IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE SLAUGHTER, Appellant, vs. THE STATE OF NEVADA, Respondent,	Supreme Court No. 61991 **OPENING BRIEF**

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STATEMENT OF THE ISSUES

I. THE PRESENTATION OF IDENTIFICATIONS AT TRIAL WAS HARMFUL ERROR BECAUSE THEY WERE UNRELIABLE AS A RESULT OF AN IMPERMISSIVELY SUGGESTIVE PHOTGRAPHIC LINEUP.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING THE SURVEILLANCE VIDEO INTO EVIDENCE WITHOUT AUTHENTICATION.

III. THE DISTRICT COURT COMMITTED MANIFEST ERROR WHEN IT ALLOWED THE VIDEO INTO EVIDENCE DESPITE THE FACT THAT THE RISK OF CONFUSION OF THE ISSUES, PREJUDICE TO DEFENDANT, AND MISLEADING THE JURY OUTWEIGHED THE PROBATIVE VALUE OF THE VIDEO.

IV. THE STATE COMMITTED NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT THAT RISE TO THE LEVEL OF REVERSIBLE ERROR.

STATEMENT OF THE CASE

Appellant's jury trial was May 12, 2011 through May 20, 2011, in Department Three of the District Court of Clark County, Nevada. Prior to trial, Appellant filed a motion to preclude suggestive identifications that was denied. Appellant's counsel objected on two grounds to the admission of a 7-11 tape into evidence at trial, but was overruled by the court and the tape was admitted into evidence. Appellant was convicted on all counts on May 20, 2011 and subsequently filed a number of motions in the hope of obtaining a new trial. Appellant's motions were denied, and sentencing occurred on October 16, 2012. The Judgment of Conviction was filed on October 22, 2012. Appellant was sentenced on fourteen felony counts and was given an additional life sentence for weapons enhancements.

Appellant now appeals from the denial of his motion to preclude suggestive identifications, from the denial of his objection regarding the authenticity of the surveillance video, and from the Judgment of Conviction.

INTRODUCTION

This case hinges on the identifications of Appellant by witnesses through an impermissibly suggestive photo lineup created by a police officer with the intention of highlighting Appellant relative to the filler photos, a surveillance video that has not been authenticated, and dramatic statements made by the State. Aside from this inappropriate evidence, every link between Appellant and the robbery can be summarized as follows:

- Witnesses described the suspects as two black males (APPELLANT"S INDEX VOLUME I, "AA I," SLAU046); Appellant is black;

- Witnesses reported that the suspects were driving a green Pontiac Grand Am (Id.); Appellant was known to drive his girlfriend's green Ford Taurus;
- Two guns were found in this car. (AA I, SLAU190). A bullet was found in this car that could have been fired from such a gun, but could be fired from many other guns (AA II SLAU411, 141-42).

Because of the minimal untainted evidence in this case, the State cannot prove beyond a reasonable doubt that the totality of these errors did not contribute to the verdict, thus making these trial errors harmful. Therefore, Appellant is entitled to a trial.

FACTS

Upon receiving information from a confidential informant implicating Appellant as a perpetrator in this crime, Detective Prieto constructed a photo lineup. (AA I, Transcript of Preliminary Hearing attached to Defendant's Reply to State's Opposition to Motion to Preclude Suggestive Identification, "Prelim," at SLAU189). He testified that when constructing the photo lineups at issue in this case, he chose to use a photo of Slaughter from Las Vegas Metropolitan Police Department with filler photos from the North Las Vegas Police Department's photo lab. (Id.). Prieto was responsible for picking out the filler photos in the lineup to match them up to the suspect. (Id.). The photo lineup in dispute contains a picture of Appellant with a white background along with five filler photos that all have blue backgrounds. (AA I, Lineups SLAU00-SLAU04).

Ivan Young was shot in the face during the incident. (AAI, Police Report Attached to Motion to Preclude Suggestive Identification "Police Report," SLAU095). After receiving treatment at the hospital, Young told officers the suspects were two black males, one bald wearing a blue shirt and blue shorts, the other had dreadlocks with a

Jamaican accident. (Id.). On June 28, 2004, Young was shown the suggestive lineup at UMC in his hospital bed. (Id. at SLAU110). Young identified Appellant. (Id.).

At the preliminary hearing, Young stated that he had seen Appellant before this incident with a friend of Young's. (AA I, Prelim at SLAU185). Young testified that one suspect was wearing a basketball jersey and the other a blue shirt. (Id.). Young testified that Appellant didn't have dread locks at the time of the robbery, but that the other suspect did. (Id.). He also testified that Appellant had a hat on at the time of the robbery. (Id.).

At trial, Young testified that both suspects were wearing wigs, and that both had Jamaican accents. (AA II, Jury Trial Transcript, May 16, 2011, 49:13, SLAU340). Young recounted being awoken by police to perform the photo lineup when he just wanted to sleep, and agrees that his memory of the lineup is foggy. (Id. at SLAU342). Incredibly, Young also testified that either the officer showing him the pretrial lineup or his wife had to sign his name on the lineup because he "couldn't really see good." (Id.). Young's testimony indicates that he knew Appellant's name before viewing the lineup. (Id. at SLAU345).

At the scene, Jermaun Meeks told officers that while walking up to the front door, the suspects grabbed him by the arm, pulled him into the house, forced him to the floor, and tied him up. (AA I, "Police Report," at SLAU87). He described the suspects as two black males, one wearing a beige suit jacket and the other one either with dreadlocks or wearing a wig. (Id.) Means also told officers that he could not identify the suspects. (Id.).

On June 29, 2004, Meeks selected Appellant out of the suggestive photo lineup, stating that "the face just stands out to me." (Id. at SLAU111). Means did not identify Appellant at trial, although his June 29, 2004 identification of Appellant in the photo lineup was presented to the jury. (AA II, Jury Trial Transcript, May 16, 2011, SLAU337).

At the scene, Ryan John told officers that upon walking into the house, the suspects told him to lie on the floor, tied him up, and placed a black jacket over his head. (AA I "Police Report" at SLAU84). He also told officers that he did not remove the black jacket from over his head until the suspects were gone. (Id. at SLAU87). John described the suspects as two black males, one of whom had a Jamaican accent. (Id. at SLAU 86). At this time, he stated that he could not identify the suspects. (Id.).

On June 29, 2004, John identified Appellant out of the suggestive lineup. (Lineup SLAU00-SLAU003). He wrote: "This is the guy that *I think* called me over to Ivan's house and tied me up and shot Ivan." (emphasis added) (Id.).

At the preliminary hearing, John did not remember anything that the men were wearing or any details about the men, saying only that he remembered Appellant's facial features. (AA I, Prelim at SLAU178).

At trial, Ryan John identified Appellant as the suspect in this case nearly seven years after the incident. (AA II, Jury Trial Transcript, May 17, 2011, 65:2, SLAU392). John also testified that Appellant's photo looked different than all of the other photos in the pretrial photo lineup in which Johns identified Appellant. (Id. at 76:23, SLAU394).

During the robbery, Jose Posada was forced to face a wall and tied up. (AA I, "Police Report" at SLAU38). He described the suspects as one black male with braids and one black male with a dark afro. (Id. at SLAU39). He stated one wore a tuxedo shirt. (Id.)

At the suggestive photo lineup, Posada identified Appellant stating "I saw him next to my uncle. This man had a gun." (AA I, Lineup SLAU001-SLAU003).

At the preliminary hearing, Posada identified Appellant and described him wearing a dark green tuxedo shirt and had braids during the robbery. (AA I Prelim at SLAU184-SLAU186). At trial, Posada identified Slaughter seven years after the incident. (AA III Jury Trial Transcript, May 18, 2011, 51:25-52, SLAU435). Posada also testified that he knew that Appellant was the man that was arrested prior to viewing the pretrial photo lineup. (Id. at SLAU 436). Posada acknowledged under oath that Appellant's background color was different from that of the filler photos. (Id.)

Destiny Waddy described two black males, one 5'11 and one 5'8 and she described both as wearing blue and white clothing. (AA I, "Police Report" at SLAU87). Ms. Waddy could not identify a suspect from the lineup. (Id.)

Aaron Dennis described two black males, one wearing a black jacket. Ms. Dennis could not identify a suspect from the lineup. (Id. at SLAU88).

Jennifer Dennis described the suspects as two black males, one 5'10 weighing 170 pounds and the other 5'11 weighing 190 pounds. (Id. at SLAU92). She described one wearing a blue shirt with blue jeans and the other with a red shirt and blue jeans. (Id.)

At trial, the State introduced a videotape into evidence. (AA II, Jury Trial Transcript, May 17, 2011, 30, SLAU384). This tape was played before the jury. (Id.) The tape is a surveillance video from the 7-11 on 3051 E. Charleston in Las Vegas, Nevada from approximately one hour after the robbery. Id. The tape depicts a black man with his face covered entering the store, spending a couple of minutes near the ATM machine, and then leaving. (Id. at SLAU385).

Although the store owner authenticated the time and place of the video, the State never put forth documents from Wells Fargo or the ATM machine to connect the card being used in the video to the robbery. In response to a leading question on direct, Ryan John answered affirmatively that he had made calls to Wells Fargo and found out his card had been used "at a 7-11 just after 8 p.m." (Id. at 61, SLAU391). John thought $300 was withdrawn during this ATM transaction, but was "not exact." (Id.).

Appellant's trial counsel objected to the introduction of the tape on the grounds that the multiple timestamps were confusing, (Id. at 3:11, SLAU377) and that it "can't be authenticated because it does not show what the State is intending or purports it to show." (Id. at 8:15, SLAU378). During arguments, the State conceded that: "Well, at this moment, I don't necessarily know that we'll put in the physical document from the custodian of records of Wells Fargo." (Id. at 7-8, SLAU378). The district court overruled this objection, declared the video as admissible, and left the weight of the credibility to the jury. (Id. at 16:9, SLAU379).

Despite the State's inability to authenticate the video through witnesses or evidence, they made numerous statements vouching for the authenticity of the video:

"In addition there is a 7-Eleven where the credit card was used that's located also on East Charleston and that location should any of you guys know that will be asked during jury selection." (AA II, Jury Trial Transcript, May 12, 2011, 13, SLAU224)

"You'll hear that Ryan John immediately gets on the phone with his card company concerning the robbery…and finds out that at 8:00 o'clock his card was utilized at the 7-11 at 305 East Charleston." (AA II, Jury Trial Transcript, May 16, 2011, 14-16, SLAU331);

"…and Slaughter using that credit card. There will be no question at the end of this case that he's guilty." Id.;

"[w]e know that at about 8:07 pm none other than the defendant comes into the 7-Eleven and he uses that credit card. The proceeds of the robbery he just participated in…." (AA III Jury Trial Transcript, May 20, 2011, at 25, SLAU509);

"He is additionally successful in getting money from Ryan John's Wells Fargo." (Id. at 39-40, SLAU512);

"He went into the 7-11 at 8:07 and used the proceeds of the robbery that he perpetrated on Ryan John." (Id. at 53:20, SLAU516).

ARGUMENT

I. THE IDENTIFICATIONS MUST BE EXCLUDED BECAUSE THE PHOTO LINEUP WAS UNNECEESARILY SUGGESTIVE AND THE IDENTIFICATIONS LACK RELIABILITY.

The standard of review of the constitutionality of the pretrial identification procedures is de novo. *United States v. Love*, 746 F.2d 477, 478 (9th Cir.1984).

In reviewing the propriety of a pretrial identification, this court considers "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989). A photographic lineup is suggestive if, given the totality of the circumstances, the

"procedure was 'so unduly prejudicial as [fatally to] taint [the defendant's] conviction.'" *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997).

A. THE USE OF THE UNNECESSARILY SUGGESTIVE PHOTO LINEUP WAS UNCONSTITUTIONAL

Suggestive pretrial identification procedures may be so impermissibly suggestive as to taint subsequent in-court identifications and thereby deny a defendant due process of law. *Love*, 746 F.2d 477, 478. To determine whether a challenged identification procedure is so impermissibly suggestive as to give rise to a substantial likelihood of mistaken identification, the court must examine the totality of the surrounding circumstances. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968).

In *United States v. Saunders*, the 4th Circuit considered a case with similar facts. 501 F.3d 384, 390 (4th Cir. 2007). The photo lineup in Saunders contained no overhead lighting and a dark background that made his photo stand out considerably compared to the filler photos. *Id.* The Saunders court concluded that differences in background and lighting suggests that one photo was taken at a different time and place from the rest of the photographs. *Id*. As to this point, the court noted that such glaring differences create a substantial risk for the viewer to conclude that the similar pictures were taken together to form a pool or control group, and that one of the pictures stands out is the suspect. *Id.* (citing *US v. Sanchez*, 24 F.3d 1259, 1262-63 (10th Cir. 1994)).

Here, an almost identical scenario is presented as that in *Saunders*. Appellant's image stood out considerably from the other images because of a highlighted background not present in the other photos. The photo of Appellant differed in age and condition as

compared to the filler photos. This gave the witnesses the impression that Appellant was "the man who did it."

Detective Pietro testified that he had control over the lineup. His decision to use photos with different backgrounds was unnecessary because there were booking photos of Appellant from both departments on file. Pietro's choices here can only be viewed as gratuitously and purposely designed to assure a particular outcome.

Ivan Young and Posada both testified that they knew that Appellant was the name of the suspect before their pretrial lineup identifications. The record is silent as to whether Means or John had been told that police had a suspect and his name was Rickie Slaughter. Because the white background gives the impression of newness, at least Young and Posada drew the inference that Rickie Slaughter had been arrested in the last day or two, and, therefore, the new picture had to be that of the perpetrator. The different background in the photo creates the impression that the photo was recently taken, and, therefore, must be a photo of a man that the police have recently arrested for this crime.

There was no emergency need to do the lineup in this matter. When a photo lineup without this glaring background inconsistency was shown to the other four witnesses, none of them identified Appellant. The photo lineup created a very substantial likelihood of irreparable misidentification. For all of these reasons, the photo lineup in question was unnecessarily suggestive.

B. THE IDENTIFICATIONS WERE NOT SUFFICIENTLY RELIABLE TO WARRANT ADMISSION

If the Court finds a pretrial procedure impermissibly suggestive, automatic exclusion of identification testimony is not required. *Manson v. Brathwaite,* 432 U.S. 98, 113–14, 97 S.Ct. 2243, 2252–53, (1977); *Neil v. Biggers,* 409 U.S. 188, 198–99, 93 S.Ct. 375, 381–82 (1972). If under the totality of the circumstances the identification is sufficiently reliable, identification testimony may properly be allowed into evidence. *Id.*

A witness's out-of-court photo identification that is found unreliable, and therefore inadmissible on due process grounds, will render his subsequent in-court identification inadmissible. *Simmons*, 390 U.S. at 383-84, 88 S.Ct. 967; *United States v. Smith*, 459 F.3d 1276, 1293-94 (11th Cir.2006); *Amador v. Quarterman*, 458 F.3d 397, 413 (5th Cir.2006). In this circumstance, a witness "is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent ... courtroom identification." *Simmons*, 390 U.S. at 383-84, 88 S.Ct. 967.

To determine whether the identification was sufficiently reliable to warrant admission, the Court weighs the indicia of reliability against the "corrupting effect of the suggestive identification procedure itself." *Brathwaite,* 432 U.S. at 114, 97 S.Ct. at 2253. Several factors which should be considered in evaluating the reliability of both in-court and out-of-court identifications are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the

confrontation. *Biggers,* 409 U.S. at 199–200, 93 S.Ct. at 382; *United States v. Field*, 625 F.2d 862, 866–67 (9th Cir. 1980).

It is important for this Court to note that the record supports the premise that Appellant was convicted almost solely by the eyewitness identification of three of the six victims: (1) Young "couldn't really see good"; (2) Posada was a child; and (3) John was immediately tied up and had his face covered. A fourth victim, (4) Means made an identification through the lineup but refused to at trial. Appellant submits that criminal law has long recognized the risk of inaccurate eyewitness identification testimony.

> A great upsurge in eyewitness memory research began in the early 1970's, and much of this research has revealed a disturbingly high error rate and ever more ways in which eyewitness identifications and recollections are susceptible to error.

Michael R. Leipe, The Case for Expert Testimony About Eyewitness Memory. 1 Psychol. Pub. Pol'y & L. 909 (1995).

In *State v. Long*, 721 P.2d 483, 488-490 (Utah 1986), the Utah Supreme Court, conducted a comprehensive summary of this subject that leads to a firm conclusion:

> The literature [referred to *supra* See F. Woocher, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977); J. Bibicoff, Seeing is Believing? The Need for Cautionary Jury Instructions on the Unreliability of Eyewitness Identification Testimony, 11 San Fernando Valley L. Rev. 95 (1983); R. Sanders, Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards, 12 Am. J. Crim. Law 189 (1984).] is replete with empirical studies documenting the unreliability of eyewitness identification. See generally P. Wall, Eyewitness Identification in Criminal Cases (1965); E. Loftus, Eyewitness Testimony (1979). There is no significant division of opinion on the issue. The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible. We therefore have concluded that a more rigorous approach to cautionary instructions than this court has heretofore followed is appropriate. *See State v. Malmrose*, 649 P.2d at 62-66 (Stewart, J., dissenting)...

Some background is necessary. Anyone who stops to consider the matter will recognize that the process of perceiving events and remembering them is not as simple or as certain as turning on a camera and recording everything the camera sees on tape or film for later replay. What we perceive and remember is the result of a much more complex process, one that does not occur without involving the whole person, and one that is profoundly affected by who we are and what we bring to the event of perception. *See* R. Buckhout, Eyewitness Testimony, 15 Jurimetrics J. 171, 179 (1975) (reprinted from 231 Scientific American 23 (Dec. 1974)).

Research on human memory has consistently shown that failures may occur and inaccuracies creep in at any stage of what is broadly referred to as the "memory process." This process includes the acquisition of information, its storage, and its retrieval and communication to others. These stages have all been extensively studied in recent years, and a wide variety of factors influencing each stage have been identified. *See* Loftus, *supra*, at chs. 3-5; Buckhout, *supra*, at 172-81.

During the first or acquisition stage, a wide array of factors have been found to affect the accuracy of an individual's perception. Some of these are rather obvious. For example, the circumstances of the observation are critical: the distance of the observer from the event, the length of time available to perceive the event, the amount of light available, and the amount of movement involved. Buckhout, *supra*, at 173. However, perhaps the more important factors affecting the accuracy of one's perception are those factors originating within the observer. One such limitation is the individual's physical condition, including both obvious infirmities as well as such factors as fatigue and drug or alcohol use. Another limitation which can affect perception is the emotional state of the observer. Contrary to much accepted lore, when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly. *See, e.g., Woocher, supra*, at 979 n.29.

A far less obvious limitation of great importance arises from the fact that the human brain cannot receive and store all the stimuli simultaneously presented to it. This forces people to be selective in what they perceive of any given event. *See* Woocher, *supra*, at 976-77. To accomplish this selective perception successfully, over time each person develops unconscious strategies for determining what elements of an event are important enough to be selected out for perception. The rest of the stimuli created by the event are ignored by the brain. These unconscious strategies of selective perception work quite well in our day-to-day lives to provide us with only the most commonly useful information, but the strategies may result in the exclusion of information that will later prove important in a court proceeding. For example, the significance of the event to the witness at the time of

perception is very important. Buckhout, *supra*, at 172-73. Thus, people usually remember with some detail and clarity their whereabouts at the time they learned of John F. Kennedy's assassination. Those same people, however, are generally less accurate in their descriptions of people, places, and events encountered only recently in the course of their daily routines. For instance, few of us can remember the color or make of the car that was in front of us at the last traffic signal where we waited for the light to turn green. An everyday situation such as this presents an excellent opportunity to observe, and yet, while such information may be a critical element in a criminal trial, our process of selective perception usually screens out such data completely. To the extent that court proceedings may focus on events that were not of particular importance to the observer at the time they occurred, then, the observer may have absolutely no memory of the facts simply because he or she failed to select the critical information for perception.

Another mechanism we all develop to compensate for our inability to perceive all aspects of an event at once is a series of logical inferences: if we see one thing, we assume, based on our past experience, that we also saw another that ordinarily follows. This way we can "perceive" a whole event in our mind's eye when we have actually seen or heard only portions of it. *Id*. at 980. The implications of this memory strategy for court proceedings are similar to those of selective perception.

Other important factors that affect the accuracy of a viewer's perception, and which are unique to each observer, include the expectations, personal experience, biases, and prejudices brought by any individual to a given situation. Buckhout, *supra*, at 175-76. A good example of the effect of preconceptions on the accuracy of perception is the well-documented fact that identifications tend to be more accurate where the person observing and the one being observed are of the same race. Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, 36 J. Personality & Social Psych. 1546, 1550 (1978); Note, Cross Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984); Bibicoff, *supra*, at 101.

The memory process is also subject to distortion in the second or retention stage, when information that may or may not have been accurately perceived is stored in the memory. Research demonstrates that both the length of time between the witness's experience and the recollection of that experience, and the occurrence of other events in the intervening time period, affect the accuracy and completeness of recall. Just as in the perception stage, where the mind infers what occurred from what was selected for perception, in the retention stage people tend to add extraneous details and to fill in memory gaps over time, thereby unconsciously constructing more detailed, logical, and coherent recollections of their actual experiences. Thus, as eyewitnesses wend their way through the criminal justice process, their reports of what was seen and heard tend to become "more accurate,

more complete and less ambiguous" in appearance. Buckhout, supra, at 179. The implications of this mental strategy for any criminal defendant whose conviction hinges on an eyewitness identification are obvious. *See* Woocher, *supra*, at 983 n.53.

Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection. K. Deffenbacher, Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?, 4 Law and Human Behavior 243 (1980); Lindsay, Wells, Rumpel, Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?, 66 J. Applied Psych. 79, 80-82 (1981); Bibicoff, *supra*, at 104 n.35. In fact, the accuracy of an identification is, at times, inversely related to the confidence with which it is made. Buckhout, *supra*, at 184.

Finally, the retrieval stage of the memory process--when the observer recalls the event and communicates that recollection to others--is also fraught with potential for distortion. For example, language imposes limits on the observer. Experience suggests that few individuals have such a mastery of language that they will not have some difficulty in communicating the details and nuances of the original event, and the greater the inadequacy, the greater the likelihood of miscommunication. An entirely independent problem arises when one who has accurately communicated his recollection in a narrative form is then asked questions in an attempt to elicit a more complete picture of the event described. Those asking such questions, by using a variety of subtle and perhaps unconscious questioning techniques, can significantly influence what a witness "remembers" in response to questioning. And as the witness is pressed for more details, his responses become increasingly inaccurate. *See* Loftus, Reconstructing Memory: The Incredible Eyewitness, 15 Jurimetrics J. 188 (1975). In addition, research has documented an entirely different set of no less significant problems that relate to the suggestiveness of police lineups, showups, and photo array. *See, e.g*., Buckhout, *supra*, at 179-87.

Long, 721 P.2d at 488-490 (emphasis added).

It is not surprising that these scientific facts give rise to the following statistics regarding faulty eyewitness identification:

• Over 230 people, serving an average of 12 years in prison, have been exonerated through DNA testing in the United States, and 75% of those wrongful convictions (179 individual cases as of this writing) involved eyewitness misidentification.
• In 38% of the misidentification cases, multiple eyewitnesses misidentified the same innocent person.

> • Over 250 witnesses misidentified innocent suspects.
> • 53% of the misidentification cases, where race is known, involved crossracial misidentifications.
> • In 50% of the misidentification cases, eyewitness testimony was the central evidence used against the defendant (without other corroborating evidence like confessions, forensic science or informant testimony).
> • In 36% of the misidentification cases, the real perpetrator was identified through DNA evidence.
> • In at least 48% of the misidentification cases where a real perpetrator was later identified through DNA testing, that perpetrator went on to commit (and was convicted of) additional violent crimes (rape, murder, attempted murder, etc.), after an innocent person was serving time in prison for his previous crime.

Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification, An Innocence Project Report, Benjamin N. Cardozo School of Law at Yeshiva University. http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

Eyewitness identification is unreliable. Here, the three positive identifications were made by a man who "couldn't really see good", a man whose face was covered who "thinks" Appellant is the man, and a child at the time of this traumatic event. One other man made a phantom identification based on the lineup, but refused to do so at trial. Four of the seven witnesses did not identify Appellant. Although the police reports and pictures tell of a bloody scene, the State could not produce any DNA evidence of blood in Appellant's car, on his shoes, on the guns impounded from his car, or on any of his belongings in his home, nor at the scene.

Appellant preys that the Court will consider these factors in order to give him a proper "totality of the circumstances" analysis.

1. Ivan Young

(1) Young had sufficient time to view the shooter. (2) His degree of attention was undoubtedly affected by the immediate threat to both himself and his family. (3)

Young's description of Slaughter changed dramatically from his initial interview, to the preliminary hearing to trial. (4) Young stated that he was confident that Slaughter was the suspect. (5) Two days had passed between the robbery and the identification.

It seems that Young knew Slaughter was in custody when he performed the lineup. Further, Young had been shot in the face two days prior and had the effects of both a stressful situation and hospital drugs affecting his judgment and memory. He testified that he was awoken to perform the lineup and that his memory was foggy. He also stated that he couldn't sign the lineup because he "couldn't really see good." Appellant respectfully submits that an identification wherein the witness cannot see well enough to sign the mechanism of identification is per se; an unreliable identification.

Young also states that he had seen Appellant before with a friend of his. If that is the case, one must ask why Young didn't tell police this fact or contact his friend to get the identity of Appellant in the days between the shooting and viewing the lineup? Ivan's wife, obviously in much better physical, mental, and emotional health than Ivan at the time, couldn't pick Appellant from the photo lineup.

Under a totality of the circumstances analysis, the "corrupting effect of the suggestive identification procedure itself" outweighs the relatively low independent reliability of Ivan Young's "couldn't really see good" identification, the introduction of that identification at trial, and Young's in-court identification of Appellant. The identification procedure led to a substantial likelihood of irreparable misidentification.

2. Jermaun Means

(1) Upon entering the house, Means was immediately overpowered and tied up; he had only seconds to view the suspects. (2) During these few seconds where Means was under high stress and confusion, his degree of attention had to be low. (3) He described the suspects as two black males, one wearing a beige suit jacket and the other one either with dreadlocks or wearing a wig. Means also told officers that he could not identify the suspects. (4-5) On June 29, 2004, Means selected Appellant out of the suggestive photo lineup, stating that "the face just stands out to me."

By his version of events, Means couldn't have had more than a few seconds to identify the suspects before he was tied up. Three days later, however, he miraculously identified Appellant through the impermissibly suggestive lineup. Later at trial he could not identify Appellant as the perpetrator. Other than the one instant that he was shown this impermissibly suggestive photo lineup, Means has never been able to identify or even describe the suspect in this case.

Of course Appellant's face stood out among the photos in the lineup that day: the lineup was designed by its creator for that very purpose. When the totality of the circumstances of Means' isolated identification through the impermissible lineup are weighed against the unnecessary and purposefully suggestive nature of the photo lineup obviously highlighting Appellant as the suspect, this phantom identification and its admission to the jury lack any substantive reliability.

3. Ryan John

Here, all the factors go against reliability of the identification. (1) John had seconds to observe the suspects before he was tied up and blinded by a jacket being placed over his head. (2) John was ambushed as he walked into the house, and stress and confusion must have decreased his attention to detail. (3) John described the suspects as two black males, one of whom had a Jamaican accent; he stated that he could not identify the suspects. (4-5) On June 29, 2004, John identified Appellant out of the suggestive lineup saying "*I think*" Appellant is the guy. (emphasis added).

When all of these factors are weighed against the unnecessary, capricious, and purposefully suggestive nature of the photo lineup obviously highlighting Appellant as the suspect, the photo lineup identification, its admission into evidence, and the subsequent in-court identification of Appellant by John are unreliable because John was "apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent ... courtroom identification." The lineup procedure led to a very substantial likelihood of irreparable misidentification.

4. Jose Posada

(1) When the suspects entered the house, Jose Posada only had a few seconds to observe the suspects before he was tied up. (2) As a frightened child overcome with stress and anxiety from the situation, his attention was affected. (3) He described the suspects as one black male with braids and one black male with a dark afro; one was wearing a tuxedo shirt. (4-5) At the suggestive photo lineup on June 29, 2004, Posada stated "I saw him next to my uncle. This man had a gun."

A child tied up within seconds of men with guns coming into his relatives' house, is traumatized by the sights and sounds of his uncle being shot in the face, and can give only broad descriptions of the scene. He knows that a man by the name of Appellant has been arrested prior to being shown the impermissibly suggestive photo lineup. At the photo lineup, the child identified the man who the child heard was arrested for this crime and the man who stood out on the photo lineup: the man with the highlighted white background. Under these circumstances, it was a near certainty that the impermissible photo lineup would point the adolescent Posada to Appellant.

Posada's trial identification are unreliable because Posada was "apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent ... courtroom identification."

C. THE INCLUSION OF THE IDENTIFICATIONS IS HARMFUL ERROR

Even if a defendant proves that the identifications lacked independent reliability, such trial error must pass harmless error review in order to warrant relief on appeal. *Arizona v. Fulminante,* 499 U.S. 279, 280, 111 S. Ct. 1246, 1249, 113 L. Ed. 2d 302 (1991). The appropriate standard is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Cortinas v. State*, 124 Nev. 1013, 1027, 195 P.3d 315, 324 (2008).

The identifications based upon the impermissibly suggestive lineups violate Slaughter's 5th and 14th Amendment rights under *Love*. Even if the Court finds that one or two of these suggestive identifications were independently reliable, Appellant argues that the finding of any inadmissible identification constitutes harmful error because it is

impossible for the State to prove beyond a reasonable doubt that such individual identification did not contribute to the verdict.

These trial errors are not harmless because the inadequacy of the other evidence makes it impossible to argue beyond a reasonable doubt that the identifications did not contribute to the conviction. Therefore, Petitioner is entitled to a new trial without the taint of the unreliable identifications.

II. THE AUTHENTICATION OF THE SURVEILLANCE VIDEO WAS INSUFFICIENT AND, THEREFORE, INADMISSABLE

Generally, a district court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Nev. Rev. Stat. Ann. § 52.015 (West). The testimony of a witness is sufficient for authentication if the witness has personal knowledge that a matter is what it is claimed to be. Nev. Rev. Stat. Ann. § 52.025 (West).

"Hearsay is generally inadmissible, *see* NRS 51.065; however, the business records exception provides, in pertinent part, that a

> record or compilation of data, in any form, of acts, events, [or] conditions ... made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is [admissible]."

Heusner v. State, 52023, 2010 WL 3295121 (Nev. May 3, 2010).

In the case at hand, the district court abused its discretion by allowing the State to admit evidence that was not authenticated. Petitioner concedes that Interdeep Judge was a person qualified under NRS 51.065 to provide authentication for the location of the machine, time of the video, and whether the video is kept in the course of regularly conducted activity.

In response to a leading question by the State, Ryan John testified to being notified by Wells Fargo security that his card was used at a 7-11 on Charleston. Because the State could not produce evidence from Wells Fargo that this specific card was used at this specific location, they leaned on hearsay instead. The State authenticates the fact that the video shows the time and location that Ryan John's stolen card was used through the following: (1) that Interdeep Judge heard from police who heard from Ryan John who heard from Wells Fargo that Ryan John's ATM was used at a 7-11 store on Charleston (2) Ryan John's affirmative response that he made calls to Wells Fargo and that approximately $300 was taken. The first is triple hearsay and the second is hearsay. There is no exception to the hearsay rule that covers either situation.

Why not subpoena Wells Fargo? Why not ask John to have the security department call the investigators? Why not have police testify and save the authentication from hearsay status? Appellant contends the answer to these questions is because the video does not show what the State purports that it shows. While Interdeep Judge laid the foundation for the time and location of the tape, he cannot make the barest factual showing that Ryan John's card was used at that time and location. Without this

foundation, we only know that a black male walked into a 7-11 on Charleston a while after the robbery; no other fact can be established or inferred from this tape.

The State authenticated the video with its own self serving statements regarding the tape. The prosecutor practically winks at the jury, says trust me, and vouches that the card used in the video was the card taken in the robbery. Respectfully, it would take little time to get a custodian of records report from Wells Fargo to give Appellant due process. However, the State's vouching that the video shows what they say it shows, tramples Appellant's constitutional right to examine and cross examine the evidence against him.

Wells Fargo is an easily accessible institution; it has many custodians of records. Triple hearsay is not enough to sentence a man to LIFE IN PRISON when there is such an EASY way to verify that the tape shows what it purports to show; the use of a stolen debit card. Appellant submits that the State did not present such evidence from Wells Fargo because it does not exist. Whether it exists or not, Appellant was denied his right to confront this evidence based upon the Court's error which constituted abuse of discretion. Appellant is entitled to a new trial where this videotape is not played because there wasn't a showing made that the tape is what it purports to be.

III. THE PROBATIVE VALUE OF THE VIDEO IS OUTWEIGHED BY PREJUDICE TO APPELLANT, CONFUSION OF THE ISSUES, AND MISLEADING THE JURY

Decisions to admit or exclude evidence, after balancing prejudicial effect against probative value, is within discretion of a trial judge and such decisions will not be overturned absent manifest error. *Jones v. State*, 113 Nev. 454, 937 P.2d 55, (1997) *rehearing denied*. "Although relevant, evidence is not admissible if its probative value is

substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." Nev. Rev. Stat. Ann. § 48.035 (West)

Even if the Court somehow finds that Interdeep Judge's testimony and John's simple "yes" to a leading question on direct are enough to authenticate this video, the district court committed manifest error by admitting the video because its probative value was substantially outweighed by unfair prejudice, confusion of the issues, and misleading the jury. The district court erred when it left the "weight" of the video to the jury because the prejudice to defendant was too great. It was manifest error to subject Appellant to such prejudice, especially when it would have taken the state minutes to subpoena sufficient records to show that the card used at that date and time was the card stolen in the robbery. To say that this tape depicts the time and place that a stolen card was used misleads the jury. No proof of this fact was shown to the jury to connect this tape to the robbery.

The tape confuses the issues because for the jury to believe that the tape depicts the stolen card being used they could only rely on inferences from hearsay, triple hearsay, and vouching by the State.

Finally, admission of the tape works an unfair prejudice on Appellant. It makes it look as if the card from the robbery was being used and that the black man in the video is Appellant. Basically the State was allowed to say the card was being used was John's and Appellant's attorney was allowed to argue that it was not. At best, the video depicts a black man walking into one of any number of eleven 7-11 stores on Charleston an hour after the robbery.

The trial court improperly allowed the State to unilaterally authenticate that the card stolen in the robbery was the card in the video by continually attributing the card to the transaction in the video. This improperly prejudiced the Appellant, confused the issues, and mislead the jury. The trial court to failed to properly weigh the probative value of this evidence against its prejudicial value and the court's decision to leave this issue to the jury constitutes manifest error. It was manifest error because the prejudicial value, risk of confusion, and reality of misleading of the jury, without authentication that the card from the robbery was being used, substantially outweighed its probative value.

IV. NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT RISE TO A CONSTITUTIONAL LEVEL AND WARRANT REVERSAL

The test for considering prosecutorial misconduct was spelled out by this court in *Valdez v. State*. 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008). When considering prosecutorial misconduct, this court engages in a two-step analysis. First, the court determines whether the prosecutor's conduct was improper. *Id*. If the conduct was improper, the Court determines whether the improper conduct warrants reversal. *Id*.

The standard of harmless-error review is dependent on whether the prosecutorial misconduct is of a constitutional dimension. *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); accord *U.S. v. Harlow*, 444 F.3d 1255, 1265 (10th Cir. 2006). If the error is of constitutional dimension, then the Court applies the *Chapman v. California* standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. 386 U.S. 18, 24, 824, (1967); *Tavares*, 117 Nev. 725, 732, 30 P.3d 1128, 1132. If the error is not of constitutional dimension, a

reversal will occur only if the error substantially affects the jury's verdict. *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct.1239 (1946)).

Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct. *Harlow*, 444 F.3d 1255, 1266. For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error. E.g., *Chapman*, 386 U.S. at 21, 24, 87 S.Ct. 824; *Bridges*, 116 Nev. at 764, 6 P.3d at 1009; *Coleman v. State*, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995). Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974)).

Harmless-error review applies only if the defendant preserved the error for appellate review. *United States v. Olano*, 507 U.S. 725, 731–32, 113 S.Ct. 1770 (1993). Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this "allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002). When an error has not been preserved, this court employs plain-error review. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under plain-error review, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing "actual prejudice or a miscarriage of justice." *Id.*

This court and the federal courts recognize that when multiple instances of prosecutorial misconduct have occurred "in those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *United States v. Fredrick*, 78 F.3d 1370, 1381 (9th Cir. 1996). "In cases where the state of the evidence is uncertain, it becomes especially important for the prosecution to avoid improper and inflammatory rhetorical comment" *Morales v. State*, 122 Nev. 966, 972 (2006).

Petitioner asks the Court to consider the following misconduct individually and cumulatively.

A. PROSECUTORIAL MISCONDUCT RELATED TO THE 7-ELEVEN VIDEO

It is elementary that a prosecutor may not make statements unsupported by evidence produced at trial. *Floyd v. State*, 118 Nev. 156, 173, 42 P.3d 249 (Nev. 2002). "The prosecutor should not intentionally refer to or argue on the basis of facts outside the record." American Bar Association Standards for Criminal Justice 3-5.9. "A defendant has a right to a verdict based on the evidence admitted at trial. Remarks by a prosecutor which imply that state is possessed with further incriminating evidence impair that right." *Schrader v. State*, 102 Nev. 64, 65 (1986).

The prosecutors actually began tainting jurors' perceptions on this video from the introduction of the case on voir dire, and continued throughout closing arguments.

References to the link between the video and credit card permeated the case from beginning, suggesting a powerful link between Appellant and the alleged crimes that is

unsupported by the record. Therefore the errors infected Slaughter's entire trial with unfairness. They are prejudicial under plain error review.

B. MISCONDUCT DURING CROSS-EXAMINATION OF MS. WESTBROOK

This court has held a prejudicial error existed in prosecutor's cross-examination because "question was not relevant to any proper line of inquiry at the trial and was not supported by any admissible evidence." *Knorr v. State*, 103 Nev. 604, at 607, 748 p.2d 1 (1987).

Prosecutor DiGiacomo engaged in misconduct when during his cross-examination of Ms. Westbrook he insinuated that individuals' names "JuJuan Richards" and "Little Marv" had procured her to testify falsely on Slaughter's behalf, when no evidence was presented about these individuals:

> DiGiacomo: M'am, do you know somebody by the name of JuJuan Richards?
> Ms. Westbrook: No, sir.
> DiGiacomo: Do you know a person named Little Mary?
> Ms. Westbrook: No, sir.
> DiGiacomo: Are you telling me that Jujuan Richards didn't come to you and find, quote, a bitch to come say they saw Rickie Slaughter at the time of the crime?
> Ms. Westbrook: No, sir.

(AA III, Jury Trial Transcript, May 18, 2011, 87, SLAU444).

Because no evidence regarding these individuals was presented, the prosecutor's line of questioning should have ceased after Ms. Westbrook's answers informing him that she did not know these individuals. The prosecutor's failure to cease this line of questioning and his unsupported insinuations suggested to the jury that the State possessed unproduced evidence that these individuals secured Ms. Westbrook's presence

at Appellant's trial for the purpose of providing him a false alibi. The prosecutor's use of the derogatory term "bitch" to describe Ms. Westbrook was over the top and humiliated her in front of the jury.

C. MISCONDUT RELATED TO THAT ALONE WOULD MAKE HIM GUILTY ARGUMENT.

Prosecutor DiGiacomo committed misconduct when he made serious misrepresentation of law that potentially misled the jury regarding reasonable doubt:

> " DiGiacomo… If he had not been doing something wrong at 7:00 at night, he wouldn't need anybody to come in here and lie for him. That alone would make him guilty"

(AA III, Jury Trial Transcript, May 20, 2011, 142:13, SLAU538).

These remarks influenced the jury to improperly shift the State's burden of proof on to Appellant, especially given the fact that the jury did not receive instructions in this case regarding alibi. Such misconduct effects Appellant's Constitutional right to a verdict based on guilt beyond reasonable doubt.

D. MISCONDUCT RELATED TO 'I GOT TO TELL APPELLANT THIS, TOO….' ARGUMENT

In *Collier v. State*, this Court found a prosecutor's conduct to be "egregiously improper" when during the prosecutor's closing argument the prosecutor "*melodramatically faced the defendant* and exhorted him: Gregory Allen Collier, you deserve to die." 101 Nev. 473, 479, 705 p.2d 1126 (Nev. 1985) (emphasis in original) (modified on other grounds in *Howard v. State*, 106 Nev. 713, 719 (1990)). This Court specifically found that such melodramatic behavior in a personalized manner by a

prosecutor was prejudicial because it "detracts from the unprejudiced, impartial, and nonpartisan role that a prosecuting attorney [is supposed to] assume [ ] in the courtroom" and invites the jurors to rely on the prosecutor's personal beliefs and greater experience. *Id.* at 480; *see also Guy v. State*, 108 Nev. 770, 785, 839 p.2d 578 (1992) (acting sua sponte to find similar conduct by a prosecutor improper).

"Any inclination to inject personal beliefs into arguments to inflame the passions of the jury must be avoided. Such comments clearly exceed the boundaries of proper prosecutorial conduct." *Floyd*, 118 Nev. 156, 173.

Prosecutor DiGiacomo engaged in egregious misconduct when during a dramatic peak of his rebuttal argument he turned and faced Appellant, and while personally staring him down, exclaimed, "I got to tell Appellant this, too, you shoot a guy in the face, you don't just get 10 years." (AA III, Jury Trial Transcript, May 20, 2011, 143:8, SLAU538).

There can be no question that the prosecutor's personalized, over-dramatic behavior, and comments had the same effect and improper influence upon the jurors as those found to be egregious in *Collier* and *Guy*. The State's conduct was also improper because it was intended to inflame the passions and emotions of the jurors.

E. MISCONDUCT RELATED TO DOING THE JOB ARGUMENT

In *Anderson v. State*, the prosecutor committed misconduct when he stated to the jury during his closing argument "do your duty in this case – find that he's guilty." 121 Nev. 511, 517, 118 p. 3d 184 (2005). This court explained that to "advise a jury that it has a duty to convict is to distort the entire criminal justice process" *Id*.

"There's at least one person in this room that knows beyond any shadow of a doubt who committed this crime. I suggest to you, if you are doing the job, 12 of you will go back in that room, you will talk about it, and come back here and tell him you know, too." (AA III, Jury Trial Transcript, May 20, 2011, 150:16, SLAU540).

DiGiacomo's remarks and the comments made by the prosecutor in *Anderson* are substantial equivalents because both sets of remarks suggest that convicting is the only way of "doing the job" or duty that the jury was seated to do. This argument went uncorrected, was among the last words the jury heard before going into the deliberations, and increased the likelihood that it would influence the jurors.

CONCLUSION

Based upon the above and foregoing, Appellant respectfully asks this Court to vacate the Judgment of Conviction in this case and remand the matter back to the District Court for a new trial.

Dated this 3rd day of September, 2013.

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/s/ William H. Gamage, Esq.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that I am an employee of GAMAGE & GAMAGE, and that I served a copy of the foregoing **Appellant's Opening Brief** to the parties identified below:

XX	Through the Courts electronic filing system,
	by placing the same in the United States Mail via Certified Mail, Return Receipt Requested, with postage prepaid attached thereto,
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