantage and economy of a joint trial  
17 to the administration of justice against possible prejudice to a  
18 defendant." United States v. Donaway, 447 F.2d 940, 943 (9<sup>th</sup> Cir.  
19 1971). A defendant's trial must be severed from the trial of a co-  
20 defendant if the prejudice to the defendant endangered by a joint  
21 trial is "of such magnitude that the defendant's right to a fair trial  
22 [would be] abridged." United States v. Lewis, 787 F.2d 1318, 1321  
23 (9<sup>th</sup> Cir. 1986), amended 798 F.2d 1250 (1986). Severance is  
24 warranted "if there is serious risk that a joint trial would  
25 compromise a specific trial right of one of the defendants, or  
26 prevent the jury from making a reliable judgment about guilt or  
27 innocence." Zafiro v. United States, 113 S.Ct. 933, 938 (1993).  
28

22 Additionally, Nevada Revised Statute 173.115 provides that two or more offenses may  
23 be joined together in a separate count for each offense if the offenses charged: (1) are based  
24 on the "same act or transaction,"; (2) are "connected together"; or (3) constitute a "common  
25 scheme or plan." Additionally, offenses may be joined w here "evidence of one charge would  
26 be cross-admissible in evidence at a separate trail on another charge." Mitchell v. State, 105  
27 Nev. 735, 738 (1989).  
28

1 The joinder of offenses is not proper when the offenses charged are not part of the  
2 same transaction or comprises a common scheme or plan. Brown v. State, 114 Nev. 1118,  
3 967 P.2d 1126, (1998)(citing Gibson v. State, 96 Nev. 48, 51, 604 P.2d 814, 816 (1980)).  
4 However, if "evidence of one charge would be cross-admissible in evidence at a separate trial  
5 on another charge, then both charges may be tried together. Mitchell v. State, 105 Nev. 735  
6 (citing Robinson v. United States, 459 F.2d 847, 855 (D.C.Cir. 1972)).

8 To determine cross-admissibility of a charge the following factors must be satisfied: 1)  
9 the prior bad act is relevant to the crime because it shows motive, intent or other material  
10 element as listed in NRS 48.045(2); 2) the prior bad acts are proved by clear and convincing  
11 evidence; and 3) the prior bad acts are more probative than prejudicial. Mitchell v. State, 105  
12 Nev. 735, 738, (citing Berner v. State, 104 Nev. 695 (1988)).

14 In Mitchell, the Defendant was charged in the same information with the one count of  
15 sexual assault and grand larceny for the first victim, and one count of sexual assault and  
16 murder of the second victim. Id. at 737. The two incidents were separated by 45 days and  
17 did not appear to be connected except that the Defendant had met both women at the same  
18 bar. Id. Because of the length of time between the two incidents, 45 days, these two distinct  
19 crimes cannot be part of the same transaction.<sup>1</sup> Id. at 738. Merely taking two different women  
20 to the same bar "cannot be considered part of a common plan." Id. Finally, as to cross  
21 admissibility the court found that evidence of one of the sexual assaults was not proved by  
22 clear and convincing evidence given the "paucity of evidence of lack of consent." Id.

24 The Supreme Court of California as set forth the standard determinative of a  
25

26  
27 <sup>1</sup> See also, Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985) wherein the offenses  
28 constituted a single or continuing course of conduct rather than offenses separated by weeks or  
months. The court allowed joinder of attempt murder and grand larceny counts because they occurred  
during the defendant's flight from the scene of the homicides.

1 severance motion:

2 When a trial court considering a defendant's motion for severance of unrelated  
3 counts has determined that the evidence of the joined offenses is not  
4 "cross-admissible," it must then assess the relative strength of the evidence as  
5 to each group of severable counts and weigh the potential impact of the jury's  
6 consideration of "other crime" evidence. I.e., the court must assess the  
7 likelihood that a jury not otherwise convinced beyond a reasonable doubt of the  
8 defendant's guilt of one or more of the charged offenses might permit the  
9 knowledge of the defendant's other criminal activity to tip the balance and  
10 convict him. (citation omitted). If the court finds a likelihood that this may occur,  
11 severance should be granted.

12 People v. Bean, 760 P.2d 996, 1006 (Cal. 1988).

13 The Supreme Court of Montana has well-articulated the possible prejudice to a  
14 defendant of joinder of offenses:

15 The first kind of prejudice results when the jury considers a person  
16 facing multiple charges to be a bad man and tends to accumulate  
17 evidence against him until it finds him guilty of something. The  
18 second type of prejudice manifests itself when proof of guilt on the  
19 first count in an information is used to convict the defendant of a  
20 second count even though the proof would be inadmissible at a  
21 separate trial on the second count. The third kind of prejudice  
22 occurs when the defendant wishes to testify on his own behalf on  
23 one charge but not on another.

24 State v. Campbell, 615 P.2d 190, 198 (Mont. 1980). Thus, "a great disparity in the  
25 amount of evidence introduced against joined defendants may, in some cases, be grounds  
26 for severance." United States v. Douglas, 780 F.2d 1472, 1479 (9<sup>th</sup> Cir. 1986).

27 Here, Counts I and II involve an altercation solely between Malone and Estores. This  
28 altercation was based on the relationship between Malone and Estores. Malone never  
threatened Estores with death nor did he use a weapon of any kind in the altercation.  
Combado, Magee, Herb and McCarty were never involved in the incident or present during its  
occurrence. Estores never reported this incident to the police and reconciled with Malone

1 shortly after the incident. Both of these Counts refer to an incident that occurred a month prior  
2 to the deaths of Combado and Magee. The State has not shown a connection or cross  
3 admissibility of any evidence between Counts I and II and the remaining charges in the  
4 information; nor has it been demonstrated that it arises from same transaction or comprises  
5 a common scheme or plan relating to the deaths of Combado and Magee. As stated by the  
6 Montana Supreme Court, allowing these counts to be included in the prosecution of the deaths  
7 of Combado and Magee serves only the purposes of making Malone out to be "a bad man and  
8 tends to accumulate evidence against him until it finds him guilty of something...";  
9 misapplication of proof to the wrong charges; and restriction of Malone's due process right and  
10 ability to testify in his own defense. Because the State has not shown the cross admissibility  
11 of the evidence, despite the fact that it may be proven by a clear and convincing standard, the  
12 extreme prejudice Malone faces by the joinder of Counts I and II to the rest of the allegations  
13 clearly out weighs any probative value it may have. See, generally, Mitchell v. State, 105 Nev.  
14 at 738. Additionally, it cannot be said that the public's interest in judicial economy in this case  
15 overrides Malone's right to a fundamentally fair trial. See, generally, Zafiro, 113 S.Ct. at 938;  
16 Lewis, 787 F.2d at 1321, amended 798 F.2d 1250; Echeles, 352 F.2d at 896. Therefore, to  
17 maintain fundamental fairness and due process Counts I and II must be severed and tried  
18 separately from the remaining charges in the information.

19  
20  
21  
22 The same argument and analysis applies to Counts III-VI. These Counts involve an  
23 incident again between Malone and Estores. Again, this incident occurred one (1) full day  
24 before the incident involving Combado and Magee. And again, this incident involved solely  
25 Malone and Estores. There is, however, a slight difference in the fact pattern inasmuch as  
26 McCarty, Magee and Combado were present at the scene possibly witnessing the altercation  
27 between Malone and Estores. The State will argue that McCarty was significantly involved in  
28



1 the incident. Yet, the facts belie that presumption. McCarty was the driver of the vehicle but  
2 did not physically participate in the beating of Estores. In fact, McCarty may have been  
3 attempting to assist Estores by giving her the advice to not fight back. As stated above, the  
4 State has not shown a connection or cross admissibility of any evidence between Counts III-VI  
5 and the remaining charges in the information; nor has it been demonstrated that it arises from  
6 the same transaction or comprises a common scheme or plan relating to the deaths of  
7 Combado and Magee. Additionally, because the State has not shown the cross admissibility  
8 of the evidence, the extreme prejudice Malone faces by the joinder of Count III-VI to the rest  
9 of the allegations clearly outweighs any probative value it may have. See, generally, Mitchell  
10 v. State, 105 Nev. at 738. Furthermore, it cannot be said that the public's interest in judicial  
11 economy in this case overrides Malone's right to a fundamentally fair trial. See generally,  
12 Zafiro, 113 S.Ct. at 938; Lewis, 787 F.2d at 1321, amended 798 F.2d 1250; Echeles, 352 F.2d  
13 at 896. Therefore, to maintain fundamental fairness and due process Counts III-VI must be  
14 severed and tried separately from the remaining charges in the information.  
15  
16  
17

18 **MUTUALLY EXCLUSIVE DEFENSES BETWEEN DEFENDANTS NECESSITATES**  
19 **SEVERANCE**

20 An additional consideration that the court must contemplate in considering the  
21 severance is the effect on a defendant's right to a fair trial when his co-defendant claims actual  
22 innocence while assessing culpability to his co-defendants.

23 Mutually exclusive defenses are said to exist when acquittal of one co-defendant would  
24 necessarily call for the conviction of the other." United States v. Tootick, 952 F.2d 1078, 1081  
25 (9<sup>th</sup> Cir. 1991). The prototypical example is a trial in which each of two defendants claims  
26 innocence, seeking to prove instead that the other committed the crime." United States v.  
27 Tootick, 952 F.2d at 1081. "Mutually exclusive defenses may exist when only one defendant  
28 accuses the other, and the other denies any involvement." United States v. Tootick, 952 F.2d

1 at 1081 (quotation marks omitted).

2 Here, clearly from the statements alleged in the preliminary hearing and given to Metro  
3 both co-defendants are at odds against each other. Herb alleges statements made by Malone  
4 inculpating his role in the incident. According to Herb, Malone makes a statement about  
5 breaking the golf club on one of the girl's head. McCarty allegedly instructs Malone to use a  
6 rock. Also, per Herb, Malone gives him the head of the golf club, used in the crime, to be  
7 destroyed or eliminated. Herb also alleges that all three individuals discuss alibis. McCarty  
8 allegedly states that he would get Phillips and Nagel to be his alibi. In his statement to Metro,  
9 Malone denies any involvement in the incident itself. It is clear that Herb is alleging that  
10 "Rome" and "D-Roc" were the principal actors of the incident. McCarty is denying any  
11 involvement in the incident blaming it on Malone and Herb. And Malone has denied any  
12 involvement whatsoever leaving the incident in the hands of McCarty and Herb. Due to the  
13 mutually exclusive defenses between Malone and McCarty, and their former co-defendant  
14 Herb, now an informant for the State, a situation is created where each defendant is claiming  
15 innocence and seeking the conviction of the opposing party. Because these defenses that are  
16 diametrically opposed to each other it allows the court to grant a severance to preserve  
17 everyone's fundamental right to due process and a fair trial. Therefore, in conjunction with the  
18 reasons set forth above this Court must grant a severance between Co-Defendants.

22 **TESTIMONY OF ONE DEFENDANT AGAINST ANOTHER CREATES BRUTON/  
23 CONFRONTATION CLAUSE ISSUES**

24 Another tenuous situation is created when a defendant makes an incriminating  
25 statement that also incriminates a co-defendant and the defendant does not testify.

26 The admission of a co-defendant's statement at a joint trial violates the defendant's  
27 right to confrontation if the statement also incriminates the defendant and the co-defendant  
28

1 does not testify. Bruton v. United States, 391 U.S. 123 (1968). Bruton holds, that instructing  
2 the jury to disregard the statement as evidence against the defendant is insufficient to render  
3 the confession admissible unless the confession is redacted to eliminate all references to the  
4 defendant or his participation in the crime.

5  
6 The Nevada Supreme Court also noted that redaction many times does not clearly  
7 avoid the Bruton problem. In Duckworth v. State, 113 Nev. 780 (1997) the court stated: We  
8 conclude that because Duckworth did not testify, the introduction of his confession, which  
9 probably inculpated co-defendant Martin, violated Martin's right to cross-examination secured  
10 by the Confrontation Clause of the Sixth Amendment. The Court further noted citing Stevens  
11 v. State, 97 Nev. 443 (1981):  
12

13 It appears likely that the jury read the appellant's name into the blanks in each  
14 one of [co-defendant's] statements introduced at the trial below. The  
15 circumstantial links between [the co-defendant] and [the appellant], referred to  
16 by the prosecutor, and the fact that [the co-defendant] and appellant were being  
17 tried together made it not only natural, but seemingly inevitable, that the jury  
18 would infer appellant to be the person referred to in the blanks in [the co-  
19 defendant's] statements.

20 A "primary concern is whether the jury will be able to segregate the evidence applicable  
21 to each defendant and follow the limiting instructions of the court as they apply to each  
22 defendant." United States v. Vaccaro, 816 F.2d 443, 448-449 (9<sup>th</sup> Cir. 1987).

23 The risk that a joint trial will compromise a specific trial right of one of the defendants, or  
24 prevent the jury from making a reliable judgment about guilt or innocence, occur[s] when  
25 evidence that the jury should not consider against a defendant and the would not be  
26 admissible if a defendant were tried alone is admitted against a co-defendant." Zafiro v.  
27 United States, 113 S.Ct at 938. Thus, "a great disparity in the amount of evidence introduced  
28 against joined defendants may, in some cases, be grounds for severance." United States v.  
Douglas, 780 F.2d 1472, 1479 (9<sup>th</sup> Cir. 1986). It is well established that "[w]hen many  
defendants are tried together in a complex case and they have markedly different degrees of

1 culpability, the risk of prejudice is heightened." Zafiro v. United States, 113 S.Ct. At 938.

2 "The prime consideration in assessing the prejudicial effect of a joint trial is whether the court  
3 may reasonably expect the jury to collate and appraise the independent evidence against each  
4 defendant in view of its volume and the court's limiting instructions." United States v. Sherlock,  
5 962 F.2d 1349, 1360 (9<sup>th</sup> Cir. 1989). A defendant is prejudiced if "the jury cannot reasonably  
6 be expected to compartmentalize the evidence as it relates to separate defendants in light of  
7 its volume and limited admissibility." United States v. Unruh, 855 F.2d 1363, 1374 (9<sup>th</sup> Cir.  
8 1987) (internal quotation marks omitted). "[E]vidence that is probative of a defendant's guilt  
9 but technically admissible only against a co-defendant also ... presents a risk of prejudice."  
10 Zafiro v. United States, 113 S.Ct. At 938.

11 Malone's position as a co-defendant in a conspiracy trial is a precarious one, as Mr. Justice  
12 Jackson cogently points out in his concurring opinion in Krulewitch v. United States, 336 U.S.  
13 440 (1949):

14 A co-defendant in a conspiracy trial occupies an uneasy seat. There generally  
15 will be evidence of wrongdoing by somebody. It is difficult for the individual to  
16 make his own case stand on its own merits in the minds of jurors who are ready  
to believe that birds of a feather flock together.

17 Krulewitch v. United States, 336 U.S. at 454.

18 "While limiting instructions are presumed to be followed, the Ninth Circuit has  
19 recognized there are times when it is unrealistic to expect a jury to follow such instructions,  
20 necessitating a severance." United States v. White, 766 F.Supp. 873, 891 (E.D. Wash 1991).  
21 "The naive assumption that prejudicial effects can be overcome by instructions to the jury ...  
22 all practicing lawyers know to be a unmitigated fiction." Krulewitch v. United States, 336 U.S.  
23 at 454 (Jackson, J., concurring).

24 For example, the United State Court of Appeals for the District of Columbia observed  
25 that "[e]ven when the trial judge carefully instructs the jury regarding the limited significance  
26 it should give to evidence of other crimes, prejudice to the defendant is 'well-nigh  
27 inescapable.'" United States v. Daniels, 770 F.2d at 1116 (quoting United States v. Carter, 482  
28 F.2d 738, 740 (D.C. Cir. 1973)).

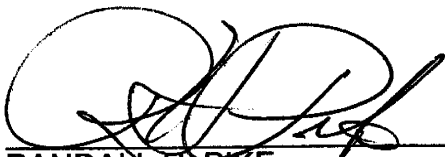
1 Here, there are several statements that are made by Co-Defendant McCarty in regards  
2 to Malone's actions. Estores testified that both McCarty said, "if they didn't get that money  
3 from us by sunrise, we would be in three shallow graves in the desert." (Vol. I, p. 113).  
4 McCarty tells Phillips, "days before that they were going to take them out to the desert and  
5 they were going to, weren't going to kill them or anything like that. . . [t]hey did mention going  
6 to take them out to the desert, smack them around a couple of times, teach them a lesson,  
7 I guess, because they owed them money or something." (Vol. II, p. 51). McCarty incriminates  
8 Malone by stating that "Red" had received some drugs from "D-Roc", and she was also  
9 missing. (Vol. V, p. 26). McCarty states on the cell phone prior to Herb's arrival: "You know  
10 what we're doing out here. We're not just beating them up this time. You're involved in two  
11 murders now." (Vol. V, p. 18). Allegedly in the background, he hears Malone saying that "he  
12 broke the club that they had" to which McCarty replies, "Okay. Just hit the bitch in the head  
13 with a rock." During one cell phone call, "Rome" tells Donny "Victoria is dead" and then hung  
14 up. (Vol. V, p. 39). Also, McCarty and Malone allegedly discuss alibis, and what everyone's  
15 alibi would be. (Vol. V, p. 36). McCarty later advised Herb that "[McCarty] would have two of  
16 [their] friends, Correna and Lynn . . . say that he was at their house at that time, and that the  
17 green car was there, they remember him." (Vol. V, p. 38). Also, McCarty "told Mr. Malone to  
18 take the girls' clothes and burn them". (Vol. V, p. 34). McCarty called Herb and told him that  
19 he was going to leave the state with the car. (Vol. V, p. 60). Mc Cart also makes numerous  
20 phone calls to friends and family inculpating Malone. Additionally, there are statements placing  
21 Malone at the scene with McCarty and Combado and Magee. Because of the statements  
22 made by McCarty incriminating himself and Malone should he choose not to testify it hinders  
23 and violates Malone's right to confront and cross-examine his accuser. See Sixth  
24 Amendment; Bruton, 391 U.S. 123; Duckworth, 113 Nev. 780. Additionally, a joint trial will  
25 compromise the specific trial right of Malone by allowing the jury to make an unreliable  
26 judgment on his guilt or innocence based on "spill over" evidence that should be only used in  
27 consideration of McCarty's actions and would not be admissible if Malone were tried alone.  
28

1 See Zafiro, 113 S.Ct at 938. Malone submits that no limiting instruction will be sufficient to  
2 purge from the jurors' minds the taint of a joint trial in this case or allow the jury to segregate  
3 the evidence and apply it individually to each defendant. See Vaccaro, 816 F.2d at 448-449.  
4 Therefore, for all of the foregoing reason the court must allow a severance of the trial between  
5 Malone and McCarty.

### 6 CONCLUSION

7 In conclusion, "justice, not legal economy, is the first principle of our legal system, and  
8 under no circumstances may well-intentioned efforts to conserve judicial time be permitted to  
9 prejudice the fundamental right of a criminal defendant to a fair trial." United States v. Crane,  
10 499 F.2d 1385 (6<sup>th</sup> Cir. 1974). A joint trial will clearly infringe on Malone's right to present an  
11 individual defense, untainted by antagonistic defenses and "spill over" evidence. Therefore,  
12 counsel for Malone respectfully moves this court to sever his trial from the trial of his co-  
13 defendant in order to preserve his constitutional right to receive a fair trial. Additionally this  
14 court must sever Count I and II for the remaining charges and Counts III-VI from Counts I and  
15 II and the remaining charges.

16 DATED this 24 day of October, 2006.

17 

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1 JOIN

2 DAVID M. SCHIECK  
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5 CHARLES A. CANO  
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13 (702) 455-6265  
Attorneys for Defendant

FILED

2006 OCT 25 A 9:54

*Charles A. Cano*  
CLEAR

DISTRICT COURT  
CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,  
12  
13 Plaintiff,

vs.

CASE NO. C224572

DEPT. NO. V

15 DOMONIC MALONE,  
16  
17 Defendant.

DATE OF HEARING: 10/31/06  
TIME OF HEARING: 8:30 a.m.

JOINDER WITH CO-DEFENDANT JASON McCARTY'S MOTION TO SEVER

19 COMES NOW, Defendant, DOMONIC MALONE, by and through his attorneys,  
20 DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public  
21 Defender and RANDALL H. PIKE, Deputy Special Public Defender, and hereby joins in Co-  
22 Defendant JASON McCARTY's Motion to Sever.

23 DATED this 25 day of October, 2006.

24  
25 *Randall H. Pike*  
26 RANDALL H. PIKE  
27 Deputy Special Public Defender  
28 Nevada Bar No. 1940  
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*Charles A. Cano*  
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**MOTION TO SEVER** is hereby acknowledged this 25<sup>th</sup> day of October, 2006.

DMR



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*Shirley S. [Signature]*  
CLERK

PETN  
DAVID M. SCHIECK  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,  
vs.

CASE NO. 0224572  
DEPT. NO. V

DOMONIC MALONE, et al.,  
Defendant.

Date of Hearing: 12-12-06  
Time of Hearing: 8:00

**PETITION FOR WRIT OF HABEAS CORPUS**

TO: The Honorable Eighth Judicial District Court of the State of Nevada, in and for the County of Clark:

The Petition of Randall H. Pike, Assistant Special Public Defender for the above-captioned individual, respectfully shows:

1. Petitioner is a duly qualified, practicing and licensed attorney and court-appointed counsel for Defendant DOMONIC MALONE (hereinafter "MALONE").

2. That Petitioner makes application herein on behalf of his client for a Writ of Habeas Corpus; that the place where Applicant is constructively restrained of his liberty in the Clark County Detention Center; by BILL YOUNG, Sheriff.

3. That the imprisonment and restraint of said above-captioned client of Petitioner is unlawful in this: That the indictment was not supported by evidence.

4. That client of Petitioner waives the 60-day limitation for bringing said client to trial.

1           5.     That client of Petitioner was arraigned in District Court on \_\_\_\_\_, 2006.

2           6.     That the Court extended the due date of the filing of the instant petition based  
3 upon the length of the Preliminary Hearing.

4           7.     That client of Petitioner consents that if the Petition is not decided within 15 days  
5 before the date set for trial, the Court may, without notice or hearing, continue the trial  
6 indefinitely to a date designated by the Court;


7           8.     That client of Petitioner consents that if any party appeals the Court's rulings and  
8 the appeal is not determined before the date set for trial, the trial date is automatically vacated  
9 and the trial postponed unless the Court otherwise orders.

10          9.     That no other Petition for Writ of Habeas Corpus has heretofore been filed on  
11 behalf of defendant on these particular issues.

12           WHEREFORE, Petitioner prays that the Honorable Court issue an order directing the  
13 Clark County Clerk to issue a Writ of Habeas Corpus directed to the said BILL YOUNG,  
14 Sheriff, commanding him to bring the above-captioned defendant before your Honor, and  
15 return the cause of imprisonment.

16           DATED this 6<sup>th</sup> day of November, 2006.

17           RESPECTFULLY SUBMITTED:

18             
19           Randall H. Pike  
20           Assistant Special Public Defender  
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**POINTS AND AUTHORITIES IN SUPPORT OF  
PETITION FOR WRIT OF HABEAS CORPUS**

**FACTUAL BACKGROUND**

On May 5, 2006, Henderson Police responded to a call indicating that there were two female bodies located in the desert to the south of Henderson. They were subsequently identified as Charlotte Combado and Victoria Magee. The cause of death was blunt force trauma and sharp force trauma. (Coroner's report admitted at preliminary hearing)

The preliminary hearing lasted a number of days. At the initial appearance, Counsel for the Defendants Malone and McCarty brought a motion to continue (PH Vol 1, P.12-21) based upon the late production of reports. Additionally, the morning of the preliminary hearing, the co-defendant, Donald Herb, was offered and signed a plea agreement that included an agreement that he testify against his co-defendants. (Vol 1. P.28). The Court denied the Defendants motion to continue, or, in the alternative, allow the testimony to proceed for preliminary hearing purposes only and not allow the testimony to be "preserved" for trial purposes. (p 47).

The first witness called by the state was Melissa Estores (a.k.a. "Red"). She described herself as a "hustler" (p. 292), who sold drugs (p. 52). Immediately Prior to testifying, she had been drinking Crown Royal (an alcoholic beverage) in the jury room with two of the other witnesses for the State. ( p. 133) She indicated that she knew the victims for approximately one year (p.49). She identified the Defendant, Domonic Malone, by his "street name" of "D-Roc" (p.50) and Defendant McCarty as "Romeo or Rome" (p.51). She was D-Roc's girlfriend and she sold drugs for him. (p.52). She sold "hard and soft drugs" (p.53). Mr. Digiacommo argued that "the nature of the relationship (between D-Roc and Red) is the motivation for the murder" (p. 56) and the Court did not require any disclosure of agreements between Red and the State regarding non-prosecution for the drug sales. (p. 57).

Red also sold drugs for "Black" (p.59), but never worked for Romeo (p.71) Victim Christine "took work" (e.g. sold drugs) "from whoever she could get work from". (Work means drugs) (p. 77) She worked for whoever would give her drugs. (P. 78) Red helped her sell Dope around

1 the Sportman's Manor. (p. 79)

2 In April of 2006, Red was residing in an area known as the "Sportsman's Manor". She  
3 met D-Roc and was involved in a physical altercation. (P.60). Red testified that her jewelry  
4 "got lost" when "we had our fight" (p. 64). During the "fight" she did not fight back, because  
5 she "felt it was better if I just went with it because I cared about him" (id). Red testified that  
6 she was "hit in the chest, ... in the forehead, the temples and the other side... [and] again in  
7 the chest. (p.68). This lasted for about 10 minutes. D-Roc allegedly called the physical  
8 beating as "PT time" (id). According to the witness, the bruising lasted about 6 weeks, she  
9 was "laid up" for about 5 days" (p. 69). She did not want to get the police involved and she  
10 "took it in stride" ( p.241). After 5 days, Mr. Malone "said he was sorry" and advised her that  
11 she owed Black \$120.00. (P. 71). It was at this time that Red ended her personal relationship  
12 with D-Roc (p. 222). But restarted it at a later time (223)

13 On Mother's day, 2006, D-Roc told Red that "He didn't want [her] to see [Black], work  
14 with him, call him, nothing, no contact" (p. 74). On that day, however, she was at the South  
15 Cove apartments number 217 with Black and Christine (p. 75). Christine owed someone for  
16 drugs advanced to her and she was "in the hole" (p. 79). Red made some sales for her, but  
17 she put the funds back into "the machines" (id). Red was concerned enough to try and borrow  
18 money for Christine (p. 80).

19 The next morning, Rome arrived at Christina's and Red's residence, they got into the  
20 car that Rome was driving and left the Sportsman. (p.83) They left in the green car that would  
21 subsequently be identified as belong to Donald Herb, (a.k.a. Donny) but had been loaned to  
22 Romeo for his use. While traveling to the Oasis Hotel, Christina talked with Romeo about how  
23 she needed to come up with \$150.00 to pay back her "sack money". (p. 88). During this drive,  
24 Red was smoking a blunt. (p. 254). The conclusion between Christina and Romeo was that  
25 "if Christina brought Victoria to [Romeo] so the he could get his \$80.00, he [Romeo] would  
26 take care of her [Christina] on her \$150 debt". (p.89) During this period of time, Romeo was  
27 questioning Red about her relationship with D-Roc (p. 90). They are interrupted by an  
28 employee of the Oasis who indicates that three people cannot go into a room, Christina and

1 Rome leave to get D-Roc.(p.93).

2 Red's next recollection is seeing Christina and Victoria across the street from the Oasis  
3 at the Burger King, walking. Christina's arm was around Victoria (p. 94). Rome came back  
4 to the Oasis, retrieved Red and they walked towards the Stratosphere Hotel and Casino. (Id).  
5 Rome was talking on his telephone with Donny who was now driving the green car, which had  
6 Christina, Victoria and D-Roc in the back. (p. 94-95). Donny was dropped off at his residence  
7 and the remainder of the occupants travel to the Sportsman where Rome, Christina and  
8 Victoria exit the vehicle, (P. 97), return and all 5 leave together in the car with Rome driving  
9 (p. 99).

10 The car is driven by Rome to the Desert area with D-Roc in the front passenger seat.  
11 D-Roc gets out of the car, Red also gets out of the car with him and D-Roc started to strike  
12 her with his fists (p. 105). Rome is telling her not to fight back (p. 106). The bruises from this  
13 beating lasted about "a week or so, maybe two weeks"according to Red. (P. 109). The bruises,  
14 Red explained had nothing to do with the murders (p. 285). After they left the desert, D-Roc  
15 went through Red's purse looking for her cell phone. Red had removed the cell phone from  
16 the purse and hid it under the driver's seat. He eventually threw the purse and contents out  
17 of the car. (P. 111).

18 Rome drove the car to the Hard Rock Hotel and Casino where Christina, Victoria and  
19 Red were dropped off. D-Roc told them they were to make some money. Red testified that  
20 both Rome and D-Roc said that "if they didn't get that money from us by sunrise, we would be  
21 in three shallow graves in the desert." (P. 113). According to D-Roc, Red owed him \$360, but  
22 nothing was owed to D-Roc by either Christina or Victoria (113-114). Victoria owed \$80 to  
23 Rome. (Id). The girls were to raise the money by selling drugs. Christina had been given  
24 drugs from Rome. However, rather than selling the drugs, Christina smoked the drugs in the  
25 bathroom at the Hard Rock. Victoria tried to raise money through prostitution, but was  
26 unsuccessful (p. 115). According to Red, Christina was there to "make sure that me and  
27 Victoria did what we were supposed to do." (P. 115). Red refused Christina's direction to sell  
28 herself, describing herself as "a hustler, not a ho." (Id). Red yelled at Christina in the Hard

1 Rock, (p.160) "I wouldn't be in this situation if it wasn't for her" (p. 161) and wanted to beat her  
2 up (p. 169).

3 Red called David Parker who picked the girls up from the Hard Rock and took them to  
4 his residence where they stayed until the next night. (P. 117) The girls went to the South Cove,  
5 and talked with Black, who said D-Roc was on his way over, so they left and went to the  
6 Cortez. (119). While at the Cortez house, they were able to contact Leonard Black, who  
7 picked them up and took them back to the South Cove, apartment 222 where he was staying  
8 with "Demarco". There were two golf clubs in the room. (P. 121). Red was concerned about  
9 Christina lying to Leonard Black, so she left with him and Demarco to get another car. They  
10 were gone for about 45 minutes (p. 123). When they returned, Christina and Victoria were  
11 gone, two purses were dumped out and a golf club was missing. (P. 125).

12 Red told Leonard Black that she suspected D-Roc and Rome of entering his apartment,  
13 so they went to the Sportsman to confront Rome and D-Roc. Leonard Black beat up Rome  
14 (p. 129), and Red left with Leonard and DeMarco. She had no further contact with Rome or  
15 D-Roc after that. After learning of the deaths, Red contacts the police. (P. 131). She had a  
16 number of recorded statements as well as 15-20 contacts with the police. (P. 138). She was  
17 provided living accommodations and expenses for food by the police after this for awhile  
18 (p.147).

19 Red admitted to drinking "almost every day" and smoking a "blunt" (a marijuana  
20 cigarette) almost every day. (Id). Red cannot read (p. 159) and has memory problems (id).

21 The next witness called by the State, Correna Phillips, lived at the Sportsman Manor  
22 with her girlfriend, Lynn Nagel (II p. 4) during the week in question. On March 16<sup>th</sup>, Tuesday  
23 night, Romeo, D-Roc, Christina, and Victoria came to their residence (II p. 7). It was the first  
24 time she had met Christina (II p.8), although she had known Romeo for "about a month and  
25 a half" prior to that date (II p. 8) and D-Roc "a couple of weeks less than that" (II p. 9). She  
26 believed that "the leader to me, I though was kind of like Romeo. But then I thought D-Roc,  
27 though too in a way. But Romeo, like Donny, controlled all the money and stuff like that.  
28 Romeo and Donny would sell together, and D-Roc pretty much sold on his own... It seemed

1 like Romeo, like pretty much controlled Donny, and like he and Donny not so much D-Roc. D-  
2 Roc was pretty much on his own." (II p. 26).

3 Correna had been with D-Roc, Romeo and Lynn earlier that evening about 4:00 to 5:00  
4 p.m. over at Walmart (II p. 20). At Walmart, Rome bought new shoes and D-Roc bought a  
5 black sweater. (II p. 23).

6 During that evening meeting at Coreena's residence, Christina was "running in and out  
7 doing deals", D-Roc was "doing business", Lynn was playing the Playstation and Romeo was  
8 standing around. (II p. 11). D-Roc was on the telephone and Coreena testified that she  
9 overheard him "wanting to take the girls out there for PT time." ( II p. 14). ( Although she had  
10 no idea what "PT" meant, she "though it had something to do with taking pimptraining or  
11 something." (II p. 18)) She overheard D-Roc say, "well, we were going to take the girls, take  
12 them out to the desert, PT, or whatever, and just leave them out there and come back , or  
13 something like that ". (II p. 15). Coreena did not know to whom D-Roc was speaking on the  
14 telephone. She had her Romeo, Donny, D-Roc "all three of them" talking about it earlier, two  
15 or three days before that weekend. (II p. 16). Victoria had left to perform an act of  
16 prostitution. (II p.12). Correna told them to stop, and Romeo advised her that he was leaving  
17 and he was going to "take the girls to the Hard Rock. I will see you later" (II p. 12), "because  
18 Romeo mentioned that the girls wanted to go to the Hard Rock." (II p. 98). They all left.

19 Prior to this time, Romeo had explained to her how he pimps girls, how he got them and  
20 how he made money off of them. (II p. 19). This included how he controlled them. (Id). She  
21 did not have these conversations with D-Roc. (Id).

22 Correna did not see them again until the next day (Wed. the 17<sup>th</sup> of March). When  
23 Romeo and Donny gave her a ride to work at about 5:00 p.m. (II p. 13). After she got off  
24 work, Romeo and D-Roc picked her up between 10:15 and 10:30 p.m. Romeo was driving the  
25 green car owned by Donny. (II p. 27). In at least one of her statements however, Coreena  
26 told police that she took the bus home that evening (II p. 92) because "after [the police] kept  
27 telling me that I had taken the bus, I was just like whatever, I took the bus," (II p. 91). At the  
28 residence, Romeo was involved with Lynn with the Play Station video game, and D-Roc was

1 "nodding off". (II p. 28). D-Roc explained that he was "really tired. I have been up for days"  
2 to which Romeo responded "I'm taking him [D-Roc] home" between 11:30 and midnight. (Id).

3 Romeo called Coreena later that next morning at about 2:00 a.m., and arrived at her  
4 residence at about 3:00 a.m.. Romeo had been drinking, had some shoes in his hand and  
5 then left. (II p. 29). Coreena got a call that Romeo had just been beat up. Thursday morning  
6 she saw him and he had a black eye, scratches on his neck and "looked like he got beat up  
7 pretty bad" (Id. ), like he was in a state of shock...like scared or something. Like stunned". (II  
8 p. 34).

9 On the Friday following the above events, Coreena testified that she overheard D-Roc  
10 on the telephone and he had mentioned something "about I had taken their clothes off and left  
11 them out there," (II p. 38). She did not know to whom he was speaking. (Id). On that Friday,  
12 when Romeo, Donny and D-Roc picked her up from work, D-Roc took his shorts off and threw  
13 them away. Coreena did not question this, as "[D-Roc] did weird things, so I just thought it was  
14 something he did". (II p. 41). Coreena took the green car from Romeo the next Monday and  
15 tried to have the tires replaced (II p. 45), was unsuccessful and returned the car to Romeo who  
16 stated "Me and D-roc will go and take care of it." (II p. 46). While D-roc was in the room at the  
17 time, he didn't say anything or nod his head, "He was just standing there". (II p. 48).

18 While watching the T.V. with Romeo, there was a report about the instant deaths.  
19 Romeo he told Coreena that someone was "framing him and D-Roc" for the murders. (II p.  
20 51). Romeo had previously told her ("days before that (id)) that "they were going to take them  
21 out to the desert and they were going to, weren't going to kill them or anything like that. . .  
22 [t]hey did mention going to take them out to the desert, smack them around a couple of times,  
23 teach them a lesson, I guess, because they owed them money or something." (Id). Coreena  
24 never talked with D-Roc about the deaths. (II p. 52).

25 Coreena testified that she discussed them matter with Donald Herb (a.k.a. Donny) at  
26 his residence. She overheard Donny telling his parents that "a couple girls were killed in the  
27 desert, that they were trying to frame him for the murder" (II p. 54) Donny and his father told  
28 her "not to talk to anybody without his lawyer." (II p. 55).



1 Romeo took Coreena into the desert and "showed me a spot where it was, where he  
2 had buried it. Supposedly 95,000 or 90,000 and two kilos. (II p.56). Coreena was unable to  
3 find the money and drugs however, "it wasn't there. I looked". (id). Coreena testified that  
4 during her interview the police knew about the money (II p. 117) due to "three way calls" from  
5 Romeo through the bailbondsman to Coreena.

6 Coreena gave numerous statements to the police, when confronted by officers and  
7 being told by officers that she was going to either be a suspect or a witness, she stated " I  
8 wanted to be on the other side, on the witness side. I was just scared" (II p.108).

9 Donald Jay Herb (a.k.a. "Donny", "D-Boy" and "Donny") is charged within the original  
10 complaint in the case. Prior to the preliminary hearing, he had, through his attorneys,  
11 brokered a negotiated plea that involved him testifying against his co-defendant's in this case.  
12 (V 44-46).

13 Donny was a regular at Sportsman. He was selling drugs at that location. "Pretty much  
14 every day." (V 48).

15 Donny testified that he was the owner of the two cars in question, the 2002 green  
16 Oldsmobile Allero (V p.5) and the 1993 white Honda Accord . He had allowed Romeo to use  
17 the green car for the entire months of April and May of 2006. (V 6). This despite the fact that  
18 the Honda was not registered and has an expired 30 day permit. (V 64). Romeo was a friend  
19 of Donny's for three to four years and they had resided together for a period of about two  
20 years. (Id). Donny and Romeo communicated frequently by cellular telephones, Donny's  
21 number was 453-9274 and Romeo's number was 237-3308 (V p. 8). They saw each other  
22 "almost every day" (V p. 9).

23 D-Roc was a recent acquaintance of approximately two or three months (V p. 9).  
24 Donny didn't even know Mr. Malone's last name until he read in the Court records. (Id). D-Roc  
25 and Romeo were "just hanging out together for protection in the neighborhood " (V p. 10).

26 In establishing the relationship between the parties, Donny established that Victoria was  
27 "Rome's girl", Christine was hanging out around the Sportsman, and was identified with  
28 Romeo, Red was "a friend of Malone's girlfriend, or a female companion." (Id).

1 Donny described the events of the night before the death of the girls. Donny stated that  
2 on that evening, he (Donny) called Romeo and stated "I'm going to come and get my car." (V  
3 p. 15). Romeo gave him directions to Exit 56A on the 95 south. (id). Donny stated that he did  
4 this because Romeo said he was going to leave the state with the car. (V 60) however, Donny  
5 had not made any arrangements to have someone assist him in retrieving his car. (V 65) nor  
6 was there any conversation about Donny and Romeo switching cars (V 66). . They had  
7 numerous calls back and forth. (V 16-18) until Donny arrives. Romeo states on the cell phone  
8 prior to Donny arriving: "You know what we're doing out here. We're not just beating them up  
9 this time. You're involved in two murders now." (V p. 18). Allegedly in the background, he  
10 hears Mr. Malone saying that "he broke the club that they had. They only brought one. Mr.  
11 McCarty proceeds to tell him, "Okay. Just hit the bitch in the head with a rock.". During one cell  
12 phone call, Romeo tells Donny "Victoria is dead" (V 39) and then hung up.

13 Arriving at the scene, Donny sees Romeo and D-Roc in the green car. He follows them  
14 toward Boulder City. (V 19). Romeo's hearsay statements (as to D-Roc) describe the prior  
15 battery by D-Roc on Red. ( V 24). About a week prior to that, Romeo complained to Donny  
16 that Victoria " had went to work and then not showed up for a couple of days. She took some  
17 work [drugs] with her. She was smoking it- this being Victoria..." (V 25). Red had received  
18 some drugs from D-Roc, and she was also missing. (V 26). The two vehicles stop about "four  
19 miles south of the dam" and Romeo and D-Roc start removing things from the trunk of the car.  
20 (V 28). Donny gets out of his car, D-Roc hands him a head of a golf club and tells him to get  
21 rid of it. Donny then throws it into the desert. Donny, Romeo and D-Roc discussed alibis, and  
22 what everyone's alibi would be. (V 36). Romeo later advised Donny that " he would have two  
23 of our friends, Correna and Lynn . . . would say that he was at their house at that time, and  
24 that the green car was there, they remember hm." (V 38). After cleaning out the rest of the  
25 trunk, everyone leaves in the two cars, until they stop at Russell Road and Boulder highway.  
26 Romeo calls Donny, and "asks me to go inside and get a bottle of water for him." Donny  
27 complies (V 30).

28 From that location, Romeo "asks [Donny] to drive Mr. Malone home". Romeo "heads

1 towards the Sportsman." (Id). Donny takes D-Roc to his (Donny's) house, where Donny turns  
2 off his alarm, changes his clothes for work, and drops off D-Roc near Lake Mead and Martin  
3 Luther King Drive. Donny then picks up Lenny and takes him to work. (V 31).

4 During this time, D-Roc was wearing black shorts, sandals and a long sleeved black t-  
5 shirt. At the spot near the dam, several discussions about clothing was held. This culminated  
6 when Romeo "told Mr. Malone to take the girls' clothes and burn them". (V 34). The night  
7 after the deaths, Romeo gave additional information to Donny, (V 38) although he did not say  
8 exactly how they were killed. (V 39). D-Roc "didn't say anything about it." stating that " We  
9 shouldn't talk about what happened at all. ".(V 40).

10 In an effort to destroy evidence, Romeo "told [Donny] the we needed to change the tires  
11 so they wouldn't match the tire marks at the crime scene... I then gave him \$200 cash so he  
12 could take care of that" (V 41). D-Roc, although present, said nothing. (Id).

13 Prior to assisting the police, Donny admitted lying to them. He lied to them about his  
14 involvement as well as Romeo's and D-Roc's involvement. (V 43). After interrogations  
15 wherein the police told Donny that Romeo had said that Donny and D-Roc did it and that D-  
16 Roc said that Donny and Romeo did it, the police made him an offer: "I could either be a  
17 witness or I could be a suspect..." (Id). After determining that he would assist the police,  
18 Donny took officers out to the locations that he had described and assisted police in  
19 recovering evidence. (V 42).

20 At the conclusion of the preliminary hearing, the Defendant was bound over on all  
21 charges. (See attached information).

## 22 II.

### 23 PROCEDURAL STATEMENT POINTS AND AUTHORITIES

24 Since this has been designated as a capital prosecution, exacting standards must be  
25 met to assure that it is fair. The death penalty "is unique in its irrevocability." Furman vs.  
26 Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed. 2d. 346 (1972) (Stewart, J. concurring).  
27 As the United States Supreme Court has held, "[t]he fundamental respect for humanity  
28 underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives

rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case." Johnson vs. Mississippi, 486 U.S. 578, 584, 108 S.Ct.1981, 100 L.Ed. 2d 575 (1988) (quoting Gardner vs. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L.Ed 2d 393 (1977) (quoting Woodson vs. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976) (White, J., concurring)).

## **LEGAL ARGUMENT**

### **A. THE EVIDENCE PRODUCED AT THE PRELIMINARY HEARING WAS INSUFFICIENT TO ESTABLISH THAT MALONE WAS A PRINCIPAL TO THE OFFENSES OR THAT HE WAS PART OF ANY CONSPIRACY**

In discussing the matter before the Court, unless specifically identified otherwise, the Defendant is challenging the Counts dealing with the deaths of the two victims in this case, and the attendant theories of liability. There is no independent eye witness to the murders, and the nexus to these Counts to Defendant Malone are brought through the testimony of a co-defendant who offers both hearsay statements from Defendant McCarty as well as his own uncorroborated testimony to focus the blame on Mr. Malone.

To hold an accused to answer in the District Court, it must appear to that from the evidence presented before the Justice of the Peace, that there is probable cause to believe that an offense has been committed, and that the defendant committed it. NRS 171.206. If, at the preliminary hearing, the evidence is in conflict, it is the function of the magistrate to determine the weight to be given to the witness testimony. Ricci v. State, 88 Nev. 662, 663, 503 P.2d 1222 (1972).

Probable cause is established when the evidence introduced at the preliminary hearing establishes a "reasonable inference that the defendant committed the crime." Morgan v. Sheriff, 86 Nev. 23, 25, 467 P.2d 600, 601 (1970).

In the present case, there was not substantial and competent evidence presented before the Justice of the Peace that Malone either committed the murders and attendant crimes set forth above and listed in the Information in the underlying case. No reasonable inference can be drawn that he was involved in any conspiracy relating to the instant offenses.

1 The only evidence that places defendant Malone at the scene of the deaths is the  
2 testimony of the co-defendant Donald Herb. There was no evidence presented that was  
3 consistent with Mr. Malone being at the desert or involved in the murder except the  
4 uncorroborated statement of Mr. Herb. The only competent evidence of Mr. Malone with Mr.  
5 McCarty on the evening of the deaths was the testimony of Coreena that when they were at  
6 her residence, Romeo (McCarty) was involved with Lynn with the Play Station video game,  
7 and D-Roc was "nodding off". (Il p. 28). D-Roc explained that he was "really tired. I have been  
8 up for days" to which Romeo responded "I'm taking him [D-Roc] home" between 11:30 and  
9 midnight. (Id). Coreena never talked with D-Roc about the deaths. (Il p. 52). Finally, there  
10 was evidence adduced at the time of the preliminary hearing that the relationship with the  
11 deceased girls was through Donny and Romeo.  
12  
13

14 **B. THE INTRODUCTION OF THE CO-DEFENDANT DONALD HERB'S**  
15 **TESTIMONY REGARDING THE TELEPHONE CONVERSATIONS WITH AND**  
16 **ADMISSIONS OF DEFENDANT MCCARTY IS INSUFFICIENT TO SUPPORT**  
17 **THE BIND OVER VIOLATIVE OF MALONE'S PROCEDURAL AND**  
18 **SUBSTANTIVE DUE PROCESS RIGHTS**

19 The State in this matter sought a joint bind over of both of the individuals  
20 named in the Amended Complaint. Pursuant to this procedure, the co-defendant, who was  
21 charged as an accessory entered a plea agreement and agreement to testify against Malone  
22 and McCarty. During the testimony of "Donny" he testified regarding a number of telephone  
23 conversations that were allegedly made by the McCarty. These were improper to consider  
24 against Mr. Malone.

25 Both the United States Supreme Court and the Nevada Supreme Court have issued  
26 decisions concerning admission of alleged co-conspirator statements in joint trials. Although  
27 not a trial, , the reasoning of the Courts in these cases explains why the statements may not  
28

1 be used in justifying the bind over against Malone.

2 In Gray v. Maryland, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), the United States  
3 Supreme Court explained the historical foundation for this argument:  
4

5 The issue in this case concerns the application of Bruton v. United States, 391  
6 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton involved two  
7 defendants accused of participating in the same crime and tried jointly before  
8 the same jury. One of the defendants had confessed. His confession named  
9 and incriminated the other defendant. The trial judge issued a limiting  
10 instruction, telling the jury that it should consider the confession as evidence  
11 only against the codefendant who had confessed and not against the defendant  
12 named in the confession. Bruton held that, despite the limiting instruction, the  
13 Constitution forbids the use of such a confession in the joint trial.

14 Id. at 1153. While the same analysis should be applied in the preliminary hearing stage, in  
15 binding both defendants over to trial, the Honorable Justice of the Peace did not articulate how  
16 he considered the testimony as it applied in this instance.

17 The Gray case differed from Bruton because the prosecutors in Gray redacted the co-  
18 defendant's confession by substituting for the defendant's name in the confession a blank  
19 space or the word "deleted." Id. The Supreme Court held that these substitutions did not  
20 make a significant legal difference and that Bruton's protective rule applied. Id.

21 The introduction of an out-of-court confession by a co-defendant at the trial of an  
22 accused violates the accused's right, protected by the Sixth Amendment, to cross-examine  
23 witnesses. Bruton, 391 U.S. at 137, 88 S.Ct., at 1628. While defense concedes that the rights  
24 of cross examination are not necessarily applicable to presentations before the Grand jury, but  
25 the unbridled presentation of evidence against one defendant in a joint indictment, without  
26 proper caution or instruction raises constitutional due process violations.

27 Bruton, as interpreted by Richardson, holds that certain "powerfully incriminating  
28 extrajudicial statements of a codefendant"-- those naming another defendant -- considered as  
a class, are so prejudicial that limiting instructions cannot work. Richardson, 481 U.S., at 207,

1 107 S.Ct., at 1707; Bruton, 391 U.S., at 135, 88 S.Ct., at 1627. Unless the prosecutor wishes  
2 to hold separate indictments or to use separate empaneled grand juries or to abandon use  
3 of the confession, he must redact the confession to reduce significantly or to eliminate the  
4 special prejudice that the Bruton Court found.

5  
6 The impact of a co-defendant's statements have long been recognized as being so  
7 harmful, that even redaction may be insufficient to ameliorate the prejudice. That is why  
8 Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name  
9 of a codefendant not only "would have been futile.... [T]here could not have been the slightest  
10 doubt as to whose names had been blacked out," but "even if there had been, that blacking  
11 out itself would have not only laid the doubt, but underscored the answer." United States v.  
12 Delli Paoli, 229 F.2d 319, 321 (C.A.2 1956), aff'd, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278  
13 (1957), overruled by Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L Ed.2d 476  
14 (1968). See also Malinski v. New York, 324 U.S. 401, 430, 65 S.Ct. 781, 795, 89 L.Ed. 1029  
15 (1945) (Rutledge, J., dissenting) (describing substitution of names in confession with "X" or "Y"  
16 and other similar redactions as "devices ... so obvious as perhaps to emphasize the identity  
17 of those they purported to conceal").  
18  
19

20 Finally, as the court in Bruton held that the "powerfully incriminating" effect of what  
21 Justice Stewart called "an out-of-court accusation," 391 U.S., at 138, 88 S.Ct., at 1629  
22 (Stewart, J., concurring), creates a special, and vital, need for redress by this reviewing Court.  
23

24 **C. THE INTRODUCTION OF THE CO-DEFENDANT DONALD HERB'S TESTIMONY**  
25 **WITHOUT INDEPENDENT CORROBORATION IS INSUFFICIENT TO SUPPORT THE**  
26 **BIND OVER AND IS VIOLATIVE OF MALONE'S PROCEDURAL AND**  
27 **SUBSTANTIVE DUE PROCESS RIGHTS**

28 NRS 175.291 provides that:

1. A conviction shall not be had on the testimony of an accomplice unless he is

1 **corroborated by other evidence which in itself, and without the aid of the**  
2 **testimony of the accomplice, tends to connect the defendant with the**  
3 **commission of the offense;** and the corroboration shall not be sufficient if it  
4 merely shows the commission of the offense or the circumstances thereof.

5 2. An accomplice is hereby defined as one who is liable to prosecution, for the  
6 identical offense charged against the defendant on trial in the cause in which the  
7 testimony of the accomplice is given.(emphasis added)

8 In the present case, the only evidence which suggests that defendant Malone was at the  
9 scene of the deaths comes from the testimony of Donald Herb. There is no other admission,  
10 or piece of evidence which "in itself" connects the defendant with the commission of the  
11 deaths of the two girls. This statute, it appears was to protect an accused from the  
12 "synecdoche effect" by coloring the perceived liability of Mr. Malone for the actions of  
13 Defendants McCarty and Donald Herb. e.g. "the specific for the general". The Nevada  
14 Supreme Court in the case of Lapena v. State, 92 Nev. 1, 8 (1976) articulated how the Courts  
15 would determine the sufficiency of the corroboration.

16 "'The difficulty comes in determining what corroboration is sufficient. First, we must  
17 eliminate from the case the evidence of the accomplice, and then examine the  
18 evidence of the remaining witness or witnesses with the view to ascertain if there be  
19 inculpatory evidence, -- evidence tending to connect the defendant with the offense. If  
20 there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no  
21 corroboration, though the accomplice may be corroborated in regard to any number of  
22 facts sworn to by him.'

23 The Court also prefaced the above by holding that 'corroborative evidence is insufficient when  
24 it merely casts a grave suspicion upon the accused.' *Citing with approval People v. Shaw*, 112  
25 P.2d 241, 255 (Cal. 1941), and cases there cited; *Cooper v. Territory*, 91 P. 1032 (Okla.  
26 1907):.

27 There certainly is a difference between the corroboration of crimes  
28 ancillary to the commission of a murder, such as disposing of evidence and/or  
independent corroboration by witnesses placing the defendant at the location.  
In the present case there is no corroboration insofar as the Murder counts are  
concerned.



1 **D. THE PRESENTATION BEFORE THE JUSTICE OF THE PEACE WAS**  
2 **INSUFFICIENT TO SUPPORT THE CHARGES OF FIRST DEGREE**  
3 **KIDNAPING ALLEGED IN COUNT 1 AND 4 OF THE COMPLAINT AS THEY**  
4 **RELATE TO MELISSA ESTORRES (RED).**

5 Conceding that there was sufficient evidence to bind Mr. Malone to trial on the Battery  
6 Counts, there was no evidence to indicate that Red was not either a voluntary participant or  
7 that it "part of the relationship" that existed between the two parties. NRS 200.310 defines  
8 kidnaping as:

9 A person who willfully seizes, confines, inveigles, entices, decoys,  
10 abducts, conceals, kidnaps or carries away a person by any means whatsoever  
11 with the intent to hold or detain, or who holds or detains, the person for ransom,  
12 or reward, or for the purpose of committing sexual assault, extortion or robbery  
13 upon or from the person, or for the purpose of killing the person or inflicting  
substantial bodily harm upon him, . . . is guilty of kidnaping in the first degree  
which is a category A felony.

14 2. A person who willfully and without authority of law seizes, inveigles, takes,  
15 carries away or kidnaps another person with the intent to keep the person secretly  
16 imprisoned within the State, or for the purpose of conveying the person out of the State  
without authority of law, or in any manner held to service or detained against his will,  
is guilty of kidnaping in the second degree which is a category B felony.

17 In relation to the prosecution of this matter, there was no evidence that there was any  
18 asportation associated with the events that were against her will or without her consent. As the  
19 testimony was developed during the preliminary hearing She met D-Roc and was involved in  
20 a physical altercation. (P.60). Red testified that her jewelry "got lost" when "we had our fight"  
21 (p. 64). During the "fight" she did not fight back, because she "felt it was better if I just went  
22 with it because I cared about him" (id). Red testified that she was "hit in the chest, ... in the  
23 forehead, the temples and the other side... [and] again in the chest. (p.68). This lasted for  
24 about 10 minutes. D-Roc allegedly called the physical beating as "PT time" (id). According  
25 to the witness, the bruising lasted about 6 weeks, she was "laid up" for about 5 days" (p. 69).  
26 She did not want to get the police involved and she "took it in stride" ( p.241). After 5 days,  
27  
28

1 Mr. Malone "said he was sorry" and advised her that she owed Black \$120.00. (P. 71). "It was  
2 at this time that Red ended her personal relationship with D-Roc (p. 222). But restarted it at  
3 a later time (223).  
4

5 The evidence as developed during the preliminary hearing indicated that Red did not  
6 contact police to file charges on these cases, and the charges were merely used as a basis  
7 for an initial arrest of the defendant ; and were dropped when he was booked for the murder  
8 charges. It was not until the pending preliminary hearing that the State sought, via an  
9 amended complaint to charge Defendant Malone with the batteries and include the instant  
10 kidnaping charges. " Kidnap means to take and carry away any person by unlawful force or  
11 fraud and against his will." Jensen v. Sheriff, 89 Nev. 123, 508 P.2d 4 (1973); NRS 200.310.  
12 Here the victim testified that there was no force or fraud and that she not only voluntarily  
13 accompanied the accused but voluntarily returned with him to the Sportsman's Bar. See  
14 McDonald v. Sheriff, 89 Nev. 326,327 (1973).  
15  
16

17 **E. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A**  
18 **CONSPIRACY BETWEEN MCCARTY AND MALONE AS IT RELATES TO THE**  
19 **ALLEGED BATTERY ON MAY 16. ( Count 7).**

20 There was no evidence to indicate that Defendant Malone and McCarty had any common  
21 plan, scheme or design for Malone to commit a battery on Red. A battery, as defined by NRS  
22 200.400 is defined as "any willful and unlawful use of force or violence upon the person of  
23 another", a conspiracy being defined as " Whenever two or more persons conspire. . . To  
24 commit any crime " NRS 199.480. Mere presence, such as being in the car together, is  
25 insufficient to support the allegation that a conspiracy existed. There was no testimony that  
26 there was a common plan, scheme or design for McCarty and Malone regarding the  
27 battery.  
28

1 **F. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT DEFENDANT**  
2 **MALONE WAS INVOLVED IN THE PANDERING (Counts 8 and 9).**

3 The State's theory of liability in relation to these Counts apparently relate to the Victoria  
4 had left to perform an act of prostitution. (II p.12). Correna told them to stop, and Romeo  
5 advised her that he was leaving and he was going to "take the girls to the Hard Rock. I will see  
6 you later" (II p. 12), "because Romeo mentioned that the girls wanted to go to the Hard Rock."  
7 (II p. 98). They all left.

8  
9 Prior to this time, Romeo had explained to her how he pimps girls, how he got them and  
10 how he made money off of them. (II p. 19). This included how he controlled them. (Id). She  
11 did not have these conversations with D-Roc. (Id). Red described the incident at the Hard  
12 Rock stating that Rome drove the car to the Hard Rock Hotel and Casino where Christina,  
13 Victoria and Red were dropped off. D-Roc told them they were to make some money. Red  
14 testified that both Rome and D-Roc said that "if they didn't get that money from us by sunrise,  
15 we would be in three shallow graves in the desert." (P. 113). According to D-Roc, Red owed  
16 him \$360, but nothing was owed to D-Roc by either Christina or Victoria (113-114). Victoria  
17 owed \$80 to Rome. (Id). The girls were to raise the money by selling drugs. Christina had  
18 been given drugs from Rome. However, rather than selling the drugs, Christina smoked the  
19 drugs in the bathroom at the Hard Rock. Victoria tried to raise money through prostitution, but  
20 was unsuccessful (p. 115). According to Red, Christina was there to "make sure that me and  
21 Victoria did what we were supposed to do." (P. 115). Red refused Christina's direction to sell  
22 herself, describing herself as "a hustler, not a ho." (Id). Red yelled at Christina in the Hard  
23 Rock, (p.160) "I wouldn't be in this situation if it wasn't for her" (p. 161) and wanted to beat her  
24 up (p. 169)  
25  
26  
27

28 Clearly, based upon the testimony presented, each of the defendants, Donny included,

1 had their own distinct relationship with the girls. Romeo was the only pimp, and the only  
2 involvement with D-Roc involved his providing drugs to Red and having a "personal  
3 relationship" with her.  
4

5 Pandering is defined in NRS 201.300 which provides for the criminal prosecution of a  
6 person who "Induces, persuades, encourages, inveigles, entices or compels a person to  
7 become a prostitute or to continue to engage in prostitution". In the instant case, the supplying  
8 of drugs to Red for sale, as well as Defendant Malone's relationship solely with Red precludes  
9 prosecution for the pandering charges.  
10

11 **G. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH A CONSPIRACY**  
12 **BETWEEN THE DEFENDANTS TO COMMIT MURDER (Count 10)**

13 In Count 10, the conspiracy alleged relates to Counts 13-19, which includes First  
14 degree kidnaping of the two deceased girls, two counts of robbery as to each of the girls as  
15 well as the two murder counts. The legal arguments contained within sections A, B, C and I  
16 are applicable hereto and hereby incorporated.  
17

18 **H. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH A BURGLARY OR**  
19 **CONSPIRACY TO COMMIT BURGLARY BETWEEN THE DEFENDANTS. (Counts**  
20 **11 and 12).**

21 Counts 11 and 12 allege the violation of the possessory invasion of room 222 located  
22 at 1525 East Fremont. According to the charging document the property was "occupied by  
23 LEONARD ROBINSON". During the presentation before the Justice of the Peace, Leonard  
24 Robinson was not called to testify, nor was any representative appointed by him to offer any  
25 testimony that the defendants were unwelcome within the premises.  
26

27 An accusation must include such a description of the acts alleged to have been  
28

committed as will enable the accused to defend against the accusation. Lane v. Torvinen, 97 Nev. 121, 624 P.2d 1385 (1981); Simpson v. District Court, 88 Nev. 654, 503 P.2d 1225 (1972). To uphold a conspiracy count, the Nevada Supreme Court stated:

The gist of the crime of conspiracy is the unlawful agreement or confederation. . . includ[ing] allegations as to the date and place of the conspiracy, the object of the conspiracy, and the means by which the conspiracy was to be accomplished.

Lane v. Torvinen, *supra*, 624 P.2d at 1386. Here, by contrast, the information does not specify the place of the conspiracy or the means by which the conspiracy was to be accomplished. The conspiracy count is not definite enough to enable Malone to defend against the accusation. See Sheriff, Clark County v. Blasko, 98 Nev. 327, 329 (1982).

**I. THE EVIDENCE PRESENTED OF THE CO DEFENDANT AS A RESULT OF HIS PLEA AGREEMENT CONSTITUTES IMPROPER CONSIDERATION PROVIDED TO A WITNESS AND HIS TESTIMONY SHOULD BE STRICKEN.**

NRS 50.225 limits the fees and expenses that may be paid witnesses in criminal cases.

NRS 50.225 Fees and expenses of witnesses.

1. For attending the courts of this state in any criminal case, or civil suit or proceeding before a court of record, master, commissioner, justice of the peace, or before the grand jury, in obedience to a subpoena, each witness is entitled:

(a) To be paid a fee of \$25 for each day's attendance, including Sundays and holidays.

(b) Except as otherwise provided in this paragraph, to be paid for attending a court of the county in which he resides at the rate of 19 cents a mile for each mile necessarily and actually traveled from and returning to the place of residence by the shortest and most practical route. . .

This statute, does not distinguish between the State or the defense and prohibits any party from purchasing testimony, and that this proscription applies with equal force to the government.

1 NRS 50.255 is the embodiment of "the general common law principle that 'the public  
( ) 2 has a right to every man's evidence.'" *Kastigar v. United States*, 406 U.S. 441, 443 (1972).

3  
4 Among the necessary and most important of the powers of the States as well as  
5 the Federal Government to assure the effective functioning of government in an  
6 ordered society is the broad power to compel residents to testify in court or  
7 before grand juries or agencies. See *Blair v. United States*, 250 U.S. 273 [63  
L.Ed. 979, 39 S.Ct. 468]. Such testimony constitutes one of the Government's  
primary sources of information.

8 *Murphy v. Waterfront Commission*, 378 U.S. 52, 93-94 (1964) (White, J., concurring). See  
9 *Kastigar*, 406 U.S. at 443-444 ("The power to compel testimony, and the corresponding duty  
10 to testify, are recognized in the Sixth Amendment requirements that an accused be confronted  
11 with the witnesses against him, and have compulsory process for obtaining witnesses in his  
12 favor."). Every citizen is obliged to give her truthful testimony if called, and the plain language  
13 of NRS 50.255 prohibits the gift, offer or promise of anything of value for or because a person  
14 has fulfilled or will fulfill that duty.  
15

16  
17 **1. It is improper to allow "negotiated" co-defendant testimony with an**  
18 **inchoate negotiation or "expectation" particularly in the present case wherein the**  
**witness has been given extraordinary consideration**

19  
20 Plea agreements and cooperation agreements with witnesses are struck under a  
21 variety of scenarios, all of which are amenable to a rough contract analysis. *United States v.*  
22 *Cooper*, 70 F.3d 563, 565 (10th Cir. 1995); *Pinter*, 971 F.2d at 557. In a limited subset of  
23 those agreements, the defendant is required to cooperate with prosecutors or law enforcement  
24 in order to receive the benefit of the bargain. These situations are analogous to, yet sharply  
25 different from, run-of-the-mill plea bargaining. See *Pinter*, 971 F.2d at 557. In the eyes of  
26 both prosecutors and the accused, the dominant purpose of the bargaining in these cases is  
27 to secure cooperation: the cooperator badly needs the concessions, while the prosecutor  
28

1 badly needs the cooperator's services. Graham Hughes, *Agreements for Cooperation in*  
2 *Criminal Cases*, 45 Vand. L.J. 1, 67 (1992). Far from being contracts of adhesion, the terms  
3 of cooperation agreements are fashioned individually to meet the parties' interests.  
4

5 The essence of this argument is that the government must play by the rules, and that  
6 it is not free to pursue its interests by buying witness testimony. 1998 WL 350507 at \*4 (the  
7 statute "does not restrict any interest of the sovereign itself; it operates only upon an agent of  
8 the sovereign, limiting the way in which that agent carries out the government's interests").  
9 After all, contracts involving payments of benefits to fact witnesses for their testimony never  
10 have been sanctioned.<sup>1</sup> Professor Corbin characterized such bargains as "harmful to justice:"  
11

12 In extreme cases, such a bargain amounts to the crime of subornation of  
13 perjury; but many bargains made with no criminal intent are illegal because of  
14 their tendency to affect injuriously the administration of justice. A bargain to pay  
15 compensation, to a witness who is in the jurisdiction and subject to subpoena,  
16 in addition to the fees to which he is by law entitled, is illegal ... because such  
17 extra compensation is almost certain to affect the attitude of the witness and to  
color his testimony, consciously or unconsciously.... Doubtless, such bargains  
are not very effectively discouraged by merely declaring them to be illegal and  
unenforceable; but as in many other cases it is better than nothing....

18 6A Arthur Linton Corbin, *Corbin on Contracts*, § 1430 (1962). See also Restatement (2nd) of  
19 *Contracts*, § 73 cmt. b (1981). The illegality of the bargain derives from the fact that every  
20 person is obliged by law to give testimony if she has knowledge of facts relevant to the matter  
21 being heard. Richard A. Lord, 7 *Williston on Contracts* § 15:6 (4th ed. 1997) ("As it is a duty  
22 of a citizen, when required to do so, to testify in court concerning facts within the person's  
23 knowledge for the compensation allowed by law, a bargain to pay one who is amenable to  
24

25 <sup>1</sup>Even agreements authorizing compensation and rewards for information leading to arrest and  
26 conviction are not immune from criticism. See Restatement of *Contracts*, § 553(4) (1932) (an agreement  
27 to pay for evidence leading to the arrest and conviction of the criminal may be illegal if, in view of the  
28 surrounding circumstances, it is likely to induce false evidence).

1 process a further sum for attending as a witness is generally invalid, both on grounds of public  
2 policy and for lack of consideration.... [B]argains to obtain testimony for compensation  
3 conditional upon success or to pay for evidence of a certain nature desired for purposes of  
4 litigation have been similarly denounced as contrary to public policy.”).

5  
6 The Singelton panel correctly recognized that “the judicial process is tainted and justice  
7 cheapened when factual testimony is purchased, whether with leniency or money.” 1998 WL  
8 350507 at \*6. Since defendants in criminal trials may not compensate witnesses to obtain  
9 testimony favorable to their case, it seems anomalous that prosecutors should be permitted  
10 to influence the content of a witness’ testimony through promises of favorable treatment. The  
11 only tool at a defendant’s disposal is the Sixth Amendment compulsory process doctrine—but  
12 this does not assure the defendant that the witness will provide favorable testimony once the  
13 witness is in court.  
14

15  
16 Regardless of the differences in the duties of a prosecutor and defense counsel,  
17 compensating a witness to testify involves an identical threat to the integrity of the judicial  
18 system whether the witness testifies for the prosecution or the defense. This threat is  
19 underscored by the American Bar Association’s Standards for Criminal Justice, Prosecution  
20 Function Standards governing relations with victims and prospective witnesses, which instruct  
21 that  
22

23 [a] prosecutor should not compensate a witness, other than an expert, for giving  
24 testimony, but it is not improper to reimburse an ordinary witness for the  
25 reasonable expenses of attendance upon court, attendance for depositions  
26 pursuant to statute or court rule, or attendance for pretrial interviews. Payments  
27 to a witness may be for transportation and loss of income, provided there is no  
28 attempt to conceal the fact of reimbursement.

ABA Standards, Prosecution Function Standard 3-3.2(a) (3d ed. 1993). The Commentary to



1 this section warns that the rule is intended to avoid "the risk of encouraging perjury."<sup>2</sup>—

2 Professor Hughes has opined that "**corroboration requirements [ ] would be a**  
3 **welcome requirement in all cases of bought testimony whether or not the witness was**  
4 **an accomplice or the defendant," but the "small measure of assurance" added by such**  
5 **a requirement does not "go to the heart of the problem of how best to guard against the**  
6 **suspect quality of...cooperating witness testimony."** Hughes, *Agreements for Cooperation*  
7 *in Criminal Cases* at 32, n.125. (emphasis added).  
8

9  
10 Defendant Malone in the present case asserts that there is insufficient corroborative  
11 testimony that can be deemed sufficient to establish either probable cause or guilt beyond a  
12 reasonable doubt. Given the myriad problems surrounding the use of accomplice testimony  
13 in criminal prosecutions, (i.e. Franklin v. State, 94 Nev. 220, 577 P.2d 860 (1978) see also  
14 Cynthia K.Y. Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's  
15 Expanding Power Over Substantial Assistance Departures, 50 Rutgers L.Rev. 199, 207-209  
16 (1997) (noting that the culpable cooperating witness' incentive to lie is exacerbated by  
17  
18

19  
20 <sup>2</sup>Many judicial decisions approve the admission of trial testimony from accomplices and co-  
21 conspirators whose testimony was procured as part of a bargained-for disposition of charges. See, e.g.,  
22 Hoffa v. United States, 385 U.S. 293, 310-12 (1966) (informant's testimony not constitutionally  
23 inadmissible); United States v. Tarantino, 846 F.2d 1384, 1418-19 (D.C. Cir.), (citing cases, refusing  
24 to require *per se* rule excluding testimony obtained through contingent agreements conditioning sentence  
25 recommendations on the "value" of testimony or cooperation provided), cert. denied, 488 U.S. 867  
26 (1988). However, these cases have turned on evidentiary or due process considerations only. The  
27 Supreme Court has yet to fashion specific rules to deal with particular problems generated by  
28 cooperation agreements between prosecutors and their witnesses.

1 prosecutor's promise of leniency), it is indeed sound public policy to circumscribe the  
2 government's ability to reward that kind of inherently unreliable testimony with government  
3 assistance in areas of charge, sentence, or pre-sentencing release from custody.  
4

5 **2. The purchase of testimony by prosecutors corrupts the fairness**  
6 **of the trial process and violates professional standards of conduct.**

7 Over three decades ago, Professor Abraham Goldstein commented on the "subtle  
8 erosion of the accusatorial system." Abraham S. Goldstein, *The State and the Accused:*  
9 *Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1199 (1960). The inherent  
10 inequalities between the prosecutor, backed by the vast resources of the state, and the  
11 individual defendant have only been exacerbated over the intervening years. The continuing  
12 attempt to exempt prosecutors from the rules that govern the conduct of all other lawyers is  
13 an important component in the continuing dangerous tilt in the criminal justice system's  
14 balance of power in favor of the state.  
15

16  
17 It is particularly egregious in the present case when negotiations are tendered during  
18 the investigative process. "You can either be a defendant or a witness"..  
19

20 **3. Legislatively mandated sentence enhancements have increased**  
21 **the ability of the State to recruit and use snitch testimony**

22 As a result of the trend toward minimum mandatory sentencing, there has been an  
23 increased the leverage of the prosecutor to compel plea bargaining both with the Defendants  
24 as well as leverage to secure testimony from jailhouse snitches who have nothing to sell but  
25 their fellow prisoners. For Defendant Herb for instance, as he is currently under the  
26 supervision of the District Court for one offense, any second offense will not entitle him to  
27 credit for time served pending sentencing, and, if charged with the offenses encompassed  
28

1 within the conspiracy and murder charges, he is facing a minimum of forty years in prison.

2 The most recent dramatic expansion in the prosecutors' power is in the sentencing  
3 realm. The prosecutors' control of sentencing is comprised of the traditional discretion  
4 involved in the charging and plea bargaining decisions, but now is enhanced by the exclusive  
5 power of the prosecutor to seek a reduction in the defendant's sentence for "substantial  
6 assistance," in offering inculpatory testimony against another prisoner. In the case of United  
7 States v. Correa, 995 F.2d 686, 687 (7th Cir. 1993) the court analogously decried the use of  
8 this authority by prosecutors as securing testimony as "simple prosecutorial expediency".  
9

10  
11 The use of this type of testimony along with the prosecutors' unreviewable (pre-trial)  
12 discretion to seek the death penalty continues to be a primary factor in the arbitrary infliction  
13 of the death penalty in this State, as it is sought in the present case against both defendants.  
14

15 **4. Local rules of Professional Conduct should preclude the use of**  
16 **bargained for testimony from a co-defendant in this case**

17 One of the few checks on abuse of prosecutorial power are the local state rules of  
18 professional conduct. Many states, including Nevada, have adopted, in general, the Model  
19 Rules of Professional Conduct ("Model Rules"). Nevada Supreme Court rule governing the  
20 payment of witnesses is simple:  
21

22 Rule 173. Fairness to opposing party and counsel. A lawyer shall not:

23  
24 1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or  
25 conceal a document or other material having potential evidentiary value. A lawyer shall  
not counsel or assist another person to do any such act;

26 2. Falsify evidence, counsel or assist a witness to testify falsely, *or offer an inducement*  
27 *to a witness that is prohibited by law;*

28 Supreme Court rule 179 offers some limited ethical guidance to prosecutors. Under the

1 Model rules, the prosecution is admonished simply "to do justice." Rule 3.8 cmt. However, the  
2 rules governing the conduct of lawyers with witnesses are much more explicit and specific and  
3 importantly, make no distinction between prosecutors and defense counsel. Model Rule 3.4(b)  
4 provides:

6 A lawyer shall not: (b) falsify evidence, counsel or assist a witness to testify  
7 falsely, or offer an inducement to a witness that is prohibited by law. (Emphasis  
8 added.)

9 The comment to Rule 3.4 adds:

10 With regard to paragraph (b), it is not improper to pay a witness' expenses or to  
11 compensate an expert witness on terms permitted by law. The common law rule  
12 in most jurisdictions is that it is improper to pay an occurrence witness any fee  
13 for testifying and that it is improper to pay an expert witness a contingent fee.

14 The proscriptions of Rule 3.4(b) are clear and unequivocal, just like the provisions of Supreme  
15 Court Rule 173. The policy underlying both the ethical provision and the statute is that justice  
16 is undermined by the purchase of testimony by a prosecutor. Both recognize what common  
17 sense teaches, that purchased testimony is inherently unreliable. Purchased untrustworthy  
18 testimony does not magically have its taint removed simply because the government is the  
19 buyer. Indeed, a compelling argument can be made that testimony purchased by the state,  
20 with its power to punish if it does not like what it hears, is more likely to be unreliable than any  
21 testimony purchased by any private party involved in litigation.<sup>3</sup> To sanction a reward system  
22

---

24 <sup>3</sup>Courts have been quick to condemn the payment of money or other rewards to witnesses for their  
25 testimony in civil cases. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine  
26 Association, 865 F.Supp. 1516, 1526 (S.D. Fla. 1994); In re Robinson, 151 A.D. 589, 600 (1912), *aff'd*,  
27 209 N.Y. 354, 103 N.E. 160 (1913); In re Klein, 372 N.E.2d 376, 379 (1977). See also The Florida Bar  
28 v. Jackson, 490 So.2d 935, 936 (Fla. 1986) (attorney suspended for 18 months); Wagner v. Lehman

1 for the purchase of testimony *only* when it provides assistance to the prosecution side of the  
2 criminal adversary system so substantially distorts the trial process as to deny the accused  
3 any semblance of a fair trial.  
4

5 Decency, security, and liberty alike demand that government officials shall be  
6 subjected to the same rules of conduct that are commands to the citizen.  
7 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

8 It has been noted perceptively that the confidence of the public in the criminal justice  
9 system is greatly influenced by the way the prosecutor, the system's most visible and vocal  
10 representative, exercises his or her discretion. Deborah L. Rhode and David Luban, *Legal*  
11 *Ethics*, 322-23 (1995). Requiring prosecutors to abide by the same standards of conduct that  
12 all other lawyers are required to meet would help restore public confidence in the criminal  
13 justice system and would constitute a small step toward restoring some equilibrium in the  
14 adversarial system. Purchased testimony is unreliable and its use corrupts the fairness of the  
15 criminal justice system.  
16

17 **5. This case highlights the continued problems with the use of**  
18 **purchased co-defendant testimony**

19 The use of "purchased" co-defendant testimony has become increasingly difficult for  
20 the defense and prosecution. The "implicit promise" of leniency in charging or sentencing is to  
21 the testifying individual consideration in his mind. Indeed, with the clear language of NRS  
22 199.240 in reference to "Bribing or intimidating witness to influence testimony", a person who:  
23  
24

25 Bros. Kuhn Loeb Inc., 646 F.Supp. 643 (N.D. Ill. 1986) (attorney disqualified for promising to remit a  
26 percentage of potential recovery in a case to induce witness to tell the truth). The rules should be equally  
27 strong, if not stronger, with respect to ensuring the integrity of a criminal trial where someone's life or  
28 liberty is at stake.

1 1. Gives, offers or promises directly or indirectly any compensation", gratuity or reward  
2 to any "witness" or person who may be called as a witness in an official proceeding,  
3 upon an agreement or understanding that his testimony will be thereby influenced;

4 Despite this provisions, there has been developed over the years a well-established  
5 practice of paying prosecution witnesses for their testimony, either in cash or by favorable plea  
6 bargains, or both. In the present case, it is exemplified by the testifying co-defendant having  
7 access to discovery, and offering a vastly different statement before the Justice of the Peace  
8 than that version contained within his previous statements to the police.  
9

10 This Honorable Court will remember the danger of accepting such testimony by  
11 recalling the case in 1984, Joseph Conforte testified as the government's star witness in the  
12 first trial of United States District Judge Harry Claiborne, in which he was charged with bribery  
13 and other offenses. Conforte was enticed to return to the United States from Brazil, where he  
14 had fled to avoid imprisonment, and to testify against Judge Claiborne by a government  
15 promise that included (a) recommending that he be resented for tax evasion, for which he  
16 had already been convicted, with the result that he serve the four five year terms to which he  
17 had been sentenced concurrently and that all but 15 months of each sentence be suspended;  
18 (b) dropping federal bail-jumping charges against him; and ©) persuading Nevada state  
19 officials to drop state charges then pending against him, while prevailing upon state  
20 prosecutors to agree to concurrent sentences on state offenses for which Conforte had  
21 already been convicted. The government kept its promise. Conforte returned to the United  
22 States and testified as the prosecution's principal witness at the first Claiborne trial, which  
23 resulted in a hung jury on all counts of the indictment.  
24  
25  
26

27 While it is common for the defense to claim that these witnesses commit perjury for  
28 rewards of money or leniency, counsel for defendant Malone has only been able to find one

1 reported case in which an informer testifying as a government witness in a criminal case has  
2 been prosecuted for perjury. (United States v. Wallach, 935 F.2d 445, 455 n.2 (2d Cir 1991).)

3  
4 **6. The uneven application of the legislative protections.**

5 If a defense lawyer in a criminal case induced (or attempted to induce) a witness to  
6 testify for the defendant by offering a fraction of the rewards given with impunity to prosecution  
7 witnesses, that lawyer could anticipate serious disciplinary problems. Indeed, the Defense  
8 does not have the power to release witnesses from the Clark County Detention Center, to not  
9 oppose O.R. releases or to "make the sentencing Court "aware" of the Defendant's  
10 cooperation". So, why are prosecutors who pay witnesses to testify not in violation of the  
11 above provisions of Nevada Revised Statutes as well as State Supreme Court Rules? There  
12 is no clear answer, The rules governing the conduct of lawyers make no distinction between  
13 prosecutors and defense counsel in prohibiting payments to witnesses.

14  
15  
16 **7. Analogous Civil Authority**

17 There are examples where the courts have imposed sanctions in civil cases when a  
18 percipient witness was paid to testify, even when the witness testified truthfully. In Golden  
19 Door Jewelry Creations Inc v. Lloyd's Underwriters Non-Marine Association, 865 F. Supp.  
20 1516 (S.D. Fla. 1994), Lloyd's was found to have paid two witnesses a total of \$493,103  
21 (Lloyd's acknowledged paying a total of \$120,000 to the two for testifying at depositions.) The  
22 district court found that although there was insufficient evidence to show that the payments  
23 were made "corruptly," it nevertheless held that the payments violated Rule 4-3.4(b) of the  
24 Rules of Professional Conduct, as those rules existed in Florida, and it excluded all evidence  
25 "tainted by the ethical violations." The evidence indicated that Lloyd's paid for the testimony  
26 of the two witnesses contingent upon three conditions: (1) the testimony had to be truthful; (2)  
27  
28

1 the testimony had to be material; and (3) the testimony had to be helpful to Lloyd's in defense  
2 of the litigation. The court found that "this conduct was egregious and constituted willful and  
3 repetitive violations of Rule 4-3.4(b) of the Rules of Professional Conduct." (865 F.2d Supp. at  
4 1525.) In support of its decision, the court cited the case of The Florida Bar v. Jackson, 490  
5 So. 2d 935 (Fla. 1986) and it quoted with approval from the Florida court's opinion, as follows:  
6

7       The very heart of the judicial system lies in the integrity of the participants,.... Justice  
8 must not be bought or sold. Attorneys have a solemn responsibility to assure that not  
9 even the taint of impropriety exists as to the procurement of testimony before courts of  
10 Justice. It is clear that the actions of the respondent in attempting to obtain  
11 compensation for the testimony of his clients . . . violates the very essence of the  
12 integrity of the judicial system and the disciplinary rule and the code of professional  
13 responsibility, the integration rules of the Florida Bar and the oath of his office.

14 The case concerned a lawyer who had requested that his clients be paid \$50,000 for their  
15 testimony in a New York case involving an insurance claim. This was held to be a violation of  
16 Rule 1-102(A)(5) of the Florida Code of Professional Responsibility and the lawyer was  
17 suspended from practice for three months.

18       In a civil case tried in the U.S. District Court for the District of Columbia, the court  
19 imposed a \$1,000 fine on one of the participants and his lawyer for making more than \$45,000  
20 in payments to a potential witness conditional on the favorable outcome of the litigation. ...  
21 Sanders Associates, Inc v. Summagraphics Corporation, 2 F.3d 394 (Fed. Cir.  
22 1993). Discipline has been imposed even when only a nominal payment was involved. In the  
23 case of a defendant charged with unlawful possession of a weapon, the police officer who  
24 discovered the weapon in the defendant's automobile demanded -- and was paid by the  
25 defendant's lawyer -- \$50 to testify truthfully. The lawyer was suspended from practice for 18  
26 months. (In re Kien, 372 N.E.2d 376 (111. 1977).  
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**CONCLUSION**

The prosecution's interest in a criminal prosecution is "not that it shall win the case, but that justice shall be done". . . "he may prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935). Compensating a witness for testifying is improper, and the testimony of the co-defendant in the present case should be stricken and excluded from the trial in this matter.

Based on the foregoing points and authorities, the Defendant respectfully requests that this Court dismiss the charges against him.

DATED this 6<sup>th</sup> day of November, 2006.

RESPECTFULLY SUBMITTED:  
DAVID M. SCHIECK  
SPECIAL PUBLIC DEFENDER



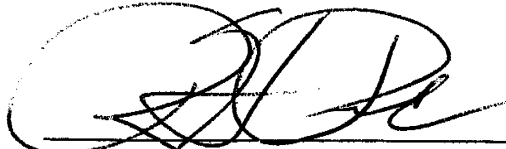
Randall H. Pike  
Assistant Special Public Defender  
State Bar No. 1940  
CHARLES CANO  
Deputy Special Public Defender  
State Bar No. 5901  
330 South Third Street, Ste. 800  
Las Vegas, NV 89155  
Attorneys for Defendant MALONE

VERIFICATION

STATE OF NEVADA )  
 ) ss:  
COUNTY OF CLARK )

Randall H. Pike, Assistant Special Public Defender, being first duly sworn,  
upon his oath, deposes and says as follows:

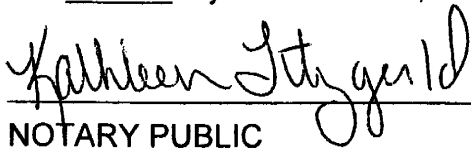
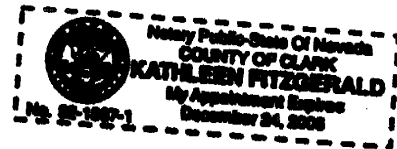
That he is the Petitioner in the above-entitled matter; that he has read the above and  
foregoing Petition, knows the contents thereof, and that the same is true of his own  
knowledge, except as to those matters therein stated on information and belief, and as to  
those matters he believes it to be true.



RANDALL H. PIKE

SUBSCRIBED and SWORN to before me

this 6 day of November, 2006.

  
NOTARY PUBLIC

1 **ROC**  
2 **DAVID M. SCHIECK**  
3 **SPECIAL PUBLIC DEFENDER**  
4 **Nevada Bar No. 824**  
5 **Randall H. Pike**  
6 **Assistant Special Public Defender**  
7 **Nevada Bar No. 1940**  
8 **Charles Cano**  
9 **Deputy Special Public Defender**  
10 **Nevada Bar No.**  
11 **330 South Third Street, Suite 800**  
12 **Las Vegas, NV 89155-2316**  
13 **(702) 455-6265**  
14 **Attorney for Defendant**

**FILED**

**Nov 6 1 38 PM '06**

*Schickley S. Ramirez*  
**CLERK**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

10 **THE STATE OF NEVADA,**  
11 **Plaintiff,**  
12 **vs.**

13 **DOMONIC MALONE, et al.,**  
14 **Defendants.**

**CASE NO. C 224572**  
**DEPT. NO. V**

**Date of Hearing: 12-12-06**  
**Time of Hearing: 8:30 a.m.**

**RECEIPT OF COPY**

16 **RECEIPT of a copy of MALONE'S Petition for Writ of Habeas Corpus is hereby**  
17 **acknowledged.**

18 **DATED: Nov 6, 2006.**

**DISTRICT ATTORNEY'S OFFICE**

21 *[Signature]*  
22 **200 Lewis Ave., 3rd Floor**  
23 **Las Vegas NV 89155**

  
CLERK

**OPPS**  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
MARC DIGIACOMO  
Chief Deputy District Attorney  
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200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
-vs-  
  
DOMONIC RONALDO MALONE,  
#1670891  
  
Defendant.

CASE NO: C224572  
DEPT NO: V

**STATE'S OPPOSITION TO DEFENDANT MALONE'S MOTION TO SEVER**

DATE OF HEARING: 11/21/06  
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached  
Points and Authorities in Opposition to Defendant's Motion To Sever.

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

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1 **STATEMENT OF FACTS**

2 On May 20, 2006 at approximately 0915, the Henderson Police Department received  
3 a 9-1-1 emergency call that there were two naked deceased females in the desert just west of  
4 Paradise Hills and Dawson Street. Patrol officers responded to the location and secured the  
5 scene. At the time, there was no identification for the partial decomposed females who  
6 appeared to have been killed by both blunt and sharp force trauma.

7 **MELISSA ESTORES aka "RED"**

8 The next day, during the autopsies, two individuals contacted the HPD about the  
9 bodies, Ryan Noe and Melissa Estores (hereinafter "Red"). Red was a friend of Noe who  
10 informed him that she believed she knew who the two females in the desert were. Noe  
11 brought Red to the police station.

12 Red is a street hustler that sells both "hard" and "soft" drugs for various people.  
13 "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months  
14 leading up to the killings, Red worked mainly for an individual named Tre Black (later  
15 identified as Ramaan Hall) selling methamphetamine. Tre Black had a protégée named D-  
16 Roc (later identified as Defendant Domonic Malone). Red would sell crack for D-Roc.  
17 Red's main area of sale was the bar at the Royal Sportsman Manor located at the corner of  
18 Tropicana and Boulder Highway.

19 **APRIL KIDNAPPING AND**  
20 **BEATING OF RED**

21 At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter,  
22 D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.  
23 Sometime in April of 2006, D-Roc showed up at the bar in the Royal Sportsman Manor and  
24 told Red he wanted to talk to her. Red left the bar with D-Roc and went behind it where no  
25 one could see them. Once they were back there, D-Roc demanded his and Tre Black's  
26 "work" and money back from Red. Red gave D-Roc all of his stuff, some of Tre Black's  
27 work and some of Tre Black's cash back to D-Roc. D-Roc then told Red it was "PT" time or  
28 "prayer time." This is a saying for getting a beating. Other witnesses have said "PT" stands

1 for Pimp Training.

2 D-Roc explained the rules of the beating. He was going to punch Red in the chest. If  
3 she tried to block, he was going to hit her in the right temple, left temple and forehead. Then  
4 he was going to do it all over again. D-Roc began by punching Red in the chest. When he  
5 did so, she naturally tried to block. Then he would punch her in the head three times, and  
6 start all over. This went on for a lengthy period of time until Red ultimately was down and  
7 severely hurt. At that point, a friend came and helped her to a car.

8 After several days of convalescing, Red went back to work. When she went back, she  
9 learned that Tre Black never received the "work" she had given back to D-Roc, and he  
10 wanted to get paid.

### 11 **TUESDAY MAY 16<sup>th</sup> KIDNAPPING OF VICTORIA**

12 On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner  
13 when she saw Charlotte Combado (hereinafter "Christine"). Christine was another local  
14 hustler who sold drugs for "D boys," or low level street drug dealers. On this occasion,  
15 Christine was selling for another individual known simply as "Black" (later identified as  
16 Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the bar, however,  
17 she lost all of her money in the gambling machines, so she owed Leonard Black \$150 and  
18 didn't know what to do. Red offered to help Christine. This eventually led to them coming  
19 into contact with Defendant Jason McCarty (hereinafter Rome) in a green Oldsmobile Alero.

20 While everyone knew the green Oldsmobile as Rome's car, the car is actually owned  
21 by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. Donny is  
22 really a wannabe "D Boy" that hung around D-Roc and Rome.

23 Rome began driving downtown. As they were going, Christine told Rome her  
24 problem of needing \$150. Rome explained that he was having an issue with one of his girls,  
25 Victoria Magee as she owed him \$80. The group wound up at the Oasis hotel downtown and  
26 began to smoke Marijuana. During this time, Rome and Christine struck up an agreement  
27 that Christine would find Victoria and bring her to Rome and Rome would cover her debt to  
28 Leonard Black.

1 Red fell asleep in the apartment. When she woke up, Christine and Rome were gone.  
2 While they were gone, she looked out the window, saw the green Oldsmobile across the  
3 street at a Burger King. In the parking lot, Christine had her arm around Victoria and was  
4 leading her to the car.

5 The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red  
6 left the Oasis on foot and walked towards the Stratosphere. On the way, Rome was on the  
7 Nextel two way with Christine in the green Oldsmobile. Rome told Christine that they  
8 would meet at the valet to the Sahara Hotel. By this time, it was early evening.

9 When Red and Rome arrived at the valet, they came into contact with green  
10 Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and  
11 Victoria. Everyone piled into the Green Oldsmobile. From the Sahara, the group drove to  
12 Donny's house, where Donny got out and the group left.

13 Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red  
14 remained in the car, while Rome, Victoria and Christine went into the complex. D-Roc  
15 began to talk to Red about her being his girl. Red told D-Roc that she was nobody's girl. D-  
16 Roc told Red that she still owed Tre Black \$360 but Red told D-Roc that she had paid off her  
17 debt. The \$360 was allegedly the money owed from the incident in April where D-Roc had  
18 beaten Red. After a while, Rome, Victoria and Christine came back to the car.

## 19 TUESDAY MAY 16<sup>TH</sup> KIDNAPPING

### 20 AND BEATING OF RED

21 From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc  
22 was acting strange. Eventually, the group pulled off the Wagonwheel exit and wound up in a  
23 desert site near some new home construction. Once she got there, Red was ordered out of  
24 the car. When she got out, D-Roc guided her to a location, and began to beat her again. D-  
25 Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome  
26 was yelling at Red to just take her beating. The beating was related to the prior April  
27 beating.

28 Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her

1 there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5)  
2 seconds to get into the car or he was going to leave her there. Ultimately, D-Roc dragged  
3 Red back into the car. At this point, it was approximately midnight or early morning on  
4 Wednesday, May 17<sup>th</sup>.

5 On the way back into town, D-Roc wanted Red's purse. Ultimately, Red gave D-Roc  
6 her purse, and he threw the contents of it out of the window. Once they got back into town,  
7 D-Roc and Rome explained what was going to happen.

8 **THREATS TO KILL PRIOR TO**  
9 **DROPPING THE GIRLS OFF AT THE**  
10 **HARDROCK**

11 D-Roc and Rome explained to the girls that Victoria had to make \$80 to give to  
12 Rome, Red had to make \$360 to give to D-Roc and Christine had to make sure no one got  
13 away. If any one of them did not do what they were told, there would be three shallow  
14 graves in the desert where Red had just been beaten.

15 Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc  
16 and Rome were trying to "put her on the track." (Prostituting). The group remained at the  
17 Hotel for hours however, Red had nothing to sell and refused to prostitute herself, Victoria  
18 couldn't catch a date, and Christine used all the drugs that she was supposed to sell.

19 Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend  
20 named David Parker. Parker came and picked all three girls up and took him back to his  
21 house behind the Cancun Hotel.

22 The group spent most of Wednesday, during the day, at Parker's house. Finally, the  
23 three decided that they needed to head back to the South Cove Apartments where both Tre  
24 and Leonard Black live. Early in the evening on Wednesday, the group wound up at the  
25 South Cove Apartments.

26 ///

27 ///

28 ///



1                                   **WEDNESDAY KIDNAPPING OF**  
2                                   **VICTORIA AND CHRISTINE FROM**  
3                                   **THE SOUTH COVE APARTMENTS**

4           When they got there, they tried to go to Leonard Black's apartment which is 222,  
5 however, they could not get in. The group ran into Tre Black near his apartment at 217 and  
6 Tre Black told Red that D-Roc was looking for her. Finally, Leonard Black arrived, with a  
7 friend named DeMarcus. The three girls then got into 222. Leonard Black, Red and  
8 Demarcus left to go get gas in Demarcus' car.

9           When they return to the apartment, Victoria and Christine were gone, there was a golf  
10 club missing from the apartment, as well as signs that they did not leave voluntarily. The  
11 clothes of both people were still there along with other personal items. Most importantly,  
12 Victoria's sandals were still there. They were the only shoes that Victoria owed, and she  
13 would not have left without them.

14           Leonard Black was upset that someone broke into his home and asked Red who did it.  
15 Red told Leonard Black that it was D-Roc and Rome. Early the next morning, Leonard went  
16 looking for D-Roc and Rome at the Sportsman.

17                                   **THURSDAY MAY 18<sup>th</sup> BEATING OF**  
18                                   **ROME BY LEONARD BLACK**

19           On May 18<sup>th</sup>, at 4 a.m., Leonard Black found Rome in the parking lot of the  
20 Sportsman and beat him pretty badly. The police were called and the ambulance arrived.

21           A couple of days later, Red saw a news story related to the two bodies and knew,  
22 since she had not seen them, that the two girls in the desert were Victoria and Christine. The  
23 police had Red show them where her beating took place, and she directed them to a desert  
24 area just across the street from where the bodies were taken. Based upon this information,  
25 the police set out to find D-Roc, Rome, and Donny.

26           Leonard Black was located and confirmed the information that he was aware of from  
27 Red. David Parker confirmed Red's information as far as he was aware. Ryan Noe also  
28 supported Red's information.

1 In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually  
2 contacted. Corrina initially tried to alibi Rome and D-Roc but eventually changed confirmed  
3 they were responsible for the crime.

4 Corrina corroborated that Rome, Victoria and Christine showed up at their place in at  
5 the Sportsman on Tuesday night. That Victoria appeared to be scared and upset. And that  
6 the three left together. During this time, Rome was driving the green Oldsmobile.

7 Corrina remembered D-Roc and Rome picking her up on Wednesday night from work  
8 and taking her home somewhere around 11 p.m. At that time, both D-Roc and Rome were  
9 complaining about the three girls and looking for them. At around midnight, D-Roc and  
10 Rome left together.

11 They did not see Rome until several hours later when he was beat up in the parking  
12 lot by Leonard Black. They heard statements by Rome in front of D-Roc after the murder  
13 about having the tires on the car changed. In fact, Corrina at one point tried to get the tires  
14 changed. Also, Corrina heard D-Roc make mention of leaving the girls in the desert without  
15 clothing.

16 After the preliminary hearing, Tre Black was interviewed. Tre Black indicated that  
17 he saw D-Roc and Rome in the South Cove Apartments, D-Roc had a golf club, and they  
18 were looking for the girls. A short while later, he saw D-Roc and Rome leading Victoria and  
19 Chistine to the green Oldsmobile. Tre Black also indicated that when he saw Red earlier in  
20 the evening, he had warned her the D-Roc was looking for her.

### 21 CELL PHONE RECORDS

22 When the case was submitted to the district attorney's office, it was submitted on all  
23 three, D-Roc, Rome and Donny. The cell phone records establish that on Wednesday  
24 evening, after 1 a.m., Rome called Donny. The tower records reflect that Donny was at his  
25 home in the northeast portion of town, while Rome was hitting on a tower at Wagon Wheel  
26 and US 95, next to the crime scene. From that point, the records show Rome remaining in  
27 that area as calls are received between Donny and Rome until about 2:17 a.m., when Donny  
28 is hitting off another cell tower located almost on top of the bodies. Shortly thereafter, the

1 cell records show both of them returning north.

## 2 ACCESSORY DONNY HERB'S TESTIMONY

3 Donny Herb waived his preliminary hearing to plead guilty to accessory to murder.  
4 Donny testified during the preliminary hearing. Donny testified that he owed the green  
5 Oldsmobile but that Rome had borrowed it for the past two months. That on some day in  
6 mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to pick-up Rome  
7 and Red. At the time, D-Roc, Victoria, and Christine were in the vehicle. After picking  
8 them up, he drove to his house and stayed there. The rest left in the green Oldsmobile.  
9 Sometime thereafter, D-Roc told Donny that he beat up Red and that Rome was there also.

10 At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome.  
11 At the time, Donny was home. In the first phone call, Rome told Donny that D-Roc and  
12 Rome had the girls, and asked him if he wanted to come. Donny said no. Later, Rome  
13 called back and told him that if he wanted the green Oldsmobile, he was going to have to  
14 come and get it or they were going to drive to California and send it back to him on a flatbed  
15 truck. Donny agreed to drive his other car to meet them. In one of the phone calls, Donny  
16 overhead Rome yelling to D-Roc to "hit her again with a rock."

17 Donny drove to the area of exit 56 by the Railroad pass casino and met up with D-  
18 Roc and Rome. The three then drove off to a remote desert location and Rome disappeared  
19 for a short time, then came back to the vehicles.

20 Eventually, Donny got the story from the D-Roc and Romeo. Donny said they both  
21 told him that they went to South Cove Apartments to some guy's room and left together with  
22 the girls arm in arm. Both indicated that they only had Victoria and Christine because Red  
23 had gone with the guy that had the apartment. Donny said they took the girls to where Red  
24 had been beat up. D-Roc and Romeo told him that they had beat the girls up pretty bad.  
25 They told him they beat them, took their clothes and left them there.

26 Donny drove the detectives out to the remote location. During the ensuing search, a  
27 golf putter, broken in three places was found. Ultimately, Rome drove them to a similar  
28 location, and a knife was located.

1 **D-ROC'S STORY**

2 D-Roc was first contacted on May 23, 2006 by HPD. At that time, D-Roc denied any  
3 knowledge of the any of the crimes with the exception of the April beating of Red. D-Roc  
4 admitted to being at the Sportsman the day of the crime, however, said that Rome took him  
5 home around midnight. He was re-contacted again on June 1<sup>st</sup> and stuck to that story.

6 **DEFENDANT JASON McCARTY'S STATEMENTS**

7 **ROME'S STORY ON MAY 25th**

8 Rome was contacted on May 25, 2006 by HPD. At first, Rome admitted that he had  
9 drove the green Oldsmobile in the past, but he hadn't driven it in 2-3 weeks. He also stated  
10 that the last time he saw D-Roc was a couple of weeks before. Rome told detectives that he  
11 was jumped at 4 a.m. on Thursday, May 18<sup>th</sup> in the Sportsman parking lot.

12 When advised that there was an investigation into a beating, and Rome was told D-  
13 Roc was in jail, Rome asked, "don't tell me he beat up Red. Don't tell me he beat that girl  
14 up again." Rome admitted to knowing D-Roc beat Red back in April, but denied knowledge  
15 of the beating on Tuesday night.

16 After several denials, Rome then admitted that after Red and him were picked up  
17 from the Sahara, Red got beat. He said Red owed D-Roc \$360. Rome said, "he did beat her  
18 down. He beat the shit out of her."

19 Rome then admitted that he drove the green Oldsmobile out to Henderson where Red  
20 was beaten by D-Roc. He claimed not to know where he was going, but D-Roc directed  
21 him. Rome said that in fact, he missed the turn off the first time, drove to the Railroad Pass  
22 Casino then had to make a U-turn. Rome stated that he stopped the car, D-Roc made Red  
23 get out and he beat her. Rome claimed to have stopped D-Roc during the beating. Rome  
24 claimed they got back into the car and drove back to the Sportsman. Then he said that he  
25 and D-Roc drove the girls to the Hardrock at about 2:30 or 3:00 in the morning. Rome  
26 claimed that Victoria called for him to come get her, but that when he got to the Hardrock,  
27 she was gone.

28 Rome admitted that the night before he was beaten, he was contacted by Donny at

1 about 9 or 9:30 in the evening. At the time, Donny showed up with D-Roc and wanted the  
2 green Oldsmobile and offered to give Rome the white Honda. Rome claimed that Donny  
3 told him that he and D-Roc were going to go pick up the girls. He claimed that Donny and  
4 D-Roc then left and he remained in an apartment with Corrina Phillips and Lynn Nagel. He  
5 claims that Donny and D-Roc returned at 6:00 a.m. the next morning.

#### 6 **ROME'S STORY ON JUNE 1st**

7 On June 1, 2006, Rome's father contacted the District Attorney's Office indicating  
8 that his son wanted to talk to a DA. The detectives were sent back to interview Rome. On  
9 this occasion, Rome told HPD that he knew where the weapons were buried that were used  
10 to kill the two girls.

11 Rome claimed that he and D-Roc were in apartment 217 at South Cove (Tre Black's)  
12 talking to a friend of D-Roc named "Black." Rome claimed not to know the guy, but that the  
13 person was a black male with a bald head with a white girl. Rome said he received a call  
14 from Victoria and he and D-Roc went to get her at apartment 222. Rome said they didn't  
15 kidnap the girls, he said they left willingly. Rome claimed they got the Sportsman and that  
16 Donny met up with them and that Donny and D-Roc took the girls out to the desert and  
17 killed them.

18 Rome acknowledged that he did some things that might end up getting him some time  
19 in prison, but denied doing the killing. He said he could tell the DA why the girls were  
20 killed, who killed them and what was used to kill the girls. He also stated that he could take  
21 the police to where the weapons were hid, where the tires from the car were and where the  
22 clothes were put. He claimed Donny and D-Roc paid him to dispose of these items. He said  
23 that one weapon was a golf club broken into three pieces and that he discarded it in a desert  
24 area by Lake Mead. He also claimed to have discarded some clothing.

25 Rome then said that when they picked up the girls, they went to the Sportsman where  
26 he met up with Donny and D-Roc. He claimed to have gone to Corrina and Lynn's  
27 apartment and that Donny gave D-Roc a ride home. He claimed he didn't know at the time  
28 that the girls left with them. He only figured it out later.

1 Most importantly, Rome told the detectives that he always has his cellular phone.  
2 That the only time during the relevant period that he did not have his phone was when he got  
3 arrested because it was in the green Oldsmobile.

#### 4 **ROME'S STORY ON JUNE 5th**

5 On June 5<sup>th</sup>, Rome was contacted again. He offered to take the police to the location  
6 of the weapons (he did not know that Donny had already helped them locate the golf club).  
7 Rome drove them to the desert and helped them find the knife. During the ride, detectives  
8 confronted him about some of the evidence. When they confronted him with the fact that his  
9 phone was pinging off a tower over the bodies, Rome claimed that was because he had  
10 traded phones with Donny. When told that Donny's phone was pinging off a tower by  
11 Donny's home, Rome claimed because he went to get the white car. When asked why he  
12 need to go to the house to get the white car when Donny gave it to him the night before,  
13 Rome, finally, asked for a lawyer.

#### 14 **AUTOPSIES**

##### 15 **CHARLOTTE "CHRISTINE" COMBADO**

16 On May 21, 2006, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted  
17 an autopsy on the person of Charlotte Combrado. Dr. Kubicek identified multiple blunt  
18 force and sharp force injuries to the head, neck, thorax, abdomen, and upper and lower  
19 extremities. Ultimately, he appeared to identify at least 20 blunt force injuries and two sharp  
20 force injuries. The one to the chest appeared to be a superficial incision before death,  
21 however, the stab wound to the neck was peri-mortum as there is no injury to the skin itself  
22 from the wound. Ultimately, the cause of death was blunt and sharp force trauma to the head  
23 and thorax. The manner of death was homicide. There was an amount of methamphetamine  
24 in both the decomposition fluid and the liver.

##### 25 **VICTORIA MAGEE**

26 On the same date, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted  
27 an autopsy on the person of Victoria Magee. Dr. Kubicek identified multiple blunt force and  
28 sharp force injuries to the head, neck, thorax, abdomen, and upper and lower extremities.

1 Ultimately, he appeared to identify at least 31 blunt force injuries and three sharp force  
2 injuries. All three appear to be superficial to the head, however, the stab wound to the jaw  
3 was peri- mortum as there was no injury to the skin itself from the wound. Ultimately, the  
4 cause of death was blunt and sharp force trauma to the head and thorax. The manner of  
5 death was homicide. There was an amount of cocaine in both the decomposition fluid and  
6 the liver.

## 7 **POINTS AND AUTHORITIES**

8 Defendant Malone asserts that at least two counts should be severed from the other  
9 counts in the information, as well as suggests some of the other counts should be severed.  
10 Additionally, Defendant Malone asserts his trial should be severed due “mutually exclusive”  
11 defenses and Bruton problems.<sup>1</sup> As the April incident is the motive for the May beating and  
12 ultimate homicide, those counts are properly joined. Defendant’s conclusory remarks  
13 concerning the “mutually exclusive” defenses do not rise to a level which would necessitate  
14 severance. Finally, most of the statements alleged by Defendant McCarty are statements  
15 made by a co-conspirators made in the course and in furtherance of the conspiracy. As such,  
16 they do not present a Confrontation Clause or Bruton problem. To the extent the State seeks  
17 to introduce any statements by Defendant McCarty which implicate the Confrontation  
18 Clause, those statements will not be the type that would facially implicate Defendant  
19 Malone.

### 20 **I.**

#### 21 **THE APRIL BEATING IS CONNECTED TOGETHER WITH THE MAY** 22 **BEATINGS AND KILLINGS**

23 Defendant Malone asserts that the April incident should be severed from the May  
24 incidents. He argues that these incidents are not factually similar. While some facts may be  
25 different, it is the cross-admissibility of the evidence which makes joinder of the charges  
26 proper.

---

27  
28 <sup>1</sup> Citing Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

1 NRS 173.115 states:

2 Two or more offenses may be charged in the same indictment or  
3 information in a separate count for each offense if the offenses charged,  
4 whether felonies or misdemeanors or both, are:

5 1. Based on the same act or transaction; or

6 2. Based on two or more acts or transactions **connected together** or  
7 constituting parts of a common scheme or plan.

8 (emphasis added). Until recently, the Nevada Supreme Court had not completely defined  
9 what “connected together” specifically meant. However, in Weber v. State, 121 Nev. 554,  
10 119 P.3d 107 (2005), the court defined “connected together:”

11  
12 We have not addressed the “connected together” language  
13 in the statute, and it is a term that calls for more precise  
14 definition. We hold that for two charged crimes to be “connected  
15 together” under NRS 173.115(2), a court must determine that  
16 evidence of either crime would be admissible in a separate trial  
17 regarding the other crime. We have recognized this cross-  
18 admissibility as a basis for joinder of charges in some of our  
19 prior decisions. We now expressly employ it to define  
20 “connected together” under NRS 173.115(2). We conclude that  
21 the groups of crimes charged and proven in this case are  
22 connected together because evidence of each group would have  
23 been relevant and admissible at separate trials of the other  
24 crimes.

25 Id at 120. In Weber, Defendant repeatedly raped the daughter of his girlfriend over a period  
26 of time. On the last occasion, Defendant killed his girlfriend and another one of her  
27 children. Almost a month later, Defendant then attacked the surviving son of the victim. In  
28 holding that the three different set of charges were properly joined, the Nevada Supreme  
Court found that each was relevant to the other because it provided not only the motive for  
the homicides, but the identity of the perpetrator. Additionally, the Court found that the  
joinder was not unfairly prejudicial. In making that determination, the Court stated:

“To establish that joinder was [unfairly] prejudicial ‘requires  
more than a mere showing that severance might have made



acquittal more likely.' " Rather, the defendant carries the heavy burden of showing an abuse of discretion by the district court.

Id (footnotes omitted).

Certainly, the beating in April is "cross-admissible" with the May beatings and killings as it is the April incident which provides the motivation for the May incident as well as provides the identity of the perpetrators. In April, Defendant Malone beat Victim Estores in the exact same manner he beat her the night before the homicide. During that time, he took from her not only the money and drugs she owed Defendant, but the money and drugs owed to "Black." That money and drugs, according to Defendant Malone, were the basis of the debt that Victim Estores allegedly owed to "Black" that Defendant Malone was to collect. It is that three hundred sixty dollars (\$360) which provided the motivation for the beating of Ms. Estores on the 16<sup>th</sup> of May. Additionally, it is the failure to repay that money, and the fact that Ms. Estores got away, that was the motive for the killing of Victim Combado.

The April incident is proven by clear and convincing evidence. Not only does Victim Estores specifically describe the crime, but she still carried the evidence of the beating by the deep purple and black bruises on her chest. Moreover, Defendant Malone admits to conducting that beating.

Finally, the April beating is certainly more probative than it is prejudicial. It is the April beating which starts the whole chain of events which results in the homicides, making it highly probative. Of all of the charges, the April charges are the least sever, making them the least prejudicial. Therefore, joinder of the offenses are proper. See Mitchell v. State, 105 Nev. 735 (1989).

Defendant Malone also suggests, without real argument, that the beating of Victim Estores on May 16<sup>th</sup> should be severed from the homicide counts. Such an argument is specious. Victim Estores was beaten on May 16<sup>th</sup>, in the presence of Defendant McCarty by Defendant Malone with Victims McGee and Combado watching. It was from this beating, that the victims were driven to the Hardrock Hotel so they could recover the money allegedly owed to Defendants. It is during this ride to the Hardrock where the threats to kill

1 the victims, in the very location where they were found, were made. Additionally, it is  
2 during this ride that the motivation to kill Victim Combado was told to the victims. It is this  
3 motivation to kill the girls in that location which establishes the identity of the killers on the  
4 night in question. As such, the May beatings and killings are one series of acts connected  
5 together, but also part of a common scheme or plan.

## 6 II.

### 7 DEFENDANTS CONCLUSORY STATEMENTS CONCERNING THE 8 "MUTUALLY EXCLUSIVE" DEFENSES IS NOT GROUNDS FOR SEVERANCE 9

10 NRS 173.135 clearly allows two or more defendants to be charged under the same  
11 indictment or information if they participated in the same criminal conduct. Persons who  
12 have been jointly indicted should be tried jointly, absent compelling reasons to the contrary.  
13 Jones v. State, 111 Nev. 848, 853, 899 P.2d 544 (1995). In order to obtain a severance, a  
14 criminal defendant must show clear, manifest, or undue prejudice from the joint trial. United  
15 States v. Entriquez-Estrada, 999 F.2d 1355, 135 n. 1 (9th Cir. 1993). The decision to sever is  
16 left to the trial court and will not be reversed absent an abuse of discretion. Amen v. State,  
17 106 Nev. 749, 755, 801 P.2d 1354, 1359 (1990). The burden is upon the party requesting  
18 severance to establish prejudice. Broad and general allegations of prejudice are not enough  
19 to require a trial court to grant a severance. United States v. Baker, 10 F.3d 1374, 1389 (9th  
20 Cir. 1993). In order to meet this burden, the party challenging the trial court's decision on  
21 the issue of severance must make a substantial showing of prejudice. Amen v. State, 106  
22 Nev. 749, 755, 801 P.2d 1354, 1358 (1990). Finally, even if prejudice is shown, the trial  
23 court is not required to sever; rather, it must grant relief tailored to alleviate the prejudice.  
24 See, e.g., Zafiro v. United States, 506 U.S. 534, 540-541, 113 S.Ct. 933 (1993).

25 The general rule favoring joinder has evolved for a specific reason – there is a  
26 substantial public interest in joint trials of persons charged together because of the judicial  
27 economy involved. Jones v. State, 111 Nev. at 853. Joint trials of persons charged with  
28 committing the same offense expedites the administration of justice, reduces the congestion

1 of trial dockets, conserves judicial time, lessens the burden upon citizens to sacrifice time  
2 and money to serve on juries, and avoids the necessity of recalling witnesses who would  
3 otherwise be called upon to testify only once. Jones, 111 Nev. at 853-854 (citations  
4 omitted). Consequently, the doctrine of severance is a very limited one.

5 In Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002), for example, codefendants  
6 Marshall and Currington were tried and convicted together of first degree murder, robbery,  
7 and conspiracy to commit robbery. At trial, Marshall's defense strategy was to blame  
8 Currington; Currington's defense strategy was to blame Marshall. Id. at 644-645. Both  
9 were convicted.

10 On appeal, Marshall contended the district court erred in refusing to sever his trial  
11 from Currington's. Id. at 644. Marshall contended he and Currington had antagonistic  
12 defenses in that each argued the other was responsible for the murder. Id. at 645. Marshall  
13 relied on the standard articulated in Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002),  
14 which stated that, "defenses must be antagonistic to the point that they are 'mutually  
15 exclusive' before they are to be considered prejudicial," requiring severance. Marshall, 118  
16 Nev. at 646 (citation omitted). Rowland further stated that defenses are mutually exclusive  
17 when the core of the codefendant's defense is so irreconcilable with the core of the  
18 defendant's own defense that the acceptance of the codefendant's theory by the jury  
19 precludes acquittal of the defendant. Marshall, 118 Nev. at 646 (citations omitted).

20 The Court in Marshall was concerned that the language in Rowland was too broadly  
21 stated. Consequently, the Court clarified - - and limited - - the standard articulated in  
22 Rowland which requires severance.

23  
24 "To the extent that this language suggests that prejudice  
25 requiring severance is presumed whenever acceptance of one  
26 defendant's defense theory logically compels rejection of another  
27 defendant's theory, **it is too broadly stated.** As we have  
28 explained elsewhere, while there are situations in which  
inconsistent defenses may support a motion for severance, **the  
doctrine is a very limited one.** A defendant seeking severance  
must show that the codefendants have conflicting and  
irreconcilable defenses and there is danger that the jury will

1 unjustifiably infer that this conflict alone demonstrates that both  
2 are guilty. We take this opportunity to further clarify this issue.

3 Marshall, 118 Nev. at 646 (emphasis added). The Court then went on to explain the  
4 standard articulated in Rowland.

5  
6 The decisive factor in any severance analysis remains prejudice  
7 to the defendant. NRS 174.165(1) provides in relevant part: 'If it  
8 appears that a defendant ... is prejudiced by a joinder ... of  
9 defendants ... for trial together, the court may order an election or  
10 separate trials of counts, grant a severance of defendants or  
11 provide whatever other relief justice requires.' Nevertheless,  
12 prejudice to the defendant is not the only relevant factor: **a court  
13 must consider not only the possible prejudice to the  
14 defendant but also the possible prejudice to the State  
15 resulting from expensive, duplicative trials.** Joinder promotes  
16 judicial economy and efficiency as well as consistent verdicts  
17 and is preferred as long as it does not compromise a defendant's  
18 right to a fair trial. Despite the concern for efficiency and  
19 consistency, the district court has a continuing duty at all stages  
20 of the trial to grant a severance if prejudice does appear. Joinder  
21 of defendants is within the discretion of the district court, and its  
22 decision will not be reversed absent an abuse of discretion. To  
23 establish that joinder was prejudicial requires more than simply  
24 showing that severance made acquittal more likely; mis-joinder  
25 requires reversal only if it has a substantial and injurious effect  
26 on the verdict.

17  
18 Marshall v. State, 118 Nev. at 646-647 (emphasis added) (citations omitted).

19 Most importantly, the Court stated that **"antagonistic defenses are a relevant  
20 consideration but not, in themselves, sufficient grounds for concluding that joinder of  
21 defendants is prejudicial."** 118 Nev. at 648 (emphasis added). In fact, the Court in  
22 Marshall ruled that the defenses were antagonistic; nevertheless, joinder was proper. The  
23 fact that codefendants at a joint trial offer mutually exclusive defenses, the Court recognized,  
24 is not, in itself, sufficient to establish that joinder was prejudicial. Id. at 648. Marshall failed  
25 to demonstrate that the joint trial compromised a specific trial right or prevented the jury  
26 from making a reliable judgment regarding guilt or innocence. Marshall, 118 Nev. at 648.  
27 Moreover, the State's case was not dependent on either defendant's testimony, and the  
28 prosecution presented evidence linking both to the murder. Id. Accordingly, the Court

1 affirmed Marshall's conviction.

2 A similar analysis was offered by the highest court of the land in Zafiro v. United  
3 States, 506 U.S. 534, 113 S.Ct. 933 (1993). In that case, petitioners contended it is  
4 prejudicial whenever two defendants both claim they are innocent and each accuses the other  
5 of the crime. 506 U.S. at 538. The United States Supreme Court rejected their contention,  
6 holding that "mutually antagonistic defenses are not prejudicial *per se*." 506 U.S. at 538. A  
7 court should grant a severance *only* if there is a serious risk that a joint trial would  
8 compromise a specific trial right of one of the defendants, or prevent the jury from making a  
9 reliable judgment about guilt or innocence. 506 U.S. at 539. It is *not* prejudicial for a  
10 codefendant to introduce relevant, competent evidence that would be admissible against the  
11 defendant at a severed trial. Id. The Government offered sufficient evidence against all four  
12 petitioners, and the district court cured any possibility of prejudice by properly instructing  
13 the jury that it had to consider the case against each defendant separately. 506 U.S. at 540-  
14 541. Thus, the U.S. Supreme Court held it was not an abuse of discretion to deny  
15 petitioners' motions to sever. Id. at 541.

16 The instant case falls directly in line with Marshall and Zafiro. While both may be  
17 arguing that the other person did the killing, there is no substantial evidence which will be  
18 admitted against one which would not be admitted against the other. As such, a specific trial  
19 right of a Defendant will not be infringed upon the joinder of the cases.

### 20 III.

#### 21 22 THE STATEMENTS MADE BY McCARTY WHICH WILL BE INTRODUCED BY 23 THE STATE WILL NOT PRESENT A BRUTON PROBLEM

#### 24 25 A. Statements By A Co-Conspirator During The Course And In Furtherance Of 26 The Conspiracy Are Admissible Whether Or Not The Trials Are Severed.

27 Defendant lists a number of statements in his motion alleging that they are  
28 inadmissible against him as the words were spoken by Defendant McCarty. However, every

1 single quoted statements on page 23 of his motion are statements by co-conspirators in the  
2 course and in furtherance of the conspiracy. See NRS 51.035(3)(e). Statements admitted  
3 under NRS 51.035(3)(e) are non-hearsay and not a violation of the Bruton rule. See  
4 Bourjaily v. United States, 483 U.S. 171, 182-84, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).  
5 Moreover, the decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004),  
6 excludes them from the definition of "testimonial." Crawford. at 56, 124 S.Ct. 1354. As  
7 such, since the statements are admissible against both Defendants, they cannot be grounds  
8 for a severance. To the extent any one of those statements were determined to be outside of  
9 the conspiracy, then, since they are not testimonial, they would be the subject of a limiting  
10 instruction, not severance. See Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987).

11 **B. Testimonial Hearsay Statements Made By Mccarty Which Facially**  
12 **Implicate Malone Will Not Be Offered By The State**

13 **i. The Bruton Rule allows for redaction of statements to the**  
14 **Police**

15 The Confrontation Clause of the Sixth Amendment of the United States Constitution  
16 guarantees the right of a criminal defendant to be confronted with the witnesses against him.  
17 Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Thus, when two defendants  
18 are tried together, the extra judicial statement to the police of one, which is not admissible  
19 against the other, cannot be admitted against the other unless the confessing defendant  
20 testifies and is subject to cross-examination. Bruton v. United States, 391 U.S. 123, 88 S.Ct.  
21 1620 (1968).<sup>2</sup>

22 In Bruton, the United States Supreme Court held that the Sixth Amendment Right  
23 of Confrontation is denied where a co-defendant's statement implicating the defendant is  
24 admitted into evidence without effective redaction or opportunity to cross-examine. Since

25 \_\_\_\_\_  
26 <sup>2</sup> Bruton does not stand for the proposition that all statements by one co-  
27 defendant are not admissible against another co-defendant. In Lilly v.  
28 Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999), the Supreme Court held that such  
statements against penal interests are not a "firmly rooted hearsay exception"  
as required by Roberts, however, held they may satisfy Confrontation Clause  
concerns if there were "particular guarantees of trustworthiness." Id at 138.  
However, NRS 51.345(2) would preclude admission in Nevada.

1 Bruton, many cases have interpreted the meaning of the rule, and clarified its application.  
2 However, the most instructive interpretation by the Court was provided in Richardson v.  
3 Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987). In Richardson, the Court stated:

4           We hold that the Confrontation Clause is not violated by the  
5 admission of a non-testifying codefendant's confession with a  
6 proper limiting instruction when, as here, the confession is  
7 redacted to eliminate not only the defendant's name, but any  
8 reference to his or her existence.

9 Id at 211. The Court left open the question of whether the confession can be redacted by  
10 blanks or symbols. Id at n. 5. However, the Nevada Supreme Court has addressed that issue  
11 in the negative. See Stevens v. State, 97 Nev. 443, 444-45, 634 P.2d 662, 663-64 (1981).<sup>3</sup>  
12 The State intends to scrupulously adhere to the requirements of Richardson and Stevens and  
13 remove any implication from any statement to the police made by Defendant McCarty.  
14 Even if such were not the case, Defendant Malone would have to show some prejudice from  
15 joinder. See Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002).

16           In Defendant Malone's instant motion, he does not reference any of the statements  
17 which would present a Bruton problem. In fact, no where in his motion does Defendant  
18 discuss the statements McCarty made to the police at all. It is the statements to the police  
19 which would provide Defendant the grounds for severance should the State intend to offer  
20 facially incriminating statements without proper redaction.<sup>4</sup>

21           **ii. Bruton only applies to "testimonial statements"**

22           As the United States Supreme Court stated in Richardson v. Marsh, 481 U.S. 200,  
23 206, 107 S.Ct. 1702 (1987):

24  
25           <sup>3</sup> While some of the language in Stevens was abrogated by Richardson, the issue of  
26 blanks or symbols still appears to be valid law.

27           <sup>4</sup> Defendant also asserts that redaction by putting a blank or a pronoun is not  
28 proper citing Duckworth v. State, 113 Nev. 780 (1997). While Duckworth does  
relate to severances, the statements which were the basis of the severance in  
Duckworth would no longer raise a Confrontation Clause issue as the statements  
were not testimonial. See Crawford. Moreover, it was the failure of the  
redaction which was improper, not the extent of redaction.

1 Ordinarily, a witness whose testimony is introduced at a  
2 joint trial is not considered to be a witness 'against' a defendant  
3 if the jury is instructed to consider that testimony only against a  
4 codefendant. This accords with the almost invariable assumption  
5 of the law that jurors follow their instructions.

6 The only narrow exception to the foregoing rule is what has become known as the Bruton  
7 Rule. Id. The Bruton rule is a Confrontation Clause rule based upon the hearsay statements  
8 of a co-defendant.<sup>5</sup> Since Bruton, the Supreme Court decided another seminal Confrontation  
9 Clause case involving hearsay statements, Crawford v. Washington, 541 U.S. 36, 124 S.Ct.  
10 1354 (2004), which changes the test for what hearsay implicates the Confrontation Clause.  
11 By definition, it also qualifies what statements implicate the Bruton rule.<sup>6</sup>

12 Prior to Crawford, every out of court statement offered in a trial for the truth of the  
13 matter asserted implicated the Confrontation Clause. See Ohio v. Roberts, 48 U.S. 56, 100  
14 S.Ct. 2531 (1980). An exception was created under Roberts for reliable hearsay statements.  
15 Id.

16 In Crawford, the United States Supreme Court changed the test for determining  
17 whether or not a hearsay statement implicated the Confrontation Clause. Under Crawford,  
18 an out of court statement offered to prove the truth of the matter asserted only implicates the  
19 Confrontation Clause if it is testimonial. The Court overruled Roberts and said the reliability  
20 or unreliability of the statement was no longer relevant to the Confrontation Clause concerns.

21 Once Crawford was decided, the ultimate test for any hearsay statement must first be  
22 whether or not it is testimonial. For if it is testimonial, then it implicates the Confrontation  
23 Clause. Likewise, under Bruton and its progeny, for a statement of a co-defendant to  
24 implicate the Confrontation Clause, it similarly must be testimonial.<sup>7</sup> If they are not, the  
25 Confrontation Clause is not implicated.

26 If there is any question that the Confrontation Clause only applies to "testimonial"

27 <sup>5</sup> In fact, in Bruton, the Supreme Court limited its ruling to those statements  
28 that did not fall under a proper hearsay objection. Bruton at 129 n. 3.

<sup>6</sup> In fact, Crawford cites to Bruton. Crawford at 57.

<sup>7</sup> Traditionally, all co-defendants confessions are testimonial as they are formal  
statements to police.



1 statements, that question was answered in Davis v. Washington, 547 U.S. \_\_\_, 126 S.Ct.  
2 2266 (2006). In Davis, the Court needed to decide whether the Confrontation Clause **ONLY**  
3 applied to testimonial statements:

4 We must decide, therefore, whether the Confrontation Clause applies only to  
5 testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

6  
7 The answer to the first question was suggested in Crawford, even if not  
8 explicitly held:

9  
10 “The text of the Confrontation Clause reflects this focus [on  
11 testimonial hearsay]. It applies to ‘witnesses’ against the accused-  
12 in other words, those who ‘bear testimony.’ 1 N. Webster, An  
13 American Dictionary of the English Language (1828).  
14 ‘Testimony,’ in turn, is typically ‘a solemn declaration or  
affirmation made for the purpose of establishing or proving some  
fact.’ Ibid. An accuser who makes a formal statement to  
government officers bears testimony in a sense that a person who  
makes a casual remark to an acquaintance does not.”

15 541 U.S., at 51, 124 S.Ct. 1354.

16 **A limitation so clearly reflected in the text of the constitutional provision**  
17 **must fairly be said to mark out not merely its “core,” but its perimeter.**

18 Davis, 126 S.Ct. at 2274 (footnotes omitted, emphasis added).

19 If the statements being offered are not hearsay, or are non-testimonial, the statements  
20 do not infringe the Confrontation Clause. As such, a non-testimonial statement offered  
21 against one co-defendant would no longer infringe upon a “trial right” of a Defendant.  
22 Therefore the introduction of such a statement no longer can be a basis for severance  
23 because there is no Bruton rule violation. For severance requires an infringement of a trial  
24 right. Marshall, 118 Nev. at 648. Therefore, it would be subject to a limiting instruction  
25 should it be non-testimonial or non-hearsay.

26 Notwithstanding, the State does not intend, at this time, to offer any statement,  
27 testimonial or not, by McCarty which facially implicates Malone or any other person at trial  
28 that do not qualify as statements made by a co-conspirator in the course and in furtherance of

1 the conspiracy. See NRS 51.035(3)(e). However, should a non-testimonial statement be  
2 utilized, the remedy would not be severance but a limiting instruction. See Richardson v.  
3 Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987).

4 **C. Defendant Cannot Assert A Prejudice From The Admission Of The**  
5 **Redacted Version Of McCarty's Statements As Those Statements Support**  
6 **Defendant Malone's Defense**

7 Under all of the jurisprudence in this area, the ultimate question presented is whether  
8 or not Defendant is prejudiced by the joinder with his co-defendant. See Marshall v. State,  
9 118 Nev. 642, 56 P.3d 376 (2002).

10 To establish that joinder was prejudicial requires more than  
11 simply showing that severance made acquittal more likely; mis-  
12 joinder requires reversal only if it has a substantial and injurious  
effect on the verdict.

13 Id., 118 Nev. at 646-647. Defendant clearly cannot establish such a joinder is prejudicial to  
14 the extent that severance would be required.

15 As Defendant asserts on page 20 of his motion, his defense is that McCarty and Herb  
16 committed the crime and he is denying any culpability. Based upon the rules outlined in  
17 Bruton, the only statements of McCarty to the police which will be admissible will be  
18 statements which implicate McCarty in the crime. Such statements, by their very nature,  
19 will not be able to implicate Malone. Therefore, the admission of the statements would not  
20 prejudice Defendant Malone in the least bit. Moreover, Defendant Malone may in fact offer  
21 the statements in a severed trial to the extent they are statements against penal interest. See  
22 NRS 51.345.

23 This situation clearly distinguishes the instant matter from Duckworth v. State, 113  
24 Nev. 780 (1997). In Duckworth, there were three people involved in the case, Duckworth,  
25 Martin and the victim. All three had driven to Nevada together. Duckworth told two other  
26 people he had killed the victim and indicated he had an accomplice. None of Duckworth's  
27 statements were redacted. The Court found that the situation was similar to Stevens v. State,  
28 97 Nev. 443, 444-45, 634 P.2d 662, 663-64 (1981), wherein the redaction was such that the

1 jury would automatically read the Defendant's name in the blanks. Nothing could be further  
2 from the truth in this case. The State does not intend to introduce those type of statements  
3 where only the name Malone would be redacted from the statements. In fact, the State may  
4 not introduce any statement that refers to an accomplice whatsoever. However, even if the  
5 State were to do so, it is Defendant Malone's defense that McCarty did the crime with Herb,  
6 so the jury isn't necessary going to associate an allegation with Malone instead of Herb.  
7 Additionally, the Supreme Court in Duckworth appeared to be concerned that the State, in  
8 violation of NRS 51.345, utilized the Duckworth statements to convict Martin.

9 Finally, Duckworth doesn't appear to be valid law after Davis v. Washington, 547  
10 U.S. \_\_\_, 126 S.Ct. 2266 (2006). Clearly, the statements addressed in Duckworth were not  
11 testimonial. As such, after Davis, they no longer implicate the Confrontation Clause. If they  
12 do not implicate the Confrontation Clause, they are not the subject of Bruton. If Bruton does  
13 not apply, severance would not be proper, and a limiting instruction is all that is required.  
14 See Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987).

#### 15 CONCLUSION

16 Based on the foregoing, Defendant Malone's Motion To Sever should be denied.

17  
18 DATED this 13th day of November, 2006.

19 Respectfully submitted,

20 DAVID ROGER  
21 Clark County District Attorney  
22 Nevada Bar #002781

23  
24 BY /s/MARC DIGIACOMO  
25 MARC DIGIACOMO  
26 Chief Deputy District Attorney  
27 Nevada Bar #006955

28 CERTIFICATE OF FACSIMILE TRANSMISSION

1 I hereby certify that service of State's Opposition To Defendant Malone's Motion To  
2 Sever, was made this 13th day of November, 2006, by facsimile transmission to:

3  
4 SPECIAL PUBLIC DEFENDER  
FAX #455-6273

5  
6 /s/D. McDonald  
Secretary for the District Attorney's  
7 Office  
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CLERK

**RWHC**  
**DAVID ROGER**  
Clark County District Attorney  
Nevada Bar #002781  
**MARC DIGIACOMO**  
Deputy District Attorney  
Nevada Bar #006955  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
State of Nevada

DISTRICT COURT  
CLARK COUNTY, NEVADA

In the Matter of Application,

of

DOMONIC RONALDO MALONE,  
#1670891

for a Writ of Habeas Corpus.

Case No. C224572

Dept No. V

RETURN TO WRIT OF HABEAS CORPUS

DATE OF HEARING: 12/12/06

TIME OF HEARING: 8:30 A.M.

COMES NOW, BILL YOUNG, Sheriff of Clark County, Nevada, Respondent, through his counsel, DAVID ROGER, District Attorney, through MARC DIGIACOMO, Deputy District Attorney, in obedience to a writ of habeas corpus issued out of and under the seal of the above-entitled Court on the 6th day of November, 2006, and made returnable on the 12th day of December, 2006, at the hour of 8:30 o'clock A.M., before the above-entitled Court, and states as follows:

1. Respondent admits the allegations of Paragraphs 1, 2, 6 and 9 of the Petitioner's Petition for Writ of Habeas Corpus.

2. Respondent denies the allegations of Paragraph 3 of the Petitioner's Petition for Writ of Habeas Corpus.

3. Paragraphs 4, 5, 7 and 8 do not require admission or denial.

4. The Petitioner is in the actual custody of BILL YOUNG, Clark County Sheriff, Respondent herein, pursuant to a Criminal Information, a copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the Petition be dismissed.

DATED this 22nd day of November, 2006.

Respectfully submitted,

DAVID ROGER  
Clark County District Attorney  
Nevada Bar # 002781

BY /s/ MARC DIGIACOMO  
MARC DIGIACOMO  
Deputy District Attorney  
Nevada Bar #006955

## STATEMENT OF FACTS

On May 20, 2006 at approximately 0915, the Henderson Police Department received a 9-1-1 emergency call that there were two naked deceased females in the desert just west of Paradise Hills and Dawson Street. (PH, vol 3, p. 366). Patrol officers responded to the location and secured the scene. At the time, there was no identification for the partial decomposed females who appeared to have been killed by both blunt and sharp force trauma. (PH, vol 3, p. 368).

**MELISSA ESTORES aka "RED"**

The next day, during the autopsies, two individuals contacted the HPD about the bodies, Ryan Noe and Melissa Estores (hereinafter “Red”). (PH, vol 1, p. 130). Red was a friend of Noe who informed him that she believed she knew who the two females in the desert were. Noe brought Red to the police station. (PH, vol 1, p. 131).

Red is a street hustler that sells both “hard” and “soft” drugs for various people.

1 "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months  
2 leading up to the killings, Red worked mainly for an individual named Tre Black (later  
3 identified as Ramaan Hall) selling methamphetamine. (PH, vol 4, p. 75). Tre Black had a  
4 protégée named D-Roc (later identified as Defendant Domonic Malone). Red would sell  
5 crack for D-Roc. (PH, Vol 1, 52-58). Red's main area of sale was the bar at the Royal  
6 Sportsman Manor located at the corner of Tropicana and Boulder Highway. (PH, vol 1, p.  
7 60).

#### 8 **APRIL KIDNAPPING AND BEATING OF RED**

9 At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter,  
10 D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.  
11 (PH, vol 1, p. 91). Sometime in April of 2006, D-Roc showed up at the bar in the Royal  
12 Sportsman Manor and told Red he wanted to talk to her. Red left the bar with D-Roc and he  
13 led her behind it, at night, where no one could see them. (PH, vol 1, pp. 103, 225, 230).  
14 Once they were back there, D-Roc demanded his "work" and money back from Red. Red  
15 gave D-Roc all of his stuff D-Roc then told Red it was "PT" time or "prayer time." This is a  
16 saying for getting a beating. (PH, vol 1, p. 68). Other witnesses have said "PT" stands for  
17 Pimp Training. (PH, vol 2, p. 18).

18 D-Roc explained the rules of the beating. (PH, vol 1, p. 65). He was going to punch  
19 Red in the chest. If she tried to block, he was going to hit her in the right temple, left temple  
20 and forehead. Then he was going to do it all over again. D-Roc began by punching Red in  
21 the chest. When he did so, she naturally tried to block. (PH, vol 1, p. 66). Then he would  
22 punch her in the head three times, and start all over. This went on for a lengthy period of  
23 time until Red ultimately was down and severely hurt. (PH, vol 1, p. 67). In fact, her injuries  
24 and pain lasted for more than six weeks. (PH, vol 1, p. 70). At that point, a friend came and  
25 helped her to a car. (PH, vol. 1, p. 68).

26 During the beating, Red lost Tre Black's work and money, although she isn't sure  
27 how. After several days of convalescing, Red went back to work. When she went back, she  
28 learned that Tre Black never received the "work" she had given back to D-Roc, and he

1 wanted to get paid.

## 2 **TUESDAY MAY 16<sup>th</sup> KIDNAPPING OF VICTORIA**

3 On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner  
4 when she saw Charlotte Combado (hereinafter "Christine"). Christine was another local  
5 hustler who sold drugs for "D boys," or low level street drug dealers. (PH, vol 1, p. 77). On  
6 this occasion, Christine was selling for another individual known simply as "Black" (later  
7 identified as Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the  
8 bar, however, she lost all of her money in the gambling machines, so she owed Leonard  
9 Black \$150 and didn't know what to do. (PH, vol 1, pp. 79, 122). Red offered to help  
10 Christine. (PH, vol 1, p. 78). This eventually led to them coming into contact with  
11 Defendant Jason McCarty (hereinafter Rome) in a green Oldsmobile Alero. (PH, vol 1, p.  
12 80).

13 While everyone knew the green Oldsmobile as Rome's car, the car is actually owned  
14 by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. (PH, vol 2,  
15 p. 20). Donny is "D Boy" that hung around D-Roc and Rome. (PH, vol 1, p. 174).

16 Rome began driving downtown. As they were going, Christine told Rome her  
17 problem of needing \$150. Rome explained that he was having an issue with one of his girls,  
18 Victoria Magee as she owed him \$80. (PH, vol 1, pp. 87-9). The group wound up at the  
19 Oasis hotel downtown and began to smoke Marijuana. (PH, vol 1, p. 84). During this time,  
20 Rome and Christine struck up an agreement that Christine would find Victoria and bring her  
21 to Rome and Rome would cover her debt to Leonard Black. (PH, vol 1, pp. 87-9).

22 Red fell asleep in the room. When she woke up, Christine and Rome were gone.  
23 While they were gone, she looked out the window, saw the green Oldsmobile across the  
24 street at a Burger King. In the parking lot, Christine had her arm around Victoria and was  
25 leading her to the car. (PH, vol 1, pp. 93-4).

26 The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red  
27 left the Oasis on foot and walked towards the Stratosphere. (PH, vol 1, p. 94). On the way,  
28 Rome was on the Nextel two-way with Christine in the green Oldsmobile. (PH, vol 1, p.



1 95). Rome told Christine that they would meet at the valet to the Sahara Hotel. By this time,  
2 it was early evening.

3 When Red and Rome arrived at the valet, they came into contact with green  
4 Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and  
5 Victoria. (PH, vol 1, pp. 95-7). Everyone piled into the Green Oldsmobile. From the  
6 Sahara, the group drove to Donny's house, where Donny got out and the group left.

7 Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red  
8 remained in the car, while Rome, Victoria and Christine went into the complex. (PH, vol 1,  
9 p. 97). D-Roc told Red that she still owed Tre Black \$360 but Red told D-Roc that she had  
10 paid off her debt. The \$360 was allegedly the money owed from the incident in April where  
11 D-Roc had beaten Red. (PH, vol 1, p. 283). After a while, Rome, Victoria and Christine  
12 came back to the car. (PH, vol 1, p. 98).

### 13 **TUESDAY MAY 16<sup>TH</sup> KIDNAPPING AND BEATING OF RED**

14 From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc  
15 was acting strange. (PH, vol 1, p. 99). Eventually, the group pulled off the Wagonwheel  
16 exit and wound up in a desert site near some new home construction. (PH, vol 1, p. 101).  
17 Once she got there, Red was ordered out of the car by Rome. (PH, vol 1, p. 103). When she  
18 got out, D-Roc guided her to a location, and began to beat her again. (PH, vol 1, p. 104). D-  
19 Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome  
20 was yelling at Red to just take her beating. (PH, vol 1, p. 106). The beating was related to  
21 the prior April beating.

22 Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her  
23 there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5)  
24 seconds to get into the car or he was going to leave her there. (PH, vol 1, p. 106).  
25 Ultimately, D-Roc dragged Red back into the car. At this point, it was approximately  
26 midnight or early morning on Wednesday, May 17<sup>th</sup>.

27 On the way back into town, D-Roc wanted Red's purse. (PH, vol 1, p. 110).  
28 Ultimately, Red gave D-Roc her purse, and he threw the contents of it out of the window.

1 (PH, vol 1, p. 111). Once they got back into town, D-Roc and Rome explained what was  
2 going to happen. (PH, vol 1, p. 113).

### 3 **THREATS TO KILL PRIOR TO DROPPING** 4 **THE GIRLS OFF AT THE HARDROCK**

5 D-Roc and Rome explained to the girls that Victoria had to make \$80 to give to  
6 Rome, Red had to make \$360 to give to D-Roc and Christine had to make sure no one got  
7 away. (PH, vol. 1, p. 281). If any one of them did not do what they were told, there would  
8 be three shallow graves in the desert where Red had just been beaten. (PH, vol 1, p. 113).  
9 Defendant Malone alleged the \$360 was owed to Tre Black from the April beating, even  
10 though Red believed she had paid the money back to Tre Black. (PH, vol 1, p. 283).

11 Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc  
12 and Rome were trying to "put her on the track." (Prostituting). (PH, vol 1, p. 115). The  
13 group remained at the Hotel for hours however, Red had nothing to sell and refused to  
14 prostitute herself, Victoria couldn't catch a date, and Christine used all the drugs that she  
15 was supposed to sell. (PH, vol 1, pp. 115-6).

16 Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend  
17 named David Parker. Parker came and picked all three girls up and took him back to his  
18 house behind the Cancun Hotel. (PH, vol 1, p. 116).

19 The group spent most of Wednesday, during the day, at Parker's house. (PH, vol 1, p.  
20 117). Finally, the three decided that they needed to head back to the South Cove Apartments  
21 where both Tre and Leonard Black live. Early in the evening on Wednesday, the group  
22 wound up at the South Cove Apartments.

### 23 **WEDNESDAY KIDNAPPING OF VICTORIA AND CHRISTINE** 24 **FROM THE SOUTH COVE APARTMENTS**

25 When they got there, they tried to go to Leonard Black's apartment which is 222,  
26 however, they could not get in. (PH, vol 1, p. 117). The group ran into Tre Black near his  
27 apartment at 217 and Tre Black told Red that D-Roc was looking for her. (PH, vol 1, p.  
28 118). Finally, Leonard Black arrived, with a friend named DeMarcus. The three girls then  
got into 222. (PH, vol 1, p. 120). Leonard Black, Red and Demarcus left to go get gas in

1 Demarcus' car.

2 When they return to the apartment, Victoria and Christine were gone, there was a golf  
3 club missing from the apartment, as well as signs that they did not leave voluntarily. (PH,  
4 vol 1, pp. 124-5). The clothes of both people were still there along with other personal items.  
5 Most importantly, Victoria's sandals were still there. They were the only shoes that Victoria  
6 owed, and she would not have left without them.

7 Leonard Black was upset that someone broke into his home and asked Red who did it.  
8 Red told Leonard Black that it was D-Roc and Rome. (PH, vol 1, p. 127). Early the next  
9 morning, Leonard went looking for D-Roc and Rome at the Sportsman.

#### 10 **THURSDAY MAY 18<sup>th</sup> BEATING OF ROME BY LEONARD BLACK**

11 On May 18<sup>th</sup>, at 4 a.m., Leonard Black found Rome in the parking lot of the  
12 Sportsman and beat him pretty badly. (PH, vol 1, p. 128). The police were called and the  
13 ambulance arrived.

14 A couple of days later, Red saw a news story related to the two bodies and knew,  
15 since she had not seen them, that the two girls in the desert were Victoria and Christine. (PH,  
16 vol 1, p. 130). The police had Red show them where her beating took place, and she directed  
17 them to a desert area just across the street from where the bodies were taken. Based upon  
18 this information, the police set out to find D-Roc, Rome, and Donny.

#### 19 **CORRINA PHILLIPS AND LYNN NAGEL**

20 In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually  
21 contacted. Corrina initially tried to alibi Rome and D-Roc but eventually changed her tune.  
22 (PH, vol 2, p. 103).

23 Corrina corroborated that Rome, Victoria and Christine showed up at their place in at  
24 the Sportsman on Tuesday night. (PH, vol 2, pp. 7-8). While there, Rome and D-Roc sent  
25 Victoria upstairs to "give a blow job to somebody for a rock." (PH, vol 2, 12). Also, D-Roc  
26 was on the phone talking about taking the girls out to the desert for "PT time." (PH, vol 2,  
27 14).

28 Rome had once explained to her that he was a pimp, and the "PT training" or Pimp

1 Training, was a method of putting his prostitutes to work and keeping them in line. (PH, vol  
2 2, p. 18). He had previously explained that he and D-Roc were going to take the girls out to  
3 the desert and smack them around. (PH, vol 2, p. 51).

4 Corrina remembers D-Roc and Rome picking her up on Wednesday night from work  
5 and taking her home somewhere around 11 p.m. (PH, vol 2, p. 26 At around midnight, D-  
6 Roc and Rome left together. They did not see Rome until several hours later when he was  
7 beat up in the parking lot by Leonard Black. (PH, vol 2, p. 30). They heard statements by  
8 Rome in front of D-Roc after the murder about having the tires on the car changed. (PH, vol  
9 2, pp. 43-4). In fact, Corrina at one point tried to get the tires changed. When queried why  
10 he needed the tires changed, Rome, in the presence of D-Roc, stated that he had been out in  
11 the desert where the girls had been killed. (PH, vol 2, p. 46). When Corrina could not get  
12 the tires changed, she told Rome and D-Roc about the problem. They indicated that they  
13 would take care of it. (PH, vol 2, p. 49). Corrina heard D-Roc make mention of leaving the  
14 girls in the desert without clothing. (PH, vol 2, p. 37). Corrina overheard a conversation  
15 between D-Roc and Rome on Friday where they were checking the paper to see if there was  
16 any news in it. (PH, vol 2, p. 40).

#### 17 **ACCESSORY DONNY HERB'S TESTIMONY**

18 Donny Herb waived his preliminary hearing to plead guilty to accessory to murder.  
19 Donny testified during the preliminary hearing. Donny testified that he owed the green  
20 Oldsmobile but that Rome had borrowed it for the past two months. (PH, vol 5, pp. 5-6) That  
21 on some day in mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to  
22 pick-up Rome and Red. (PH, vol 5, p. 12). At the time, D-Roc, Victoria, and Christine were  
23 in the vehicle. After picking them up, he drove to his house and stayed there. (PH, vol 5, p.  
24 13). The rest left in the green Oldsmobile. Sometime thereafter, Rome told Donny that D-  
25 Roc beat up Red and that Rome, Victoria and Christine were there also. (PH, vol 5, pp. 22-  
26 3). After the beating, Rome told Donny that they drove to the Hard Rock to "put the girls to  
27 work" to sell drugs and prostitute themselves. (PH, vol 5, p. 24). D-Roc and Rome  
28 explained the reason for the beatings were the money owed by Victoria and Red. (PH, vol 5,

1 p. 25). Additionally, both Defendants had been looking for the girls for several days.

2 At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome.  
3 (PH, vol 5, p. 15). At the time, Donny was home. In the first phone call, Rome told Donny  
4 that D-Roc and Rome had the girls, that they were "had to put in some work", and asked him  
5 if he wanted to come. (PH, vol 5, p. 27). Donny said no. Rome called back and told him  
6 that if he wanted the green Oldsmobile, he was going to have to come and get it or they were  
7 going to drive to California and send it back to him on a flatbed truck. Donny agreed to  
8 drive his other car to meet them. (PH, vol 5, p. 15). Donny had trouble finding the location  
9 and had multiple phone calls with Rome. (PH, vol 5, pp. 16-7). When he almost arrived,  
10 Rome called and told him, "You know what we're doing out here. We're not just beating  
11 them up this time. You're involved in two murders now." (PH, vol 5, p. 18). In the  
12 background, Donny could here Rome and D-Roc talking about the killings. Rome asked D-  
13 Roc what was taking so long. D-Roc told Rome that he had broken the golf club. In  
14 response, Rome told D-Roc, "Okay. Just hit the bitch in the head with a rock." Thereafter,  
15 Rome told Donny that they were just cleaning up and would meet him in a minute. (PH, vol  
16 5, p. 19). At one point, Rome told Donny, "Victoria is dead." (PH, vol 5, p. 39).

17 Donny drove to the area of exit 56 by the Railroad pass casino and met up with D-  
18 Roc and Rome. The three then drove off to a remote desert location. (PH, vol 5, p. 28).  
19 Defendants began emptying items from the trunk of the Oldsmobile. D-Roc was emptying  
20 rocks, Rome removed a knife and D-Roc gave Donny the head of a golf club. (PH, vol 5, p.  
21 29). Rome disappeared for a shot time, then came back to the vehicles. Rome instructed D-  
22 Roc to burn the victim's clothing. (PH, vol 5, p. 34). Rome asked Donny to be his alibi, and  
23 D-Roc said his wife would alibi him. (PH, vol 5, p. 36).

24 Thereafter, both vehicles drove back to town. On the way, Rome called Donny and  
25 asked him to buy a bottle of water at a convenience store. (PH, vol. 5, p. 30). Donny did so,  
26 Rome drank it and D-Roc threw a plastic bag in a dumpster at that location. Rome asked  
27 Donny for money to change the tires. (PH, vol 5, p. 41). Donny gave him \$200. Thereafter,  
28 Rome left in the Oldsmobile and Donny drove D-Roc home.

1 Later in the week, Rome acknowledged that he had blood spatter on his pants, but he  
2 didn't know if it was the victims' or his own as he was beaten later that morning. (PH, vol 5,  
3 p. 35). Rome now indicated that Corrina and Lynn were now going to be his alibi. (PH, vol  
4 5, p. 37). When Rome, D-Roc, Corrina and Lynn were in the room, Rome said D-Roc beat  
5 up Christine, and that they took the clothes to keep them from leaving the desert. (PH, vol 5,  
6 p. 38).

7 Donny drove the detectives out to the remote location. (PH, vol 5, p. 42). During the  
8 ensuing search, a golf putter, broken in three places was found.

### 9 **DETECTIVE COLLINS**

10 Detective Collins testified to the examination of the crime scene. One thing of note,  
11 was a golf ball that appeared to be relatively new. (PH, vol 3, p. 373). On one occasion,  
12 Accessory Donald Herb helped him locate some of the murder weapons. (PH, vol 4, p. 87).  
13 On another occasion, Rome helped him locate some of the murder weapons. (PH, vol 4, p.  
14 88). Additionally, Detective Collins interviewed the Defendant D-Roc.

### 15 **D-ROC'S STORY**

16 D-Roc was first contacted on May 23, 2006 by HPD. (PH, vol 3, p. 378). At that  
17 time, D-Roc denied any knowledge of the any of the crimes, with the exception of beating  
18 Red in April. (PH, vol 3, p. 382). Specifically, D-Roc told Detective Collins that Red owed  
19 money to Tre Black, and D-Roc felt it was his responsibility to collect, so he beat her. (PH,  
20 vol 3, p. 383). On May 31<sup>st</sup>, D-Roc admitted to being at the Sportsman the day of the crime,  
21 however, said that Rome took him home around midnight. (PH, vol 4, p. 68).

### 22 **AUTOPSIES**

#### 23 **CHARLOTTE "CHRISTINE" COMBADO**

24 On May 21, 2006, Dr. Piotr Kubiczek of the Clark County Coroner's Office  
25 conducted an autopsy on the person of Charlotte Combado. (PH, vol 4, p. 5). Dr. Kubiczek  
26 identified multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen,  
27 and upper and lower extremities. (PH, vol 4, p. 16). Ultimately, he appeared to identify at  
28 least 20 blunt force injuries and two sharp force injuries. (PH, vol 4, pp. 17-20). The one to

1 the chest appears to be a superficial incision before death, however, the stab wound to the  
2 neck it peri-mortem as there is no injury to the skin itself from the wound. Ultimately, the  
3 cause of death is blunt and sharp force trauma to the head and thorax. The manner of death  
4 is homicide. There is an amount of methamphetamine in both the decomposition fluid and  
5 the liver.

## 6 **VICTORIA MAGEE**

7 On the same date, Dr. Piotr Kubiczek of the Clark County Coroner's Office  
8 conducted an autopsy on the person of Victoria Magee. (PH, vol 4, p. 5). Dr. Kubiczek  
9 identified multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen,  
10 and upper and lower extremities. (PH, vol 4, p. 6) Ultimately, he appeared to identify at  
11 least 31 blunt force injuries and three sharp force injuries. (PH, vol 4, pp. 8-15). All three  
12 appear to be superficial to the head, however, the stab wound to the jaw is peri- mortem as  
13 there is no injury to the skin itself from the wound. Ultimately, the cause of death is blunt  
14 and sharp force trauma to the head and thorax. The manner of death is homicide. There is  
15 an amount of cocaine in both the decomposition fluid and the liver.

## 16 **POINTS AND AUTHORITIES**

### 17 **I**

## 18 **STANDARD OF REVIEW**

19 The burden before a grand jury or justice of the peace is slight as compared to the  
20 burden of proof at trial. See Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980);  
21 Woodal v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-5 (1979). Probable cause to  
22 support a criminal charge "may be based on slight, even 'marginal' evidence, . . . because it  
23 does not involve a determination of the guilt or innocence of an accused." Sheriff v.  
24 Steward, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993) (quoting Sheriff v. Hodes, 96 Nev. 184,  
25 186, 606 P.2d 178, 180 (1980)). To commit an accused for trial, the State is not required to  
26 negate all inferences which might explain his conduct, but only to present enough evidence  
27 to support a reasonable inference that the accused committed the offense. Kinsey v. Sheriff,  
28 87 Nev. 361, 363, 487 P.2d 340, 341 (1971); see also, Sheriff v. Milton, 109 Nev. 412, 851

1 P.2d 417 (1993).

2 The sole function of the justice of the peace is to determine whether all of the  
3 evidence establishes probable cause to believe that an offense has been committed by a  
4 specific individual. The Court need not consider whether the evidence presented in the  
5 record would support a conviction since the State need not produce the quantum of proof  
6 required to establish guilt of the accused beyond a reasonable doubt. Miller v. Sheriff, 95  
7 Nev. 255, 256-7, 952 P.2d 774, 774-5 (1973). By applying the evidence elicited at the  
8 preliminary hearing to the probable cause standard, it is apparent the State met its burden.

## 9 II

### 10 SUFFICIENT EVIDENCE WAS PRESENTED INDEPENDENT OF DONALD 11 HERB'S TESTIMONY TO SUPPORT DEFENDANT MALONE'S INVOLVEMENT IN THE HOMICIDES

12 Defendant Malone asserts that without the testimony of Donald Herb, there was  
13 insufficient evidence to support his involvement in the murders. Defendant Malone's  
14 assertion fails to account for the motive evidence, his statements of prior intent, his plan to  
15 commit the homicide, his admissions after the homicides and his involvement in concealing  
16 the homicides.

17 Red described how Defendant Malone beat her in April of 2006. This beating was  
18 what prompted Defendant Malone to allege that Red owed Tre Black \$360 in lost "work."  
19 Defendant Malone felt it was his responsibility to collect. On May 16, 2006, Defendant  
20 Malone attempted to collect the debt. The manner in which he did so was to engage in a  
21 coordinated series of acts with Rome to lure Red out to a desert location to beat her. At the  
22 time, Rome was engaged in an effort to collect \$80 from Victoria. After the two engaged in  
23 the beating of Red, Defendant Malone and Rome drove the three girls to the Hard Rock.  
24 During the drive, Defendant Malone told all three girls, that if Victoria and Red did not pay  
25 back the money, or if Christine allowed either one of them to get away, there would be three  
26 shallow graves out in the desert where Red was beaten.

27 Red escaped and Victoria did not pay back the money. Christine and Victoria were  
28 found in the desert exactly where Defendant Malone stated they would be killed, just a day



1 after they got away. The evidence shows the girls were taken from Room 222 of the South  
2 Cove Apartments and that Defendant Malone lived in Room 217 of those Apartments with  
3 Tre Black. Moreover, Defendant himself acknowledged that he felt compelled to collect the  
4 debt from Red to the police.

5 If that were not enough, Corrina Phillips testified that Defendant Malone and Rome  
6 were in her apartment at the Sportsman on Tuesday May 16<sup>th</sup>. During that time, Defendant  
7 Malone indicated he was overheard on the phone indicating he was going to take the girls  
8 out to the desert for "PT time." Additionally, during that time, he pandered Victoria by  
9 ordering her to "give a blow job to somebody for a rock." (PH, vol 2, 12).

10 On Wednesday evening, Corrina puts Defendant Malone and Rome together at the  
11 Sportsman after 11 p.m. on Wednesday, May 17<sup>th</sup>. Corrina indicated that they left at about  
12 Midnight, together. Corrina next saw Rome after he had been beaten by Leonard Black.  
13 After the homicide, Corrina overheard Rome and Defendant Malone discuss changing the  
14 tires. She also heard Defendant Malone indicate that he left the girls in the desert without  
15 clothing. The victims were found naked. Finally, Defendant Malone was witnessed looking  
16 in the newspaper for stories about the bodies before they were reported. Certainly, that alone  
17 is sufficient evidence to support the bindover of Defendant Malone on the homicide charges.  
18 However, the Court still needs to consider Donald Herb.

### 19 III

#### 20 **DONALD HERB IS NOT A CO-CONSPIRATOR AS A MATTER OF LAW,** 21 **AND THEREFORE NEED NOT BE CORROBORATED**

22 NRS 175.291 states:

23 1. A conviction shall not be had on the testimony of an accomplice unless he is  
24 corroborated by other evidence which in itself, and without the aid of the  
25 testimony of the accomplice, tends to connect the defendant with the  
26 commission of the offense; and the corroboration shall not be sufficient if it  
27 merely shows the commission of the offense or the circumstances thereof.

28 2. An accomplice is hereby defined as one who is liable to prosecution, for the  
identical offense charged against the defendant on trial in the cause in which  
the testimony of the accomplice is given.

While a reading of the statute appears to only apply to trial, the Nevada Supreme Court has

1 ruled that the corroboration rule applies to preliminary hearings. See Lamb v. Bennett, 87  
2 Nev. 89, 482 P.2d 298 (1971).

3 Under 175.291, an accomplice is defined as a person who is liable to prosecution for  
4 the identical offense charged against the defendant. If, from the testimony of the witness'  
5 alone, there is no doubt the witness is liable for the charged crimes, he is an accomplice as a  
6 matter of law. See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). However, if the  
7 testimony of the witness leaves doubt whether he is liable for the charged crime, then the  
8 question of whether or not he is an accomplice is a matter of fact. See id (citing Austin v.  
9 State 87 Nev. 578, 588-89, 491 P.2d 724, 730-31 (1971)). Matters of fact are determinations  
10 for a jury. See Ford v. State, 99 Nev. 209, 660 P.2d 992 (1983).

11 Donald Herb's testimony taken at face value alone does not establish that he is liable  
12 for the murders of Christine and Victoria. From his testimony, there is no evidence to  
13 support an accusation that Donny participated in the killing of Victoria and Christine. At  
14 most, it may be argued that at some point, he had knowledge that the murder was occurring.  
15 However, mere knowledge or approval of, or acquiescence in, the object and purpose of a  
16 conspiracy without an agreement to cooperate in achieving such object or purpose does not  
17 make one a party to conspiracy. Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996)  
18 (overruled on other grounds by, Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).  
19 Mere presence is never sufficient to make someone liable for a crime. See Winston v.  
20 Sheriff, Clark County, 92 Nev. 616, 555 P.2d 1234 (1976). Moreover, in order to hold  
21 someone liable for a crime on an aiding and abetting theory, it must be shown that the person  
22 had the specific intent that the crime be committed. See Sharma v. State, 118 Nev. 648, 56  
23 P.3d 868 (2002). As such, Defendant is not a co-conspirator as a matter of law. Therefore,  
24 the determination of whether or not he is a co-conspirator is a question left to the jury. As  
25 such, he need not be corroborated, unless and until, a jury determines he is a co-conspirator.  
26 See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002) and Ford v. State, 99 Nev. 209, 660  
27 P.2d 992 (1983).

#### 28 IV

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1 (2004), excludes them from the definition of “testimonial.” Crawford. at 56, 124 S.Ct. 1354.

2 If there is any question that the Confrontation Clause only applies to “testimonial”  
3 statements, that question was answered in Davis v. Washington, 547 U.S. \_\_\_, 126 S.Ct.  
4 2266 (2006). In Davis, the Court needed to decide whether the Confrontation Clause **ONLY**  
5 applied to testimonial statements:

6 We must decide, therefore, whether the Confrontation Clause applies only to  
7 testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

8 The answer to the first question was suggested in Crawford, even if not  
explicitly held:

9 “The text of the Confrontation Clause reflects this focus [on  
10 testimonial hearsay]. It applies to ‘witnesses’ against the accused-  
11 in other words, those who ‘bear testimony.’ 1 N. Webster, An  
12 American Dictionary of the English Language (1828).  
13 ‘Testimony,’ in turn, is typically ‘a solemn declaration or  
affirmation made for the purpose of establishing or proving some  
fact.’ Ibid. An accuser who makes a formal statement to  
government officers bears testimony in a sense that a person who  
makes a casual remark to an acquaintance does not.”

14 541 U.S., at 51, 124 S.Ct. 1354.

15 **A limitation so clearly reflected in the text of the constitutional provision**  
16 **must fairly be said to mark out not merely its “core,” but its perimeter.**

17 Davis, 126 S.Ct. at 2274 (footnotes omitted, emphasis added).

18 In the instant matter, the statements made by Rome while he and Defendant Malone  
19 were at the murder scene viciously killing Christine and Victoria clearly qualify under NRS  
20 51.035(e). The statements were made by a co-conspirator, Rome. All but one of the  
21 statements were made to enlist the help of the accessory after the fact to come and help the  
22 co-conspirators conceal the crime. The other statement was giving direction to his other co-  
23 conspirator, Defendant Malone, on how to kill one of the victims. As such, they are in the  
24 course of and in furtherance of the conspiracy, and admissible.

25 //

26 //

## 27 VI

28 **DEFENDANT MALONE WAS PROPERLY CHARGED WITH A  
KIDNAPPING IN RELATION TO BOTH BEATINGS OF RED**

1 Defendant Malone asserts that because no force was used to get Red behind the bar or  
2 to the desert location, he cannot be held to answer for a kidnapping. Defendant is incorrect  
3 in his assertion that force is necessary for a kidnapping. The crime of kidnapping only  
4 requires an act which seizes, confines, **inveigles, entices, decoys**, abducts, conceals, kidnaps  
5 or carries away a person **by any means whatsoever** with the intent to hold or detain . . . for  
6 the purpose of substantial bodily harm. NRS 200.310 (emphasis added). Certainly the facts  
7 of this case fall within that definition.

8 As to the location behind the bar, Defendant Malone enticed Red behind the bar  
9 where she was excluded from the view of other people. The purpose in doing so was to beat  
10 her with impunity without anyone seeing or coming to her rescue. While no force was used  
11 to get her to the secluded location behind the bar, forcible movement is never a requirement  
12 of a kidnapping. See Bridges v. State, 116 Nev. 752, 765 (2000).

13 In Bridges, the Defendant convinced his ex-wife and her new boyfriend to drive to a  
14 location where Defendant claimed a trailer with his ex-wife's stuff was located. Once they  
15 got to the location, Defendant killed the new boyfriend. Defendant Bridges asserted  
16 essentially the same claim that Defendant McCarty now claims, essentially that the new  
17 boyfriend voluntarily went to the location of his death. In rejecting the argument and  
18 affirming his death sentence, the Supreme Court indicated using taking someone without  
19 force still constitutes a kidnapping. This analysis clearly applies to this case.

20 As to the May 16<sup>th</sup> beating, Defendant Malone and Rome drove Red to a remote  
21 location so she could be beaten with impunity. The only purpose for going to the location  
22 was to beat Red where she would neither be seen or heard. In fact, Defendant Malone  
23 indicated that the purpose in taking the girls to the desert location was so that he could give  
24 them "PT time." As such, he is guilty of kidnapping even if Red went along willingly as,  
25 forcible movement is never a requirement of a kidnapping. See Bridges v. State, 116 Nev.  
26 752, 765 (2000).

## 27 VII

1       **DEFENDANT MALONE WAS PROPERLY CHARGED FOR A CONSPIRACY TO**  
2       **COMMIT KIDNAPPING AND A BATTERY OF RED ON MAY 16<sup>th</sup>**

3       Defendant asserts that no evidence was presented which indicated that Defendant  
4       Malone and Rome entered into an agreement to kidnap Red on the night she was beaten by  
5       Defendant Malone. The circumstances of Defendant Malone and Rome's behavior  
6       demonstrates that he is guilty of conspiracy.

7       Nevada law defines a conspiracy as "an agreement between two or more  
8       persons for an unlawful purpose." "A person who knowingly does any act to  
9       further the object of a conspiracy, or otherwise participates therein, is  
10      criminally liable as a conspirator ...." **"Evidence of a coordinated series of**  
11      **acts furthering the underlying offense is sufficient to infer the existence of**  
12      **an agreement and support a conspiracy conviction."**

13      Bolden v. State, 124 P.3d 191, 194 (Nev.2005) (internal footnotes and citations omitted)  
14      (Emphasis added).

15      "[C]onspiracy is seldom susceptible of direct proof and is usually established  
16      by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785,  
17      790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990) (quoting State v. Dressel, 85 N.M.  
18      450, 451, 513 P.2d 187, 188 (1973)).

19      Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (overruled on other grounds by,  
20      Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

21      Certainly, slight or marginal evidence was presented that Defendant Malone and  
22      Rome engaged in a coordinated series of acts furthering the underlying kidnapping and  
23      beating of Red. First, Rome lured Red to the green Oldsmobile at the Sahara Valet which  
24      contained Defendant Malone. Thereafter, once Donny was dropped off, Rome drove the car  
25      back to the Royal Sportsman where D-Roc was acting strange with Red. After getting back  
26      in the car, Rome proceeded to drive Red to a remote location where D-Roc beat her without  
27      any evidence that Rome was told where to go. While she was getting beaten by Defendant  
28      Malone, Rome told Red not to fight back and just take the beating. Rome told Defendant  
29      Malone to leave her out there to die. Finally, Rome told her if she did not get back into the  
30      vehicle, Rome would leave her there. On the way back from the desert, Defendant Malone  
31      and Rome engaged in the threats to kill Red if she did not repay the money owed to D-Roc.  
32      Defendant Malone and Rome also threatened to kill Christine if she left Red get away.  
33      These coordinated series of acts is enough to convict Defendant Malone of the Conspiracy to

1 Kidnap Red on May 16th, let alone the "slight or marginal evidence" necessary to hold  
2 Defendant to answer.

3 If that overwhelming amount of evidence was not enough, Corrina Phillips testified  
4 that both Rome and Defendant Malone were talking about taking the girls out into the desert  
5 to beat them prior to it happening. So in addition to the "coordinated series of acts", there is  
6 evidence of prior planning. All of the evidence is more than necessary to hold Defendant  
7 Malone to answer to the charge.

## 8 VIII

### 9 DEFENDANT MALONE WAS PROPERLY CHARGED WITH PANDERING

10 Defendant Malone asserts there was insufficient evidence to establish that he  
11 pandered either Victoria or Christine. There was direct evidence of his pandering of Victoria  
12 and the facts and circumstances of the case establishes that he pandered Christine.

13 Corrina Phillips testified that Defendant Malone and Rome sent Victoria upstairs to  
14 "give a blow job to somebody for a rock." (PH, vol 2, 12). That alone is sufficient to  
15 support the charge of pandering. However, Donny testified that Rome told him, before the  
16 murder but after the beating, that they had dropped the girls off at the Hard Rock to "put  
17 them to work." Such a statement is admissible against Defendant Malone as a co-  
18 conspirator statement in the course and in furtherance of the crime. See NRS 51.035(e).

19 Defendant Malone was overheard indicating that he intended to take the girls out to  
20 the desert for "PT time." What happened on the evening of May 17 was an extension of  
21 pimp training. Pimp training is just an inarticulate word for pandering. As such, the beating  
22 of Christine was an extension of Defendant Malone's pandering efforts.

23 Moreover, the facts of the case when the victims were dropped off at the Hard Rock  
24 demonstrate that Defendants were attempting to pander all three (3) victims. They were  
25 dropped off at a hotel and told to make money. Red took this to mean that they were trying  
26 to prostitute them. Additionally, the evidence showed that Christine was one of Defendant  
27 McCarty's girls and he described himself as a pimp. Defendant Malone was his co-  
28 conspirator.

IX

**DEFENDANT MALONE WAS PART OF A CONSPIRACY  
TO MURDER OF CHRISTINE AND VICTORIA**

Defendant Malone asserts there is insufficient evidence to charge him with a conspiracy in the killing of Victoria and Christine.

**“Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction.”**

Bolden v. State, 124 P.3d 191, 194 (Nev.2005) (internal footnotes and citations omitted) (Emphasis added).

“[C]onspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties.” Gaitor v. State, 106 Nev. 785, 790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990) (quoting State v. Dressel, 85 N.M. 450, 451, 513 P.2d 187, 188 (1973)).

Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (overruled on other grounds by, Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

Aside from the overwhelming evidence of the coordinated series of acts to commit the murder with Rome, there was direct evidence of the murder. First, Defendant Malone indicated before the murders that they intended to take the girls out to the desert and beat them. Once he was out in the desert, Rome told Donny that they were going to Murder the girls. See NRS 51.035(e). Finally during the murder, Rome told Defendant Malone to hit one of the girls with a rock when Defendant Malone indicated that the golf club had broken. After the murder, Defendant Malone engaged in disposal of the murder weapons and clothing.

Defendant McCarty indicated to Donny during while driving the girls to the murder scene, that Defendant Malone and he had the girls and were going to “put in some work.” See NRS 51.035(e). If that were not enough, Defendant Malone along with Rome specifically told the victims they were going to kill them if they did not make the money. Defendant Malone, along with Rome, told them they would be killed in the area where Red was beaten. The money wasn’t repaid and the girls wound up dead in the exact location Defendant Malone and Rome said they would be killed. Additionally, Defendant Malone



1 was overheard by Corrina Phillips that he left the girls in the desert without their clothes.

2 X

3 **DEFENDANT WAS PROPERLY CHARGED WITH BOTH A BURGLARY**  
4 **AND A CONSPIRACY TO COMMIT BURGLARY**

5 The evidence reflects that Defendant McCarty and D-Roc engaged in a coordinated  
6 series of acts which resulted in the Burglary of 222. The last place that Victoria and  
7 Christina were seen alive was in Room 222 of the South Cove Apartments. The evidence  
8 shows that they were taken from that location because of the items which remained in that  
9 location, including the shoes of Victoria, the only pair she owned and would not have left.  
10 Moreover, one of the murder weapons was taken from Room 222. When Red was first in  
11 Room 222, there were several golf clubs. When she returned, not only were the girls  
12 missing, but so was a golf club. One of the murder weapons located was a broken golf club.  
13 Also, at the scene of the murder was a fresh golf ball.

14 **“Evidence of a coordinated series of acts furthering the underlying offense**  
15 **is sufficient to infer the existence of an agreement and support a**  
16 **conspiracy conviction.”**

17 Bolden v. State, 124 P.3d 191, 194 (Nev.2005). As such, Defendant McCarty is properly  
18 charged.

19 Defendant Malone also asserts that because there was no evidence that Defendant  
20 Malone was not welcome at Room 222, that the crime of Burglary cannot be established.  
21 Defendant is charged in Count 12:

22 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
23 wilfully, unlawfully, and feloniously enter, with intent to commit assault  
24 and/or battery and/or a felony, to-wit: Kidnapping and/or Murder, that certain  
25 building occupied by LEONARD ROBINSON, located at 1525 East Fremont,  
26 Room No. 222, Las Vegas, Clark County, Nevada.

27 (Exhibit 1). Evidence presented at the preliminary hearing is that the occupant of the  
28 apartment was Leonard Robinson and that Victoria and Christine were left there by Leonard  
Black, DeMarcus, and Red shortly before their abduction.

Consent to enter is not a defense to the crime of burglary so long as it is shown that  
entry was made with the specific intent to commit the alleged crimes. See Thomas v. State,

1 94 Nev. 605 (1978). The intention with which entry was made is a question of fact which  
2 may be inferred from the defendant's conduct and all other circumstances disclosed by the  
3 evidence. See Flynn v. State, 93 Nev. 247 (1977). Whether Leonard Robinson gave consent  
4 to enter is not relevant to the determination of whether a person committed a burglary. In  
5 fact, a person can burglarize their own home. The question is whether the evidence shows  
6 that Defendant entered with the intent to commit an assault, battery, kidnapping, or murder  
7 therein. Clearly, the evidence demonstrates those facts.

8 Defendant also asserts that there is insufficient notice in the charging document to  
9 allow him to know what conduct he is being charged with. Such an argument is meritless.  
10 Defendant is alleged to have entered Room 222, whose owner is Leonard Robinson, on May  
11 17<sup>th</sup>, with the intent to commit the alleged crimes. What more information need he be  
12 provided. Moreover, Defendant provides no authority for the proposition that if this Court  
13 found insufficient notice in the pleading document, that dismissal is the proper remedy. The  
14 proper remedy would be to allow the State to amend the information. See NRS 173.095(1);  
15 State v. Eighth Judicial District Court, 997 P.2d 126 (Nev. 2000).

## 16 XI

### 17 **THERE IS NOTHING IMPROPER WITH PLEADING AN ACCESSORY** 18 **AFTER THE FACT TO THE CRIME HE COMMITTED** 19 **WITH AN AGREEMENT TO TESTIFY TRUTHFULLY**

20 Defendant asserts, without citing to controlling authority in this jurisdiction to the  
21 contrary, that plea bargaining of Donny was inappropriate. The Nevada Supreme Court has  
22 stated:

23 We now conclude that bargaining for specific trial testimony, i.e., testimony  
24 that is essentially consistent with the information represented to be factually  
25 true during negotiations with the State, and withholding the benefits of the  
26 bargain until after the witness has testified, is not inconsistent with the search  
27 for truth or due process. However, we emphasize that our ruling does not  
28 countenance a bargain for testimony conforming to a predetermined script or  
for leniency or other consideration contingent upon the State obtaining a  
conviction. We hold only that when our prosecutors bargain in good faith for  
testimony represented to be factually accurate, it is not a violation of due  
process or public policy to withhold the benefit of the bargain until after the  
witness testifies.

1 Although we have concluded that executory plea agreements are acceptable  
2 under Nevada law, we are not unmindful of the danger posed by perjured  
3 testimony concocted by persons seeking lenient treatment in connection with  
4 their own criminal problems. We have already noted that the State may  
5 properly enter into plea arrangements when the putative witness persuasively  
6 professes to have truthful information of value and a willingness to accurately  
7 relate such information at trial. The less than remote possibility remains,  
8 however, that the recipient of the State's promise has fabricated his or her  
9 information and will repeat it at trial as a perjurer. Courts across the land have,  
10 in part, sought to deal with the incentive to commit perjury by requiring at trial  
11 the baring of all aspects of the bargain pursuant to which the testimony is  
12 given. As a result, it is generally determined that the terms of the State's  
13 bargain concern only the weight, and not the admissibility of the testimony.

8 In accordance with the foregoing, we now embrace the rule generally  
9 prevailing in both state and federal courts, and hold that any consideration  
10 promised by the State in exchange for a witness's testimony affects only the  
11 weight accorded the testimony, and not its admissibility. Second, we also hold  
12 that the State may not bargain for testimony so particularized that it amounts to  
13 following a script, or require that the testimony produce a specific result.  
14 Finally, the terms of the *quid pro quo* must be fully disclosed to the jury, the  
15 defendant or his counsel must be allowed to fully cross-examine the witness  
16 concerning the terms of the bargain, and the jury must be given a cautionary  
17 instruction.

13 Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). The State strictly  
14 conformed to this holding. In the Guilty Plea Agreement as well as the Agreement to Testify,  
15 the State did not bargain for anything other than the truth from Donald Herb. See Exhibit 2.  
16 Additionally, it isn't even the States' responsibility to decide what that truth is, it is the  
17 responsibility of the Court. As such, Defendant's argument is without merit.

### 18 CONCLUSION

19 As overwhelming evidence was presented to support each and every charge in the  
20 information, Defendant Malone's Writ of Habeas Corpus (Pre-Trial) should be denied.

21 DATED this 22nd day of November, 2006.

22 Respectfully submitted,

23 DAVID ROGER  
24 Clark County District Attorney  
25 Nevada Bar # 002781

26 BY /s/ MARC DIGIACOMO  
27 MARC DIGIACOMO  
28 Deputy District Attorney  
Nevada Bar #006955

*Shirley C. Paragon*  
CLERK

1 **INFO**

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11 Attorney for Plaintiff

12 I.A. 8/16/06  
13 9:00 A.M.  
14 PD; SGRO

DISTRICT COURT  
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 DOMONIC RONALDO MALONE,  
19 #1670891,  
20 JASON DUVAL MCCARTY, #0932255

21 Defendants.

Case No: C224572  
Dept No: V

INFORMATION

22 STATE OF NEVADA }

23 COUNTY OF CLARK }

ss.

24 DAVID ROGER, District Attorney within and for the County of Clark, State of  
25 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

26 That DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY, the  
27 Defendant(s) above named, having committed the crimes of CONSPIRACY TO COMMIT  
28 KIDNAPPING (Felony - NRS 200.310, 200.320, 199.480); FIRST DEGREE  
KIDNAPPING (Felony - NRS 200.310, 200.320); BATTERY WITH SUBSTANTIAL  
BODILY HARM (Felony - NRS 200.481); PANDERING (Felony - NRS 201.300);  
CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480);  
CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 205.060,  
199.480); BURGLARY (Felony - NRS 205.060); MURDER WITH USE OF A DEADLY  
WEAPON (Felony - NRS 200.010, 200.030, 193.165); and ROBBERY WITH USE OF A

C:\PROGRAM FILES\NEVIA.COM\DOCUMENT CONVERTER\TEMP\19752-7005

**EXHIBIT "1"**

1 DEADLY WEAPON (Felony - NRS 200.380, 193.165), on or between April, 2006 and May  
2 19, 2006, within the County of Clark, State of Nevada, contrary to the form, force and effect  
3 of statutes in such cases made and provided, and against the peace and dignity of the State of  
4 Nevada,

5 COUNT 1 - FIRST DEGREE KIDNAPPING

6 Defendant DOMONIC RONALDO MALONE did, in April of 2006, wilfully,  
7 unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy,  
8 abduct, conceal, kidnap, or carry away MELISSA ESTORES, a human being, with the intent  
9 to hold or detain the said MELISSA ESTORES against her will, and without her consent, for  
10 the purpose of inflicting substantial bodily harm on the said MELISSA ESTORES.

11 COUNT 2 - BATTERY WITH SUBSTANTIAL BODILY HARM

12 Defendant DOMONIC RONALDO MALONE, did, in April of 2006, then and there  
13 wilfully, unlawfully, and feloniously use force or violence upon the person of another, to-  
14 wit: MELISSA ESTORES, by beating and kicking the said MELISSA ESTORES about the  
15 head and body, resulting in substantial bodily harm to the said MELISSA ESTORES

16 COUNT 3 - CONSPIRACY TO COMMIT KIDNAPPING

17 Defendants did, on or about May 16, 2006, then and there meet with each other and  
18 between themselves, and each of them with the other, wilfully, unlawfully, and feloniously  
19 conspire and agree to commit a crime, to-wit: kidnap MELISSA ESTORES, and in  
20 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 4-6,  
21 said acts being incorporated by this reference as though fully set forth herein.

22 COUNT 4 - FIRST DEGREE KIDNAPPING

23 Defendants did, on or about May 16, 2006, wilfully, unlawfully, feloniously, and  
24 without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or  
25 carry away MELISSA ESTORES, a human being, with the intent to hold or detain the said  
26 MELISSA ESTORES against her will, and without her consent, for the purpose of inflicting  
27 substantial bodily harm on the said MELISSA ESTORES.

28 //

1 COUNT 5 - BATTERY WITH SUBSTANTIAL BODILY HARM

2 Defendants did, on or about May 16, 2006, then and there wilfully, unlawfully, and  
3 feloniously use force or violence upon the person of another, to-wit: MELISSA ESTORES,  
4 by beating and kicking the said MELISSA ESTORES about the head and body, resulting in  
5 substantial bodily harm to the said MELISSA ESTORES, the Defendants being responsible  
6 under one or more of the following theories of criminal liability, to-wit: (1) by directly or  
7 indirectly committing said crime, and/or (2) by conspiring with each other to commit the  
8 crime of battery and/or kidnapping where each co-conspirator is liable for the general intent  
9 crimes committed by fellow co-conspirators which were a foreseeable consequence of the  
10 conspiracy; and/or (3) by aiding and abetting, by Defendant JASON DUVAL MCCARTY  
11 driving the said MELISSA ESTORES and Defendant DOMONIC RONALDO MALONE to  
12 the location where said battery took place, then instructing the said MELISSA ESTORES to  
13 submit to said beating.

14 COUNT 6 - ROBBERY

15 Defendant did, on or between May 16, 2006 and May 17, 2006, then and there  
16 wilfully, unlawfully, and feloniously take personal property, to-wit: purse and/or its contents,  
17 from the person of MELISSA ESTORES, or in her presence, by means of force or violence  
18 or fear of injury to, and without the consent and against the will of the said MELISSA  
19 ESTORES, the Defendants being responsible under one or more of the following theories of  
20 criminal liability, to-wit: (1) by directly or indirectly committing said crime, and/or (2) by  
21 conspiring with each other to commit the crime of battery and/or kidnapping where each co-  
22 conspirator is liable for the general intent crimes committed by fellow co-conspirators which  
23 were a foreseeable consequence of the conspiracy; and/or (3) by aiding and abetting, by  
24 Defendant JASON DUVAL MCCARTY driving the said MELISSA ESTORES and  
25 Defendant DOMONIC RONALDO MALONE to the location where a battery took place,  
26 then instructing the said MELISSA ESTORES to submit to said beating, thereafter driving  
27 both DOMONIC RONALDO MALONE and MELISSA ESTORES from the location as  
28 DOMONIC RONALDO MALONE robbed MELISSA ESTORES of her purse and/or its

1 contents.

2 COUNT 7 - CONSPIRACY TO COMMIT KIDNAPPING

3 Defendants did, on, about, or between May 17, 2006 and May 19, 2006, then and  
4 there meet with each other and between themselves, and each of them with the other,  
5 wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: kidnap  
6 MELISSA ESTORES and/or CHARLOTTE COMBADO and/or VICTORIA MAGEE, and  
7 in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 2-3,  
8 said acts being incorporated by this reference as though fully set forth herein.

9 COUNT 8 - PANDERING

10 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
11 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
12 compel CHARLOTTE COMBADO to become a prostitute, and/or to engage or continue to  
13 engage in prostitution.

14 COUNT 9 - PANDERING

15 Defendants did, on or between May 16, 2006 and May 17, 2006, then and there  
16 wilfully, unlawfully, and feloniously induce, persuade, encourage, inveigle, entice, or  
17 compel VICTORIA MAGEE to become a prostitute, and/or to engage or continue to engage  
18 in prostitution.

19 COUNT 10 - CONSPIRACY TO COMMIT MURDER

20 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
21 with each other and between themselves, and each of them with the other, wilfully,  
22 unlawfully, and feloniously conspire and agree to commit a crime, to-wit: Murder, and in  
23 furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 13-19,  
24 said acts being incorporated by this reference as though fully set forth herein.

25 COUNT 11 - CONSPIRACY TO COMMIT BURGLARY

26 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there meet  
27 with each other and between themselves, and each of them with the other, wilfully and  
28 unlawfully conspire and agree to commit a crime, to-wit: Burglary, and in furtherance of

1 said conspiracy, Defendants did commit the acts as set forth in Count 13, said acts being  
2 incorporated by this reference as though fully set forth herein.

3 COUNT 12 - BURGLARY

4 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
5 wilfully, unlawfully, and feloniously enter, with intent to commit assault and/or battery  
6 and/or a felony, to-wit: Kidnapping and/or Murder, that certain building occupied by  
7 LEONARD ROBINSON, located at 1525 East Fremont, Room No. 222, Las Vegas, Clark  
8 County, Nevada.

9 COUNT 13 - FIRST DEGREE KIDNAPPING

10 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,  
11 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,  
12 conceal, kidnap, or carry away CHARLOTTE COMBADO, a human being, with the intent  
13 to hold or detain the said CHARLOTTE COMBADO against her will, and without her  
14 consent, for the purpose of committing murder.

15 COUNT 14 - FIRST DEGREE KIDNAPPING

16 Defendants did, on or between May 17, 2006 and May 19, 2006, wilfully, unlawfully,  
17 feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct,  
18 conceal, kidnap, or carry away VICTORIA MAGEE, a human being, with the intent to hold  
19 or detain the said VICTORIA MAGEE against her will, and without her consent, for the  
20 purpose of committing murder.

21 COUNT 15 - MURDER WITH USE OF A DEADLY WEAPON

22 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
23 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and  
24 with malice aforethought, kill CHARLOTTE COMBADO, a human being, by striking the  
25 said CHARLOTTE COMBADO about the head and body with a deadly weapon, to-wit: a  
26 golf club and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown  
27 sharp object, the said actions of the Defendants resulting in the death of the said  
28 CHARLOTTE COMBADO; the Defendants being responsible under one or more of the



1 following principles of criminal liability, to-wit: (1) by having premeditation and  
2 deliberation in its commission; and/or (2) the killing occurring during the perpetration or  
3 attempted perpetration of kidnapping and/or robbery and/or burglary and/or (3) by being  
4 liable as co-conspirator for the acts done in furtherance of the conspiracy, which acts were  
5 intended by the Defendants; and/or (4) by aiding and abetting in the commission of the crime  
6 by accompanying each other to the crime scene where the Defendants acted as lookouts for  
7 one another, the Defendants did physically take the said CHARLOTTE COMBADO, to a  
8 remote area, the Defendants did take personal property from the person or presence of the  
9 said CHARLOTTE COMBADO, the Defendants did either both physically strike the said  
10 CHARLOTTE COMBADO, or did act as lookout and prevent her from escaping while the  
11 other struck the said CHARLOTTE COMBADO about the head and body with a golf club  
12 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
13 object, the said actions of the Defendants resulting in the death of the said CHARLOTTE  
14 COMBADO, the Defendants left the crime scene together, the Defendants encouraging one  
15 another throughout by actions and words, the Defendant and the accomplice acting in  
16 concert throughout each with intent to commit murder.

17 COUNT 16 - MURDER WITH USE OF A DEADLY WEAPON

18 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
19 wilfully, feloniously, without authority of law, and with premeditation and deliberation, and  
20 with malice aforethought, kill VICTORIA MAGEE, a human being, by striking the said  
21 VICTORIA MAGEE about the head and body with a deadly weapon, to-wit: a golf club  
22 and/or a knife and/or a rock and/or an unknown blunt object and/or an unknown sharp  
23 object, the said actions of the Defendants resulting in the death of the said VICTORIA  
24 MAGEE; the Defendants being responsible under one or more of the following principles of  
25 criminal liability, to-wit: (1) by having premeditation and deliberation in its commission;  
26 and/or (2) the killing occurring during the perpetration or attempted perpetration of  
27 kidnapping and/or robbery and/or burglary and/or (3) by being liable as co-conspirator for  
28 the acts done in furtherance of the conspiracy, which acts were intended by the Defendants;

1 and/or (4) by aiding and abetting in the commission of the crime by accompanying each  
2 other to the crime scene where the Defendants acted as lookouts for one another, the  
3 Defendants did physically take the said VICTORIA MAGEE, to a remote area, the  
4 Defendants did take personal property from the person or presence of the said VICTORIA  
5 MAGEE, the Defendants did either both physically strike the said VICTORIA MAGEE, or  
6 did act as lookout and prevent her from escaping while the other struck the said VICTORIA  
7 MAGEE about the head and body with a golf club and/or a knife and/or a rock and/or an  
8 unknown blunt object and/or an unknown sharp object, the said actions of the Defendants  
9 resulting in the death of the said VICTORIA MAGEE, the Defendants left the crime scene  
10 together, the Defendants encouraging one another throughout by actions and words, the  
11 Defendant and the accomplice acting in concert throughout each with intent to commit  
12 murder.

13 COUNT 17 - ROBBERY WITH USE OF A DEADLY WEAPON

14 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
15 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
16 person of CHARLOTTE COMBADO, or in her presence, by means of force or violence or  
17 fear of injury to, and without the consent and against the will of the said CHARLOTTE  
18 COMBADO, said Defendants using a deadly weapon, to-wit: a golf club and/or a knife  
19 and/or a rock and/or other unidentified blunt or sharp object, during the commission of said  
20 crime.

21 COUNT 18 - ROBBERY WITH USE OF A DEADLY WEAPON

22 Defendants did, on or between May 17, 2006 and May 19, 2006, then and there  
23 wilfully, unlawfully, and feloniously take personal property, to-wit: clothing, from the  
24 person of VICTORIA MAGEE, or in her presence, by means of force or violence or fear of  
25 injury to, and without the consent and against the will of the said VICTORIA MAGEE, said

26 //

27 //

28 //

1 Defendants using a deadly weapon, to-wit: a golf club and/or a knife and/or a rock and/or  
2 other unidentified blunt or sharp object, during the commission of said crime.

3  
4  
5 BY

*David Roger*

6 DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

7 Names of witnesses known to the District Attorney's Office at the time of filing this  
8 Information are as follows:

9 <u>NAME</u>	<u>ADDRESS</u>
10 ALLRED, CLAY	HPD #1221
11 BENJAMINS, FELICIA	HPD #720
12 COLLINS, GERARD	HPD #324
13 ESTORES, MELISSA	UNKNOWN ADDRESS
14 FUENTES, FRANKLIN	HPD #621
15 HALL, RAMAAN	UNKNOWN ADDRESS
16 HERB, DONALD	UNKNOWN ADDRESS
17 HERB, HAROLD	140 SIR NOBLE ST., LVN
18 HOSAKA, MARK	HPD #777
19 KUBICZEK, PIOTR DR.	CORONER'S OFFICE
20 NAGEL, LYNN	C/O CCDA OFFICE
21 PARKER, DAVID	CANCUN APARTMENTS
22 PHILLIPS, CORRINA	C/O CCDA OFFICE
23 RIDINGS, CRAIG	HPD #358
24 ROBINSON, LEONARD	1525 E. FREMONT #F-222, LVN
25 WEBSTER, MICHAEL	HPD #899

26  
27 DA#06FH0742A, B/mb  
HPD EV#06-11513  
28 CONSP; KIDNAP; BWSBH; BURG; MWDW; RWDW - F  
(TK5)

ORIGINAL

1 ANAG  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 MARC DIGIACOMO  
6 Deputy District Attorney  
7 Nevada Bar #006955  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

FILED IN CLERK'S OFFICE  
AUG 02 2006  
BY Chanel West  
CHANEL WEST

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 DONALD JAY HERB,  
13 #1217129

14 Defendant.

Case No. C 201572

Dept No. XII

15  
16 AGREEMENT TO TESTIFY

17 IT IS HEREBY AGREED by and between the State of Nevada, by the Clark County  
18 District Attorney and through the undersigned Deputy, MARC DIGIACOMO, and  
19 DONALD JAY HERB, by and through his undersigned defense attorney, BEN DURHAM:

20 1. DONALD JAY HERB will cooperate voluntarily with the Clark County District  
21 Attorney's Office and the Las Vegas Metropolitan Police Department in the investigation  
22 and prosecution in Case No. 06FH0742A, B, *State of Nevada vs. Domonic Ronaldo Malone*  
23 *and/or Jason Duval McCarty*, concerning the murder and/or kidnapping and/or pandering of  
24 Charlotte Combado and/or Victoria Magee and/or Melissa Estores, which occurred on or  
25 between May 16, 2006 and May 19, 2006.

26 2. DONALD JAY HERB will cooperate voluntarily by providing true information  
27 and by testifying fully and truthfully in all court proceedings in the above referenced case  
28 against the co-defendants Domonic Ronaldo Malone and/or Jason Duval McCarty.

3. The full terms of the plea agreement are set forth in the document styled Guilty

EXHIBIT "L"

1 Plea Memorandum, a copy of which is attached hereto and incorporated herein by reference.  
2 DONALD JAY HERB shall receive the benefits described in this agreement subject to his  
3 compliance with all of the terms and conditions contained in this document.

4 4. It is further understood that as a result of entering this agreement, DONALD JAY  
5 HERB is waiving all appeal rights with respect to the entry of plea, speedy trial rights, and  
6 any other right to appeal any issue as a result of his prosecution in the instant case.

#### 7 OBLIGATION TO BE TRUTHFUL

8 OVERRIDING ALL ELSE, it is understood that this agreement requires from  
9 DONALD JAY HERB an obligation to do nothing other than to tell the truth. It is  
10 understood between all the parties to this agreement that DONALD JAY HERB, at all times,  
11 shall tell the truth, both during the investigation and while testifying on the witness stand.  
12 DONALD JAY HERB shall tell the truth, no matter who asks the questions, including but  
13 not limited to investigators, prosecutors, judges and defense attorneys.

14 It is further understood that this entire agreement shall become null and void and  
15 DONALD JAY HERB shall lose the benefits of this agreement for any deviation from the  
16 truth, for failure to answer any question that is the subject matter of this investigation, for  
17 purposely withholding information regarding this investigation, for providing evasive  
18 answers to questions asked by law enforcement officers investigating this case, for providing  
19 false information at any time on any matter concerning this investigation. Further,  
20 DONALD JAY HERB shall be subject to prosecution for perjury for any intentional false  
21 statement which occurs while he is on the witness stand.

22 The parties agree that the trial court shall determine if DONALD JAY HERB  
23 complied with his obligation of truthfulness for purposes of this agreement.

#### 24 ADDITIONAL CONDITIONS

25 1. It is further agreed that if this agreement is declared null and void as a result of  
26 violation of the terms and conditions by DONALD JAY HERB, the District Attorney will  
27 use any statements made by regarding this investigation against him, in any subsequent  
28 criminal trial/prosecution arising in the instant case.

1 2. It is agreed that no interviews or communication with DONALD JAY HERB shall  
2 be conducted by the District Attorney or its agents unless defense counsel BEN DURHAM  
3 has been notified and BEN DURHAM agrees to expressly waive his right to be present.

4 3. Any failure by the Office of the District Attorney and its agents to comply with the  
5 above requirements shall render this Agreement null and void and may result in DONALD  
6 JAY HERB taking any action which would otherwise be available to him, including but not  
7 limited to refusing to testify based on his Fifth Amendment right or seeking to withdraw  
8 from the plea agreement in the instant case.

9 4. All parties realize and understand their obligations and duties under this  
10 Agreement. Each party enters this Agreement with full knowledge of the meaning and effect  
11 of such Agreement.

12 5. DONALD JAY HERB has discussed this matter fully with his attorney. The  
13 parties realize and understand that there are no terms to this Agreement other than what is  
14 contained herein and in the Guilty Plea Agreement. DONALD JAY HERB fully and  
15 voluntarily accepts all the terms and conditions of this agreement and understands the  
16 consequences of entering into this agreement.

17 7/19/06  
18 DATE

17   
18 DONALD JAY HERB  
19 Defendant

20 7/19/06  
21 DATE

20   
21 BEN DURHAM  
22 Attorney for Defendant

23 7/19/06  
24 DATE

23   
24 MARC DIGIACOMO  
25 Deputy District Attorney

26  
27  
28 mb

1 **GMEM**  
2 **DAVID ROGER**  
3 **DISTRICT ATTORNEY**  
4 Nevada Bar #002781  
5 **MARC DIGIACOMO**  
6 **Deputy District Attorney**  
7 Nevada Bar #006955  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 Plaintiff,

11 -vs-

12 **DONALD JAY HERB,**  
13 **#1217129**

14 Defendant.

CASE NO: C  
DEPT NO: XII

15 **GUILTY PLEA AGREEMENT**

16 I hereby agree to plead guilty to: **ACCESSORY TO MURDER (Category C Felony -**  
17 **NRS 195.030, 195.040, 200.010)**, as more fully alleged in the charging document attached  
18 hereto as Exhibit "1".

19 My decision to plead guilty is based upon the plea agreement in this case which is as  
20 follows:

21 The State has agreed to retain the right to argue at the rendition of sentence.

22 **CONSEQUENCES OF THE PLEA**

23 I understand that by pleading guilty I admit the facts which support all the elements of  
24 the offense(s) to which I now plead as set forth in Exhibit "1".

25 I understand that as a consequence of my plea of guilty the Court must sentence me to  
26 imprisonment in the Nevada Department of Corrections for a minimum term of not less than  
27 one (1) year and a maximum term of not more than five (5) years. The minimum term of  
28 imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I

**EXHIBIT "1"**

PAWPDOCS\IN\OUT\LYING\6H0\6H074202.doc

1 understand that I may also be fined up to \$5,000.00. I understand that the law requires me to  
2 pay an Administrative Assessment Fee.

3 I understand that, if appropriate, I will be ordered to make restitution to the victim of  
4 the offense(s) to which I am pleading guilty and to the victim of any related offense which is  
5 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to  
6 reimburse the State of Nevada for any expenses related to my extradition, if any.

7 I understand that I am eligible for probation for the offense to which I am pleading  
8 guilty. I understand that, except as otherwise provided by statute, the question of whether I  
9 receive probation is in the discretion of the sentencing judge.

10 I understand that if more than one sentence of imprisonment is imposed and I am  
11 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order  
12 the sentences served concurrently or consecutively.

13 I also understand that information regarding charges not filed, dismissed charges, or  
14 charges to be dismissed pursuant to this agreement may be considered by the judge at  
15 sentencing.

16 I have not been promised or guaranteed any particular sentence by anyone. I know  
17 that my sentence is to be determined by the Court within the limits prescribed by statute.

18 I understand that if my attorney or the State of Nevada or both recommend any  
19 specific punishment to the Court, the Court is not obligated to accept the recommendation.

20 I understand that if the State of Nevada has agreed to recommend or stipulate a  
21 particular sentence or has agreed not to present argument regarding the sentence, or agreed  
22 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor  
23 when the offense could have been treated as a felony, such agreement is contingent upon my  
24 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing  
25 is continued). I understand that if I fail to appear for the scheduled sentencing date or I  
26 commit a new criminal offense prior to sentencing the State of Nevada would regain the full  
27 right to argue for any lawful sentence.

28 I understand if the offense(s) to which I am pleading guilty to was committed while I



1 was incarcerated on another charge or while I was on probation or parole that I am not  
2 eligible for credit for time served toward the instant offense(s).

3 I understand that as a consequence of my plea of guilty, if I am not a citizen of the  
4 United States, I may, in addition to other consequences provided for by federal law, be  
5 removed, deported, excluded from entry into the United States or denied naturalization.

6 I understand that the Division of Parole and Probation will prepare a report for the  
7 sentencing judge prior to sentencing. This report will include matters relevant to the issue of  
8 sentencing, including my criminal history. This report may contain hearsay information  
9 regarding my background and criminal history. My attorney and I will each have the  
10 opportunity to comment on the information contained in the report at the time of sentencing.  
11 Unless the District Attorney has specifically agreed otherwise, then the District Attorney  
12 may also comment on this report.

13 WAIVER OF RIGHTS

14 By entering my plea of guilty, I understand that I am waiving and forever giving up  
15 the following rights and privileges:

16 1. The constitutional privilege against self-incrimination, including the right to refuse  
17 to testify at trial, in which event the prosecution would not be allowed to comment to the  
18 jury about my refusal to testify.

19 2. The constitutional right to a speedy and public trial by an impartial jury, free of  
20 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the  
21 assistance of an attorney, either appointed or retained. At trial the State would bear the  
22 burden of proving beyond a reasonable doubt each element of the offense charged.

23 3. The constitutional right to confront and cross-examine any witnesses who would  
24 testify against me.

25 4. The constitutional right to subpoena witnesses to testify on my behalf.

26 5. The constitutional right to testify in my own defense.

27 6. The right to appeal the conviction, with the assistance of an attorney, either  
28 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional

1 or other grounds that challenge the legality of the proceedings and except as otherwise  
2 provided in subsection 3 of NRS 174.035.

3 VOLUNTARINESS OF PLEA

4 I have discussed the elements of all of the original charge(s) against me with my  
5 attorney and I understand the nature of the charge(s) against me.

6 I understand that the State would have to prove each element of the charge(s) against  
7 me at trial.

8 I have discussed with my attorney any possible defenses, defense strategies and  
9 circumstances which might be in my favor.

10 All of the foregoing elements, consequences, rights, and waiver of rights have been  
11 thoroughly explained to me by my attorney.

12 I believe that pleading guilty and accepting this plea bargain is in my best interest,  
13 and that a trial would be contrary to my best interest.

14 I am signing this agreement voluntarily, after consultation with my attorney, and I am  
15 not acting under duress or coercion or by virtue of any promises of leniency, except for those  
16 set forth in this agreement.

17 I am not now under the influence of any intoxicating liquor, a controlled substance or  
18 other drug which would in any manner impair my ability to comprehend or understand this  
19 agreement or the proceedings surrounding my entry of this plea.

20 My attorney has answered all my questions regarding this guilty plea agreement and  
21 its consequences to my satisfaction and I am satisfied with the services provided by my  
22 attorney.

23 DATED this \_\_\_\_ day of July, 2006.

24  
25 DONALD JAY HERB  
Defendant

26 AGREED TO BY:

27 MARC DIGIACOMO  
28 Deputy District Attorney  
Nevada Bar #006955

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of  
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)  
5 to which guilty pleas are being entered.

6 2. I have advised the Defendant of the penalties for each charge and the restitution  
7 that the Defendant may be ordered to pay.

8 3. All pleas of guilty offered by the Defendant pursuant to this agreement are  
9 consistent with the facts known to me and are made with my advice to the Defendant.

10 4. To the best of my knowledge and belief, the Defendant:

11 a. Is competent and understands the charges and the consequences of pleading  
12 guilty as provided in this agreement.

13 b. Executed this agreement and will enter all guilty pleas pursuant hereto  
14 voluntarily.

15 c. Was not under the influence of intoxicating liquor, a controlled substance or  
16 other drug at the time I consulted with the defendant as certified in paragraphs  
17 1 and 2 above.

18 Dated: This \_\_\_\_ day of July, 2006.

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\_\_\_\_\_  
ATTORNEY FOR DEFENDANT

mb