IN THE SUPREME COURT OF THE STATE OF NEVADA

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DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 65168

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

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APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The Notice of Entry of Findings of Fact, Conclusions of Law and Order denying Mr. Johnson's Petition was filed on March 21, 2014 (A.A. Vol. 42 pp. 8184). Mr. Johnson filed a timely Notice of Appeal on March 6, 2014 (A.A. Vol. 42 pp. 8203-8204).

STATEMENT OF THE CASE

On September 2, 1998, the Grand Jury returned a true bill indicting the defendant (A.A. Vol. 1 pp. 1-10). On September 16, 1998, a superceding indictment was filed (A.A. Vol. 2 pp. 278). On September 17, 1998, the defendant was formally arraigned before the Honorable Jeffery Sobel. The defendant waived his right to a trial within sixty days. The matter was set for trial on July 5, 1999.

On November 18, 1999, the State agreed to provide the inducements of the witnesses pursuant to the defense's motion to compel the disclosure of existence of benefits or cooperation with prosecution (A.A. Vol. 6 pp. 1347).

On June 5, 2000, trial commenced (A.A. Vol. 11 pp. 2603). On June 9, 2000, the jury returned guilty verdicts as to Count one, burglary while in possession of a firearm; Count two, conspiracy to commit robbery and/or kidnapping and/or murder; Counts three-six, Robbery with use of a deadly weapon; Count seven-ten, first degree kidnapping with use of a deadly weapon; Counts eleven-fourteen,

murder with use of a deadly weapon (A.A. Vol. 14 pp. 3239-3247).

On June 15, 2000, the penalty phase instructions and closing arguments were heard. On June 16, 2000, the jury declared that they were unable to reach a verdict as to punishment (A.A. Vol. 17 pp. 3928-4018).

On July 24, 2000, the three judge panel consisting of Judge Jeffery Sobel, Judge Michael Griffin and Judge Steve Ariat heard the second penalty phase. On July 26, 2000, closing arguments were heard by the three judge panel. The three judge panel returned a verdict, having found the aggravating circumstances outweigh any mitigating circumstance and imposed a sentence of death as to all four murder counts with use of a deadly weapon. On October 3, 2000, formal sentencing was heard. The defendant was sentenced to death for all four murders with consecutive death sentences for the use of a deadly weapon.

Mr. Johnson appealed his convictions and ultimate death sentences. On December 18, 2002, this Court filed it's Order of Affirmance in part, vacated in part, and remanded. This affirmed Mr. Johnson's convictions and his sentences other than his death sentences. This Court vacated his death sentences and remanded for a new penalty hearing. This Court overruled Mr. Johnson's death sentences based upon the United States Supreme Court's decision in Ring v. Arizona, 536 U.S.584, 122 Sup Ct.2428, 153 L. Ed.2d 556, (2002) ruling that three

judge panels are unconstitutional.

On remand, the Special Public Defender was appointed to represent Mr. Johnson at his penalty phase. In April 2005, a jury was impaneled and heard the bifurcated penalty phase (A.A. Vol. 20 pp. 4654-4679).

On April 27, 2005, the jury heard closing arguments regarding the first portion of the bifurcated penalty phase (A.A. Vol. 25 pp. 5854-5949). The jury found that there was at least one aggravating circumstance as to all four victims and determined that the mitigating circumstances did not outweigh the aggravating circumstances.

The jury returned the special verdict finding the single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders, (he was eighteen years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful contact with either parent; he had no positive male role models; he grew up in a violent neighborhood; he witnesses many violent attacks as a child; while a teenager he attended schools where violence was common. Johnson v. State of Nevada, 122 Nev. 1344, at 1350. Therefore, on April 28, 2005, the jury heard opening arguments regarding the second portion of the bifurcated penalty phase (A.A. Vol. 26 pp. 6181-6246).

On May 5, 2005, the jury returned a verdict sentencing Donte Johnson to death for the first degree murder with use of a deadly weapon of Jeffery Biddle, Tracey Corrinage, Matt Mowen, and Peter Talamentez. Mr. Johnson filed a timely notice of appeal (A.A. Vol. 30 pp. 7113-7124). On December 28, 2006 this Court affirmed Mr. Johnson's appeal. 122 Nev. 1344,148 P.3d 767, (Dec. 2006). The remittitur issued on January 28, 2008.

Mr. Johnson filed a timely Petition for Writ of Habeas Corpus on February 13, 2008 (A.A. Vol. 43 pp. 8346). Numerous supplemental briefs were filed (A.A. Vol. 32 pp. 7308; A.A. Vol. 33 pp. 7343). The Notice of Entry of Findings of Fact, Conclusions of Law and Order denying Mr. Johnson's Petition was filed on March 21, 2014 (A.A. Vol. 42 pp. 8184). Mr. Johnson filed a timely Notice of Appeal on March 6, 2014 (A.A. Vol. 42 pp. 8203-8204).

STATEMENT OF FACTS

In the summer of 1998, Mr. Justin Perkins, had some friends that lived at 4825 Terra Linda, Clark County Nevada.[1] On August 13, 1998, at approximately 7:30-8:00 p.m, Mr. Perkins went to the Terra Linda home and visited with Matt Mowen, Tracey Gorringe, and Jeff Biddle. (A.A. Vol. 23 pp.5490-5492)

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[1] The Statement of facts is from the defendant's third penalty phase in April and May 2005.

The friends were playing video games and lounging around. (A.A. Vol. 23 pp. 5492) There was a VCR, playstation and television in the entertainment center. (A.A. Vol. 23 pp. 5493) Before Mr. Perkins left, he was offered some muscle relaxers, which he refused. (A.A. Vol 23 pp. 5494) At approximately 9 p.m. Mr. Perkins left. (A.A. Vol 23 pp. 5494) Remaining at the house was Matt Mowen, Jeff Biddle, and Tracey Gorringe. (A.A. Vol 23 pp. 5494)

At approximately 6 p.m., on August 14, Mr. Perkins went back to the Terra Linda home. When Mr. Perkins entered the home, he observed Matt Mowen, Tracy Gorringe and Jeff Biddle laying face down with duct tape binding their wrists and ankles. (A.A. Vol 23 pp. 5497). Mr. Perkins went to a neighbors home where he requested assistance in contacting authorities. (A.A. Vol 23 pp. 5499) Mr. Perkins was informed by a police officer that a fourth victim was also inside. (A.A. Vol 23 pp. 5501)

Officer David West and Sargent Randy Sutton were the first responding officers to the crime scene. (A.A. Vol 23 pp. 5514-5516) The officers had to concern themselves with sweeping the home for possible suspects and any other victims. (A.A. Vol 23 pp. 5516) There was no sign of forced entry. (A.A. Vol 23 pp. 5524)

Four deceased victims were located inside the Terra Linda residence. (A.A.

Vol 23 pp. 5516)The four victims were identified as Jeffrey Biddle, Tracey Gorringe, Matthew Mowen, and Peter Talamentez. (A.A. Vol 23 pp. 5591) At the feet of Tracey Gorringe, was a box of black and mild cigars. (A.A. Vol 23 pp. 5594) The cigar box was processed for fingerprints.(A.A. Vol 23 pp. 5594) Donte Johnson's fingerprint was located on the black and mild box located in the Terra Linda residence. (A.A. Vol 23 pp. 5597)

According to detective Thomas Thowsen, the perpetrators had been motivated in looking for narcotics and money. (A.A. Vol 23 pp. 5526) The home had been thoroughly ransacked. (A.A. Vol 23 pp. 5526) No paper currency was located in the entire home. (A.A. Vol 23 pp. 5527) Detective Thowsen surmised from observing the entertainment center that the thieves had taken a VCR and Play stations.

During investigation, the police began investigating information connected to the "Everman home".(A.A. Vol 23 pp. 5510) The Terra Linda home and Everman home were approximately eight-tenths of a mile apart. (A.A. Vol 23 pp. 5510)

On August 18, detectives made contact with three young males of interest, Mr. Todd Armstrong, Bryan Johnson and Ace Hart. (A.A. Vol 23 pp. 5532-5533)

Mr. Armstrong lived at 4815 Everman.[2] The legal owner of that address was his mother.(A.A. Vol 23 pp. 5535) Mr. Armstrong was friends with Ace Hart and Bryan Johnson. In early August of 1998, Donte Johnson, Terell Young and Charla Severs (Donte Johnson's girlfriend) moved into the Everman house.

Donte Johnson was known as "Deko" and John White.(A.A. Vol 23 pp. 5536) Consent to search the Everman residence was provided by Todd Armstrong. (A.A. Vol 23 pp. 5536)

Donte Johnson and his girlfriend occupied the master bedroom.(A.A. Vol 23 pp. 5539) Todd Armstrong allegedly occupied a different bedroom because there was a water bed there.(A.A. Vol 23 pp. 5539) Ace Hart stayed in a bedroom and Terell Young stayed in the living room.(A.A. Vol 23 pp. 5539) The defendant had been seen with a .380 caliber pistol, a six shot revolver, and a .22 caliber rifle that looked like a sawed off shotgun. (A.A. Vol 23 pp. 5540) Mr. Armstrong observed these weapons in a black and green duffle bag. (A.A. Vol 23 pp. 5540) The duffle bag was located during the search of the Everman home. (A.A. Vol 23 pp. 5540)

Also located during the search of the Everman home was a VCR and Playstation. (A.A. Vol 23 pp. 5541) Detectives believed the VCR and Playstation

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[2] During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Armstrong and several other witnesses.

located at the Everman home, originated from Terra Linda and were taken during the robbery. (A.A. Vol 23 pp. 5541-5542)

At first, Donte Johnson was only going to stay at Everman two or three days but stayed longer. (A.A. Vol 23 pp. 5545) Todd Armstrong claimed Donte Johnson was not told to leave because he was scared of him. (A.A. Vol 23 pp. 5545) Mr. Armstrong had the only key to the residence. (A.A. Vol 23 pp. 5547-5548) He claimed that the defendant could climb through a broken bathroom window to get into the home. (A.A. Vol 23 pp. 5548)

Somewhere between the seventh and tenth of August, Matt Mowen came to the Everman home. (A.A. Vol 23 pp. 5548) When Matt Mowen arrived, Mr. Armstrong, the defendant and Terell Young were present. (A.A. Vol 23 pp. 5548) Matt Mowen made a comment that he had been following a musical group, called Fish Tour and had made a lot of money selling acid. (A.A. Vol 23 pp. 5549)

Mr. Johnson apparently looked around as if he had formed an idea when he heard Matt Mowen's comment. (A.A. Vol 23 pp. 5549) Over the next several days, Mr. Johnson asked Todd Armstrong where Mowen lived. (A.A. Vol 23 pp. 5550) Mr. Johnson and Mr. Armstrong were in a vehicle accompanied by Ace Hart, when Mr. Hart pointed out where Mr. Mowen lived. (A.A. Vol 23 pp. 5551) Ace Hart pointed out the Terra Linda home, between the tenth and twelfth of August. (A.A.

Vol 23 pp. 5552)

During the search of the Everman home, duct tape was located in the master bedroom. (A.A. Vol 23 pp. 5554) Also located during the search was a .22 caliber rifle and black jeans. (A.A. Vol 23 pp. 5555) Police also noted freshly dug portion of dirt which caused them to located a blue pager and two motel keys. (A.A. Vol 23 pp. 5557-5558) The pager was later identified as belonging to Peter Talamentez. (A.A. Vol 23 pp. 5557-5558)

According to the summary of the evidence provided by Detective Thowsen, on the morning of August 14, Todd Armstrong awoke in the master bedroom and observed Donte Johnson and Terell Young caring the duffle bags containing guns, duct tape, a VCR and a play station. (A.A. Vol 23 pp. 5559-5560)

When Mr. Johnson and his co-defendant's approached the home one of the individuals was watering the lawn and was ordered inside the home. (A.A. Vol 23 pp. 5563)

Mr. Armstrong claimed that Donte Johnson admitted to killing one of the men because he was "mouthing off". (A.A. Vol 23 pp. 5561-5562)

Mr. Armstrong said that Donte Johnson confessed to having to kill the other three individuals after killing the man who thought he was "joking around". (A.A. Vol 23 pp. 5566-5567) Donte Johnson was laughing according to Mr. Armstrong.

(A.A. Vol 23 pp. 5567)

Bryan Johnson was a friend of Ace Hart and Todd Armstrong[3]. (A.A. Vol 23 pp. 5568) Mr. Johnson lived at the Everman home for a brief period. (A.A. Vol 23 pp. 5571) According to Mr. Bryan Johnson, he observed Donte Johnson smoke black and mild cigars. (A.A. Vol 23 pp. 5574) Bryan Johnson previously testified that he heard Donte Johnson confess to the killings. Bryan Johnson stated that Donte explained that he had to kill one of the individuals who was Mexican because he felt like the robbery was a joke. (A.A. Vol 23 pp. 5574-5578) He then shot the other individuals. Mr. Bryan Johnson said that Donte Johnson explained that the blood squirted up like it was Niagra Falls. (A.A. Vol 23 pp. 5579) Donte mentioned the fact that he had some of the blood on his pants. (A.A. Vol 23 pp. 5580)

Ms. Lashawnya Wright is the girlfriend of co-defendant, Sikia Smith(also known as tiny bug). (A.A. Vol 23 pp. 5580) Ms. Wright previously testified, she did not testify in the penalty phase.[4] (A.A. Vol 23 pp. 5580) On August 13, Ms. Wright entertained Terell Young and Donte Johnson at her apartment. (A.A. Vol

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[3] During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Bryan Johnson.

[4] During the penalty phase, detective Thowsen was permitted to summarize the testimony of Ms. Lashawnya Wright.

23 pp. 5581-5582) When Donte and Terell Young left, Donte was caring a duffle bag with duct tape and gloves. (A.A. Vol 23 pp. 5582) Prior to leaving the apartment, the two were discussing a "lick," a slang word for robbery. (A.A. Vol 23 pp. 5583) When they returned fourteen hours, later Sikia Smith appeared to be scared. (A.A. Vol 23 pp. 5584) Ms. Wright explained that Sikia Smith sold .380 caliber handgun on approximately August fifteenth or sixteenth of 1999. A.A. Vol 23 pp. 5587()

Allegedly, when Mr. Johnson saw the Review Journal newspaper he stated, "we made the front page." (A.A. Vol 23 pp. 5588) He appeared excited. (A.A. Vol 23 pp. 5589) Four empty bullet casings were located at the Terra Linda address. (A.A. Vol 23 pp. 5592) Mr. Richard Goode tested all four shell casings and determined that they were all fired by the same weapon. (A.A. Vol 23 pp. 5592)

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (A.A. Vol 23 pp. 5600) Later, it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte Fletch. (A.A. Vol 23 pp. 5600) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants. (A.A. Vol 23 pp. 5600-5601).

During the search of 4825 Terra Linda, police noted that Peter Talamentez had a loaded handgun on his person. (A.A. Vol 25 pp. 5956) Police also located white baggies with methamphetamine at Terra Linda. (A.A. Vol 25 pp. 5960-5961)

Although police had indications that Mr. Armstrong was involved he was never arrested or charged with the instant offenses. (A.A. Vol 25 pp. 5972-5973) There was evidence that he told the defendant there was money and illegal mushrooms inside the residence. (A.A. Vol 25 pp. 5974) When officers arrived at the Everman residence on August 18th, they located Charla Severs, Donte Johnson and Duane Anderson (A.K.A Scale). (A.A. Vol 25 pp. 5951) The defendant denied living at the residence. (A.A. Vol 25 pp. 5952)

The previous testimony of Charla Severs was read to the jury. (A.A. Vol 25 pp. 5978-5979) Ms. Severs had a moniker "Lala". (A.A. Vol 25 pp. 5979) In 1998, Ms. Severs and Donte Johnson were involved in a dating relationship. (A.A. Vol 25 pp. 5980-5981) Ms. Severs noted that none of the defendants had jobs in the month of July. (A.A. Vol 25 pp. 5990) Donte Johnson smoked black and mild cigars according to Ms. Severs. (A.A. Vol 25 pp. 5990) Donte Johnson would sell crack cocaine and she had observed Donte put the narcotics in a black and mild box one time and gave it to "DJ". (A.A. Vol 25 pp. 5995)

Ms. Severs had seen the defendant with a duffle bag that had guns in it.

(A.A. Vol 25 pp. 6000-6001) Ms. Severs explained that Matt Mowen came by the Everman residence approximately two days prior to the murders looking for some crack cocaine but she did not hear him make any mention of how he made money following a musical group. (A.A. Vol 25 pp. 6010-6013) After Matt Mowen left, Ms. Severs heard Mr. Armstrong say that there was ten thousand dollars and a lot of mushrooms in the home and they should rob the home. (A.A. Vol 25 pp. 6014)

On the day of the murders, Donte was wearing a black pair of jeans. (A.A. Vol 25 pp. 6016-6017) "Red" is carrying the duffle bag with guns inside when they left. (A.A. Vol 25 pp. 6019-6020) When Donte returned, he kissed Ms. Severs on the cheek which woke her up. Donte Johnson allegedly stated, "you have to go to sleep after you kill somebody". (A.A. Vol 25 pp. 6023) Ms. Severs said that Donte Johnson confessed that he killed the Mexican because he was talking "mess". (A.A. Vol 25 pp. 6026-6027) Mr. Johnson also said that he kicked the Mexican before shooting him in the back of the head. Mr. Johnson allegedly stated the victims made noises when they were shot and blood squirted out of their heads. (A.A. Vol 25 pp. 6026-6027) Mr. Johnson had been concerned people would hear the gunshots, so he turned the music up very loud. (A.A. Vol 25 pp. 6029)

The next day, Ms. Severs said she talked to Donte Johnson, who confessed to killing all four victims by shooting them in the back of the head. (A.A. Vol 25

pp. 6030-6033) Donte relayed to Ms. Severs that the first two individuals did not have any money or drugs so they called the other two victims over to the house. (A.A. Vol 25 pp. 6035)

Ms. Severs admitted that she originally lied to the police to help Donte. (A.A. Vol 25 pp. 6042) Ms. Severs also lied to the grand jury to help Donte. (A.A. Vol 25 pp. 6044) Ms. Severs had previously stated that Todd Armstrong had gone to the murder scene with the other defendants. (A.A. Vol 25 pp. 6053) She claimed that Todd Armstrong had set everything up. (A.A. Vol 25 pp. 6053) However, she later claimed that Mr. Armstrong did not go to the murder scene and she did it just to get him in trouble. (A.A. Vol 25 pp. 6054)

Ms. Severs originally told the Grand Jury that the defendant did not have black jeans on. She knew that there was blood on them and she didn't want to get him in trouble. (A.A. Vol 25 pp. 6056) Ms. Severs told Channel 8 news that Donte did not go to the murder scene and in fact she had gone to the murder scene. (A.A. Vol 25 pp. 6062)

Eventually, Ms. Severs was arrested on a material witness warrant and a warrant for possession of a stolen vehicle. Ms. Severs was promised that if she stayed out of trouble the case for possession of a stolen vehicle would be dropped against her. (A.A. Vol 25 pp. 6068) Ms. Severs admits she has approximately five

aliases. (A.A. Vol 24 pp. 5685)

When Ms. Severs was arrested and placed in the Clark County Detention Center she hoped her testimony would gain her release. (A.A. Vol 24 pp. 5656) Ms. Severs admitted that she committed perjury in front of the Grand Jury even though she had told the Grand Jury at least three times that she promised to tell the truth. (A.A. Vol 24 pp. 5676) Ms. Severs was never charged with perjury for her lies to the Grand Jury. (A.A. Vol 24 pp. 5677)

Todd Armstrong smoked crack cocaine on a daily basis. (A.A. Vol 24 pp. 5666)

When the defendants came home from Terra Linda after the robbery, Ms. Severs explained that Mr. Armstrong was upset there was no cocaine or money in the house and Mr. Armstrong expected some. (A.A. Vol 24 pp. 5680-5681) In fact, Mr. Armstrong said where is my cocaine. (A.A. Vol 24 pp. 5681)

Mr. Berch Henry works for the DNA laboratory with the Las Vegas Metropolitan Police Department. (A.A. Vol 24 pp. 5706) Mr. Henry had analyzed the work conducted by Mr. Thomas Wahl. (A.A. Vol 24 pp. 5707) A cigarette butt located at the Terra Linda residence had the DNA of Donte Johnson identified on it. (A.A. Vol 24 pp. 5718-5719) There is no way to tell when the DNA was left on the cigarette butt. (A.A. Vol 24 pp. 5719) A pair of black Calvin Klein jeans was

tested and the DNA was determined to originate from Tracey Gorringe. (A.A. Vol 24 pp. 5720-5721)

An autopsy of the victims provided evidence that the barrel of the murder weapon was within about an inch of the skin of the victims. (A.A. Vol 24 pp. 5738) All four victims died as a result of a single gunshot wound. (A.A. Vol 24 pp. 5740-5752)

Mr. Talamentez also had a laceration behind his left ear and an abrasion to his nose. (A.A. Vol. 24 pp. 6529) These injuries were caused by blunt force trauma. The toxicology report of all victims demonstrated the presence of methamphetamine, amphetamine, and cocaine. (A.A. Vol. 24 pp. 6536-6537) Mr. Matthew Mowen also had alcohol in his system. (A.A. Vol. 24 pp. 6537) At the conclusion of the medical examiners testimony, the State rested.

The defense case in mitigation.

The defense called Moises Zamora. Mr. Zamora is married to Donte Johnson's sister, Johnnisha Zamora. (A.A. Vol. 24 pp. 5766) Mr. Zamora knew Donte Johnson by his real name, John White. (A.A. Vol. 24 pp. 5766) Mr. Zamora is half Hispanic and explained that the defendant did not treat him any differently because of his background. (A.A. Vol. 24 pp. 5768-5770) Mr. Zamora felt that Donte accepted him like a brother. (A.A. Vol. 24 pp. 5770) Mr. Zamora briefly

lived with Donte Johnson and described him like a family member who he loved. (A.A. Vol. 24 pp. 5771-5772)

Donte Johnson has a child named Allen. Allen's communication with his father while he has been incarcerated, was very important to him. (A.A. Vol. 24 pp. 5775)

The defense called Arthur Cain, Mr. Johnson's uncle. (A.A. Vol. 24 pp. 5780) Mr. Cain described Donte's mother, Eunice as "slow" and she attended special ed classes in school. (A.A. Vol. 24 pp. 5787) People often teased Donte Johnson's mother because she was "slow". (A.A. Vol. 24 pp. 5787) They referred to her as "retarded or stupid". (A.A. Vol. 24 pp. 5787) Eunice eventually married John White (the defendant's father). (A.A. Vol. 24 pp. 5788) Mr. Cain became aware that Eunice had begun to use alcohol and drugs. (A.A. Vol. 24 pp. 5790) He was also aware that there was physical violence between Mr. White and Eunice. (A.A. Vol. 24 pp. 5790) Eventually, Donte Johnson was taken from his mother and went to live with his grandmother, "big momma". (A.A. Vol. 24 pp. 5793)

Eunice and Cain testified for the defense. (A.A. Vol. 24 pp. 5799) Eunice described Donte Johnson as her oldest child. (A.A. Vol. 24 pp. 5800) Eunice stated that she drank alcohol when she was pregnant with Donte. (A.A. Vol. 24 pp. 5800) Eunice described her husband as violent and that her children would see her being

beaten by him. (A.A. Vol. 24 pp. 5804) Donte would try to defend his mother but he was too little. John White actually knocked Eunice's teeth out. (A.A. Vol. 24 pp. 5804) John White also attempted to throw her out of a window at the Frontier and Donte ran for help, which she believed saved her. (A.A. Vol. 24 pp. 5805)

Eunice explained that she was having a problem taking care of her children because she was smoking PCP at the time. (A.A. Vol. 24 pp. 5809) She would get high when her kids were present. (A.A. Vol. 24 pp. 5810) Her children were taken from her and sent to foster care but eventually ended up living with her mother. (A.A. Vol. 24 pp. 5811)

Johnnisha Zamora is the younger sister of Mr. Johnson. (A.A. Vol. 24 pp. 5814) Johnnisha remembers her mother would smoke drugs in front of the children and her father would beat her mother in front of the children. (A.A. Vol. 24 pp. 58216) Sometimes when her mother would see a ghost, the children would be locked in the closet while she was screaming. There were no lights inside the closet. (A.A. Vol. 24 pp. 5817) At one point, the children were forced to live in a shed. (A.A. Vol. 24 pp. 5818) There were approximately five or six of them living in a shed with no toilet, running water, or furniture. (A.A. Vol. 24 pp. 5819-5821) Johnnisha observed John White beating Donte Johnson and Donte not understanding why he was being beaten. (A.A. Vol. 24 pp. 5825)

When the Donte went to live with his grandmother, his grandfather did not spend time with Donte. (A.A. Vol. 24 pp. 5828) Johnnisha and Donte observed a lady who was found dead with a "pole shoved up her private." (A.A. Vol. 24 pp. 5830) Donte and Johnnisha observed a police shootout where a man was killed upstairs. (A.A. Vol. 24 pp. 5831)

When the children would walk to school they would be chased almost everyday by bullies. (A.A. Vol. 24 pp. 5832) They observed a lot of street violence.(A.A. Vol. 24 pp. 5832) The bullies would throw rocks and beat them up. (A.A. Vol. 24 pp. 5833) Johnnisha testified that she loved her brother. (A.A. Vol. 24 pp. 5840)

The defendant's other sister, Eunisha White testified for the defense. (A.A. Vol. 26 pp. 6073) Ms. White observed her mother being abused by her father. (A.A. Vol. 26 pp. 6075) She observed Mr. White strangle her mother with his hands and on one occasion grab her by the neck and hold her over a balcony. (A.A. Vol. 26 pp. 6076) Ms. White remembered having to live in the shack with lots of other people. (A.A. Vol. 26 pp. 6079) Eventually, the children went to live with their grandmother, but even then, sometimes they went without food. (A.A. Vol. 26 pp. 6083-6084)

Ms. Keonna Atkins was the cousin of Donte Johnson. (A.A. Vol. 26 pp.

6088) Ms. Atkins remembers how they would be chased by bullies. (A.A. Vol. 26 pp. 6120-6121) On one occasion, there was a burglary and a perpetrator came through the window and groped Ms. Atkins. (A.A. Vol. 26 pp. 6122) The perpetrator confronted the children which upset Donte (he was seven or eight years old). (A.A. Vol. 26 pp. 6121-6122)

Donte's grandmother, Jane Edwards testified that she attempted to take care of approximately ten children in her home, including Donte. (A.A. Vol. 26 pp. 6132)

The defendant's son, Allen White, told the jury that he loved his father and read a letter to the jury that he had written to his father. (A.A. Vol. 26 pp. 6143-6145)

On April 27, 2005 the jury heard closing arguments regarding the first portion of the penalty phase.(A.A. Vol. 25 pp. 5871-5932) The jury found that there was at least one aggravating circumstance as to all four victims. The jury began the second portion of the penalty phase on April 28, 2005. On April 28, 2005 opening arguments were heard regarding the second portion of the penalty phase

The State called Los Angeles police officer Jimmy Grayson (second portion of the penalty phase). On June 8, 1993, Officer Grayson was involved in the investigation of a bank robbery at Sen Fed Bank in Marina Del Ray, California.

(A.A. Vol. 26 pp. 6218-6220) There were four suspects in a ryder van. There was a police pursuit of the getaway van and Donte Johnson was identified as the driver. (A.A. Vol. 26 pp. 6221-6222) During the bank robbery one of the robbers stood near the door with a sawed off shotgun. (A.A. Vol. 26 pp. 6223) Ms. Sandra Gatlin worked for Sen Fed Bank on June 8, 1993, as assistant bank manager. (A.A. Vol. 26 pp. 6239-6240) She remembered how she felt fear and described that some of the robbers jumped the counters where the tellers were working. (A.A. Vol. 26 pp. 6241-6242)

Donte Johnson received a total of four years commitment to the California youth authority for the bank robbery. (A.A. Vol. 26 pp. 6216) Once Donte Johnson was released from custody, he was on parole. (A.A. Vol. 26 pp. 6218) However, Donte Johnson became an absconder and his parole was suspended and a warrant issued. (A.A. Vol. 26 pp. 6218)

On May 4, 1998, Officer Charles Burgess responded to a shooting call at the 2100 block of east Fremont. (A.A. Vol. 26 pp. 6268) When Officer Burgess arrived he noticed Derrick Simpson lying motionless on the road. (A.A. Vol. 26 pp. 6269) He had suffered from gunshot wounds. (A.A. Vol. 26 pp. 6270) Officer Burgess asked the victim what had occurred and he stated “that a black male named Deko shot him”. (A.A. Vol. 26 pp. 6271) The State introduced a judgement of conviction

in which Donte Johnson was adjudicated guilty of battery with use of a deadly weapon connected with the shooting. (A.A. Vol. 26 pp. 6276)

On February 24, 2001, Officer Alexander Gonzales was working in the Clark County Detention Center in the disciplinary housing unit. (A.A. Vol. 26 pp. 6295-6296) Officer Gonzales claimed that he witnessed a fight wherein Mr. Reginald Johnson and Donte Johnson threw Oscar Irias over the second story tier. (A.A. Vol. 26 pp. 6300-6301) Officer Gonzales claimed that he could observe the fight through a window. (A.A. Vol. 26 pp. 6303)

Oscar Irias had disciplinary problems including being written up for masturbating on a toilet and attacking his roommate for no apparent reason. (A.A. Vol. 26 pp. 6313) It was also noted that Oscar was a psych patient with a violent temper. (A.A. Vol. 26 pp. 6319) After being thrown over the tier, Oscar went into his cell and was shaken up but had no other significant injuries. (A.A. Vol. 27 pp. 6323-6324)

Prisoner George Cotton observed Oscar Irias fall from the second tier on February 24, 2001. (A.A. Vol. 27 pp. 6504-6507) Mr. Cotton heard someone yell help, help, and then saw Oscar fall and then jump up and run in his cell. (A.A. Vol. 27 pp. 6511-6512) Mr. Cotton indicated that Donte Johnson was not involved in the incident. (A.A. Vol. 27 pp. 6514) Mr. Cotton has two convictions for robbery

with use of a deadly weapon. (A.A. Vol. 27 pp. 6515)

Prisoner Permaine Lytle also heard Oscar yell for help. (A.A. Vol. 27 pp. 6526) He explained that the Officers were unable to see what had occurred from their vantage point. (A.A. Vol. 27 pp. 6530) Mr. Lytle is currently serving life without parole consecutive to life without parole for first degree murder with use of a deadly weapon. (A.A. Vol. 27 pp. 6531)

Mr. Reginald Johnson told the jury that he was solely responsible for the attack on Oscar Irias.(A.A. Vol. 27 pp. 6540-6544) Mr. Reginald Johnson explained, "I assaulted him and heped him over the tier." (A.A. Vol. 27 pp. 6544) Mr. Reginald Johnson pled guilty for his role in the assault. (A.A. Vol. 27 pp. 6544) Reginald Johnson told the jury he attacked Oscar because he did not like child molesters. (A.A. Vol. 27 pp. 6545) Mr. Reginald Johnson denied that Donte Johnson had any involvement in the crime. (A.A. Vol. 27 pp. 6546-6556) Subsequently, Reginald Johnson and Oscar Irias were again placed together in a holding cell and Reginald Johnson beat him up for a second time. (A.A. Vol. 27 pp. 6556) During Reginald Johnson's cross-examination, he became so heated the Court called a recess. (A.A. Vol. 27 pp. 6559-6560)

Reginald Johnson's attorney, Ms. Gloria Navarro testified that she is employed with the Clark County District Attorney's Office. (A.A. Vol. 28 pp.

6581) Mr. Reginald Johnson informed her that Donte Johnson was not involved with the crime. (A.A. Vol. 28 pp. 6582-6583) Pursuant to an independent investigation, Ms. Navarro concluded that Officer Gonzales was unable to see the fight, as he had claimed. (A.A. Vol. 28 pp. 6591) Ms. Navarro testified Reginald Johnson entered a plea of guilty because she guaranteed him that the charges against Donte would be dismissed with prejudice. (A.A. Vol. 28 pp. 6608)

The State called several witnesses to provide victim impact statements. (A.A. Vol. 28 pp. 6596) Juanita Aguilar provided victim impact regarding her son, Peter Talamentez. (A.A. Vol. 28 pp. 6598-6600) Marie Biddle provided an impact statement regarding her son Jeff. (A.A. Vol. 28 pp. 6602-6609) Sandy Viau provided victim impact regarding her son Tracey Corrinage. (A.A. Vol. 28 pp. 6610-6617) Jennifer Mowen provided victim impact regarding her brother, Matthew. (A.A. Vol. 28 pp. 6618-6621) Lastly, Mr. David Mowen provided victim impact regarding his son, Matthew. (A.A. Vol. 28 pp. 6621-6629)

The State then rested their case in the second part of the penalty phase. (A.A. Vol. 28 pp. 6631).

Penalty Mitigation in the second portion of the penalty phase

Keonna Atkins testified again, for the defense. (A.A. Vol. 28 pp. 6632) Ms. Atkins explained that during their youth, there were Blood and Crip gangs that

were very violent in the area. (A.A. Vol. 28 pp. 6634) There were shoot outs and gang members often harassed them. (A.A. Vol. 28 pp. 6635) Donte Johnson became the protector of the family. (A.A. Vol. 28 pp. 6638) Ms. Atkins learned that Donte had become a gang member because of a threat to rape her by Baby Sonny. (A.A. Vol. 28 pp. 6640) Donte had become a member or "jumped in" to the six deuce brims. (A.A. Vol. 28 pp. 6641) Ms. Atkins felt that Donte's participation in the gang had provided protection for her. (A.A. Vol. 28 pp. 6643) Donte's sister also confirmed that he joined a gang to protect the family. (A.A. Vol. 28 pp. 6655) Donte's sister also reported that Donte took care of her growing up and made sure others did not harm her. (A.A. Vol. 28 pp. 6660-6661)

The defense recalled Moises Zamora who told the jury that he was a crip and Donte was a blood. (A.A. Vol. 28 pp. 6669) Mr. Zamora explained he had similar experiences to Donte growing up in South Central, LA. (A.A. Vol. 28 pp. 6670)

The defense called Martin Jankowski, a professor of sociology at the University California, Berkley and an expert in gangs. (A.A. Vol. 28 pp. 6690-6691) Professor Jankowski lived and worked with gangs for ten years. (A.A. Vol. 28 pp. 6694) He also authored a book on gang culture entitled, "Islands in the Street". (A.A. Vol. 28 pp. 6695) Professor Jankowski indicated that violence is in an integral part of the gang environment.(A.A. Vol. 28 pp. 6702) Professor

Jankowski offered insight into the gang culture throughout his testimony.

The defendant's first cousin, Donna Revomer explained that she was very frightened to walk in her neighborhood until Donte Johnson joined the gang. (A.A. Vol. 28 pp. 6733) Her fear level improved after Donte joined the gang. (A.A. Vol. 28 pp. 6734)

The defense recalled Donte's grandmother, Jane Edwards. (A.A. Vol. 28 pp. 6736) The defense also recalled the defendant's son Allen White. (A.A. Vol. 28 pp. 6740) Allen told the jury that he loved his father. (A.A. Vol. 28 pp. 6741)

The defense called parole agent, Mr. Craig Clark from the California youth authority. (A.A. Vol. 28 pp. 6650) Officer Clark explained the area in which Donte lived was filled with gang activity and that there was always a chance of being beaten up, ridiculed, or harassed by enemies. (A.A. Vol. 28 pp. 6665) Officer Clark indicated that there were several gangs in the area that Mr. Donte Johnson was raised. A.A. Vol. 28 pp. 6666() Donte Johnson was always polite, cordial, and respectful to other members of the parole staff. (A.A. Vol. 28 pp. 6676) In fact, Officer Clark like Donte Johnson. (A.A. Vol. 28 pp. 6676)

Ms. Nancy Hunterton administered a program at the Clark County Detention Center that was attended by Donte Johnson. (A.A. Vol. 28 pp. 6691-6692) The class was called life skills, and Donte participated in the class in approximately

2000. (A.A. Vol. 28 pp. 6692) Mr. James Esten was retired from the California department of corrections. (A.A. Vol. 28 pp. 6713) Mr. Esten personally reviewed the records of Donte Johnson and toured Ely State penitentiary. (A.A. Vol. 28 pp. 6718) Mr. Esten described the type of living conditions and prison environment that Donte would live in for life. Mr. Esten did not notice any significant write-ups on Donte Johnson while at Ely State penitentiary. (A.A. Vol. 28 pp. 6751)

Dr. Thomas Kinsora, a psychologist in clinical neuropsychology, testified on behalf of Mr. Donte Johnson. (A.A. Vol. 29 pp. 6789) Dr. Kinsora explained that the environment that Donte Johnson grew up in and the factors of his environment played an important role in who he became. (A.A. Vol. 29 pp. 6813) Dr. Kinsora explained that Donte Johnson had grown up in an impoverished area of Los Angeles, Donte had even been reduced to looking in trash cans for food. (A.A. Vol. 29 pp. 6821) Dr. Kinsora noted that Donte Johnson's mother would regularly smoke crack cocaine in front of the children. (A.A. Vol. 29 pp. 6822) Social services talked with Donte who complained that he was frequently beaten but didn't know why. (A.A. Vol. 29 pp. 6823)

Dr. Kinsora also noted that Donte was a very small child and he had no father figure or male role model at home. (A.A. Vol. 29 pp. 6841-6842) Therefore, Donte felt responsible for protecting the women at home and this was difficult

based upon his stature. (A.A. Vol. 29 pp. 6842) At thirteen years old, Donte Johnson witnessed a friend stabbed to death with a screwdriver by a rival gang member. (A.A. Vol. 29 pp. 6844) At age fifteen, he had a friend shoot himself in the head in front of Donte because he felt that he had disappointed the gang. (A.A. Vol. 29 pp. 6844) In 1992, Donte witnessed a girl in his neighborhood shot in the face by a Crip gang member as she exited a bus. (A.A. Vol. 29 pp. 6845)

Dr. Kinsora compared South Central to a war zone, equivalent of something you would see in a third world country . (A.A. Vol. 29 pp. 6851) Dr. Kinsora explained that Donte committed the bank robbery because an older member of the gang had ordered him to do so and Donte did not want to appear afraid and let the gang down. (A.A. Vol. 29 pp. 6853)

Dr. Kinsora stated "I don't think there is any brain damage in talking to him and reading some of his writings." (A.A. Vol. 29 pp. 6861). The doctor concluded that there is no organic brain disorder. (A.A. Vol. 29 pp. 6876)

Dr. Kinsora admitted that he relied upon a report prepared by Tina Francis, a defense mitigation expert. (A.A. Vol. 29 pp. 6887) On page 31 of Tina Francis' report it reflects that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles. (A.A. Vol. 29 pp. 6900) There was an objection by the defense throughout this testimony

(A.A. Vol. 29 pp. 6901) The Court permitted the prosecutor to cross-examine Dr. Kinsora on Tina Francis' report because he claimed he had relied upon it. (A.A. Vol. 29 pp. 6904) Eventually, the court precluded the state from introducing any more evidence from Tina Francis' report. (A.A. Vol. 29 pp. 6905) At the conclusion of Dr. Kinsora's testimony, the defense rested their mitigation case.

The State called a rebuttal witness, Ms. Cheryl Foster. (A.A. Vol. 29 pp. 6908) Ms. Foster is the warden of Southern Desert Correction Center. (A.A. Vol. 29 pp. 6909) Ms. Foster testified extensively regarding the inner workings of the Nevada Penitentiaries.

The defendant informed the Court he did not want to provide allocution. (A.A. Vol. 29 pp. 6971) Thereafter, the jury was once again instructed on the law and closing arguments were heard.

On May 5, 2005, the jury returned a verdict sentencing Donte Johnson to death for the first degree murder with use of a deadly weapon of Jeffery Biddle, Tracey Corrinage, Matt Mowen, and Peter Talamentez. (Vol. 12, May 4, 2005).

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to

invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994), citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984).

This Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996). The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984).

In the instant case, Mr. Johnson's proceedings were fundamentally unfair. The defendant received ineffective assistance of counsel. Based upon the following arguments:

TRIAL PHASE ARGUMENTS

II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON DIRECT APPEAL THE UNCONSTITUTIONALITY OF JOHNSON'S JURY SELECTION PROCESS.

In the instant case, Mr. Johnson's entire voir dire was unconstitutional and Mr. Johnson was severely prejudiced. Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise the following issues on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

A. MR. JOHNSON RECEIVED AN UNCONSTITUTIONAL JURY VENIRE

At the conclusion of voir dire, trial counsel argued that the jury pool did not reflect a cross-section of Clark County, Nevada (A.A. Vol. 8 pp. 1833). Specifically, trial counsel stated that the jury pool consisted of over eighty (80) potential jurors and only three (3) were potential minority jurors (A.A. Vol. 8 pp. 1833).

In Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005), this Court considered a defendant's Sixth Amendment right to a fair cross section of the community in a venire panel. This Court expressed,

> Williams is entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution. The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Thus, as long as the jury selection process is designed to

> select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible. Williams 121 Nev. 934, 939, 940 (see also Evans v. State, 112 Nev. 1172, 1186, 926 P. 2d 265, 274 (1996), Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)).

In Williams, the defense moved to dismiss the first venire because it contained only one African American out of forty venire members. In Williams, this Court explained,

> The first venire included only one African American person out of forty venire members. Clark County, Nevada, contains 9.1% Black or African American people. Id. at 938. (citing the United States Census Bureau, profile of general demographic characteristics (2000).

In fact, in Williams, the Court found that "the district court stated that, on average, three (7.5%) to four (10%) African Americans are present in a forty-person venire. This reflects the percentage of African Americans in Clark County (9.1%)." Williams,121 Nev. 934, 941. In the instant case, Mr. Johnson did not receive between 3-4 African Americans per every forty (40) potential jurors. Additionally, like Mr. Williams, Mr. Johnson had less African Americans in his venire panel by percentage, only three (3) minority jurors in a pool of over eighty (80) potential jurors (A.A. Vol. 8 pp. 1833).

Mr. Johnson should have been provided a new jury venire. In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986), the United States

Supreme Court recognized that the remedy for Batson violations would vary from jury system to jury system and allow the courts to fashion their own remedy. 476 U.S. at 99. The United States Supreme Court reasoned that one of the remedies would be to discharge the venire and empanel an entirely new one. Id.

Mr. Johnson was entitled to that remedy. Mr. Johnson's venire panel insufficiently represented a cross section of the community according to statistics provided by the United States Census. Mr. Johnson's venire panel had a less percentage of African Americans than a relevant cross section of the community.

On direct appeal, appellate counsel failed to raise this issue. At an evidentiary hearing in the district court, trial counsel emphasized that he objected to this issue because it was an important issue in the case and should have been raised on appeal (A.A. Vol. 40 pp. 7987-7989). Counsel indicated if he were appellate counsel, he would have raised the issue on appeal (A.A. Vol. 40 pp. 7990). If appellate counsel had raised this issue based upon the United States Constitution, the result of the appeal would have been different and Mr. Johnson would have been granted a new trial.

B. THE STATE PREEMPTED A JUROR IN AN UNCONSTITUTIONAL MANNER IN VIOLATION OF BATSON V. KENTUCKY.

In the instant case, Mr. Johnson did not receive between six and nine (6-9)

African Americans in his venire of approximately eighty (80). Additionally, this was compounded as the State dismissed a African American juror. There was a contemporaneous Batson Challenge on Juror number seven (7) (A.A. Vol. 8 pp. 1833).

The defense complained the State had excluded the juror in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986).

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

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

The Holder court also held,

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

Mr. Johnson would contend he is a member of a cognizable racial group and

the prosecutor did use a peremptory challenge to remove a member of Mr. Johnson's race.

Juror number seven (7) was only one of three potential minority jurors in the jury pool. The State preempted this juror[5] (A.A. Vol. 8 pp. 1829). Hence, only one potential minority juror was available for selection[6]. Trial counsel objected to the fact that there were only three potential minority jurors in a pool of over eighty (80) (A.A. Vol. 8 pp. 1829).

In response to the Batson Challenge, the State claimed that the juror had a stepson who had been in jail (A.A. Vol. 8 pp. 1830). The prosecutor also explained that she had crossed her arms when questioned (A.A. Vol. 8 pp. 1830) Ms. Fuller informed the prosecutor that she could be fair (A.A. Vol. 33 pp 7381). Ms. Fuller indicated that sitting in judgment of Donte Johnson did not cause her concern. (A.A. Vol. 33 pp 7381). Ms. Fuller indicated to the prosecutor that there was nothing in her social or religious background that would cause her a problem with sitting in judgment (A.A. Vol. 33 pp 7381). Ms. Fuller stated that she could pass judgment fairly (A.A. Vol. 33 pp 7381). Ms. Fuller also explained without

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[5] Additionally, one of the only other three potential minority jurors who was in the jury panel never made it to the questioning process (A.A. Vol. 8 pp. 1832).

[6] It appears the third, and final minority juror, was a black female who was seated in the number three position. It is difficult to ascertain from the record whether she actually was sworn as a juror.

hesitation, she could consider all four forms of punishment. A.A. Vol. 33 pp 7381). Ms. Fuller again affirmed that she could follow the law and consider all four forms of punishment (A.A. Vol. 33 pp 7381).

Ms. Fuller was asked whether she could consider the death penalty and she indicated she could (A.A. Vol. 33 pp 7381). In fact, Ms. Fuller went further, stating that she could check the block on the form if she believed the death penalty was the appropriate punishment (A.A. Vol. 33 pp 7381). The last question by the prosecutor was, "Can you promise me this: That the verdict you pick will be a just and fair verdict, no matter how difficult the choice? Juror Fuller stated, "definitely fair, yes". The Court then stated, "Pass for cause" and the prosecutor stated yes. (A.A. Vol. 33 pp 7381).

A review of Ms. Fuller's questioning by the prosecutor establishes that she could be fair to the State of Nevada and would have considered the death penalty. There was nothing in the transcript to reflect that she would be unfair to the State of Nevada. In fact, defense counsel accused the State of using pretextual reasons for excusing Ms. Fuller[7]. (A.A. Vol. 8 pp. 1831).

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[7]After the prosecutor provided the race neutral reasons, defense counsel stated, "Now which of those reasons are you determining to be race neutral and which do you determine to be pretextual so I can respond to them" (A.A. Vol. 8 pp. 1831).

A review of Ms. Fuller's testimony demonstrates the State had no race neutral reason to preempt this particular juror. Ms. Fuller's testimony demonstrates that she should not have been systematically excluded. (See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986)).

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

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

Additionally, the United States Department of Justice concluded that in 1997, nine percent (9%)of the African American population in the United States was under some form of correctional supervision compared to two percent (2%) of the Caucasian population[8]. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black

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

males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males and 727 white male inmates per 100,000 white males[9]. Under the state's argument, virtually, every African-American as a prospective juror would be ineligible under the state's theory of racial neutrality because the statistics show they will know someone who has been arrested.

According to the Bureau of Justice Statistics presented by the Department of Justice African American's were almost three (3) times more likely than Hispanics, and five times more likely than Caucasians to be in jail[10]. Additionally, midyear 2006, African American men comprised forty-one (41%) percent of the more than two million men in custody. Overall, in 2006 African American men were incarcerated at a rate of six and a half percent (6.5%) times the rate of Caucasian Men[11].

In the instant case, the State used a reason to excuse juror Fuller that can be used against almost any single African American in Clark County. The statistics cited above illustrate that almost every African American will have had a family

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

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

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

member or someone closely associated with him or her who has been arrested in their lifetime. Now, prosecutors are free to argue, that the potential jurors being excused because they know someone who has been arrested and their body languages (twitching of facial muscles, crossing of the arms, crossing of the legs) all establish a race neutral reason to excuse the juror.

This factor combined with the failure to ensure a cross section of the community in Mr. Johnson's jury venire established a discriminatory and unconstitutional jury selection. Appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

C. THE DEFENSE OBJECTED TO THE STATE USING PEREMPTORY CHALLENGES TO REMOVE PERSPECTIVE LIFE AFFIRMING JURORS MR. MORINE AND MR. CALBERT.

In the instant case, not only did Mr. Johnson receive an inadequate jury venire and had member of his race systematically excluded, the State used peremptory challenges to remove life affirming jurors.

The defense complained that they were life affirming jurors who were not essentially opposed to considering the death penalty. The court denied the objection (A.A. Vol. 8 pp. 1825). The State used one of their peremptory challenge on Ms. Calvert (A.A. Vol. 11 pp. 2741). The State used their second peremptory

challenge to excuse Ms. Ashmore. (A.A. Vol. 11 pp. 2819).

Mr. Calvert indicated that he was opposed to the death penalty (A.A. Vol. 33 pp. 7383). Although Mr. Calvert indicated he was opposed to the death penalty he stated he would consider it (A.A. Vol. 33 pp. 7383). Mr. Calvert stated, "I mean, it would really be a situation where I just felt that the person was just so cold hearted, and that would be definitely the only answer to the problem, you know, I could consider it" (A.A. Vol. 33 pp. 7383). Mr. Calvert was challenged for cause by the State however, Mr. Calvert was again asked whether he could consider the death penalty and he answered, "Yes, I could" (A.A. Vol. 33 pp. 7384). Mr. Calvert again affirmed that he could follow the law and consider all four forms of punishment at sentencing (A.A. Vol. 33 pp. 7384).

During voir dire, the prosecution questioned prospective juror Mr. Morine (A.A. Vol. 11 ROA 2670). Mr. Morine agreed that all four forms of punishment could be appropriate in a murder case (A.A. Vol. 11 pp. 2668). Mr. Morine agreed that the worst possible crimes deserve the worst possible punishment (A.A. Vol. 11 pp. 2668). Mr. Morine indicated that he could impose a death sentence although he stated... "I think it would take an awful lot of compelling argument for and an awful lot of soul searching before I could ever come to that conclusion" (A.A. Vol. 11 pp. 2670).

Interestingly enough, the district court had no difficulty excusing any juror who demonstrated reservation on the death penalty.

D. THE DISTRICT COURT IMPROPERLY DENIED MR. JOHNSON'S CHALLENGES FOR CAUSE ON THREE POTENTIAL JURORS. MR. JOHNSON WAS FORCED TO USE PEREMPTORY CHALLENGES ON ALL THREE OF THE DISTRICT COURT'S DENIALS OF THE CHALLENGES FOR CAUSE

Compounded with the discriminatory and unconstitutional method in which Mr. Johnson's trial jury was selected, was the District Court's failure to recognize the standard of law in the defense's challenges for cause.

The defense challenged three jurors for cause based upon the same legal rational. All three potential jurors indicated that having found an individual guilty of murder of the first degree they could not consider all four forms of punishment (the possibility of parole).

1. POTENTIAL JUROR FINK

Mr. Fink indicated that his favorable beliefs regarding the death penalty were "deeply held" (A.A. Vol. 11 pp. 2738). Mr. Fink was asked the following question, "So you would agree that you would always vote for the death penalty when you have premeditated intentional murders," and Juror Fink stated he would (A.A. Vol. 11 pp. 2739). The defense attempted to ask the juror if he found an individual guilty of premeditated intentional multiple murders would he automatically vote for

the death penalty and an objection was sustained (A.A. Vol. 11 pp. 2739). The defense then attempted to ask the juror whether every person convicted of intentional premeditated deliberate murder should receive the same sentence, Mr. Fink indicated, yes. Mr. Fink was then asked, "Do you think the only appropriate penalty should be the death penalty to which the State successfully objected and the Court sustained the objection[12] (A.A. Vol. 11 pp. 2740).

Mr. Fink indicated that he would not take the defendant's youth into account in terms of mitigation (A.A. 11 pp. 2741). Mr. Fink explained that if the defendant had a bad childhood, he would think that was just something used in today's society, as an excuse[13] (A.A. Vol. 11 pp. 2742). Mr. Fink further stated that was the type of mitigation he would not consider in a penalty phase. (A.A. Vol. 11 pp. 2742).

Mr. Fink obviously believed that the only appropriate punishment for an individual convicted of premeditated deliberate first degree murder was the death

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[12]The question was not objectionable, but was valid questioning of a potential juror. The defense had every right to determine whether or not the juror would automatically vote for the death penalty. Which apparently, was his indication.

[13]Even the three judge panel found the mitigator that the defendant had a very bad childhood. Something Mr. Fink indicated he would not be willing to consider.

penalty. A review of the transcript reflects his obvious opinions. Mr. Fink would not even consider appropriate mitigation. More importantly, the District Court erroneously precluded the defense from verifying those facts. The defense challenged Mr. Fink for cause (A.A. Vol. 33 pp. 7386). Trial counsel indicated that Mr. Fink would automatically vote for the death penalty if he convicted Mr. Johnson. The Court denied the challenge for cause (A.A. Vol. 33 pp. 7386). Therefore, the defense was forced to use of one their eight peremptory challenges to remove Mr. Fink (A.A. Vol. 33 pp. 7386). Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the district court's improper and unconstitutional denials of the defenses challenge for cause in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

2. <u>POTENTIAL JUROR BAKER</u>

Mr. Baker (just like Mr. Fink) indicated that he was a strong supporter of the death penalty (A.A. Vol. 11 pp. 2754). Mr. Baker affirmed that an individual who is found guilty of intentional and premeditated murder should receive the death penalty (A.A. Vol. 11 pp. 2754). The defense then asked, "so you're saying that there is - - if I'm hearing you right, there is no circumstances where someone who you already convicted of a premeditated deliberate and intentional murder should

get life with the possibility of parole". Juror Baker replied, "A possibility, but not parole" (A.A. Vol. 11 pp. 2754). Prospective juror Baker indicated that it would be highly unlikely that he could vote for a period or a term of years (A.A. Vol. 11 pp. 2754). Mr. Baker was further asked the following, "Let me ask you, do you feel that's appropriate for every case in which a person has been found guilty and the aggravators are there as well, do you think that person should get the death penalty every time?" Juror Baker replied, "I believe so, yes (A.A. Vol. 11 pp. 2754).

Mr. Baker did not believe he should consider the youth of the defendant in the penalty phase (A.A. Vol. 11 pp. 2755). Mr. Baker did not think that the defendant's childhood would be important to consider during the penalty phase (A.A. Vol. 11 pp. 2756-2757). Mr. Baker was also asked, "But once your positive that the person did the offense, it would be hard for you to come up with a scenario where you wouldn't vote for the death penalty, is that fair to say". Mr. Baker stated, "Yes, that's fair" (A.A. Vol. 11 pp. 2758).

Trial counsel challenged Mr. Baker for cause. Trial counsel challenged on the basis that Mr. Baker would automatically vote for the death penalty and he could not consider all four forms of punishment. The District Court denied the challenge for cause. Therefore, the defense was forced to use another peremptory challenge to excuse prospective juror, Mr. Baker (A.A. Vol. 11 pp. 2759).

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the improper and unconstitutional denials of the defenses challenge for cause.

3. <u>POTENTIAL JUROR SHINK</u>

Mr. Shink indicated that he would impose a death sentence if there was overwhelming evidence of guilt (A.A. Vol. 33 pp. 7387). Mr. Shink was asked the following question, "So if he's the individual that pulled the trigger, that's when you would say the person deserves the death penalty?" Mr. Shink stated, "Yes" (A.A. Vol. 33 pp. 7387).

Mr. Shink was so bizarre in his answers that he actually indicated that prisoners should be given numbers, and a number should be picked out of the barrel for their execution. Mr. Shink affirmed that they should use a "Logan's Run" theory on punishment[14] (A.A. Vol. 33 pp. 7387). Mr. Shink was asked the following question, "You mentioned earlier, probably the best thing to do is just get a random drawing and go into the prisons and run around and pull out the numbers?" Juror Shink replied, "Yeah". Mr. Shink was then asked, "So you're saying that people who are in prison from anywhere from car theft to murder,

[14] Logan's run refers to a Hollywood Film where people are randomly considered for death. (A.A. Vol. 33 pp. 7387).

they're eligible for Logan's Runs numbers?" Mr. Shink stated, "Yes, unless they got less than a year, they would be exempt (A.A. Vol. 33 pp. 7387). Defense counsel then asked Mr. Shink, "How long have you had this view of kill em' all let God sort em out?" Mr. Shink replied, "I don't know a long time" A.A. Vol. 33 pp. 7387). Mr. Shink was further questioned as to his "Logan's Run" theory. Defense counsel stated, "How ingrained is it in your beliefs that it's easier to kill or it's best to put them in a drum, pull out the numbers and get rid of them?" Mr. Shink stated, "because they had a choice. There was nobody twisting their arms to do what they did. They made a decision. Nobody else did" (A.A. Vol. 33 pp. 7388).

Trial counsel challenged Mr. Shink for cause based on his "Logan Run Theory" of pulling out numbers for execution, on car thieves to murderers (A.A. Vol. 33 pp. 7388). Unbelievably, the District Court denied the challenge for cause (A.A. Vol. 33 pp. 7388). Hence, the defense was forced to use another peremptory challenge to excuse a prospective juror. Mr. Henry Shink who believed in a "Logan's Run" theory of execution was acceptable to the judge (A.A. Vol. 33 pp. 7388).

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the improper and unconstitutional denials of the defenses challenge for cause in violation of the fifth, sixth, eighth, and

fourteenth amendments to the United States Constitution.

For instance, prospective juror Davis, initially indicated that he did not believe in the death penalty (A.A. Vol. 11 pp. 2778). However, under further questioning, Mr. Davis was asked, "Now if the judge was to instruct you on the law and say that you have to consider everything in a particular case, can you follow the law to consider things?" Juror Davis stated, "I can consider stuff ya" (A.A. Vol. 11 pp. 2781). However, the transcript reflects that Mr. Davis was significantly opposed to the death penalty. Therefore, the State's challenge for cause was granted. Therefore, the district court determined that a prospective juror who opposed the death penalty was not appropriate to sit on the jury. However, someone who believed that a car thief should have a number thrown into a barrel until it was his time for execution was properly seated.

This violates the equal protection clause of the United States Constitution. The Court treated Donte Johnson very differently than the State of Nevada. Mr. Johnson was not entitled to have jurors seated that could consider life as punishment. However, the State of Nevada was entitled to have "Logan's Run jurors". This is a blatant violation of the fourteenth, fifth and eighth amendments to the United States Constitution.

The challenge for cause against Mr. Davis was granted over the defense's

request to continue to question Mr. Davis (A.A. Vol. 11 pp. 2784).

Similarly, prospective juror Grecco was challenged for cause by the State and the judge granted the State's challenge (A.A. Vol. 11 pp. 2826). Mr. Greko had demonstrated reservation on the death penalty (Even though Mr. Grecco had answered in his questionnaire (question number 45) that he would not always vote for a life sentence). Mr. Grecco answered "no" in his questionnaire when asked if he would always vote for life and never consider the death penalty (A.A. Vol. 11 pp. 2828). The challenge for cause was sustained (A.A. Vol. 11 pp. 2828). Mr. Grecco was asked whether he would legally consider all four forms of punishment. Mr. Grecco said, "legally I would consider all four, yes". For a second time, juror Grecco stated "legally I would have to consider it" regarding the death penalty.

Hence, any prospective juror with reservations regarding the death penalty was successfully challenged by the State. Whereas, people who would only consider the death penalty and could not consider a life sentence, including a prospective juror with a "Logan's Run" theory, could not be successfully challenged for cause by the defense in violation of the Fourteenth, Fifth, Sixth, and Eighth amendments to the United States Constitution. During a post-conviction evidentiary hearing, trial counsel explained he was extremely concerned with the lack of a fair jury selection process (A.A. Vol. 40 pp. 7993).

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

In Marshall v. Loneerger, 459 U.S. 422, 103 Sup. Ct. 843, 74 L.Ed. 2d. 646 (1983) "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record" 459 U.S. at 432. In United States v. Martinez-Salazar, 528 U.S. 304, 120 Sup. Ct. 774, 145 L.Ed. 2d. 1792 (2000), the United States Supreme Court held, "although the peremptory challenge plays an important role in reenforcing a defendant's constitutional right to trial by an impartial jury, this court has long recognized that

such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not a federal constitutional dimension, See Ross v. Oklahoma, 487 U.S. 81, 88, 108 Sup. Ct. 2273, 101 L. Ed.2d 80 and Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L. Ed.2d 759 (1965).

In the United States v. Martinez-Salazar, the defendant challenged a single juror for cause, but when the trial judge swore the jury. Whereas, in the instant case, the defendant was forced to use three peremptory challenges after the trial judge erroneously failed to grant three challenges for cause even after the jury was announced. In the instant case, the defense clearly complained about the juries makeup and their failure to represent a cross-section of the community. In Ross, the United States Supreme Court held that a loss of a single peremptory challenge does not constitute a violation of the constitutional right to an impartial jury Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273,101 L. Ed. 2d 80 1988). So long as the jury which sits is impartial Id. The Majority in the United States Supreme Court decision in Ross determined that the single loss of the state law right to a single peremptory challenge did not violate his right to a fair trial under the federal constitution 47 U.S. at 90-91.

However, in United States v. Martinez-Salazar, the United States Supreme

Court stated, "[i]n conclusion, we note what this case does not involve. A trial court deliberately misapplied the law in order to force the defendant's to use a peremptory challenges to correct the court's error" 528 U.S. 304, 316.

In the instant case, that is exactly what occurred. The trial judge clearly should have granted the defense's three challenges for cause. Remembering, at least one prospective juror apparently had a vision that car thieves should even have a number placed in the barrel so that their time could come up for execution. The judge refused to grant the defense's challenge for cause. Therefore, this decision forced the defendant into using almost forty percent of his peremptory challenges in order to remedy the trial court's errors.

In Ross v. Oklahoma, the United States Supreme Court was divided five to four on a similar issue. Four dissenting justices opined,

> The defense's attempt to correct the court's error and preserve it's six amendment claim deprived it of a peremptory challenge. That deprivation could possibly have affected the composition of the jury panel under the Gray standard, because the defense might have used the extra peremptory to remove another juror and because the loss of a peremptory might have affected the defenses strategic use of it's remaining peremptories 487 U.S. 81, 93.

The dissent explained, "The Court today ignores the clear dictates of these and other similar cases by condoning a scheme in which a defendant must surrender procedural parity with the prosecution in order to preserve his Sixth

Amendment right to an impartial jury". 487 U.S. 81, 96.

In Morgan v. Illinois, 504 U.S. 716, 112 Sup. Ct. 2222, 119 L.Ed. 2d 492 (1992), the United States Supreme Court held trial court's refusal to inquire into whether potential jurors would automatically vote to impose the death penalty if the defendant were convicted violated the due process clause of the federal constitution's fourteenth amendment, and that the defendant's sentence therefore could not stand, because (1) a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances, and (2) determine whether the latter is sufficient to preclude imposition of the death penalty, as required by state statute and by the court's instructions; and neither general fairness and "follow the law" questions, nor the jurors' oath, were sufficient to satisfy the defendant's right to make inquiry. Id.

In Morgan, the United States Supreme Court noted that Illinois conducts capital cases in two phases (Nevada conducts the trial and penalty phase as well). In Morgan, the United States Supreme Court noted that the trial court questioned every member of the venire whether they possessed moral or religious difficulties that would prevent them from imposing the death penalty regardless of the facts. However, the trial court refused a defense request to ask perspective jurors whether

they would automatically vote to impose the death penalty if they found the defendant guilty Id. The trial court found that it had properly questioned the jury because all of the jurors were asked whether they could follow the law and whether they could be fair and impartial. In the panel, all the jurors swore to render a verdict in accordance with the law. Id. The supreme court of Illinois held that 1) there is no rule requiring a trial court to life qualify a jury to exclude all jurors who believe that the death penalty should be imposed in every case. Id.

In Morgan, the United States Supreme Court reversed the lower court's ruling, and held that the trial court's refusal to inquire into whether potential jurors would automatically vote to impose the death penalty if the defendant were convicted violated the due process clause of the fourteenth amendment. The United States Supreme Court noted that the Illinois Supreme Court had affirmed the conviction and death sentence relying upon Ross v. Oklahoma, Supra.

The United States Supreme Court determined that any juror who would automatically vote for death is entitled to have a defendant challenge for cause that perspective juror. 505 U.S. 719, 729. "...Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Dennis v. United States, 339 U.S. 152, 171-172 , 70 Sup. Ct. 519, 94 L.Ed. 734 (1950). "Voir dire plays a critical function in assuring a criminal defendant that his constitutional

right to an impartial jury will be honored. Without an adequate voir dire the trial judges responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled" Rosales-Lopez v. United States, 451 U.S. 182, 101 Sup. Ct. 1629, 188, 68 L.Ed. 2d. 22 (1981). The United States Supreme Court ultimately reversed the lower court's decision, "because the inadequacy of voir dire leads us to doubt that the petitioner was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand" 504 U.S. 719, 739.

In the instant case, Mr. Johnson's voir dire was unconstitutional for a number of reasons. First, the judge systematically precluded the granting of defense counsel's challenges for cause, a blatant violation of Morgan v. Illinois. Defense counsel actually cited the district court to Morgan v. Illinois at the time of their objections (A.A. Vol. 8 pp. 1826). The district court ignored the defenses challenges. In addition, over the defense objection, jurors were excused because of their concerns regarding the death penalty (juror Davis and juror Grecco). Juror Lewis, indicated in voir dire that she could not consider the death penalty (A.A. Vol. 8 pp. 1826). However, the court noted that this answer was different than what she had answered in her questionnaire (A.A. Vol. 8 pp. 1827).

E. CUMULATIVE ERROR

Pursuant to the rulings of the United States Supreme Court, Mr. Johnson is entitled to a new trial for multiple reasons connected with the unconstitutional nature in which his voir dire was conducted. First, a black juror was removed pretextually. Second, his jury venire did not represent a cross section of the community. Third, the defense was forced to use peremptory challenges where the district court erred in denying the challenge for cause. Fourth, the State was permitted to challenge for cause, at least one juror who said he could apply the law but was generally opposed to the death penalty. Fifth, the State used two peremptory challenges on perspective jurors who had reservations about the death penalty but indicated that they would consider it. This resulted in cumulative error.

Therefore, Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise these issues on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. Had appellate counsel raised these issues on appeal the result of the appeal would have been different, and Mr. Johnson would have been granted a new trial.

III. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR COUNSEL'S FAILURE TO OBJECT AND FILE A MOTION TO DISMISS THE KIDNAPPING AS IT IS INCIDENTAL TO THE ROBBERY. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL.

The instant case involved a contemporaneous robbery, therefore, the kidnapping charges should have been dismissed as a separate crime. In the instant case, trial counsel failed to file a pre-trial motion dismissing the kidnapping charge and appellate counsel failed to raise on appeal. (The insufficiency of the evidence to convict Mr. Johnson of Kidnapping).

This Court provided in Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006),

> We hold that to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk ofdanger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion. 122 Nev. at 274.

In Wright v. State of Nevada, 94 Nev. 415, 581 P.2d442 (1978), the Supreme Court reversed the kidnaping convictions where the defendants had also been convicted for robbery with use of a deadly weapon. This Court held that:

> (1) if movement of victim is incidental to robbery and does not substantially increase risk of harm over and above that necessarily present in crime of robbery itself, it would be unreasonable to believe that Legislature intended a double punishment . . .and
>
> (2) convictions of kidnaping were subject to being set aside where, with respect to movement and detention of victim, movement appeared to have been incidental

> to robbery and without an increase in danger to victims and detention was only for short period of time necessary to consummate robbery.

The defendants in the Wright case entered into the lobby of the Ambassador Motel on February 11, 1977. Defendant Wright, pulled a gun on the night clerk while his co-defendant pulled a gun on the night auditor. The cash registered was then emptied, and the victims were instructed to walk to a back office. Subsequently, the night auditor was taken to open the safe located in the motel lobby. The defendants then returned the night auditor to the back office where they commanded the victims to lie face down on the floor. The victims were then taped at their hands and feet and threatened. Id.

The appellant argued that the kidnaping was contemporaneous to the robbery and should not be considered a separate crime. This Court agreed, stating that the movement of the victims appeared to have been incidental to the robbery. There appeared to be no increased danger to the victims. Additionally, the victims were only detained for a short time period which was necessary for the commission of the robbery. This Court further held that "[i]n these circumstances, the convictions for kidnaping **must** be set aside. " Citing People v. Ross, 81 Cal. Rptr. 296 (Cal. App. 1969). (Emphasis added).

Likewise, in Hampton v. Sheriff, 95 Nev. 213,591 P.2d 1146 (1979), this

Court reversed the decision of the district court wherein the appellant's Petition for Writ of Habeas Corpus had been denied. Again, this Court held that a separate charge of kidnaping would not lie against the appellants, as the movement of the victim had occurred incidentally to the commission of a robbery.

This Court has held that this factual scenario demonstrates that the kidnaping was clearly incidental to the robbery and therefore, the kidnaping charge should have been dismissed. Mr. Johnson received ineffective assistance of trial counsel for failure to object and file a motion to dismiss the kidnapping counts. Additionally, appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

IV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THE ISSUE OF CHANGE OF VENUE ON DIRECT APPEAL.

Trial counsel for Mr. Johnson filed a motion for change of venue prior to voir dire. The State filed their opposition (A.A. Vol. 6 pp. 1421). In the motion, the State argues that the defense filed a motion for change of venue pursuant to NRS 174.455 which provides, "an application for removal of a criminal action shall not be granted by the Court until after the voir dire examination has been conducted...". Defense counsel renewed his request for a change of venue after jury selection

(A.A. Vol. 13 pp. 3147).

In the instant case, several members of the jury had heard about this case through the media. Juror Juarez had heard about the case. (A.A. Vol. 11 pp. 2682). Juror Baker had some knowledge of the case (A.A. Vol. 11 pp. 2687). Juror Garceau had heard about the case on Channel 8 news (A.A. Vol. 11 pp. 2769). Juror Garceau stated that it inflamed his emotions, the description of the crime it made him angry (A.A. 11 pp. 2770). Juror Garceau stated this in front of the entire jury panel. Prospective juror Sandoval stated that when she read the summary on the questionnaire it "rang a bell" regarding the facts (A.A. Vol. 12 pp. 2927).

In Ford v. State of Nevada, 102 Nev. 126, 717 P.2d 27 (1986), this Court explained,

> The preeminent issue in a motion seeking a transfer of trial site is whether the ambiance of the place of the forum has been so thoroughly perverted that the constitutional imperative of a fair and impartial panel of jurors has been unattainable. See, Kaplan v. State, 96 Nev. 798, 618 P.2d 354 (1980). The net concern of a criminal defendant is whether the community hosting the trial will yield a jury qualified to deliberate impartially and upon competent trial evidence, the guilt or innocence of the accused 102 Nev. 126 at 129.

This Court further stated, [t]his, of course, implicates the jury selection process and explains why a motion for a change of venue must be presented to the court after voir dire of the venire". (See, NRS 174.45) Mr. Johnson's conviction

was in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise this issue on direct appeal.

V. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE OF COUNSEL TO RAISE ON DIRECT APPEAL THE DISTRICT COURT'S RULING TO NOT ALLOW TRIAL COUNSEL TO INTRODUCE THE BIAS AND PREJUDICE OF THE STATE'S WITNESS.

Mr. Armstrong, a key witness for the state against Mr. Johnson, had previously testified in Henderson Justice Court against Michael Celis. Mr. Celis was bound over for trial based upon Mr. Armstrong's testimony

During the cross-examination of Todd Armstrong, the defense questioned Mr. Armstrong regarding whether he had been a witness in another murder case. Mr. Armstrong agreed that he had also testified as a witness for the State in another murder case. The State requested permission to approach and a recess was held. The State argued to the district court that this information had no relevance. The Court noted that District Attorney, had questioned Mr. Armstrong regarding the fact that he was receiving no benefit in this case. The State indicated that he was receiving no benefit in Mr. Johnson's case nor did he receive any benefit in Mr. Celis' case.

The district court then precluded Mr. Johnson's defense attorneys from

questioning Mr. Armstrong based on the highly relevant fact that Mr. Armstrong was a witness in two murder cases, yet claimed to receive no benefit. This information went to his prejudice and bias. The State requested the Court strike the cross-examination (A.A. Vol. 8 pp. 2067)

Mr. Armstrong admitted that he had identified the defendant in the other murder case, but the question was stricken based upon an objection by the State (A.A. Vol. 8 pp. 2071). Mr. Armstrong denied receiving any benefit from the State (A.A. Vol. 8 pp. 2070). The defense was denied the opportunity to go into the facts of the other case [15].

District Court's have wide discretion to control cross-examination that attacks a witnesses general credibility. However, a trial court's discretion is narrowed when bias or motive is a subject to be shown and the cross-examiner must be permitted to elicit the facts which impeach a witnesses testimony, Busnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979);See Also Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984). This Court has held, "[a]nd extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias,

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[15] The State admitted that Todd Armstrong was a fourth suspect in the case (A.A. Vol. 8 pp. 2035). On direct examination, Todd Armstrong was asked whether he was promised anything regarding whether he would be prosecuted for this crime. He states that he was not promised anything by the District Attorney's office (A.A. Vol. 8 pp. 2035).

interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50. 085(3)" Lobato v. Nevada, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

Proof of a witnesses bias, interests, corruption or prejudice is exempt from the collateral fact rule. 1 John W. Strong McCormick on Evidence Sec. 49 (5th ed. 1999). Therefore, impeachment by extrinsic evidence on the basis of bias, corruption, or prejudice is never collateral and is admissible.

In Lobato v. Nevada, 120 Nev. 512, 96 P.3d 765 (2004), this Court explained,

> Having held that there was error in the record, we must consider whether that error was harmless. NRS 178.598 directs that any error that does not affect a defendant's substantial rights shall be disregarded. The "exclusion of a witness' testimony is prejudicial if there is a reasonable probability that the witness' testimony would have affected the outcome of the trial.

The instant case is very similar to Lobato. In both Lobato and the instant case, the introduction of the evidence in question was directed towards one of the State's star witness. Mr. Armstrong had testified for the State in two murder cases. Yet, Mr. Armstrong claimed he was receiving no benefit. This evidence would have affected the outcome of the trial.

Defense counsel should have been permitted to examine for bias and

prejudice. Defense counsel was completely precluded from doing that. Therefore, Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise this issue on direct appeal.

VI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL MISCONDUCT REGARDING INTESTINAL FORTITUDE ON DIRECT APPEAL.

During the voir dire, the prosecutor asked the jury during voir dire, "do you believe that you have the intestinal fortitude, for lack of a better word, to impose the death penalty if you truly believe that it fits this crime? (A.A. Vol. 11 pp. 2640). During voir dire, the prosecutor also speculated that Donte Johnson has future dangerousness and could kill a prison guard or a maintenance worker. (A.A. Vol. 11 pp. 2672).

During voir dire, the prosecutor questioned a juror stating, "you would agree that it's possible someone in that situation might harm somebody in prison?" The prospective juror replied stating that it is entirely possible. The prosecutor then stated, "you would agree that there aren't just prisoners in prison, there are prison guards, correct". The prosecutor further states, "medical staff in prison"? The prospective juror replied, yes. The prosecutor further asked, "maintenance workers at a prison correct:? The juror replied yes. The prosecutor then states, "certainly you would concede that it's possible for somebody who was convicted of a crime

to harm those individuals within the confines of the prison". During this point in voir dire, the defense objects to the prosecution speculating that Mr. Johnson will kill a prison guard or other staff member (A.A. Vol. 11 pp. 2672).

The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995)(internal quotations omitted).

In Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), this Court stated,

> This improper prosecutorial argument to which Castillo objected at trial, was as follows:
>
> The issue is do you, as the trial jury, this afternoon have the resolve and the **intestinal fortitude**, the sense of commitment to do your legal and moral duty, for whatever your decision is today, and I say this based upon the violent propensities that Mr. Castillo has demonstrated on the streets, I say it based upon the testimony of Dr. Etcoff and Corrections Officer Berg about the threat he is to other inmates, and I say it based upon the analysis of his inherent future dangerousness, whatever your decision is today, and it's sobering, whatever the decision is, you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant 114 Nev. at 279.

This Court found the prosecutors argument in Castillo, to be improper. Likewise, the above questioning of the potential juror by the prosecutor regarding

intestinal fortitude was also improper. It was clearly improper for the prosecutor to attempt to tell the jury venire that a prison guard or maintenance worker would be Donte Johnson's next victim. It was ineffective for appellate counsel to fail to raise this issue on appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution. Had appellate counsel for Mr. Johnson raised this issue on appeal, the result of the appeal would have been different.

VII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON APPEAL THE ADMISSION OF HEARSAY IN VIOLATION OF THE UNITED STATES CONSTITUTION.

In the instant case, the district court permitted inadmissable hearsay during the direct examination of Todd Armstong. During his testimony, Todd Armstrong was questioned regarding a conversation he overheard between Bryan Johnson and the police (A.A. Vol. 8 pp. 2022). Mr. Armstrong was permitted to state that Bryan Johnson tells the police that "we knew who did it" (A.A. Vol. 8 pp. 2022).

The United States Supreme Court held that an out of court statement may not be admitted against a criminal defendant unless the Declarant is unavailable and the defendant had prior opportunity to cross-examine the Declarant. The United States Supreme Court reasoned that the only indicia of reliablity sufficient to satisfy the U.S. Constitution's Confrontation Clause was "actual confrontation."

Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004).

Pursuant to Crawford, hearsay evidence is to be separated into that which is testimonial and that which is non-testimonial. If the statement is testimonial, the statement should be excluded at trial unless 1) the Declarant is available for cross-examination at trial, or 2) if the Declarant unavailable, the statement was previously subjected to cross-examination. Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004). The Crawford Court expressly declined to address what constitutes a testimonial statement

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

Mr. Johnson received ineffective assistance of appellate counsel for failure

to raise this issue on direct appeal.

VIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR THE FAILURE TO RAISE ON DIRECT APPEAL THE STATE'S FAILURE TO REVEAL ALL OF THE BENEFITS THE STAR WITNESSES RECEIVED FROM THE STATE OF NEVADA IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENTS FIVE, SIX AND FOURTEEN.

In the instant case, two witnesses testified for the State against Mr. Johnson.

A. TODD ARMSTRONG

Mr. Armstrong testified for the State (A.A. Vol. 8 pp. 2062). The State should have introduced that evidence on direct examination and introduced the fact that he had testified for the State instead of having Mr. Armstrong testify that he had received no benefit in the instant case without even mentioning the prior murder.

B. LASHAWNYA WRIGHT

Lashawnya Wright testified as a witness for the State (A.A. Vol. 8 pp. 2018). Ms. Wright says she is receiving no special treatment on her other cases (A.A. Vol. 8 pp. 2110-2113). Ms. Wright does admit that the prosecutor helped her get released on a misdemeanor (A.A Vol. 8 pp. 2120). Ms. Wright testified that she was receiving no benefit, even though she has a probation hold (A.A. Vol. 8 pp. 2113).

In criminal cases, the prosecution has a duty to disclose all material evidence

that is favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87, 10 Led 2d 215, 83 S. Ct. 1194 (1963). This duty extends not only to exculpatory evidence but also to evidence that the defense might have used to impeach the government's witness by showing bias or interest. United States v. Bagley, 473 U.S. 667, 676, 87 L.Ed 2d 481, 105 S.Ct. 3375 (1985). A finding that non disclosed evidence tending to undermine the reliability of a key witness testimony was material was error. Kyles v. Whitley, 514 U.S. 419, 444, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995). In Giglio v. United States, 405 U.S. 150, 154-155, 31 L.Ed 2d 104, 92 S.Ct. 763 (1972), the United States Supreme Court held that finding that undisclosed deal with key prosecution was a material non-disclosure and should result in the reversal of a conviction. The Ninth Circuit Court of Appeals recently considered the issue of whether the government must disclose to the defense all benefits conferred upon a "star witness". In Horton v. Mayle, No. 03-56618 U.S. Appeal, Lexis 8121 (2005). The Ninth Circuit held,

> In sum, we hold that the prosecution's failure to disclose the deal between McLaurin and the police violated Brady. The rule in this situation is clear and specific: the prosecution must disclose material evidence favorable to the defense. Brady, 373 U.S. at 87. By implicitly finding that the suppression of McLaurin's leniency deal was immaterial, the state court unreasonably applied Supreme Court-established federal law set down in Napue, Brady, Giglio, and Kyles. The recurrent theme of these cases is that HN13where the prosecution fails to disclose evidence such as the existence of a

> leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial. Napue, 360 U.S. at 270; Giglio, 405 U.S. at 154; Kyles, 514 U.S. at 444. Here, the prosecution failed to disclose a promise of immunity given to McLaurin, its "star witness," in exchange for his testimony, testimony that provided the only evidence of a motive and the opportunity to kill the victim and that included a confession by Horton himself. The state court was not only wrong in its application of these cases, it was objectively unreasonable. See 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 538 U.S. 63, 75-76, 155 L. Ed. 2d 144, 123 S. Ct. 1166 (2003); see also Gantt, 389 F.3d at 916 (holding that the state court's conclusion that the suppression of evidence did not violate Brady was an unreasonable application of clearly established federal law).

In essence, it has long been established in federal law that the failure of the prosecution to disclose evidence such as the existence of a leniency deal or promise that would be invaluable in impeaching a witnesses will result in a violation of the due process clause of the United States Constitution.

Mr. Johnson received ineffective assistance of counsel for failure to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution. Had appellate counsel raised this issue on appeal, the result of the appeal would have been different.

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IX. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO OBJECT TO THE PROSECUTORS REPEATED REFERENCE TO THE TRIAL PHASE AS THE GUILT PHASE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

On November 29, 1999 Mr. Johnson filed a motion in limine to prohibit any reference to the first phase of trial as the guilt phase. In the instant case, the prosecutor repeatedly referred to the trial phase of Mr. Johnson's trial, as the "guilt phase".

During voir dire the prosecutor refers to the trial as the "guilt phase". Again, in voir dire, the prosecutor refers to the trial phase as the "guilt phase" (A.A. Vol. 11 pp. 2821). The State continues to refer to the trial phase as the "guilt phase". Trial counsel for Mr. Johnson does not object (A.A. Vol. 11 pp. 2656). The prosecutor tells the jury that the first part of the trial is called the Guilt Phase of the trial.

Article I, Section 8, of the Nevada Constitution, as well as the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, guarantee every criminal defendant the right to a fair trial. This right requires the court to conduct trial in a manner which does not appear to indicate that a particular outcome of the trial is expected or likely.

Although participants, including some defense counsel, have lapsed into referring to the verdict-determination process as the "guilt phase" of a capital proceeding (apparently to distinguish it from the "mitigation" or "punishment" phase), the "guilt" label creates an unfair inference that the very purpose of the evidentiary phase is to find a defendant guilty. The terms "evidentiary stage," "trial stage," or "fact-finding stage" would more appropriately designate that phase of the matter without unfairly predisposing the jury toward assuming Defendant's guilt. Present use of the phrase "guilt phase" makes no more sense than referring to the trial as the "innocence phase".

Mr. Johnson received ineffective assistance of trial counsel for the failure of counsel to object to the State's repeated reference to the first phase of the trial as the guilt phase. Additionally, Mr. Johnson received ineffective assistance of appellate counsel for failing to raise this issue on direct appeal.

X. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE EVIDENCE BEING PRESENTED PURSUANT TO NRS 48.045.

In the instant case, the State brought out several instances of inadmissable bad acts against Mr. Johnson.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). "The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not

unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

A. MR. JOHNSON SOLD NARCOTICS

During the direct examination of Ms. Sharla Severs, the prosecutor elicited that Mr. Johnson would sell crack cocaine to several individuals (A.A. Vol. 9 pp. 2147). The prosecutor asked Ms. Severs whether she had actually personally witnessed Mr. Johnson selling drugs, to which she replied, “yes” (A.A. Vol. 9 pp. 2148). Again, the prosecutor elicits from witness Bryan Johnson that Donte Johnson had sold him crack cocaine in the past (A.A. Vol. 9 pp. 2302). The prosecutor asked if Mr. Johnson would put the cocaine in a black and mild cigar box and Bryan Johnson stated, he never remembered Donte Johnson selling narcotics to him in that fashion (A.A. Vol. 9 pp. 2302).

Therefore, introducing Mr. Johnson’s alleged narcotics transactions had no relevance to the case other than to demonstrate that he was a person of poor character. The prosecutor specifically asked whether the black and mild box had any relevance and Bryan Johnson indicated that Donte Johnson had not sold it to him in that manner.

The above noted bad acts were more prejudicial than they were probative. In

presenting these acts, the State portrayed Mr. Johnson as someone of bad character. None of the bad acts were proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution.

XI. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON IMPROPER CLOSING ARGUMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellate counsel failed to raise on appeal the following instances of improper argument which were objected to by trial counsel.

A. IMPROPER WITNESS VOUCHING

During closing argument the following exchange took place,

The prosecutor: "Now, I suppose it's possible we can take each one of these points and explain it away. I guess Sharla Severs is lying, perhaps Todd Armstrong was lying, Bryan Johnson he must be lying too".

Defense counsel: "Your honor, they objected during the course as to that terminology, we would have to object at this time for that as well".

The Court then proceeded to overrule the defense's objection.

The prosecutor: "And if Donte Johnson is not guilty and Lashawnya Wright must be lying too. So Sharla is lying, Todd is lying, Bryan is lying, and Lashawnya Wright is lying." (A.A. Vol. 13 pp. 3196).

In the instant case, the prosecutor was essentially vouching for the credibility

of the witness indicating that there was no evidence that these individuals were lying and therefore they were telling the truth. In United States v. Williams, 112 Fed. Appx 581 (2004), the Ninth Circuit Court of appeals held that a defendant was entitled to a new trial when the prosecutor improperly vouched for the veracity of a government key witness. Id. In Williams, the prosecutor explained that the government agent came to court and told the truth. That the government agent had told the truth about what had occurred. It was improper for the prosecutor to place the prestige of the government behind a witness through assurances of the witnesses veracity. See United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

In Williams, the Ninth Circuit also considered the prosecutor informing the jury that the witness could be penalized if he lied. 112 Fed. Appx. 581, 582. See United States v. Combs, 379 F.3d 564,575 (9th Cir. 2004)(holding that it was improper vouching when a prosecutor implied she knew an agent would be fired for committing perjury).

In the instant case, during opening argument, the prosecutor informed the Court that Sharla Severs had given numerous inconsistent statements throughout the investigation of the case. The prosecutor then stated, 'You will learn that she had been told again and again what perjury is and that she must tell the truth when

she comes to this courtroom" (A.A. Vol. 8 pp. 1873). At which time, the district court overruled the defenses objection.

Thus, in the instant case, the prosecutor vouched for the credibility of the witnesses and also informed the jury that one of the witnesses was well aware of the penalties for perjury.

B. IMPROPER ARGUMENT TO ASK THE JURORS TO PLACE THEMSELVES IN THE VICTIMS SHOES.

A prosecutor may not make remarks putting jurors in the victims shoes. A prosecutor should also not make remarks requesting that jurors consider the victims plight. Normally, such comments violate the rule against referring to facts not in evidence since the evidence of the victims reaction before death is not before the jury. In Rhodes v. State, 547 So.2d 1201, 1205-06 (Florida 1989), the court remanded for a new sentencing hearing where a prosecutor improperly asked the jurors to place themselves at the crime scene, Cert. Denied 513 U.S. 1046 (1994). Bertolotti v. State, 476 So.2d 130, 133 (Florida, 1985) (condemning prosecutors suggestion that jurors put themselves in the victims position and imagine the final pain, terror, and defenselessness of the victims. Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (Holding it is improper for a prosecutor to place the jury in victims shoes). Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991)(the Court has held that arguments asking the jury to place themselves in the

shoes of a party of the victim(the golden rule argument) are improper. Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702-03 (1987) (Explaining that the prosecutor improperly placed the jury in the position of the victim by stating the following, "can you imagine what she must have felt when she saw that it was the defendant and he had a gun?"

In the instant case, during closing argument, the prosecutor stated,

> "Imagine the fear in the minds of these three boys as they lay face down, duct tapped at their ankles and wrists, completely defenseless as they hear the first shot that kills their friend, Peter Talamanpez. Imagine the fear in their minds. And imagine the fear as they all lay waiting for their turn".

Defense counsel stated, "Your honor, golden rule objection". The objection was sustained. The judge asked the prosecutor to rephrase the statement and the prosecutor stated,

> There should be no doubt in anyones mind that these three boys had fear in their minds as they laid face down, duct taped, and defenseless, waiting for the bullet that would send each of them into eternity. I'm certain that they were in fear as Donte placed the barrel of the gun two inches from the skull at each boy" (JT Day 4 pp. 200-201; 13 ROA 3181-3182).

These improper remarks by the prosecutor were objected to by defense counsel (A.A. Vol. 13 pp. 3181-3182). Therefore, Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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C. IT WAS IMPROPER FOR THE PROSECUTOR TO REFER TO FACTS THAT WERE NOT INCLUDED AT TRIAL.

During the testimony of the State's DNA expert, Mr. Tom Wahl, Mr. Wahl explained the DNA on a cigarette butt from the crime scene contained a major DNA component allegedly consistent with Donte Johnson and human DNA that was a mixture (A.A. Vol. 13 pp. 3086-3193).

During closing argument the prosecutor stated, "Did Donte Johnson allow the victim to take one last drag of the cigarette before he put a bullet in the back of his head? Is that why there is two sources of DNA on the cigarette? We know Donte Johnson smoked the cigarette, we know Donte Johnson was at the crime scene" (A.A. Vol. 13 pp. 3193). The prosecutor further stated, "Did Donte Johnson allow the victim to take on last drag before he put a bullet in the back of his - -" (A.A. Vol. 13 pp. 3193). Defense counsel objected to these statements, as speculation (A.A. Vol. 13 pp. 3193).

Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997) (Holding that alluding to facts that are not in evidence is prejudicial and not at all probative) cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). In the instant case, the prosecutor asked the jury to completely speculate as to the minor component of the DNA. Defense counsel objected to these statements by the prosecutor as to speculation and appellate counsel was ineffective for failing to raise this issue on direct appeal

in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. These comments taken as a whole mandate a new trial for Mr. Johnson.

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

The defense filed a motion to exclude autopsy photos (A.A. Vol. 5 pp. 1098). During the testimony of the medical examiner, Dr. Bucklin, the defense continued to object to the photographs. The Court noted that there was a continuing objection (A.A. Vol. 10 pp. 2406). The autopsy photos and exhibit numbers that were objected to by defense counsel were exhibits 74, 76, 135-148 151 113 114 116 120, 125, 127, 130 134 (A.A. Vol. 13 pp. 3147). In Byford v. State of Nevada, 116 Nev. 215 pp4 P.2d 700 (2000), this Court held:

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

court's sound discretion, Mr. Johnson would argue this evidence should not have been permitted. It was admitted to inflame the jury. Appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on direct appeal.

XIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR TRIAL COUNSELS TO FAILURE TO OBJECT AND STATE ON THE RECORD WHAT TOOK PLACE DURING THE UNRECORDED BENCH CONFERENCES.

In the instant case, numerous bench conferences were held during trial. None of the bench conferences were recorded. In Daniels v. State of Nevada, 119 Nev. 498, 78 P.3d 890 (2003), this Court expressed that rarely should a proceeding in a capital case not be recorded and failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations. This Court reiterated this position recently in Preciado v. State, 130 Nev. Adv. Op. 6 (February 13, 2014). In Preciado, this Court extended its holding in Daniels to non-capital cases. This Court explained bench conferences should be memorialized either contemporaneously or by allowing counsel to make a record afterward (pp. 1-2).

On direct appeal, Johnson argued that there were 59 bench conferences off the record. Johnson cl aimed this violated this Court rule 205 (5) (a) and his right to meaningful appellate review. This Court explained, "Johnson's trial attorney did not object to these off the records conferences or try to make them part of the

records. Thus Johnson did not preserve the issue for appeal, and he fails to show that any plain error occurred" (This Court's decision pp. 28-29).

Nev. Sup. Ct. R. 250, Procedure at trial and post-conviction proceedings states,

> (a) Calendar priority and transcripts. The district court shall give capital cases calendar priority and conduct such proceedings with minimal delay. The court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel the court may conduct proceedings outside the presence of the jury or the court reporter. If any objection is made or any issue is resolved in an unreported proceeding, the court shall ensure that the objection and resolution are made part of the record at the next reported proceeding.

In Daniels v. State of Nevada 119 Nev. 498, 78 P.3d 890 (2003), this Court reasoned,

> Moreover, meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations. A capital defendant therefore has a right to have proceedings reported and transcribed 119 Nev. at 508.

In the instant case, it is uncertain as to what was discussed during the numerous bench conferences held during Mr. Johnson's trial, as they were unrecorded. Mr. Johnson was denied meaningful appellate review because the trial court conducted numerous conferences without having them reported, or recorded, and transcribed in violation of NSC Rule 250 (5)(a). Trial counsel was ineffective

for failing to object to the bench conferences being unrecorded and failing to place on record what was stated during said unrecorded bench conferences in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

XIV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS THIRD AND FINAL PENALTY PHASE WHEN COUNSEL FAILED TO INTRODUCE EVIDENCE THAT MR. JOHNSON HAD PREVIOUSLY HAD A FINDING OF NUMEROUS MITIGATING CIRCUMSTANCES WHICH WERE NOT ARGUED TO AND FOUND BY THE JURY WHICH SENTENCED HIM TO DEATH IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

During Mr. Johnson's third and final penalty phase, the jury found seven mitigating circumstances. Seven mitigating circumstances were found: Johnson's youth at the time of the murders, (he was eighteen years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful contact with either parent; he had no positive male role models; he grew up in a violent neighborhood; he witnessed many violent attacks as a child; while a teenager he attended schools where violence was common. Johnson v. State of Nevada, 122 Nev. 1344, at 1350.

However, the jury in Mr. Johnson's first penalty phase found a number of

mitigating circumstances that were not argued or found by the final jury. The following list of mitigators were checked or hand written onto the special verdict form in Mr. Johnson's first penalty phase, dated June 15, 2000 (signed by the foreperson). The jury found:

1. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
2. The youth of the Defendant at the time of the crime.
3. Witness to father's emotional abuse of mother.
4. Witness to drug abuse by parents and close relatives.
5. Abandonment by parents.
6. Poor living conditions while at great grandmothers.
7. Turned into police by great grandmother.
8. Crowded living conditions while at grandmothers house.
9. Very violent neighborhood.
10. Witness to various acts of violence in neighborhood.
11. Had to live a guarded life
12. Grandmothers second house was even more crowded.
13. No way to avoid gangs at second house
14. Gang intimidation
15. Could not comply with parole conditions - other gang territories
16. Indicators he may have wanted to return to parole school
17. Lack of positive male role model
18. Lifestyle of victims
19. No eyewitness to identify of shooter
20. Killings happened in a relatively shore period of time, more isolated incidence than a pattern
21. No indication of any violence while in jail

22. Appears to excel in structured environment of jail
23. Joined gang to protect family

In the instant case, defense counsel failed to argue to the jury that Mr. Johnson had all of these mitigators found by his first jury. Mr. Johnson's twenty-three (23) mitigators found by the first jury was much more extensive than from the second jury's seven (7) mitigators that ultimately resulted in a sentence of death. Obviously, the first jury could not reach a resolution as to Mr. Johnson's sentence given the effort they made in locating mitigating circumstances. [16]

Additionally, trial counsel was ineffective for not filing a pretrial motion to have the Court consider whether a jury had already determined that these mitigators exist. Defense counsel was ineffective for failing to obtain a pretrial order instructing the jury that the mitigators existed. Additionally, the first jury noted that the evidence was not clear who was responsible for the actual shooting given the handwritten mitigator by the jury stating, "no eyewitness to identity of shooter".

This mitigator should have been argued pretrial in order for defense counsel to argue to the jury that there was a question as to who the actual shooter was. The State was able to enforce the finding that Mr. Johnson had already been determined

[16] Mr. Johnson relies on the legal authority articulated in the argument pertaining to the failure to investigate.

to be the physical killer and defense counsel failed to enlighten the court that the first jury did not agree with that conclusion.

During a post-conviction evidentiary hearing, penalty phase counsel was concerned that she had not seen the document containing the list of mitigators and did not know why they were not presented to the jury (A.A. Vol. 42 pp. 8224-8225). Counsel for Mr. Johnson fell below a standard of reasonableness by not obtaining the special verdict form and listing each and everyone of these mitigators to the jury. But for the failure of counsel to argue these mitigators pretrial and/or to the jury, the result of the trial would have been different (ie. the first jury did not sentence Mr. Johnson to death). Mr. Johnson received ineffective assistance of counsel in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE ON DIRECT APPEAL THE DISTRICT COURT GIVING INSTRUCTION NUMBERS 5, 36, 37 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSELS FAILURE TO OFFER PROPER JURY INSTRUCTIONS ON MALICE.

These issues are presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for

federal review.

A. THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

INSTRUCTION NO. 36 AND 37

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

> Premeditation is a design, a determination to kill distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constitution the killing has been preceded by and has been the result of premeditation, no matter how rapidly t he act follows the premeditation, it is premeditated (A.A. Vol. 10 pp. 2577-2578).

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

in death sentences that violate the constitution's guarantee of a reliable sentence.

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

By relieving the State of it's burden of proof as to an essential element of the charged offense, this unconstitutional "premeditation and deliberation" instruction was per se prejudicial, and no showing of specific prejudice is required. Nevertheless, substantial prejudice occurred as a result of the giving of this instruction. The unconstitutional "premeditation and deliberation" instruction substantially and injuriously affected the process to such an extent as to render Johnson's conviction fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instruction did not affect the conviction. Appellate counsel was ineffective for failing to raise this issue on appeal in

violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

B. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 5

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

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation (A.A. Vol. 10 pp. 2543).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See

Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S.39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991). Johnson recognizes that this Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). This issue is presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

XVI. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR COUNSEL'S FAILURE TO RAISE ON DIRECT APPEAL THE COURTS OFFERING OF JURY INSTRUCTION 12.

INSTRUCTION NO. 12:

> Where two or more individuals join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not indented as part of the original plan and even if he was not present at the time of the commission of such act.

Over the objection of defense counsel, the district court gave the jury instruction number twelve.

Jury Instruction 12 fails to inform the jury that Mr. Johnson would have been

required to have the intent that the crime charged was to be committed. In fact, the instruction fails to provide the fundamental elements of intent. The instruction given to the jury fails to dictate that a defendant cannot be convicted under conspiracy to specific intent crimes unless the defendant had the specific intent to commit those crimes. Yet, Mr. Johnson is convicted of the kidnappings which were all specific intent crimes. Additionally, the prosecutor highlighted the faulty instruction during closing argument (A.A. Vol. 13 pp. 3177).

In Sharma v. Nevada, 118 Nev. 648; 56 P. 3d 868; (2002)[17], this Court held:

> In order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime. Id. at 655,56 P. 3d at 872.

Sharma, overturned Mitchell v. State, 114 Nev. 1471, 971 P. 2d 813 (1998), and Garner v. State, 116 Nev. 770; 6 P. 3d 1013 (2000), to the extent that those other cases permitted a defendant to be convicted for a specific intent crime under an aiding or abetting theory without proof that the aider or abettor specifically intended the commission of the crime charged. 118 Nev. at 652-655, 56 P.3d at 872. See also, Bolden v. State, 124 P. 3d 191; 121 Nev. Ad. Rept. 86 (2005).

Trial counsel objected to this instruction (JT Day 4 pp. 167; 13 ROA 3148).

Therefore, appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on appeal in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution.

XVII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE OF TRIAL COUNSEL TO OFFER A JURY INSTRUCTION REGARDING MALICE.

In the instant case, the jury was not properly instructed as to the elements of murder in the first and second degree based on the failure of the court to define malice for the jury. Trial counsel for Mr. Johnson should have offered the following instructions to the jury in order to properly define malice.

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

Trial counsel for Mr. Johnson was ineffective for failing to offer a instruction that would define malice for the jury. Additionally, appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution.

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PENALTY PHASE ARGUMENTS

XVIII. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL WHEREIN TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE IN THE THIRD PENALTY PHASE.

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, due to the failure of defense counsel to conduct an adequate investigation. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

Counsel's complete failure to properly investigate renders his performance ineffective.

> [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In the instant case, Mr. Johnson's trial counsel failed to properly investigate the facts of the case prior to trial.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), this Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S. Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S. Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S. Ct. at 2068.

In the instant case, Mr. Johnson argues that the following facts show a lack of reasonable investigation by his trial counsel. Defense counsel failed to properly investigate several issues that should have been presented at the third penalty phase.

A. FAILURE TO PRESENT ANY MITIGATION ON FETAL ALCOHOL DISORDERS.

Donte's mother, Eunice told the jury that she consumed alcohol when she was pregnant with Donte (A.A. Vol. 24 pp. 5800). In the instant case, counsel for Mr. Johnson failed to present or investigate the prospect that Mr. Johnson had suffered from Fetal Alcohol Disorder. Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. Often, persons with this type of disorder have a mix of these problems. The Center for Disease Control and Prevention has described some of the symptoms of Fetal Alcohol Spectrum Disorder as being shorter than average height, low body weight, and poor judgment and reasoning skills.

Counsel failed to obtain or conduct testing on Donte Johnson to determine whether he suffered from Fetal Alcohol disorder. Donte Johnson's mother testified she abused alcohol during her pregnancy. Donte Johnson was of very small stature according to the record. Donte Johnson has showed poor reasoning and judgement skills as displayed by the record. Donte Johnson is in the process of requesting funds from the county in an effort to have an expert appointed to determine whether Donte Johnson suffered from Fetal Alcohol Spectrum Disorder.

During a post-conviction evidentiary hearing, penalty phase counsel admitted presentation of fetal alcohol syndrome would have been beneficial to Mr. Johnson (A.A. Vol. 40 pp. 8217-8218). Penalty phase counsel further explained that the physiological symptoms of Fetal Alcohol Syndrome were glaring in Mr. Johnson (A.A. Vol. 42 pp. 8218). It was ineffective assistance of counsel for counsel to fail to obtain an expert to make such a determination given the fact that the record provides evidence that Mr. Johnson displayed signs of Fetal Alcohol Disorder.

B. FAILURE OF COUNSEL TO OBTAIN A PET SCAN.

In the instant case the defense presented evidence in mitigation regarding the defendant's environment. However, the defense never caused the defendant's brain to be properly analyzed. In fact, the defense called Dr. Kinsora who speculated that the defendant did not suffer from brain damage. It was incumbent upon the defense to have the defendant properly analyzed.

A Positron Emission Tomography Scan (PET Scan) is a nuclear medicine imaging technique which produces a three dimensional picture of the functional process in the body. PET Neuroimaging is based on an assumption that areas of high radioactivity are associated with brain activity. What is actually measured indirectly is the flow of blood to different parts of the brain, which is generally believed to be correlated, and has been measured using the tracer oxygen. It can also

assist in examining links between specific psychological processes or disorders in brain activity ("A Close look into the Brain," Julich Research Center, 29 April 2009.)

In the instant case, the defense should have investigated in an effort to determine whether Mr. Johnson suffered from internal difficulties within the brain. Counsel never attempted to obtain an analysis of Mr. Johnson's brain. Mr. Johnson was denied funding to conduct this testing, during the post-conviction proceedings.

C. FAILURE TO PRESENT EVIDENCE THAT THE CO-DEFENDANT SIKIA SMITH AND TERELL YOUNG RECEIVED SENTENCES OF LIFE.

In the instant case, the defense failed to properly argue proportionality as an issue in mitigation. The defense failed to present evidence from either Mr. Smith or Mr. Young's attorneys regarding the outcome of their penalty hearings. Neither of the co-defendants received sentences of death.

In fact, on April 27, 2005, defense counsel attempts to argue in the penalty phase that the two other defendants did not receive the death penalty. The State objected and defense counsel argued, "it's mitigation if they receive life." The State's objection was sustained.

In the instant case, a reasonable investigation would have proved that both

co-defendants did in fact receive sentences of less than death. However, there was no such evidence in the record. Therefore, the State's objection was sustained. A simple investigation would have revealed that both the co-defendants did in fact receive sentences of less than death. The judgment of conviction and sentencing transcripts could have been introduced. Defense counsel for both co-defendants should have been called as witnesses to establish that their clients did not receive death sentences for these acts.

When questioned about calling the co-defendant's attorneys to introduce this vital information, penalty phase counsel explained, "...I made a mistake. I thought that evidence was in. I neglected to even introduce the JOCs, which would have been admissible. It just was I made a mistake". (A.A. Vol. 42 pp. 8224). Therefore, it was ineffective assistance of counsel not to introduce evidence of the co-defendants sentences in an effort to argue proportionality. Appellate counsel was also ineffective for failure to raise this issue on appeal.

D. FAILING TO OFFER MITIGATORS WHICH HAD BEEN FOUND BY THE FIRST JURY.

In the instant case, post conviction counsel made contact with Mr. David Figler. Mr. Figler was trial counsel at the first trial and at the second penalty hearing before the three judge panel. Mr. Figler informed post conviction counsel that the first jury filled out a mitigation form finding more than thirty (30) mitigators

including one indicating the defendant's role in the instant case.

At the third penalty phase, the jury did not find any where near thirty mitigating factors for Donte Johnson. In fact, they only offered eleven mitigators in the third penalty phase. (A.A. Vol. 25 pp. 5867). Hence, it was ineffective assistance of counsel in the third penalty phase for the failure to offer all of the mitigating factors found by the first jury (the first jury was unable to reach a verdict as to Donte Johnson's penalty).

The failure to properly investigate is compounded during first portion of the penalty phase closing argument where the state explains to the jury,

> "The evidence is unequivocal that it is the defendant, Donte Johnson, that fired the fatal rounds into each one of the victims heads. To argue before you that the evidence is anything else, cite to me the facts". Mr. Whipple then states, "judge, I'll object.

Additionally, there is no evidence in the file that counsel in the third penalty phase made an effort or actually interviewed the hold out juror(s) from the first hung jury. Had defense counsel properly investigated, and interviewed the jury from the first penalty phase, they would have recognized that jurors had found many more mitigators than the jury did in the third penalty phase.

E. FAILURE TO PRESENT EVIDENCE FROM THE DEFENDANT'S FATHER.

In the instant case, the defense presented mitigation evidence that Donte

Johnson had been abused by his father and had observed his father be abusive to his mother. Donte Johnson was clearly neglected and abused by his father. The defense should have presented testimony from the father even if the examination was hostile to demonstrate to the jury the type of upbringing Mr. Johnson endured.

In summary, the mitigation evidence that counsel unreasonably failed to investigate and present is the same type of evidence that has been found to have a reasonable probability of a more favorable outcome in the penalty phase of a capital trial. Eg, Rompilla v. Beard, 545 U.S. 374, 390-93 (2005); Wiggins v. Smith, 539 U.S. 510, 533-37 (2003); Tennard v. Dertke, 542 U.S. 274, 284 (2004)(mitigating evidence as capital sentencing hearing defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")(citation omitted); Williams v. Taylor, 529 U.S. 362, 396-98 (2000); Boyde v. Brown, 44 F.3d 1159, 1176-80 (9th Cir. 2005)(counsel ineffective for failing to present much larger body of mitigating evidence).

Additionally, the Court should be concerned regarding the failure to properly obtain important experts for the penalty phase as noted above. Eg, Daniels v. Woodford, 428 F.3d 1181, 1209-10 (9th Cir. 2005)(counsel ineffective in selection and preparation of expert and capital sentencing); Paine v. Massie, 339 F. 3d 1194,

1202-03 (10th Cir. 2003); Roberts v. Dretke, 356 F.3d 632, 639-41 (5th Cir. 2004); Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002)(failure to provide experts with available medical records constitutes ineffective assistance); Silva v. Woodford, 279 F.3d 825, 841-42 (9th Cir. 2002); Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999); Bloom v. Calderon, 132 F.3d 1267, 1271-72 (9th Cir. 1997); Clayborn v. Lewis, 64 F. 3d 1373, 1385-87 (9th. Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995).

XIX. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO PRECLUDE THE STATE FROM INTRODUCING AN INADMISSIBLE BAD ACT.

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated by providing the State a mitigation report from Tina Francis which was used to impeach a defense expert. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle (A.A. Vol. 23 pp. 5600). Later it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte

Fletch. (A.A. Vol. 23 pp. 5600) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants (A.A. Vol. 23 pp. 5600-5601). Defense counsel objected to the introduction of this evidence in the first part of the penalty phase, stating the evidence had never been subject to pre-trial scrutiny even though it was used in the first trial. (A.A. Vol. 23 pp. 5600).

Defense counsel claimed it was error to let the evidence into the first trial. The State was permitted to introduce this bad act because a gun was located in the back of the vehicle but it happened not to be the murder weapon (A.A. Vol. 23 pp. 5602).

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

Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

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

It is ineffective assistance of trial counsel in the first trial to permit the introduction of this bad act without a Petrocelli hearing and it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal from

the first trial. Additionally, it was ineffective assistance of trial counsel not to attempt to preclude this evidence prior to the third penalty phase.

The State argued that the gun should be permitted because it appeared similar to a gun described by Charla Severs in that it looked sort of like a sawed off shotgun. However, the Court asked the prosecution if she ever identified the gun and she did not (A.A. Vol. 23 pp. 5602-5603). The court did taken notice that it was not the murder weapon and Ms. Severs never identified the gun (A.A. Vol. 23 pp. 5604). The judge rules, "It's tenuous. Like I said, you can bring it in - in the second part. In this part I don't agree." (A.A. Vol. 23 pp. 5605). Hence, it was ineffective assistance of trial counsel to not realize that a pre-trial motion was necessary to preclude the evidence. Additionally, appellate counsel was ineffective for failing to raise this issue on appeal.

XX. TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING THE STATE A MITIGATION REPORT FROM TINA FRANCIS WHICH WAS USED TO IMPEACH A DEFENSE EXPERT.

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, , a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated by providing the State a mitigation report from Tina Francis which was used to impeach a defense expert. U.S. Const. Amends. V, VI, VIII & XIV; Nevada

Constitution Art. I and IV.

Appellate counsel was ineffective for failing to raise the following issue on appeal. The defense presented the expert testimony of Dr. Kinsora, who admitted that he had relied upon a report prepared by Tina Francis, the defense mitigation expert (A.A. Vol. 29 pp. 6887). Dr. Kinsora was impeached with Tina Franscis' mitigation report regarding there being nothing in the report to suggest that Donte's mother used drugs or alcohol during her pregnancy (A.A. Vol. 29 pp. 6888). Additionally, Dr. Kinsora was questioned regarding bad act evidence contained in Ms. Francis' report wherein Donte Johnson allegedly took a small caliber gun gave it to a co-defendant in another case because the co-defendant was angry with a cheerleader (A.A. Vol. 29 pp. 6896).

Dr. Kinsora was further examined regarding Donte's grandmother stating that he should be treated as an adult by the California authorities (A.A. Vol. 29 pp. 6897-6898). Dr. Kinsora was cross-examined regarding Tina Francis' report reflecting that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles (A.A. Vol. 29 pp. 6900). There was an objection by defense counsel regarding this portion of testimony. Defense counsel argued that these issues were the work product of Tina Francis. The court overruled the objection (A.A. Vol. 29pp. 6901).

Eventually, the trial court began precluding the State from introducing any more evidence from Tina Francis' report (A.A. Vol. 29 pp. 6905). Yet, the damage was done. The defense had permitted a mitigation experts information and report to be used against the defendant. It was ineffective assistance of counsel to cause the report to be prepared and for the State to be permitted to use evidence in the report against the defendant's expert.

The discovery statute that previously required defense counsel to turn over reports of non-testifying experts was declared unconstitutional by this Court. See Binegar v. 8th Judicial District Court, 112 Nev. 544, 551-52, 915 P.2d 889, 894 (1996).

In assessing a claim of ineffective assistance of trial counsel, the court is required to look at counsel's performance as a whole which includes commutative assessment of counsel's multiple errors and admissions during the penalty phase of trial. See eg. Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005) Citing Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) see also Harris Exrel. Ramseyer v. Wood, 94 F.3d 1432, 1438-39 (9th Cir. 1995). In the instant case, the defense should have never placed their own expert in a situation where he was cross-examined regarding facts in a mitigation experts report. Defense counsel should have reviewed the notes and discussed with Ms. Tina Francis the nature of any facts

contained in the report. Appellate counsel was ineffective for not raising this issue on appeal as it was objected to during trial. It was ineffective assistance of counsel for the mitigation experts report to have been provided to the prosecution so that the State could use it against the defense's expert witness.

XXI. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL TO DISAGREE AMONG THEMSELVES IN FRONT OF THE JURY.

During closing argument, defense counsel argued in contradiction to each other. First, one defense attorney stated in closing arguments,

> "I also brought Mr. Esten in here for a very important reason, and that is to show you that there are no drugs in prison. We know for a fact that those individuals, that Mr. Johnson and those other individuals were simply loaded on drugs. There are no drugs in prison."(A.A. Vol. 29 pp. 7020-7021).
>
> ...
>
> **"**He was loaded on drugs when these homicides occurred, and in prison, there are no drugs. You saw the way they search the inmates as they come and go, there are no drugs in prison. That's another reason that society is protected." (A.A. Vol. 29 pp. 7020-7021)
>
> **...**
>
> "The drugs that Mr. Johnson was on, those were mind altering drugs, and those drugs are not in prison, and that is another reason why we in society are protected, and that's why I brought Mr. Esten in here to talk to you." (A.A. Vol. 29 pp. 7021)

Therefore, defense counsel found it ultimately important to call an expert witness in an effort to convince the jury that Mr. Johnson would not be able to consume the same type of drugs that caused the behavior for which he was convicted. Thereafter, in a subsequent argument by the other defense attorney, counsel states,

> "There is one thing my learnered co-counsel that I beg to differ; he said there are no drugs in prison. I beg to differ. And you know how they get in prison? The guards, you know, how often do we pick up a paper and see where guards have brought drugs into prisons? Inmates can get them in their. You know, they are human beings and they make mistakes just like any body else." (A.A. Vol. 30pp. 7047)

It was ineffective assistance of counsel for both defense counsel to disagree on a theory. Mr. Whipple actually called a witness for the very "important purpose" of establishing that there are no drugs in prison. Specifically, no mind altering drugs that Mr. Johnson was on at the time of the shootings. Thereafter, co-counsel argues that Mr. Whipple is wrong and therefore implying that the defense witness was inaccurate as was the argument of Mr. Whipple. Mr. Whipple believed that the jury would be concerned with future dangerousness if they thought Donte Johnson would have access to mind altering drugs. Co-counsel argued that Donte would have access to drugs in the prison because of the nature of the guards activities.

It was ineffective assistance of trial counsel to disagree in front of the jury as to such an important point. Additionally, it was ineffective assistance of appellate counsel to fail to raise this issue on appeal.

XXII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL REFFERED TO THE VICTIMS AS KID/KIDS.

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated due to defense counsel referring to the victims as "kids". U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

During closing arguments the defense attorney explains that it didn't matter whether Donte Johnson laughed about the murders or not after one of the "kids" are killed. Defense counsel further stated, "Does it make it any worse? The poor kid is dead."(A.A. Vol. 30 pp. 7028) Defense counsel was ineffective for referring to the victims as kids because on appeal, appellate counsel argued prosecutorial misconduct on the basis that the prosecutor referred to the victims as "kids". The Supreme Court noted,

> "Second, Johnson contends that the prosecutor violated a pre-trial order by the District Court when he referred to the victims as "boys" or

> "kids" during rebuttal argument. He is correct that the prosecutor violate the order but we conclude he was not prejudiced. The meaning of the term "boys" or "kids" is relative in our society depending on the context of its use and the terms do not inappropriately describe the victims in this case. One of the four victims was seventeen year old; one was nineteen years old; and two others were twenty years old. Referring to them as "young men" may have been the most appropriate collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson." Johnson v. State, 122 Nev. 1344, 1356, (2006).

In fact, pre-trial, Johnson filed a motion in limine regarding these references, which was argued by the parties and ruled on by the district court. Id.(Footnote 23). In the instant case, it was ineffective assistance of trial counsel to refer to the victims as "kids" even after trial counsel had filed a pre-trial motion to preclude the prosecution from arguing the same. Defense counsel found it appropriate to motion the Court to preclude these type of references and then complained on appeal that the State violated the court order. Yet, so did defense counsel. It was ineffective assistance of counsel to raise this issue and not follow the court's order.

XXIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS SUCCESSFULLY MOTIONED THE COURT FOR A BIFURCATED PENALTY HEARING.

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because the trial attorneys provided ineffective assistance

of counsel for successfully motioning the court for a bifurcated penalty hearing. U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In the first penalty phase, the jury was unable to reach a verdict. Prior to the third penalty phase, trial counsel successfully petitioned the court for a bifurcated penalty phase. As a result, Mr. Johnson was severely prejudiced.

Under the Nevada death penalty scheme the jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found (NRS 175.554(3)).

Support for a bifurcated penalty phase is found in a decision by the United States Supreme Court. In Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702,(1998), the Court explained:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id., at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. Id., at 972.

Mr. Johnson's attorneys were ineffective for demanding a bifurcated penalty phase and severely prejudiced Mr. Johnson in doing so. On appeal from the third penalty phase, appellate counsel argued that inmate disciplinary reports from the Clark County Detention Center were improperly admitted over defense objection in violation of Crawford v. Washington, 541 U.S. 36, 124 Sup. Ct. 1354, 158 L.Ed. 2d 177 (2004). In Summers v. State, 122 Nev. 1326, 148 P.3d 778, (2006), in the dissenting opinion, it was reasoned that capital defendants have a Sixth Amendment right to confront the declarants of testimonial hearsay statements. However, in the instant case, on appeal from the third penalty phase a concurring opinion provides,

> For the reasons stated in my concurring and dissenting opinion in Summers v. State, I believe that capital defendants have a sixth amendment right to confront the declarants of testimonial hearsay statements admitted throughout an unbifurcated capital penalty hearing. Where the hearing is bifurcated into death eligibility and selection phases, however, I believe that the right to confrontation extends only to evidence admitted in the eligibility phase. Here, because the evidence at issue in Johnson's case- - inmate disciplinary reports- - was admitted during the selection phase only, I concur in the majorities conclusion that it was not error under the confrontation clause and Crawford v. Washington to admit the reports into evidence. 122 Nev. 1344, 1360. (Internal citations omitted).

Hence, if defense counsel had not moved for a bifurcated hearing three of the seven justices would have determined that the disciplinary reports admitted were testimonial hearsay and required confrontation in violation of Crawford v.

Washington.

The following are further examples of why Johnson's attorneys should not have requested a bifurcated hearing. During the settling of jury instructions for the second portion of the third penalty phase, the State and the defense stipulated that the jury would not be advised as to the definition of reasonable doubt because they were previously instructed on reasonable doubt in the first portion of the penalty phase. It was ineffective assistance of trial and appellate counsel to not insure that the jury be advised of the reasonable doubt instruction at every part of a criminal case where jury instructions are provided to the jury. If the penalty phase had not been bifurcated, this would not have presented itself as an issue. When the jury retired to deliberate to determine the fate of Donte Johnson, they should have been instructed on the definition of reasonable doubt.

During the opening arguments in the penalty phase, the prosecutor stated, "During the second phase of this hearing, we will have the opportunity to present additional evidence about Donte Johnson's upbringing. That will be in the second phase of this proceeding. "(A.A. Vol. 24 pp. 5630) Additionally, during the first portion of the penalty phase, defense counsel objects stating, "I need to object. They keep suggesting that there is something that the jury hasn't heard, and that is in violation of this Courts order, they have done it twice." (A.A. Vol. 25 pp. 5933)

The prosecution then states, "The jury had already been admonished in voir dire that there are two phases in the proceeding and that facts and evidence will be presented in both phases." (A.A. Vol. 25 pp. 5933).

In the instant case, the State cleverly informed the jury that if they determined that a second portion of the penalty phase was necessary, they were going to hear additional bad acts and/or character evidence of the defendant. This naturally would make a jury curious as to what they have yet to hear. This is exactly the objection by trial counsel. There would be an overwhelming temptation amongst a reasonable jury to find that the mitigators do not outweigh the aggravators in order to determine what the nature of the evidence was. Appellate counsel was ineffective for failing to raise this issue on appeal. Trial counsel was ineffective for obtaining a bifurcated penalty phase.

Additionally, the bifurcated hearing provided the prosecution the opportunity to comment during the second portion of the penalty phase on mitigators that the jury had found. Lastly, the bifurcated penalty phase gave the opportunity for the State to make two opening arguments, two closing arguments, and two rebuttal closing arguments. Whereas, if the case was not bifurcated, the prosecution would make one opening argument, one closing argument, and a rebuttal argument. Additionally, the State would not be given an opportunity to comment and question

on mitigators already found by the jury.

XXIV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO OFFER A MITIGATION INSTRUCTION.

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because the trial attorneys failed to request an appropriate mitigation instruction U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In the instant case, jury instruction number three stated,

> The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt. The jurors need not find mitigating circumstances unanimously (A.A. Vol. 25 pp. 5863-5864).

In the instant case, the jury should have been advised that mitigating circumstances do not need to be found beyond a reasonable doubt which they were instructed on. However, the jury should have been told, "a mitigating circumstance is found if any one juror believes that it exist." The jury was instructed that a mitigator need not be found unanimously. However, that fails to explain to the jury that a mitigating circumstance can be found by a single juror. The jurors who read the instruction as a whole may believe that a majority of jurors necessarily were

needed to find a mitigator.

Mr. Johnson acknowledges that a similar issue was considered by this Court in Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996). In Jimenez, the petitioner argued that the jury instructions would lead a reasonable juror to the belief that a mitigating circumstance must be found unanimously. 112 Nev. 610, 624.

In a capital case, a sentencer may not be precluded from considering any relevant mitigating evidence. Mills v. Maryland, 46 U.S. 367, 374-75, 100 L.Ed.2d 384, 108 Sup. Ct. 1860 (1988). This rule is violated if the jury believes it cannot give mitigating evidence any effect unless they unanimously agree upon the mitigating circumstance. Id. at 375. In Jimenez, this Court held,

> "...there was no basis in the instruction for jurors to believe that there own individual views on the existence and nature of mitigating circumstances could not be applied by each of them in weighing the balance between aggravating circumstances and mitigating circumstances." Id. at 625.

Admittedly, the jury instructions do not state that a mitigating circumstance must be found unanimously. However, counsel for Mr. Johnson tried the instant case in 2005. This Court's decision in Jimenez v. Nevada was decided in 1996. Hence, counsel should have been aware of the Jimenez decision and insured that the jury was properly instructed that each individual juror could find the existence of a

mitigator even though eleven other jurors disagreed. Appellate counsel was ineffective for failing to raise this issue on appeal. Trial counsel was ineffective for failing to offer such a jury instruction.

XXV. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE PROSECUTION IMPROPERLY IMPEACHING A DEFENSE WITNESS.

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because appellate counsel failed to raise on appeal the prosecution improperly impeaching a defense witness. U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

During the penalty phase of this matter, the prosecutor improperly elicited evidence of a misdemeanor conviction of Mr. Johnson's mitigation witness. Upon defense counsel's objection, the prosecutor argued that he was specifically eliciting the information regarding Mr. Zamora's prior arrest for impeachment purposes. The district court sustained the objection but provided no admonishment to the jury.

The following questions and answers during Mr. Zamora's cross-examination by the prosecutor, illustrates the impermissible impeachment:

Prosecutor: Your not a convicted felon
Mr. Zamora: No

Prosecutor:	You don't have any felony convictions or misdemeanor convictions?
Mr. Zamora:	I have misdemeanor convictions**.**
Ms. Jackson:	Your honor that's not a proper question for impeachment.
The Court:	That is correct (A.A. Vol. 27 pp. 6437).

NRS 50.095 states as follows:

> "Impeachment by evidence of conviction of a crime.
>
> 1. For the purpose of attacking credibility of a witness, evidence that he has convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than one year under the law under which he was convicted.
>
> 2. Evidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since:
>
> (a) The date of the release of the witness from confinement; or
>
> (b) The expiration of the period of his parole, probation, or sentence, whichever is the later date.
>
> 3. Evidence of a conviction is inadmissible under this section if the conviction has been the subject of a pardon.
>
> 4. Evidence of juvenile adjudication is inadmissible under this section.
>
> 5. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is inadmissible.
>
> 6. A certified copy of a conviction is prima facie evidence of the conviction."

It is important to note that the prosecutor introduced the mitigation witness's prior misdemeanor arrest, in direct violation of NRS 50.095.

This Court has held that, "[o]n appeal from denial of a writ of habeas corpus,

where during preliminary hearing counsel for defendant asked witness for State if he had ever been arrested, and objection to question was sustained and counsel refused to cross-examine witness unless counsel could attack witness's credibility, defendant was not denied right to confront witness because pursuant to the statute, credibility may be attacked only by showing conviction of felony, not by mere arrest." Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966), *cited*, Plunkett v. State, 84 Nev. 145, at 148, 437 P.2d 92 (1968), Azbill v. State, 88 Nev. 240 at 247, 495, P.2d 1064 (1972), Bushnell v. State, 95 Nev. 570 at 572, 599 P.2d 1038 (1979).

In the instant case, the defense attorney clearly objected to this improper impeachment evidence of an important mitigation witness. The rules and caselaw clearly demonstrate the error made by the prosecutor. Appellate counsel was ineffective for failing to raise this issue on direct appeal.

XXVI. THE DEATH PENALTY IS UNCONSTITUTIONAL

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

A. NEVADA'S DEATH PENALTY SCHEME DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population Estimates: April 2000 to July 2001, http://eire.census.gov/pspest/date/states/tables/ST-eest2002-01.php. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11.

The sates with the highest death rate for the death penalty for this period were

as follows: Nevada – 10.91 death sentences per 100,000 population; Arizona - 7.82; Alabama - 7.75; Florida - 7.74; Oklahoma -7.06; Mississippi - 6.47; Wyoming - 6.44; Georgia - 5.44; Texas - 4.55. Id. Nevada's death penalty rate was nearly three time the national average and nearly 40% higher than the next highest state for this 12 year period. Such a high death penalty rate in Nevada is due to the fact that neither the Nevada statues defining eligibility for the death penalty nor the case law interpreting these statues sufficiently narrows the class of persons eligible for the death penalty in this state.

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

B. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

Johnson's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment and under the Eighth and Fourteenth

Amendments. He recognizes that this Court has found the death penalty to be constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

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

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may

not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

The death penalty is also unusual, both in the sense that is seldom imposed and in the sense that the particular cases in which it is imposed are not qualitatively distinguishable from those in which is it not. Further, the case law has so broadly defined the scope of the statutory aggravating circumstances that it is the rare case in which a sufficiently imaginative prosecutor could not allege an aggravating circumstance. In particular, the "random and motiveless" aggravating circumstance under NRS 200.033(9) has been interpreted to apply to "unnecessary" killings, e.g. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990), a category which includes virtually every homicide. Nor has the Court ever differentiated, in applying the felony murder aggravating factor, between homicides committed in the course of felonies and homicides in which a felony is merely incidental to the

killing. CF. People v. Green, 27 Cal.3d 1, 61-62, 609 P.2d 468 (1980). Given these expansive views of the aggravating factors, they do not in fact narrow the class of murders for which the death penalty may be imposed, nor do they significantly restrict prosecutorial discretion in seeking the death penalty: in essence, the present situation is indistinguishable from the situation before the decision in Furman v. Georgia, 408 U.S. 238 (1972) when having the death penalty imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). There is no other way to account for the fact that in a case such as Faessel v. State, 108 Nev. 413, 836 P.2d 609 (1992), the death penalty is not even sought and the defendant receives a second-degree murder sentence; in Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984), the perpetrator of an organized murder in prison receives a life sentence; and appellant, convicted of killing the woman he loved in a drug-induced frenzy, is found deserving of the ultimate penalty the state can exact.

The United States Supreme Court, unfortunately, has continued to confuse means with ends: while focusing exclusively upon the procedural mechanisms which are supposed to produce justice, it has neglected the question whether these procedures are in fact resulting in the death penalty being applied in a rational and even-handed manner, upon the most unredeemable offenders convicted of the most

egregious offenses. The fact that this case was selected as one of the very few cases in which the death penalty should be imposed is a sufficient demonstration that these procedures do not work. Accordingly, this Court should recognize that the death penalty as currently constituted and applied results in the imposition of cruel or unusual punishment, and the sentence should therefore be vacated.

C. EXECUTIVE CLEMENCY IS UNAVAILABLE.

Johnson's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that ever of the 38 states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people

have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

Johnson is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was mentally retarded and the U.S. Supreme Court found that the mentally retarded could no longer be executed. It cannot have been the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that is does not exist. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Johnson's sentence.

XXVII. MR. JOHNSON'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

Mr. Johnson hereby incorporates each and every allegation contained in this appeal as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is

permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Johnson stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by this Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from he statutory aggravating

circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

There is no rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Johnson deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as

aggravated as the one for which Mr. Johnson was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and

until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The

report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial *per se.*

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XXVIII. MR. JOHNSON'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR"}. The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6. Other applicable articles include, but are not limited to ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (right "freedom of thought"), UDHR, Art. 19 (right to "freedom of opinion and expression"), UDHR, Art. 5 and ICCPR, Art. & (prohibition against cruel, inhuman or degrading treatment or punishment); *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In support of such claims, Mr. Johnson reasserts each and every claim and supporting fact contained in this petition as if fully set forth herein.

The United States Government and the State of Nevada are required to abide by norms of international law. The Paquet Habana, 20 S.Ct. 290 (1900)("international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the United States Constitution specifically requires the State of Nevada to honor the United States' treaty obligations. U.S. Constitution, Art. VI.

Nevada is bound by the ICCPR because the United States has signed and ratified the treaty. In addition, under Article 4 of the ICCPR no country is allowed to derogate from Article 6. Nevada is bound by the UDCR because the document is a fundamental part of Customary International Law. Therefore, Nevada has an obligation not to take life arbitrarily.

XXIX. MR. JOHNSON IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS AND SENTENCE OF DEATH BASED UPON CUMULATIVE ERROR.

Johnson's state and federal constitutional right to due process, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment due to cumulative error. U.S. Const. Amend. V, VI, VIII, XIV;

Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (Citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this supplement requires reversal of the conviction and sentence. Johnson incorporates each and every factual allegation contained in this supplement as if fully set forth herein. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice. In Dechant v. State, 116 Nev. 918, 10 P.3d 108,(2000), this Court reversed the murder conviction

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

Based on the foregoing, Mr. Johnson would respectfully request that this Court reverse his conviction based upon cumulative errors of counsel.

CONCLUSION

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

DATED this 9th day of January, 2015.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words, to wit 31,878 words.

Finally, I 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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of January, 2015.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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