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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

MOTION IN LIMINE
REGARDING CO-DEFENDANTS' SENTENCES

Date of Hearing: 12/27/99
Time of Hearing: 9:00 a.m.

COMES NOW the Defendant, by and through his attorneys, and hereby files this Motion in Limine.

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

This Motion is made and based upon the following Points and Authorities, all the pleadings and papers on file herein, and any oral argument of counsel that the Court may deem necessary.

DATED this 29th day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

DAYVID J. FIGLER
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar No. 004264
309 South Third Street, Fourth Floor
Las Vegas, Nevada 89155
Attorneys for Defendant

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: STEWART L. BELL, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **Motion in Limine** on the **27th** day of **December, 1999**, at the hour of **9:00 a.m.**, in Department No. **V** of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 29th day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

DAYVID J. FIGLER
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar No. 004264
309 South Third Street, Fourth Floor
Las Vegas, Nevada 89155
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Defendant along with Co-Defendants, Sikia Smith and Terrell Young were charged with four counts of Murder With Use of a Deadly Weapon along with multiple other counts by way of Indictment. In both cases, the jury in the matter returned a verdict of guilty and sentenced both co-defendants to life without the possibility of parole.

LEGAL ARGUMENT

NRS § 48.035 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or confusing the jury. **Sonner v. State**, 930 P.2d 710, 714, 112 Nev. 1328 (1996). As the Court is aware, the State has filed a notice to seek death against Mr. Johnson. Any attempt by the state to use the co-defendant's convictions or sentences in this matter would be improper. Such is unauthorized by case or statute and would clearly be violative of not only NRS § 48.035 but also the fundamental due process rights of a defendant secured by the Fourteenth Amendment. See also, **Garner v. State**, 78 Nev. 366 (1962).

CONCLUSION

Based on the foregoing, Mr. Johnson requests that an Order be entered by this Court excluding any evidence of co-defendant's convictions or sentences.

DATED this 29th day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

DAYVID FIGLER
Deputy Special Public Defender
Nevada Bar #004264
309 South Third Street, Fourth Floor
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(702) 455-6265
Attorneys for Donte Johnson

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DISTRICT COURT

CLARK COUNTY, NEVADA

****

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON, aka
John White, ID # 1586283,

Defendant.

CASE NO: C153154
DEPT. NO: V

MOTION IN LIMINE FOR ORDER PROHIBITING PROSECUTION MISCONDUCT IN ARGUMENT

Date of Hearing: 12/27/99
Time of Hearing: 9:00 a.m.

Defendant DONTE JOHNSON hereby moves this court for an order enforcing his right to a fundamentally fair trial, by directing the prosecutors in this case not to engage in prosecutorial misconduct in argument. This motion is based upon the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections Three, Four, Six, and Eighteen, and Article 4, Section

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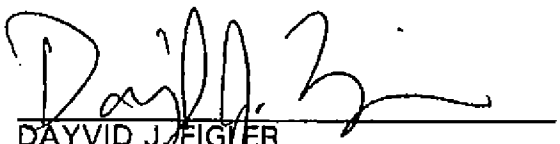
21, of the Nevada Constitution, the attached memorandum of points and authorities and exhibits, and the entire file in this matter.

DATED this 24 day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER



DAYVID J. FIGLER
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Las Vegas, Nevada 89155
Attorneys for Defendant

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: STEWART L. BELL, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION IN LIMINE FOR ORDER PROHIBITING PROSECUTION MISCONDUCT IN ARGUMENT** on the **27TH** day of December, 1999, at the hour of 9:00 a.m., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 29th day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

DAYVID J. FIGLER
DEPUTY SPECIAL PUBLIC DEFENDER
Nevada Bar No. 004264
309 South Third Street, Fourth Floor
Las Vegas, Nevada 89155
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

A. GRANTING THE MOTION IN LIMINE REQUESTED BY THE DEFENDANT IS AN APPROPRIATE AND NECESSARY MEASURE TO PREVENT IMPROPER ARGUMENT BY THE PROSECUTOR.

This Court should enter an order in limine barring the prosecution from engaging in the types of misconduct identified below and requiring it to abide by the requirements imposed on prosecutors by the federal and state constitutions, laws, and ethical canons. The Court of Appeals for the Ninth Circuit has explained that "[t]he whole purpose of a motion in limine is to prevent the opposing side from asking a

question or making comments in opening statements or otherwise bringing before the jury some fact which the movant believes will damage his case by the mere mention of it." Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982). Similarly, McCormick on Evidence §52, at 74 (4th ed. 1992), notes that the "purpose of such motions may be to insulate the jury from exposure to harmful inadmissible evidence or to afford a basis for strategic decisions." As described below, prosecutorial misconduct in argument violates the state and federal constitutions and prejudices jurors against the accused. Entering an order in limine would assist in avoiding violations of these rights by prohibiting prosecuting attorneys from making improper arguments.

Entering the motion in limine would fulfill the role trial judges must play in safeguarding the constitutional rights of defendants at criminal trials. State and federal courts have stressed that trial judges bear the responsibility for preventing prosecutorial misconduct. In United States v. Young, 470 U.S. 1, 10 (1985), the Supreme Court wrote, "[w]e emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" (quoting Quercia v. United States, 289 U.S. 466, 469 (1933)); see also Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (explaining that trial judge should have acted to prevent improper argument instead of overruling the defense's objections, which gave the prosecution's argument an "official imprimatur").

Like federal courts, the Nevada Supreme Court has long recognized and stressed that trial judges are ultimately responsible for preventing improper argument by prosecutors. In Yates v. State, 103 Nev. 200, 205-206, 734 P.2d 1252, 1256 (1987), the court emphasized that "[t]he district judge is in an especially well-suited position to control the overall tenor of the trial. He can order the offending statements

to cease and can instruct the jury in such a manner as to erase the taint of improper remarks that are made." See also Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985) ("Our district courts have a duty to ensure that every accused shall receive a fair trial. This duty requires that trial courts exercise their discretionary power to control obvious prosecutorial misconduct sua sponte."); State v. Cyty, 50 Nev. 256, 259, 256 P.793, 794 (1927) ("[I]t is the duty of the court, unsolicited, to reprimand instantly such [prosecutorial] misconduct"); State v. Moss, 376 S.E.2d 569, 574 (W. Va. 1988) (trial court erred in failing to intervene sua sponte to correct improper argument). The ABA Standards for Criminal Justice similarly provide that "'[i]t is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper, accepted bounds.'" American Bar Association, ABA Standards for Criminal Justice, Standards Relating to Prosecution Function, Standard 3-5.8 (3d ed. 1993) (citations omitted).

Given the breadth and persistence of such misconduct evidenced by the number of Nevada cases devoted to this issue, see note 2, and sections II, III, below, entering and enforcing such an order is the only adequate means of insuring the fundamental fairness of the proceeding and the reliability of the resulting sentence. The court's duty to ensure the fairness of the proceedings is particularly important in capital cases, which must satisfy a "heightened standard of reliability" under the Eighth and Fourteenth Amendments. Ford v. Wainwright, 477 U.S. 399, 411 (1986). Any improper argument which diverts the jury from imposing a sentence that is a "reasoned moral response to the defendant's background, character and crime," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), or from making an "individualized decision" as to the punishment for the particular defendant and the particular crime, Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and

Fourteenth amendments); see Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Sumner v. Shuman, 483 U.S. 66, 75 (1987), will violate the requirement of heightened reliability in capital sentencing proceedings imposed by the Eighth Amendment, as well as the protections of the other amendments cited below.

Entering an order in limine would also reduce the burden of litigation over this issue on this state's highest court and in habeas corpus proceedings in federal courts.[1]

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[1] By filing this motion, the defense preserves the issue of prosecutorial misconduct in argument for appeal. The commission of misconduct places counsel for the defendant in a position in which nothing counsel does will adequately protect the defendant's rights. If counsel objects, he or she runs the risk of drawing attention to, and reinforcing, the prejudicial effect of the misconduct, thus giving the prosecutor a further reward for committing the misconduct. Courts have acknowledged that interrupting a prosecutor's argument to object can draw attention to an offensive argument. See, e.g., United States v. Young, 470 U.S. 1, 13-14 ("[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously."); U.S. v. Garza, 608 F.2d 659, 666 (5th Cir. 1979) ("[O]bjection to these extremely prejudicial comments [by the prosecutor] would serve only to focus the jury's attention on them."); U.S. v. Grayson, 166 F.2d 863, 871 (2d Cir. 1948) ("[T]o raise an objection to [improper] testimony - - and more, to have the judge tell the jury to ignore it - - often serves but to rub it in.") (Frank, J., concurring). Similarly, objections followed by curative instructions risk both drawing attention to and exacerbating a prosecutor's unconstitutional argument. The Supreme Court has recognized, for instance, that a curative instruction to objectionable remarks can compound the error in the eyes of the jury. See, e.g., Bruton v. United States, 391 U.S. 123, 129 (1968) (citing a study finding that "the limiting instruction actually compounds the jury's difficulty in disregarding" inadmissible evidence). Similarly, in the analogous situation of judicial misconduct, the Nevada Supreme Court has recognized:

> Counsel for plaintiffs was placed in the untenable position of silently accepting the judge's [misconduct] or risking the prospect of alienating the judge or the jury...
> Litigants who bear the brunt of [misconduct] by trial judges are faced with a 'Hobson's choice' of either objecting to the misconduct (with the attendant risks of antagonizing the judge and exasperating the jury), or refusing to assume the risks posed by such objections, thereby jeopardizing their right of appellate review.

Parodi v. Washoe Medical Center, 111 Nev. 365, 369, 892 P.2d 588, 591 (1995). By filing this motion in limine, the defendant should be considered to have made an

(continued...)

The Nevada Supreme Court has consistently expressed frustration about improper arguments and remarks by the state's attorneys, noting both the severe consequences for the defendant and the cost society must shoulder as a result. In Neal v. State, 106 Nev. 23, 25, 787 P.2d 764 (1990), the Nevada Supreme Court emphasized that, "[t]his court has repeatedly condemned such prosecutorial misconduct, and noted the enormous expense borne by the state each time such misconduct necessitates a retrial. Unfortunately, as this case illustrates, the problem continues."[2]

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[1](...continued)
objection to each and every kind of misconduct specified herein, without the necessity of risking further prejudice by objecting at the time of the misconduct, and to have invoked the court's sua sponte duty to grant a mistrial.

[2] See also Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) ("We have less difficulty in determining that [the prosecutor's] misbehavior was non-prejudicial than we do in understanding why it occurred. In both instances, the impropriety of the prosecutor's conduct was beyond speculation."); Williams v. State, 103 Nev. 106, 110, 734 P.2d 700 (1987) ("[W]e are unwilling - indeed, not at liberty - to see the criminal justice system unnecessarily encumbered and extended by inappropriate behavior on behalf of the State. Accordingly, we are constrained to again emphasize that those who violate these rules do so at their peril.") (citations omitted); Yates v. State, 103 Nev. 200, 206, 734 P.2d 1252 n. 7 (1987) ("It is time that this kind of conduct be stopped. We do not see reversal of convictions as an appropriate or useful way to adjudicate prosecutorial misconduct. Reversal may prejudice society more than it does the prosecutor.... We have reached the point where we can no longer look at this problem in terms of isolated examples of 'understandable, if inexcusable overzealousness in the heat of trial.'") (citations omitted); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985) (describing prosecutorial misconduct as "a burden to the judicial system that is totally unnecessary and, so far as the prosecution is concerned, often self-defeating."), cert. denied, 486 U.S. 1036 (1988); Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) ("We again admonish the district attorneys of this state to heed the warnings we expressed in McGuire."); McGuire v. State, 100 Nev. 153, 155, 677 P.2d 1060, 1062 (1984) ("In the past we have publicized our concern over the serious nature of the problem of prosecutorial misconduct. We have emphasized not only the problems such misconduct causes in terms of depriving an accused of his or her right to a fair trial, but also the additional public expense needlessly occasioned by such misconduct, especially where such misconduct results in the necessity of a retrial."); State v. Cyty, 50 Nev. 256, 256 P.2d 793, 794 (1927) ("There is no excuse for such misconduct in any kind of a case. If the state has a strong case it is not necessary, and if it has a close case such misconduct is gross injustice to the defendant. Furthermore, prosecutors should remember that such misconduct often leads to the expense of burdensome retrials, which can but be a serious reflection upon their regard for the welfare of

(continued...)

Prosecutorial misconduct is unique among constitutional violations at trial because it results from the prosecutor's unilateral action. The easiest way to avoid the constitutional problems arising from misconduct is for the prosecutor to refrain from committing misconduct. The caselaw cited below establishes the representative kinds of misconduct which the prosecutor should not commit. This court should therefore enter an order directing the prosecutors not to commit misconduct, the prosecutors should obey that order, and no further litigation over this issue should be necessary.

B. ENTRY OF AN ORDER IN LIMINE IS NECESSARY BECAUSE OF THE PERSISTENT PATTERN OF MISCONDUCT ENGAGED IN BY THE CLARK COUNTY DISTRICT ATTORNEY.

Entry of the order in limine is not only appropriate but it is necessary as well. The Clark County District Attorney has a history and practice of violating the constitutional rights of defendants through the commission of prosecutorial misconduct. The most experienced members of that office (who are now retired) were consistent and habitual perpetrators of misconduct. See, e.g., McKenna v. State, 114 Nev. 1044, 468 P.2d 739 (1998) (Mr. Seaton); Howard v. State, 106 Nev. 713, 722-723 and n.1, 800 P.2d 175 (1991) (Mr. Seaton); Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (Mr. Harmon); see note 1, above. Unfortunately, the new generation of prosecutors in the Clark County District Attorney's Office has learned from its seniors to commit the same type of pernicious misconduct. See, e.g., Greene v. State, 113 Nev. 157, 170, 931 P.2d 54 (1997) (Mr. Schwartz); Murray v. State, 113 Nev. 11, 17-18, 930 P.2d 121 (1997) (reversing three Clark County cases for prosecutorial misconduct in commenting on defendants' post-arrest silence).

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[2](...continued)
the taxpayer."); State v. Rodriquez, 31 Nev. 342, 102 P.2d 863, 865 (1909) (noting that improper argument "caus[es] the necessity of courts of last resort to reverse causes and order new trials, to the expense and detriment of the commonwealth and all concerned").

tern of prosecutorial misconduct in this county, even in the most serious kind of case in which the defendant's life is at stake.

C. THE STATE CANNOT LEGITIMATELY OBJECT TO THE ENTRY OF AN ORDER IN LIMINE DIRECTING THE PROSECUTORS TO CONFORM THEIR ARGUMENT TO THE DICTATES OF THE LAW ON IMPERMISSIBLE PROSECUTORIAL ARGUMENT.

Given the unique role prosecutors play in the criminal justice system, the state cannot legitimately oppose this motion or raise any objection to the entry of an order in limine. State and federal law, as well as professional ethical standards, not only prohibit prosecutors from committing the type of misconduct described below, but also, obligate them to assist in protecting the constitutional rights of people facing trial. The United States Supreme Court has held that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by, Stirone v. United States, 361 U.S. 212 (1960). The Ninth Circuit explained in Commonwealth of the Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992), overruled on other grounds by, George v. Camacho, 119 F.3d 1393 (9th Cir. 1997), that "[i]t is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." See also Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) ("The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction."); National District Attorneys Association, National Prosecution Standards, Rule 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."). In State v. Rodriquez, 31 Nev. 342, 347, 102 P.d 863, 865 (1909), the Nevada Supreme Court agreed that:

> "Prosecuting attorneys ... have a duty to perform equally as sacred to the accused as to the state they are employed to represent, and that is to see that the accused has the fair and impartial trial guaranteed every

person by our Constitution, no matter how lowly he may be, or degrading the character of the offense charged..." (emphasis added).

Prosecutors cannot look to the standards applicable to other lawyers to determine the propriety of their conduct, remarks, and argument. The Ninth Circuit has stressed that:

> Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may -indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.

U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993); see also American Bar Association, Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client.").

Given the obligation prosecutors have to respect the rights of accused under well-established federal and state law, the state has no legitimate basis for opposing entry of the order in limine sought by the defendant: The state cannot contend that its prosecutors have a right to commit the misconduct described below; nor can it legitimately contend that the court should not enter an order which is consistent with the law the prosecutors are obligated to follow. This Court cannot assume that the prosecutors will comply with their obligations in this regard, or credit any self-serving assertions by the prosecutors that an order in limine is unnecessary because they are aware of their ethical obligations. As the Jones argument shows, the fact that courts have condemned an argument as misconduct provides no assurance that prosecutors will not make it.

D. ENTRY AND ENFORCEMENT OF AN ORDER IN LIMINE IS REQUIRED TO ENSURE THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS ARE ACTUALLY, AND NOT MERELY HYPOTHETICALLY, ENFORCED.

In light of the historical practices of the Clark County District Attorney, the

defendant and this court must consider the measures to take should the prosecutor nevertheless commit misconduct. That analysis must take into account the intentional character of any such misconduct. While courts sometimes find misconduct to be non-prejudicial on the ground that it was unintentional or inadvertent, see, e.g., Turner v. Johnson, 106 F.3d 1178, 1188 (5th Cir. 1997); United States v. Manning, 56 F.3d 1188, 1199 (9th Cir. 1995), that cannot be the case here: The defendant has compiled below the caselaw illustrating the kinds of misconduct the prosecutor is prohibited from committing; the prosecutors in this case thus cannot claim that any misconduct they commit is a result of ignorance or inadvertence.

There are several reasons militating in favor of a mistrial sua sponte should the prosecutor make an impermissible comment in spite of the filing of this motion. First, the state's knowing, deliberate and intentional attempt to bolster a weak case by depriving the defendant of a fair trial, prior to the entry of the verdict requires a mistrial sua sponte. As noted above, it is primarily the trial court's obligation to respond to misconduct before it. See, e.g., Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126 (1985). Any act of misconduct in this case must be recognized for what it will be: A deliberate and intentional attempt to violate the defendant's right to a fundamentally fair trial and a reliable sentence; and an acknowledgment of the weakness of the prosecution's case by attempting to win the case by impermissible means. "By resorting to wrongful devices, [the party] is said to give ground for believing that he thinks his case is weak and not to be won by fair means." McQueeney v. Wilmington Trust Co., 779 F.2d 916, 922 (3d Cir. 1985) (quoting McCormick, Handbook of the Law of Evidence § 273 at 660 (2d ed. 1972)); see also United States v. Metcalf, 435 F.2d 754, 758 (9th Cir. 1970) (characterizing commission of misconduct as result of "the careless zeal of a prosecutor conscious of the weakness of the case").

In the habeas corpus context, the United States Supreme Court recognized in

Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993):

> [T]he possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. [Citation].

The Court of Appeals for the Ninth Circuit has characterized this type of error as a "hybrid" which is "declared to be incapable of redemption by actual prejudice analysis. The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994), cert. denied, 513 U.S. 1130 (1995).[3] The defendant here has provided the state and the court with the caselaw establishing what the prosecutors cannot do, and the defendant has done all he can to prevent misconduct from occurring. If the prosecutors attempt to bolster their case by committing misconduct anyway, they should not be heard to argue that any response less than an immediate mistrial would be an adequate remedy for their intentional and deliberate attempt to deprive the defendant of a fair trial. A mistrial is also necessary to prevent the state from obtaining the further benefit of rubbing in the misconduct by objection and instruction. See note 1, above. Having polluted the trial by prejudicing the jury, the state cannot properly seek to gain the benefit of having that jury, which it has deliberately poisoned, render a verdict.[4]

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[3] While the Nevada Supreme Court has indicated that even intentional and contemptuous prosecutorial misconduct is not necessarily reversible, Middleton v. State, 114 Nev. 1089, 968 P.2d 296, 312 (1998), it has not analyzed the effect of the supremacy clause of the federal constitution, or of Brecht, on that issue. Federal law does not countenance such toleration of bad faith, intentional misconduct that violates the federal constitution. Compare, e.g., Brecht, 507 U.S. at 628 n. 9; Oregon v. Kennedy, 456 U.S. 667, 678 (1982) (misconduct intended to goad defendant into seeking mistrial); Miller v. Pate, 386 U.S. 1, 6-7 (1967) (deliberate misrepresentation of evidence at trial invalidated conviction).

[4] At minimum, any commission of misconduct would have to be analyzed under the Chapman standard of prejudice applicable to further constitutional errors. Chapman v. California, 386 U.S. 18 (1967). This standard requires the prosecution, and not the defendant, to prove beyond a reasonable doubt that its

(continued...)

Second, the integrity of the court is at stake where the prosecutor commits misconduct in argument. By providing the relevant case authorities to this court in advance of argument, the defendant has also ensured that this court can satisfy its duty to intervene sua sponte to prevent or sanction misconduct. This court is therefore not in the apparent position of the trial judge in the Jones case, who refused to sustain defense objections to misconduct which was flagrant and obvious under well-settled (but uncited) authority. See Ex. 1 at II 88-89. Further, because this court, as well as the state, is on notice as to what constitutes misconduct, this court must fulfill its duty to respond to the prosecutor's misconduct. If the court fails to intervene sua sponte, or fails to sustain defense objections to misconduct, it thereby places its imprimatur on the misconduct; and it invests the prosecutor's violation of the defendant's constitutional rights with the weight and authority of the court, thus necessarily making that misconduct prejudicial. See Bollenbach v. United States, 326 U.S. 607, 612 (1946) ("'[T]he influence of the trial judge on the jury is necessarily and properly of great weight,' [citation] and jurors are ever watchful of the words that fall from him."). As the Nevada Supreme Court recognized in Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 121-122, 140 P.519 (1914):

> The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is ofttimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.

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[4](...continued)
intentional commission of misconduct would not "contribute to the verdict." Id. at 24. If the prosecutor is so desperate to obtain a conviction or death sentence that he commits misconduct after the filing of this motion, this court can only infer that the prosecutor considered the misconduct necessary to achieve his aim, and thus that it could not be shown, beyond a reasonable doubt, to be non-prejudicial.

Accord Parodi v. Washoe Medical Center, 111 Nev. 365, 368, 892 P.2d 588 (1955); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 416-417, 470 P.2d 135 (1970). If the court refuses to sustain a proper objection to the prosecutor's deliberate and intentional misconduct, based upon the settled caselaw cited in this motion, it will violate its own duty to enforce the law evenhandedly against the prosecution. See, e.g., Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126 (1985); State v. Cyty, 50 Nev. 256, 259, 256 P. 793 (1927).

Third, since a reversal would be required on appeal, granting a mistrial sua sponte will lessen the burden of litigation on this state's highest court and on federal courts in habeas corpus proceedings. A refusal by the court to enforce the law against the prosecution at the proper instance of a defendant would demonstrate judicial bias in favor of the prosecution and thus require reversal. See, e.g., Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (failure of court to act in response to improper argument gave prosecutor's argument "official imprimatur"); Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 122, 140 P. 519 (1914) ("[I]f remarks made by the judge in the progress of a trial are calculated to mislead the jury or prejudice either party, it would be grounds for reversal."). Since trial before an impartial tribunal is a fundamental element of due process of law under the Fourteenth Amendment, such a refusal would be prejudicial per se. Tumey v. Ohio, 273 U.S. 510, 535 (1927); see Neder v. United States, 1999 WL 373186, at *5 (June 10, 1999).[5]

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[5] The judicial response to misconduct objections is a serious problem. In the Jones matter, the trial court failed to sustain an objection to prosecutorial misconduct which was flagrant and obvious under existing authority (although that authority was not cited by the defense), Ex. 1 at II 88-89; but when the prosecutor objected to defense argument, which does not even appear to have been misconduct, the trial court's response in front of the jury was to tell defense counsel "you're out of line." Ex. 1 at II-96. The defendant submits that such a double standard of response to alleged misconduct would be prima facie evidence of judicial bias which violates the due process clause, as well as depriving the defendant of equal protection under the Fourteenth Amendment.

Finally, curative instructions cannot adequately repair the damage impermissible arguments inflict on the constitutional rights of the criminally accused. As the Supreme Court explained in Bruton, 391 U.S. at 129 n. 3, "'[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.'" (quoting Krulewitch v. U.S., 336 U.S. 440, 453 (1949) (Jackson, J., concurring); see also Throckmorton v. Holt, 180 U.S. 552, 567 (1901) ("[T]here may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error."); U.S. v. Garza, 608 F.2d 659, 666 n. 7 (5th Cir. 1979) ("[A]s this Court observed in overturning a conviction because of improper prosecutorial comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'") (quoting Dunn v. U.S., 307 F.2d 883, 886 (5th Cir. 1962)); Government of Virgin Islands v. Toto, 529 F.2d 278, 282 (3d Cir. 1976) (holding that curative instruction could not cure the violation of the defendant's right to a presumption of innocence).

To the extent that the prosecutor may commit misconduct that is only marginally covered by the cited caselaw, this court should intervene to protect the defendant's rights by instructing the jury in terms which address the real effect of the misconduct. An instruction merely to disregard misconduct would not be adequate and would likely exacerbate the effect of the misconduct. Only an instruction that explains to the jury what has actually occurred - - that is, that the prosecutor has attempted to influence the jury by impermissible and unconstitutional means, and that

it would be a violation of the jurors' duty to consider in any way the substantive basis of the misconduct in its decision - - would arguably correct the harm. Thus, if a court concludes that it can cure misconduct by giving a cautionary instruction, the court "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." People v. Bolton, 23 Cal. 3d 208, 589 P.2d 396, 400 n. 5 (1970). In Bolton, the prosecutor's argument insinuated that the defendant had a criminal record when in fact he did not. The court in Bolton indicated that a cautionary instruction sufficient to counterbalance such an argument could take this form:

> "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."

Id.

To the extent that the prosecutors in this case may commit any misconduct not clearly within the categories of misconduct explicitly identified in this motion, the defendant submits that only an instruction similar in form to the one described in Bolton could adequately correct the harm such misconduct would cause.

E. CONCLUSION.

The defendant has shown that this court should issue an order in limine directing the prosecutors not to commit misconduct in argument. Such an order is an appropriate use of a ruling in limine; it is not objectionable by the state; it is necessary in light of the Clark County District Attorney's pattern and practice of committing misconduct; and it is imperative in order to furnish actual protection, rather than mere lip-service, to the defendant's rights. Accordingly, this court should issue an order in limine prohibiting the prosecutors from committing any of the kinds of misconduct

discussed in sections II and III, below, and any other form of misconduct, and enforce that order as requested above.

II.

EXAMPLES OF IMPERMISSIBLE ARGUMENT AT THE GUILT PHASE

To safeguard the fairness of the defendant's trial and protect the specific constitutional rights to which he is entitled, the defendant sets forth some of the improper arguments a prosecutor is forbidden from making by the federal Constitution, and the laws and ethical rules of this state. This list represents some of the most common improper arguments the prosecutor can make and is by no means exhaustive. The defendant presents these examples of improper arguments to inform the Court of his unequivocal objection to them in advance of trial. By making this motion, the defendant also preserves any available objections to the improper arguments the prosecutor may make before the Court and the jury in this case. See pages 4, n.1, and 10-11, above.

A. ARGUMENTS INFRINGING SPECIFIC CONSTITUTIONAL RIGHTS.

A prosecutor may not under any circumstances make a comment which violates the specific constitutional rights the accused enjoys under the Bill of Rights and the Fourteenth Amendment's Due Process Clause. The Supreme Court has held that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

- Darden v. Wainwright, 477 U.S. 168, 182 (1986) ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as the right to counsel or the right to remain silent").
- Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir. 1990) (explaining that a lower standard applies for the grant of the federal writ of habeas corpus where "the impropriety complained of effectively deprived the defendant of a specific constitutional right").

The following sections identify some, but not all, of the arguments which would

violate the defendant's specific constitutional rights. The arguments below also violate the more general right an accused enjoys to a fair trial under the Due Process Clause of the Fourteenth Amendment. Since these arguments infringe specific constitutional rights, however, they are especially intolerable and must be met with extremely strong measures by this Court.

1. ARGUMENTS ABOUT THE DEFENDANT WHICH VIOLATE THE BILL OF RIGHTS.

a. Commenting on Defendant's Post-Arrest Silence Violates the Fifth and Fourteenth Amendments to the United States Constitution And Nevada Law.

A prosecutor may not comment on the accused's post-Miranda silence.

- U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself."); see also Malloy v. Hogan, 378 U.S. 1, 3 (1964) (right against self-incrimination applies to the states through the Fourteenth Amendment's due process clause).
- U.S. v. Robinson, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence ... the privilege against compulsory self-incrimination is violated.").
- Darden, 477 U.S. at 182 ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as ... the right to remain silent.").
- Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (explaining that the Doyle decision "rests on the 'fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'") (quoting South Dakota v. Neville, 459 U.S. 553, 565 (1983)).
- Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that a comment by the State's attorneys about the accused's post-Miranda silence, even during the course of impeachment, violates the due process clause).
- People of the Territory of Guam v. Veloria, 136 F.3d 648, 652-53 (9th Cir. 1998) (reversing conviction and remanding for a new trial, after concluding that the prosecutor's comment on the defendant's post-Miranda silence amounted to *plain error* since "the Doyle rule prohibiting testimony regarding post-arrest silence has been well-established in the law") (emphasis added).
- U.S. v. Harp, 536 F.2d 601, 602 n. 2 (5th Cir. 1976) (holding that prosecutor violated Constitution when asked, "[n]ow doesn't it make sense that if the facts had been like the defendants said they had been, that they would have told

somebody?").[6]

- Nev. Const. art. I, § 8 ("No person shall ... be compelled, in any criminal case, to be a witness against himself.").

- Washington v. State, 112 Nev. 1054, 921 P.2d 1253, 1255 (1996) (ordering new trial where prosecutor asked defendant, "[f]rom the time that you had your Miranda rights read to you till today, have you ever told the police officer or someone in authority your story?").

- Mahar v. State, 102 Nev. 488, 489, 728 P.2d 439, 440 (1986) (reversing and remanding for new trial where prosecutor asked defendant during cross-examination why he had failed to tell the police about his story).

- McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986) (reversing and remanding for new trial where prosecutor in closing argument commented that the defendant "didn't tell anybody in the system, law enforcement. He didn't tell anybody in our offices").

- Bernier v. State, 96 Nev. 670, 671-72, 614 P.2d 1079, 1080 (1980) (reversing and remanding for new trial where prosecutor argued that an innocent person would not have waited two years before telling his story).[7]

The Nevada Supreme Court has extended the protection of the Fifth Amendment to include an accused's silence after arrest but before receiving Miranda warnings.

- Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267 (1996) (holding that the prosecution cannot use post-arrest, pre-Miranda silence in case-in-chief).

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[6] Federal courts have frequently granted relief from convictions because prosecutors commented at trial on the accused's right to remain silent. See, e.g., Franklin v. Duncan, 70 F.3d 75, 76 (9th Cir. 1995) (per curiam); U.S. v. Foster, 985 F.2d 466, 468 (9th Cir. 1994), as amended, 17 F.3d 1256 (9th Cir. 1994); Hill v. Turpin, 135 F.3d 1411, 1417-19 (11th Cir. 1998); Gravley v. Mills, 87 F.3d 779, 790 (6th Cir. 1996); Fields v. Leapley, 30 F.3d 986, 990 (8th Cir. 1996); U.S. v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995); U.S. v. Newman, 943 F.2d 1155, 1158 (9th Cir. 1991); Matire v. Wainwright, 811 F.2d 1430, 1435-36 (11th Cir. 1987); Alo v. Olim, 639 F.2d 466, 467 (9th Cir. 1980); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975).

[7] The Nevada Supreme Court has frequently recognized that prosecutors cannot comment on the right to remain silent. See, e.g., McCraney v. State, 110 Nev. 250, 255-57, 871 P.2d 922, 925-27 (1994); Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990); Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 291 (1989) (ordering new trial where prosecutor commented on silence and argued that it permitted the defense to fabricate plausible defense); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 382 (1986); McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984); Vipperman v. State, 92 Nev. 213, 214, 547 P.2d 682, 683 (1976); Layton v. State, 87 Nev. 598, 600, 491 P.2d 45, 47 (1975).

- Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 656 (1995) (applying Doyle doctrine to post-arrest, pre-Miranda silence).

- Supreme Court Rule 173 (5) ("In trial [the prosecutor shall not] allude to any matter that the lawyer does not reasonably believe is relevant...").

- The American Bar Association, Standards for Criminal Justice, Standards Relating to Prosecution Function, Standard 3-5.6 (b) (3d ed. 1993) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments in the presence of the judge or jury."); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.").

b. Directly Commenting on the Defendant's Failure to Testify Violates the Fifth and Fourteenth Amendments to the United States Constitution.

A prosecutor may not comment directly on a defendant's failure to testify.

- U.S. Const. amend. V.

- Carter v. Kentucky, 450 U.S. 288, 301 (1981) (a person accused of committing a crime "must pay no court-imposed price for the exercise of the constitutional privilege not to testify").

- Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) ("Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").

- Griffin v. California, 380 U.S. 609, 612 (1965) (holding that the Fifth Amendment prohibits a prosecutor from commenting on the defendant's failure to testify).

- Lesko v. Lehman, 925 F.2d 1527, 1541-42 (3d Cir. 1990) (reversing death sentence and holding that comment on failure to express remorse violated Fifth Amendment's right against self-incrimination), cert. denied, 502 U.S. 898 (1991).

- Flanagan v. State, 104 Nev. 105, 110, 754 P.2d 836, 839 (1988) (finding that prosecutor committed "flagrant" and "reversible error" where he stated "they could or could not take the stand, whatever they wanted"), vacated on other grounds, 504 U.S. 930 (1992).

- In Re Dubois, 84 Nev. 562, 574, 445 P.2d 354, 361 (1968) (holding that it was improper for prosecutor to refer to the defendant's "opportunity to take the

stand" in objecting to closing argument).[8]

- See section II (A) (1) (a), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b); 3-5.9.
- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (1998) (reporting that jurors take into account an absence of expression of remorse when they determine whether to impose death sentence).

c. Indirectly Commenting on the Defendant's Failure to Testify Violates the Fifth and Fourteenth Amendments to the United States Constitution And Nevada Law.

The Fifth and Fourteenth Amendments prohibit a prosecuting attorney from commenting indirectly on the defendant's failure to testify. Federal courts have repeatedly held that where no one but the defendant can refute a witness's testimony, it is improper for a prosecutor to say that the evidence the state presents is "uncontroverted," "undisputed," "unchallenged," "uncontradicted," "undenied," "intact," or "unrefuted," or to otherwise draw attention to the accused's failure to testify.

- U.S. v. Cotnam, 88 F.3d 487, 496-500 (7th Cir. 1996) (holding that the prosecutor committed reversible error in violation of the Fifth Amendment when he commented that the evidence the state had put on was "uncontroverted" since it was unlikely that anyone but the accused could contradict the evidence), cert. denied, 117 S.Ct. 326 (1996).
- U.S. v. Hardy, 37 F.3d 753, 759 (1st Cir. 1994) (reversing a conviction after holding that the prosecutor indirectly commented on the defendant's failure to testify by commenting that the defendant is "still running and hiding today").
- Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) ("Our cases have recognized that a prosecutor may not comment concerning the uncontradicted nature of the evidence when 'It is highly unlikely that anyone other than the defendant could rebut the evidence.'") (quoting U.S. v. Di Caro, 852 F.2d 259, 263 (7th Cir. 1988).

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[8] Both federal and this state's courts have recognized that it is impermissible for prosecutors to comment on the defendant's failure to testify. Burke v. Greer, 756 F.2d 1295, 1300 (7th Cir. 1985); Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759 (1991); McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984).

- Floyd v. Meachum, 907 F.2d 347, 353 (2d Cir. 1990) (holding that the prosecutor's question "if there was confusion in this case, from whence did that come?" and "[i]f there were facts left out in this case, from whence did that come?" violated the accused's right under the Fifth Amendment against self-incrimination).

- U.S. v. Sblendorio, 830 F.2d 1382, 1391 (7th Cir. 1987) ("We have taken Griffin to forbid comment on the defendant's failure to call witnesses, when the only potential witness was the defendant himself."), cert. denied, 484 U.S. 1068 (1988).

- Williams v. Lane, 826 F.2d 654, 664 (7th Cir. 1987) (affirming district court's grant of habeas corpus and conclusion that prosecutor's comment that witness "told it to you and nobody else told you anything different" was unconstitutional, explaining that "[t]his Court has on numerous occasions held that prosecutorial references to 'undisputed,' 'unchallenged,' or 'uncontradicted' testimony were indirect references to defendant's failure to testify in violation of the Fifth Amendment."), cert. denied, 484 U.S. 956 (1987).

- Raper v. Mintzes, 706 F.2d 161, 166 (6th Cir. 1983) (affirming district court's grant of relief and holding that prosecutor violated Constitution by arguing that state witness' testimony was "uncontradicted or unrefuted" which constituted indirect reference to failure to testify).

- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (concluding that prosecutor committed error requiring habeas relief where argued that the victim's testimony "stood unchallenged").

- U.S. v. Fearns, 501 F.2d 486, 490 (7th Cir. 1974) ("[W]hen a defendant has not testified a prosecutor risks reversal by arguing that evidence is undisputed when that evidence was of a kind that could have been disputed by the defendant if he had chosen to testify").
- Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (reversing conviction where the prosecutor asked rhetorically "whose fault is it if we don't know the facts in this case?" and "what is he hiding?").

- Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989) (holding that the prosecutor improperly drew attention to the defendant's failure to testify by pointing out his opportunity to take the stand).

- See section II (A) (1) (a), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Referring to Defendant's Courtroom Demeanor Violates the United States Constitution and Nevada Law.

A prosecutor may not comment on a non-testifying defendant's courtroom demeanor. The defendant's demeanor is not part of the evidence before the jury. See

section II (A) (5), below.

- U.S. v. Schuler, 813 F.2d 978, 982-83 (9th Cir. 1987) (holding that the prosecutor violates the Fifth Amendment by commenting on a non-testifying defendant's demeanor at trial or suggesting that the jury can consider his behavior as evidence of guilt).

- U.S. v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (same).

- U.S. v. Carroll, 678 F.2d 1208, 1209 (5th Cir. 1982) (reversing and remanding for new trial, holding that prosecutor's reference to the defendant's courtroom behavior violated his Fifth Amendment right not to testify, and not to be convicted except on the basis of evidence the state puts on against him, and the Sixth Amendment's right to a trial by jury which prohibited his presence from being taken into account as evidence of guilt).

- U.S. v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (holding that it violates due process clause for prosecutor to comment on non-testifying defendant's demeanor at trial because it is irrelevant to question of guilt).

- People v. Garcia, 160 Cal. App. 3d 82, 91, 206 Cal. Rptr. 468, 473 (1984) ("Ordinarily, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of 'relevant evidence' as that which 'tends logically, naturally [or] by reasonable inference to prove or disprove a material issue' at trial.") (citations omitted).

- Good v. State, 723 S.W.2d 734, 736 (Tex. Crim. App. 1986) (holding that prosecutor could not comment on *testifying* defendant's demeanor because it was not part of the evidence before the jury).

- See section II (A) (1) (a), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

e. Suggesting that Defendant's Presence At Trial Helped Him Fabricate A Defense Violates the United States Constitution and Nevada Law.

A prosecuting attorney may not suggest that the accused's presence at trial helped him frame his testimony or fabricate a defense. Such comments infringe the defendant's constitutional right to be present at trial and to confront and cross-examine the witnesses against him.

- U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..."); see also Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that Sixth amendment right to confrontation applies to states through the due process clause of the Fourteenth Amendment).

- Shannon v. State, 105 Nev. 782, 788-89, 783 P.2d 942, 946 (1989)

(condemning as "improper," under the constitutional right to appear and defend, the prosecutor's comment that the defendant was putting on a "show" for jurors).

- Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 291 (1989) (reversing conviction where the prosecutor argued that the accused's defense was credible because he could remain silent during trial, listen to other witnesses, and tailor his testimony accordingly).

- Aesoph v. State, 102 Nev. 316, 321, 721 P.2d 379, 382 (1986) (ordering a new trial where the prosecutor told jurors in closing that "[t]hey could just sit here and ... fit their story to ours because we got to go first").

f. Referring to the Defendant's Refusal to Consent to a Search Violates the Fourth and Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not comment on the defendant's refusal to consent to a search or seizure.

- U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); see also Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that right under Fourth Amendment would be enforced by "the same sanction of exclusion as is used against the federal government"); Ker v. California, 374 U.S. 23, 30 (1963) (holding that searches by state authorities would be judged under same standards as those the Fourth Amendment imposes on federal searches).

- U.S. v. Prescott, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (reversing the conviction where the prosecutor commented on the defendant's assertion of her Fourth Amendment right to refuse to unlock her door when the police sought entry to search her apartment without a warrant because the "[t]he Amendment gives [a person] a constitutional right to refuse to consent to entry and search").

- People v. Keener, 148 Cal.App.3d 73, 78, 195 Cal.Reptr. 733 (Cal. Ct. App. 1983) (holding that prosecutor could not comment on defendant's refusal to leave apartment while a SWAT team searched because defendant enjoyed "privilege to be free from comment upon the assertion of a constitutional right.").

- See section above II (A) (1) (a), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

g. Arguing that the Defendant is Abusing the System or the Constitution Violates the Constitution and Nevada Law.

A prosecutor may not complain that the defendant has too many constitutional

rights or that he is abusing the system.

- Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of his right to a trial by jury which court calls "outrageous").

- See section II (A) (4) (d) above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

2. ARGUMENTS ABOUT DEFENSE COUNSEL THAT VIOLATE THE FEDERAL CONSTITUTION AND NEVADA LAW.

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of counsel for his defence." U.S. Const. amend. VI. The right to counsel applies to the states through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

The right "to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." U.S. v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980). For this reason, certain comments about counsel are a violation of the Sixth and Fourteenth amendments. Examples of these are set forth below.

a. Commenting on the Defendant's Retention of, or Request for, Counsel Violates the Sixth and Fourteenth Amendments to the United States Constitution and Nevada Law.

Under the Sixth Amendment's right to counsel and the Fourteenth Amendment's due process clause, a prosecutor may not comment on the accused's retention of, or request for, counsel.

- Hill v. Turpin, 135 F.3d 1411, 1417-19 (11th Cir. 1998) (granting relief in habeas corpus under Fourteenth Amendment's due process clause where prosecutor referred to petitioner's request for counsel).

- U.S. v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995) (holding that prosecutor violated the due process clause under the rule in Doyle and committed reversible

error when prosecutor asked the accused during cross-examination whether he had hired an attorney, whether that attorney was a criminal defense lawyer, and the length of time during which he had retained his services).

- U.S. v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment right to counsel, prosecutors may not imply that the fact that a defendant hired a lawyer is a sign of guilt."), cert. denied, 515 U.S. 1162 (1995).

- Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) ("A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt.... Such statements strike at the core of the right to counsel and must not be permitted.").

- U.S. v. Daoud, 741 F.2d 478, 480 (1st Cir. 1984) (holding that prosecutor's reference to the defendant's request for the best attorney in Puerto Rico violated the Constitution).

- Bruno v. Rushen, 721 F.2d 1193, 1194 (9th Cir. 1983) (per curiam) (affirming grant of writ of habeas corpus and holding that it violates due process to suggest that jury take into account the hiring of counsel in determining guilt), cert. denied, 469 U.S. 920 (1984).

- U.S. v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) (holding that prosecutor's conduct "penalized McDonald for exercising his Sixth Amendment right to counsel" by eliciting testimony, and commenting in closing, 'that attorney was present when Secret Service agents searched defendant's home).

- Zemina v. Solem, 573 F.2d 1027, 1028 (8th Cir. 1978) (affirming habeas corpus relief and district court's conclusion that prosecutor violated the petitioner's right under the Sixth Amendment where suggested in closing that the defendant's phone call to his attorney after his arrest indicated guilt).

- U.S. ex. rel. Macon v. Yeager, 476 F.2d 613, 614 (3d Cir. 1973) (reversing conviction under Sixth Amendment because prosecutor argued that hiring attorney after crime committed supported finding of guilt), cert. denied, 414 U.S. 855 (1973).

- See section II (B) (2), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Disparaging Counsel Violates the Sixth And Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not disparage or ridicule the defendant's counsel or criminal defense attorneys in general because defendants enjoy "the right to counsel unstained by unfair disparagement." U.S. v. Rodrigues, 159 F.3d 439, 451 (9th Cir. 1998); see

also U.S. v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment, prosecutors may not imply that ... all defense counsel are programmed to conceal and distort the truth."), cert. denied, 515 U.S. 1162 (1995). Comments suggesting that defense counsel in general, or the defendant's attorney in particular, are unethical, amoral, sneaky, cunning, or deceptive violate the Constitution's Sixth Amendment right to counsel and the Fourteenth Amendment's due process clause.

- U.S. v. Richardson, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversing conviction and ordering new trial where prosecutor suggested to jury that defense counsel was "out of touch with the realities and concerns" of the defendant's and the jury's world).

- U.S. v. Rodrigues, 159 F.3d at 451 (ordering new trial in spite of defense counsel's failure to object contemporaneously where the prosecutor told jurors at trial that after listening to defense counsel, "you all must be feeling somewhat confused ... [defense counsel] has tried to deceive you" because the prosecutor "does not speak as a mere partisan. He speaks on behalf of a government interested in doing justice. When he says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted.").

- U.S. v. Friedman, 909 F.2d 705, 709-10 (2d Cir. 1990) (holding that it was reversible error for prosecuting attorney to state that defense counsel would "make any argument he can to get that guy off" and that "while some people ... prosecute [drug] dealers ... there are others who try to get them off, perhaps even for high fees").

- Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam) (holding that prosecutor violated defendant's right to due process by commenting that witness changed story after meeting with defense attorney and explaining that, maligning defense counsel "severely damage[s] an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice"), cert. denied, 469 U.S. 920 (1984).

- Manley v. State, _ Nev. _, 1999 WL 366610, at *6 (1999) (calling prosecutor's comment, that "we could do that one exhibit at a time for the mentally challenged" in response to defense counsel's request that the prosecutor admit exhibit more slowly, "inappropriate," and emphasizing that "we direct the prosecutors to refrain from interposing these kinds of remarks").

- Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (per curiam) (condemning the prosecutor for commenting that defense counsel was "making

stuff up" because "it is ... inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney"), cert. denied, 514 U.S. 1052 (1995).

- Cuzdey v. State, 103 Nev. 575, 578, 747 P.2d 233, 235 (1987) (reversing and remanding for new trial where prosecutor made disparaging remarks about counsel).

- Yates v. State, 103 Nev. 200, 204, 734 P.2d 1252, 1255 (1987) (labeling the prosecutor's remarks that defense counsel was in "violation of all ethics of any attorney" and that the court should hold him in contempt "gross injustice" and a "foul blow").

- Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (holding that it is improper for the prosecutor to criticize defense counsel for legitimately impeaching prosecution witness in a case where prosecutor commented that impeaching the witness was a "poor reward for testimony of public-spirited citizen").

- McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct.").

- See section II (B) (2), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6, 3.5-8 (d), 3-5.9 (b).

- National District Attorneys Association, National Prosecution Standards, Rule 6.5 (b) (2d ed. 1991) ("Counsel should avoid the expression of personal animosity toward opposing counsel, regardless of personal opinion.").

c. Complimenting Defense Counsel Violates the Sixth and Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not compliment the defense attorney.

- U.S. v. Frederick, 78 F.3d 1370, 1380 (9th Cir. 1996) (explaining that it was improper for prosecutor to comment that "it is a defense attorney's job to do his best to cross-examine thoroughly the witnesses presented by the Government for the benefit of his client. And you can have admiration for [the defense attorney] because he is a skilled practitioner of that art," and in response to an objection, "I'm trying to compliment him that he did a very good job of confusing [the witness] on the stand" because they suggested to jurors that the defense counsel's "methods were somewhat underhanded and designed to prevent the truth from coming out.").

- See section II (B) (2), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Commenting On the Cost Of Defense Violates the Constitution and Nevada Law.

A prosecutor may not comment on the cost of the defense, including the fees the state must pay for lawyers and witnesses.

- U.S. Const. amend. VI.
- Gideon v. Wainwright, 372 U.S. 335, 359 (1963) (recognizing that an indigent defendant has a right to have counsel appointed for him by the state).
- Taylor v. U.S., 329 F.2d 384, 386 (5th Cir. 1964) (holding that right as indigent to subpoena witnesses exists under the Sixth Amendment's right to compulsory process).
- Young Bark Yau v. U.S., 33 F.2d 236, 237 (9th Cir. 1929) (holding that the district court erred in denying application to take the testimony of witnesses in China).
- Ake v. Oklahoma, 470 U.S. 68, 70 (1985) (holding that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition").

Prosecutors may not comment on the cost of the defense since this would penalize the accused for the exercise of federal constitutional rights. Were prosecutors permitted to make these comments, they would force the defendant to choose between, first, exercising his rights to the assistance of counsel and the right to present a defense under the federal Constitution and being penalized for it, or second, foregoing these rights in an effort to foreclose the opportunity for the prosecutor to argue improperly. Like other comments which penalize the accused for asserting a constitutional right, comment on the cost of the defense would, as the Supreme Court explained in U.S. v. Robinson, 485 U.S. 25, 30 (1988), "cut[] down on the privilege by making its assertion costly." Under the federal constitution, therefore, a prosecutor may not comment on the cost of the defense.

Nevada's ethical rules similarly prohibit prosecutors from commenting on the cost of the accused's defense. See also section II (A) (1, 2), above; SCR 173 (5); ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

3. ASSERTING PERSONAL OPINION OR EXPERTISE.

The prosecutor may not offer a personal opinion or assert an expertise on any

matter because it violates the accused's right to confrontation. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..." This right applies to the states through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Supreme Court explained in California v. Green, 399 U.S. 149, 158-59 (1970), that the Confrontation Clause requires that a witness be "subject to full and effective cross-examination" and it emphasized that:

> Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

By offering an opinion or asserting an expertise on a matter, the prosecutor performs the role of a witness. As one court explained it,

> [b]y giving his opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position.... The prosecutor is not just a retained attorney; he is a public official occupying an exalted station. Should he be allowed to 'testify' in closing argument, jurors hear the 'expert testimony' of a trusted officer of the court on, perhaps, a crucial issue. On the other side may be appointed counsel, laboring valiantly to present all defenses available to the accused, who nevertheless may be unable to respond to the implied challenge by asserting his personal belief in his assigned client's innocence.

U.S. v. Morris, 568 F.2d 396, 401-02 (5th Cir. 1978). When a prosecutor offers "expert testimony," he or she does not take the stand, testify under oath, or subject himself to the defense's right of confrontation. Indeed, as the ABA Standards for Criminal Justice, Standard 3-5.8, have noted in their commentary, "[e]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's

office..."[9] They therefore violate the right of confrontation.

The prosecutor also violates the right to a trial by an impartial jury when he or she offers a personal opinion or asserts an expertise on a matter. The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. Const. amend. VI. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court recognized that the accused enjoys the right to have a jury ascertain the facts and determine the ultimate question of guilt or innocence. Id. at 149. When a prosecutor offers a personal opinion, jurors will naturally be swayed. As the Supreme Court explained in U.S. v. Young, 470 U.S. at 18-19, a prosecutor may not offer his personal opinion because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." In U.S. v. Garza, 608 F.2d 659, 663 (5th Cir. 1979), the court of appeals wrote that:

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Indeed, the court of appeals emphasized in Morris, 568 F.2d at 401 that "an attorney's statement of his beliefs impinges on the jury's function of determining the guilt or liability of the defendant." See also Aesoph, 102 Nev. at 383, 721 P.2d at 322 (explaining that the expression of

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[9] The Supreme Court, in Donnelly v. DeChristoforo, 416 U.S. 637, 643 n. 15 (1974), briefly and without explanation remarked in a footnote that, although improper, the assertion of a personal opinion itself might not violate the Confrontation Clause. This does not, however, foreclose the argument that the assertion of a personal opinion about a factual matter is tantamount to testifying without taking the stand and would violate this provision of the Sixth Amendment.

personal beliefs and opinions "could only serve to influence the jury to rely upon the prosecutor's expertise and authority, rather than objectively weighing the evidence.").[10]

Ethical rules in this state prohibit the assertion by a prosecutor of a personal opinion. Rule 173 of the Supreme Court Rules forbids "assert[ing] personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness ... the guilt or innocence of an accused..." The ABA Standards for Criminal Justice provide, moreover, that "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant." Standard 3-5.8 (b). In the explanatory notes, the ABA warns prosecutors to avoid using the first person in describing or remarking on evidence and to instead "restrict themselves to statements such as 'The evidence shows...' or something similar." Id. Commentary.

The unconstitutional and improper assertion of a personal opinion can take different forms. As described below, courts have condemned prosecutors for expressly stating an opinion or a belief. They have also held that pointing at the defendant or facing him melodramatically while stating that he is guilty or deserves the death penalty constitutes an improper assertion of a personal opinion. See, e.g.,

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[10] The Nevada Supreme Court has inconsistently followed the federal constitutional rule prohibiting prosecutors from asserting a personal opinion or expertise on any matter. In Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995), for example, the court held that there is a "duty not to inject [the prosecutor's] personal beliefs into argument." As fully described below, it has frequently condemned prosecutors for asserting personal opinions. By contrast, the Nevada Supreme Court suggested recently that prosecutors can assert a personal opinion as long as it concerns a proper subject. Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 446 (1997), cert. denied, 119 S.Ct. 82 (1998). The court fails to grasp that it is the assertion of a personal opinion itself that both federal and state courts have long condemned and not just the assertion of a personal opinion on improper matters as the Williams court apparently believes.

Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (holding that prosecutor improperly asserted personal belief when melodramatically faced defendant and said, "you deserve to die."), cert. denied, 486 U.S. 1036 (1988). The following arguments are examples of improper assertions by prosecutors of personal opinions or expertise.

a. **Expressing A Personal Opinion About the Defendant's Guilt Violates the United States Constitution And Nevada Law.**

Under federal constitutional law, a prosecuting attorney may not express a personal opinion about the guilt of the person on trial or assert an expertise in assessing guilt. Asserting a personal opinion also violates the rule against referring to facts outside the record. See section II(a)(5); see also Young, 470 U.S. at 18-19; U.S. v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999).

- U.S. v. Young, 470 U.S. 1, 17 (1985) (holding that it is "improper" for prosecutors to express an opinion about the guilt of the accused).
- U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) (calling prosecutor's comments about his experience of 26 years as a lawyer and his story of his grandfather's struggles "irrelevant and unnecessary" as well as "objectionable" and an attempt "to vouch for his own credibility and thereby the credibility of the prosecution's case").
- Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998) (comment that crime was "disgusting and it's as cold as anything I've ever seen," in support of aggravating factor, was "clearly improper" because "[i]t invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").
- U.S. v. Molina, 934 F.2d 1440, 1444-45 (9th Cir. 1991) ("[A] prosecutor may not express his opinion of the defendant's guilt...").
- Floyd v. Meachum, 907 F.2d 347, 354-55 (2d Cir. 1990) (explaining that prosecutor's misconduct in requesting that jury consider prosecutor's own integrity before considering and evaluating the evidence against the defendant was reversible error).
- U.S. v. Garza, 608 F.2d 659, 662 (5th Cir. 1979) (reversing conviction and remanding for new trial because prosecutor's comments that "I don't want innocent people going to jail" and "if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit" were "so clearly improper and so obviously require reversal").

- U.S. v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) (explaining that it is impermissible for prosecutor to state "I believe that the defendant is guilty").

- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering the district court to grant habeas corpus relief where state's attorney made "highly improper expression of personal opinion" in telling jurors that "[i]f you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home...").

- Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989) ("A prosecutor may not offer his personal opinion of the guilt or character of the accused.").

- Santillanes v. State, 104 Nev. 699, 702, 765 P.2d 1147, 1149 (1988) (holding that it was improper for the prosecutor to tell jurors "the factors that lead me--and the evidence -- to believe that" the accused is guilty and "I believe the evidence has shown us that Mr. Santillanes is indeed guilty of this crime").

- Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) (condemning prosecutor's statement that "we don't try people that we believe are innocent.").

- Yates v. State, 103 Nev. 200, 203, 734 P.2d 1252, 1253 (1987) ("Any expression of opinion on the guilt of an accused is a violation of prosecutorial ethics.").

- McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) (reversing conviction and remanding for new trial and labeling "highly improper" the state's comment that "I will never want to be accused of trying to send an innocent man to jail. You don't think I got a rape victim out of the street to march here into court and waste your time, do you?").

- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (labeling "improper" prosecutor's comments that "I feel just as strongly if persons are not guilty that they should be found not guilty ... I happen to revere human life.").[11]

- SCR 173 (5) (provides that lawyers must not "[i]n trial ... state a personal opinion as to the justness of a cause ... or the guilt or innocence of an accused.").

- ABA Standards for Criminal Justice, Standard 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to ... the guilt of the defendant.").

b. Vouching for the Credibility of Witnesses or Offering A Personal

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[11] The Nevada Supreme Court has repeatedly condemned the assertion of personal opinions by prosecutors. See, e.g., Dawson v. State, 103 Nev. 76, 79, 734 P.2d 221, 222 (1987) (per curiam), cert. denied, 507 U.S. 921 (1993); Emerson v. State, 98 Nev. 158, 163, 643 P.2d 1212, 1215 (1982); Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1239 (1980).

Opinion About the Evidence Violates the Sixth and Fourteenth Amendments to the United States Constitution And Nevada Law.

A prosecutor may not vouch for the credibility of any witness. There are two types of vouching and they are both improper. The Ninth Circuit, in U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996), held that a prosecutor can neither personally vouch for the witness by asserting his belief in him nor bolster his testimony by alluding to facts outside the record tending to support the credibility of a particular witness.

- Young, 470 U.S. 1, 18-19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

- U.S. v. Sanchez, 1999 WL 343734, at *10 (9th Cir. 1999) (holding that prosecutor improperly vouched for government witnesses when commented that "Department of Justice would be put on the line to solicit false testimony just to prove up a case against these two defendants" and "you will have to believe what the two people who have the most to lose here have said happened").

- U.S. v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 283-84 (3d Cir. 1999) (reversing conviction because prosecutor improperly vouched for credibility of witnesses by telling jurors that "[t]hey told the Government they fixed prices twice and I can guarantee you the Justice Department doesn't give two for one deals; they had to plead guilty to both price-fixing conspiracies and their sentence reflected that," which court concluded was an attempt "to buttress the credibility of cooperating witnesses by providing extra-record information").

- U.S. v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999) (holding that prosecutor's comments about role she would play in recommending whether witnesses' sentences would be lowered were improper vouching because she "made it clear that her recommendation would depend on whether she personally believed [the witnesses] told the truth. Because this could lead a reasonable juror to infer that the prosecutor had a special ability or extraneous knowledge to assess credibility, the statements were improper").

- U.S. v. Garcia-Guizar, 160 F.3d 511, 520-21 (9th Cir. 1998) (calling defendant a "liar" based on state witness' "compelling" testimony constituted improper vouching).

- Frederick, 78 F.3d 1370, 1377 (9th Cir. 1996) (holding that prosecutor's reference to the consistency of witness' testimony and earlier statement was improper).

- Maurer v. Minn. Dept. Of Corrections, 32 F.3d 1286, 1290 (8th Cir. 1994) (reversing denial of writ and ordering habeas relief where prosecutor improperly bolstered credibility of witnesses by asking witnesses if complainant appeared sincere when she reported rape).

- U.S. v. Manning, 23 F.3d 570, 572-75 (1st Cir. 1994) (holding that it was reversible error for prosecutor to comment that government witnesses could not lie on the stand), cert. denied, 117 S.Ct. 147 (1996).

- U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (holding that it was plain error for prosecutor to relay to jurors his opinion about a witness' testimony).

- U.S. v. Simtob, 901 F.2d 799, 805 (9th Cir. 1990) (reversing because prosecutor improperly bolstered witness's credibility by offering to grant immunity to witness and urging to tell the truth).

- U.S. v. Rodriguez-Estrada, 877 F.2d 153, 158 (1st Cir. 1989) (holding that "prosecutor crossed the line" and "was out of bounds" when assured jurors that the witness was telling the truth).

- U.S. v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987) (holding that it was improper for the prosecutor to bolster witness's credibility by remarking to jurors that plea agreement requires truthful testimony because this remark "contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain), cert. denied, 485 U.S. 1022 (1988).

- U.S. v. West, 680 F.2d 652, 655 (9th Cir. 1982) (reversing and remanding where prosecutor improperly vouched for witness' credibility by saying to jurors, "[i]f you are willing to believe that an officer of this Court and a member of the U.S. Attorney's Office is going to commit perjury...").

- U.S. v. Garza, 608 F.2d 659, 663-64 (5th Cir. 1979) (reversing conviction and ordering new trial where prosecutor both offered his opinion about the motives of state witnesses and bolstered their credibility by arguing that they were "professional" and "dedicated" and would not have obtained a job with the Drug Enforcement Administration unless they had integrity).

- U.S. v. Morris, 568 F.2d 396, 402 (5th Cir. 1978) (explaining that prosecutor may not say, "[t]he prosecution's witnesses are telling the truth," or "I believe that the prosecution's witnesses are telling the truth.").[12]

- SCR 173 (5) (counsel cannot "[i]n trial ... state a personal opinion as to ... the

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[12] See also U.S. v. Cotnam, 88 F.3d 487, 496 (7th Cir. 1996), cert. denied, 117 S.Ct. 326 (1996); U.S. v. Smith, 962 F.2d 923, 936 (9th Cir. 1992); U.S. v. Eyster, 948 F.2d 1196, 1207 (11th Cir. 1991).

credibility of a witness...").

- ABA Standards for Criminal Justice, 3-5.8 (b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence...").

4. MISSTATING THE FACTS VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

A prosecutor may not misstate or misrepresent the facts. The Ninth Circuit recently explained that the rationale of the rule against misstating the facts is that "[w]hen a lawyer asserts that something in the record is true, he is, in effect testifying. He is telling the jury: 'look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper." U.S. v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993). See sections II (A) (3), above; and II (A) (5), below.

- Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("It is totally improper for a prosecutor ... to misstate the facts.").
- Berger v. U.S., 295 U.S. 78, 84 (holding that, by misstating the facts, "the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense...").
- U.S. v. Mastrangelo, 172 F.3d 288, 298 (3d Cir. 1999) (holding that prosecutor's misstatements about content of stipulation warranted reversal).
- U.S. v. Donato, 99 F.3d 426, 432 (D.C. Cir. 1997) (reversing and remanding for new trial where prosecutor made factually incorrect statement).
- U.S. v. Forlorma, 94 F.2d 91, 96 (2d Cir. 1996) (holding that prosecutor's misstatement, which reinforced notion that defendant was aware of narcotics concealed in bag, was reversible error).
- Davis v. Zant, 36 F.3d 1538, 1544 (11th Cir. 1994) (reversing denial of writ of habeas corpus where prosecutor committed falsehood by objecting to defendant's testimony that there was another confession when in fact there was).
- U.S. v. Blakey, 14 F.3d 1557, 1559 (11th Cir. 1994) (holding that, by calling defendant a "professional criminal," when contrary facts existed, prosecutor committed reversible error).
- Kojayan, 8 F.3d at 1321 (holding that misstatement of fact by prosecutor constituted reversible error).

- U.S. v. Foster, 982 F.2d 551, 555 n. 7 (D.C. Cir. 1993) (holding that prosecutor's statement to court that state had not granted immunity to witness was reversible error where untrue).

- Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (ordering new trial where prosecutor argued false evidence).

- Lee v. Bennett, 927 F. Supp. 97, 101-06 (S.D.N.Y. 1996) (granting writ of habeas corpus where prosecutorial misconduct, including misstating evidence, denied petitioner due process right to fair trial), aff'd, 104 F.3d 349 (2d Cir. 1996).

- Mahan v. State, 104 Nev. 13, 16, 752 P.2d 208, 209 (1988) (reversing a conviction where the prosecutor incorrectly stated that the fingerprints at the crime scene matched those of the defendant which contradicted the testimony of a police officer).

- Layton v. State, 91 Nev. 363, 365, 536 P.2d 85, 87 (1975) (holding that it was improper for prosecutor to call defendant's statements admissions when they were not).

- SCR 172 (prohibiting the knowing making of "a false statement of material fact or law to a tribunal").

- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

5. ALLUDING TO FACTS OUTSIDE THE RECORD VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In Donnelly, 416 U.S. at 645, the Supreme Court explained "[i]t is totally improper for a prosecutor to argue facts not in evidence..." Such arguments also violate the right to confrontation and cross-examination, in the same way that a prosecutor's expression of personal opinion puts unsworn "testimony" before the jury. See section II (A) (3), above.

- Berger, 295 U.S. at 85 ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [of the prosecutor to uphold justice], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.").

- Agard v. Portuondo, 117 F.3d 696, 711 (2d 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 S.Ct. 1248 (1999).

- U.S. v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991) ("The prosecutor's assertions that there were as many as nine other law enforcement officials who would support their testimony is an improper reference to inculpatory evidence not produced at trial.").

- Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983) (holding that it was improper for prosecutor to imply that he knew more evidence of guilt than had been presented, which partly rendered sentencing hearing fundamentally unfair), cert. denied, 463 U.S. 1210 (1983), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383 (1985).

- U.S. v. Carroll, 678 F.2d 1208, 1210 (5th Cir. 1982) (calling it "wholly improper" to argue, with no evidence on the proposition, that defendant was at scene of crime because he knew more about pictures than his lawyer did and reversing and remanding for new trial).

- People v. Adcox, 47 Cal.3d 207, 236, 763 P.2d 906, 919 (Cal. 1988) (reaffirming that "'statements of fact not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.'") (quoting People v. Kirkes, 39 Cal.2d 719, 724, 249 P.2d 1 (Cal. 1952)), cert. denied, 494 U.S. 1038 (1990).

- Leonard v. State, 108 Nev. 79, 82, 824 P.2d 287, 290 (1992) (per curiam) (holding that it is improper for a prosecutor to state that defendant committed crime because he "liked it" with no supporting evidence), cert. denied, 505 U.S. 1224 (1992).

- Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (per curiam) (holding that it is improper to argue that defendant purchased alibi testimony based on facts outside record).

- Downey v. State, 103 Nev. 4, 8, 731 P.2d 350, 353 (1987) (calling it "unprofessional conduct" for prosecutor to suggest that there was evidence he was not permitted to present to the jury).

- State v. Cyty, 50 Nev. 256, 256 P. 793, 794 (1927) ("[I]t is an abuse of the high prerogative of a prosecuting attorney in his argument to make statements of facts outside of the evidence or not fairly inferable therefrom, and that to do so constitutes error. In fact, there is no dissent from this view.").[13]

- SCR 173 (5) (lawyer must not "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...").

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[13] The Nevada Supreme Court has frequently condemned prosecutors for alluding to facts outside the record. See, e.g., Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992), cert. denied, 507 U.S. 1009 (1993); Sanborn v. State, 107 Nev. 399, 408-09, 812 P.2d 1279, 1286 (1991); Jiminez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985), cert. denied, 486 U.S. 1036 (1988); Ybarra v. State, 103 Nev. 8, 15-16, 731 P.2d 353, 357-58 (1987).

- National Prosecution Standards, Rule 76.2 ("The prosecution should not allude to evidence unless there is a reasonable objective basis for believing that such evidence will be tendered and admitted into evidence at the trial.").

- ABA Standards for Criminal Justice, Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice"); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

B. OTHER ARGUMENTS INFRINGING THE DEFENDANT'S RIGHT TO FAIR TRIAL.

In addition to enjoying specific constitutional rights, the accused enjoys the right to due process of law. The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1. The Supreme Court has held that prosecutorial misconduct may violate the federal constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The following are some examples of arguments which violate the right to a fair trial under the due process clause of the Fourteenth Amendment to the Constitution and Nevada law. In many of these cases, federal courts and the Nevada Supreme Court have granted defendants relief from their convictions and ordered new trials.

1. MISSTATING THE LAW VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

a. Misstating the Law on the Presumption of Innocence Violates the Constitution and Nevada Law.

A prosecutor may not misstate the law on the presumption of innocence. To do so not only violates the due process clause, but also, the prohibition against alluding to facts outside the record. Such comment may also violate the rule against asserting a personal opinion about the guilt of the accused.

- Mahorney v. Williams, 917 F.2d 469, 473-74 (10th Cir. 1990) (reversing denial

of writ of habeas corpus where prosecutor commented, in violation of Fifth Amendment, that presumption protected only the innocent and that it did not apply in petitioner's case).

- Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990) (reversing denial of habeas relief where prosecutor remarked that the Fifth Amendment is "a protection for the innocent" rather than "a shield" for "the guilty").

- Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 n. 1 (1988) (deeming "outrageous" the prosecutor's reference to the presumption as a "farce," stressing that "[t]he fundamental and elemental concept of presuming the defendant innocent until proven guilty is solidly founded in our system of justice and is never a farce").

- Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) (emphasizing that remark by prosecutor that the state has right to have defendant convicted "clearly constituted misconduct.").

- SCR 172 (a) (lawyers cannot knowingly "make a false statement of ... law to a tribunal").

- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not ... mislead the jury as to the inferences it may draw.").

b. Misstating the Law About What The State Must Show to Establish Guilt Violates the Federal Constitution and Nevada Law.

A prosecutor may not misstate the law on the meaning of guilt beyond a reasonable doubt.

- Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (holding that misstating law on reasonable doubt is so egregious that it is never harmless).

- Cage v. Louisiana, 498 U.S. 39, 41 (1990) (holding that any equation of reasonable doubt with "substantial doubt" or "moral certainty" as well as any other definition that would confuse jurors or lead them to believe that the state's burden is less significant than it is, is unconstitutional), overruled on other grounds by Estelle v. McGuire, 502, U.S. 62, 73 (1991).

- Holmes v. State, 114 Nev. 1357, 972 P.2d 337, 343 (1998) (holding that any misstatement by prosecutors of the standard is reversible error).

- Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 902 (1996) (holding that it is improper for prosecutors to analogize reasonable doubt with major life decisions since they are different from decision jurors must make in determining guilt of accused).

- Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991) (holding that it is improper to quantify reasonable doubt).

- McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1159 (1983) ("The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify.").

c. **Misstating the Law on Who Carries The Burden of Proof or Suggesting that the Accused Bears Any Burden of Proof Violates the Constitution and Nevada Law.**

A prosecutor may not suggest that the defendant bears a burden of proof.

- U.S. v. Roberts, 119 F.3d 1006, 1011 (1st Cir. 1997) (holding that it is reversible error for the prosecutor to explain to jurors that the defendant is responsible for presenting a compelling case).

- Lisle v. State, 113 Nev. 540, 937 P.2d 473, 481 (1997) (holding that it was "improper" to insinuate that the defendant must explain the absence of witnesses or evidence), cert. denied, 119 S.Ct. 101 (1998).

- Washington v. State, 112 Nev. 1054, 1059-61, 921 P.2d 1253, 1256-58 (1996) (improper to call attention to the defendant's failure to call witnesses or to present evidence because "[p]rosecution comments on the failure to present witnesses or to produce evidence unconstitutionally shift the burden of proof to the defense") (citations omitted).

- Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996) (ordering new trial where prosecutor commented on defendant's failure to produce evidence or witnesses and explaining that "it is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense").

- Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (reversing and remanding for new trial where prosecutor asked "whose fault is it if we don't know the facts in this case," which suggested that the defendant bore burden of proving not guilty).

- Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989) ("The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper. It suggests to the jury that it is the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate.").[14]

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[14] See also Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (reversing and remanding for new trial and explaining that it is "outside the

(continued...)

- SCR 172 (a).
- ABA Standards for Criminal Justice, Standard 3-5.8 (a).

d. Misstating the Law on Intent Violates the Federal Constitution and Nevada Law.

A prosecutor may not misstate the law on intent.

- Francis v. Franklin, 471 U.S. 307, 317 (1985) (holding that jury instruction which shifted burden of persuasion on intent element to the defendant violates Constitution's Fourteenth Amendment).
- Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (ruling that instruction presuming a person intends ordinary consequences of voluntary acts violated due process clause under which state must prove each element of offense beyond a reasonable doubt).
- SCR 173 (a).
- ABA Standards for Criminal Justice, Standard 3-5.8 (a).

2. MISCHARACTERIZING THE EVIDENCE VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

A prosecutor may not mischaracterize the evidence. Mischaracterizing the evidence introduces the same kind of unsworn "testimony" before the jury, without cross-examination or confrontation as misstatements of the facts and expressions of personal opinion. See sections II (A) (3, 4), above.

- U.S. v. Donato, 99 F.3d 426, 432 (D.C. Cir. 1997) ("[I]t is clear that it is error for a prosecutor to mischaracterize evidence...").
- State v. Cyty, 50 Nev. 256, 259, 256 P.2d 793, 794 (1927) ("Courts have uniformly condemned as improper statements made by a prosecuting attorney, which are not based upon, or which may not fairly be inferred from, the evidence.").

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[14](...continued)
boundaries of proper argument to comment on a defendant's failure to call a witness. This can be viewed as impermissibly shifting the burden of proof to the defense"); Cuzdey v. State, 103 Nev. 575, 578, 747 P.2d 233, 235 (1987); Emerson v. State, 98 Nev. 158, 163, 643 P.2d 1212, 1215 (1982) (explaining that it was "clearly inaccurate" for prosecutor to insinuate that defendant had to explain absence of witnesses or to "come up with something" in reversing and ordering new trial).

- SCR 172 (a) (a lawyer "shall not knowingly make a false statement of material fact...").

- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

3. ARGUMENTS ABOUT THE DEFENDANT WHICH VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

a. Ridiculing Or Disparaging the Defendant Violates the Federal Constitution and Nevada Law.

It is improper for prosecutors to ridicule or disparage the defendant. Indeed, "the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account." U.S. v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st Cir. 1989). Such comments not only violate the right to due process of law, but may also violate the rule forbidding prosecutors from asserting a personal opinion and from alluding to facts which are not in the record.

- Harris v. People, 888 P.2d 259, 263 (Colo. 1995) (en banc) (the prosecutor bears "the responsibility to refrain from improper methods calculated to produce a wrong conviction as well as to use every legitimate means to bring about a just one. The constitutional basis for this prosecutorial duty is the right to trial by a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution...").

- Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997) ("[T]he responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.").

- Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995) (recognizing "duty ... not to ridicule or belittle the defendant or his case").

- Barron v. State, 105 Nev. at 780, 783 P.2d at 452 (same).

- SCR 173 (5) (lawyers cannot "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.").

- ABA Standards for Criminal Justice, Standard 3-5.6 (b) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments

in the presence of the judge or jury."); see also Standard 3-5.8 (c) ("The prosecutor should not make argument calculated to appeal to the prejudices of the jury."); Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

b. Calling The Accused An "Animal," or a Particular Animal, "Monster," "Beast," "Creature," or a "Devil" Is Improper.

It is improper to call the defendant a monster, beast, creature, devil, an "animal" or to describe him as a particular type of animal. Such improper descriptions may also constitute a comment appealing to group prejudice. See section II (B) (4), below.

- Darden v. Wainwright, 477 U.S. 168, 180 (1986) (condemning as "improper" the prosecutor's description of defendant as an "animal").
- Miller v. Lockhart, 65 F.3d 676, 683 (8th Cir. 1995) (calling defendant "mad dog" violated due process).
- Volkmor v. U.S., 13 F.2d 594, 595 (6th Cir. 1926) (ordering new trial where prosecutor referred to defendant as "skunk," "onion," "weak-faced weasel," "cheap, scaly, slimy crook").
- Cassady v. State, 287 So.2d 254, 257 (Ala. 1973) ("[W]e agree with appellant that the prosecuting attorney should never demean a defendant by unwarranted vituperation, abuse, and appeals to prejudice in order to foster convictions upon accused. It was highly improper to refer to appellant as a demon, even though he may have possessed such evil traits of character.").
- Dandridge v. State, 727 S.W.2d 851, 853 (Ark. 1987) (calling defendant "gross animal" improper) (non-capital).
- State v. Couture, 482 A.2d 300, 317 (Conn. 1984) (holding that defendants were entitled to new trial where prosecutor, among other things, referred to them as "murderous fiends," "rats," and "creatures" which was improper), cert. denied, 469 U.S. 1192 (1985).
- People v. Caballero, 533 N.E.2d 1089, 1097 (Ill. 1989) (holding that description of defendant as "animal" was "improper" and explaining that "[w]here a prosecutor's statements in summation are not relevant to the defendant's guilt or innocence and can only serve to inflame the jury, the statements constitute error") (non-capital).
- People v. Williams, 425 N.E.2d 1321, 1324 (Ill. App. 1981) (calling defendants "disgusting animals" and "beasts" "reach[ed] the bounds of propriety" and constituted error) (non-capital).
- State v. Blanks, 479 N.W.2d 601, 603 (Iowa 1991) (reversing conviction because prosecutor referred to the movie, "Gorrillas in the Mist," in a case of black man accused of assaulting white woman which "can be interpreted by the jury as having racial overtones. Additionally, the comparison of a defendant to

gorillas, apes, other animals or other demeaning descriptions by itself may constitute reversible error.") (non-capital).

- Sanborn v. Comm., 754 S.W.2d 534, 544 (Ky. 1988) (emphasizing that "[t]here is no place in argument for scurrilous and degrading terminology" in holding that it was improper to characterize defendant as "black dog of the night," "wolf," "monster," and "coyote that roamed the road at night hunting women to use his knife on," and, combined with other forms of misconduct, required new trial) (non-capital).

- State v. Wilson, 404 So.2d 968, 971 (La. 1981) (explaining that, where defendants were black and jurors all white, "the repeated references to ... 'animals' as a description of the defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact").

- Walker v. State, 709 A.2d 177, 185 (Md. App. 1998) (holding that prosecutor committed misconduct by calling defendant an animal and emphasizing that "[n]ot only is it inappropriate to refer to a defendant in a criminal case as 'an animal,' it may be argued that such a strategy, in some instances, could be counterproductive should the jury view the State as engaging in a personal contest with the defendant. It is incumbent upon the People's representative to maintain an air of dignity and stay above the fray.") (non-capital).

- Comm. v. Collins, 373 N.E.2d 969, 973 (Mass. 1978) (explaining that it "was clearly an impermissible excess" for prosecutor to use the term "animal," which jurors might have understood to refer to the defendant).

- Jones v. State, 113 Nev. 454, 468-69, 937 P.2d at 62 (calling defendant a "rabid animal" constituted misconduct).

- Hilt v. State, 91 Nev. 654, 660, 541 P.2d 645, 649 (1975) (condemning prosecutor's remarks that "I have got dogs at home I wouldn't shoot them and leave them out in the parking lot").

- Pacheco v. State, 82 Nev. 172, 178-80, 414 P.2d 100, 103 (1966) (holding that description of defendant as "mad dog" was improper).

- State v. Jerrett, 307 S.E.2d 339, 355 (N.C. 1983) (holding that it was improper for prosecutor to state that defendant was a "disciple of Satan" and a "con man").

- People v. Burke, 566 N.Y.S.2d 169, 169 (N.Y. App. Div. 1991) (referring to accused as "predatory animal" in murder case, combined with other misconduct, required reversal of conviction); see also People v. Rivera, 426 N.Y.S.2d 785, 786-87 (N.Y. App. Div. 1980) (holding that, although defendants were conclusively shown to have committed a brutal and singularly senseless murder, convictions had to be reversed because of improper closing argument, during which prosecutor referred to defendants as "wolves of this society" and victim as "sheep" and emphasizing that "prosecutor must speak with special care to insure that the right of a defendant to a fair trial is not

destroyed. Such was not here the case. Here, the purple passages were used as a tool to inflame the passions of the jurors to the end that a conviction would be assured.").

- State v. Keenan, 613 N.E.2d 203, 208 (Ohio 1993) (by calling defendant an animal, the "prosecutor's histrionic approach to this case crossed the line that separates permissible fervor from a denial of a fair trial") (non-capital).

- Comm. v. McGeth, 622 A.2d 940, 944 (Pa. Super 1993) (reversing conviction because prosecutor "exceed[ed] reasonable latitude extended to counsel in arguing their case" when commented that "creeps like this should not be allowed to treat others like this.... We're dealing with animals..."); see also Comm. v. Lipscomb, 317 A.2d 205, 207 (Pa. 1974) (calling defendants "hoodlums" and "animals" improper and "interjected his personal belief in the guilt of the accused") (non-capital); Comm. v. Balles, 50 A.2d 729, 731 (Pa. Super. 1947) (reference to "Beasts of Belsen" improper) (non-capital).

- State v. Bates, 804 S.W.2d 868, 881 (Tenn. 1991) ("rabid dog" argument "patently improper") (capital).

- State v. Music, 489 P.2d 159, 170 (Wash. 1971) (holding that prosecutor improperly referred to the defendant in closing argument as a "mad dog" in murder trial and stressing that "[w]e do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.").

- Tompkins v. State, 774 S.W.2d 195, 218 (Tex. Crim. App. 1987) (calling defendant "animal" improper).

- State v. Brown, 853 P.2d 851, 860 (Utah 1992) ("Referring to a defendant as a "mad dog" is the type of personal invective that reflects a lack of objective detachment a prosecutor should maintain in carrying out prosecutorial responsibilities. It should not be part of the prosecutor's rhetoric on remand.") (non-capital).

- Rosser v. Comm., 482 S.E.2d 83, 86-7 (Va. App. 1997) (reversing conviction because prosecutor called shackled defendant "in every sense an animal" which "deprived appellant of the 'scrupulously fair and impartial trial' to which he was entitled.") (quotation omitted) (non-capital).

c. Calling the Defendant Evil, Sadistic, Wicked, Depraved, a Maniac, a Psychopath, a Liar, Scum, Filth, or Dirt Is Improper.

It is improper for a prosecutor to call a defendant evil, sadistic, wicked, depraved, a maniac, a psychopath, scum, filth, or dirt. Such comments may represent an impermissible assertion of a personal opinion. See section II (A) (3). Where a

defendant is from a minority group, such comments are also racially and ethnically inflammatory. See section II (B) (4), below.

- Martin v. Parker, 11 F.3d 613, 616 (6th Cir. 1993) (condemning prosecutor's improper remarks that referred to accused as "dictator," a "disturbed individual," and "one of the most obnoxious witnesses you'll ever hear").

- Drew v. Collins, 964 F.2d 411, 419 (5th Cir. 1992) (calling "inflammatory" prosecutor's reference to the defendant as "sadistic killer" and to trip during which murder took place as "rolling torture chamber"), cert. denied, 509 U.S. 925 (1993).

- Floyd v. Meachum, 907 F.2d 347, 355 (2d Cir. 1990) (explaining that prosecutor's references to defendant as "liar" were "clearly excessive and inflammatory").

- Rodriguez-Estrada, 877 F.2d at 158-9 (emphasizing, in recounting prosecutor's comments that defendant was a "liar," a "crook" and that prosecutor "had the courage" to call the accused these names "that these statements were improper is so clear as not to brook serious discussion ... the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account").

- U.S. v. Prantil, 764 F.2d 548, 555 (9th Cir. 1985) (holding that prosecutor's description of defendant as "corrupt," "dishonest, sleazy, and greedy" were reversibly prejudicial and represented an assertion of personal knowledge in a testimonial, rather than an argumentative manner).

- U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984) (holding that it "well beneath the standard which a prosecutor should observe" to call the accused a "sick man" with "problems), cert. denied, 469 U.S. 1088 (1984).

- Patterson v. State, 747 P.2d 535, 537-38 (Alaska 1987) (reversing conviction because, among other errors, prosecutor referred to defendant as "crud").

- Biondo v. State, 533 So.2d 910, 911 (Fla. 1988) (holding that prosecutor's reference to the defendant as "slime" was improper).

- Green v. State, 427 So.2d 1036, 1038 (Fla. 1983) (reversing conviction after holding that prosecutor improperly referred to defendant as "Dragon Lady, beautiful, cunning, and evil" and emphasizing that "[i]t is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them. There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so").

- People v. Terrell, 310 N.E.2d 791,795 (Ill. App. Ct. 1974) (concluding that prosecutor's characterization of defendant in closing argument as a "maniac" exceeded the bounds of propriety).

- People v. Nightengale, 523 N.E.2d 136, 141-42 (Ill. 1988) (reversing conviction after holding that state's attorney violated right to fair trial by telling jurors to sweep "scum" like the defendant off of the streets); People v. Hawkins, 410 N.E.2d 309 (Ill. 1980) (holding that it was improper for prosecutor to characterize the defendants as "evil men"); People v. Smothers, 302 N.E.2d 324 (Ill. 1973) (prosecutor in murder trial improperly referred to defendant in closing argument as a "sociopath").

- Bridgeforth v. State, 498 So.2d 796, 801 (Miss. 1986) (reversing in part because prosecutor characterized the defendant as "scum" that should be removed from the streets and emphasizing that "[t]here is no justification for such an argument to the jury. While an attorney has a right to argue his case a prosecutor should not indulge in personal abuse or vilification of the defendant.... The interest of the State of Mississippi is best served by the orderly rational lawful presentation of the facts and the law. That is the way the criminal justice system is designed to operate. Justice is not served by attorneys who use closing argument to express inflammatory personal ideas or engage in personal vilification. The purpose of closing argument is to enlighten the jury, not to enrage it.").

- Barron, 105 Nev. at 780, 783 P.2d at 452 (holding that it was improper to comment that "I got some ocean front property for you in Tonopah" if jurors believed defendant's testimony).

- State v. Rodriquez, 31 Nev. 342, 102 P. 863, 864 (1909) (explaining that "we are of the opinion that [calling defendant a "macque"] unduly influenced the jury in arriving at their verdict.").

- State v. Clausell, 580 A.2d 221 (N.J. 1990) (emphasizing that a prosecutor may not make derogatory statements about the accused in condemning the prosecutor for saying in closing argument: "You got [the victim's wife] on the floor trying to shut the door before these maniacs come through and massacre the family").
- Comm. v. MacBride, 587 A.2d 792, 796-97 (Pa. 1991) (holding that prosecutor committed reversible error when he referred to defendant as "nut," which "insinuates that defendant is a mindless and dangerous individual who had no reason whatsoever for his conduct," was "stigmatizing" and tantamount to an expression of "personal opinion of defendant's character --and, indirectly, defendant's guilt or propensity to act recklessly").

- Comm. v. Smith, 385 A.2d 1320, 1322 (Pa. 1978) (reversing denial of post-conviction relief where prosecutor told jurors that the defendant was a "vicious" criminal who would "kill for a nickel," explaining that it is impermissible for prosecutor to assert personal belief as to defendant's guilt).

- State v. Moss, 376 S.E.2d 569, 574 (W. Va. 1988) (trial judge reversibly erred in first-degree murder case by failing to intervene in the prosecutor's closing argument and correct improper description of the accused as a "psychopath" with a "diseased criminal mind").

d. Comparing the Defendant to Notorious Figures is Improper.

It is improper for a prosecutor to compare the defendant to a notorious figure; it is thus impermissible to compare him to terrorists, murderers, movie characters, and so forth. Such comments can also constitute impermissible appeals to racial, ethnic, and other group prejudices. See section II (B) (4), below. They also constitute improper assertions of personal opinion, see section (11)(A)(4), above, and references to facts outside the record, see section II (A)(5).

- Young v. Bowersox, 161 F.3d 1159, 1161 (8th Cir. 1998) (calling "improper" prosecutor's comparison of defendant's crime to other murders which the court remarked "invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").
- Martin v. Parker, 11 F.3d 613, 616 (6th Cir. 1993) (per curiam) (ordering habeas corpus relief in part because of highly improper comparisons by prosecutor of defendant to Hitler and a dictator).
- U.S. v. North, 910 F.2d 843, 895 (D.C. Cir. 1990) (holding that prosecutor's comment that compared defendant's strategy to that of Adolf Hitler was "[u]nquestionably inflammatory"), cert. denied, 500 U.S. 941 (1991).
- Newlon v. Armontrout, 885 F.2d 1328, 1341 (8th Cir. 1989) (affirming grant of habeas corpus writ where prosecutor compared the defendant to Charles Manson in violation of the Constitution), cert. denied, 497 U.S. 1038 (1990).
- U.S. v. Steinkoetter, 633 F.2d 719, 720-21 (6th Cir. 1980) (holding that the comparison by prosecutor of accused to Pontius Pilate and Judas Iscariot warranted reversal of conviction).
- Steele v. U.S., 222 F.2d 628 (5th Cir. 1955) (referring to defendant as "doctor Jekyll and Mr. Hyde" as well as "cunning," "crafty," and "smart," held improper and reversibly prejudicial).
- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (condemning as "completely irrelevant or totally unsupported by the evidence," in granting habeas corpus writ, prosecutor's remark that victim's mental state was similar to that of "our flyers shot down over Iraq and captured"), aff'd, 104 F.3d 349 (1996).
- People v. Bedolla, 94 Cal.App.3d 1, 8, 156 Cal.Rptr. 171 (Cal. Ct. App. 1979) (condemning prosecutor's comparison of defendant's actions with those of Hitler's Brown Shirts, Mussolini's loyalists in Italy, and Tojo's in Japan, the Ku Klux Klan, and George Lincoln Rockwell's people).
- Harris v. People, 888 P.2d 259, 263 (Colo. 1995) (ordering new trial in spite of failure to object where prosecutor compared defendant to Saddam Hussein soon after President announced military strikes against Iraq).

- Mathis v. U.S., 513 A.2d 1344, 1348 (D.C. 1986) (holding that repeated reference to defendant as "the Godfather," had "strong prejudicial overtones," and along with other misconduct, constituted reversible error).

- Comm. v. Graziano, 331 N.E.2d 808, 812-13 (Mass. 1975) (holding that repeated references to one or both defendants as "Al Capone," constituted reversible error because "those references were calculated to appeal to prejudice based on national origin, and thus 'to sweep jurors beyond a fair and calm consideration of the evidence'").

- Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 (1988) (admonishing the prosecutor for referring in argument to the horror movie, "Friday the 13th," which the court explained "served no purpose other than to divert the jury's attention from its sworn task").

- Flanagan v. State, 104 Nev. 105, 110, 754 P.2d 836, 839 (1988) (labeling, in ordering a new sentencing hearing, "patently prejudicial" and "serv[ing] to divert the focus of the juror's attention" the prosecutor's comments about a murderer who had no connection to the defendant), vacated on other grounds, 504 U.S. 930 (1992).

- Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1129 (1985) (condemning the prosecutor's references to a notorious inmate), cert. denied, 486 U.S. 1036 (1988).

- Comm. v. Valle, 362 A.2d 1021, 1023 (Pa. 1976) (holding that defendant was entitled to new trial because prosecutor remarked in closing that defendant was "vicious" and was an "Al Capone").

e. **Calling the Defendant a "Professional Criminal" is Improper.**

It is improper for a prosecutor to refer to the accused as a "professional criminal."

- U.S. v. Blakey, 14 F.3d 1557, 1560 (11th Cir. 1994) (ordering new trial because prosecutor committed reversible error by referring to the defendant as "a professional, professional criminal").

- Hall v. U.S., 419 F.2d 582, 587 (5th Cir. 1969) (reversing conviction after holding that it was misconduct to refer to defendant as "hoodlum," explaining that "[t]his type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises-- succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government").

- Cox v. State, 465 So.2d 1215, 1216 (Ala. 1985) (reversing conviction after holding that repeated references to defendant as "bad boy in the community" "constituted a direct attack on the character of the appellant and the remark was highly improper in light of the fact that there had ben no attempt by the appellant to present evidence of his good character").

- Ellis v. State, 254 So.2d 902 (Miss. 1971) (holding that prosecutors cannot refer to defendant as a "professional criminal" where there is no proof in the record to that effect).

- State v. Teeter, 65 Nev. 584, 200 P.2d 657, 686 (1948) (holding that it was improper to refer to defendant as a "hoodlum").

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

f. Suggesting that the Defendant Poses a Threat to Society or to Individual Jurors is Improper.

A prosecutor may not tell jurors that the person on trial is a threat to society in general or to jurors in particular. Such comments can also be racially inflammatory. An academic study reports that 57.9% of the jurors he questioned were more likely to vote for death if they thought that the defendant might present a danger to society. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998). Since jurors will likely be influenced by a prosecutor's improper suggestion that the defendant will pose a future threat unless he is found guilty and executed, this Court must prevent the prosecutor from making such comments. See section II (B) (4), below.

- Darden, 477 U.S. at 180 (condemning as "improper" comment that "implied that the death penalty would be the only guarantee against a future similar act").

- Commonwealth of the Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992) (reversing conviction because prosecutor's remark that if jurors acquitted him, he would follow them out of the courtroom and retrieve the gun, denied him his right to a fair and impartial jury), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997).

- Rodriguez v. Peters, 63 F.3d 546, 566 (7th Cir. 1995) (condemning as "inflammatory" and "improper" the prosecutor's remark that the defendant would "scurr[y] off into the night to do it again").

- Tucker v. Kemp, 762 F.2d 1496, 1508 (11th Cir. 1985) (holding that prosecutor made improper comment emphasizing to jurors the importance of their decision and that they were last line of defense since it implied that they were the only ones who could stop him from killing again).

- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering habeas relief because of prosecutorial misconduct, including "[h]ighly inflammatory and wholly impermissible appeal to racial prejudice" in which prosecutor told jurors that "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know. And maybe the next time he'll use the knife").

- Russell v. State, 233 So.2d 154, 155 (Fla. App. 1970) (reversing and remanding after finding that the district attorney's comment that if the defendant was not convicted there would be "people getting stabbed all over" the region was highly prejudicial and required a new trial).

- Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (calling "clearly inflammatory" and stating that "we admonish the prosecutor for suggesting that Jones' violent tendencies could be visited upon individual jurors").

- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (reversing and remanding for new trial where prosecutor suggested to jurors that if they acquitted him, he would rape again, saying, "these comments [were] exceedingly improper in and of themselves").

- Cosey v. State, 93 Nev. 352, 354, 566 P.2d 83, 85 (1977) (condemning as "improper" comment that "[i]f you cut [the defendant] loose, you are going to be cutting loose a person who is going to be out there to rob you or I.").

- Lime v. State, 479 P.2d 608, 609 (Okl. Crim. 1971) (holding that it was reversible error for prosecutor to tell jurors that if they did not convict "there will be somebody else's relative that will be killed by these two men within I will say, a year or two").

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

g. Referring to the Defendant's Gang Involvement Violates The U.S. Constitution and Nevada Law.

A prosecutor may not refer to a person's gang involvement when gang involvement is not relevant to the proof of the charged offense. Such comments both violate the rule against referring to facts outside the record and can be racially or ethnically inflammatory. See section II (B) (4), below.

- U.S. v. Williams, 496 F.2d 378, 384 (1st Cir. 1974) (prosecutor's comment that he did not know the names of "characters of the underworld" was "utterly unacceptable" and "inconsistent with 'the dignity of the government' and cannot be permitted") (quotation omitted).

- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (reversing the conviction where the prosecutor called the defendant an "Aryan warrior,"

since "[t]hese comments were completely irrelevant to the issues in this case, and could only have impermissibly served to inflame the emotions of the jury, therefore clearly constituting misconduct on the prosecutor's part").

- People v. Billingsley, 425 N.Y.S.2d 139, 141 (N.Y. App. Div. 1980) (holding that new trial was required where prosecutor commented that during the defendant's confession, "[t]hey had big bright lights shining on his face. Just like we see in the movies with all the gangsters," which the court deemed an extremely prejudicial use of the gangster idiom).
- SCR 173 (6).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

h. **Referring to Prior Convictions Violates the U.S. Constitution and Nevada Law.**

A prosecutor may not refer to the defendant's prior convictions which are not in evidence or suggest in any way to the jury that the defendant has a criminal record.

- Stewart v. Duckworth, 93 F.3d 262, 267 (7th Cir. 1996) (holding that it was improper to refer to past convictions).
- U.S. v. LeQuire, 943 F.2d 1554, 1571 (11th Cir. 1991) (holding that prosecutor's elicitation of testimony about defendant's prior convictions was reversible error), cert. denied, 505 U.S. 1223 (1992).
- Witherow v. State, 104 Nev. 721, 723, 765 P.2d 1153, 1154 (1988) (reversing the conviction because of the prosecutor's references to the defendant's relationship with inmates while he was in prison and to his filing a habeas petition, explaining that "[r]eference to prior criminal history is reversible error.").
- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (explaining that the prosecutor's remarks about defendant's felony convictions were a "highly improper use of character evidence.").
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c); 3-5.8 (d).

4. **ARGUMENTS BASED ON GROUP PREJUDICE VIOLATE THE UNITED STATES CONSTITUTION AND NEVADA LAW.**

"A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991). Such comments not only violate the right to due process of law, but also, as the federal court explained in Lee v. Bennett,

927 F. Supp. 97, 101 (S.D.N.Y. 1996), aff'd, 104 F.3d 349 (1996), "[d]eliberate injection of extrinsic or prejudicial matter which has no relevance to the case and no basis in the evidence is not an appropriate element of a prosecutor's summation because it impinges on the jury's function for determining guilt or innocence." The American Bar Association has similarly condemned such arguments, providing in one of its standards that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury," and elaborating:

> Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence.

American Bar Association Standards for Criminal Justice, Standard 3-5.8. The National District Attorneys Association also states that it is impermissible for prosecutors to make "prejudicial or inflammatory argument..." National Prosecution Standards, Rule 6.5 (g) (5). Such comments may also violate the rule against singling out jurors. See section II (B) (10) (d), below.

Arguments explicitly or implicitly urging the jury to make a finding of guilt, or to impose punishment, based on group bias violate the defendant's right to equal protection of the laws under the State and Federal Constitutions. U.S. Const. amend. XIV; Nev. Const. Art. 4 § 21.

a. **Comments, Whether Explicit or Veiled, About Race Violate the U.S. Constitution and Nevada Law.**

A prosecutor may not make a comment which appeals to the racial prejudices jurors may hold. A recent study about the reactions of jurors to certain factors highlights the need for prosecutors to refrain from, and for courts to prevent, improper

comments about race. Jurors take into account the race of an accused in deciding at sentencing whether aggravating factors, like future dangerousness, exist. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (1998). When prosecutors make comments appealing to racial prejudice, they evoke or reinforce any racial prejudice jurors may hold and confirm in their minds that race is a proper consideration at a capital trial. Comments referring to race, whether explicit or veiled, thus compromise the accused's right to a fair trial and to equal protection of the laws.

- U.S. v. Richardson, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversing the conviction where prosecutor attempted to rebut defense of misidentification by stating to predominantly black jurors "we don't all look alike, ladies and gentlemen," which court held was attempt to appeal to racial prejudices of jurors).

- U.S. v. Cannon, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (holding that it was reversible error for prosecutor to refer to black people as "bad people" and to comment on fact that defendants were not from region).

- U.S. v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990) (racial bias appeal in prosecutor's closing argument constitutes reversible error).

- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering habeas relief because of prosecutorial misconduct, including "[h]ighly inflammatory and wholly impermissible appeal to racial prejudice" in which prosecutor told jurors that "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know. And maybe the next time he'll use the knife").

- State v. Blanks, 479 N.W.2d 601, 605 (Iowa 1992) (holding that reference to movie, "Gorrillas in the Mist," in case of black man was racially prejudicial and emphasizing that "[r]egardless of the prosecutor's good faith intentions and what he claims to be an innocent remark, there is the prejudicial possibility that from the jury's standpoint an attempt was made to compare the behavior of the defendant with that of apes and gorillas").

- State v. Wilson, 404 So.2d 968, 971 (La. 1981) (explaining that, where defendants were black and jurors all white, "the repeated references to ... 'animals' as a description of the defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact").

- Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (per curiam) (emphasizing that, in recounting prosecutor's comment to jurors that the

defendant, a Black man, had a "preference for white women" and a "relationship" with them, "we unhesitantly declare such conduct to be prejudicially improper even if there were some logic to it and even if, as claimed, no racial bias was intended to be elicited by the remarks"), cert. denied, 507 U.S. 921 (1993).

- SCR 173(5) (a lawyer shall not "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...").

- ABA Standards for Criminal Justice, Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); see also Standard 3-5.8 (c) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.").

b. **Comments Appealing to Gender Bias Violate the United States Constitution and Nevada Law.**

A prosecutor may not appeal to gender bias in argument.

- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (prosecutor improperly appealed to gender bias by commenting that defense witness's testimony helped explain "why so many rapes go unreported in this country" and was "completely insensitive" because the term "insensitive" is "a current buzz word used on TV talk shows and soap operas to describe masculine reactions to complaints by women. This statement itself was an appeal to gender bias among the jurors."), aff'd, 104 F.3d 349 (1996).

- SCR 173(5).

- ABA Standards for Criminal Justice, Standards 3-5.8 (d), 3-5.8 (c).

c. **Comments Appealing to Class Bias Violate the United States Constitution and Nevada Law.**

A prosecutor may not appeal to class bias.

- U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940) ("[A]ppeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them.").

- Sizemore v. Fletcher, 921 F.2d 667, 670-72 (6th Cir. 1990) (explaining that "appeals to class prejudice must not be tolerated in the courtroom" in holding that prosecutor committed reversible error where referred to the accused's "money," "multitude of attorneys," and made the statement that the defendant "would rather kill" two people than increase their salaries).

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.8 (d); 3-5.8 (c).

d. **Comments About Region Violate the Federal Constitution and**

Nevada Law.

A prosecutor may not appeal to regional prejudice.

- U.S. v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996) (reversing conviction after holding that it was improper for prosecutor to point out to jurors that defendants were not locals).
- Miranda v. State, 101 Nev. 562, 569, 707 P.2d 1121, 1126 (1985) (condemning the prosecutor's comment about the accused's Cuban nationality and his mode of entry into the U.S.), cert. denied, 475 U.S. 1031 (1986).
- SCR 173(5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (d); 3-5.8 (c).

e. **Comments About Religion Violate the Federal Constitution and Nevada Law.**

A prosecutor may not appeal to religious authority in support of an argument. Such comment also constitutes an impermissible reference to facts outside the record.

- Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991) (affirming grant of habeas corpus writ and condemning prosecutor's "outrageous" appeals to religious beliefs and statement that "How do you know that if you let him go this time it won't be done again? You know, Judas Iscariot was a good person, the most trusted of them all and you all know what he did.").
- Cobb v. Wainwright, 609 F.2d 754, 756 n.2 (5th Cir. 1980) (calling "clearly objectionable" prosecutor's references to the Bible to support his proposition that there was no reason to show the defendant mercy).
- People v. Wrest, 3 Cal.4th 1088, 1091, 839 P.2d 1020 (Cal. 1992) (holding that it was "improper" for prosecutor to refer to the bible for support), cert. denied, 510 U.S. 848 (1993).
- People v. Poggi, 45 Cal.3d 306, 340, 753 P.2d 1082 (Cal. 1988) (calling "inappropriate" prosecutors' statement that a higher authority would judge the defendant, that victim would testify against him, and that the defendant would suffer eternal damnation and hell).

f. **Comments About Beliefs Protected by the First Amendment Violate the Federal Constitution and Nevada Law.**

Arguments stigmatizing the defendant on the basis of beliefs protected by the First Amendment, or membership in unpopular organizations, when those facts are not relevant to issues presented at trial, are improper.

- Dawson v. Delaware, 503 U.S. 159, 166-167 (1992) (impermissible to admit

evidence of defendant's membership in Aryan Brotherhood prison gang at sentencing, where not relevant to issues presented and defendant's abstract beliefs protected by First Amendment and not admissible to show "character").

- Keyeshian v. Board of Regents, 385 U.S. 580, 606 (1967) ("[M]ere knowing membership without a specific intent to further the unlawful aims of [Communist Party]" not adequate basis for exclusion from university employment).

- Schware v. Board of Bar Examiners, 353 U.S. 232, (1957) (previous membership in Communist Party not basis for denying admission to bar where no connection to requirement of "good moral character").

5. RIDICULING OR DENIGRATING THE DEFENSE THEORY VIOLATES THE CONSTITUTION AND NEVADA LAW.

A prosecutor may not ridicule the defense theory.

- U.S. v. Sanchez, 1999 WL 343734, at *11 (9th Cir. 1999) (holding that the prosecutor "committed misconduct in ... denigrating the defense as a sham" and reversing the conviction).

- Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (reversing the conviction where the prosecuting attorney called the defendant's testimony "malarkey," explaining that "[t]his remark by the prosecutor violated his duty ... not to ridicule or belittle the defendant or the case").

- Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989) (recognizing a duty not to ridicule the defense theory and condemning prosecutor for telling jurors that the defense "tried to hustle you" and that if "you accept what Barbara Barron and Carol Tomlinson told you, I got some ocean front property for you in Tonopah").

- Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 629 (1979) (holding that prosecutor's comment, referring to defense theory as "red herring," was improper).

6. ARGUMENTS ABOUT WITNESSES WHICH VIOLATE THE CONSTITUTION AND NEVADA LAW.

a. Disparaging, Complimenting, or Ridiculing Defense's Expert Witness Violates the Federal Constitution And Nevada Law.

A prosecutor may not disparage or ridicule an expert witness. As the Nevada Supreme Court has explained:

> The District Attorney may argue the evidence and inferences before the jury. He may not heap verbal abuse on a witness nor characterize a witness as a perjurer or a fraud.... Such characterizations transform the prosecutor into an unsworn witness on the issue of the witnesses [sic]

credibility and are clearly improper.

Yates v. State, 103 Nev. 200, 204-05, 734 P.2d 1252, 1255 (1987) (citations omitted).

- People v. McGreen, 107 Cal.App.3d 504, 514-19, 166 Cal.Rptr. 360 (Cal. Ct. App. 1980) (explaining that "character and professional assassination is misconduct" in holding that it was improper for prosecutor to suggest that defense expert was habitual liar, the subject of an ethics investigation, and prostituted his expertise for $50 per hour), overruled on other grounds by People v. Wolcott, 665 P.2d 520, 34 Cal.3d 92 (1983).

- Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) (admonishing prosecutor for disparaging defense's expert as one who "goes to the highest bidder.").

- Yates, 103 Nev. at 204, 734 P.2d at 1255 (condemning prosecutor's statement that expert had "crawl[ed] up on the witness stand" and that testimony was "melarky" [sic] "an outright fraud," and that he had violated his "oath to God").

- Aesoph v. State, 102 Nev. 316, 323, 721 P.2d 379, 383 (1986) (holding that it was improper for prosecutor to compliment expert witness by saying, "you will see the definition of an expert. That was [expert witness] and that was his job here and he did it in my opinion very well...").

- Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234 (1986) (reversing and remanding for new trial in spite of failure to object in part because of prosecutorial misconduct, including disparaging and ridiculing defense expert by calling him "[t]he hired gun from Hot Tub Country. Have stethoscope, will travel.").

- National Prosecution Standards, Rule 6.5 (f) (prosecutors "should treat witnesses fairly and with due consideration .... should take no action in taking testimony of a witness to abuse, insult, or degrade the witness. Examination of a witness's credibility should be limited to accepted impeachment procedures"); see also Rule 77. 1 (providing that "[t]he examination of all witnesses should be conducted fairly, objectively, and with due regard for the reasonable privacy of witnesses").

- ABA Standards for Criminal Justice, Standard 3-5.7 (a) ("The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity ... of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.").

b. Calling Lay Witness a "Liar" Violates The Constitution And Nevada Law.

A prosecutor may not call a lay witness a "liar." Such comment is also an assertion of a personal opinion, see section II (A) (3), and of a fact outside the record,

see section II (A) (5).

- Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) ("[P]revious decisions of this court clearly state that it is improper argument for counsel to characterize a witness as a liar.").
- Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (reversing and remanding, in part because prosecutor improperly stated that witness was lying).
- Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 703 (1987) (condemning prosecutor's comment that alibi witness was lying).
- National Prosecution Standards, Rule 6.5 (f), 77.1, 77.6.
- ABA Standards for Criminal Justice, Standard 3-5.7 (a).

c. Commenting on Inability to Call Witnesses Because of Privilege Violates the Constitution and Nevada Law.

A prosecutor may not comment on the state's inability to call people as witnesses because of an assertion of a privilege, or to call a witness so that he will invoke the privilege before the jury. Commenting on the inability to call witnesses also violates the rule against alluding to facts outside the record. See section II (A) 15).

U.S. v. Sanchez, 1999 WL 343734, at *9 (9th Cir. 1999) ("The prosecutor committed misconduct in revealing to the jury that he could not make [the defendant's wife] testify as a witness for the prosecution.").

- U.S. v. Golding, 168 F.3d 700, 702 (4th Cir. 1999) (improper for prosecutor to comment on wife's failure to testify when has a privilege not to testify).
- U.S. v. Chapman, 866 F.2d 1326, 1334 (11th Cir. 1989) (improper for a prosecutor to comment on a spouse's assertion of the marital privilege).
- Nezowy v. U.S., 723 F.2d 1120, 1121 (3d Cir. 1983) (holding that it was error to allow state attorney to cross examine defense witness about invocation of self-incrimination privilege), cert. denied, 467 U.S. 1251 (1984).
- U.S. v. Tsinnijinnie, 601 F.2d 1035, 1039 (9th Cir. 1979) ("[I]t is improper to comment adversely on a defendant's exercise of the marital privilege, or to permit the jury to draw adverse inferences.").
- Courtney v. U.S., 390 F.2d 521, 526-27 (9th Cir. 1968) (holding that prosecutor committed plain error by commenting on the failure to call wife as witness where defendant gave notice of intent to invoke privilege), cert. denied, 393 U.S. 857 (1968).
- Robbins v. Small, 371 F.2d 793, 795 (1st Cir. 1967) (holding that prosecutor's questioning of witness despite invocation of privilege violates Confrontation

Clause), cert. denied, 386 U.S. 1033 (1967).

- San Fratello v. U.S., 340 F.2d 560, 562-63 (5th Cir. 1965) (holding that court erred in permitting prosecuting attorney to call wife to the stand where knew that she would invoke privilege and reversing and remanding).

- Franco v. State, 109 Nev. 1229, 1243, 866 P.2d 247, 256 (1993) ("We have reversed criminal convictions where the prosecutor commented on the defendant's failure to call certain witnesses, and where the state commented upon a wife's failure to take the stand either for or against her husband.").

- Hylton v. State, 100 Nev. 539, 541, 688 P.2d 304, 304-05 (1984) (explaining that it was "flagrant misconduct" for prosecutor to comment on inability to call wife of accused as witness).

- George v. State, 98 Nev. 196, 197, 644 P.2d 510, 511 (1982) (holding that it was improper for prosecution to comment on state's inability to call defendant's spouse to the stand).

- Emerson v. State, 98 Nev. 158, 162, 643 P.2d 1212, 1215 (1982) (reversing and remanding because of prosecutorial misconduct, including improper comment on exercise of marital privilege).

- ABA Standards for Criminal Justice, Standard 3-5.7 (c) (improper to "call a witness who the prosecutor knows will claim a valid privilege for the purpose of impressing upon the jury the fact of the claim of privilege.").

- See also 8 Wigmore on Evidence § 2243 at 259-61 (McNaughton rev. ed. 1961); McCormick on Evidence § 66 at 255.

7. ARGUMENTS ABOUT THE VICTIM WHICH VIOLATE THE CONSTITUTION AND NEVADA LAW.

a. Putting Jurors in Victim's Shoes.

A prosecutor may not make remarks putting jurors in the victim's shoes. Normally, such inflammatory comments also violate the rule against alluding to facts not in evidence since evidence of the victim's reaction before death is not before the jury. See section II (A) (5), above.

- Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) (per curiam) (remanding for new sentencing hearing where prosecutor improperly asked jurors to place themselves at crime scene), cert. denied, 513 U.S. 1046 (1994).

- Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) (condemning prosecutor's suggestion that jurors put themselves in victim's position and imagine the "final pain, terror and defenselessness.").

- Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (holding

that it is improper for a prosecutor to place the jury in victim's shoes).

- Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991) ("We have held that arguments asking the jury to place themselves in the shoes of a party or the victim (the Golden Rule argument) are improper.").

- Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702-03 (1987) (explaining that 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?").

- Jacobs v. State, 101 Nev. 356, 359, 705 P.2d 130, 132 (1985) (reversing and remanding where prosecutor committed misconduct in describing murder and remarked to the jury "I will not tell you to put yourselves in Mrs. Jacobs' position looking down the barrel of this shotgun, because that would be improper.").[16]

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Identifying The State With the Victim Is Improper.

A prosecutor may not put himself or herself in the victim's shoes or otherwise ally himself with a victim. Such comments also violate the rules against expressing personal opinions and invoking the authority of the state. See sections II (A) (3), above; II (B) (9), below.

- Hawthorne v. U.S., 476 A.2d 164, 172 (D.C. 1984) ("A prosecutor may no more represent the victim ... than he may urge the jurors to place themselves in the victim's shoes.").

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[15] The Nevada Supreme Court has recently contravened its own "golden rule." In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 445 (1997), the court explained that the "'Golden Rule' argument asks the jury to place themselves in the shoes of the victims, and has repeatedly been declared to be prosecutorial misconduct." It nevertheless held that the prosecutor had not committed misconduct even though he asked jurors to "[i]magine the pain that [the victims] went through both physically and mentally" and proceeded to describe in vivid detail from the victims' perspective the murder. See also Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) (holding that prosecutor did not violate the Golden Rule by telling jurors "[f]or a moment, we recreate that crime ... how aggravating is it to sit there and this man get in your car, the vehicle that you own, and begin to perpetrate these crimes on you?"). Neither case is distinguishable from the court's decisions in Williams and Jacobs. Indeed, the supreme court did not attempt to distinguish them factually or to explain its reasoning in either case. See Williams 113 Nev. at 445-46; Witter, 112 Nev. at 927, 921 P.2d at 899.

- Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) (calling it "inappropriate" for prosecutor to ally himself with the victim by comparing his own relationship with his grandmother to that of the accused with his grandmother who also happened to be the victim).

- Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) (holding that the prosecutor committed misconduct by telling jurors to return a death sentence for the victims and himself).

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9, 3-5.8 (d).

c. Referring to Victims and Holidays Violates the U.S. Constitution and Nevada Law.

A prosecutor may not seek to elicit an emotional reaction by referring to holidays.

- U.S. v. Payne, 2 F.3d 706 (6th Cir. 1993) (per curiam) (condemning prosecutor's remarks about Christmas time as "part of a calculated effort to evoke strong sympathetic emotions" for victims).

- Williams, 103 Nev. at 109, 734 P.2d at 702 (explaining that "[i]t is quite clear that 'holiday' arguments are inappropriate; they have no purpose other than to arouse emotions" and admonishing prosecutor for telling jury, "Happy Valentine's Day from [accused to victim] with malice. Cupid uses arrows. [The accused] used bullets...").

- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (labeling "improper" prosecutor's comment that victim would not be able to keep New Year's resolution or to see springtime roses bloom).

- Moser v. State, 91 Nev. 809, 813, 544 P.2d 424, 427 (1975) (condemning as improper and having "no place in a trial" prosecutor's comment to jury, "December 2, 1972, Merry Christmas, from [the accused to the victim's] family").

- Mears v. State, 83 Nev. 3, 422 P.2d 230 n. 4 (1967) (admonishing prosecutor for telling jury that "[t]here was a little girl here that will not be able to hear her daddy say, 'Merry Christmas' this year, or any year in the future because of the inconsiderate, selfish act of this defendant."), cert. denied, 389 U.S. 888 (1967).

- SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Arguing that The Victim Did Not Have as Many Rights As The Defendant Violates the Federal Constitution and Nevada Law.

A prosecutor may not compare the victim's rights with those of the accused. Such arguments infringe the defendant's exercise of his constitutional rights to trial by jury, to representation by counsel, to cross-examination and confrontation, and all other trial rights, see section II (A), above; and they also seek to deform the jury's constitutional function, by suggesting that the jury should act the same way as an alleged criminal. See section III (3)(c), below.

- Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of right to trial by jury).
- Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985) (condemning the prosecutor for impermissibly commenting on the defendant's exercise of his constitutional rights and for remarking that the victim did not enjoy the same procedural protections), cert. denied, 478 U.S. 1022 (1986), vacated on other grounds, 478 U.S. 1016 (1986).
- State v. Cockerham, 365 S.E.2d 22, 23 (S.C. 1988) (reversing sentence where prosecutor violated Sixth Amendment rights to counsel and jury trial by remarking that victim's rights under the Constitution "didn't do much for her that night because [defendant] ... was her judge, jury, and executioner. And she didn't have the right to ... be represented by a lawyer ... to have independent people on her jury.").
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

8. INSINUATING OR STATING THAT JUDGE AND STATE ARE ON SAME SIDE VIOLATES THE FEDERAL CONSTITUTION AND NEVADA LAW.

A prosecutor may not suggest that the judge is on the state's side or otherwise invoke the authority of the court. The Court of Appeals for the Ninth Circuit has explained, "[a] prosecutor must not abuse his position and his duty to see justice done by invoking the authority of the court." U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). This is because, as the same court elaborated in another case,

> vouching ... on behalf of the court would pose a clear threat to the integrity of judicial proceedings. That particular form of vouching goes beyond the mere proffer of an institutional warranty of truthfulness; rather, it casts the court as an active, albeit silent, partner in the prosecutorial enterprise. In doing so, it strikes at two principles that lie at the core of our system of criminal justice. The first of these is that '[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary....' The second, long elevated to constitutional significance because it is so closely intertwined with the first, is that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'

U.S. v. Smith, 962 F.2d 923, 936 (9th Cir. 1992) (citations omitted).

- U.S. v. Frederick, 78 F.3d 1370, 1380 (9th Cir. 1996) (reversing conviction partly because the prosecutor implied that the state and the court agreed in an interpretation of the law by telling jurors that "[t]he Government and the Judge will be asking you to consider all of the evidence in making your decision").

- Kerr, 981 F.2d at 1053 (reversing conviction in spite of the defense's failure to object because the prosecutor insinuated that the judge, by accepting a witness' plea bargain with the state, believed that the witness was truthful).

- Smith, 962 F.2d at 936 (reversing conviction in spite of defense counsel's failure to object where the prosecutor vouched for the credibility of a witness by arguing to the jurors "if I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen" and explaining that "unlike the other comments that courts have on some occasions reluctantly overlooked, it placed the imprimatur of the judicial system itself on [witness's] credibility. That is something we simply cannot permit").

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

- National Prosecution Standards, Rule 6.5 (c) ("Counsel should at all times display proper respect and consideration for the judiciary...").

- See section II (A) (3), above; SCR 173 (5).

9. INVOKING THE POWER OF THE STATE OR DISCUSSING THE STATE'S SYSTEM FOR CHARGING A PERSON.

It is impermissible for a prosecutor to invoke the authority of the state. Such comment also constitutes an impermissible reference to facts outside the record., See section II(A)(5).

- Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) (calling "clearly improper" prosecutor's argument that 'we only prosecute the guilty'" because it "is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined the appellant to be guilty

on evidence not before them").

- Garza, 608 F.2d at 665 (reversing conviction in spite of failure to object to prosecutor's comment that "those people and the Government [have] no interest whatsoever in convicting the wrong person" because such comment "presumed that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant's guilt before the trial and implied that the jury should give weight to this fact in making its determination").

- ABA Standards for Criminal Justice, Standards 3-5.8 (d), 3-5.9.

- See section II (A) (4), above; SCR 173 (a).

10. PRESSURING THE JURORS AS A GROUP OR AS INDIVIDUALS VIOLATES THE UNITED STATES CONSTITUTION AND NEVADA LAW.

a. Telling Jurors to "Do Your Job," to Fulfill their Civic Duty, To Act as the Conscience of the Community, To Correct Society's Ills, Or To Send Out a Message (Deterrence) Is Improper.

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill their civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty.[16] Such comments may also constitute an impermissible assertion of a personal opinion and a reference to facts outside the record. See section II(A)(4,5).

- Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (arguing dangerousness of defendant improper at guilt phase of trial).

- U.S. v. Young, 470 U.S. 1, 5-7 (1985) (reminding prosecutors to "refrain from improper methods calculated to produce a wrongful conviction" in holding that it was improper for a prosecutor to tell jurors that "[i]f you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law...").

- Viereck v. U.S., 318 U.S. 236, 247 (1943) (holding that the prosecutor's statement, including telling jurors that "[t]he American people are relying upon you ladies and gentlemen for their protection against this sort of a crime"

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[16] Were deterrence a proper subject for argument, the defendant would have a due process right to present evidence, for example, to rebut allegations that the death penalty deters under Simmons v. South Carolina, 512 U.S. 154, 163-64 (1994) (if state rests its arguments at sentencing at least in part on future dangerousness, due process requires that defendant be allowed to rebut with evidence that he will not be eligible for parole). See also section II (A) (6) (referring to facts outside the record); section III (3)(C)(a) below.

compromised the defendant's right to a fair trial).

- U.S. v. Sanchez, 1999 WL 343734, at *11 (9th Cir. 1999) ("The prosecutor committed misconduct in ... arguing that it was the jury's duty to find the defendants guilty.").

- U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.").

- U.S. v. Tulk, 171 F.3d 596, 599 (8th Cir. 1999) ("A prosecutor should not urge a jury to convict for reasons other than the evidence; arguments intended to inflame juror emotions or implying that the jury's decision could help solve a social problem are inappropriate.").

- U.S. v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997) ("[T]he law does not permit jurors to construe accounts of current events, gleaned from sources extraneous to the case record (such as newspapers), as somehow applicable to the question of a particular defendant's guilt or innocence. A jury cannot appropriately reason that a particular defendant is guilty based on media reports of rampant drug use coupled with the fact that the defendant is accused of a drug crime."), cert. denied, 118 S.Ct. 395 (1997).

- Arrieta-Agressot v. U.S., 3 F.3d 525, 527 (1st Cir. 1993) (comments urging jury to view case as chance to fight war on drugs were "plainly improper" and required reversal in spite of failure to object).

- U.S. v. Beasley, 2 F.3d 1551, 1560 (11th Cir. 1993) (comment that case was "another battle" in the war on drugs "are clearly improper" and "'calculated to inflame'") (quotation omitted), cert. denied, 512 U.S. 1240 (1994).

- U.S. v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993) (reference in closing argument to "protecting the community that has been plagued by violence, senseless violence, shootings and killings" was "patently improper"), cert. denied, 510 U.S. 971 (1993).

- U.S. v. Solivan, 937 F.2d 1146, 1149-50 (6th Cir. 1991) (holding that it violates due process for prosecutor to appeal to community conscience and to suggest that local drug problem would continue unless jurors acted).

- U.S. v. Machor, 879 F.2d 945, 955 (1st Cir. 1989) (comment that cocaine "is poisoning our community and our kids die because of this" designed "to inflame the passions and prejudices of the jury, and to interject issues broader than the guilt or innocence of the accused"), cert. denied, 493 U.S. 1081 (1990).

- U.S. v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) (finding no difference

between "urging a jury to do its job and urging a jury to do its duty" because "such an appeal is designed to stir passion").

- Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983) (calling improper the prosecutor's comments that, "[h]ow many times have you said to yourself as you pick up your morning newspaper or turn on your radio or television newscast, has the whole world gone crazy, when you read about a crime like this, has the whole world lost its mind?... when have you said to yourself what can I do, just one citizen, just one individual to stop this?"), cert. denied, 463 U.S. 1210 (1983), overruled by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1983).

- People v. Williams, 238 N.W.2d 186, 188 (Mich.App. 1975) ("[E]motional reaction to social problems should play no role in the evaluation of an individual's guilt or innocence...").

- Flanagan, 104 Nev. at 112, 754 P.2d at 840 (ordering new penalty hearing commented that "if we don't punish, then society is going to laugh at us," which court concluded "serve[d] no other purpose than to raise the specter of public ridicule and arouse prejudice against Flanagan").

- Schoels v. State, 114 Nev. 109, 966 P.2d 735 (1998) (recognizing "well-established prohibition against" referring to the jury as "conscience of the community").

- Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) (labeling "misconduct" prosecutor's appeal that the if the jury was not angry with Collier "we are not a moral community"), cert. denied, 486 U.S. 1036 (1988).[17]
- Marshburn v. State, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (condemning prosecutor's comment that "the only way that you are going to do any good and help us here in Dallas County is to make examples of each and

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[17] The Nevada Supreme Court has failed to adhere to the constitutional prohibition against arguments appealing to the civic duty of jurors. In Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997), the court held that "a prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or make a statement to the community." The prosecutor in that case argued to jurors that they should send a "message" to others and reminded them of the "commitment" they had undertaken. Id. at 447. Although these remarks violate well-established law prohibiting appeals to civic duty or to the conscience of the community, the supreme court failed to find any misconduct. See also Witter v. State, 112 Nev. 908, 924, 921 P.2d 886, 896 (1996) (holding that prosecutor did not violate Constitution where commented that failure to impose death "would be disrespectful to the dead and *irresponsible* to the living," which implies the existence of a duty to society); Mazzan v. State, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989) (recognizing that it is improper to pressure jurors and to threaten them with community opprobrium but refusing without reasoning to find improper comment that jurors needed to "set a standard" for the community); cf. Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126 (1985) (condemning argument that jury must be angry with defendant "or we are not a moral community" as impermissible appeal to community standard).

every one of the five..." as "arguments ... calculated to introduce prejudice into the minds of jurors").[18]

b. Seeking to Make the Defendant a Scapegoat For Asserted Failings of the American Justice System is Improper.

The prosecutor may not seek to make the defendant a scapegoat for asserted failings of the American justice system. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion. See section II (A) (3, 5), above.

- Darden, 477 U.S. at 179-80 (condemning as "improper" the prosecutor's comment that "attempted to place some of the blame for the crime on the Division of Corrections").
- U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) (calling "unnecessary and largely irrelevant" comments that emphasized importance of the oath in American justice system).

c. Telling Jurors They Are Involved in War or Appealing to Patriotism Violates the Federal Constitution And Nevada Law.

A prosecutor may not allude to a war or appeal to the patriotic sensibilities of jurors. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion. See section II (A) (3, 5), above.

- Viereck, 318 U.S. 236, 247-48 (1943) (holding that it denied defendant right to a fair trial when prosecutor remarked to jurors that "this is war. This is war, harsh, cruel, murderous war" because these comments "were offensive to the

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[18] But see Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (relying on Gregg to hold that "[o]f course, it may be proper for counsel to go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty"; note that cited portion in Gregg opinion merely states that "[b]oth counsel ... made lengthy arguments dealing generally with the propriety of capital punishment" and does not hold that this is proper comment for either side in criminal trial), cert. denied, 486 U.S. 1036 (1988); see also Williams v. State, 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997) (writing that "[t]he United States Supreme Court has held that it is permissible to argue in favor of the purposes of the death penalty, including the objectives of retribution and deterrence"; note that the cited portion of Gregg v. Georgia, 428 U.S. 153, 186 (1976), explains that *legislators* can properly consider these factors in determining whether to enact a capital sentencing scheme but does not hold that these are proper subjects for argument in criminal trial or for sentencers to consider in deciding whether to impose death).

dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection.").

- Arietta-Agressot v. U.S., 3 F.3d 525, 526 (1st Cir. 1993) (holding that it was reversible error for prosecutor to tell jurors they are involved in war against drugs and defendants are enemy foot soldiers).

- Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) (affirming grant of habeas corpus writ in spite of defense's failure to object where prosecutor committed misconduct, including resorting to war and self-defense analogies), cert. denied, 497 U.S. 1038 (1990).

- Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985) (condemning use of "the soldier metaphor, and coupling it with a challenge to the jurors' patriotism -- 'When [the soldiers] did a good job of killing ... we decorated them and gave them citations'"), cert. denied, 478 U.S. 1022 (1986), vacated on other grounds, 478 U.S. 1016 (1986).

- Harris v. People, 888 P.2d 259, 265 (Colo. 1995) ("[T]he prosecutor's repeated references to past and present military operations by and against Saddam Hussein were not only irrelevant but constituted improper encouragement to the jurors to employ their patriotic passions in evaluating the evidence.").

- State v. Fitch, 65 Nev. 668, 685, 200 P.2d 991, 1000 (1948) (condemning prosecutor's comment that victim was a veteran who had given defendant freedom by serving in the war), overruled on other grounds by Graves v. State, 82 Nev. 137, 139, 413 P.2d 503, 506 (1966).

- Comm. v. LaCava, 666 A.2d 221, 235 (Pa. 1995) (admonishing prosecutor for saying that drug dealers "suck the life out of our community" and that they bore the responsibility for ruining neighborhoods and turning children into drug addicts, which "painted a vivid picture that society is under heavy attack and that this jury was in a unique position to respond to that attack...").

d. Speaking to Only a Few Jurors or Otherwise Singling Them Out Violates the Federal Constitution and Nevada Law.

A prosecutor may not single out jurors because "it brings to bear a collateral influence which may tend to prejudice the mind of the juror on the basis of something irrelevant to the issues of the case." Lee v. Bennett, 927 F. Supp. 97, 105-06 (S.D.N.Y. 1996). Such arguments may also constitute impermissible appeals to group bias. See section II (B) (4), above.

- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (explaining that "[i]t is grossly improper to address individual jurors or less than all of the members

of the jury in summation" in ruling that prosecutor made impermissible appeal to female jurors in case involving rape), aff'd, 104 F.3d 349 (1996).

- Dixie Motor Coach Corp. v. Galvan, 86 S.W.2d 633, 633 (Tex. Crim. App. 1935) ("[A]rgument [addressing individual jurors], as well as all other remarks suggestive of an intimate friendly relationship between counsel and jurors, should be scrupulously avoided.").
- SCR 176 (1) ("A member of the state bar should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.").
- E. LeFevre, Annotation, Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument, 55 A.L.R.2d 1198 (1957).

III.

EXAMPLES OF IMPROPER ARGUMENT AT THE PENALTY PHASE

The prohibition on impermissible arguments described above applies with even greater force to the phase of a capital trial. As the Court of Appeals for the Eleventh Circuit explained, "it is most important that the sentencing phase of a trial not be influenced by passion, prejudice, or any other arbitrary factor .... With a man's life at stake, a prosecutor should not play on the passions of the jury." Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983), cert. denied, 463 U.S. 1210 (1983), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985). The Nevada Supreme Court has quoted this passage in stressing the importance of the sentencing phase of a capital trial. See Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988), vacated on other grounds, 504 U.S. 930 (1992).

A prosecutor's impermissible arguments typically vio

process of inflicting the penalty of death." 428 U.S. at 304.[19] In Penry v. Lynaugh, 492 U.S. at 326, the Supreme Court recognized that improper prosecutorial argument poses an unconstitutional impediment to individualized sentencing. The prosecutor in Penry told jurors that "[y]our job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly." The Supreme Court concluded that these comments prevented sentencers from considering the defendant's mitigating evidence and therefore violated the Eighth and Fourteenth Amendments. Id. A prosecutor's appeals based on prejudice, by definition, suggest to jurors that they ignore the individual's traits and impose a punishment of death based on stereotype and prejudice. Such appeals, like statutes or arguments suggesting that sentencers ignore the individual characteristics or mitigating evidence of a defendant effectively "treat[] all persons convicted ... not as *uniquely individual human beings*, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson, 428 U.S. at 304 (emphasis added). The task of jurors in determining the appropriate sentence is to make a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), and prosecutorial argument which diverts the jurors' attention from that task violates the Eighth and Fourteenth Amendments.

This Court must ensure that the prosecutor refrain from making improper

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[19] The Supreme Court invalidated the mandatory portion of the Nevada death scheme in Sumner v. Shuman, 483 U.S. 66 (1987); see also Lockett v. Ohio, 438 U.S. 586, 605 (1978) (striking down a sentencing scheme which restricted the consideration of sentencers to a handful of mitigating factors, elaborating that "we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.")

arguments at the penalty phase of the defendant's capital trial. To safeguard the fairness of the defendant's penalty phase and the specific constitutional rights to which he is entitled, the defendant sets forth some of the improper arguments a prosecutor is forbidden from making in the penalty phase by the federal Constitution, and the laws and ethical rules of this state. This list merely represents some of the most common improper arguments the prosecutor can make and is not exhaustive. The defendant incorporates the arguments made in section II, (A) (1, 2, 3, 4, 5), II (B) (1, 2, 3, 4, 5, 6, 7, 8, 9, 10), as if fully set forth herein, since the forms of misconduct identified in those sections are equally impermissible when they are made in a penalty proceeding.

A. ARGUMENTS INFRINGING THE DEFENDANT'S SPECIFIC CONSTITUTIONAL RIGHTS.

1. ARGUMENTS ABOUT THE DEFENDANT.

a. Comment on the Defendant's Failure to Express Remorse is Unconstitutional.

A prosecutor may not comment on the defendant's failure to express remorse because the Fifth Amendment right against self-incrimination applies to the penalty phase of a capital trial.

- Estelle v. Smith, 451 U.S. 454, 462 (1981) (holding that Fifth Amendment right against self-incrimination applies in penalty phase of capital trial).
- Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (explaining that a prosecutor may not comment on the convicted defendant's failure to ask for mercy or to express remorse in holding that prosecutor violated the Fifth and Fourteenth amendments by commenting that the defendant had failed to testify, which showed that he was "tough" and that he did not care about having committed the crime).
- Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1990) (explaining that it violates the Fifth and Fourteenth amendments for prosecutor to comment on failure to ask for mercy or to express remorse during allocution and granting relief in habeas corpus proceedings where prosecutor paraphrased the defendant's testimony as "I don't want you to put me to death, but I'm not even going to say that I'm sorry" and commented on the defendant's "arrogance" in taking the stand without showing "the common decency to say

I'm sorry for what I did").[20]

- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (reporting that a lack of remorse is "highly aggravating," which means that it is very likely that jurors view a lack of remorse as a reason, albeit an impermissible one, for imposing a death sentence).

b. Invoking Group Bias or Otherwise Disparaging the Defendant is Improper.

As shown in sections II (B) (3) and II (B) (4), above, arguments personally attacking the defendant or seeking to evoke a jury's bias and prejudice against a defendant are improper. In the setting of the penalty phase, these arguments are inconsistent with individualized and reliable sentencing required by the Eighth Amendment and they violate the due process and equal protection guarantees of the Fourteenth Amendment. The authorities cited in those sections are incorporated as if fully set forth herein. Similarly, commenting on the defendant's exercise of his constitutional rights is improper. Sections II (A) (1), II (A) (2).

c. Arguing that the Defendant Should be Sentenced to Death on the Basis of His Beliefs Unrelated to the Appropriate Punishment is Improper.

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[20] The Nevada Supreme Court has failed to adhere to the federal constitutional rule prohibiting comments on the failure to testify, to express remorse, or to ask for mercy. In McNelton v. State, 111 Nev. 900, 903-04, 900 P.2d 934, 936-37 (1995), cert. denied, 517 U.S. 1212 (1996), the court faced the same facts the federal court of appeals faced in Lesko but, unlike the court in Lesko, ruled that the prosecutor could comment on the defendant's failure to express remorse. Like Lesko, the defendant exercised his right of allocution and made a statement to the jury in an attempt to prove the existence of mitigating factors. Id. at 935. Like the prosecutor in Lesko, the prosecutor in McNelton, commented that the defendant had failed to express remorse despite his opportunity to do so. Id. Unlike the federal court of appeals in Lesko, however, the Nevada Supreme Court concluded that the prosecutor had not committed misconduct. Although the court in Lesko explained that a "capital defendant does not completely waive his Griffin rights by testifying at the penalty phase," the Nevada Supreme Court held that "the prosecutor was entitled to comment in rebuttal on McNelton's statement, including commentary on what McNelton did not say which he could properly have said within the bounds of an allocution statement." Id. at 937. The McNelton decision directly contradicts the federal court's holding in Lesko, does not analyze the constitutional issue, and is erroneous.

It is improper under the First Amendment to argue that the defendant should be sentenced on the basis of his abstract beliefs, however "morally reprehensible" they may be, if those beliefs are not related to any issue presented at sentencing.

- Dawson v. Delaware, 503 U.S. 159, 166-167 (1992) (improper to admit evidence of defendant's membership in Aryan Brotherhood prison gang, where not related to issues presented at sentencing, and admission of evidence of abstract beliefs, without more, as relevant to defendant's "character" violates First Amendment).

2. ASSERTING PERSONAL OPINION OR EXPERTISE VIOLATES THE U.S. CONSTITUTION.

As described above in section II (A) (3), it is unconstitutional for a prosecutor to assert a personal opinion or expertise on any matter. For the same reasons, a prosecutor may not assert a personal opinion on the propriety of the death penalty or an expertise in arguing whether it is the appropriate punishment. An assertion of a personal opinion may also constitute an impermissible attempt to invoke the authority of the state, see section II (B) (9), and an improper reference to facts outside the record. See section II (A) (5).

a. Expressing Opinion About the Propriety of the Death Penalty Violates the Constitution.

A prosecutor may not express an opinion about the death penalty or assert an expertise in determining the propriety of imposing a death sentence on the defendant. Such impermissible expressions of opinion include positive statements about the general deterrent effect of the death penalty, which are always without evidentiary support. See section II (A) (5), above.

- Darden v. Wainwright, 477 U.S. 168, 179 (1986) (condemning as "improper" comments by the prosecutor, including a comment that "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public").
- Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (granting habeas relief and ordering new penalty phase where prosecutor expressed his personal belief that death penalty was appropriate punishment based on his experience of working for twenty years with people who commit crimes).

- Newlon v. Armontrout, 885 F.2d 1328, 1335-36 (8th Cir. 1989) (affirming grant of writ of habeas corpus where prosecutor expressed personal belief in the death penalty as appropriate punishment), cert. denied, 497 U.S. 1038 (1990).

- Bowen v. Kemp, 769 F.2d 672, 679-80 (11th Cir. 1985) (holding that it was improper for prosecutor to express personal opinion about the prospects for rehabilitation in support of death penalty), cert. denied, 478 U.S. 1021 (1986).

- Tucker v. Kemp, 762 F.2d 1480, 1486 (11th Cir. 1985) (en banc) (holding that "[a]n attorney's personal opinions are irrelevant to the task of a sentencing jury" and condemning prosecutor's comment to jurors that, "if he is executed, and if you bring in a verdict of guilty, I'll sleep just as good, or I'll sleep better knowing that one of them won't be on the street. Knowing that one of them will be gone. It's not all of them, but it's better than none."), vacated on other grounds, 474 U.S. 1001 (1985).

- Marshburn, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (telling jurors that "[t]here is something special about this case" was "calculated to introduce prejudice into the minds of jurors").

- Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (reversing death sentence and ordering a new penalty hearing in part because the prosecutor's remark while facing him, "Gregory Alan Collier, you deserve to die" amounted to an expression of a personal opinion and was "egregiously improper"), cert. denied, 486 U.S. 1036 (1988).

- Guy v. State, 108 Nev. 770, 786, 839 P.2d 578, 588 (1992) (concluding that it was "improper" for prosecutor to tell the defendant, "you, sir, deserve to die"), cert. denied, 507 U.S. 1009 (1993).

- Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991) (explaining that prosecutor's statement, "[w]e have to tell you that we believe in what we're telling you, that Sam Howard should be put to death, and we do believe that" was "improper and constituted prosecutorial misconduct.").

- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (rebuking prosecutor for "improper remarks" where stated "I believe that mercy cannot rob justice even for persons who murder their good friends.").
- SCR 173 (5) (improper to "state a personal opinion as to the justness of a cause...").

- ABA Standards for Criminal Justice, Standard 3-5.8 (b), commentary.

3. COMMENTS MISLEADING JURORS ABOUT THE SENTENCING PROCESS OR ABOUT THE DEATH PENALTY VIOLATE THE CONSTITUTION.

It is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971).

When prosecutors attempt to mislead jurors about their role in the sentencing process or to diminish their sense of responsibility, they violate the Eighth and Fourteenth Amendments requirement of reliability in sentencing. Indeed, "[a]rguments that trivialize the task of a capital jury are improper." Tucker v. Kemp, 762 F.2d 1480, 1485 (11th Cir. 1985) (en banc), vacated on other grounds, 474 U.S. 1001 (1985). The following sections describe some examples of impermissible attempts by prosecutors to diminish jurors' sense of responsibility by misleading jurors about the sentence, the sentencing process, or the appeals system.

a. Misstating the Law On Mitigation or Otherwise Misleading Sentencers About the Sentencing Determination Violates the Constitution.

A prosecutor may not misstate the law on mitigation or otherwise mislead sentencers about how to impose sentence. Comments telling jurors that they cannot consider certain factors mitigating or that they cannot show the defendant mercy are unconstitutional. Whenever a prosecutor tells jurors that they cannot consider evidence the defense presents as mitigating, he or she violates the Eighth and Fourteenth Amendments. See also Sections II (B) (5) (denigrating defense theory); II (B) (6) (denigrating witnesses).

- Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (explaining that it is not enough "simply to allow the defendant to present mitigating evidence to the sentencer," and that there must be no impediment -- including prosecutorial argument -- to sentencer's full consideration and ability to give effect to mitigating evidence in holding that prosecutor's argument that they could not act on their emotions violated the Eighth and Fourteenth Amendments).
- Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that jury must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

b. Arguing that Jurors Should Not Show Mercy Violates the Federal Constitution and Nevada Law.

A prosecutor may not suggest to jurors that they refrain from showing the defendant mercy in deciding whether to impose the death penalty. Mercy -- as

opposed to "mere sympathy or emotion" -- is a relevant factor in capital sentencing. See California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); see also Nelson v. Nagle, 995 F.2d 1549, 1556 (11th Cir. 1993) ("[T]his court has found that mercy is an implicit sentencing consideration in many United States Supreme Court decisions in capital cases."). It is thus unconstitutional for the state to argue that mercy has no place at a capital proceeding.

- Penry, 492 U.S. at 326 (holding that the prosecutor violated the Eighth and Fourteenth Amendments by telling jurors that they could not act on their emotions and instead had to act on the law as the judge had given it to them).
- Nelson, 995 F.2d at 1556 (concluding that prosecutor committed misconduct where state quoted case to the effect that axe of justice should be stern, unbending and unflinching, which court said rendered sentencing fundamentally unfair).
- Presnell v. Zant, 959 F.2d 1524, 1529 (11th Cir. 1992) (holding that the trial was rendered fundamentally unfair in violation of due process where prosecutor argued to the jury, based on a quotation from a nineteenth century state case, that jurors should not show the defendant mercy).
- Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) ("[T]he suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central considerations, the one most likely to tilt the decision in favor of life"), cert. denied, 478 U.S. 1020 (1986).
- Stanley v. Zant, 697 F.2d 955, 960 (11th Cir. 1983) (concluding that Eighth Amendment creates "asymmetry weighted on the side of mercy").
- Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981) (emphasizing that the Constitution requires clear instruction on mercy option), cert. denied, 458 U.S. 1111 (1982).
- Buttrum v. Black, 721 F. Supp. 1268, 1318 (N.D. Ga. 1989) (holding that it was improper for prosecutor to argue that mercy cannot be considered at penalty phase), aff'd, 908 F.2d 695 (11th Cir. 1990).

c. Arguing that Jurors Should Show Defendant Same Mercy He Showed Victim Violates the U.S. Constitution and Nevada Law.

A prosecutor may not suggest that jurors show the defendant the same mercy he showed the victim. Exhorting the jurors to act in the same way that the perpetrator of a criminal homicide would act is the antithesis of generating a "reasoned moral response" to the defendant and his crime.

- Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991) (holding that it was impermissible for the prosecutor to argue that jurors should make their decision about whether the defendant should receive the death penalty in the "cruel and malevolent manner shown by the defendant when they tortured and drowned William Nicholls and shot Leonard Miller," which court characterized as an attempt to "incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence").[21]
- Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (per curiam) (holding that prosecutor's argument that jury show the defendant same mercy he showed the victim "was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation."), cert. denied, 513 U.S. 1046 (1994).

d. A Prosecutor May Not Argue that the Defendant Is an Improbable Candidate for Rehabilitation or that the Potential for Rehabilitation is an Impermissible Consideration in Mitigation.

A prosecutor may not comment that the defendant is unlikely to be rehabilitated, or that the defendant's potential for rehabilitation cannot be considered as a mitigating

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[21] The Nevada Supreme Court has not adhered to the federal constitutional rule prohibiting prosecutors from suggesting that sentencers show the defendant the same sympathy or mercy he showed the victim. In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 444-45 (1997), the prosecutor argued that the jury should show the defendant the same sympathy he had shown the victim. Even though the case fell squarely under the federal constitutional rule enunciated in Lesko, this state's Supreme Court nonetheless held that the prosecutor's argument was not improper because the defense had first raised the issue of mercy. The issue of mercy, however, is a proper consideration by sentencers. There is no rule which permits prosecutors to violate the Constitution in response to proper argument by the defense. The court in Williams appears to have misconstrued and misapplied the United States Supreme Court's holding in U.S. v. Young , 470 U.S. 1, 11 (1985), which upheld in certain circumstances the "invited response" rule, under which appellate courts can consider improper arguments by prosecutors in response to *improper* arguments by the defense to determine on *appeal* whether the prosecutor's misconduct amounts to reversible error. The decision in Williams, by contrast, is not limited to the determination of prejudice, but rather, allows prosecutors to respond improperly to *proper* arguments by defense counsel. The decision contravenes well-established federal law holding that it is a federal constitutional violation for a prosecutor to argue either that jurors show no mercy to the defendant or that they show the same mercy the defendant showed the victim.

Arguing that the jury should act in the same manner as the perpetrator of a criminal homicide is also inconsistent with the Nevada Supreme Court's own jurisprudence. In Collier v. State, 101 Nev. 473, 481, 705 P.2d 1126 (1985), the Nevada Supreme Court held that it is improper to "blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' the jury must approach their duties in anger and give the community what it needs.'" Urging the jury to show the defendant the same mercy he showed the victim similarly asks the jury to "approach their duties in anger."

factor.

- Bowen v. Kemp, 769 F.2d 672, 678 (11th Cir. 1985) (improper for prosecutor to express opinion about prospects for rehabilitation in support of death penalty), cert. denied, 478 U.S. 1021 (1986).
- Flanagan v. State, 104 Nev. 105, 108, 754 P.2d 836, 838 (1988) (concluding that prosecutor's reference to defendant's improbable rehabilitation was "particularly objectionable" and ordering new penalty hearing), vacated on other grounds, 504 U.S. 930 (1992).
- Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (calling "highly inappropriate" prosecutor's comment that rehabilitation was improbable), cert. denied, 486 U.S. 1036 (1988).

e. Referring to the Possibility of Escape Without Presenting Evidence On this Question Is Improper.

A prosecutor may not refer during the penalty hearing to the possibility that the defendant will escape unless the defendant presents evidence on this question.

- Hance v. Zant, 696 F.2d at 951-53 (holding that it was improper to mention James Earl Ray's escape from "[w]hat was thought to be the most secure cell in the most secure prison in the United States").
- Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1991) (holding that, without evidence to prove the statement, it is improper to remark that defendant might escape).
- Collier v. State, 101 Nev. at 480, 705 P.2d at 1130 ("Remarks about the possibility of escape are improper. The prospect of escape is not part of the calculus that the jury should consider in determining a defendant's sentence.").

f. Suggesting, Without Evidence Independent of the Offense, that the Person Will be a Threat to Society If He Is Not Executed, Or Would Endanger Future Victims, Violates the Federal Constitution.

A prosecutor may not suggest that the person convicted will pose a threat to society unless he presents evidence independent of the commission of the capital offense.. The constitutional rule that prosecutors cannot suggest at the penalty phase that the defendant poses a continuing threat unless they present evidence independent of the offense is consistent with the Constitution's requirement that aggravating factors narrow the class upon which sentencers can impose the death penalty. The Supreme Court has long held that aggravating factors must "genuinely narrow the

class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Furthermore, aggravating circumstances must permit the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." Lewis v. Jeffers, 497 U.S. 764, 774 (1990); see also Richmond v. Lewis, 506 U.S. 40, 46 (1992) ("[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty"); Clemons v. Mississippi, 494 U.S. 738, 758 (1990) (holding that invalid aggravating circumstance provided "no principled way to distinguish the case in which the death penalty is imposed, from the many cases in which it was not"); Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). In other words, the death penalty cannot be imposed on every defendant convicted of first-degree murder. Were prosecutors permitted to argue, based merely on the offense for which the defendant is convicted, that a defendant poses a continuing threat, sentencers could impose the death penalty on every person convicted of first-degree murder. This would contravene the constitutional requirement that schemes narrow the class of people upon whom sentencers can impose death.

Such arguments may also constitute an impermissible assertion of personal opinion, see section II (A) (3), above, and reference to facts outside the record, see section II (A) (5), above.[22]

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[22] While consideration of the defendant's dangerousness is not impermissible in sentencing, see, e.g., Simmons v. South Carolina, 512 U.S. 154, 163 (1994), (continued...)

- Darden, 477 U.S. at 180 (condemning as "improper" the prosecutor's comment that "*implied* that the death penalty would be the only guarantee against a future similar act") (emphasis added). [23]

- McKenna v. State, 114 Nev. 1944, 968 P.2d 739, 748 (1998) (holding that the prosecutor improperly commented that, whatever the verdict of the jury was, it was "likely to sentence someone to death," suggesting the possibility of a future victim).

- Castillo v. State, 114 Nev. 271, 280, 956 P.2d 103, 109 (1998) (holding that it is improper for prosecutor to present choice between executing the defendant or an innocent person and reaffirming that prosecutor cannot personalize a future victim).

- Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 64-65 (1997) (rebuking prosecutor for personalizing a potential future victim).

- Flanagan v. State, 104 Nev. at 109, 705 P.2d at 838 (explaining that statement, "if I take that chance and give them life, I hope I am right because if you are wrong, there are more [victims] out there waiting to be killed" "impermissibly inflamed the jury's emotion and ... placed undue pressure on the jury to conclude that [the defendant] would undoubtedly kill again unless he himself were put to death").

- McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) (holding that it is improper to try to identify or personalize the future victim).[24]

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[22](...continued)
the vice of the kind of argument cited in this section is that it implies, without evidentiary support, that imposition of the death penalty is the sole means of controlling that danger.

[23] The Nevada Supreme Court has failed to follow federal constitutional law requiring that prosecutors present evidence independent of the offense to prove future dangerousness. In a series of cases, the court has concluded that the prosecution can argue that the defendant will pose a continuing threat even though it presents no evidence other than the offense for which he has been convicted. See, e.g., Jones v. State, 113 Nev. 454, 937 P.2d 55, 65 (1997) (reaffirming that finding of future dangerousness could be based solely on offense itself and need not be based on independent evidence); Witter v. State, 112 Nev. 908, 927, 921 P.2d 886, 889 (1996) (holding that prosecutor could argue that the defendant posed future danger based solely on murder in question), cert. denied, 117 S.Ct. 1708 (1997); Redmen v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992) ("[W]e expand our holding in Riley to allow prosecutors to argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question."), cert. denied, 506 U.S. 880 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995).

[24] The Nevada Supreme Court has not consistently followed federal

(continued...)

- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998) (57.9% of the jurors questioned were more likely to vote for death if they thought that the defendant might present a danger to society).

g. Suggesting to Jurors that the Sentence Is Reviewable or that they Do Not Actually Impose the Death Sentence Violates the Eighth And Fourteenth Amendments To the United States Constitution and Nevada Law.

It is improper to suggest that sentencers are not ultimately responsible for imposing the death penalty, either by telling them that the sentence is reviewable or that they do not actually impose the death penalty. Such arguments also constitute an impermissible reference to facts outside the record. See section II (A) (5), above.

- Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (explaining that it violates the Eighth Amendment to make comments which have the effect of reducing the jurors' sense of responsibility in sentencing the defendant to death in holding that prosecutor improperly told jurors that their decision about the appropriate penalty was reviewable).

- Driscoll v. Delo, 71 F.3d 701, 711 (8th Cir. 1995) (affirming grant of habeas corpus writ because prosecutor remarked that judge was "thirteenth juror" and could overrule them, and that "juries do not sentence people to death in Missouri" even though this was technically accurate), cert. denied, 117 S.Ct. 273 (1996).

- Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir. 1988) (en banc) (holding that it was reversible penalty phase error to tell jurors that the burden of imposing

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[24](...continued)
constitutional law, or its own jurisprudence, in condemning comments on possible future victims. In Bennett v. State, 106 Nev. 135, 141, 787 P.2d 797 (1996), the court held that it was a permissible reference to future dangerousness for the prosecutor to argue "[y]ou possess the power to guarantee that [the defendant] will never again make a healthy, vibrant, caring woman into a corpse." It does not appear that Bennett is distinguishable from McKenna, Castillo, Flanagan, and Jones, cited above. Further, Bennett demonstrates the fact that this kind of argument is based on speculation and matters outside the record, when there is no evidence to support a future dangerousness argument, and thus it is constitutionally impermissible. There is nothing to suggest that the defendant in Bennett would "again make ... a woman a corpse" if he had been given a sentence less than death. See Simmons v. South Carolina, 512 U.S. 154, 157-58 (1994) (defendant constitutionally entitled under due process clause to inform jury that life sentence meant life imprisonment without possibility of parole, where evidence showed that defendant was dangerous to specific class of potential victims and defendant would not be in contact with that class of people in prison).

the death penalty was "not on your shoulders"), cert. denied, 489 U.S. 1071 (1989).

- Wheat v. Thigpen, 793 F.2d 621, 628-29 (5th Cir. 1986) (affirming grant of habeas writ because prosecutor told jury, in violation of Eighth and Fourteenth Amendments, that reviewing court would correct its mistakes), cert. denied, 480 U.S. 930 (1987).

- Tucker v. Kemp, 762 F.2d at 1485-86 (condemning as improper and as having the "effect of trivializing [the sentencing's] importance" the prosecutor's suggestion "that the jury is only the last link in a long decision"), vacated on other grounds, 474 U.S. 1001 (1985).

- Buttrum v. Black, 721 F. Supp. 1268, 1317 (N.D. Ga. 189) (holding that it was error to argue that defendant was only one responsible for death sentence and that the jury was merely a cog in the criminal process), aff'd, 908 F.2d 695 (11th Cir. 1990).

- Taylor v. State, 116 So. 415, 416 (Ala. Ct. App. 1928) (reversing because prosecutor commented that "[t]hey are laying like vultures to take this case to the Supreme Court").

- Plyler v. State, 108 So. 83, 84 (Ala. Ct. App. 1926) (holding that prosecutor committed reversible error by telling jurors that defendant would seek review if unsatisfied with verdict).

- Beard v. State, 95 So. 333, 334 (Ala. Ct. App. 1923) (ruling that it was improper for prosecutor to argue that appellate court would correct jurors' verdict if it is wrong).[25]

h. Inaccurately Describing, or Misleading Sentencers About, the Death Penalty or Alternative Punishments Is Unconstitutional.

A prosecutor may not mislead jurors about the nature of the death penalty or a lesser sentence. Such argument typically suggests facts outside the record as well,

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[25] The Nevada Supreme Court has failed to follow the rule in Caldwell. In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 445-46 (1997), cert. denied, 119 S.Ct. 82 (1998), the court held that it is not a violation of the rule in Caldwell to tell jurors that "the next step in the *long process of justice* is the jury makes a decision as to what is an appropriate punishment. You are *not the last step*. You are the *next step*." (emphasis added). Although, as described above, federal courts have condemned any attempt by prosecutors to suggest that sentencers do not bear the ultimate responsibility for imposing death, the court explained without referring to the holdings in these federal cases or distinguishing them from the case that "an isolated reference to future steps in the case does not amount to prosecutorial error." Id. at 446. See also McKenna v. State, 114 Nev. 1044, 968 P.2d 739, 747 (1998) (holding that prosecutor did not violate Eighth Amendment when elicited testimony from an attorney who represented another inmate about the appeals process and the number of times another inmate on death row had appealed his conviction and sentence).

and often relies upon misstatements of the law or the evidence. See sections II (A) (4, 5), II (B) (1, 2), above.

- Darden v. Wainwright, 477 U.S. 168, 179 (1986) ("improper" to tell jurors that "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public.").

- Antwine v. Delo, 54 F.3d 1357, 1362 (8th Cir. 1995) (holding that the prosecutor violated the Constitution by commenting to the jury that the gas chamber meant that the person "would be put to death instantaneously" and explaining that "[t]he danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty. This diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened need for 'the responsible and reliable exercise of discretion capital cases'"), cert. denied, 516 U.S. 1067 (1996).

- Clayton v. State, 767 S.W.2d 504, 505 (Tex. Crim. App. 1989) (prosecutor exceeded bounds of permissible argument by telling jurors "how quick he will be back out on the streets").

- Jones v. State, 564 S.W.2d 718, 719-21 (Tex. Crim. App. 1978) (prosecutor's comment in closing that "if you don't assess a punishment for both of these characters for a term of years in the Texas Department of Corrections between seven and ten years it won't mean anything" was improper and "clearly was not a request for appropriate punishment based on the evidence").

- Marshburn v. State, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (prosecutor prejudiced jury by urging jury to impose excessive prison term to compensate for, or protect against, action of Board of Pardons and Parolees).

i. **Referring to the Cost of Imprisonment Violates the U.S. Constitution And Nevada Law.**

A prosecutor may not refer to the cost of imprisonment. As the Court of Appeals for the Eighth Circuit explained, "[t]here is simply no legal or ethical justification for imposing the death penalty on this basis and it is not a proper factor to be considered by the jury, for it does not reflect the properly considered circumstances of the crime or the character of the individual." Blair v. Armontrout, 916 F.2d 1310, 1323 (8th Cir. 1990), cert. denied, 502, U.S. 825 (1991). Such comment also constitutes an improper reference to facts outside the record. See section II (A) (5), above.

- Miller v. Lockhart, 65 F.3d 676, 682-83 (8th Cir. 1995) (concluding that prosecutor's improper arguments, including referring to cost of imprisonment, "violated the Eighth Amendment by minimizing the jury's role and injecting irrelevant factors into the jury's deliberations").

- Antwine v. Delo, 54 F.3d 1357, 1362-63 (8th Cir. 1995) (holding that it violates the due process clause for prosecutor to refer to burden tax payers would bear if jurors imposed life, rather than death, sentence), cert. denied, 516 U.S. 1067 (1996).

- Edwards v. Scroggy, 849 F.2d 204, 210 (5th Cir. 1988) (condemning as "improper" prosecutor's comment that a life sentence would permit the defendant to "live off the taxpayers' money for ten years ... [a]nd get fed and housed and given all the conveniences of life"), cert. denied, 489 U.S. 1059 (1989).

- Tucker v. Kemp, 762 F.2d 1480, 1486 (11th Cir. 1985) (en banc) (explaining that remarks about cost of life imprisonment or the burden taxpayers will shoulder are "completely alien to any valid sentencing consideration").

- Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985) (holding that it was "clearly improper ... to argue that death should be imposed because it is cheaper than life imprisonment").

- Collier, 101 Nev. 473, 481, 705 P.2d 1126, 1131 (1986) (ordering new penalty hearing where the prosecutor told jurors that the state would spend $35,000 for every year that Collier spent in prison and explaining that "[t]o proffer the issue of saving money through a particular sentence for the defendant is improper").

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j. A Prosecutor May Not Comment On Mitigating Factors During Argument Which the Defendant Did Not Raise.

It is impermissible for a prosecutor to comment on mitigating factors which the defendant does not raise for a number of reasons. First, it suggests that jurors are restricted in the sentencing process to only the mitigating factors the prosecution discusses. Second, it suggests that the defendant is more worthy of receiving the death penalty because his case does not present mitigating factors found in other cases, which is fundamentally inconsistent with the principle of individualized sentencing.

- Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and Fourteenth

Amendments).

- Lockett v. Ohio, 438 U.S. 586, 604 (1978) (restricting consideration of sentencers to a handful of specified mitigating factors violates the Eighth and Fourteenth Amendments).

- State v. DePew, 528 N.E.2d 542, 557 (Ohio 1988) (explaining that "[i]f the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution").

- State v. Bey, 709 N.E.2d 484, 497 (Ohio 1999) ("As in State v. Mills, ..., here 'the prosecutor did err by referring to statutory mitigating factors not raised by the defense, when he explained why those statutory mitigating factors were not present.'").

4. INVOKING THE AUTHORITY OF THE STATE OR TELLING JURORS THAT THE STATE RARELY SEEKS DEATH IS UNCONSTITUTIONAL.

A prosecutor may not tell jurors that the state rarely seeks the death penalty. This kind of argument impermissibly invokes the prestige and authority of the state and constitutes an expression of personal opinion and a reference to facts outside the record. See sections II (A) (3, 5), II (B) (4), above.

- Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998) (comment that crime was "disgusting and it's as cold as anything I've ever seen," in support of aggravating factor, was "clearly improper" because "[i]t invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").
- Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985) (holding that it is improper for a prosecutor to suggest to jurors that the prosecution rarely seeks the death penalty and explained, "[i]t is wrong for the prosecutor to tell the jury that, out of all possible cases, he has chosen a particular case as one of the very worst. While facts of the crime can be stressed to show the seriousness of the case, the prosecutor's careful decision that this case is special is irrelevant and is potentially prejudicial. Such comments, made by an experienced prosecutor, may alter the jury's exercise of complete discretion by suggesting that a more authoritative source has already decided the appropriate punishment.").

- Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) ("Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint.").

5. ARGUMENTS PRESSURING JURORS TO IMPOSE THE DEATH PENALTY

ARE IMPROPER.

a. **Telling Jurors to Do Their Jobs, to Fulfill their Civic Duty, to Act as the Conscience of the Community, To Correct Society's Ills, to Send Out a Message (Deterrence), or To Seek Revenge, in Support of the Death Penalty is Improper.**

A prosecutor may not suggest to sentencers that it is their duty to impose death. In U.S. v. Young, the Supreme Court held that a statement by the prosecutor that the jury should do its "job" has "no place in the administration of justice." This kind of argument is inconsistent with the principles of individualized sentencing and the jury's duty of making a "reasoned moral response" to the defendant and his crime, by suggesting that the jury should engage in the kind of "payback" associated with criminal vigilantes. See section II (B) (10), above.

- Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1990) (holding that it was reversible error to suggest at penalty phase that jurors had an obligation to "even the score for two murders"), cert. denied, 502 U.S. 898 (1991).
- U.S. v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) (finding no difference between "urging a jury to do its job and urging a jury to do its duty" because "such an appeal is designed to stir passion").
- Tucker v. Kemp, 762 F.2d 1496, 1508 (11th Cir. 1985) (holding that it was improper for prosecutor to emphasize importance of decision and to tell jurors they were last line of defense against Tucker).
- Hance, 696 F.2d at 952 (holding that it was improper for a prosecutor to appeal to the patriotism and courage of sentencers, "extorting them to join in the war against crime" by returning a death verdict).
- Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985) (holding that the description of jurors as "soldiers in the war on crime" was improper).
- Schoels v. State, 114 Nev. 981, 966 P.2d 735, 740 (1998) (recognizing "well-established prohibition against" referring to the jury as "conscience of the community).
- Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) ("Gregg in no way supports the view that a prosecutor may blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' they must approach their duties in anger and give the community what it 'needs.'"), cert. denied, 486 U.S. 1036 (1988).
- Flanagan, 104 Nev. at 112, 754 P.2d at 840 (ordering new penalty hearing where prosecutor commented that "if we don't punish, then society is going to

laugh at us," which court concluded "serve[d] no other purpose than to raise the specter of public ridicule and arouse prejudice against Flanagan.").

Further, the improper arguments seeking to identify the state with the victim, asking the jurors to put themselves in the victim's shoes, or otherwise inflaming the jury on the basis of emotional factors relating to the victim, are equally improper in the penalty phase of the trial. The defendant incorporates the authorities cited in section II (B) (7) as if fully set froth herein. See also Payne v. Tennessee, 501 U.S. 808, 825 (1991) (due process clause limits admission of victim impact evidence that is unduly prejudicial).

b. Equating the Death Penalty with Self-Defense is Unconstitutional.

A prosecutor may not equate the death penalty with an act of self-defense by the community.

- Kirkpatrick v. Blackburn, 777 F.2d 272, 283 (5th Cir. 1985) (explaining that it is impermissible to focus the jury's attention on the law of self-defense as the basis for giving the death penalty. It is thus improper to urge the death penalty "'simply because lethal force could have been used in defense of the victim.'") (quotation omitted).

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IV.

CONCLUSION

For all the reasons stated above, the defendant respectfully submits that this Court should enter an order in limine, prohibiting the prosecutor from committing any

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A By that time, we was in the living room. By that time, we was back in the living room.

Q Okay.

A And he said, "You're supposed to go to sleep after you kill somebody."

Q He said, "You're supposed to go to sleep after you kill someone,"?

A Yes.

Q Now, how is it that, if you were sleeping in the living room–or no, in the master bedroom and he kissed you, how is it that you then were in the living room?

A Because that's where we got up and went because that's where everybody was at.

Q So, you got up and walked into the living room?

A Yeah.

Q Where was Deko was you walked into the living room?

A He was–he came–he went and sat on the couch.

Q And who else was in the living room once you walk into the living room and Deko sits on the couch in the living room?

A Red, and Tiny Bug, and Todd.

Q Now, after Deko said, "You're supposed to go to sleep after you kill someone," did he say anything else about where he had been or what he had done?

A No.

Q Did Red, while Deko was seated in the living room and while you were in the living room, and Red and Tiny Bug and Todd were in the living room, did Red say anything?

A No.

Q How about Bug?

A No.

Q Now, can you tell me, as you looked at Deko, how Deko was acting once he got home that night?

MR. FIGLER: I'll object to this, Your Honor. It's a -- ambiguous question.

THE COURT: Overruled.

Q (By Mr. Guymon) What was Deko's demeanor, or how did he look?

A He looked the same to me.

Q And what was Deko wearing when he got back home after six hours?

A He had the same thing on. He had the same thing on.

Q Black jeans?

A Yeah.

Q Same shirt?

A Yeah.

Q Do you remember, if you know, if you have personal knowledge, do you know what brand the black jeans were?

A No.

Q Okay. And tell me: did you look at Red and see Red that night in the living room?

A I mean, I'm pretty sure I did, but I didn't look at him like that.

Q Okay. Do you remember anything about Red's demeanor or Bug's demeanor, how they acted?

A Yeah.

Q Can you describe that as you saw it?

A They act like they was all paranoid and stuff. They acted all paranoid, and scared, and stuff.

Q How many minutes, or how long did you stay up with these four people, now, in the living room?

A I don't know how long. I don't know how long it was before we went back to sleep.

Q Did you go back to sleep that night?

A Yeah.

Q Where did you sleep?

A In the master bedroom.

Q Where did Deko sleep, if you know?

A In the master bedroom.

Q With you?

A Yes.

Q And where did Red sleep?

A I don't remember.

Q Okay. Now then, did you talk, at all, about what Deko had done–

MR. FIGLER: Objection, Your Honor. It pre-supposes that Deko had done something and it's leading.

THE COURT: What is the full–what is the full question?

MR. GUYMON: The question was: had you–did you talk with Deko the next day about what he had done, or where he had been for those six hours?

THE COURT: Overruled.

Q (By Mr. Guymon) Do you understand the question?

A No.

Q When you wake up–did you wake up the next day?

A Yes.

Q All right. When you woke up the next day, did you talk with Deko about what he had done or where he had been during those six hours that he had been gone for?

A We talked a little.

Q Okay. Tell me where you're at when you talk with Deko.

A No, but that's not how it went. First we went into the living room or whatever. And we was sitting in there. And then he said–

MR. FIGLER: Your Honor, this is non-responsive--

A –to watch the news.

MR. FIGLER: –to the specific question.

THE COURT: Wait until there is a new question.

Ask a new question, please, Mr. Guymon. Sustained.

Q (By Mr. Guymon) After you woke up that morning, what happened first?

A We went in the living room.

Q And who is "we"?

A Me and Deko.

Q And who else was in the living room, if anyone?

A Red.

Q Anyone else?

A No.

Q All right. And what does Deko say once you get into the living room?

A He said, "Watch the news."

Q Okay. And did you watch the news?

A Yeah.

Q And what did you see on the news?

A I seen Matt. I seen Matt on the news.

Q Did you recognize Matt?

A Yeah.

Q And how was it that you recognized Matt?

A Because he had came to the house a couple of days before.

Q Now, when you saw Matt on the news, did you say anything about that?

A Yeah.

Q What did you say?

A I was like–I said–I asked him–I was like you did–and then it was like I was fucked up.

Q And what did Deko say, if anything?

A He told me just be quiet and don't worry about it.

Q Did you want to talk about that?

A I wanted to know–not at first. I didn't want to talk about it at first.

Q Why?

A Because I ain't never seen nobody in my face one day and the next day they was on

the news and they was dead.

Q Did you end up talking about that?

A Yeah.

Q And who did you talk to about that?

A Deko.

Q And where were you at when you talked to Deko about what you had now seen on the news?

A In the room.

Q Which room?

A The master bedroom.

Q Okay. And who was there in the master bedroom?

A Just Deko and myself.

Q And tell me what it is Deko and you said to one another about what you had seen on the news.

A I asked him why he did it. And he said he had to because they knew him. And then one of them was talking shit.

Q Did Deko–describe or explain which one was "talking shit," to use your expression.

A Yeah.

Q Who did Deko describe as talking?

A The Mexican dude.

Q What did Deko say the Mexican dude had said?

A He was just talking–disrespecting him.

MR. FIGLER: You know, Your Honor, this is double hearsay.

THE COURT: Overruled.

Q (By Mr. Guymon) What did Deko say the Mexican boy had said?

A He was disrespecting him and talking–

Q Did he give an actual quote of what the Mexican boy said?

A He was just like Cuz. He was like "Cuz, what's going on?" or whatever like that.

Q So, the Mexican boy had said–or called Deko "Cuz" and said, "What's going on?"?

A Yeah.

Q Did Deko explain how it all started and what had happened at the Terra Linda house?

MR. SCISCENTO: I'm going to object to that, Your Honor. I think we need more foundation; it's a little speculative.

THE COURT: I'll sustain it as to the form of the question.

MR. GUYMON: Okay.

Q (By Mr. Guymon) During this conversation as Deko told you that he had to do it because these boys knew who they were, did Deko explain what had actually happened to the boys?

THE COURT: Would you approach the bench before she answers that, please?

(Whereupon a bench conference was held, not recorded)

THE COURT: Go ahead if you recall the question. Otherwise, he'll ask it again.

THE WITNESS: Could you ask it again?

MR. GUYMON: All right.

Q (By Mr. Guymon) during the conversation that you had with Deko back in the master bedroom, did Deko tell you what happened to the boys at the Terra Linda house?

A Yeah.

Q Tell me what Deko told you happened at the boys at the Terra Linda house.

A That he–that they–they duct-taped them up.

Q Who duct-taped them up?

A I don't know who did it, but they was the ones there. So, they did it.

MR. FIGLER: Your Honor, I'm going to object and move to strike that as speculative. It was pretty clear that she didn't receive that as a statement from anybody, that she assuming.

THE COURT: Sustained.

Q (By Mr. Guymon) What did Donte Johnson tell you happened from the time–when they first got to the house, let's start there.

A He got out the car. He told them, "Get they fucking ass in the house."

Q Okay. So, Donte said to the boys at the Terra Linda house, "Get the fuck in the house"?

A Yeah, "Get your fucking ass in the house."

Q And that's what Donte said he said?

A Yeah.

Q Okay. Did Donte tell you where the boys from Terra Linda were at when Donte first saw them?

A On the front yard. In they front yard.

Q Did Donte tell you how many boys from Terra Linda were in the front yard when Donte first saw them?

A Two of them.

Q Okay. Did Donte tell you after he ordered the boys, the two boys into the house, if Donte had a weapon?

MR. FIGLER: Your Honor, I'm going to object to the forms of these questions. If he wants to ask her what Donte said, Your Honor has already ruled as far as that goes. But if he's suggesting the answer to her, if he's going through and keep reiterating the testimony from before to somehow enhance it, I'm going to object to that form of question.

THE COURT: I don't perceive that's what he's doing. I would sustain it if so. I will watch–listen more carefully. I will overrule it as to this time.

Q (By Mr. Guymon) When Donte Johnson told you–I'm trying to–when Donte Johnson told you that he ordered the boys into the house, did Donte tell you if he had any weapons?

A No, not that I remember.

Q Okay. Did Donte tell you what Red and Sikia were doing as Donte told the boys to get in the house?

MR. FIGLER: Your Honor, I'm going to–

A No.

MR. FIGLER: –I thought my objection was sustained and it's the same form of question, leading her through.

THE COURT: No, it was overruled. And I don't think it is. But, you can continue to make it if it is bothering you.

Go ahead and answer if you recall the question.

MR. GUYMON: And I think that she answered no, that he didn't.

THE COURT: Go ahead.

Q (By Mr. Guymon) Was that your answer?

A Yes.

Q Okay. Now, take me from what does Donte tell you next about what happened after the boys are ordered into the house?

A I don't remember.

Q Okay. Do you recall–well, anything else about what Donte said once the boys got in the house, did Donte tell you what everyone did in the house?

A No.

Q Okay. What did Donte tell you happened once Donte got in the house?

A They had duct-taped them.

Q Okay, they had duct-taped them?

A Yeah.

Q Did Donte tell you how they duct-taped them?

A Face down with their hands behind they backs.

Q Did Donte tell you how many boys, total, got duct-taped in that style?

A No, he didn't tell me.

Q Once the boys were duct-taped, did Donte tell you what he, then, did?

A No.

Q Did Donte tell you what Red had done while in the house?

A No.

Q Did Donte tell you what, say, Tiny Bug had done?

A No.

Q Now, then, you indicated that Donte told you that–was it that they had to do it

because they knew them. Was that the quote?

MR. FIGLER: Objection, Your Honor, asked and answered. He's doing that again.

THE COURT: It's preliminary to the next question; overruled.

Q (By Mr. Guymon) Did Donte tell you who shot the boys?

MR. FIGLER: Objection; asked and answered. She said no one was–no one told her.

THE COURT: I don't recall it; overruled.

Q (By Mr. Guymon) Did Donte tell you who shot the boys?

A No, but he told me–

MR. FIGLER: Objection, Your Honor. It's non-responsive. It was a yes or no question.

THE COURT: Anything beyond that would be non-responsive. Ask your next question; sustained.

Q (By Mr. Guymon) Other than you said no, did he tell you anything about how the boys died?

A Yes.

MR. FIGLER: Objection, Your Honor, asked and answered. He asked her if anything else was said; asked and answered.

THE COURT: Overruled.

Q (By Mr. Guymon) Did he tell you how the boys died?

A Yes.

Q Excuse me?

A Yes.

Q How did he tell you they died?

A They got shot in the back of the head.

Q And he said, "they got shot"?

A I don't know, yeah. That's what I remember.

Q You remember him saying "they got shot"?

A Yeah, because he didn't–yes, yes.

Q During your conversation with Donte in the bedroom, did Donte ever say who shot

the boys?

A He told me he shot the Mexican dude.

Q Donte said he shot the Mexican dude?

A Yeah.

Q Did Donte tell you who shot any of the other three boys?

A No.

Q Now, then, during your conversation with Donte, did Donte tell you if any property or money was taken from the boys at Terra Linda?

A No.

Q Did Red–now, let me ask you a little bit about Red. Did Red ever come back into the bedroom and talk to you when you talked to Donte?

A No.

Q Did you ever talk with Red about what happened to the boys at Terra Linda?

A No.

Q Did you ever hear Donte and Red talking about what happened to the boys?

A No.

Q With each other?

A No.

Q Okay.

MR. SCISCENTO: Your Honor, may we approach for a moment?

THE COURT: Yes.

(Whereupon a bench conference was held, not recorded)

THE COURT: Go ahead.

MR. GUYMON: Judge, I've shown counsel what has been marked State's proposed exhibits 4 through 13. If I could approach the witness.

Q (By Mr. Guymon) Mrs. Severs, showing you what has been marked as State's proposed exhibit 4–

MR. SCISCENTO: May I approach, too, Your Honor, so I can view them, too. I don't

know which numbers he's talking about.

THE COURT: Sure.

Q (By Mr. Guymon) Do you recognize that particular photograph?

A Yes.

Q And what is that a photograph of?

A The Everman house.

Q Is that where you, Deko, and Red stayed during the month of August?

A Yes.

MR. GUYMON: I'd move for the admission of State's proposed exhibit 4.

MR. SCISCENTO: No objection as to 4, Your Honor.

Q (By Mr. Guymon) And were you familiar with some of the items that were in the Everman house in the month of August, 1998?

A Yes.

Q All right. Showing you what's been marked as State's proposed exhibit 5–

THE COURT: Is there any way to do them as a group?

MR. GUYMON: Sure. I can do them 5 through 13.

Q (By Mr. Guymon) Why don't you look at all those photographs.

Have you seen all 5 through 13?

A Yes.

Q And do you recognize photographs 5 through 13?

A Yes.

Q Do photographs 5 through 13 fairly and accurately show the things that were in the house right around August 14th, 1998?

A Yes.

MR. GUYMON: I'd move for the admission of 5 through 13.

MR. SCISCENTO: Your Honor, I object as to–

THE COURT: Well, you did make certain objections at the bench. I'll overrule them at this time subject to later–

MR. SCISCENTO: If I may, at least put on the record as to exhibit number 10. It shows a picture of a–and I'm not sure what kind of gun this is–it does show a picture of a gun. My motion is exclude this because there's no proof this gun was ever used. This is not alleged to be the murder weapon. We don't know if it was ever used in any connection to any crime that my client is being tried for.

And, Your Honor, I would ask, at this time, seeing that we're trying to admit some evidence, if I take this witness on voir dire as to ask her specifically regarding exhibit number 10, whether or not, in fact, this was–she had any prior knowledge of this, if she knew on the night of this incident if this was one of the guns she alleges is inside that bag. If not, I would move to exclude it.

THE COURT: All right. We'll admit it all and you can take that up on cross. And if you're successful in the motion that we discussed at the bench, we'll edit the tape later.

MR. SCISCENTO: As for the voir dire, Your Honor?

THE COURT: No, you can do that on cross.

Go ahead, Mr. Guymon.

Q (By Mr. Guymon) Now, I've been showing you exhibit–let's start with 10, 11, 12, and 13. Can you tell me what bedroom is shown in 10 through 13?

A The master bedroom.

Q And can you tell me–there are two pair of black jeans in the master bedroom. Is that correct?

A Yeah.

Q Whose jeans were those?

A Red and Deko.

Q And there are some black FUBU shoes and some, oh, I don't know, green FUBU shoes and some black Nikes. Can you tell me whose shoes those are?

A Red and Deko.

Q And there are also–and that would be in State's proposed exhibit 13–some women's shoes on the bottom corner as well as women's shoes in 10. Whose shoes are those?

A My shoes.

Q The gun, in State's exhibits 13 and 10, had you ever seen that gun before?

A Yeah.

Q And when had you seen that gun?

A All the time.

Q And at what location had you seen that gun?

A What do you mean, location in the house?

Q Well, is that where you had seen it, at the Everman house?

A Yes.

Q Was that gun in the brown and tan bag on the night these boys left?

A Yes.

Q And showing you what is exhibit 12, do you see on that black pair of pants a spot on the pants?

A Yeah.

Q Do you remember seeing that spot on the pants when Deko came home that night?

A No.

Q Okay. And exhibit number 8 and 9, do you see a tote bag in 8 and 9?

A Yes.

Q Do you recognize that tote bag?

A Yes.

Q And what tote bag is that?

A That's the bag that they carried the guns in.

Q Is that the same bag that they left with that night?

A Yes.

Q There's also a roll of duct tape in the bag. Is that correct?

A Yeah.

Q Had you seen that duct tape at the house–

A Yes.

Q --before?

A Yes.

MR. SCISCENTO: I'm objecting. Duct tape is duct tape, Your Honor. I don't think you can say specifically that duct tape was at the house.

THE COURT: Something for cross examination, Mr. Sciscento; overruled.

Q (By Mr. Guymon) Now, showing you what has been marked as--or what is marked as State's exhibit 7, do you know whose stuff is in the shoe box there?

A Yeah.

Q Who?

A Some of that stuff I know. The Black and Mild, they Deko's and the-- is ours because we smoke weed, whatever.

Q Okay. You say the Black and Mild box was Deko's?

A Um-hum.

Q Now, who at the Everman house smoked Black and Milds?

A Deko.

Q Did anyone else at the Everman house smoke Black and Milds?

A No.

Q And how often did Deko smoke Black and Milds?

A All the time.

Q And just what are Black and Milds, ma'am?

A It's a sweet cigar.

Q A sweet cigar?

A Um-hum.

Q Is that a yes?

A Yes.

Q All right. And showing you what's been marked as State's proposed--State's exhibit 5, do you recognize State's exhibit 5?

A Yes.

Q There is a Nintendo and a video machine in State's exhibit 5.

MR. SCISCENTO: Your Honor, I would object to that as leading. If she's seen it, she knows what it is.

THE COURT: Overruled, preliminary.

Q (By Mr. Guymon) Well, can you tell me–all right. The Ninetendo and the video machine?

A Um-hum.

Q Do you know where the Nintendo and the video machine came from?

A No.

Q Had the Nintendo and the video machine been–were they at the house when you moved in on the 4th?

A No.

Q When did you first see the Nintendo and the video machine?

A I don't remember what date it was.

Q Do you remember if it was before or after thee 14th?

A It was after.

Q After the 14th?

A Yes.

Q Now, then do you recall or do you remember approximately how many days after the 14th that the police came to the Everman house?

A Yeah. It was like on the 18th.

Q You say like on the 18th?

A Yeah.

Q And when the police came, who was home on the 18th?

A Me, Deko, and Scale.

Q And who is Scale?

A Deko home boy.

THE COURT: Mr. Guymon, let me ask you: how much longer do you expect direct to

take?

MR. GUYMON: About 10 to 15 minutes, Judge.

THE COURT: Let's take a break. And just so everybody knows, we're going to go through the lunch hour, whatever it takes to finish this up.

Let's take about a five-minute recess until 25 after 11:00, break it up a little.

(At the hour of 11:20 a.m., the Court recessed until 11:25 p.m.)

THE COURT: Go ahead.

Q (By Mr. Guymon) On August 18th, 1998, the police came to the Everman house you said. Is that correct?

A Yes.

Q And did the police want to talk to you about what you knew about the murders?

A Yes.

Q Did you want to talk to the police?

A No.

Q Did you tell the police the truth that night?

A No.

Q Why?

A Because I didn't want to get Deko in trouble.

Q And why didn't you want to get Deko in trouble?

A Because he's my boyfriend.

Q How did you feel about him back on August 18th, 1998?

A I loved him a lot.

Q And how do you feel about him today as you sit there?

A I still like him a little.

Q Excuse me?

A I still like him a little.

Q Is it difficult to testify today?

A Yeah.

Q Why?

A Because I know it's going to get him in trouble.

Q Do you want to get him in trouble?

A No.

Q Now, then, do you recall testifying in front of the grand jury on September 1st, 1998, two weeks after the police spoke to you?

A Yeah.

Q And did you understand then, in front of the grand jury, that you were under oath?

A Yeah.

THE COURT: Would you approach the bench, please?

(Whereupon a bench conference was held, not recorded)

Q (By Mr. Guymon) Now, then, let me ask you–I'm going to leave September 1st of 1998 and go to September 15th of 1998. Do you recall testifying in front of the grand jury on that date, a second time?

A Yeah.

Q And do you recall me asking you questions about what happened in the house at Terra Linda?

A Yeah.

Q Do you recall–or do you remember now, perhaps, what Donte said about blood, if anything in the Terra Linda house?

MR. FIGLER: Objection, Your Honor. I'll object to all this. If he's going in any substance of the grand jury testimony and the nature of this type of question is improper.

THE COURT: Well, I don't know quite what the grounds that you're of, but I think on some grounds it is. Ask her a question, perhaps she'll need to refresh her recollection, maybe there's some additional foundation, but at this time it's sustained.

Q (By Mr. Guymon) Let me ask you this: during your conversation with Donte back in the master bedroom, the next day, do you recall you and I talked about that today, or me asking you questions about that today?

A Yeah.

Q Okay. And do you recall what Donte said about the blood, if any, at the Terra Linda house?

MR. SCISCENTO: Your Honor, I object. I don't think any statement was made regarding that.

THE COURT: Rephrase the question.

MR. GUYMON: Well, I've not asked her any questions about it.

HE COURT: Well, I thought that was the end of your question.

MR. GUYMON: No, actually, I didn't ask her any questions. I realize I failed to. So, I was going to return now to it.

THE COURT: Go ahead. Pose a question. Maybe I misheard it. I thought you had already asked the question. I don't mean earlier, I meant just right now.

MR. GUYMON: Okay.

THE COURT: And the way I heard it right now, it didn't seem proper. But go ahead,and ask her again, maybe I wasn't listening carefully enough.

Q (By Mr. Guymon) After the homicide, when you and Donte talked about it, did Donte ever talk to you about the blood, if any, at the Terra Linda house?

MR. SCISCENTO: Objection, leading, Your Honor.

THE COURT: Overruled.

A Yes.

Q (By Mr. Guymon) And what did he say about the blood at the Terra Linda house?

A That it squirted out. It just squirted up like a waterfall, I guess.

Q Did he say like a waterfall?

A Yeah.

Q Okay. Have you ever used any other term to describe the bloodshed at the Terra Linda house?

MR. SCISCENTO: I'm going to object as leading, Your Honor. I think it's asked and answered.

THE COURT: Overruled.

A I don't remember.

Q (By Mr. Guymon) Okay. I'm directing your attention to September 15th, 1998. Do you recall testifying in front of the grand jury?

A Yes.

MR. FIGLER: Counsel, what page?

MR. Sciscento: Page 43. Do you have that?

(Conference between counsel, not recorded)

MR. GUYMON: Let me strike that question.

Q (By Mr. Guymon) As Donte, during your conversation with Donte, described to you the blood, did he say anything about any noises that the victims made?

MR. SCISCENTO: Objection, leading, Your Honor.

THE COURT: Overruled.

A I asked him what kind of noise they made after he shot them.

Q And what did he–what was his answer?

A Yeah, they made noise.

Q And did he describe the noise to you?

A Yeah.

Q How did he describe it?

A It was like they made a noise like "uh." After they shot in the back of the head, it was like a "uh" noise or whatever.

Q Now, then, I asked you earlier about how much money–if you know how much money was taken. Is that correct?

A Yeah.

Q And you said you don't remember?

A Yeah.

Q Okay. Do you recall–page 44, counsel–on September–

MR. SCISCENTO: Your Honor, if I may.

(Conference between counsel, not recorded))

MR. GUYMON: And I'm referring to September 15th, 1998, page 44.

If I could approach, Your Honor?

THE COURT: Sure.

MR. FIGLER: Court's indulgence.

THE COURT: Yes?

MR. FIGLER: Could we wait before we do this?

THE COURT: Sure, wait until he finds it.

MR. SCISCENTO: The problem I've got, Your Honor, is I've got the September 15th transcript which shows both of her testimonies, one–recall, but mine is numbered from 1 to 200-I'm sorry, 1 to 118.

THE COURT: Well, why don't you just look at what Gary is going to show her and regardless of the page, it will clear it up.

MR. GUYMON: If I could approach, Judge?

THE COURT: Go ahead.

Q (By Mr. Guymon) Do you recognize your name at the top of this transcript?

A Yes.

Q Is that a copy of your answers in front of the grand jury on September 15th, 1998?

A Yes.

Q Directing your attention to page 44, do you recall me asking you the question, "Did Donte tell you how much–"

MR. FIGLER: I'll object, Your Honor; this is improper.

THE COURT: It is. If you would ask her another question, perhaps we could get to this, but I haven't heard the predicate question.

MR. GUYMON: Okay.

Q (By Mr. Guymon) Do you remember me asking you whether or not Donte talked about how much–

MR. FIGLER: Your Honor, this whole thing–is he going to testify as being a witness here

or something?

THE COURT: The way I perceive it, Mr. Guymon–

MR. FIGLER: He's trying to force his ideas down this witness' throat.

THE COURT: If the sense of the objection, which I agree with, is: you have to ask her a question, whatever it is, and if she doesn't remember, then you can show her the transcript.

MR. GUYMON: Okay. I thought I had done that, but let me do it.

Q (By Mr. Guymon) Do you recall any discussion with Donte Johnson about how much money, if any, they took from the house?

A Yeah.

Q Okay. And what do you recall about that?

A That they didn't get–they only got a couple hundred bucks.

Q How much?

A Like a couple hundred bucks.

Q Okay. And did Donte Johnson say anything about how little or how much money they got from the robbery?

A Yeah, he–yeah.

Q And what did he say?

A That they only got a couple hundred bucks. And that Todd sent them on a fucked-up mission or whatever.

MR. SCISCENTO: I'm going to object and move to strike the remaining as unresponsive, Your Honor. The question was, "How much did they receive?" Anything after that about the amounts is unresponsive.

THE COURT: All right. Technically it is; sustained. He can ask another question to elicit that if he wishes.

Q (By Mr. Guymon) After Donte told you that they only got two hundred dollars, did he say anything about how much they had gotten?

A No, just that it was fucked up; they just got a little bit.

MR. SCISCENTO: Objection, Your Honor. Again, the same thing; it's unresponsive. And

I think it's an asked and answered question.

THE COURT: It's close enough. I suppose he could say to her, "What, if anything else, did he say?" But I think we're past that. We've heard the witness' answer; overruled.

Q (By Mr. Guymon) Now then, can you describe lastly the size of Terrell Young. How tall and what weight is Terrell Young back in August of '98?

A Like 5'7" or 8". He weighs like 250 pounds, something like that.

Q And how tall was Donte Johnson in August of 1998?

A Like 5'5".

Q And about how much did Donte Johnson weigh?

A Probably like 140.

Q And how about Sikia Smith, how tall was he?

A Like 5'7", 5'8".

Q And his weight?

A 120.

Q If you know, did Deko and Red wear the same size jeans?

A No.

Q Whose jeans were bigger?

A Red's.

Q How did Donte wear his jeans back in August of '98?

A Like baggy fitting. Like baggy fitting.

Q And can you tell me, if you know, who the leader of those three were?

MR. FIGLER: Objection.

MR. SCISCENTO: Objection, Your Honor. I don't see the relevancy.

MR. FIGLER: And characterization.

THE COURT: Sustained.

MR. GUYMON: Court's indulgence.

Q (By Mr. Guymon) One last question, or area: during your conversation with Donte Johnson about what happened to these boys when you were in the bedroom, did you have any

conversation about any noise that was going on at the time of the shooting, or any sounds?

MR. SCISCENTO: Objection; leading, Your Honor.

THE COURT: Overruled. I don't think it suggests the answer.

A Yes.

Q (By Mr. Guymon) Okay. And can you tell me about that conversation as well?

A They turned the music up so nobody could hear the gunshots.

Q And who told you that?

A Deko.

Q And when Deko said that, who did he say turned the music up?

A I don't remember who he said did it.

Q Okay. If I showed you your voluntary statement, do you recall speaking to the police?

A A number of times.

MR. SCISCENTO: What page?

MR. GUYMON: September 3rd, 1998.

MR. FIGLER: What page?

MR. GUYMON: Page 21.

Q (By Mr. Guymon) First of all, do you recognize this particular statement?

A Yes.

Q Did you, in fact, talk to the police on September 3rd, 1998?

A Yeah.

Q If I were to show you your response to that question, would it refresh your recollection--

A Yes.

Q –as to who you said turned the music up?

A Yeah.

Q Okay. I'll show you right here and ask you to read the question to yourself first and then the answer. And it's the third to the last question on the page.

A I see it; I read it.

Q Do you recall what your answer was to the police on September 3rd regarding who turned the music up?

A Yeah. I said, "He turned the music up."

Q And who were you referring to?

A Baby Deko.

MR. GUYMON: Pass the witness, Your Honor.

THE COURT: Cross?

MR. SCISCENTO: Thank you, Your Honor.

MR. FIGLER: First, Your Honor, I'd like to make a motion. During the course of Ms. Severs' direct testimony, there have been numerous objections by defense counsel as to leading. It's our position that when asked general questions, Ms. Severs gave a response. And then with the succession of following leading questions, she was able to conform her testimony with what the prosecutor wanted.

In that impact, we would renew our motion that this video taped deposition be stricken and not be allowed to be introduced at the time of trial. And also that her testimony be stricken because of the cumulative and prejudicial nature of the leading questions of the prosecutor impacting on the due process and fair trial rights of Mr. Johnson.

THE COURT: I guess we have a different view of what constitutes leading and how much discretion the Court has to permit it, Mr. Figler; denied. Process with the cross examination.

MR. SCISCENTO: Thank you, Your Honor.

THE COURT: Perhaps we can resolve that before trial so that it moves more quickly.

CROSS EXAMINATION

BY MR. SCISCENTO:

Q Ms. Severs?

A Yes?

Q How are you today?

A All right.

Q The dress that you're wearing is a nice dress. Where did you get that dress?
A The one I got on right now?
Q Yes.
A My sister bought it.
Q Okay. Yesterday you weren't wearing that dress, though, were you?
A No.
Q You were in prison garb yesterday?
A Yeah.
Q Were you in handcuffs yesterday?
A No.
Q This morning where did you wake up at?
A At the jail house.
Q Okay. You're in custody?
A Yeah.
Q Your hairstyle today–you dyed your hair last night?
A No.
Q When did you dye your hair?
A It's not dyed.
Q Yesterday afternoon your hair was red?
A Well, gel–when you put gel on it, gel makes your hair get darker.
Q Okay. So, it's a different color than it was yesterday?
A Yeah, because of the gel.
Q And you're in custody today because the prosecution placed you in custody. Is that correct?
A Yes.
Q Okay. And what are you in custody for?
A Because of a material witness warrant.
Q What's your anticipation if you testify today, what's going to happen to you as to

that material witness bond?

A Could you like rephrase that?

Q Well, let me ask you this: do you anticipate today, if you testify, you're going to be released?

A Yes.

Q From custody?

A Yes.

Q And who is going to release you from custody?

A The Judge.

Q At the request of who, the prosecution?

A I believe so.

Q Okay. I didn't place you in custody? I want to make sure I understand that. Is that correct?

A Yes.

Q You have given numerous statements previously: September 3rd, September 18th, August–September 15th, September 1st, September 11th. But you gave different varying stories about what happened on the night of the murder. Is that correct?

A Yeah.

Q You've given five different statements?

A I'm not sure how many it is.

Q Okay. You've written two other letters? Two letters, one dated December 2nd, '98 regarding this case?

A Yeah.

Q One dated September 27th, '98 regarding this case?

A Yes.

Q That's 9/27/98?

A Um-hum.

Q In those statements and all those other statements, you give different stories,

correct?

A Yeah.

Q But today you give another story. Why is that?

A Because I don't want to go to jail for no perjury.

Q That's right. You don't want to go to jail for perjury?

A Exactly.

Q You're also in custody, or you were in custody for possession of a stolen vehicle, correct?

A Yeah.

Q That's a felony?

A Um-hum.

Q Is that a yes?

A Yes.

Q You could serve time on a felony, correct?

A Yes.

Q How long were you going to serve–how long, if you know, could you serve on a possession of stolen vehicle?

MR. GUYMON: Objection, relevance.

MR. SCISCENTO: Your Honor, it goes to motivation.

THE COURT: Overruled.

A I don't know.

Q (By Mr. Sciscento) Have you ever been informed how many months, years, you might have to spend?

A For possession of stolen vehicle?

Q Yes.

A No.

Q Okay. But you know it is a felony?

A Yeah.

Q And that case, possession of stolen vehicle, which happened out here in Nevada, is going to be dismissed. Is that correct?

A If I stay out of trouble.

Q If you stay out of trouble and do what?

A Oh, and grant all my subpoenas.

Q And testify today?

A Okay.

Q Is that a yes?

A Yeah.

Q In fact, if you testify today, the district attorney's office will dismiss that case if you stay out of trouble, is that correct?

A For four months, yeah.

Q Okay. So, basically, your testimony today, for giving your testimony your compensation is that you're going to receive dismissal on the felony of possession of stolen vehicle, correct?

A Yes.

Q And, hopefully, you'll also get out of prison today. Isn't that correct?

A Yes. Not today.

Q Within a couple of days after you sign your deposition?

A Yes.

Q Okay. A couple things I don't quite understand. First: your first couple of statements you say--September 8th you say Donte Johnson had nothing to do with this, correct?

A Yes.

Q You go to the grand jury on September 15th and you say, "I have no idea what's going on," correct?

A Yeah.

Q Then later on, you give some testimony that, in fact, you know what's going on and you implicate Donte Johnson in this case?

A Yeah.

Q But when asked specifically about the black pants, you say, "Deko had," that being Donte Johnson, "had red and tan plaid shorts." Isn't that correct?

A Yeah, I said that.

Q You said that on September 3rd, 1998, when asked specifically the question–and I want to make sure I understand this–I'm referring to page 11–I'm sorry, page 12.

I'm sorry, Court's indulgence for just one moment.

THE COURT: Sure.

MR. SCISCENTO: Let me rephrase that.

Q (By Mr. Sciscento) Page 180 of the grand jury hearing on September 1st, you state, "Deko had on shorts and no long pants," isn't that correct?

A Yeah, I said that.

Q Okay. You said that, "Deko never wore," on page 184, you say, "Deko never wore black pants–black jeans"?

A Yeah.

Q Okay. When you said that Deko and Red left, you said that Red had on black pants, isn't that correct?

A Yes.

Q You also said, when asked about two pants in a picture, there was a question, "There were two pants. Did Red wear more than one pants at a time?" Your answer was, "No, he had more than one pair of pants." Isn't that what you answered?

A Yeah.

Q And your statement today is different?

A Yeah.

Q Why is it that today your statement is consistent with the fact that you're saying that Mr. Johnson did this, but you're changing the facts as to whether or not he was wearing black pants? I don't understand that. Why?

A Because I had to tell the truth because I'm going to go to jail.

Q Well, were you telling the truth back on September 1st when you said–or September 15th when you said that Donte Johnson was involved in this case?

A Yes, I was telling the truth.

Q But you didn't tell the truth about the black pants?

A I know because they had blood on them.

Q Who told you about the black pants?

A That they had blood on them?

Q Who told you that they were black pants with blood on them?

A The district attorney.

Q The district attorney's office told you about that?

A Yes.

Q Did Detective Hefner tell you about that?

A I don't know who that is.

Q The detective in this case?

A No.

Q Did you talk to any detectives in this case?

A I have before when they questioned me.

Q And they mentioned to you that they were black pants. Isn't that correct?

A I don't remember.

Q Do you think if you testified today and said that, "Donte Johnson told me he did this and he went out the door and he was wearing shorts," do you think that the district attorney will agree to let you go on this case?

A No.

Q He wants you to say he's wearing black pants, isn't that correct?

A Yeah, because he was wearing black pants.

Q The question is: the district attorney wants you to say he wore black pants?

MR. GUYMON: Judge, I'm going to object as to what her speculation as to what I want her to say.

THE COURT: I think that it's relevant on cross; overruled.

Q (By Mr. Sciscento) Again, my question is: the district attorney expects you to say today–I'm sorry–wants you to say today that Donte Johnson was wearing black pants?

A Yes.

Q Let's talk a little about–let's talk a little about Todd, Todd Armstrong. How long had you known Mr. Armstrong before this case, this murder?

A Like maybe two, three weeks.

Q Two or three weeks?

A Yeah, when we moved in the house.

Q He's the one that talked about this $10,000. Is that correct?

A Yeah.

Q The one that he talked about saying that these three kids over here on Terra Linda--Terra Vista–Terra Linda, that they had $10,000?

A Yeah.

Q He's the one that brought that up?

A Yeah.

Q Was anybody up–was anybody else present at that time besides the people that you talked about? You mentioned that Red, Johnson, and Armstrong were there.

A And myself.

Q And yourself? Was anybody else present?

A No, not–no.

Q How about Ace?

A No, he wasn't there.

Q Ace wasn't present?

A No.

Q Are you sure about that?

A Yeah.

Q Do you remember giving testimony on September 1st, 1998, at the grand jury

hearing when Mr. Guymon asked you who was present when Todd said this?

A Yeah.

Q Do you remember what your answer was at that time?

A It was the same.

MR. SCISCENTO: If I may approach, Your Honor?

THE COURT: Sure.

MR. SCISCENTO: Thank you.

Q (By Mr. Sciscento) Can you read that to yourself?

A This right here?

Q Yeah, read that.

A Okay.

Q Now, upon reading your testimony given on September 1st, 1998, you were under oath on that date, weren't you?

A I believe so, yeah.

Q And the oath was that you tell the truth?

A Yeah.

Q Similar to the oath you took today?

A Yeah.

Q Similar to the oath you took on September 15th?

A Yeah.

Q Okay. Today's oath is different than the other two oaths. Is that correct?

A Yes.

Q Because you've got a reason to get out of prison and you've got an ace hole–and ace card. Is that correct?

A Yes.

MR. SCISCENTO: Strike that, Your Honor; I'll move on.

Q (By Mr. Sciscento) Now, again, let me redirect your attention. When we talked about Todd saying about this $10,000 that these kids had at the Terra Linda house, who was

present at that hearing–at that meeting?

A The only people I remember that was there was Todd, Red, Deko, and myself.

Q Okay. But on September 1st from the grand jury, you said that Ace was present?

A Yeah, but I don't remember saying that.

Q You don't remember saying that?

A No.

Q You will agree with me, though, that it's written down in the transcript?

A Yes.

Q You believe that this is a true and accurate transcript?

A Yeah.

Q When the prosecution asked you if it was true and correct, you said it was?

A Yeah.

Q So, you would agree, then, that your statement here is true and correct that, "Okay, Deko, Red, and Ace were present when he said this,"?

A Yeah.

Q "And he said that they guys, they always carried–they always carry, they always had like ten g's, ten thousand in the house and a bunch of mushrooms. And he said that. And that he wanted to rob them." "He wanted to rob them," that being Todd?

A Yeah.

Q Todd was upset because Ace hadn't done a lick with him. He was supposed to do a lick with him?

A Yeah.

Q What's a "lick"?

A Get some money, rob somebody.

Q Rob somebody. And Todd and Ace were supposed to get together and rob somebody?

A Yeah.

Q Were they supposed to rob these people for the ten thousand?

A I don't know.

Q Okay. You had mentioned earlier that the district attorney had asked you if Red ,or Donte Johnson, or Sikia Smith had any kind of job and your answer was no. Is that correct?

A Yeah.

Q Did B.J. have a job?

A No.

Q Did Todd have a job?

A No.

Q Did Ace have a job?

A No.

Q And I'm talking specifically on this date in August, did they have a job, those three people?

A No.

Q How did they get their money?

A How did who get their money?

Q How did B.J. get his money?

A From his mom.

Q And how about Todd?

A He was always broke.

Q Okay. But he always had drugs with him. Is that correct?

A Yeah.

Q He was smoking a lot?

A Yeah.

Q Smoking a lot of what?

A Crack cocaine.

Q How many days–how many times a day would you see, personally see, Todd smoking crack?

A All day.

Q All day long?

A Um-hum.

Q How many days per week?

A Every day.

Q You were there for three weeks?

A Yeah.

Q You had seen him smoke crack every day?

A Practically every day, yeah.

Q What about Ace?

A Him too.

Q He would smoke crack every day?

A Yeah.

Q As a matter of fact, it was Ace that stole some crack out of your purse?

A Yeah.

Q He stole some crack out of your purse so he could go in the back room and smoke it. Isn't that correct?

A Yeah.

Q He's not a very trustworthy person, according to you. Is that correct?

A No.

Q He probably is not telling the truth in a lot of things.

A I don't know.

MR. GUYMON: Judge, I'm going to object; it calls for speculation.

THE COURT: Sustained.

Q (By Mr. Sciscento) While you were at the Everman house, you had–if I can have exhibits 5 through 13, please, thank you.

While you were at the Everman house, Todd brought over a shotgun. Is that correct?

A Yes.

Q What kind of shotgun was it?

A I don't know; it was a big shotgun.

Q Todd brought over some other guns, too. Isn't that correct?

A I'm not sure. I just know about the shotgun.

Q Did you ever see another gun in his hand?

A No

Q Did you ever see him holding the gun?

A Yeah.

Q You saw him holding a .9 millimeter chrome pistol. Isn't that correct?

A I don't know.

Q Is it you don't know if it was a .9 millimeter, or you don't know if it was a chrome pistol, you don't–

A I think it was a rifle. I mean, a big shotgun. That's the only gun I seen.

Q What about the handgun he was holding? Do you remember that?

A No.

Q Okay. On the night in question of the–when you were over there at the Everman house, Ace handled some guns, too. Isn't that correct?

A I don't know.

Q Ace brought over some guns. Isn't that correct?

A I don't know.

Q You don't remember?

A I don't remember.

Q You don't remember if Ace handled any guns?

A They all used to handle the guns.

Q Now, on the night of the killing, the homicide, you said you saw three people leave, that being Donte Johnson, Sikia Smith, and Terrell Young?

A Yeah.

Q And I think–if I may approach, Your Honor, in exhibit 9, you identified a bag that

the district attorney–in this picture. Is that correct?

A Yes.

Q And that's a bag that you saw leave that night?

A Yes.

Q Could you see through that bag?

A Do you mean like see through it?

Q Can you see through it?

A No.

Q It's not transparent?

A No.

Q It's cloth of some sort?

A Yes.

Q Did you see it earlier that night?

A I see it every day.

Q Did you see it earlier the night on the homicides?

A I don't remember.

MR. SCISCENTO: Court's indulgence for a moment.

Q (By Mr. Sciscento) You don't remember seeing it earlier that night?

A No.

Q Do you remember seeing what was inside of it earlier that night?

A No.

Q What's in exhibit–State's exhibit number 10. Do you recognize this exhibit?

A Yes.

Q Okay. Let me ask you this: did you see State's exhibit number 10, which is a gun, did you see it inside of this hand–or inside of this bag, which is State's exhibit 9, on the night of the murder?

A No.

Q You did not see State's exhibit 10, this gun, inside this handbag?

A No, I didn't.

Q Did you see it after Mr. Johnson or Mr. Terrell Young, or Mr. Sikia Smith returned that night?

A No.

Q Did you look inside that bag that next night–

A No.

Q –that morning, that 3:00 in the morning when they returned?

A No.

Q So, you don't know exactly what was inside that bag?

A No.

Q That's correct? Am I correct, you do not know what was exactly inside that bag?

A At that night?

Q Yes.

A No.

Q On that day you don't know. And the next night, the next day, you don't know what was inside that bag?

A The only thing they always carried and it was–

Q No, my question is: you did not look inside that bag the day after you said Mr. Johnson returned at 3:00 in the morning, isn't that correct?

A Yeah, that's correct.

MR. SCISCENTO: Your Honor, I move to exclude, then, exhibit number 10, specifically the gun.

THE COURT: We'll take it up later. Go onto another area.

MR. SCISCENTO: Thank you, Your Honor.

MR. FIGLER: And, for the record, I believe 13 as well, Your Honor.

THE COURT: We'll take it up later.

MR. SCISCENTO: If I may approach, Your Honor.

Q (By Mr. Sciscento) Exhibit 13, what is that a picture of? I think you described this

earlier.

A The master bedroom.

Q Yes. Where at?

A On Everman.

Q Yes. Is that the master bedroom at Everman?

A Yes.

Q Who shared that room with you?

A Deko and Red.

Q Deko and Red?

A Um-hum, yes.

Q Red would throw his stuff around?

A Yeah.

Q It was the master bedroom where Todd lived, but Todd didn't live in the master bedroom. Is that correct?

A Yes, that's correct.

Q And the reason is because he had a waterbed in the other bedroom and didn't want to move it?

A Yes.

Q You were staying because–well, you were staying there to pay rent, Todd was receiving some kind of drugs. Is that correct?

A Yeah.

Q As a matter of fact, all the boys were coming over and getting drugs?

A Yeah.

Q Smoking crack every day?

A Yeah.

Q Running out of money?

A Yeah.

Q They wanted to make money then, sometime, didn't they?

A Yeah.

Q Todd and Ace wanted to make some money?

A Yeah.

Q Todd and Ace–yes?

A Yes.

Q Todd and Ace wanted to do a lick, which you consider robbery?

A Yes.

Q To get money?

A Yes.

Q Okay. Let's focus, Carla–is it Charla or Carla?

A Charla.

Q Charla. December 2nd, 1998, you wrote a letter. Am I correct?

A Yeah.

Q Who did you write this letter to?

A Channel 8 News.

MR. SCISCENTO: If I may approach, Your Honor.

Q (By Mr. Sciscento) Where did you write it from?

A North Las Vegas Jail.

Q What were you in jail for?

A I had a warrant for obstructing a police officer.

Q Okay. In this letter you say, "Hello, my name is Charla and I have a story for you."

MR. GUYMON: Judge, can we have that marked?

THE COURT: Sure.

MR. SCISCENTO: I will. Let's mark this as defense exhibit A, proposed A.

Q (By Mr. Sciscento) Ms. Severs, do you recognize what I've had marked as defense exhibit A?

A Yes.

Q Do you notice the first page?

A Yes.
Q It's written to Channel 8 News?
A Yes.
Q Do you recognize that writing?
A Yes.
Q Whose is that?
A My writing.
Q The second page, which is dated 12/2/98, do you recognize that writing?
A Yes.
Q Whose writing is that?
A Mine.
Q Okay. And on the last page it has initials that looks like "CCS"?
A Yes.
Q Whose initials are those?
A Mine.
Q This letter, do you recognize this letter?
A Yes.
Q It's a copy of a letter that you wrote?
A Yes.
Q Okay. And on this letter you talk about the night of the killing. Is that correct?
A Yeah.
Q And in here you say that you have a story to tell. Is that correct?
A Um-hum.
Q And this story tells that you were there?
A Yes.
Q It says in this letter that you were there at the time of the killing. Isn't that correct?
A Yeah.
Q It was directly against what you're telling us today. Isn't that correct?

A Yeah.

Q And what you're telling us today is what you're going to anticipate for getting out of prison–or jail, right?

A Um-hum, yes.

Q Okay. And in this one you said, "I was there. Donte was gone that night. Terrell and Sikia came over and was looking for Donte. But he took too long to come, so instead they made me go. I couldn't say no." Is that correct? Is that what you said?

A Yeah, I said that.

Q Okay. And you say that Donte is trying to protect you?

A Yeah, I said all that.

Q And then you got scared and instead of confessing, you put it on Donte?

A No, I was trying to protect Donte when I wrote that letter.

Q Let me ask you this. Let me ask you this. In the letter its says, "When I got scared instead of confessing, I put it on Donte." Do you want to review it? Is that what you said?

A I know what the letter says.

Q Is that what you said?

A Yes.

Q Okay. How long were you in North Las Vegas Detention Center on this?

A Just like a couple weeks, like two weeks.

Q When did you–when were you released from North Las Vegas Detention Center?

A I don't remember.

Q How many days after writing this letter?

A Maybe like three days.

Q But you knew that you were going to be released from North Las Vegas Detention Center, correct?

A No, I thought that they was going to get the letter by then and they would have believed it.

Q You believed that you were going to be released from North Las Vegas Detention

Center regardless of what you did in this case, isn't that correct?

A I don't understand what you're trying to say.

Q All right. You weren't being held for any reason connected to this case in North Las Vegas, right?

A Yes.

Q You were there for a bench warrant?

A Yes.

Q Eventually you were going to be released?

A Yes.

Q You knew that, right?

A Yes.

Q You knew that you were going to be released in a couple of days, correct?

A Yes.

Q So, you had no motivation to say anything about this case to get released, isn't that correct?

A Huh?

Q You had no motivation to give any statements while you were in custody with North Las Vegas to get released from North Las Vegas any quicker, isn't that correct?

A No, I didn't. I didn't--I don't understand what you're trying to say.

Q Let me break this down. You were going to be released from North Las Vegas Jail?

A Yeah.

Q You knew that?

A Yeah.

Q And you knew you didn't have to say anything to anybody to get you out of prison quicker, right?

A Yes.

Q Because you eventually were going to be released in a couple of days?

A Yeah, that's right.

Q So, when you wrote this letter, there was no motivation for you to get out of prison when you wrote this, correct?

A Yeah.

MR. SCISCENTO: Your Honor, if I may approach, if I can have--

MR. GUYMON: Judge, I'd move for--are you going to move the admission of 1A?

MR. SCISCENTO: If I may approach, Your Honor? If I can have this marked as defense exhibit B.

Q (By Mr. Sciscento) On 9/27/98 you also wrote another letter, correct?

A Um-hum, yes.

MR. SCISCENTO: If I can approach for one moment. If I may approach, Your Honor.

Q (By mr. Sciscento) Ms. Severs, who is Beelo?

A Somebody I made up.

Q Somebody you made up?

A Yes.

Q Do you have a habit of making up people?

A No.

Q Do you have a habit of making up information?

A No.

Q All right. 9/27/98 you wrote a letter To Whom It May Concern. Is that correct?

A Yes.

Q Do you recognize what's been marked as defense proposed exhibit B?

A Yes.

Q Is that a letter that you wrote?

A Yes.

Q It's a copy of a letter you wrote. And it says "La-La" at the top?

A Um-hum.

Q What does La-La mean?

A It's-

Q I'm sorry. La-La is your nickname?

A Yeah.

Q Okay. In here it says, "My baby still don't know I said anything. I just wish shit would have went differently."

A Um-hum.

Q What does that mean?

A That–I don't know. Know–told the police–

THE COURT: Your voice is getting low. Would you keep it up, please?

THE WITNESS: That he don't know–that he didn't know that the police had talked to me and I told him what happened.

Q (By Mr. Sciscento) In here you also say, "I can't even face him because I fell I betrayed him."

A Um-hum.

Q Who is "him"?

A Deko.

Q "So, now," you also wrote, "So, now, I guess you could perjure me because I lied about some other shit, too. But I'm not a liar, just scared." Is that what you wrote?

A Yeah, I wrote that.

Q What were you referring to? What were you referring to when you wrote that statement?

A Where is that at?

Q Right here at the bottom.

A That I lied about he–I was saying–I was trying, in that letter, I was trying to say that I lied about his involvement.

Q Okay. So, now you have another change in the story on 9/27. 12/2/98 we have another change. How many more statements do we have to go, Ms. Severs?

A I don't know, you tell me. I don't know.

Q Do you anticipate getting in trouble again?

A I don't want to get in trouble again.

Q You want to get out of prison, don't you?

A Yes.

Q You want to get out of jail?

A Yes.

Q You wrote some letters to Donte Johnson, is that correct?

A When?

Q When he was in custody. Is that correct?

A Yeah, I wrote a lot of them.

Q I'm sorry?

A Yes, I wrote a lot of them.

Q You went to visit him a few times, is that correct?

A Yes.

Q While he was in custody?

A Yes.

Q As a matter of fact, you got in trouble one time when you went there and he was talking to another girl?

A Yeah.

Q You got in a fight with her?

A Yeah, I beat her up.

Q You hit her?

A Yeah.

Q Knocked her out?

A I don't know about knocking her out.

Q Split her lip?

A I don't know what I did to her, but I beat her up.

Q You fought somebody in the Clark County Detention Center because you perceived that she was talking to Mr. Johnson?

A Yeah.

Q You were upset?

A Yes.

Q You hated him for that?

A No, I didn't hate him for that.

Q You hated her for that?

A Yeah.

Q So, you were not allowed to go back to the jail for 90 days?

A Yeah.

Q All because somebody was talking to Donte?

A That's not how it happened.

Q It happened that you went up, you saw her talking to him, and you got mad, and you hit her?

A No.

MR. SCISCENTO: Your Honor, if I may, defense exhibit C.

Your Honor, may we approach for a moment?

THE COURT: Yes.

(Whereupon a bench conference was held, not recorded)

THE COURT: I'm correct. The frame size of the camera is just the witness, right?

MR. SCISCENTO: If I may approach, Your Honor?

Q (By Mr. Sciscento) on 2/6/99, February 6th, 1999, you wrote a letter to Donte Johnson?

A Yes.

Q I'm handing you what's marked defense exhibit C. Do you recognize that letter?

A Yes.

Q Okay. It consists of three-four pages. Can you flip through those four pages real quickly. The last page has a signature on it, it says, "La-La"?

A Yes.

Q "Love always, La-La." Is that you?

A Yes.

Q Do you recognize this letter?

A Yes.

Q A copy of this letter is a copy of the original that you sent out to Mr. Johnson?

A Yes.

Q And do you recognize this as your handwriting?

A Yes.

Q Okay. And on page 2, two-thirds of the way down, you said, "I told the Sergeant. I called Pete LaPorta. I told everyone I was there at the murders, not you. And baby, they're talking with–oh, they're fucking with me, just tell Red and T.J. to tell the truth. You wasn't there."

A Yeah, I said that.

Q You said that? That's another statement you gave regarding this case?

A Yes.

Q Were you promised any leniency by the district attorney for writing this letter?

A No, they never showed me no letter like that.

Q I'm saying when you wrote this letter nobody offered you leniency?

A What do that mean?

Q They weren't going to let you go from prison?

A No.

Q You also wrote a few other letters, is that correct?

A Yeah, I wrote many letters.

Q You wrote a lot of letters?

A Um-hum.

Q 8/30/98 you wrote a letter?

A Okay.

Q 1998 to Donte Johnson. Is that correct?

A Yeah.

Q If I can show you–and I've marked this. Do you recognize this letter?

A Yeah.

Q Did you write this letter? It's a copy of a letter you wrote?

A Yes.

Q Okay. And here you say what? That line right there.

A I don't even know what I was talking about when it say, "The smoker-assed mamma probably did that shit. Why they don't accuse her?"

Q Who are you talking about there?

A I don't know. I have to read the whole letter, you know.

Q If you can read it to yourself.

A Okay.

Q Do you recognize–did you get to that part yet? Did you get to that part yet, Ms. Severs?

A No. I still don't know who I'm talking about.

Q When you say, "That smoker-assed mamma probably did that shit. Why don't they accuse her?" You're not talking about–strike that, Your Honor.

We'll mark that as defense exhibit D.

How long have you been in custody since you were picked up in New York?

A I was picked up on September 17th.

Q September 17th. What were you picked up for?

A Prostitution.

Q What were you doing out in New York?

A What do you mean what was I doing?

Q Why were you out there? Do you live out there, do your parents live out there?

A No, but I started living out there.

Q Why?

A Because I wanted to get away from Las Vegas.

Q You wanted to get away from this problem?

A Yes.

Q Okay. Were you ever told by the district attorney that you had to stay here to testify?

A No, not that I remember.

Q So, that's why you left New York?

A Yes.

Q You had no other reason to leave New York?

A Yeah, in the–

MR. GUYMON: Judge, you know, maybe we should approach at this point.

THE COURT: Yes.

MR. GUYMON: I'm going to object.

(Whereupon a bench conference was held, not recorded)

MR. SCISCENTO: We'll withdraw that last question, Your Honor.

Q (By Mr. Sciscento) Since September 17th you said you were in custody?

A Yes.

Q You wrote a letter to Deko, to Donte Johnson. Is that correct?

A Yes.

Q Just recently?

A Yes.

MR. SCISCENTO: May I have the Court's indulgence for just one moment.

Q (By Mr. Sciscento) You still have feelings for Donte?

A Yes.

Q You guys share a certain song together, Laurnell Hill?

A Lauren Hill?

Q Yes.

A Yeah.

Q And you always talk to him about that?

A Yes.

Q Let me ask you: after August 14th, after the murders happened at Terra Linda, the next day you went out with Red to go get something to eat?

A Yeah.

Q You went to Sonic Burger?

A Yeah.

Q Red bought you food?

A Yeah.

Q Red bought you some shoes?

A Yeah.

Q Red had all the money that day?

A Yeah.

Q Donte didn't have any money?

A No.

Q Didn't have any money on him that day. Isn't that correct?

A Yes.

Q Do you know where that money came from?

A I didn't know where it came from.

Q Well, you testified earlier that the district attorney told you that two hundred dollars was taken, that Donte Johnson said there was two hundred dollars was taken.

MR. GUYMON: Judge, that misstates the testimony. She didn't ever say that the district attorney–

THE COURT: We'll let the jury decide at the time of trial; overruled.

Q (By Mr. Sciscento) Isn't it true that you told the district attorney on direct examination that there was two hundred dollars that they took from these boys?

A Yeah.

Q And now, Red suddenly has money in his pocket the next day?

A Yeah.

Q Donte does not?

A Yeah.
Q Did you know where the money that Red had in his pocket came from?
A I mean, it wasn't the thought then, but yeah.
Q You knew where it came from–
A Yeah.
Q –because Red told you?
A No, Red didn't tell me.
Q You got new shoes from Red, correct?
A Yeah, I got a pair of new shoes.
Q You accepted them freely?
A Yeah.
Q You got food from Red?
A Yeah.
Q You accepted that freely?
A Yeah.
Q You knew where the money came from?
A I mean I didn't know at the time.
Q You didn't–
A I mean I knew, but I didn't know. It wasn't nothing–
Q You didn't care?
A Okay. You can say that.
Q Right? You didn't care where it came from?
A Yeah.
Q You didn't care about anything?
A That ain't true.
Q You just care about taking care of your needs?
A Everybody do.
Q Everybody cares about taking care of their needs and you've got certain needs

today, right?

A Like what do you mean?

Q You got motivations to tell this story today, don't you?

A I still don't know what you mean. No, I ain't motivated–motivated by what?

Q I've said it before, I'll say it again. For freedom.

A Oh, yeah.

Q Tell me about–you don't think we're going to see January 2nd, 2000. Is that correct?

A No.

Q Your belief is that the future is very short?

A Yeah.

Q Your belief is that January 1st, 2000, the world is going to blow up?

A It might.

MR. GUYMON: Judge, I'm going to object as to relevance.

MR. SCISCENTO: Your Honor, if we can–

THE COURT: Let's–

MR. SCISCENTO: I can–I can give you the reason why, Your Honor. I'm trying to–

THE COURT: I can see where this might go. Overruled.

MR. SCISCENTO: Thank you.

Q (By Mr. Sciscento) So, January 1st, 2000, you believe the world is going to end?

A Probably, some kind of way.

Q And you have a strong belief in that?

A Um-hum.

Q Almost a religious belief?

A I don't know about religious.

Q Okay. I'll back off of that. But the belief is strong enough that you believe there's not going to be any ramifications for anything you do today on January 2nd, 2000. Isn't that correct?

A I don't know what ramifications means.

Q Okay. I'll rephrase that. The wrongs you do right now on this earth, there will be no problems on January 2nd because this earth is not going to exist. Is that correct?

A Yeah, I don't know if it's not going to exist on January 2nd, but sometime in the year 2000 it ain't going to exist.

Q Okay. So, really, your problems that you cause today are all going to be gone after January 1st, right?

A I hope.

Q You hope so?

A Um-hum.

Q Because you don't want any problems lingering, right?

A I'm not going to be cause of the world ending, so I don't know.

Q I'm not saying that you are, but you believe it's going to end?

A Yeah.

Q You have a strong belief?

A Yeah.

Q And if you believe that there's nothing that's going to harm you in the future, you don't have to worry about what you're doing today, right?

A That's not true.

Q Well, if nothing is going to be around to harm you on January 2nd, 2000, what does it matter what you do today?

A I didn't think it would be like that, but that's a point.

Q If there's a nuclear war like you said?

A Then it ain't–nothing ain't going to matter.

Q Everything is going to be gone?

A Yeah.

Q So, all the bad we do today is going to be forgotten January 2nd, 2000?

A Um-hum.

Q That's what you believe, right?

A Um-hum.

COURT RECORDER: Could you answer–

THE WITNESS: Yes.

Q (By Mr. Sciscento) So, it doesn't matter what we say today because on January 2nd, 2000 it's all going to be forgotten?

A I didn't say it don't matter.

MR. SCISCENTO: No further questions, Your Honor.

THE COURT: Anything on redirect?

MR. GUYMON: Yes, Your Honor.

MR. SCISCENTO: Your Honor, I'm sorry. Can I have the Court's indulgence for one moment

REDIRECT EXAMINATION

BY MR. GUYMON:

Q Ms. Severs, you are–answer the question, you are in custody on a material witness warrant?

A Yeah.

Q And who issued that warrant for your arrest?

A You all did. You all did.

Q The State of Nevada?

A Yeah.

Q You are in custody right now?

MR. FIGLER: I object, Your Honor, to characterizing himself as the State of Nevada, per se. It was the prosecutor's office and the prosecutor who did that.

THE COURT: How did he characterize it? Did he say something after the question that I wasn't hearing?

MR. GUYMON: She said "you all" and then I said, "The State of Nevada?" And she said yes.

THE COURT: Overruled.

Q (By Mr. Guymon) Are you in custody now?

A Yes.

Q And what is your hope after giving a deposition?

A That I get out of jail.

Q Prior to testifying today, have you and I spoken about your testimony?

A What you mean?

Q Have we talked about this deposition?

A Yeah.

Q In my office?

A Yeah.

Q And was that yesterday?

A Yes.

Q Did you also speak to the defense yesterday in my office about this deposition?

A Yeah.

Q What, if anything, have I asked of you about the truth today?

MR. FIGLER: I'll object, Your Honor. He's put himself forward as a witness. And if that's so, then he has to disqualify himself from prosecuting this case.

THE COURT: Overruled.

A Huh? What--

Q (By Mr. Guymon) What, if anything, have I asked you about the truth today?

A Just to tell the truth.

Q Do you understand how important the truth is in this case?

A Yeah.

Q Are you telling the truth today?

A Yeah.

Q Now, then counsel asked you about your police statement and saying something different in those statements. Do you remember those questions?

A Yeah.

Q Did you tell the truth to the police on August 18th, 1998?

A No.

Q Why?

A Because I didn't want to get Deko in trouble and he told me not to say nothing.

Q Who told you not to say anything?

A Deko.

Q Did you tell the grand jury the truth on September 1st, 1998 when you testified in front of the grand jury?

A No.

Q And why didn't you?

A Because I wanted to protect Deko. I didn't want him to go–to stay in jail forever.

Q Why would you want to protect Deko–

A Because I love him.

Q --on September 1st?

A Because I love him.

Q Had you talked to Deko about helping him in this case before September 1st of '98?

A No.

Q On September 15th, 1998, did you tell the grand jury the truth about those black jeans?

A No.

Q And why didn't you?

A Because they–I seen they had blood on them.

Q And how did you see that they had blood on them?

A Because you all–the district attorney showed me a picture.

Q The same picture that you saw in State's exhibit, I believe, 11?

A Yes.

Q Did you talk to Donte Johnson about the fact that those pants had blood on them?

A Yeah.

Q What did you talk to him about when you talked about that blood?

A I asked him why he didn't have me wash his jeans.

Q Would you have washed those jeans for him?

A Yeah.

Q Why?

A Because they had blood on them and I didn't want–I didn't want them to see the blood.

Q What did you think the blood would prove?

A That he–

MR. FIGLER: Objection, Your Honor.

THE COURT: Overruled.

A That he did it.

Q (By Mr. Guymon) Now, you understand that, in front of the grand jury on the 1st and the 15th you were under oath, you promised to tell the truth then?

A Yeah.

Q Why is it different now, or is it different?

A I don't–why is it different?

Q Yes.

A Because I want to get this all behind me and I don't want to stay in jail or nothing like that.

Q Have you told the truth today?

A Yeah.

Q Now, counsel asked you–he showed you a picture of the duffle bag, State's exhibit 9. Can you tell me what was kept in the bag based on your knowledge on August 4th?

A Guns.

Q And on August 5th can you tell me what was in the bag?

A Guns.

MR. SCISCENTO: I object, Your Honor. She said specifically on cross examination that she didn't see what was inside there. Now she's merely speculating as to what's inside there.

THE COURT: Well, on the basis that it's her speculation, it's overruled. You certainly can pursue it if you wish on recross or you can leave it be. That's up to you. But it's overruled.

Q (By Mr. Guymon) Did you see guns in the bag on August the 4th of 1998?

A Yeah, but he asked me did I see guns on the 4th–on the night of the murder and I said no.

Q Okay. And what was kept in this bag while the bag was at the Everman house?

A Guns.

Q Was there ever a time that you saw the bag empty?

A Not that I remember.

Q All right. And can you tell me–you can't see through the bag, correct?

A No, I can't.

Q On August 14th, 1998, when Red carried the bag out, could you tell if anything was in it?

A I could tell something was in it.

Q How?

MR. SCISCENTO: I'm going to object to this, Your Honor. This is definitely going to call for speculation. If she could say something was it because it was heavy, but now Mr. Guymon is going to ask her what's in it and she's going to speculate as to what's in it.

THE COURT: He hasn't asked that yet; overruled.

MR. SCISCENTO: He will.

Q (By Mr. Guymon) How could you tell?

A Just because I knew what was always in it.

Q Now, then, counsel asked you about some letters that you wrote. Do you recall?

A Yeah.

MR. GUYMON: I'm using those that have been marked. Judge, at this point in time the State would move to admit the defendant's exhibits.

THE CLERK: A, B, C, and D.

MR. SCISCENTO: We'll stipulate to them.

THE COURT: All right. Based on the stipulation they'll be accepted as marked.

MR. FIGLER: Pursuant to further ruling of the Court on the various evidentiary matters, Your Honor.

THE COURT: Certainly because everything will be.

MR. FIGLER: Thank you, Your Honor.

Q (By Mr. Guymon) Showing you what has been admitted as State's exhibit--or excuse me--defense exhibit B, that is your letter. Is that correct?

A Yes.

Q And who were you writing that letter to on September 27th, 1998?

A To you.

Q And where was that letter delivered to?

A The district attorney's office on the door.

Q Who delivered it?

A I did.

Q And where did you put it?

A On the door.

Q Now, then, why did you write that letter on September 27th, 1998?

A Because that's when had first got Deko in trouble.

Q Okay. And how had you gotten Deko in trouble?

A Because I had told what I knew.

Q And when did you tell what you knew?

A A couple of days before.

Q And who had you told what you knew?

A To Tom Thousand, police.

Q Okay. Now, when you told what you knew a couple of days before to Tom Thousand, had you told Tom Thousand everything you knew?

A No.

Q And why not?

A Because–I don't know. I don't know.

Q Okay. Now, once you told–well, did you think that the stuff that you told Tom Thousand would help or hurt Donte?

A Hurt him.

Q And how was it going to hurt him?

A Because I told him that he was there; he wasn't with me.

Q Okay. Now, what was the purpose, then, of writing? After talking to Tom Thousand, why would you write that letter?

A Because I wanted them–I didn't want them to believe that what I said.

Q Did you want Donte to know that you had told the police things you knew?

A No.

Q Why?

A Because I didn't–because I don't want him to be mad at me or nothing.

Q Did you believe that he would be mad at you for what you told the police?

A Yeah.

Q Are there things that you wrote in defense exhibit B, are they true?

A No.

Q Was B'Lo Duce involved in this?

A No.

Q Why did you write defense exhibit A in December? What was the purpose of writing that?

A So the police would think I did it and Deko didn't.

Q And why would you want the police to think that you did it?

A So Deko could get out of jail.

Q Had you and Deko made a plan?

MR. SCISCENTO: I'm going to object to this, Your Honor. If we could approach?

THE COURT: Yes.

(Whereupon a bench conference was held, not recorded)

Q (By Mr. Guymon) Prior to writing the letter to Channel 8, had you and Donte talked about a plan?

A Yeah.

Q And what was the plan?

A That I would tell them that I did it and Deko would get out of jail. And then after he get out of jail I would tell them that he was threatening my family or whatever. And he would call and do it and then I would get out too because they would see that I didn't really do it or whatever. And then me and him would meet up later on after that.

Q Did you still want to be with him again at the time that you wrote that letter?

A Yeah.

Q Did you think that plan would help Donte?

A Yeah.

Q Did you think that plan would work?

A Yeah.

Q Can you explain how you felt about Donte in December when you wrote that letter?

A I loved Donte. I loved Donte.

Q Now then, you said you wrote him lots of letters. Is that right?

A Yeah.

Q In the letters, why would you write him? Why would you write the letters?

A Which ones?

Q Well, say, at first in say August and September, why were you writing?

A Because that's just what you do when you got a boyfriend and he's locked up in jail.

MR. FIGLER: Object, Your Honor, move to strike.

THE COURT: Sustained.

Q (By Mr. Guymon) Tell me from the time he got arrested--well, from the time he got arrested in August, for how many months did you want to help him for?

A Forever.

Q And has your wanting to help him stopped yet?

A No.

Q Can you tell me why?

A Because I still got feelings for him.

Q Now, do you feel as though the things you said today help him?

A No, I know they don't.

Q Why is it that you'd say them then?

A Because it's the right thing. And I don't want to stay in jail and I don't want to go to jail. I don't want to go to prison for nothing.

Q Have you told the truth today?

A Yeah.

Q Is there any other truths that you haven't told us about relating to this case?

A No.

MR. GUYMON: Pass the witness, Your Honor.

THE COURT: Any recross?

MR. SCISCENTO: One, two.

RECROSS EXAMINATION

BY MR. SCISCENTO:

Q Is there any other lies that you haven't told us today?

A No.

Q So, we basically now have the full story, the complete lies and complete truths?

A Um-hum.

Q February–I'm sorry–September 15th you came in, you were sworn in in front of a grand jury, promised to tell the truth. But now you tell us you lied. Is that right?

A Yeah.

Q September 1st you came in front of a grand jury and you promised to tell the truth, you were sworn in to tell the truth, and you lied?

A I mean, it was–it was–

Q The question is: September 1st you were sworn in, promised to tell the truth and you told a lie?

A Yeah.

Q September 15th you told a lie?

A Yeah.

Q Today under that same oath, what you hold so dearly, you're now telling the truth?

A Yeah.

MR. SCISCENTO: No further questions, Your Honor.

THE COURT: Anything further, Mr. Guymon?

MR. GUYMON: No, Your Honor.

THE COURT: Okay. All right. That will end the video tape. You just stay there on the stand for a few minutes, ma'am.

Okay. Let's take up the next issue which is what we're going to do in terms of her release. Why don't you–

MR. SCISCENTO: Your Honor?

THE COURT: Yes?

MR. SCISCENTO: Maybe I can argue real quickly in a brief motion we may object to any testimony coming in about coercion, or assisting, or threatening witnesses.

THE COURT: What I heard was–

MR. SCISCENTO: I object as to that part.

THE COURT: I understand what you're–well, I understand the objection, I just don't see how it relates to what she said which was they had this pleasant plan to help each other out.

Now, let me ask you, ma'am–well, you just stay there. Maybe we'll take it up in a few minutes.

All right, now. What I think I indicated, but I don't if everyone understood earlier, I had anticipated in terms of the timing of her possible release being an old fashioned fellow and much older than any of the other counsel, I forgot that this was a video tape. Now, in the old days

it would have taken a week and they would have transcribed it and given it to the witness. Now I hear it only takes a few days. Does she still even get anything, physically, to review and–or do we just have it all now once that tape machine is through?

MR. GUYMON: So long as the tape–

THE COURT: Did what it was supposed to.

MR. GUYMON: –right. Then we will have an actual tape that preserves this testimony. I would also believe–

THE COURT: So, although the statute that discusses her release talks about subscribing, that's a written deposition and there's not going to be any real subscription; we have her oath and we have her testimony and we're not going to have subscription?

MR. GUYMON: Correct.

THE COURT: So, the issue, is really, now–and I'm going to find there is no reliable evidence in terms of the totality of the circumstances given the way the case has been handled in the other two courts, given the representations of the prosecutor, given the listening to her testimony today, I don't find sufficient reason to believe she's an accomplice, that she is precluded from being released under sub-section 2 and I think that provides an additional retroactive justification for the taking of the deposition.

But the issue now becomes: what are we going to do with this young lady in terms of keeping her until trial or not. I can tell you–I understand what you've got in your hand. It's important to me that she be here at trial. I can't read the minds of the three different interests that are here. But as the Judge who wants to see that justice is ultimately done here, I don't want to use that video tape. I want to see her here at the time of trial. If I could look in a crystal ball and know that if I release her, she either chooses not to show up, or she doesn't show up for some other reason, I'd keep her sitting her until the week of January the 10th. Now, what would you like to say about her release, Mr. Siegel?

MR. SIEGEL: If I might approach?

THE COURT: Sure.

MR. SIEGEL: Judge, essentially, that case–

THE COURT: I have a copy of this on my desk.

MR. SIEGEL: Oh. For you, I brought a copy here.

THE COURT: I haven't read it yet, but I do have a copy of it.

MR. SIEGEL: I can highlight and summarize.

THE COURT: Let me ask you, by the way, before Chip does, if you were free to go, where would you go?

THE WITNESS: To my mother's house.

THE COURT: Where does she live? What state?

THE WITNESS: In North Las Vegas.

THE COURT: Okay. And you would intend to stay here in town from now until the trial?

THE WITNESS: Yes.

THE COURT: Does Mr. Johnson know where your mother lives?

THE WITNESS: I mean, he don't know, but I wrote him letters from my mother's house before.

THE COURT: So, he would have your address?

THE WITNESS: Yeah.

THE COURT: And his friends, who are still on the outside, would have his address–would have some relationship, you understand, maybe visiting him in the jail. How would you conceive that to be a safe place?

THE WITNESS: Well, I wanted to really go was back to New York, but that wouldn't work because you all probably wouldn't believe that I would come back. So, I don't have no other place to stay besides at my mother's house besides New York.

THE COURT: Okay. In your mind, if you don't show up for trial, we've heard how you feel about Donte in the past, how you feel about him now. Your mind, if you don't show up at trial and they play that video tape under certain circumstances, in your mind, do you think it helps him or hurts him to show up at trial?

THE WITNESS: It don't help him.

THE COURT: The only thing it could do is help him if you showed up at trial?

THE WITNESS: It would hurt him.

THE COURT: You think it would hurt him if you came in, testified live?

THE WITNESS: Yes.

THE COURT: I mean, it can't get any worse. You've said today he's guilty of murder.

THE WITNESS: Okay.

THE COURT: Do you think it would be any worse if you came in–I mean you either say the same thing again and it doesn't get any worse or you take it back yet again and that's better. So, there's no real downside to Mr. Johnson for you to show up at trial, is there?

THE WITNESS: No.

THE COURT: I mean, it would actually not hurt him in any way for you to repeat the same story, probably, right?

THE WITNESS: No, I wouldn't.

THE COURT: Okay. Now, what are you going to say, Mr. Siegel?

MR. SIEGEL: Judge, an issue in the case that you have there–a federal case that was local at our federal courthouse, they allowed the witness to return back to Florida. The witness had to check in with the prosecutor's office every week.

What I would propose is one: you can put her on intensive supervision. She would have to check in with the jail. Or, since it's in my mind, the way I read the law, it's incumbent upon the prosecution to show good faith that they cannot find her, that maybe she be required to check in with the prosecutor's office because they're going to be the ones with the most interest if she is not around because they couldn't find her.

The second thing you could do, which I wouldn't want you to do, but you could, is house arrest. Assuming that she meets all the requirements for that.

But the fact of the matter is, Judge, to hold her–and if it is your inclination–and I don't think it was to hold her without letting her out because if it was there would have been no use for the video tape. The only reason we did the--

THE COURT: I haven't made a decision, frankly.

MR. SIEGEL: Okay. The only reason for the video tape is to allow her the ability to get

out of custody. You can fashion–

THE COURT: Well, I gave the video tape specifically–I don't think the request of the prosecution independent of her request. I now say I think she is eligible, at least, for the discretionary release in the second sub-section.

MR. SIEGEL: But if you're going to keep her without going around on the law on that issue, because I still believe that if you weren't going to release her, then the prosecution is not entitled to a video tape because there would have been no reason because we would have known exactly where she was.

But what I'm suggesting, Judge, is according to the federal case law you can fashion some sort of requirements for her to be present, or to assure yourself that that can be done. I can think of one of three ways. There can be house arrest, intensive supervision, or checking in–and checking in with the district attorney's office because they're going to have an interest in this also.

THE COURT: Now, do you have any experience or any recommendations, either one of you, as to how I can allay my fears that she's not going to be around? Do you have any experience that might aid me in trying to structure something to get her here if I released her?

MR. GUYMON: Judge, I think I do. Unfortunately, I haven't provided the Court with any case law.

THE COURT: No, I understand. And I'm not, by the way, going to make a decision today. I'm either going to make it Thursday or Monday. I want to think about it. But I'd like something to think about.

MR. GUYMON: Okay. And Monday is a holiday so it would be Tuesday.

THE COURT: So I won't. Unless you want to come to my house. And we're not putting her on house arrest in my house because it's already full of cats and I don't even know if she's allergic to them. So, that is not a possible alternative.

MR. GUYMON: I understand. Judge, we have a keen interest in having her here. In fact, when she leaves the courtroom today she's going to be served a subpoena so she'll under subpoena and it will be mandated that she returns. It will be proper service because it will be personal service. We'll also serve Mr. Siegel, just as a courtesy, just so he has a copy of it. Quite honestly, I didn't

know if the Court wanted to subpoena her through him or not. We're going to personally serve her and give Mr. Siegel a copy of it.

I think what's done previously–I don't know that it's always worked–what's done previously, is checking in with either counsel when counsel is appointed, or with the prosecution. I've also seen where Intake Services has intensive supervision and she is mandated to check in.

It's also true that I've seen house arrest on these occasions. Now, I know that Charla Severs is not working right now. I don't know that her family will be able to find a job for her–be able to pay for house arrest. But I have spoken at length to her family members who indicate that she is welcome to stay either at mother and father's house or I believe sister's house is accurate. And I've spoken to them at length. They're good folks. And I think they believe that Charla will be here if Charla promises this Court that, in fact, she'll be here.

I've indicated to her and actually, Mr. Siegel was on the phone in a telephone conference call that if she fails to appear that she can be held in contempt of court, number one, and subject to being incarcerated without bail on a contempt of court.

I've also indicated to her that quite honestly, if she fails to appear and she's not here, we would move the Court to continue this; we'd issue another material witness warrant and this time she'd probably sit without bail, period, until we went to trial.

So, I've tried to convey to Mrs. Severs that her being here is not an option. I mean, she is going to be mandated to be here. But what is important is that she gives us–

THE COURT: You don't have a passport, do you?

THE WITNESS: A passport? No.

THE COURT: We'll make sure that it's written that you can't. I mean, it's a big country. But what Mr. Guymon is saying to you is if I release you Thursday or Monday and you don't show up, they may well continue the trial and .look for you. And eventually you'll be going through the same procedure whether you get arrested in Florida or you get arrested in New York, you're going to be arrested somewhere.

So, I mean unless the world ends, as you believe it might, at some point, maybe I die, maybe they die, at some point you're going to be in front of the Court again and it may be after

you've again been in jail for a month or so. So, are you telling me that you will be here for this trial?

THE WITNESS: Yes.

THE COURT: Unless the world blows up January 2nd.

THE WITNESS: Yes.

THE COURT: Then we'll all be just little atoms.

Why don't you do this, Chip: talk to your client today. I'll make the decision on Thursday. Talk to her family. Put in a letter to me–I don't think that it's something that the defense needs to be privy to–your best plan given her feelings, given any possible concerns for her well-being, her safety, what she wants to do in terms of the next couple months. What you suggest is the best idea and I'll make a decision on Thursday after I've thought about it and after I've read this Linton case.

MR. GUYMON: Judge, what I will tell the Court whatever the Court's decision, we will want to prompt the Court that, say, ten days before trial that we have some kind of intensive contact and/or have her present so we can assure this Court come calendar call that we are, in fact, ready.

THE COURT: All right. I guess you never know till she's called into the room. But that's true of any witness. Okay, let's put this on nine o'clock on Thursday.

THE CLERK: October 28th.

THE COURT: Just for the resolution of that. And, Chip, I'm sure late in the afternoon tomorrow there will be a delivery of things that I need to read for Thursday. If you could get me this letter by, maybe, three o'clock tomorrow. Does that fit your schedule?

MR. SIEGEL: I'll make it.

THE COURT: All right. Thanks a lot.

* * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

SHIRLEE PRAWALSKY, COURT RECORDER

END OF SEALED DOCUMENT

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RPLY
PHILIP J. KOHN
Special Public Defender
Nevada Bar No: 0556
JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No: 4380
DAYVID J. FIGLER
Deputy Special Public Defender
Nevada Bar No: 4264
309 South Third Street, Fourth Floor
Las Vegas, NV. 89155-2316
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO: C153154
DEPT NO: V

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:30 a.m.

REPLY TO OPPOSITION TO MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER GUNS, WEAPONS, AND AMMUNITION NOT USED IN THE CRIME

COMES NOW, the Defendant DONTE JOHNSON, by and through his counsel of record PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender and DAYVID FIGLER, Deputy Special Public Defender, and files herein a Reply to the State's Opposition to Motion to Exclude other Guns, Weapons and Ammunition Not Used in the Crime. This Reply is based upon the attached Memorandum

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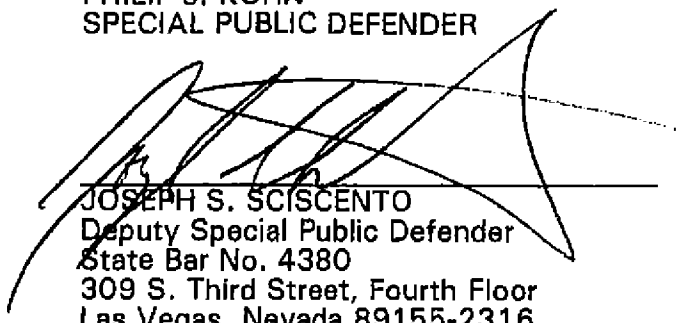
SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

of Points and Authorities, the file herein, and any argument that this court may hear is support of this motion

Dated this 15 day of November, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER



JOSEPH S. SCISCENTO
Deputy Special Public Defender
State Bar No. 4380
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89155-2316
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Mr. Johnson is being charged by way of Indictment with the following charges of; Murder, Robbery and Burglary. The alleged crimes took place on August 13, 1998. The State is alleging that, on or about August 13, 1998, the Defendant, along with other Co-Defendants, entered into a residence with the intent to rob the occupants. The State further alleges that on August 13, 1998, Donte Johnson murdered four individuals at the residence.

On or about August 17, 1998 a full four days after the alleged murders, Mr. Johnson is alleged to be in the possession of a White four-door Ford. When the vehicle was pulled over the driver identified himself as "Donte Flecth". Terrell Young was also inside the vehicle. When the officer who pulled the vehicle over, attempted to place Donte in handcuffs, Terrell Young exited the vehicle holding a gun in his hand. The officer ordered Terrell Young to drop the weapon, and subsequently the driver and the passenger fled from the vehicle and were not apprehended. The police recovered an "enforcer" .30 caliber rifle from inside the vehicle.

On or about August 18, 1998, the police, pursuant to a consent to search card

signed by Todd Armstrong, searched the residence located at 4815 Everman. The police learned from Tod Armstrong that the residence was owned by his mother. At the Everman residence the police recovered 2 firearms, a .22 Ruger rifle, Model 10/22 Serial No: 233-12826 and a .32 caliber automatic handgun. A ballistics report was performed by the Las Vegas Metropolitan Police Department, and it was confirmed that the guns that the police recovered were not the murder weapons. The forensic report states that the murder weapon was a .38 caliber. Neither of the guns recovered can fire the .38 caliber bullet.

There is no evidence that Donte Johnson has not been found to be in possession of any weapons which were alleged to be used in the crime nor of any weapons that were found, either in the vehicle or in the Everman residence.

LEGAL ARGUMENT

There is no evidence that the above guns, were ever used in the murder. There is no statement from any witness that places those guns at the murder scene. The State alleges that:

"the weapons are relevant because the Defendant is charged with crimes other than murder, including Burglary *While in possession of a firearm* Robbery *With use of a Deadly Weapon,* and Kidnapping *With Use of a Deadly Weapon*. Accordingly the weapons are relevant pursuant to N.R.S. 48.015." (State's opposition Pg 7 Lines 8-12).

In order for the evidence to have some relevancy, there must be some showing of indici that the evidence is in fact relevant. To put it more clearly, the State must show, by some evidence, that these guns were actually used in the commission of a crime. Where is the proof?

The State, in their motion, stated that Terrell Young and Sikia Smith were arrested and gave voluntary statements wherein they admitted their involvement in the robbery. This self-serving statement sheds about as much light on the issue as a candle at the bottom of the ocean on a moonless night. The State fails to say anything in their motion as to how they can prove these guns were used in the alleged crime. The State also fails to show that the above guns were used in the murder, robbery or any crime that Mr.

Johnson is charged, nor that the guns were used in the crime. The State needs to show what evidence will be presented to show that these weapons were used.

The only evidence presented so far was the statement of Charla Severs, wherein she specifically stated that she did not see the contents of the gray and green bag on the nights of the crime, nor did she see the contents of the green and gray bags after the crime.

This testimony goes directly to whether the guns were used in the crime, and the answer is they were not. The State can not bring in guns and allege that they were used in the commission of a crime.

The State must show by some evidence that the guns that they want to introduce were actually used in the commission of the crime.

A similar issue was addressed in the case of U.S. v. Hitt, 981 F.2d 422 (1992). In the Hitt case, the Ninth Circuit held that it was improper to allow the prosecution to show pictures of additional guns that were not the subject of the case and did not belong to the Defendant, but to his roommate. The Court in Hitt went on to say:

> "At the same time, the photograph was fraught with the twin dangers of unfairly prejudicing the defendant and misleading the jury. It showed a dozen nasty-looking weapons, which the jury must have assumed belonged to Hitt. The photograph looked like it was taken at Hitt's residence: The guns were laid out in an obviously residential room; the jury knew Hitt was arrested at home, I RT 23-24; the photograph was talked about in the same breath as two others identified at trial as having been taken in Hitt's bedroom, I RT 36. Moreover, there was no one else the jury could have suspected of owning the guns. Hitt's roommate, who in fact owned all the other weapons, wasn't even mentioned during Hitt's trial. Inferring that all the weapons were Hitt's wasn't just a plausible inference; it was the only plausible inference.
>
> Once the jury was mislead into thinking all weapons were Hitt's, they might well have concluded Hitt was the sort of person who's illegally own a machine gun, or was so dangerous he should be locked up regardless of whether or not he committed this offense. Rightly or wrongly, many people view weapons, especially guns, with fear and distrust. Like evidence of homosexuality, (cite omitted), or of past crimes, (cite omitted), photographs of firearms often have a visceral impact that far exceeds their probative value. *SEE* United States v. Green, 648 F.2d 587, 595 (9th Cir. 1981).

In the case at bar the similar is true. The Prosecution wants to introduce these assault weapons, and allege that they were used on the night of the murder. But in fact

there is no evidence that these guns were ever used. In the deposition of Charla Severs, she stated that she did not see the guns that were used that night, that she did not see the guns that were allegedly in the bag, and that she never looked the next day into the bag to confirm that there were indeed any guns. Yet the Prosecution, will argue to the jury that these were the guns that were used. However, they can not provide any evidence that they were in fact used.

The testimony of the Co-Defendants can not be used because they can not be crossed-examined by the defense.

Further, in the case of U.S. Tai, 994 F.2d 1204 (7 Cir.1993) the court addressed the issue of whether it was proper for the Prosecution to present guns allegedly used in the commission of the crime when there was no evidence that those guns presented were actually used.

> "Clearly the guns had no proper probative value. **Although both Suk Lee and Jung Lee testified that they had seen Tai carrying a gun, neither of them described the gun nor in any way compared it to the guns displayed during closing argument. Thus, as of the time the guns were admitted, no connection had been drawn between Tai's possession of them and his acts of extortion.** Nor could the guns have been admitted as conditionally relevant, for no further testimony was to be heard in the case. And, although the government was kind enough to explain, while displaying the guns to the jury, that Tai "carried them when he was with Suk Kyong Lee" (cite omitted) no such evidence had been introduced and closing argument was not the time to introduce it. United States v. Van Whye, 965 F.2d 528, 533 (7th Cir. 1992).
>
> So the guns were relevant only to the extent they showed Tai to be the kind of person who would carry such weapons, thus making it more likely that he was the kind of person who committed extortion. Yet for that purpose, of course, the guns were not admissible. Fed. R. Civ. P. 404(b). Tai at 1209. (Emphasis added)

In the case at bar the issue is similar to the Tai case, in that the Prosecution can not show that these exact guns were used, yet the jury will be made to believe that the guns were in fact the guns used in the crime. The State must show by clear and convincing evidence that these guns were the one used. SEE, Petrocelli v. State 101 Nev. 46, 692 P.2d 503 (1985)

CONCLUSION

The State has to show, by clear and convincing evidence, that the guns were actually used in the commission of the crime. Because the State can not provide any evidence that shows these guns were actually used, they should be excluded.

The only evidence that the State can use is the statement of Charla Severs, and she said under oath, that she did not know if these were the guns that were used and that she can not tell for certain if those guns were used the night of the crime.

For these above reasons, the Defendant moves this Court to exclude any reference to any guns, ammunition or weapons not used in the commission of the crime.

Dated this 15 day of November, 1999.

Respectfully Submitted:

PHILLIP KOHN
SPECIAL PUBLIC DEFENDER

JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 4380
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89155-2316

RECEIPT OF COPY

The Undersigned hereby acknowledges receipt of copy of the foregoing **REPLY TO OPPOSITION TO MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER GUNS, WEAPONS, AND AMMUNITION NOT USED IN THE CRIME**, this 15th day of November 1999.

STEWART L. BELL
DISTRICT ATTORNEY

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

(1.) of 5 Pages

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CLERK

Donte Johnson
~VS~
State of Nevada
Plaintiff

case NO. C153154

dept. NO.

docket NO. H

Memorandum TO
The court For requested
Motions to Be filed By Counsels

Comes now Defendant, Donte Johnson, through and by himself, with this memorandum to the court, making record of Defendants request to defense attorney's.

Through this Memorandum defendant is requesting that the following motions be filed:

#1. Motion for change of Venue. Reason being. As a result of nature pertainin the amount of media and news coverage in this matter, and the number of person in the Las Vegas area regularly reading, viewing, and hearing the news media in proportion to the area's total population, it appears that virtually every household in Las Vegas, and thus virtually every prospective juror, has been exposed to a constant barrage of inflammatory accounts, detailing in a manner highly prejudicial to defendant every occurrence in this matter that has arisen since the defendants arrest.

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*2. Motion for full recordation of all proceedings. This motion should contain a respectfull request to direct the court reporter to record and transcribe all of the proceedings in all of the phase's, including pre-trial hearings, legal arguments, voir Dire, selection of jury, in chambers, at bench confrences, any discussions regarding jury instructions and all matters during trial. This will insure the rights to full review on appeal and assistance of counsel in post-conviction.

*3. Motion in limine to bar improper prosecutional arguments. This motion should as requested contain the court to enter an order in limine prohibiting the state from engaging in improper arguments before the jury and from violating my constitutional rights in the ways discussed listed below or any way that may prejudice the defendant before the jury or the court. This should stop undue attention to my counsel by making numerous objections during the opening statement and closing argument. Defendant also ask that attorney's of record request to the court they be allowed to make formal objections to any misconduct outside the presence of the jury at every opportunity. The defendant prays that this attorney's of record also include relevant law and argument in the following areas to protect his rights under the 6th 8th and 14th amendments: A. Misleading the jury as to the law. B. Misstating the law on intent. C. Misstating the law concerning the corrabation of accomplice testimony. D. arguing facts not in evidence. Referring to Defendents right to a freedom of any prosecutional misconduct.

*4. Motion in limine to preclude state from introducing evidence of any uncharged misconduct. Also to protect the defendant by being notified in advance to prepare for a petrocelli hearing. In addition, to allow the state to inform any and all witnesse's from ingaging in this misconduct.

#5. Motion and notice for the prosecution to produce Grand Jury records to assure that the Grand Jury was not selected in a discriminatory manner. The defendant prays the attorney's of record will make this request to the court for the state to produce the records concerning the gender and racial make-up of the Grand ~~Jury~~ Jurors selected to sit for the years of 1985-1999 Clark County Grand Juries. As well as those who were potential jurors not selected through the same years. The defendant request this under the equal protection clauses, the due process clauses of the U.S.C. and the 6th amendment as well.

#6. Motion for disclosure of juvenile records of the states witnesse's. This motion would be beneficial for thourough research and preparation for effective cross-examination of the states witnesse's. NRS 62.360 governs the release of these records for this purpose.

#7. Motion for disclosure of any possible basis for disqualification of the District Attorney the defendant would ask the attorney's of record pursuant to the 4th, 5th, 6th, 8th, and 14th amendments of the U.S.C., article 1 of Nevada's State constitution and the Nevada Supreme court Rules, that a request be made to order the Clark county District Attorney to reveal on record any and all possible basis for his recusal or his office. This being a capital case, exact standards are to be met to provide a fair trial and prosecution with due process of the law.

#8. Motion for discovery of institutiona records and all files necessary to a fair trial. The defendant request the attorney's of record pursuant to NRS. 174.235 Et. section 9, article 1 of the Nevada State Constitution, the 6th, 8th, and 14th amendments to the U.S.C. and relevant case law, that the attorney's of record will outline and file this motion in order to be fully prepared, informed, aware and vividly effective on Defendants case arguements and pleadings from expotion to conclusion.

9. Motion for list of names and addresse's of persons who may have evidence favorable to the Defendant and for disclosure of all other discovery material. The Attorney's of record should request this order requiring the prosecution to search and furnish documents, files, names, and addresses of persons known to them which may be favorable to the Defendant or present any incosistencies to the prosecution's theory in this case.

10. Respectfully request Motion be filed to have state's witnesses evaluated for prior inconsistant statement's, Drug addiction, and prior felony arrest. This Motion should be filed pursuant to Rule 26.2 discovery request.

11. Respectfully request that a Motion be filed to control prejudicial publicity, this Motion should have been filed so that anyone related to the prosecution would be prohibited from releasing any information in any way, shape, or form concerning this case. Pursuant to the 4th, 5th, 6th, and 8th Amendments, "Not to forget article 1 of the Nevada State constitution along with the 14th Amendment."

12. Request counsel file Motion for disclosure of juvenile records of state's witnesses, which could be beneficial for thorough research and preparation for effective cross-examination of the States witnesses. NRS 62.360 governs the release of those records for this purpose.

13. Defendant request that counsel correct altered voluntary statements. Required pursuant to NRS 171.199 (Reporting testimony of witnesses) Line (3).

14. Request that counsel provide Defendant with a copy of "all" transcripts and documented evidence. Pursuant to NRS. 171.198 / For counsel not to comply with NRS. 171.198 would be a clear violation to Supreme Court (Rule 151) professional conduct. Not to forget (Rule 154) it quotes that "A lawyer shall keep a client reasonably informed about status of matter promptly comply with resonable request for information."

Note

These Motions should contain relevent case law so that the Defendant's rights are protected under the U.S.C. and Nevada's State constitution and laws. These motions will insure a fair trial and total awareness of all possible circumstances and scenarios surrounding the crimes that the Defendant is charged with.

Prayer and Conclusion

Defendant, Donte Johnson, prays that by expressing his request to the court and his Attorney's of record, that it shall be recognized that his best interests has been filed with the court within this Memorandum. Also, that he request that all of the above listed motions be filed in a timely manner and on his behalf to insure all of his right's are protected under the law so he may recieve a fair and unprejudiced trial with due process of the law.

Respectfully Submitted,
Donte Johnson
Donte Johnson

Attorney's
Joseph S. Sciscento
&
Dayvid Figler

Dated this 11-4-99

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NOTC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

FILED
Nov 17 8 30 AM '99
Shirley B. Parraguirre
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

NOTICE OF EXPERT WITNESSES
[NRS 174.234 (2)]

TO: DONTE JOHNSON, Defendant; and

TO: SPECIAL PUBLIC DEFENDER'S OFFICE, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call expert witnesses in its case in chief as follows:

FERGUSON, TIA

Tia Ferguson is a scientist employed by Cellmark Diagnostic Laboratories. She is expected to testify regarding serology and DNA of certain evidence collected from the crime scene(s) including, but not limited to, blood samples.

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The substance of each expert witness' testimony and a copy of all reports made by or at the direction of the expert witness has been provided in discovery.

A copy of each expert witness' curriculum vitae, if available, is attached hereto.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Expert Witnesses, was made this 16 day of November, 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #(702) 455-6273

_____
Secretary for the District Attorney's Office

98F11830X/sbs

FACSIMILE COVER PAGE

Date: 11/16/99
Time: 9:59:16
Pages: 3

To: S.P.D.
Company: SPECIAL PUBLIC DEFENDER
Fax #: 455-6273

From: STEPHANIE SCHWARTZ
Title: LEGAL SECRETARY II
Company: Clark County District Attorney's Office
Address: 200 S. Third Street - 5th floor
Las Vegas , NV 89155
USA
Fax #: 382-0317
Voice #: 455-4796

Message:

JOHNSON, DONTE - C153154
NOTICE OF EXPERT WINTESSES

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PHILIP J. KOHN
Special Public Defender
Nevada Bar No. 000556
JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 004380
DAYVID J. FIGLER
Nevada Bar No. 004264
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89155-2316
(702) 455-6265
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154
DEPT NO. V
DOCKET H

DATE OF HEARING: 11-8-99
TIME OF HEARING: 9AM

MOTION IN LIMINE TO PRECLUDE EVIDENCE OF WITNESS INTIMIDATION

COMES NOW, the Defendant, DONTE JOHNSON, by and through his attorneys of record, PHILIP J. KOHN, Special Public Defender, JOSEPH S. SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender and moves this Court for an Court for an order precluding the prosecution from presenting any evidence of witness intimidation. This motion is based upon the attached Memorandum of Points

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY
NEVADA

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and Authorities, the file herein, and argument, if any, at the time of the hearing of this Motion.

DATED this 27 day of October, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 004380
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89101
Attorney for Defendant

NOTICE OF MOTION

TO: STEWART BELL, ESQ. District Attorney for the State

TO: GARY GUYMON, Esq., Deputy District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION IN LIMINE TO PRECLUDE EVIDENCE OF WITNESS INTIMIDATION** on the 8 day of Nov, 1999, at the hour of 9 m., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 27 day of October, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER

By: JOSEPH S. SCISCENTO
Deputy Special Public Defender
State Bar No. 004380
309 S. Third Street, Fourth Floor
Las Vegas, NV 89155
Attorney for Defendant

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

AFFIDAVIT OF JOSEPH S. SCISCENTO

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

COMES NOW, JOSEPH S. SCISCENTO, and being duly sworn deposes and states as follows:

1. That he is a duly licensed attorney for and in the State of Nevada, County of Clark, and he is the attorney of record of the above Defendant.

2. That he has read the foregoing motion and knows the contents therein and believes the allegations to be true and correct and as to those matters based on information and belief he believes them to be true.

Further Affiant Sayeth Naught

JOSEPH S. SCISCENTO

SUBSCRIBED AND SWORN to before me
this 27th day of October, 1999.

Patricia S. Flood
NOTARY PUBLIC, In and for the
County of Clark, State of Nevada

PATRICIA S. FLOOD
Notary Public - Nevada
My appt. exp. Sep. 1, 2000
No. 92-3783-1

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Johnson respectfully submits that the State should not be permitted to suggest in any manner that Mr. Johnson has intimidated any potential witnesses against him or that anyone else has done so on his behalf.

A prosecutor's intimations of witness intimidation by a Defendant are reversible error unless the prosecutor also presents substantial credible evidence that the Defendant was the source of the intimidation. **Lay v. State**, 110 Nev. 1189, 1193, 886 P.2d 448, 450-451 (1994) (citing **United States v. Rios**, 611 F.2d 1335, 1343 (10th Cir. 1979); **United States v. Peak**, 498 F.2d 1337, 1339 (6th Cir. 1974); **United States v. Hayward**, 420 F.2d 142, 147 (D.C. Cir. 1969); **Hall v. United States**, 419 F.2d 582, 585 (5th Cir. 1969). See also, **Meek v. State**, 112 Nev. 1288, 930 P.2d 1104 (1996). ("the prosecutor's reference to witness intimidation was improper, and the District Court erred in failing to advise the jury to disregard it.") Likewise, the prosecutor may not imply the existence of threats that in the context of the whole record specifically hint[ed] of violence. **Lay**, 886 P.2d at 451 (citing **United States v. Muscarella**, 585 F.2d 242, 248-49 (7th Cir. 1978), **United States v. Love**, 534 F.2d 87 (6th Cir. 1976); **Peak**, 498 F.2d at 1337).

Mr. Johnson respectfully submits that if the State wishes to introduce evidence suggesting witness intimidation, it must first notify Mr. Johnson and his counsel and request that this court hold a hearing outside the presence of the jury to determine whether Mr. Johnson is actually the source of the alleged threat and to determine whether the State has met its burden of proof. If the State does not request such a hearing, and

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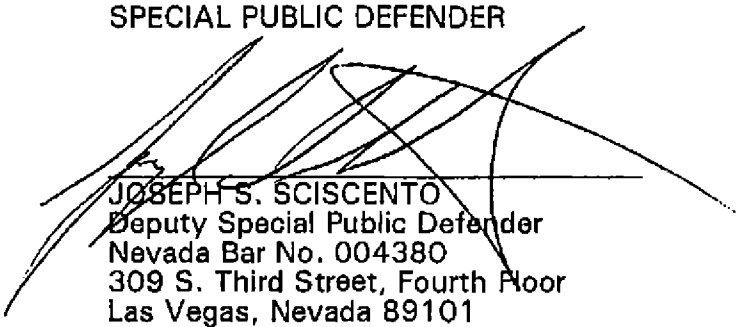
if the State does not meet its burden, then all reference of any sort, through argument or testimony, must be excluded from the trial.

DATED this 27 day of October, 1999.

PHILIP J. KOHN
SPECIAL PUBLIC DEFENDER



JOSEPH S. SCISCENTO
Deputy Special Public Defender
Nevada Bar No. 004380
309 S. Third Street, Fourth Floor
Las Vegas, Nevada 89101
Attorney for Defendant

SPECIAL PUBLIC DEFENDER

CLARK COUNTY NEVADA

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Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154
DEPT NO. V
DOCKET H

DATE OF HEARING:
TIME OF HEARING:

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **MOTION IN LIMINE TO PRECLUDE EVIDENCE OF WITNESS INTIMIDATION** is hereby acknowledged this 27 day of October, 1999.

STEWART L. BELL
District Attorney
200 S. Third Street
Las Vegas, NV 89155
Attorney for Plaintiff

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SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

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Shirley B. Parraguirre
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ORDR
WOLFSON & GLASS
Jay L. Siegel, Esq.
Nevada State Bar No. 4748
302 E. Carson Avenue, #400
Las Vegas, Nevada 89101
(702) 385-7227

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA, Plaintiff, vs. DANTE JOHNSON, aka John White, ID# 1586283, Defendant.	Case No. :C153154 Dept. No. :V **SEALED ORDER FOR RELEASE TO HOUSE ARREST OF MATERIAL WITNESS CHARLA SEVERS**

This matter having come before this Court, and good cause appearing therefore;

IT IS HEREBY ORDERED that the material witness, CHARLA SEVERS, be released on house arrest to live at 3501 Mercury Street, #D, North Las Vegas, Nevada 89030.

IT IS FURTHER ORDERED that the fees for this house arrest are to be paid at the State's expense. Further, that CHARLA SEVERS must check in with the District Attorney's office at least three (3) times per week at times predetermined by the District Attorney's office. Additionally, CHARLA SEVERS must present herself, in court, on January 4, 2000, at 9:00 a.m., in District Court #V. At that time, a determination will be made by the Court whether CHARLA SEVERS will be remanded to custody until the trial or housed at State's expense by the District Attorney's office.

DATED this 29th day of October, 1999.

DISTRICT COURT JUDGE
KATHY A. HARDCASTLE

Respectfully Submitted,

WOLFSON & GLASS

By
JAY L. SIEGEL, ESQ.
Nevada Bar No. 4748
302 E. Carson, #400
Las Vegas, Nevada 89101

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Donte Johnson
defendant
-VS-
State of Nevada
Plaintiff

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Memorandum In Pursuant
for a Motion to
Dismiss Indictment

Come now defendant, Donte Johnson through this memorandum to the court making record and giving rise to defendants request to defense counsels, "David Figler, and Joseph S. Sciscento; to file and argue the following motion, on the defendants behalf. Defendant respectfully requests attorneys to file a motion to dismiss indictment.

The grounds for this requested motion are as follows:

(1) The prosecutors, Justice Department officials and the Attorney General violated Rule 6(e) of the Federal Rules of Criminal Procedure by making extensive disclosures of confidential grand jury proceedings to the press. The prosecutors also selectively disclosed grand jury exhibits to certain witnesses in advance of their testifying in order that these witnesses were able to, better prepare, to testify before the grand jury while failing to accord the majority of witnesses this benefit.

(2) The prosecutors committed abuse of the grand jury by unjustifiable threatening and intimidating witnesses for the purpose of undermining thain credibility, influencing their testistimony, and

deliberately creating false impressions with the grand jury, thereby preventing any independent and neutral determination of probable cause as required by the Fourth Amendment.

(4) The prosecutors committed abuse of the grand jury subpoena power by interrogating grand jury witnesses outside the presence of the grand jury and by using threats and other intimidation to force the delivery of documents and other evidence to Authorities rather than to the grand jury.

(5) The prosecutors committed abuse of the grand jury by using the grand jury in substantial part solely to conduct discovery and to prepare the Government's case for trial well after the attorneys presenting the evidence had made a determination to seek an indictment.

(6) The prosecutors responsible in part for this investigation engaged in highly improper activity by gratuitously including defendant's name in a criminal complaint filed in Nevada, well knowing that defendant's alleged involvement was insignificant as well as entirely proper, and well knowing that the result would be highly prejudicial publicity focusing primarily on defendant.

(7) The prosecutors committed prosecutorial misconduct by obstructing the defendant's access to at least one key Government witness.

(8) The prosecutors committed prosecutorial misconduct by failing to correct testimony given to grand jury which the Government knew was false and misleading — the Government purposely created these false impressions and then failed to correct them.

The misconduct and grand jury abuse by the Government attorneys in this matter has not only undermined the integrity and independence of the grand jury system but has denied this defendant, Donta Johnsons constitutional rights to due process of law and to a fair, detached and unbiased return of an indictment in this matter requires that this indictment be dismissed forthwith.

(A). upon information and belief, the Grand Jury in the state of Nevada handed down the within thirteen-count felony indictment based on hearsay evidence even though primary witnesses were available. Further, it is believed that the entire record of the Nevada State

Grand Jury proceedings may not have been presented. Instead, the prosecutor selected portions of the records for presentation to the Nevada State Grand Jury.

(B). This method of securing an indictment has inherent defects. Allowing the prosecutor to select the testimony ~~as~~ presented to the indicting grand jury reduces the grand jury system to a prosecutorial "rubber stamp."

(C). The credibility of the witnesses is a major issue in this case. From my belief, one of the witnesses in this case has been granted, or will be granted immunity. (Tod Armstrong) It is believed that Tod Armstrong gave testimony to L.V.M.P.D as well as the Nevada State Grand Jury. Though, was not available for ~~two~~ past trials of the defendant Donte Johnsons, Co-defendants.

(D). One of the other witnesses in this case, Charla Severs, has admitted that she has deliberately mislead other governmental investigative agencies. It is likely that the other witnesses in this case also gave prior inconsistent statements. Such as ~~Bryan Johnson~~ and ~~Anthony~~ Bryan C. Johnson and Ace Heart.

(E). Other witnesses who are believed to have testified before the Grand Jury in this case have given such confusing and contradictory statements in past sworn proceedings that their credibility and memory of events must be questioned.

Conclusion

In the alternative, defendant submits that this court should hold a hearing to examine the Grand Jury proceedings with respect to defendant and to determine the identity of those sources close to the prosecutor's office responsible for the prejudicial pre-indictment publicity. On the basis of what is learned as a result of that hearing, the court should dispose of this motion (To dismiss indictment) and enter an order dismissing the indictment against the defendant.

By reason of all the above, this inordinate delay between my arrest and indictment has been such as to unduly prejudice me to my right to a speedy and public trial as guaranteed by the sixth Amendment of the United States Constitution and the indictment should therefore be dismissed.

4

Note

If defendants accused grounds are not accurate; Defendant Johnson respectfully request that counsel make corrections.

Respectfully Submitted
Donte Johnson
Donte Johnson

Attorneys,
Joseph S. Sciscento
and
Dayvid J. Figler

Dated: 10-28-99

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Shirley B. Parraguirre CLERK

OPPS
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF ANY AND ALL STATEMENTS OF THE DEFENDANT

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Opposition to Defendant's Motion to Compel the Production of Any and All Statements of the Defendant.

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

DATED this 29th day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

POINTS AND AUTHORITIES

Defendant seeks to discover, *inter alia*, his direct statements. Pursuant to NRS 174.235, upon motion of a defendant, the court may order the district attorney to permit the defendant to inspect (and copy or photograph) any relevant written or recorded statements made by the defendant. See NRS 174.235(1). To the extent the District Attorney's Office has not already done so, the District Attorney will comply with the provisions of NRS 174.235.

Defendant also seeks to discover what he labels his "vicarious statements." Defendant fails to cite any applicable legal authority for this proposition. Instead, Defendant relies on NRS 51.035 (3) (a)-(e) to suggest that "it is ... a logical application of NRS 174.235 to include .. words ... for which he can be held vicariously liable." NRS 51.035 (3) (a)-(e) merely lists statements which do not fall under the definition of hearsay. Defendant makes an unwarranted leap in logic to suggest that, simply because such statements do not constitute hearsay, these statements are somehow transformed into "statements made by the defendant" as contemplated by NRS 174.235.

In any event, the State of Nevada has given defense counsel access to its entire file. Moreover, if additional statements are discovered that fall under NRS 174.235, defense counsel will be provided with copies of these statements.

CONCLUSION

Based on the foregoing, the State of Nevada respectfully requests that this Court deny Defendant's Motion To Compel Production Of Defendant's Direct and Vicarious Statements.

DATED this 29TH day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's Motion to Compel the Production of Any and All Statements of the Defendant, was made this 4th day of ~~October~~ Nov., 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #(702) 455-6273

_____
Secretary for the District Attorney's Office

DASKR/sbs

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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF ANY AND ALL STATEMENTS OF THE DEFENDANT

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Opposition to Defendant's Motion to Compel the Production of Any and All Statements of the Defendant.

//

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Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

OPPOSITION TO MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER GUNS, WEAPONS AND AMMUNITION NOT USED IN THE CRIME

DATE OF HEARING: 11/04/99
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this "Opposition to Motion in Limine To Preclude Evidence Of Other Guns, Weapons and Ammunition Not Used in The Crime."

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

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department V thereof, on 1999, at the hour of 8:30 o'clock a.m., or as soon thereafter as counsel may be heard.

DATED this 4 day of November, 1999.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

I.

STATEMENT OF FACTS

In the months preceding August of 1998, Tod Armstrong and Ace Hart resided at 4815 Everman Drive in Las Vegas, Nevada. The home was actually owned by Tod Armstrong's mother, Cheryl Stevens.

In early August 1998, Donte Johnson (a.k.a. "Deko"), Charla Severs (a.k.a. "LaLa") and Terrell Young (a.k.a. "Red") occasionally stayed at the Everman residence. Charla Severs was the girlfriend of Donte Johnson. Johnson, Young and Severs stayed in the master bedroom of the house, which is also where they kept their personal belongings. Those belongings included a green/brown duffel bag which contained several guns, and possibly brown gloves and duct tape.

Matthew Mowen, Tracey Gorringe and Jeffrey Biddle lived in a residence located at 4825 Terra Linda, also in Las Vegas, during this time-frame. The Everman residence and the Terra Linda residence were within blocks of one another.

Sometime in August of 1998, Matthew Mowen visited the Everman residence to purchase rock cocaine from Donte Johnson. Shortly after Mowen left the Everman residence, it was

suggested to Donte Johnson that Mowen and his roommates kept a large sum of cash and a large amount of controlled substances in the Terra Linda home. Subsequently, Donte Johnson, Terrell Young and Sikia Smith (a.k.a. "Tiny Bug") formulated a plan to rob the occupants of the Terra Linda residence.

On August 13, 1998, during the late evening hours, Donte Johnson, Terrell Young, and Sikia Smith (collectively "Defendants" or "conspirators") executed their plan. Armed with gloves, duct tape and guns -- including a Ruger .22 caliber rifle ("Ruger"), a Univeral Enforcer .30 caliber carbine rifle ("Enforcer"), and a .380 caliber semi-automatic handgun -- the three conspirators drove a stolen vehicle to the Terra Linda residence for the purpose of robbing its occupants.

Matthew Mowen was outside the Terra Linda residence when Johnson, Young, and Smith arrived in a stolen car. Mowen was confronted by all three conspirators who ordered Mowen into the house at gunpoint. A second resident, Tracey Gorringe, was also ordered into the house. Mowen and Gorringe were both ordered to lie face down. The Defendants then bound the two young men with duct-tape by their ankles and wrists and began searching the Terra Linda residence. Meanwhile, a third Terra Linda resident, Jeffrey Biddle, arrived home in his pickup truck. He was immediately confronted at gunpoint by Donte Johnson. He, too, had his wrists and ankles duct-taped together while held at gunpoint.

The Defendants ransacked the Terra Linda residence, emptied the wallets of all three victims and, apparently unsatisfied with their spoils, demanded more money. Consequently, the Defendants demanded that the victims contact Peter Talamantez, a friend of the Terra Linda residents, to lure him to the Terra Linda home. He eventually arrived at the Terra Linda residence where he was greeted at gunpoint by the Defendants. Talamantez, like his friends before him, was ordered to lie face down and his ankles and wrists were bound with duct-tape.

Peter Talamantez offered resistance and began to "disrespect" Donte Johnson. In fact, Talamantez referred to Donte Johnson, a "Blood" gang member, as "cuz." Consequently, Talamantez was struck in the back of the head with the butt of a handgun and carried into the kitchen by the Defendants. Donte Johnson then walked to a stereo that was located in the living

room, turned up the volume to muffle the sound from any gunfire, and returned to the kitchen where Talamantez lie helpless in a fetal position. Johnson pointed the .380 handgun, which he had retrieved from Smith, at Talamentez's head and shot Talamantez execution-style. Talamantez died of a single gunshot wound from a .380 caliber bullet.

Donte Johnson and his partners returned to the living room. The Defendants realized that they could not leave any of the remaining three young men alive as they were potential witnesses to the killing of Talamantez. Accordingly, Johnson methodically fired a single bullet into the back of each of the heads of Mowen, Gorringe and Biddle. Each died from a single gunshot wound from a .380 caliber bullet.

The Defendants left the Terra Linda residence in the stolen Ford and returned to the Everman residence with their guns, duct-tape and robbery proceeds: approximately $200 in cash, a blue pager, a Video Cassette Recorder and a Nintendo Play Station.

Discovery of the Enforcer Rifle

On August 17, 1998, at approximately 10:40 p.m., Sergeant Honea of the Nevada Highway Patrol was traveling northbound on U.S. 95 near Charleston Boulevard. He paced a white, four-door Ford traveling at 85 m.p.h. in the posted 65 m.p.h. zone. Sergeant Honea activated his overhead lights to make what he thought was a routine traffic stop.

As he approached the car, Sergeant Honea noticed it was occupied by two young men. Sergeant Honea asked the driver for his license, registration and proof of insurance. The driver was unable to produce any of the requested documents. Sergeant Honea asked the driver to exit the vehicle and inquired about his name and date of birth. The driver responded that his name was "Donte Fletch," that his date of birth was 05/27/78[1] and that he could not recall his social security number. Sergeant Honea asked "Donte" the name of the passenger. "Donte" responded that he did not know the passenger's actual name; however, his nickname was "Red."

Sergeant Honea approached "Donte" with the intention of placing him in custody until a backup unit arrived. Honea then observed the passenger door of the Ford open and saw the

[1] Donte Johnson's actual date of birth is 05/27/79.

passenger exit the car with a handgun at his side. The sergeant aimed his gun at the passenger and ordered him to drop his weapon; however, both the driver and the passenger ran toward the Charleston Boulevard off-ramp.

Neither the driver nor the passenger were captured that night. A search of the Ford, however, revealed the "Enforcer" rifle which the conspirators had used during the commission of the Terra Linda robbery. This was the same Enforcer rifle that the Defendants brought to the Terra Linda household nights earlier. A fifteen round magazine of ammunition was in the rifle, and an additional thirty round magazine was found in a backpack in the rear seat of the stolen Ford.

Discovery of the Ruger Rifle

On August 18, 1998, at approximately 3:00 a.m., members of the Las Vegas Metropolitan Police Department ("LVMPD") arrived at the Everman residence. They ordered all of the occupants of the Everman residence out of the house, including Donte Johnson and Charla Severs. During a consensual search of the Everman residence, Sgt. Hefner located, *inter alia*, the Ruger rifle in the master bedroom -- the bedroom where Donte Johnson and Terrell Young stayed -- of the Everman house; this, of course, was the same Ruger rifle that Terrell Young had used to act as look-out as he stood over the quadruple homicide victims. Significantly, the green/brown duffel bag which the conspirators brought to the Terra Linda household was located in the living room of the Everman residence. A partial roll of grey duct tape was also found and impounded.

On September 2, 1998, and September 8, 1998, respectively, Terrell Young and Sikia Smith were arrested in connection with the Terra Linda quadruple homicide. Subsequently, both conspirators were informed of their Miranda rights, both acknowledged that they understood their rights, and each agreed to waive his rights and speak with Detectives. Both co-offenders gave tape-recorded, voluntary statements wherein they admitted their involvement and participation in the robbery at the Terra Linda residence. Both Smith and Young identified Donte Johnson as the "trigger-man" in the murders.

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II.

DISCUSSION

The Defendants are charged with various offenses arising out of the events that occurred on August 14, 1998, including burglary, robbery, kidnaping and murder, all with use of a deadly weapon. During the trial of these offenses, the State seeks to introduce, *inter alia*, evidence regarding the recovery of the Ruger and Enforcer rifles. Of course, this court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

A. EVIDENCE REGARDING THE RUGER AND ENFORCER RIFLES IS RELEVANT TO ALL OF THE CRIMES ASSOCIATED WITH QUADRUPLE HOMICIDE

Defendant seeks to preclude the State from introducing, *inter alia*, the Ruger and Enforcer rifles. See Motion at 3. Defendant suggests that testimony regarding recovery of these weapons is not relevant to the crimes charged because "[t]he guns are not alleged to be used in the murder." Motion at 4. Thus, Defendant suggests, "[t]here is no reason for their introduction." Id.

N.R.S. §48.015 defines relevant evidence as:

> ... evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence...

The Indictment in this case charges Defendant with fourteen (14) different felony offenses, one of which includes the use of a deadly weapon as an element of the crime and several of which allege deadly weapon enhancements. For example, Defendant is charged with Burglary *While In Possession of a Firearm*, Robbery *With Use of a Deadly Weapon*, and Kidnaping *With Use of a Deadly Weapon*. Thus, evidence which tends to prove that the Defendant was in possession of those deadly weapons -- either before, during, or after the actual crimes -- is obviously relevant in the trial of the instant matter. Accordingly, testimony that Defendant was in possession of the very weapons which were brought to the Terra Linda household for the purpose of committing burglary, robbery, kidnaping and murder is admissible

in this trial.

Defendant, however, suggests that "[n]one of these guns are alleged to be the murder weapon, and they have no evidentiary value as to the determination of guilt or innocence of the Defendant." Motion at 4. Defendant's argument is belied by the Indictment in this matter. As illustrated above, Defendant is charged with crimes other than murder. Moreover, it is the State's position, and the evidence will establish, that both the Ruger and Enforcer rifles were used *during the robberies and kidnapings* which resulted in the quadruple homicide. To be sure, the State has never suggested that either of these rifles was the "murder weapon." Nevertheless, the weapons are relevant because the Defendant is charged with crimes other than murder, including Burglary *While In Possession of a Firearm,* Robbery *With Use of a Deadly Weapon*, and Kidnaping *With Use of a Deadly Weapon.* Accordingly, the weapons are relevant pursuant to N.R.S. 48.015.

B. TESTIMONY REGARDING THE RECOVERY OF THE RUGER AND ENFORCER RIFLES IS ADMISSIBLE PURSUANT TO N.R.S. §48.035

N.R.S. 48.035(3) provides:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

This, of course, is commonly referred to as the "complete story of the crime" doctrine. The statute, and the cases interpreting it, hold that the State is entitled to present a full and accurate account of the circumstances of the commission of the crime, even if such an account also implicates the defendant in the commission of other uncharged crimes. *See e.g.,* Dutton v. State, 94 Nev. 461, 581 P.2d 856 (1978); *see also* Shults v. State, 96 Nev. 742, 616 P.2d 388 (1980) (recognizing that the state is entitled to present a full and accurate account of the circumstances surrounding a crime).

In the instant matter, as illustrated above, the Defendant is charged with crimes which involve deadly weapon enhancements. Therefore, evidence pertaining to the Defendant's

possession of, and access to, those weapons is relevant. Moreover, the state is entitled to present a full and accurate account of the events surrounding the recovery of those weapons. *See* Shults v. State, 96 Nev. 742 (1980) (holding that the state was entitled to present evidence of a prior robbery in a first degree murder prosecution in order to provide a full account of the circumstances surrounding the murder). Consequently, the evidence is admissible pursuant to the "complete story of the crime" doctrine.

C. THE PROBATIVE VALUE OF THE WEAPONS IS NOT SUBSTANTIALLY OUTWEIGHED BY ANY OTHER CONCERNS

Defendant suggests that even if the guns are relevant, they must be excluded because they will mislead the jury, create undue delay and prejudice the Defendant. See N.R.S. §48.035. Defendant cites a newspaper article and a photograph which shows the prosecutor displaying the Ruger and Enforcer rifles during a co-defendant's trial. The caption to the photo states:

> During closing arguments Monday in the murder trial of Terrell Young, Deputy District Attorney Gary Guymon holds up weapons used in the Aug. 14, 1998, slaying that left four men dead.

Defendant goes on to argue that "the possibility of mistake and confusion is evident with this picture" because the jury "can be misled into believing that the guns were used in the murder." Motion at 6.

In fact, the Ruger and Enforcer rifles displayed in the photograph were used in the quadruple slaying, albeit not to kill anyone. As previously illustrated, the guns were brought to the Terra Linda residence by the Defendant and his co-conspirators for the purpose of committing robbery. The robbery resulted in a quadruple homicide. Consequently, there is no danger of confusing or misleading the jury into believing that the guns were used in the quadruple homicide. Indeed, that is precisely what the evidence will establish. Therefore, Defendant's argument that the jury will be misled is meritless.

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III.

CONCLUSION

The Ruger and Enforcer rifles are relevant in the trial of the instant matter since the Defendant is charged with crimes which include deadly weapon enhancements. Moreover, the State is entitled to present testimony concerning the recovery of those weapons. Finally, the highly probative value of the weapons is not substantially outweighed by other concerns. Accordingly, the State respectfully that this Court permit the State to present evidence concerning those weapons and deny Defendant's Motion to Preclude their introduction.

DATED this 4 day of November, 1999.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the State's Opposition to Defendant's Motion in Limine to Preclude Evidence of Other Guns, Weapons and Ammunition Not Used in the Crime, was made this 4th day of November, 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
(702) 455-6273

BY _____
Employee of the District Attorney's Office

/tgd

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*** TX REPORT ***
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

OPPOSITION TO MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER GUNS, WEAPONS AND AMMUNITION NOT USED IN THE CRIME

DATE OF HEARING: 11/04/99
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this "Opposition to Motion in Limine To Preclude Evidence Of Other Guns, Weapons and Ammunition Not Used in The Crime."

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RSPN
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Response to Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution.

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COUNTY CLERK

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

DATED this 29TH day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

POINTS AND AUTHORITIES

The State agrees to provide the defense with information concerning any benefits or preferential treatment that witnesses have received or expect to receive in exchange for their testimony (See Exhibit "1").

DATED this 29TH day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

DASKR/sbs

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response to Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution, was made this 4th day of ~~October~~ Nov., 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #(702) 455-6273

T. Driver
Secretary for the District Attorney's Office

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ORIGINAL FILED IN OPEN COURT
DISTRICT COURT September 8 19 99
SHIRLEY B. PARRAGUIRRE, CLERK
CLARK COUNTY, NEVADA
BY Linda Skinner
LINDA SKINNER DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

TERRELL COCHISE YOUNG,

Defendant.

CASE NO. C 153461
DEPT. NO. III
DOCKET NO. "E"

BEFORE THE HONORABLE JOSEPH PAVLIKOWSKI, DISTRICT JUDGE

SEPTEMBER 1, 1999 - 9:30 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Volume II

APPEARANCES:

For the Plaintiff: G. GUYMON, ESQUIRE
Deputy District Attorney
R. J. DASKAS, ESQUIRE
Deputy District Attorney

For the Defendant: W. WOLFBRANDT, ESQUIRE
M. HASTINGS, ESQUIRE

REPORTED BY: JAMES A. HELLESO, CCR No. 15

CE31

EXHIBIT "1"

WEDNESDAY, SEPTEMBER 1, 1999 - 9:30 A.M.

* * * * *

THE COURT: This is a continuation of the matter of State of Nevada versus Terrell Young.

Mr. Daskas and Mr. Guymon for the State, Mr. Hastings and Mr. Wolfbrandt for the Defendant, and also the present of the Defendant, Mr. Young.

MR. GUYMON: Judge, I have an Order, if I could approach, a Stipulation and Order regarding the chain of custody of those tapes that are to be analyzed, if I could approach?

THE COURT: Yes.

MR. GUYMON: Specifically, we have found a person by the name of Howard Overton. He is the director and owner of Overton Productions.

He is to receive the audio tapes that were the subject of the motion to suppress so that he can analyze those.

He will receive the original equipment which those tapes were produced by. He will listen to those tapes having then enhanced them through digital process and be able to tell this court whether or not those tapes have been altered or tampered in any way, whether or not the tapes have been stopped during the communication. And he

would be prepared to do that by Monday, which I realize is a holiday, which Tuesday he will have prepared an affidavit for the same.

THE COURT: Mr. Wolfbrandt, agreeable?

MR. WOLFBRANDT: That's my understanding. It is agreeable.

It is further my understanding I guess he needed the original tapes themselves as well as the original recording device that was used by the detectives.

MR. GUYMON: And that's all in the Order, Judge.

For the record, counsel has stipulated both the release of that property to Pete Baldanado, an investigator of our office, who will take them over to Overton Productions.

They will stipulate as well there is a chain of custody; that they are in their original format now and that there will be no issue as to that when they return.

MR. WOLFBRANDT: That's correct.

THE COURT: File it in open court and give Mr. Wolfbrandt and Mr. Guymon and copy.

All right, with that do we have anything further?

MR. GUYMON: Judge, one other thing. If I could, they had asked - they have a - they being defense

- they have adopted the defense's previous motions regarding any promises or inducements that any witnesses have received.

I am prepared to put any or all inducements or promises on the record at this time, or at any time this court wishes me to do it.

THE COURT: Do it now at this time.

MR. GUYMON: With regard that there is a witness named Ace Hart. He is a witness in this case as well as the Co-Defendants' cases.

He is set to testify in Sikia's Smith. He is concerned about his safety that he expressed at the time of going to the police originally, and as such, Judge, the State or the cost to fly him to Michigan where he has stayed and where he is living now with his father.

The State has also borne the cost of his travel expenses each time he has come out here to testify. That's consistent with mandate by statute.

Judge, while he was testifying in the Sikia Smith case, it is my memory his mother brought him down here. His mother received a parking ticket. I believe it was a $10 violation.

She brought that to our office and our Victim Witness Program paid that ticket. That is the only inducement or promise, if you want to call those promises,

that Ace Hart has received.

LaShawnya Wright, another witness in this case, has a pending sentencing in a PC case. It is before Judge Hardcastle.

Her sentencing is on September 8, 1999. It is Case Number C140394B.

Before the State ever even knew she was a witness, she had already pled guilty to possession of controlled substance. The State had nothing to do with any of the negotiations, in other words, her being a witness in this case has nothing to do with what negotiations she received in that case - she had already pled guilty.

However, in that case, and for her cooperation, I indicated that if she would testify truthfully in Sikia Smith's case, that I would not oppose her receiving 453.3363 treatment, but that it was going to be up to her to successfully make and complete her probation, and that I could not promise her if the judge would, in fact, give her 453.3363 treatment.

I don't know whether Judge Hardcastle will give her that treatment. I have not spoken to Judge Hardcastle about whether Judge Hardcastle will do that.

But I have indicated to LaShawnya Wright that the State would not oppose that treatment.

Judge, she also has a pending open case,

Case Number 99F0364A. It is in front of Judge Abbatangelo for a preliminary hearing scheduled on October 19, 1999. In that case, I advised Judge Abbatangelo that I would not oppose an own recognizance release in that case of which she received an own recognizance release.

She had asked during Sikia Smith's case for a contact visit with Sikia Smith through the defense attorneys. I indicated I would not oppose that contact visit, although she never received that contact visit because she never again contacted us.

I am still waiting for her to contact us.

There is a witness of Elizabeth Nevarez. She has pled guilty to a battery case in the City. That is Case Number 9543.

She pled guilty to that before we even contacted her.

I have made no promises in that case. She has already been sentenced in that particular case.

I have, however, contacted the City Attorney that is handling that case and asked that she receive a 30 days' continuance so that she can complete all of the requirements that are asked of her.

The sentence had already been set. I have not changed or modified the sentence in any way.

While conducting a pre-trial conference with

her, she received a parking ticket, brought it to me. I believe it is a $10 violation.

I will submit that at some point in time to the Victim Witness Program to have that violation paid for.

Judge, there is a witness by the name of Gregory Travis. Some two weeks ago Gregory Travis was shot at by who he believed to be companions of the Defendant and/or the Defendant's co-defendants.

This has been made a subject of police investigation. There has been police reports that have been completed and filed in that particular case.

And as a result of his safety and the State's concern for his safety, he no longer resides in the Fremont Street area where he was shot at, where he was residing.

The State paid to relocate him to a new location here in town.

The State also paid meal expenses for some five days, I believe, until he started his new job, and now is paying for his own food and the likes.

That, Judge, is the extent of any promises that have been made to any of the witnesses.

I should say, that is, with the exception of one witness, Clarice Flint.

I have told Clarice Flint, who had come

forward giving us information about this case and other cases, and given us information about the Defendant and his co-defendants.

I have told her that I would relocate her if she has safety concerns.

She has not expressed safety concerns. She has not taken us up on our invitation to relocate her. So that is a promise I have left outstanding.

But she has not exercised that promise.

And that concludes any promises that any witnesses have received.

THE COURT: Mr. Wolfbrandt, anything?

MR. WOLFBRANDT: I will take the State at its words, that that's all of the promises that have been made. And I will still expect if there any further benefits given any witnesses that they come forward with it at the time those occur.

I would certainly trust Gregory Travis is not going to be testifying before the jury that he was shot at, that he feels that it is associated with Mr. Young?

THE COURT: Well, I don't think he will be able to say that.

MR. WOLFBRANDT: I am going to be making darn sure they don't say that.

But I would ask that if this is no problem

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
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SHIRLEY B. PARRAGUIRRE, CLERK
BY LINDA SKINNER
DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

TERRELL COCHISE YOUNG, #1509343

Defendant(s).

Case No. C153461
Dept. No. III
Docket No. E

BEFORE THE HONORABLE JOSEPH PAVLIKOWSKI, DISTRICT JUDGE

WEDNESDAY, SEPTEMBER 8, 1999, 9:30 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME NO. _____

APPEARANCES:

For the Plaintiff: MR. GUYMAN and MR. DASKUS

For the Defendant: MR. WOLFBRANDT and MR. HASTINGS

REPORTED BY: JAMES A. HELLESO, C.C.R. NO. 15

State. Is that correct?

THE COURT: Mr. Hastings.

MR. HASTINGS: That's correct, your Honor.

As discussed previously on the record, my client states there is more than three tapes. It is our standing there is only three.

I think it would be appropriate to possibly mark the originals for part of the record and have those as part of the record at this time.

MR. GUYMAN: We can do that.

THE COURT: The tapes one and two?

MR. HASTINGS: Actually tapes one, two, and three and not introduce them, but --

THE COURT: Three will be admitted as redacted. One and two will not be admitted, but for the record, we will mark one and two just as an exhibit. They will not be offered or anything of that nature, and the Jury will not be informed of it.

MR. GUYMAN: May I approach with the originals, then?

THE COURT: Yes.

All right, with that in mind, are we ready to proceed and bring in the Jury?

MR. GUYMAN: Yes, your Honor. I will tell the Court consistent with my obligation as to any promises, consistent with what I have told defense about LaShawnya Wright, her sentencing is today, I did convey to Charlie

Waterman, her attorney today again as I have previously as well as the prosecution, that she did testify yesterday in Court and that we would have no opposition to 453.3363 treatment.

I have not spoken to the Judge. I don't know that the Judge will give her 453.3363 treatment. But, again, I want to make sure the record is clear on that.

THE COURT: The record will so show.

That in mind, Mr. Bailiff, bring in the Jury.

(A short recess was taken.)

THE COURT: This is a continuation of the matter, State of Nevada vs. Terrell Young, Case No. C153461.

The record will indicate the presence of the same parties in Court at the time we recessed yesterday.

Are you ready to proceed, Mr. Daskus?

MR. DASKUS: Yes, Judge.

THE COURT: Mr. Hastings?

MR. HASTINGS: Yes, Judge.

THE COURT: Ms. Clerk, call the roll of the Jury, please.

(The Clerk called the roll of the Jury.)

THE COURT: The record will show the presence of the regular jurors and also the four alternates.

Call your next witness.

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STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Response to Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of

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ORIGINAL

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OPPS
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF INFORMANTS AND REVEAL ANY DEALS, PROMISES OR INDUCEMENTS

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Opposition to Defendant's Motion to Reveal the Identity of Informants and Reveal Any Deals, Promises or Inducements.

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COUNTY CLERK

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

DATED this 29th day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

POINTS AND AUTHORITIES

The Defendant's Motion requests information regarding both confidential informants and witnesses who have received benefits for testimony, and uses those terms almost interchangeably. In the instant case, there are currently no confidential informants as defined and described under the privilege statutes (NRS 49.335, et seq.)

NRS 50.068 states as follows:

> 1. A defendant is not incompetent to be a witness solely by reason of the fact that he enters into an agreement with the prosecuting attorney in which he agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence.

In the instant case, the defense has been provided with transcripts of all recorded statements of witnesses, copies of the Guilty Plea Memorandum for each witness and copies of the Agreement to Testify, if any, executed by each witness. This satisfies the State's discovery obligation under NRS Chapter 174.

The defense, however, has requested far more information than either the Nevada Revised Statutes or the appurtenant case law provide, including "...all records, notes, memoranda and documents in the possession of the State relating to the aforementioned grant(s) of immunity,

promises, consideration, threats or any other inducements...." For this and other propositions, the defense has relied upon case law which does not support the request.

Giglio v. United States, 405 U.S. 150 (1972) merely requires the prosecution to reveal the existence of any benefits conferred upon a testifying witness, which the State in the instant case has done by providing copies of the relevant Guilty Plea Agreements and the Agreements to Testify for each witness. *United States v. Pitt*, 717 F.2d 1334 (11th Cir. 1983), as cited by the Defendant, deals with the disclosure of personnel files of law enforcement witnesses and is inapplicable to the Defendant's request for notes and memoranda of law enforcement representatives. Similarly, *Jimenez v. State*, 112 Nev. 610, 918 P.2d 687 (1996), also cited by the Defendant, requires the State to disclose the existence of any benefit received by a confidential informant in return for his testimony.

All of these cases emanate from *Brady v. Maryland*, 373 U.S. 83 (1963), which prevents the prosecution withholding exculpatory evidence in its possession from the defense.

The prosecution does not have any confidential informants that will provide exculpatory evidence. The State has fulfilled its burden under the Nevada discovery statutes, *Brady*, and *Giglio*, (none of which require the State to turn over notes and internal memoranda created by representatives of the State). Additionally, any witnesses that have received any deals, promises or inducements from the State will testify about such deals at time of trial.

DATED this 29TH day of October, 1999.

Respectfully submitted,

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

DASKR/sbs

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's Motion to Reveal the Identity of Informants and Reveal Any Deals, Promises or Inducements, was made this 4th day of ~~October~~ Nov., 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #(702) 455-6273

J. Driver
Secretary for the District Attorney's Office

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*** TX REPORT ***
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OPPS
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF INFORMANTS AND REVEAL ANY DEALS, PROMISES OR INDUCEMENTS

DATE OF HEARING: 11/18/99
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and files this State's Opposition to Defendant's Motion to Reveal the Identity of Informants and Reveal Any Deals, Promises or Inducements.

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

STATE OF NEVADA, PLAINTIFF, VS. DONTE JOHNSON, aka JOHN LEE WHITE DEFENDANT.	CASE NO. C153154 DEPT. V Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

STATUS CHECK: FILING OF ALL MOTIONS

DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF INFORMANTS AND REVEAL ANY BENEFITS, DEALS, PROMISES, OR INDUCEMENTS

DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION

DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF ANY AND ALL STATEMENTS OF DEFENDANT

STATE'S MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER CRIMES

DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF INFORMANTS AND REVEAL ANY BENEFITS, DEALS

DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF ANY AND ALL STATEMENTS OF THE DEFENDANT

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COUNTY CLERK

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DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE/SUBSTANCE OF EXPECTATIONS

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF OTHER GUNS, WEAPONS, AMMUNITION

THURSDAY, OCTOBER 21, 1999, 8:30 A.M.

APPEARANCES:

FOR THE STATE:	GARY GUYMON, ESQ. ROBERT DASKAS, ESQ. DEPUTY DISTRICT ATTORNEYS
FOR DEFENDANT JOHNSON:	JOSEPH SCISCINTO, ESQ. DEPUTY SPECIAL PUBLIC DEFENDER
FOR WITNESS CHARLA SEVERS:	JAY SIEGEL, ESQ.

COURT RECORDER: SHIRLEE PRAWALSKY

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 21, 1999, 8:30 A.M.

THE COURT: State versus Johnson.

All right. I'm going to grant the motion–actually, there's two motions for depositions–under the following conditions, first of all. Now, I think that deposition permission should be the exception, not the rule. I think the statute makes that clear. I think it's also clear from the fact that I can't find any cases under it; that it's rarely litigated. I think this is an exceptional case.

First of all as to the State's motion, I think they made a sufficient showing under 174.175.1 that there is a risk, a substantial risk that if released, this witness isn't going to be able to come to trial. She would be prevented, perhaps, from doing so for the reasons that are articulated in the exhibits and the affidavits that are attached to the State's motion, an amended motion. And, clearly, she is a material witness and I think it's necessary to preserve justice.

Now, if the only motion that were before the Court were the witness' motion, I suppose I'd have an evidentiary hearing first to discuss the Channel 8 letter. Because, of course, she can't invoke that statute if she's an accomplice. I take it you're not asking for immunity, nor would she invoke the fifth amendment. You are satisfied enough, I take it, from those actions that she is not an accomplice?

MR. SIEGEL: I'm satisfied from my discussions with her, Ms. Severs. I am also satisfied from what the State has said in open court and in their written motions that they are not seeking to prosecute her.

THE COURT: Yeah, I don't find any substantial basis for finding that she's an accomplice and then under the third subsection not eligible for this. I don't think that the resolution that the State suggests is appropriate. That is that I would not use the deposition later, but what it does do is put me in this position, A: I'm not going to have an evidentiary hearing first because I'm going to grant the motion on the first sub-section at least. Secondly, insofar as I'm inclined to grant it under the

second subsection which is her request to take the deposition, if I develop during the deposition an idea that she really is an accomplice, then she isn't going to fall under the ambit that subsection 2 and she isn't even going to be eligible for me to exercise my discretion and order her release. It's still just discretionary. But if she's not an accomplice, it's not really her deposition; it's the State's deposition.

But for those reasons, we're going to grant the deposition. It's going to be heard at 9:30, as we already indicated, on Tuesday. That, of course, doesn't mean it's going to come in at trial and I'm hoping that at trial we're going to have the live testimony.

MR. SCISCENTO: Your Honor-

THE COURT: One minute, Joe.

The subsection that you're invoking, Chip, of course, involves discretionary release after she has signed the deposition. That means we're going to take the deposition Tuesday morning. She probably won't sign it by later in the week. I'll indicate to you now--because you know your work schedules and I don't--all of you will have an interest, but it will be a different interest, in this lady coming to trial. Your interest in assuring me she's going to be at trial is I'm more likely to release her. Your interest in seeing her at trial may well be that the context for cross examination will be clearer to you at the time of trial than it will be at the deposition and you gentlemen have an interest in at least making a very good effort to get her to trial so that if she doesn't, despite your best efforts, you can use the deposition.

I am sure there must be case law that will indicate to the Court that you guys can look for with your varying interests prior to the time she subscribes that deposition and we make a final decision as to whether she's going to be released. Whether there are conditions that could be set up that are going to satisfy the Court that if she's released she isn't just going to be like a bird. I have an imagination, but I'm sure there's case law that deals with the question of what restrictions can the

Court put on a material witness when released and I'd appreciate your input on that.

Joe, what did you want to say?

MR. SCISCENTO: A couple matters, Your Honor. One is this Court has indicated that if, during the deposition, we showed that Ms. Severs is an accomplice or a co-conspirator then the Court may, at that time, stop it and under that sub-section–

THE COURT: No.

MR. SCISCENTO: Okay.

THE COURT: I am granting it independently under the first sub-section–

MR. SCISCENTO: Let me address that issue, then.

THE COURT: –the State's motion to take the video tape.

MR. SCISCENTO: What about the motion, then, that Ms. Severs has filed?

THE COURT: I would, as I said, hold an evidentiary hearing if it was only their motion.

MR. SCISCENTO: Okay.

THE COURT: But I'm granting it on an independent grounds and we would take it under any event. What I'm saying is: if it develops in the Court's mind after the taking of the whole deposition that she, in fact, should be viewed as an accomplice, then the deposition in hindsight will not have been taken to any degree by virtue of their motion.

If I find she's not an accomplice at the end of the hearing, I'm going to say, now, in hindsight I granted it on one grounds–actually two grounds would justify it at this point. What I'm saying is if after hearing the deposition, I don't agree with the position of the State that she's not an accomplice, then she wouldn't even be eligible to ask for release from custody under the second sub-section or the third sub-section because I would deem her an accomplice. Not that we would stop the deposition.

MR. SCISCENTO: What I want to know, though, is this Court going to entertain a motion at that time, when the deposition is going, if I can show that, in fact, she doesn't meet the criteria of being an unavailable witness or that she may not show up for trial, that she's never been threatened?

THE COURT: The threats alone–

MR. SCISCENTO: Well, if I can show that, in fact, she's never been threatened–

THE COURT: No, I think there's a sufficient basis to get the deposition on. We will take up the issue of admissibility later.

Yes, Chip?

MR. SIEGEL: Just so I can be clear and I'm saying on the record based upon my discussion with the State, I'm agreeing on her behalf with this deposition because there's been a written motion and in court stated that they're not pursuing any charges against her. They know the case because they've prosecuted it twice already.

THE COURT: Well, and of course I can see why they might not want to give immunity even if they don't want to prosecute her and believe that she's an accomplice. But there are other remedies besides not taking the deposition.

MR. SCISCENTO: Your Honor, also this Court had mentioned in case law regarding subsequent requirements that Ms. Severs shows up. There is a case of U.S. versus Linton.

THE COURT: Well, put it into written Points and Authorities before she subscribes it. What we're going to do is we're going to take the deposition, we're going to continue it about a week for them to type up the deposition and to prepare it.

Now, there's an incidental motion that has to do with–and I take that to be the Motion in Limine to Preclude Evidence of Other Crimes that is filed by you

and only relates to this deposition. I would assume you have no objection to warning her not to refer to other robberies?

MR. GUYMON: That's correct, Judge.

THE COURT: Okay. And we'll assume that that be done before the deposition.

MR. GUYMON: It will be.

THE COURT: Now, there is about eight other motions that have apparently been filed that have not yet hit the court file. Do we want to set up a litigation schedule for those motions?

MR. GUYMON: Please. I've not seen the motions, Judge.

THE COURT: Okay. We have a whole host of them, three, six, seven, that are listed. Let's have--would two weeks be sufficient? I don't know what your guys schedule is.

MR. GUYMON: It will be, Judge, yes.

THE COURT: Two weeks for you folks to answer them, one week for a written reply for each of the motions, and then have a hearing which will not be based on argument, but just the written Points and Authorities on a Thursday after that.

THE CLERK: Okay, two weeks for the State to answer would be November 4th, 9:00 a.m.--or no, I'm sorry, just November 4th. One week for the reply would be November 12th and the hearing will be November 18th at 9:30.

THE COURT: All right. Now, in terms of readiness for trial, does any of the parties who are going to go to trial--which doesn't include Mr. Siegel--have any problems that they want to bring to the Court's attention, or is, as we set it, this trial date of 1/10 still firm as far as everyone is concerned?

MR. SCISCENTO: I believe it's firm if this Court would give us some flexibility. My problem is I've just been on this case for about a month and filed

numerous motions and I think our time to file motions may expire either today or tomorrow. If I can have a little more time, most of these motions are evidentiary motions to exclude or include requesting specific discovery.

THE COURT: All right. You'll have them in–what was the date for the hearing?

THE CLERK: The hearing is the 18th.

THE COURT: The 18th of November. We'll give you two additional weeks to answer–to file any additional motions. We'll set up a separate briefing schedule on any motions you file in the next two weeks which is–just without giving dates–two weeks from the date they file it to file oppositions. One week from the date they file the oppositions to file a reply. And we better have some–we'll set an additional hearing date when we come in in November on those.

Would you folks approach the bench, please?

(Whereupon a bench conference was held, not recorded)

THE COURT: All right, now, we're going to need him here at 9:30 dressed, Mr. Johnson, for this deposition.

MR. SCISCENTO: I want to clarify something, Your Honor. Also on the motion I had filed as to Ms. Severs giving the deposition or giving testimony, my request was to exclude any references to any robberies that were alleged or any prior acts or bad acts or crimes being charged or charged.

THE COURT: Yeah, that's what I take it to be–

MR. SCISCENTO: And I think the State has agreed that they would–

THE COURT: –that they have no opposition to the granting of that and they're going to warn their witness not to get into those other things.

MR. GUYMON: Right.

THE COURT: They're not going to seek to elicit them and they're going to warn her that their questions are not intended to elicit these sort of things.

MR. GUYMON: And, Judge, quite honestly, I got that motion yesterday. I haven't filed a written response, but I will agree, I will stipulate. We are going to admonish her and we're not going to elicit that type of information.

THE COURT: Okay. We'll see you at 9:30 on Tuesday. We're going to start our calendar at 9:00 to get to this.

THE CLERK: At 8:30?

THE COURT: I'm sorry, at 8:30.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

SHIRLEE PRAWALSKY, COURT RECORDER

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ORIGINAL

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

CLERK

STATE OF NEVADA,

PLAINTIFF,

VS.

CASE NO. C153154

DEPT. V

DONTE JOHNSON, aka JOHN LEE WHITE

DEFENDANT.

Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

DECISION: WITNESS RELEASE

THURSDAY, OCTOBER 28, 1999, 9:00 A.M.

APPEARANCES:

FOR THE STATE: ROBERT DASKAS, ESQ.
DEPUTY DISTRICT ATTORNEY

FOR DEFENDANT JOHNSON: JOSEPH SCISCINTO, ESQ.
DEPUTY SPECIAL PUBLIC DEFENDER

FOR WITNESS CHARLA SEVERS: JAY SIEGEL, ESQ.

COURT RECORDER: SHIRLEE PRAWALSKY

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COUNTY CLERK

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LAS VEGAS, NEVADA, THURSDAY, OCTOBER 28, 1999, 9:00 A.M.

THE COURT: Okay, Chip and Mr. Daskas, would you approach the bench, please?

(Whereupon a bench conference was held, not recorded)

THE COURT: All right. In terms of Donte Johnson, the only issue before the Court today is the witness' release. We've discussed at the bench conditions on which I'm going to release her and that's going to be reduced to a written order by Mr. Siegel.

The January 4th calendar call will remain. We'll see you, of course, earlier than that on the motions. Thank you.

MR. DASKAS: Thank you.

* * * *

THE COURT: And, Joe, what do you have?

MR. SCISCENTO: On page 18, Your Honor, Donte Johnson.

THE COURT: We already entered an order releasing her under certain conditions.

MR. SCISCENTO: Yeah, I didn't think we needed to be here for that.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

SHIRLEE PRAWALSKY, COURT RECORDER

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ORIGINAL

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

STATE OF NEVADA, PLAINTIFF, VS. DONTE JOHNSON, aka JOHN LEE WHITE DEFENDANT.	CASE NO. C153154 DEPT. V Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF WITNESS INTIMIDATION

MONDAY, NOVEMBER 8, 1999, 9:00 A.M.

APPEARANCES:

FOR THE STATE:	GREG KNAPP, ESQ. STEVEN SWEIKERT, ESQ. DEPUTY DISTRICT ATTORNEYS
FOR DEFENDANT JOHNSON:	JOSEPH SCISCINTO, ESQ. DAYVID FIGLER, ESQ. DEPUTY SPECIAL PUBLIC DEFENDERS

COURT RECORDER: SHIRLEE PRAWALSKY

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LAS VEGAS, NEVADA, MONDAY, NOVEMBER 8, 1999, 9:00 A.M.

THE COURT: Okay, Johnson on page 9.

MR. SCISCENTO: Yes, Your Honor. We have hearings on other motions, I think, on the 18th?

THE COURT: Right.

MR. SCISCENTO: And we just wanted to move this to that date, too so we can file a reply.

THE COURT: Okay, but my other question is: are we just going to be here on 11/18 to set more briefing schedules? I mean, these are mostly–or not all–these are motions that you filed?

MR. SCISCENTO: Yes.

THE COURT: Have they been answered yet?

MR. SCISCENTO: We got an answer Thursday, I believe.

THE COURT: And when are you going to get a reply in?

MR. SCISCENTO: I can reply probably–well, the problem is the one I have to wait until Thursday to get some transcripts. I think that's probably the quickest we can get them. I understand there was--

THE COURT: Oh, so you'll be filing your replies on most of them?

MR. SCISCENTO: The one–the most important one is the Motion to Exclude the Guns and Ammunitions. That one I want to probably reply on Friday so I can cite–

THE COURT: Okay, well, that will still give me plenty of time before the 18th to read them all. Okay.

MR. SCISCENTO: I think we also–we'll probably approach the Court on this, too, on a motion we need to file and maybe set a briefing schedule on the 18th.

THE COURT: Hadn't we set two schedules, one for most of these and then another schedule for others that you had indicated earlier you were going to file?

MR. SCISCENTO: We did, Your Honor, but it turns out that probably we're going to need more time to file more motions.

THE COURT: Will they even be on file by the time we come on the other motions on 11/18?

MR. SCISCENTO: Most likely, yes.

THE COURT: Okay. Then we'll set them at that time. Okay.

MR. SCISCENTO: Again, Mr. Guymon and Mr. Daskas agreed to the continuance to the 18th. Thank you.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above case.

Shirlee Prawalsky

SHIRLEE PRAWALSKY, COURT RECORDER

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NOTC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

NOTICE OF WITNESSES AND OF EXPERT WITNESSES
PURSUANT TO NRS 174.234

TO: DONTE JOHNSON, Defendant; and

TO: SPECIAL PUBLIC DEFENDER'S OFFICE, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the witnesses listed below in its case in chief, either on the presently scheduled trial date or on any subsequent trial date. PLEASE NOTICE FURTHER that copies of the curriculum vitae, if available, of any witness expected to offer testimony as an expert witness is attached. The substance of each expert witness' testimony and a copy of all reports made by or at the direction of the expert witness has been provided in discovery.

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NAME	ADDRESS
HOFFMAN, ROBERT	CALIFORNIA DEPT. OF CORRECTIONS - PAROLE DIVISION 8100 MAIE AVENUE LOS ANGELES, CA 90001
JOHNSON, THERESA	c/o ALEXIA CONGER, INVESTIGATOR CC DISTRICT ATTORNEY'S OFFICE 200 S. THIRD STREET, 5TH FLOOR LAS VEGAS, NV 89101
OSBORNE, LORNA	c/o CELLMARK DIAGNOSTIC 20271 GOLDENROD LANE GERMANTOWN, MD 20874
ROSCH, DENISE	c/o CHANNEL 3 NEWS

DATED this 8 day of November, 1999.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ROBERT J. DASKAS
Deputy District Attorney
Nevada Bar #004963

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Witnesses and of Expert Witnesses, was made this 8 day of November, 1999, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #(702) 455-6273

S Schwartz

Secretary for the District Attorney's Office

98F11830X/sbs

FACSIMILE COVER PAGE

Date: 11/8/99
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Pages: 4

To: S.P.D.
Company: SPECIAL PUBLIC DEFENDER
Fax #: 455-6273

From: STEPHANIE SCHWARTZ
Title: LEGAL SECRETARY II
Company: Clark County District Attorney's Office
Address: 200 S. Third Street - 5th floor
Las Vegas , NV 89155
USA
Fax #: 382-0317
Voice #: 455-4796

Message:

JOHNSON, DONTE - C153154
NOTICE OF WITNESSES AND OF EXPERT WITNESSES

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Shirley B. Rhoades
CLERK

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
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STATE OF NEVADA, PLAINTIFF, VS. DONTE JOHNSON, aka JOHN LEE WHITE, DEFENDANT.	CASE NO. C153154 DEPT. V Transcript of Proceedings

BEFORE THE HONORABLE JEFFREY D. SOBEL, DISTRICT COURT JUDGE

VIDEO DEPOSITION OF CHARLA SEVERS
(FILED UNDER SEAL)

TUESDAY, OCTOBER 26, 1999, 10:15 A.M.

APPEARANCES:

FOR THE STATE:	GARY GUYMAN, ESQ. ROBERT DASKAS, ESQ. DEPUTY DISTRICT ATTORNEYS
FOR DEFENDANT JOHNSON:	JOSEPH SCISCENTO, ESQ. DAYVID FIGLER, ESQ. DEPUTY SPECIAL PUBLIC DEFENDERS
FOR MATERIAL WITNESS SEVERS:	JAY SIEGEL, ESQ.

COURT RECORDER: SHIRLEE PRAWALSKY

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COUNTY CLERK

LAS VEGAS, NEVADA, TUESDAY, OCTOBER 26, 1999, 10:15 A.M.

THE COURT: Before we start the tape, I'm interested in terms of your direct examination. Who is going to do it, by the way, Gary or Robert?

MR. GUYMON: I am, Judge.

THE COURT: Gary, is it your intention, if permitted to discuss with her on direct, threats that have been made to her?

MR. GUYMON: No, Your Honor.

THE COURT: Okay. Because, of course, if he doesn't do that, Mr.Sciscento, Mr. Figler, it occurred to me in looking at the file again, the possible problems that might occur in terms of detriment to your client. Of course, it's a strategic thing. If you open the door to explanations as to why she sent the Channel Eight letter, it might get into alleged threats that I wouldn't permit on direct examination. You may open the door through cross examination. I'm sure you've thought of that?

MR. SCISCENTO: Yes.

THE COURT: Okay, is there anything that you need to bring to the Court before we start this deposition?

MR. SCISCENTO: A few motions, Your Honor. One is–

THE COURT: Have any of these been filed yet, or are you filing them in open Court?

MR. SCISCENTO: Your Honor, I've got a motion which was just finished up today; I've been working on it most of the weekend. One is the first motion to exclude the media coverage from this deposition.

THE COURT: Has this been served?

MR. SCISCENTO: This has not been served and I just have a copy of it right now, Your Honor.

THE COURT: Serve it and file it.

MR. SCISCENTO: I need to have some copies made. Like I said, our copy machine at the Special Public Defender's office is broken.

THE COURT: Okay. Do you have other motions you need copies of?

MR. SCISCENTO: No, although I would like to renew our motion as to-against this deposition.

THE COURT: Okay, that's denied. And are there any other motions?

MR. SCISCENTO: Your Honor, if I can address that one issue, though. I would like to take Ms. Severs on voir dire prior to this testimony starting so I can show the elements which are required to take a video tape deposition of the testimony that are not met in this case. That being, one: is that she was unavailable, and two: that she was ever served with notice to appear for any of the trial. And three: that she was threatened.

THE COURT: I don't know whether she was served with notice or not is important to the basic threshold question of whether they're entitled to take a video tape and I'm not gong to permit voir dire; we're just going to start it.

But what other motions do you have before we take a break and make copies for you?

MR. FIGLER: Well, subject to your ruling, Your Honor, I'd like to insert right now that we would--we reserved the right to bring a motion to strike any testimony that comes out today if it is needed in a later proceeding subject to any subsequent rulings that this Court makes on evidentiary matters. In other words, if Ms. Severs testifies today to certain matters that later hinge upon things that you find to be excluded properly pursuant to a motion in limine that you might later hear. We would be able to renew an objection or make a motion at that time to strike that testimony.

THE COURT: All right. There's no problem with that.

All right. Any other motions and we'll make copies?

MR. SCISCENTO: That's it, Your Honor.

MR. FIGLER: Actually, one other thing with regard to the video tape deposition, obviously, Mr. Johnson appears today in chains and prison garb.

THE COURT: Yeah, I already, before you arrived here--I know you were running late.

We tried to get him dressed. His clothes are in terrible shape. Apparently, no one brought any new clothes over there that were in good shape. I've asked the prosecution–I was going to put this on the record when we went back on the record. Rather than put Mr. Johnson on the video tape, this is obviously his girlfriend. And rather than show Mr. Johnson on the video tape because he's dressed in the jail uniform and there might be some prejudice to that, I've asked if it's okay with Mr. Guymon that he just say, "The man you're talking about, is he in the courtroom? And would you point to him?" And if she points to Mr. Johnson, I'm going to ask the record to reflect that she's identified Donte Johnson. I'll just say yes.

Do you have any problem with that procedure?

MR. SCISCENTO: No, I think that's all right, Judge.

THE COURT: All right. We'll make copies of this.

MR. GUYMON: And, Judge, very briefly, with regards to your first question, I want to make sure I answered it accurately. You indicated was it my intention to ask her about threats. And in the prior hearing, of course, we told the Court that we were not going to bring out any prior robberies or any other bad acts that we were aware of. We've instructed the witness at length not to talk about Donte Johnson's gang affiliation, if any, and prior robberies.

With regards to threats, it was never my intention to ask her if Donte had threatened her, Donte Johnson had threatened her in any way. I was going to ask her, however, and perhaps the Court can give me some guidance–I'm not trying to push the Court one way or another–with regards to the letters and the varying testimony that she's now given, I was going to have her account for both letters, the first letter being delivered to our office on December 1st which the defense has a copy of and the Channel Eight letter. Quite honestly, it was–

THE COURT: What do you expect her answer to be?

MR. GUYMON: She would tell us with regards to the Channel Eight letter and the first letter that was delivered to our office, she would tell us that because of her interest in helping Donte Johnson beat this case, she wrote those letters. She will not say that she was threatened to write those letters.

THE COURT: There's nothing objectionable to that.

MR. GUYMON: Okay.

THE COURT: Do caution her also not to refer to the fact that he's in jail garb today.

MR. GUYMON: I have not done that yet and I will, Judge.

THE COURT: Okay.

* * * *

THE COURT: All right. Let's go on the record, but not on the video tape for this pre-video tape motion having to do with the media.

You assert, Mr. Sciscento on–the pages don't appear to be numbered–somewhere around page 4 under the heading, "It is error to allow the media to record and any person who hears this report of the testimony of Charla Severs will be deemed to be biased and they cannot serve on the jury. I don't take it that that would actually be the case. The case would be whether they would be, despite having some exposure to this, be able to judge on what they hear in the courtroom. I have a hard time seeing a couple of things.

I have a hard time seeing, I guess, primarily what the harm is going to be in having this covered in the media. It's already been covered in the media that she's going to be a witness here today; that's all been done in public, what her expected testimony is. If she shows up at trial it won't matter; she'll be testifying then. I have a hard time seeing the kind of prejudice that apparently this federal court saw in Brooklier.

Now, before I ask you to answer that, does the State even have a position, or do you think this is just between the defense and the Court?

MR. DASKAS: I think it's between the defense and the Court and perhaps the media, Judge, with this comment. This is why we have voir dire, Judge, to question prospective jurors about whether they have preconceived notions, or whether they can be fair and impartial on any particular case. And I think we can handle this matter, that is, whether they've been exposed to this deposition, with those questions during voir dire. With that, Judge, I'd submit it.

THE COURT: Now, I mean this has been a case where there's been tremendous publicity,

there's been two co-defendants who have gone in trial in the past. There's been, during that trial, daily reference to the fact that Mr. Johnson is the alleged shooter in this. I have a hard time seeing the prejudice that would occur in having this little part of the proceedings reported. And if you believe there's prejudice, are you asking for anything short of getting all the media out of here?

MR. SCISCENTO: Your Honor, what, basically I'm talking about is as to this deposition today, this is an extraordinary measure. This is nothing that is granted off the hand, or off the cuff.

THE COURT: Right.

MR. SCISCENTO: I have control–I have no control over pre-trial publicity. I can put out there what I want to put out there. I can bring back whatever I can. That case was determined I Gentile versus the State of Nevada Bar. Basically, I can control what I release. Now, what we have here is the actual trial testimony that is going on. That is where I have to, in anticipation that Ms. Severs will not be here, actually put forth my defenses. And now I am forced to place the defenses up there for the rest of the potential jurors to see and for the district attorney to see. I can't get over that problem but I can get over the problem that the population is going to hear about this. It's a specific issue, that being this is testimony.

Now, this is going to out–actual trial testimony is gong to go out by way of the RJ which has a population–which has a circulation of 196,000 weekly and 221,000 on Sundays. This does not take into account Channel 3, Channel 5, Channel 8, and Channel 13 news which may also cover this. They are actually going to talk about specific–

THE COURT: Do we have a pool camera in here today?

UNIDENTIFIED CAMERAMAN: Yes, we do.

THE COURT: What channels? I mean, is that just a still camera?

UNIDENTIFIED CAMERAMAN: Yes.

THE COURT: Okay. So we have no video camera from any of the news channels today?

UNIDENTIFIED CAMERAMAN: They showed up earlier, but they left.

THE COURT: Okay, all right; go ahead.

MR. SCISCENTO: But, Judge, also this is going to be put on the news as to actual trial

testimony.

THE COURT: Right.

MR. SCISCENTO: Now, if we had a jury here, we would preclude them from hearing that testimony if they were sworn in. What's going to happen is they are going to hear actual trial testimony. It's going to limit the amount that they–the amount of the jury pool itself. In a population of our size in Clark County which is maybe a million people, we're going–a million, I don't know how many would be eligible for jury. I believe it's about 300,000 are eligible for the jury. We're going to limit that number greatly. And, basically, it's going to reduce to people who do not read the news, or do not read the newspaper or watch the news.

In the case of Brooklier which I'm relying on–

THE COURT: Do you have the Brooklier case with you, by the way?

MR. SCISCENTO: Yes, Your Honor, I do. If I may approach?

THE COURT: The other one is a Nevada case, Rowbottom, right?

MR. SCISCENTO: Rowbottom is a Nevada case, Your Honor.

That was cited in--Brooklier is cited in Associated Press versus U.S. District Court for the Central District of California, the Ninth Circuit, Your Honor.

THE COURT: Yes, let me read this for a minute.

Did either of these cases–I see now that the federal case did not–did either of these cases involve this kind of a proceeding?

MR. SCISCENTO: I have not found any depositions, Your Honor, pre-trial testimony depositions.

THE COURT: How would this be different, for example, from closing a preliminary hearing had she–did she testify at preliminary?

MR. GUYMON: Judge, we had a grand jury proceeding in this case.

THE COURT: Okay. Let's say this had gone to preliminary hearing. Would it be the same argument?

MR. SCISCENTO: No.

THE COURT: Why?

MR. SCISCENTO: No, it would not be and let me cite the Whitehead case where they basically said you can exclude trial information. If it's pre-trial, the chances of getting excluded are very slim. But this is actually trial information. And in the Whitehead case, it specifically addresses that issue, that being the Supreme Court of Nevada saying trial testimony is different than pre-trial investigation or pre-trial media. That is the problem that we have here. This is actual trial testimony. This is what's going to be heard to the jury. Now, the jury is going to hear this once before they even get voir dired on this matter. That's the problem that we have.

And, again, I can't control pre-trial investigation or pre-trial publicity. I can only put out what I can put out. In this case, my hands are tied. This is an extraordinary measure. And all I'm asking this Court is for an order precluding them from giving out this information until we have a jury which has not heard this.

THE COURT: I'm going to deny this motion. But I will suggest this: if you folks want to, as I always do in cases where there is a major sought-after penalty like a death penalty, I am one of those judges who do not have any problem at all with jury questionnaires. You can certainly put, if you choose to have jury questionnaires, a specific question in there about whether they saw any information about an alleged–a deposition by a girlfriend of his. And I think you can solve it through voir dire, either writing or as Robert suggests, voir dire at trial. And so, I'm going to deny the motion.

Is there anything else that needs to come before the Court? Yes, go ahead.

MR. SCISCENTO: And I'll be brief, I understand. If I could address the last issue. The problem that we're going to have is we're going to, then, diminish the jury pool.

THE COURT: Well, you say that. But I don't think that's true to any significance. When I was a lawyer, I used to go around here when it was a smaller town thinking that the murder cases that I was working on were big deals, and sometimes I would go from one trial to another trial, back to back. And I was amazed at how little people read the newspapers, watch television, and more importantly, I guess, remember. It's two months from now until the trial. And I don't think

it's going to significantly taint the jury pool.

I see you on your feet, Mr. Figler?

MR. FIGLER: Yeah, Your Honor, just to add on. Based on that ruling, I would ask the Court to put a freeze on the official court transcript and the video tape which is the video tape deposition we're talking about from release to the general media.

THE COURT: And what would be the freeze's purpose?

MR. FIGLER: Well, Your Honor, it just further supports our position. What we basically want is a fair trial when it comes to try it. I think everyone can agree to that.

THE COURT: That's what the Court wants, too. Yeah.

MR. FIGLER: And certainly we've made an argument with regard to the prejudice that's going to result with the theory of defense coming out into the media, perhaps Ms. Severs' testimony, more reporting on this, this constant snow balling and cascading of problems that come from this type of extraordinary relief which, again, we don't think is appropriate and which Mr. Sciscento renewed his objection to which was denied by the Court.

Perhaps one way, in light of your ruling to diminish that prejudicial impact would be to not allow the video tape of Ms. Severs to be played, or replayed, or replayed on the various cable outlets and the news outlets that have an insatiable hunger for this type of stuff with Mr. Johnson's case. The same thing with the official–

THE COURT: Let me ask something. When this video tape is made–and maybe you've had this experience–who gets the video tape?

MR. GUYMON: The State does, Judge. The State is the one that called for the videotaping of the deposition. We have hired an independent contractor to it. The video tape will be released to us. Typically, it's given to us one day to two days later. I did it two weeks ago in Donte Johnson's other case. And that took about two days for the tape to get to me. We also get the bill.

THE COURT: Yeah, I have no problem in saying that the State will not distribute this. I don't know that they would dare–

MR. SCISCENTO: That's what we're asking, to place it under seal.

THE COURT: –take that kind of a step. I don't know what their policy would be and I have no problem in saying that they will not release it.

MR. SCISCENTO: And my other problem is–

THE COURT: I don't take it that the State is sitting there giving anything directly to the media.

MR. GUYMON: No, Judge. I will tell the Court had they asked–and I'm not faulting them for not asking. But I'll tell the Court that when I get that video tape, chances are I'm going to watch it, they're going to get a copy. I'm going to make a copy immediately. I have no interest in releasing it to anyone.

THE COURT: Yeah, I don't think that he would take the chance of tainting the possibility of a successful prosecution.

MR. FIGLER: Certainly not with an order, then.

THE COURT: Does that satisfy that part of your motion?

MR. FIGLER: With regard to it, yes.

THE COURT: Yeah, okay.

MR. SCISCENTO: But the other concern is have and I have made a similar motion like this in another case. The district attorney's office position was they didn't want me to share that with other potential witnesses and I ask the same be imposed on the district attorney.

MR. GUYMON: Judge, I will further tell you that I will not tarnish my prosecution by showing this video tape to any other witnesses. I would be remiss if I did that. You can order me to do it--you don't have to--but I can tell this Court–

THE COURT: I'm not going to order it. I take it that he's not going to do that because–

MR. SCISCENTO: No, I just want it on the record.

THE COURT: Okay. Are we ready for the video tape, then? And make sure we're clear you're not going to show Mr. Donte Johnson on this, the defendant. Okay.

MR. SIEGEL: Can I be heard about custody status now?

THE COURT: Why now, Chip?

MR. SIEGEL: Because we're on the record before we get started.

THE COURT: But why before she testifies rather than afterward?

MR. SIEGEL: Just a procedural matter. It doesn't really matter. It's just that we're here, we're clearing up things beforehand. I'd just as soon take care of it now.

THE COURT: Are you talking about her custodial status after the deposition?

MR. SIEGEL: Exactly.

THE COURT: We'll worry about it after the deposition. If she gets on the stand and says, "I've been thinking about it. I guess I did this and this which I haven't told about and I am an accomplice," or I decide she's an accomplice, the third subsection is going to vitiate the second one, and she's not entitled to release. So, that even is a discretionary matter.

MR. SIEGEL: Okay, then assuming after–

THE COURT: Yeah, we'll take it up right at the end of the hearing.

MR. SIEGEL: Okay.

THE COURT: Frankly, I had thought this being an old fashioned deposition, we would have a week, Chip, while they typed it up and reviewed it, but obviously it's a much shorter period of time now. So, we'll do something about it then. But we'll take that up at the end of this.

MR. GUYMON: And I can tell Court that we've not–you had asked us go give you some points and authorities. And it was my intention to do points and authorities. I can have them to the Court shortly. But I will not have them–

THE COURT: What I'm going to do is I'm going to take up the issue of her release on Monday or Thursday. But we'll hear from you at the end of this, Chip.

MR. SIEGEL: Okay. Because there is a federal Nevada case on point.

THE COURT: Okay. But we'll probably continue it to Thursday and I'll read those cases.

All right. Are you ready?

MR. GUYMON: Yes, Your Honor, as long as the video reporter is set.

VIDEO RECORDER: Yes.

THE COURT: Of course, the exclusionary rule is in effect. If there are other witnesses, they won't be permitted in here, other witnesses.

MR. GUYMON: Judge, the Court has invoked the exclusionary rule. I'll tell the Court that two of the parents of one of the decedents, Matt Mullens, they are present in the courtroom today.

THE COURT: Those would be people just during the victim impact-the penalty hearing, right?

MR. GUYMON: Yes, Your Honor.

THE COURT: I don't see any problem in them sitting through this. Do you have a problem with that?

MR. FIGLER: We would note our objection for the record, Your Honor.

THE COURT: Overruled.

MR. GUYMON: Thank you, Judge. There are no other witnesses in the courtroom.

THE COURT: Let's bring the witness in. Where is she?

MR. GUYMON: Charla Severs. She should be outside.

CHARLA SEVERS

Was called as a witness, duly sworn, and testified as follows:

THE CLERK: Please be seated, state your name and spell your last name for the record.

THE WITNESS: Charla Severs, S-E-V-E-R-S.

DIRECT EXAMINATION

BY MR. GUYMON:

Q Ms. Severs, I need you to speak real loudly, into the microphone, please.

A Okay.

Q Have you given your name?

A Yes.

Q And spell your last name, please.

A S-E-V-E-R-S.

Q And, Ms. Severs, how old are you?

A Twenty-one.

Q Did you live in the Las Vegas, Clark County area in 1998?

A Yes.

Q And how long have you lived in Las Vegas, Clark County, Nevada?

A For all my life.

Q Now, then, directing your attention to 1998, did you have a boyfriend?

A Yeah.

Q And who was your boyfriend, ma'am?

A Deko.

Q Now, "Deko," does the person named Deko, is he here in court today?

A Yes.

Q Can you tell me what color he is wearing in court today and where he is seated, if you would just point in the direction?

A He has blue on and he's sitting over there.

MR. GUYMON: Would the record reflect the identification of the defendant, Judge?

THE COURT: It will.

Q (By Mr. Guymon) Now, does Deko go by any other names?

A Donte Johnson.

Q Okay. Does he use any other name other than Deko and Donte Johnson?

A John Lee White.

Q Excuse me?

A John Lee White.

Q John Lee White. Now, then, what did you call him, Deko?

A Deko.

Q And can you tell me approximately how many months you were his girlfriend for?

A Two months.

Q Now, then, do you recall when you first started dating Deko, what month it was?

A It was like the end of June or the beginning of July, something like that.

Q Of what year?

A 1998.

Q And how often, or how infrequent would you see Deko once you started dating him?

A Every day.

Q And how is it that you saw him every day?

A Because we stayed together.

Q You say you stayed together?

A Yeah.

Q Now, can you tell me–do you recall the locations that you stayed at together?

A First we stayed at the Thunderbird. And then we stayed at Everman.

Q So, first it's the Thunderbird?

A Yes.

Q And what is the Thunderbird?

A A hotel on Las Vegas Boulevard.

Q Here in Clark County?

A Yes.

Q And about how long did you stay at the Thunderbird?

MR. SCISCENTO: Your Honor, I'm going to object to this. I don't see the relevance of the Thunderbird Hotel.

THE COURT: Overruled; this is preliminary.

Q (By Mr. Guymon) Approximately how long did you stay at the Thunderbird?

A For like a month, something like that.

Q Okay. And who stayed there?

A Me, Deko, and Red.

Q And who is Red?

A Terrell–I can't think of his last name right now.

Q Now, whose friend was Red? Was he your friend or Deko's friend?

A Deko's.

Q And do you know how long Deko had known Red before you started dating Deko?

A Just–

MR. SCISCENTO: Objection; calls for speculation.

THE COURT: Overruled.

A The same amount of time like two and a half months or something like that.

Q (By Mr. Guymon) Would you recognize a picture of Red if you were to see him?

A Yeah.

MR. GUYMON: If I might approach, Your Honor?

THE COURT: Sure.

MR. GUYMON: The record should reflect I'm showing counsel three photographs.

Q (By Mr. Guymon) I'm going to show you, Mrs. Severs, three photographs and ask you if you recognize the persons that are depicted in photograph exhibit 1, or proposed exhibit 1, 2, and 3?

A Yes.

Q Do you recognize those persons?

A Yes.

Q Can you tell me who is depicted in State's proposed exhibit 1?

A Deko.

Q And can you tell me who is depicted in State's proposed exhibit 2?

A Tiny Bug.

Q And in State's proposed exhibit 3?

A Red.

Q And is that how these three young men looked, say, in August of 1998?

A Yes.

MR. GUYMON: All right. I'd move for the admission of State's proposed exhibit 1, 2, and 3.

MR. FIGLER: We would object to the admission of these photos subject to a later motion,

written motion, on the same. But for purposes of this proceeding, obviously, we would submit it to the Court.

THE COURT: All right. They'll be admitted at this time.

MR. GUYMON: Thank you.

Q (By Mr. Guymon) Now, then, State's proposed exhibit 3, or exhibit 3 now is, you said, Red. Is that right?

A Yeah, yeah.

Q And is Red the individual who stayed with you at the Thunderbird?

A Yes.

Q Now, then, did the person you've identified as Bug, stay with you at the Thunderbird?

A No.

Q And he is in number 2?

A Yes.

Q How is it that you know Bug?

A Because I met him when he came to the house on Everman.

Q You said he came to the house on Everman?

A Yes.

Q And who knew Bug when Bug showed up at the house on Everman?

A It was Deko's friend.

Q And can you tell me about what month it was when Bug came to the house on Everman?

A August of '98.

Q Who was home when Bug came to the house on Everman?

A I believe everybody who stayed there.

Q Okay. And let me get to that. After you left the Thunderbird, where did you go?

A To stay on Everman.

Q And who went to stay at Everman?

A Me, Deko, and Red.

Q Now, why would you go to Everman, if you know?

MR. FIGLER: Your Honor, could we get a date on this?

THE COURT: Sure.

Q (By Mr. Guymon) About what time–what month was it when you went to Everman?

A Like August 4th or something like that.

Q You say August 4th?

A Yeah, something like that.

MR. GUYMON: Okay. And I have marked a calendar, showing counsel first, if I could?

THE COURT: Sure.

Q (By Mr. Guymon) Showing you what has been marked as State's proposed exhibit 14, do you recognize what that is?

A Yes.

Q And what is it?

A Tuesday.

Q Okay. But, the actual exhibit?

A Oh, it's a calendar.

Q Of what month?

A August.

Q And what year, on the bottom corner?

A '98.

MR. GUYMON: All right. Now, then, I'd move for the admission of State's proposed exhibit 14.

MR. FIGLER: No objection.

MR. SCISCENTO: No objection. I'm assuming that is correct. I'm giving him the benefit of the doubt that's correct.

THE COURT: All right; admitted.

Q (By Mr. Guymon) Now, using, if we could, the calendar, if it helps in referring to

dates, what day is it that you thought you went to Everman?

A I thought it was like the 4th, early in August, like the 4th.

Q Okay. And why leave Thunderbird and go to Everman? Did someone know the people at Everman?

A Yeah.

Q Who knew the Everman residents?

A I think Deko.

Q Now, can you tell me what kind of place this was on Everman? Describe it, if you would.

A What you mean?

Q Well, was it a house or an apartment, was it a tent? What was on Everman?

A A house.

Q Okay. And who lived in the Everman house before you all got there?

A Todd, and Ace, and B.J.

Q Okay. You say Todd, Ace, and B.J.?

A Yes.

Q Whose house was it?

A Todd's mother's house.

Q Did Todd's mother live at Everman?

A No.

Q How old was Todd, if you know?

A Twenty, 19.

Q Excuse me?

A He was 20 or 19.

Q How about B.J.?

A The same.

Q Okay. Now, "B.J." that is his moniker or his street name?

A I guess it was a nickname.

Q Did you know his real name?

A Brian or something like that.

Q Okay. Are you familiar with the name Brian Johnson?

A Not the last name, but the first name.

Q You think B.J.'s first name was Brian?

A Yeah.

Q And you said–how old was Brian?

A Like 20 or 19.

Q And how about Ace? You mentioned a boy by the name of Ace.

A Twenty.

Q Do you remember Ace's last name?

A Hart.

Q So, those three boys stayed at Everman?

A Yes.

Q Now, how many of you went over to stay at Everman?

A Three of us.

Q Can you name them again for me?

A Red, Deko, and myself.

Q Okay. Now, then, how many rooms were in the house at Everman?

A I think like three.

Q Three bedrooms?

A Yeah.

Q And what room did you stay in?

A The master bedroom.

Q What room did Donte stay in?

A The master bedroom.

Q And what room did Red stay in?

A The master bedroom.

Q And where did the other boys stay?

A In the living room or in the back room.

Q Okay. Can you describe, if you would, first Donte's relationship with Red?

A I guess it was just his home boy.

Q What do you mean by "home boy"?

A His friend.

Q Okay. Can you describe Donte's relationship with Bug?

A Yeah, that was his home boy, or his friend.

Q And describe, if you would, Donte's relationship with the three boys that lived at Everman.

A They was just like–they bought crack from him, whatever.

Q You say the three boys that lived at Everman?

A Yeah.

Q Bought crack from who?

MR. FIGLER: I'll object, Your Honor, to this evidentiary grounds.

THE COURT: I guess we'll–did you intend to elicit that in the context of the proposed trial that is going to take place?

MR. GUYMON: Yes, Your Honor, absolutely.

THE COURT: All right. We'll overrule that at this time subject to later motions.

MR. GUYMON: Thank you

Q (By Mr. Guymon) The three boys that lived at Everman bought crack from who?

A Red and Deko.

Q Now, then, how often were you with Deko in the month of, say, July and August?

A Every day.

Q How often was Red with you during the month of July and August?

A Every day.

Q Directing your attention to the month of August, did something occur involving four other boys who lived at a different location?

A Yeah.

Q Okay. Are you familiar with the location of Terra Linda?

A I don't know where it's at.

Q Had you ever been to the Terra Linda house?

A No.

Q Did you know any of the boys that lived at Terra Linda?

A I met one of them before.

Q Do you recall what that young man's name was?

A Matt.

Q And can you describe how old Matt was?

A He was probably like 20 or something.

Q Other than being 20, can you give a description?

A He was kind of chubby and he had a–he looked like a hippie to me.

Q You say he looked like a hippie?

A Yeah.

Q What race was he, ma'am?

A White.

Q And do you recall what color hair he had?

A It was like blond.

Q Now, how did you meet Matt?

A Because he came over to the house one day and he wanted some drugs.

Q What house are we talking about?

A On Everman.

Q When he came to the house, who was home at the Everman house?

A Me, Red, Todd, and Deko.

Q And who did Matt talk to?

A He was just talking to everyone.

Q And using the calendar, can you give us an approximate time when this would have

been, when Matt came to the house?

A I'm not sure. I don't remember the date.

Q Do you remember what month?

A Yeah, it was in August.

Q 1998?

A Yeah.

Q All right. With that in mind, who did Matt talk to?

A He was talking--he was talking to everyone. I guess he wanted to know where he could buy some crack from.

Q And did he talk about anything else?

A Like he wanted--

MR. SCISCENTO: Your Honor, I'm going to object. I don't know if there's a foundational problem here. I don't know if she's actually heard this testimony or not. I'd like a clarification if, in fact, she's heard the testimony she's about to testify to.

THE COURT: I thought that was the drift of the question.

Q (By Mr. Guymon) I want to make sure we understand that. Were you home when Matt came over?

A Yeah.

Q Did you hear Matt talking?

A Yes.

Q And who was Matt talking to?

A I guess he was speaking to everyone, the guys, all the guys that were sitting there.

Q And who were the guys that were sitting there?

A Red, and Deko, and Todd.

Q All right. Now, could you hear what Matt was saying to Red, Deko, and Todd?

A Yeah.

Q And what was Matt talking about to these three persons?

A He wanted to know where he could get some crack from.

Q Did he get an answer?

A They didn't have any.

Q Who is "they"?

A Red and Deko didn't have any crack.

Q Okay. Do you recall how long Matt stayed at the house that day?

A Live five or 10 minutes.

Q Did Matt talk about anything else other than his interest to buy some crack that day at the house?

A Besides–he just showed us these Valium that he had or whatever, some pills. He showed us some pills that he had.

Q Can you describe the pills that Matt had?

A They were little white pills.

Q And can you tell me approximately how many pills Matt had?

A I don't know how many he had, but he gave me one and he gave Red one. He said it makes you better than a Valium; it will make you feel good.

Q He said the pills make you feel good?

A Um-hum.

Q Do you know how–did you see how those pills were packaged?

A No.

Q Did Matt leave after that?

A Yes.

Q Okay. Did you take that white pill?

A No.

Q Do you know if Red took that white pill?

A I don't know if he did, I don't think he did.

Q Okay. Now, then, after Matt left, did Deko, Red, and Todd talk about Matt?

A Yes, Todd did. He brought it up.

Q All right. And what did Todd bring up?

A That they had--

MR. SCISCENTO: Your Honor, I'm going to object to this as hearsay. Again, I don't know if she's present at this time and she hears this. And, again, if this is testimony from Todd--

THE WITNESS: No, I was--

MR. SCISCENTO: --I believe that this is hearsay. And I also believe that the district attorney is going to--there's an indication he may indict Mr. Armstrong. If that's the case, we have a Bruten problem.

THE COURT: I don't see the problem. If she's testifying about what conversation she hears in the presence of the defendant. I don't even know that it is hearsay.

MR. SCISCENTO: Well, it's testimony coming from another--

THE COURT: Does the State--

MR. SCISCENTO: --it's testimony coming from another person, Todd, who is a possible co-conspirator in this case. Therefore, I can't question or challenge the testimony he's giving because I won't be able to get him on the stand being that he's a co-defendant. I can't place him up there and that's a Bruten problem that we have.

THE COURT: Overruled.

Q (By Mr. Guymon) Now, then, what was--what did you hear Todd say to Deko and Red?

A I heard him tell them that Matt and them had like ten thousand dollars at their house and had--mushrooms and stuff like that that they can get some money.

Q And how long did that conversation last?

A For like five or 10 minutes.

Q Okay. And as Todd said those things, who was he saying them to?

MR. SCISCENTO: I'm going to object to speculation, Your Honor.

THE COURT: If you'd rephrase the question.

Q (By Mr. Guymon) Now, as Todd talked about the money that Matt had, who was present?

A Red, and Deko, and myself.

Q And where were you all at?

A Deko and Red was sitting on the couch and I was sitting on the floor.

Q And where was Todd at?

A On the other couch.

Q Was everyone in the same room?

A Yes.

Q And who was Todd speaking to when he talked about how much monies Matt had?

A To Red, Red and Deko.

Q And what did Red and Deko say when Todd talked about how much monies Matt had?

MR. SCISCENTO: I'm going to object as to anything that Red said now. In this case, Mr. Red Terrell Young is a co-defendant in this matter. And I cannot put him on the stand. I know that for a fact.

THE COURT: Overruled.

MR. FIGLER: Sustained?

THE COURT: What?

MR. FIGLER: I'm sorry, you what?

THE COURT: I overruled.

MR. FIGLER: Okay, thank you, Your Honor.

Q (By Mr. Guymon) Tell me what Deko said first when Todd said that Matt had a lot of money.

A I don't remember.

Q Okay. Was Deko part of the conversation with Todd?

A Yes.

Q And do you remember what Red said?

A No.

MR. SCISCENTO: Again, for the record, I'm going to object as hearsay on this matter, Your Honor.

THE COURT: Overruled.

A No.

Q (By Mr. Guymon) Was there a conversation with Todd, Deko, and Red after Matt left?

A Yes.

Q Okay. You don't remember, however, what Deko said to Todd, or what Red said to Todd?

A No.

Q Okay. Now, then, after that conversation, did Matt ever come back to the house?

A No.

Q Was there a time when Deko and others went over to the Terra Linda house based on your knowledge?

A Yes.

Q And do you recall what day or night that would have been?

A I think it was like on the 14th.

Q Of?

A Of August of '98.

Q All right. We'll talk about that, then. Where were you at when Deko left to go over to Terra Linda?

A At first I seen him walk out the door and then I went to the back room.

Q All right. What door are we talking about, ma'am?

A The front door.

Q Of what house?

A Everman house.

Q Okay. And who was Deko with?

A With Red and Tiny Bug.

Q The same persons that I showed you in exhibits 1, 2, and 3?

A Yes.

Q And do you recall whether this was day time or night time?

A It was night time.

Q Do you recall approximately what time it was?

A Like nine o'clock or something like that.

Q Was it light or dark outside?

A It was dark outside.

Q All right. Now, then, who was–other than Deko, Red, and Bug, and yourself, was there anyone else home–

A Yes.

Q –at the Everman house?

A Yes.

Q Who else was home?

A Todd. Todd.

Q The same boy whose mother owned the house?

A Yes.

Q Before–and who all left the house that night?

A Red, Deko, and Tiny Bug.

Q Did you leave the house with Deko?

A No.

Q Did Todd leave the house with Deko?

A No.

Q Before Deko, Red, and Tiny Bug left the house, did they talk about where they were going?

A No, they didn't talk about where.

Q Did they talk about what they were going to go do?

A Yeah.

Q What did Deko say before he left the house?

A He was going to go get some money.

Q Did he say how he was going to get that money?

A No.

Q Now, let me ask you: on August of–say August the 13th or 14th of 1998, did Deko have a job?

A No.

Q Did Red have a job?

A No.

Q Did Bug have a job?

A No.

Q Did Deko say anything more other than the fact he was going to get some money?

A No.

Q What did Red say before he left the house?

MR. SCISCENTO: Again, Your Honor, we object as hearsay. And, Your Honor–

THE COURT: And I would sustain that, depending on where Red was with relation to Deko when the statement was allegedly made. So, I'll sustain it at this point without further foundation.

Q (By Mr. Guymon) All right. Let me ask–well, first of all, before Red left the house, did he say anything about what he was going to do?

A No, I wasn't around him.

Q You weren't around Red?

A No, I wasn't.

Q Who was Red with before he left the house?

A He was in the front–I think he was in the front room, probably in the front with Todd and Tiny Bug.

Q Okay. And what room were you in?

A The master bedroom.

Q And who was with you?

A Deko came back there.

Q Do you–if you don't know, that's fine. But do you know where Deko had been before he came back to the master bedroom?

A I figure in the living room, but no, I don't know.

MR. SCISCENTO: I'm going to object and move to strike that, Your Honor.

THE COURT: Sustained. It will be stricken.

Q (By Mr. Guymon) Can you tell me approximately how long Red and Bug had been at the house, that is the Everman house, before they left?

A No.

MR. SCISCENTO: Your Honor, perhaps we can get a clarification--on what day. I mean, he's asking how long–

THE COURT: She's already answered no; it doesn't matter.

Q (By Mr. Guymon) Now, you said that we're talking about what day?

A The 14th of August of '98.

Q And when Donte left then–let's go back now to when they leave. Who did he leave with?

A Well, Red and Tiny Bug.

Q Did you actually see Donte leave the house?

A Yeah, I came to the front like about the little hallway that goes through the front door, I watched them leave out the house.

Q Okay. Did you see all three men leave out of the house?

A Yes.

Q Now, when all three men left out of the house, can you tell me what Deko was wearing?

A Yeah.

Q What was he wearing, ma'am?

A Some black jeans and a black shirt.

Q Black jeans and a black shirt?

A Yes, and some red FUBOs or something.

COURT RECORDER: Red, what was that?

THE WITNESS: FUBO shoes.

Q (By Mr. Guymon) So, red shoes, black jeans, and a black shirt?

A Um-hum.

Q Is that a yes?

A Yes.

Q Was the shirt long sleeved or short sleeve, if you know?

A Short sleeve.

Q And do you recall, if you know, what Red was wearing?

A He had the same thing on except he had black shoes on.

Q Also black jeans?

A Yes.

Q Similar styled shirt as Deko?

A Yes.

Q And how about Tiny Bug? Do you recall what Tiny Bug was wearing?

A Yeah.

Q What was Tiny Bug wearing?

A Some brown Dickies and a black like Huddy shirt and some black Converse.

Q Now, did--when the three boys left, did any of them have anything in their hands?

A Yeah.

Q Who was carrying something, if anything?

A I think Red was carrying a bag.

Q Can you describe the bag that Red was carrying?

A It was like green and brown. It was like a duffle bag.

Q And will you show the Judge how small or large the green or brown duffle bag was with your hands?

A It was like this big.

Q Will you estimate for me how many feet that is?

A Like three feet.

Q Okay. You'd say it was about three feet long. How tall was the bag, the duffle bag?

A Like this tall.

Q And how many feet are you showing?

A Like maybe one foot, or two feet.

Q Did the bag have any handles?

A I don't remember.

Q Do you know what was in the bag?

A Yes.

Q What was in the bag?

A Guns.

Q Can you tell me how many guns were in the bag?

MR. FIGLER: Objection, Your Honor. I'm going to object to a foundation of this particular testimony.

THE COURT: The foundation for everything that she's saying is that it's personal knowledge. I assume that when the questions are asked and answered that, absent some reason to believe so, she's answering on personal knowledge. We could have that objection to each and every question to each and every witness. I assume she's testifying from what she observed.

MR. SCISCENTO: I believe she's speculating as to what was in the bag, Your Honor. If we can just clarify that.

THE COURT: Well, that's what I'm saying. You could clarify that as to each and every question. I assume, unless something else appears, that she is testifying from what she sees as her own observation. But you certainly can pursue it on cross if you're not satisfied with reference to that, but at this time, the objection is overruled.

Q (By Mr. Guymon) Mrs. Severs, do you understand, I want you to testify to what you have personal knowledge of. What you know, saw, and heard.

A Okay.

Q Okay?

A Okay.

Q Now, do you know if anything was in the bag?

A Yes.

Q What do you know was in the bag?

A Guns.

Q And can you tell me how many guns were in the bag, if you know?

A Like–I think like three or four.

Q Can you describe the guns that were in the bag?

A One of them was like a revolver. The other one was like black automatic. And the other one, it was like a big rifle or something like that.

Q Let's talk a little bit about this bag first and then the guns. Had you seen this bag before August 14th?

A Yes.

Q And when had you first seen this bag?

A I don't know what day, but it was always there.

Q Always where, ma'am?

A On Everman, in the house we stayed at.

Q Okay. Do you know whose bag it was?

A No.

Q Who, prior to August 14th, had you seen any other persons or anybody, handling the bag?

A No.

Q Okay. Now, the guns. Prior to August 14th, had you seen guns?

A Yes.

Q At the Everman house?

A Yes.

Q And whose guns were they that you saw?

MR. SCISCENTO: Objection. Now, that calls for speculation, Your Honor, unless she knows whose they were exactly.

THE COURT: Overruled.

MR. SCISCENTO: The way the question is phrased.

THE COURT: Overruled.

Q (By Mr. Guymon) If you know, whose guns were they that you saw prior to August 14th?

A Deko's.

Q Okay. How did you know they were Deko's guns?

A I don't know. I just know that he brought them there.

MR. SCISCENTO: Then, Your Honor, I 'm going to move to strike this.

THE COURT: She said, "No, I just know that he brought them there." Overruled.

Q (By Mr. Guymon) And about when was it that Deko brought the guns to the Everman house?

A The day we moved in there.

Q So, the day you move into Everman, Deko brings the gun with you–or guns with you?

A Yeah.

Q And what did he bring the guns in when you moved into Everman? What was he carrying them in?

A I don't remember.

Q About how many guns did he have with him when you moved in around August 4th to Everman?

A Like two.

Q And what type of guns were those on August 4th?

A The revolver and the automatic.

Q The revolver and the automatic?

A Yeah.

Q Let me talk about the revolver first. Can you show us with your hands first how long the revolver was from the one end of the gun to the other?

A Like that long.

Q Can you tell me how long that is?

A Like seven or eight inches.

Q Okay. And what color was that gun?

A I don't remember.

Q Do you know what size that gun was?

A What you mean?

Q How large a caliber? Does that mean anything to you?

A No, I don't know.

Q Okay. Can you describe the automatic gun that was in the bag on the evening when Donte left?

A It was like black.

Q And with your hands, again, can you show us how long that gun was from the one end to the other?

A (Gesturing)

Q And how many inches is that, ma'am?

A Like maybe seven or eight, like the same. Like seven or eight.

Q Okay. Do you know how large or small that gun was in, say, diameter or caliber, how big a bullet went in that gun?

A I don't know.

Q Okay. And describe what you said was a rifle, I think, in the bag?

A Yeah.

Q How long was the rifle?

A Maybe like this long.

Q And could you tell us how long that is?

A No, not approximately. Probably like 10, 13, I don't know. I don't know how long

it is.

Q Okay. Was the long gun longer or shorter than the duffle bag?

A It was shorter than the duffle bag.

Q Okay. What color was the long gun?

A Black.

Q And did the long gun have a handle or a barrel–excuse me–a handle or a butt?

A Yeah.

Q What style was the butt of the gun or handle of the gun?

A I think it was like–it looked like a banana or whatever. But it had like a silver, like a little silver thing that you pull down from it.

Q Okay. So there was a silver thing on the end?

A Yeah.

Q And you said like a banana and you did a curving motion?

A Yeah.

Q And what went in the banana part of the gun, if you know?

A I think bullets.

Q Do you know how many bullets went into the banana portion of that gun?

A I'm not sure, like 30, something like that.

Q Do you know if there was anything else in the green and brown bag that Red carried out of the house with Bug and Deko?

A No.

Q Okay.

MR. FIGLER: May we approach for a moment, Your Honor?

THE COURT: Sure.

(Whereupon a bench conference was held, not recorded)

THE COURT: Go ahead.

MR. GUYMON: Thank you.

Q (By Mr. Guymon) I think I asked you if you knew if anything else was in the bag.

Is that where we left off?

A Yes.

Q Okay. Now, then, had you ever seen duct tape at the Everman house?

A Yes.

Q And when had you seen duct tape at the Everman house?

A It was there all the time.

Q Had you seen more than one roll, or just one roll at the Everman house?

A One roll.

Q And do you have personal knowledge as to whose duct tape that was?

A No.

Q How about gloves that people would wear on their hands? Had you ever seen gloves at the Everman house?

A Yeah.

Q All right. And when had you seen gloves at the Everman house?

A All the time.

Q Okay. Do you know–if you know, do you know where the gloves came from?

THE COURT: Hold on a second, would you, Gary? I want to read something that my bailiff just handed me and I can't concentrate on both.

MR. GUYMON: Sure.

(Whereupon the Court consulted with attorneys on an unrelated matter, not recorded)

THE COURT: Go ahead, Mr. Guymon.

MR. GUYMON: Thank you.

Q (By Mr. Guymon) You indicated that you saw gloves at the Everman house. Is that correct?

A Yes.

Q And, if you know, whose gloves were they?

A Red, and Deko, and Tiny Bug.

Q You said Red, Deko, and Tiny Bug's gloves?

A Yes.

Q Can you describe the gloves that you saw at the Everman house that belonged to Red, Deko, and Tiny Bug?

A They were brown and they had like a black knit part at the top.

Q Black knit part on the top?

A Yeah.

Q And what part of the glove–show me on your hand what part of the glove would be the top part of the glove.

A On the palm of my hand.

Q On the palm would be the black part?

A Yeah.

Q And what was the brown part made of?

A Cloth.

Q And can you tell me how many pair of gloves were at the Everman house, say, on the evening of the 13th of August?

A Like three or four pair.

Q Okay. And do you know where those gloves came from? You told me whose gloves they were. Can you tell me where they came from, if you know?

A No. No.

Q No, you don't know?

A I don't know.

Q Okay. Now then, when Deko, Red, and Tiny Bug left that night, where were the gloves?

A They had them.

Q Who had them?

A Red–Red had them on his hands. And they had them with them in they pockets.

Q Okay. You said Red had them on his hands. Did–if you know–did Sikia Smith have a pair of gloves?

A Yeah, but I'm not sure where he had them at.

Q You're not sure if he had them on or in his pockets?

A Yeah, I'm not sure.

Q And did Deko, or Donte Johnson, have a pair of gloves that night?

A Yeah, I think so.

Q Okay. Where was Deko's gloves? Were they on his hands when he left the Everman house?

A No.

Q Where were they?

A In his back pocket.

Q Now, then, how many–how much time, or how long was Deko, Red, and Tiny Bug away from the Everman house? How long were they gone for?

A For like five or six hours.

Q And where were you for those five or six hours?

A In the master bedroom, asleep.

Q And how long–how much time did you stay awake for before you went to sleep after the three left?

A I'm not sure. I don't remember how long I stayed awake.

Q Do you know–if you know–where Todd Armstrong was when the three fellows left the Everman house?

A Yeah.

Q Where was Todd?

A On the couch. He was lying on the couch.

Q At the Everman house?

A Yes.

Q Did you ever hear Todd leave the house after Donte, Red, and Bug left the house?

A No.

Q Okay. Now, then, did there come a point in time when Deko got home, or came

back to Everman?

A Yeah.

Q Was that a yes?

A Yes.

Q Where were you went Deko, or Donte Johnson, got home?

A In the room still. I was asleep.

Q The master bedroom at Everman?

A Yes.

Q Okay. And what did Deko first say or do when he got home?

A He came to the back room and he kissed me on my cheek.

Q What did you do?

A I woke up.

Q Did you talk with Deko?

A Yeah.

Q And what did you say to Deko?

A I don't remember if I said anything.

Q Do you remember what Deko said to you?

MR. FIGLER: Your Honor, could you instruct the witness to take her hand away from her face? We're having a hard time seeing and hearing her.

THE COURT: Ma'am, just so they could see you. Go ahead, Mr. Guymon.

A What did you say, again?

Q (By Mr. Guymon) I asked you if you remember what you said to Deko and you said you didn't remember.

A Un-huh.

Q And then I asked: do you remember what Deko said to you?

A Yeah.

Q What did Deko say to you as he--after he kissed you on the cheek in the master bedroom?

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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 APPENDIX TO THE OPENING BRIEF
VOLUME IV

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IN THE SUPREME COURT OF NEVADA

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

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35	TRANSCRIPT OF PROCEEDINGS DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS/HEARING AND ARGUMENT: DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (FILED 07/06/2011)	7537-7574
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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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